



**Kidero v Capital Markets Authority & another (Petition 518 of 2017)
[2023] KEHC 24469 (KLR) (Constitutional and Human Rights) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24469 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION 518 OF 2017

HI ONG'UDI, J

OCTOBER 31, 2023

BETWEEN

EVANS KIDERO PETITIONER

AND

CAPITAL MARKETS AUTHORITY 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The petition dated 16th October 2017 was filed under Articles 2, 3, 10, 19(1) & (2), 20(1) & (2), 21(1), 22(1), 23, 258(1) and 259(1) of the Constitution for the alleged contravention of the petitioner's constitutional rights under Articles 25(a) & (c), 27, 28, 29, 31, 39(1), 40, 47(1) & (2), 48 and 50 of the Constitution. Accordingly, the petitioner seeks the following orders:
 - a. A declaration that the 1st respondent has breached the petitioner's rights as enshrined in Articles 10, 25(c), 35(1)(b), 47(1) & (2) and 50(1) of the Constitution.
 - b. A declaration that the 1st respondent as a statutory body exercising quasi - judicial functions is bound by the provisions of Articles 25, 47 and 50 of the Constitution as well as the Fair Administrative Actions Act, 2015.
 - c. A declaration that the procedures and processes adopted by the 1st respondent in the inquiry against the petitioner as relates to Mumias Sugar Company limited and in issuance of the letter dated 26th July 2017 addressed to the petitioner were arbitrary, fueled by political motives, politically instigated, illegal and in breach of the Fair Administrative Actions Act, 2015.
 - d. A declaration that the procedures and the processes adopted by the 1st respondent in the inquiry against the petitioner as relates to Mumias Sugar Company Limited and in the issuance



of the letter dated 26th July 2017 addressed to the petitioner are in breach of Articles 25, 47 and 50 of the Constitution.

- e. A declaration that the reliance by the 1st respondent on Capital Markets Guidelines on Corporate Governance Practices for Listed Companies in Kenya 2002 repealed in 2002 is illegal and the Notice to Show Cause is null and void.
- f. A declaration that the 1st respondent has no jurisdiction to investigate alleged criminal offences.
- g. A declaration that the 1st respondent has no jurisdiction over the petitioner to investigate him, issue the Notice to Show Cause dated 26th July 2017, summon him to appear before the authority and mete out sanctions or impose penalties against him.
- h. A declaration that the Notice to Show Cause letter dated 26th July 2017 by the 1st respondent addressed to the petitioner is ultra vires the jurisdiction and powers of the respondent under Section 11(3) (cc) as read together with Section 25A of the Capital Markets Act, Chapter 485A Laws of Kenya.
- i. A declaration that the 1st respondent is in breach of the Petitioner's rights and caused him damage to his reputation and good name.
- j. A judicial review order of certiorari to bring into this Court and quash the decision of the 1st respondent as contained in the letter dated 26th July 2017 for the petitioner to show cause.
- k. A declaration that the 1st respondent by failing to provide the petitioner with the documents and information as requested by him amounts to failure to accord your petitioner due process and has violated the petitioner's right to a fair hearing and a fair administrative action decreed and protected under Articles 25, 35, 47 and 50 of the Constitution and the Fair Administrative Actions Act.
- l. A declaration that the 1st respondent has infringed and violated the petitioner's inviolable right to a fair hearing protected under Articles 25, 35, 47 and 50(1) of the Constitution.
- m. An order of prohibition be issued prohibiting the 1st respondent, its servants, officers and agents, in any manner whatsoever from holding any proceedings or hearings as contemplated in the letter dated 26th July 2017.
- n. A permanent injunction restraining the 1st respondent, its servants, officers and agents, in any manner whatsoever from holding any proceedings or hearings as contemplated in its letter dated 26th July 2017.
- o. The costs of and relating to this petition be borne by the 1st respondent and in any event on an advocate and client on full indemnity basis.
- p. Such other or further orders as this Honourable Court may deem just and expedient in the circumstances in enforcing the violation of fundamental rights of the petitioner.

The Petitioner's case

- 2. The petition is supported by the petitioner's affidavit of even date where he informs that he was the Managing Director of Mumias Sugar Company (MSC) from the year 2003 until July 2012. He deposes that sometime on 23rd October 2015, the 1st respondent wrote to him a letter, inviting him for an interview concerning its independent forensic investigation of MSC. The 1st respondent soon after



- through its auditors BDO LLP wrote to him another letter dated 3rd November 2015, seeking to interview him as the former Managing Director of MSC.
3. He avers that the letters showed that the aim of the interview was to understand MSC's governance practices with an objective to revive the company. He accordingly accepted the invitation and was interviewed on 12th November 2015, by Andrew Maclay, Yusuf Abdoollah and Nikhil Desai of BDO LLP.
 4. He avers that later, on 12th January 2017, the 1st respondent invited him for another interview scheduled for 2nd February 2017. This interview was to be conducted by J Miles and Company alongside the 1st respondent's employees. He was informed by the 1st respondent's employees that they would be undertaking a full inquiry into MSC for the period from 2006 to 2016. He was as well told that other people had been interviewed in the process and that he was the last person to be interviewed.
 5. He opposes the 1st respondent's action of seeking to interview him on events that took place in MSC long after he had left the company. During the interview, he told the interviewers that he could not remember all the details hence requested to be supplied with the documents to assist him in answering the questions. This was however not done. He avers that after the interview he was issued with the interview transcript on 17th July 2017.
 6. He deposes that vide a letter dated 26th July 2017, the 1st respondent issued him with a Notice to show cause letter. This was with regard to the alleged embezzlement of funds and cash misappropriation for the period between 2006 and 2012. He claims that the Notice was pre-mature as the letter made it clear that the investigations were still ongoing. He deposes that the 1st respondent sought to illegally investigate his personal bank accounts while the Court in the case of High Court Constitutional Petition No.79 of 2017 Dr.Evans Kidero v Ethics and Anti-corruption Commission and others had issued a stay order with reference to investigation of his bank accounts.
 7. He further deposes that following the Notice, he sought for information and documents from the 1st respondent through his advocates in the letters dated 31st July 2017 and 2nd August 2017. The same was never responded to as was done during the interviews. He states that this has greatly prejudiced his attempt to adequately prepare and file his response to the Notice. He equally decries the point that the objective sought in the Notice differs greatly from that of the interviews he attended.
 8. He further deposes that the 1st respondent's actions are contrary to Section 25 of the [Capital Markets Act](#). That the 1st respondent can only impose sanctions when a provision of the Act has been breached and as against the category of persons listed in this Section which he is not part of. It is his averment that the 1st respondent does not have jurisdiction to investigate and take any action against him.
 9. He also takes issue with the 1st respondent's reliance on Article 3.1.1 of the Capital Markets Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya 2002. This is with regard to the allegation of breach of his fiduciary duty of care to the shareholders of MSC as outlined in the Notice. He states that these guidelines were repealed in 2015 with the enactment of the Code of Corporate Governance Practices for Issuers of Securities to the Public 2015. Taking this into consideration he argues that the Notice is illegal for its reliance on the repealed guidelines.

The 1st Respondent's case

10. In response the 1st respondent filed a replying affidavit dated 7th February 2018 through its Chief Executive Officer, Paul Muthaura. He begins by stating that the 1st respondent's mandate as provided under Section 11 and 13A & B of the [Capital Markets Act](#) is the legal basis for the actions taken in the circumstances of this suit. In particular he informs that one of the mandates of the 2nd respondent



under Section 13A and B of the *Capital Markets Act* is to obtain warrants for search and entry, obtaining documents held by a bank and also initiating investigations of embezzlement on its own motion or upon receiving a complaint. He further informs that MSC is a public listed company whose shares are traded at the Nairobi Securities Exchange. This therefore grants the 1st respondent oversight authority over matters of MSC.

11. He deposes that MSC started having financial and operational challenges around 2014. Given the potential exposure of the public investing in MSC's listed securities, the 1st respondent commenced an independent inquiry into the affairs of the company. Pursuant to Section 11(3)(m) of the Capital Markets Authority Act, the 1st respondent enlisted the services of BDO LLP(UK) and later M/s John Miller Arbitration Investigations and Consultancy Limited to conduct the forensic audit inquiry into the company.
12. He avers that owing to the petitioner's position in the company, they sought to interview him concerning the same. The initial interview was conducted by BDO LLP (UK) on 12th November 2015. Unfortunately, BDO LLP's contract was terminated before it would submit its final report. M/s John Miller Arbitration Investigations and Consultancy Limited subsequently met and interviewed the petitioner and other relevant parties. Upon conclusion of the interviews J.Miles and Company Limited submitted its report.
13. He deposes that one of the findings in the report was the petitioner's role in the affairs of MSC as Managing Director. He avers that during the investigations it was discovered that the company had issued excessive trade discounts in the form of credit notes to certain customers which appeared to be contrary to the interests of the company. The discounts were above 10% which is above the approval limit for management. Interestingly, no Board approval was sought or obtained before the discounts were granted.
14. He further states that while interrogating the MSC's bank statements for the period of March 2010 to May 2012 , they noted suspicious and substantial cash inflows from the customers who had received the excessive discounts and outflows to the petitioner (and others)from Peter Hongo (the then Head of Sales). This prompted the 1st respondent with the assistance of the Directorate of Criminal Investigations (DCI) to seek a court order so as to investigate account number 0803464006/3000049902 under the name of Samson Peter Otieno Hongo at Prime Bank Limited.
15. He deposes that the investigation revealed that Mr.Hongo had received cash and cheque deposits from its customers such as YH Wholesalers. This customer had received discounts totaling Ksh.1.6 billion. Moreover, the statements showed that funds held in this account were then made out to the petitioner and associated entities such as the Evans Kidero Centre. Other beneficiaries of these funds were former members of senior management and the Board of MSC. It was also noted that this was not the only bank account that was used to channel such funds.
16. He avers that these discoveries provided probable cause to suspect that the management of the company had issued excessive trade discounts to customers in exchange for kickbacks and/or bribes. The 1st respondent as a result sought the assistance of the Capital Markets Fraud Investigations Unit of the DCI to obtain information on the bank accounts of not only the petitioner but also the persons who had served in the Management and Board of the company. The warrants to investigate were obtained after an application was filed before the Nairobi Chief Magistrate Court. He states that it is clear from this account that the 1st respondent conducted the inquiry and investigations in a fair and transparent manner.



17. Following the investigation, the 1st respondent issued the petitioner with a Notice to show cause dated 26th July 2017 to respond to the findings in writing. The petitioner responded to the Notice vide his advocate's letter dated 31st July and 2nd August 2017 seeking further information and an extension of time to file his response.
18. The 1st respondent in its response dated 3rd August 2017, suspended the period within which the petitioner was required to respond and further answered the Advocate's inquiries. The petitioner's advocate in reply, wrote to the 1st respondent on 16th August 2017 reiterating the petitioner's request to be supplied with information. The 1st respondent responded to the letter with its communication dated 15th September 2017.
19. He deposes that the 1st respondent supplied the petitioner with all the documents and information in its possession to enable him prepare an adequate response. These documents were supplied alongside the Notice. He claims that the petitioner's request for other documents is a delaying tactic as the documents sought are not in the 1st respondent's possession. These documents are retained by MSC and not the 1st respondent. Secondly the information sought is irrelevant to the objective of the Notice. Considering this, he avers that access to those documents and information can only be obtained by the petitioner from MSC upon making a request as provided for by the law.
20. He as well opposed the allegation that the Notice is premature because the existence of a case of embezzlement of MSC's funds had already been established. The only pending issue was the total amount embezzled by the petitioner. Nonetheless, he averred that the petitioner failed to show what prejudice would be occasioned if he responds to the allegations outlined in the Notice.
21. He equally pointed out that the orders granted in High Court Constitutional Petition No.79 of 2017 Dr.Evans Kidero v Ethics and Anti-Corruption Commission and others was not granted against the 1st respondent and neither was it a party in those proceedings. Furthermore he points out that conservatory orders were issued in Petition No.372 of 2017;Dr.Evans Kidero v Pual Muthaura,Capital Markets Authority and 2 others on 31st July 2017 and Petition No.467 of 2017 Peter Hongo & 2 others v Paul Muthaura and 4 others on 26th September 2017, after the Notice had already been issued to the petitioner. He thus avers that the conservatory orders only dealt with investigation of the petitioner's bank accounts and did not in any way bar the 1st respondent's proceedings as outlined in the Notice.
22. He further deposes that the petitioner's allegation that the 1st respondent does not have jurisdiction over him in view of Section 25 of the Capital Markets Authority Act is baseless. This is because the petitioner was the Managing Director of MSC for 9 years, the period which is being investigated.
23. With regard to the repealed Capital Markets Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya 2002, he avers that the Corporate Governance Code came into effect on March 2017.He however points out that the action against the petitioner was brought in light of allegations that took place during the subsistence of the repealed guidelines. He relied on Section 23(3) (e) of the *Interpretation and General Provisions Act*, Cap.2.
24. To this end he avers that the petition is an attempt to delay and frustrate the 1st respondent's inquiry. Furthermore, that the petition is an attempt to cause the Court to usurp the 1st respondent's jurisdiction as envisaged under the Capital Markets Authority Act which it carried out with strict observance of the law. On this premise he argues that the petition ought to be dismissed with costs.



The 2nd Respondents' case

25. In reply to the petition the 2nd respondent filed grounds of opposition dated 11th February 2019 on the premise that:
- i. The petition discloses no reasonable cause of action against the 2nd respondent.
 - ii. The petitioner has not sought any orders against the 2nd respondent.
 - iii. The petition is otherwise an abuse of the due process of the Court.

The Parties Submissions

Petitioners' submissions

26. The petitioner through his advocates Ochieng', Onyango, Kibet and Ohaga Advocates filed written submissions dated 30th July 2018. He as well filed a list of authorities dated 5th December 2018 and a supplementary list of authorities dated 14th June 2022. The issues for determination were identified as follows:
- i. Whether the 1st respondent breached the petitioner's constitutional rights.
 - ii. Whether the 1st respondent acted in contempt of Court by going against court orders issued with regard to investigation of the petitioner's personal bank accounts.
27. Counsel discussed the first issue, under various sub –topics. To begin with, on the right to a fair trial, it was submitted that the petitioner's key contention is the 1st respondent's conduct in executing its mandate. According to Counsel the 1st respondent had acted in a manner that violated the petitioner's rights under Articles 10, 25 (c), 35 (1)(b) and 47(1) & (2) of the Constitution. Counsel specifically noted that the 1st respondent's objective for the interviews varied from the Notice to show cause. It is argued that it was a ploy against the petitioner which is contrary to the principle of integrity and transparency. Secondly, that the 1st respondent issued the Notice prematurely and withheld crucial information from the petitioner.
28. Counsel submitted that the petitioner under Article 35 of the Constitution has a right to access information held by the 1st respondent. In support reliance was placed on the case of Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company and 2 others (2013) eKLR where it was held that the right to information implies entitlement by the citizen to information and imposes a duty on the State with regard to provision of information. It has to provide open access to such specific information as people may require from it. Further reliance was placed on the cases of:
- i. Timothy Njoya V Attorney and another (2014) eKLR
 - j. Famy Care Limited v Public Procurement Administrative Review Board and another (2013) eKLR among others
29. Counsel submitted that the petitioner sought the information from the 1st respondent to enforce his right to a fair trial. Accordingly, he made an official request to the 1st respondent in the letters dated 31st July 2018 and 16th August 2018. However the 1st respondent declined to avail the requested information in breach of Articles 25(c) & 35 of the Constitution and Sections 3(1) and 4(1) & (2), 3(a) (b)(c),(d),(g) of the Fair Administrative Actions Act.



30. Counsel argued that the 1st respondent, who had admitted in the interviews to having gone through various documents and thereafter made allegations of fraud, bore the onus of proof with reference to provision of the sought documents. To buttress this point reliance was placed on the case of *Amos V Hughes*, 1 Mood and R.464,174 E.R.160 (Nisi Prius)1835 where it was held that the burden of proof lies on the party who would be unsuccessful in the case if no evidence at all was given. Also see *Joseph Constantine Steamship Line Ltd. v Imperial Smelting Corporation Ltd.* (1942) A.C. 154.
31. While relying on Section 13B(2) of the Capital Markets Authority Act counsel argued that the 1st respondent being the investigator ought to obtain the sought documents from MSC and supply the same to the petitioner as they have the authority to call for such information and further has a duty of disclosure. In support reliance was placed on the case of *Republic v Capital Markets Authority* (Civil Application No.62 of 2016) where it was held that the current state of law places the onus on an administrative body or authority to furnish the person against whom allegations are made with information, materials and evidence to be relied upon in making the decision or taking the administrative action.
32. On the second issue, Counsel submitted that the 1st respondent in carrying on investigations into his personal accounts acted in contempt of Court. This is since stay orders in this regard were issued in the cases mentioned at paragraph 21 of this Judgment. He argued that the orders therein were issued in-rem contrary to the 1st respondent's argument otherwise with reference to Petition No.79 of 2017.
33. Counsel further relied on the case of *Teachers Service Commission v Kenya National Union of Teachers and 2 others* (2013)eKLR where it was observed that the importance of the court's punishment for acts of contempt is to safeguard the rule of law which is fundamental to the administration of justice. Also see the cases of: *Hell More V Smith* 1886 L.R. 35 C.D. 455 and *Kasambeli Sanane V Manhu Muli Alias Frederick Saname and 4 others* (2013)eKLR.

The 1st Respondent's Submissions

34. The 1st respondent through the firm of Mohammed Muigai Advocates filed written submissions dated 31st July 2018. Counsel as well filed a bundle of authorities dated 1st August 2018 and further a list of authorities dated 17th October 2022. He discussed the petitioner's case under various topics as underscored in the parties pleadings.
35. On the Notice to show cause, counsel while reiterating the account that led up to it as captured in the 1st respondent's replying affidavit submitted that the instant suit is geared towards shielding the petitioner from being held accountable for his actions during his tenure as Managing Director at MSC. This is despite the fact that the purpose of the Notice is to grant the petitioner an opportunity to be heard in line with the principles spelt out in the *Constitution* and the Fair Administrative Actions Act. Counsel thus urged the Court to decline the petitioner's invitation to usurp the 1st respondent's powers as granted by the *Capital Markets Act*. This caution was also captured by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others*, Civil Appeal No.290 of 2012 which was cited in support.
36. To support this point reliance was placed on the Court of Appeal decision in the case of *Capital Markets Authority v Jeremiah Gitau Kiereini and another* (2014)eKLR where it was held that there is no controversy regarding the vital role played by CMA in attempting to achieve the aspirations of the *Capital Markets Act* of promoting, regulating and facilitating the development of an orderly ,fair and efficient capital markets' in this Country. That is why CMA is given fairly wide powers and functions



under the statute. Also see the case of Ernst and Young LLP V Capital Markets Authority (Nairobi Petition No.385 of 2016.

37. On access to information, Counsel noted that the petitioner was issued with a Notice accompanied by a bundle of supporting documents. That this is seen in the petitioner's supporting affidavit dated 16th October 2017 at pages 31 to 435. Moreover the 1st respondent informed the petitioner's advocates that all the relevant documents in relation to the Notice had already been supplied and any further documents were not in its possession but MSC. Counsel as such argued that it was incumbent on the petitioner to seek the information it desired directly from MSC.
38. On the alleged premature Notice, it was submitted that there is no legal requirement on the 1st respondent to issue the Notice once all investigations are complete. Neither did the petitioner allude to any violation of a legal provision on this basis. Counsel pointed out that the Notice was issued on the premise of obtaining sufficient information to form a reasonable finding that there was a breach on the part of the petitioner.
39. On the next issue counsel submitted that the 1st respondent had relied on the Capital Market Guidelines on Corporate Governance for Listed Companies (2002) on the basis of Section 23(3) of the *Interpretation and General Provisions Act*, Cap.2. This is because the actions complained against occurred during the subsistence of the guidelines and so the operative law is the said guidelines. In support, reliance was placed on the case of Joyce Ongundo v Capital Markets Authority HC Misc. Application No.606 of 2016 where it was held that under Section 2 of the *Interpretation and General Provisions Act*, written law is defined to include any subsidiary legislation for the time being in force. Therefore, the guidelines fall within the definition of a written law and as the alleged culpability arises during the subsistence of the 2002 guidelines, the applicable law was the one comprised in the said Regulations.
40. On the allegation of contempt of court, Counsel submitted that this was in error as the Notice did not seek to investigate the bank accounts of the petitioner as this was already done and concluded before the Notice was issued. Secondly, the 1st respondent was not a party to the proceedings in Petition 78 of 2016 and neither was the Order issued against it. Likewise, the Orders in Petition 467 of 2017 and Petition No.372 of 2017 were issued after the Notice had already been issued to the petitioner. Counsel in like manner opposed the allegation that the Notice included the period when the petitioner was not Managing Director. Counsel stressed that the Notice did not cover the period after 2012.
41. Correspondingly Counsel on the final point submitted that the petitioner's allegation that the dictates of the Capital Markets Authority do not apply to him is misleading and without legal basis. This is because the petitioner was called to account for acts or omissions committed as a former director in his tenure at MSC. It is noted that the 1st respondent can do so by virtue of Section 11(3)(cc) (i) of the Act. Counsel relied on the case of Joyce Ongundo v Capital Markets Authority HC Misc. Application No.606 of 2016 where it was held that former directors are culpable if what is complained of occurred under their watch and a matter within the powers of the respondent and not the Court sitting as a judicial review court.

The 2nd Respondent's Submissions

42. The 2nd respondent did not file any submissions.

Analysis and Determination

43. The instant petition has been running alongside Petition No.372 of 2017; Dr. Evans Kidero v Pual Muthaura, Capital Markets Authority and 2 others. Petition No.372 of 2017 introduced the premise of



the petitioner's case against the Capital Markets Authority, (1st respondent). The basis of this dispute was the petitioner's challenge to the 1st respondent's mandate in the context of Section 11(3)(h) of the [Capital Markets Act](#). Undoubtedly the outcome of the decision in Petition No.372 of 2017 has a great bearing on this suit.

44. As has already been adjudged by this Court in Petition No.372 of 2017, the Capital Markets Authority was found to have the authority to investigate the petitioner as a former director of MSC as envisaged under Section 11(3)(h) of the [Capital Markets Act](#) which was found to be constitutional. The 1st respondent's power and authority in this regard was found to be in line with the constitutional principles set out in Article 24 of the [Constitution](#). In the end this Court upheld the 1st respondent's mandate and found that the petitioner's constitutional rights in the process had not been violated.

45. The effect of this pronouncement is that some of the issues raised herein have accordingly been rendered moot. The Court of Appeal in the case of *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* [2020]eKLR borrowing from the Black's Law Dictionary noted as follows:

“ 64. In Black's Law Dictionary, 8th edition, a “moot case” is defined as “a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights”, and as a verb, as meaning “to render a question as of no practical significance”.

46. The essence of the doctrine was expounded on in the case of *Daniel Kaminja & 3 others (Suing as Westland Environmental Caretaker Group) v County Government of Nairobi* (2019)eKLR as follows:

“ 26. A case or issue is considered moot and academic when it ceases to present a justiciable controversy by virtue of supervening events, so that an adjudication of the case or a declaration on the issue would be of no practical value or use. In such instance, there is no actual substantial relief which a petitioner or applicant would be entitled to, and which would be negated by the dismissal of the case. Courts generally decline jurisdiction over such cases or dismiss them on grounds of mootness, save when, among others, a compelling constitutional issue raised requires the formulation of controlling principles to guide the bench, the bar and the public; or when the case is capable of repetition yet evading judicial review.”

47. A look at the instant petition discloses a number of things. First is the 1st respondent's authority to investigate persons and companies under its regulatory authority which is well established in law. As such a Court can only intervene where this power has been unlawfully exercised and contrary to the constitutional dictates. The exercise of the 1st respondent's power in the circumstances of this case was found to be legitimate.

48. Secondly, this Court also found that the petitioner's allegation of violation of his constitutional rights in exercise of the 1st respondent's mandate lacked merit. Furthermore, a perusal of the reliefs sought herein divulges that as a consequence of the finding in Petition No.372 of 2017 some of the prayers have since been overtaken by events. In particular I refer to prayers (c), (d), (f), (g) and (I) in the petition. Taking this into account this court will not make a further determination over these issues.

49. Having carefully perused the pleadings and submissions of the parties herein, it is my considered view that the issues that remain for determination are as follows:



- i. Whether the 1st respondent's Notice to show cause dated 26th July 2017 was lawful.
- ii. Whether the 1st respondent acted in contempt of court by going against court orders issued with regard to investigation of the petitioner's personal bank accounts.
- iii. Whether the 1st respondent breached the petitioner's constitutional right to access information under Article 35 of the Constitution.
- iv. Whether the petitioner is entitled to the reliefs sought.

Issue No. (i) Whether the 1st Respondent's Notice to show cause dated 26th July 2017 was lawful

50. Following the 1st respondent's investigation into the affairs of MSC and the petitioner's bank accounts, it issued a Notice to Show Cause to the petitioner, for him to answer to the allegations therein. The petitioner faulted the 1st respondent's said Notice for being incompetent. This argument was premised on three fronts. First that the Notice had been issued prematurely as the investigations were still ongoing. Second that the Notice was anchored on the repealed Capital Markets Guidelines on Corporate Governance Practices for Listed Companies in Kenya 2002. Lastly that the Notice was ultra vires the 1st respondent's jurisdiction under Section 11(3) (cc) as read with Section 25A. In this regard, that the 1st respondent only has authority over current directors' not former directors.
51. The 1st respondent opposed this allegation on the basis that there is no law that requires it to first complete the investigation before issuing the Notice. Secondly, that reliance on the 2002 Guidelines was based on the fact that it was the operative law at the time. Lastly that it indeed has jurisdiction over former directors for actions that they carried out during their tenure.
52. The Court of Appeal in the case of Capital Markets Authority v Alnashir Popat & 8 others [2019] eKLR appreciating the role of the 1st respondent observed as follows:
 - “ 50. Under section 11(3) of the Act, CMA is also granted wide powers that enable it to instil discipline upon any errant player, with a view to regulating and facilitating the development of an orderly, fair and efficient capital market in Kenya, in line with the preamble to the Act. The Authority may, among other things, suspend or cancel the listing of any securities; inquire, either on its own motion or at the request of any person, into the affairs of any person which it has approved or to which it has granted a licence and any public company the securities of which are publicly offered or traded on an approved securities exchange; conduct inspection of the activities, books and records of any persons approved or licenced by the Authority.
 51. CMA is also empowered to act as an appellate body in respect of appeals against any self-regulatory organization, securities or exchange-traded derivatives contracts exchange, and do all such other acts as may be incidental or conclusive to the attainment of its objectives under the Act.... It is therefore clear that CMA has power and responsibility to investigate any breaches and enforce all the statutory provisions and regulations.”
53. Palpably, the 1st respondent and bodies performing investigative duties are required to adhere to the constitutional dictates so as to accord the person affected by its decision and process a procedurally fair and just opportunity to represent its case. This requirement is well anchored under Article 47 of the Constitution and the Fair Administrative Actions Act.



54. In this case, the petitioner was issued with a Notice to show cause by the 1st respondent before the investigations were finalized. A reading of the [Capital Markets Act](#) does not disclose whether the 1st respondent before issuing the said Notice ought to have fully completed its the investigations.

55. The relevant Section being Section 13B of the Act provides as follows:

Authority may investigate

1. Where the Authority has reasonable cause to believe, either on its own motion or as a result of a complaint received from any person, that—
 - a. an offence has been committed under this Act; or
 - b. a director, manager or employee of a licensee, approved person or an issuer or any other person, may have engaged in embezzlement, fraud, misfeasance or other misconduct in an issuer, licensee or approved person in connection with its regulated activity; or
 - c. the manner in which a licensed or approved person has engaged or is engaging in the regulated activity is not in the interest of the person's clients or in the public interest, the Authority may in writing depute a suitably qualified person to conduct investigations into the matter on behalf of the Authority.
2. An investigator appointed under subsection (1) may require any person whom the investigator reasonably believes or suspects to be in possession or in control of any record or document which contains, or which is likely to contain, information relevant to an investigation under this section—
 - (a) to produce to the investigator, within such time and at such place as the investigator may require in writing, any record or document specified by the investigator which is, or may be, relevant to the investigation, and which is in the possession or under the control of that person;
 - (b) to give an explanation or further particulars in respect of any record or document produced under paragraph (a);
 - (c) to attend before the investigator at the time and place specified in writing by the investigator, and to the best of his ability under oath or affirmation answer any question relating to the matters under investigation as the investigator may put to him; and
 - (d) to assist the investigator with the investigation to the best of the person's ability.
3. A person who contravenes the provisions of subsection (2) commits an offence.
4. The Authority may, where satisfied that the capital markets or an investor shall suffer irreparable damage as a result of an activity under subsection (1), impose an interim measure for not more than three months to prevent further damage pending completion of an of inquiry.

56. A further reading of the other provisions of the Act, do not also indicate such a legal requirement. The petitioner while submitting on this point failed to underscore the legal requirement of completing the investigations first to necessitate a finding that the 1st respondent had acted unlawfully. Being that there is no legal basis for the assertion, this issue must fail.



57. On the second front, the petitioner took issue with the 1st respondent's reliance on the repealed Capital Markets Guidelines on Corporate Governance Practices for Listed Companies in Kenya 2002 instead of the Code of Corporate Governance Practices for Issuers of Securities to the Public 2015.

58. The Court in the case of *Republic v Capital Markets Authority Ex parte: Joyce Ogundo* (supra) speaking to a comparable grievance which I am in agreement observed as follows:

“ 82. It was the applicant's case that the sanctions imposed by the Respondent were for the alleged contravention of the Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya of 2002 which laws have since been repealed by The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015. The applicant therefore contended that she was being sanctioned for contravening repealed laws which action was not only illegal but was also ultra vires the Capital Markets Authority.

83. It was however contended by the Respondent that the 2002 Guidelines were in force at the time when the ex parte Applicant committed the regulatory breaches and were hence the applicable Guidelines to the allegations facing the ex parte Applicant. It was explained that the 2015 Guidelines were gazetted on 4th March 2016 vide Gazette Notice No. 1420 while the events forming the basis of the allegations against the ex parte Applicant took place before the 2015 Guidelines came into effect. It was therefore contended that the 2015 Guidelines cannot form the basis of the allegations put to the Ex parte Applicant as to do so would be to give the 2015 Guidelines retrospective effect, which our laws abhor.

84. Section 23(3) of the *Interpretation and General Provisions Act*, Cap. 2 of the Laws of Kenya which provides that:

“ (3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—

a.

b. affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

c. affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

d. affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or

e. affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture



or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.”

85. Under section 2 of the *Interpretation and General Provisions Act*, a “written law” is defined to include “any subsidiary legislation for the time being in force.” Therefore the Guidelines fall within the definition of a “written law” and as the alleged culpability arose during the subsistence of the 2002 Guidelines, the applicable law was the one comprised in the said Regulations. Therefore nothing turns on that issue.”

59. The petitioner informed that he was the Managing Director of MSC from the year 2003 up until July 2012. Plainly, the investigations carried out against him were for the period when the Capital Markets Guidelines on Corporate Governance Practices for Listed Companies in Kenya 2002 were operative. His argument otherwise is untenable in light of the circumstances of this case.

60. On the final point, I adopt the observation in the case of Republic v Capital Markets Authority Ex parte: Joyce Ogundo(supra). The Court observed as follows:

“96. Under section 2 of the Act “director” has the meaning assigned to it in the *Companies Act* (Cap. 486) while under section 2 of the *Companies Act*, “director” includes any person occupying the position of director by whatever name called. What this means is that the word “director” is not restricted to persons occupying the position of director. In my view section 25A of the Act must be read together with section 11(3)(cc)(i) thereof which empowers the Respondent to impose sanctions for breach of the provisions of the Act or the regulations made thereunder, or for non-compliance with the Authority’s requirements or directions, and such sanctions may include levying of financial penalties, proportional to the gravity or severity of the breach, as may be prescribed. It is noteworthy that section 25A is expressed to be “without prejudice to any other provision of this Act” which clearly means that section 25A cannot be read in isolation to section 11(3)(cc)(i) which is expressed in very wide terms as opposed to the literal reading of section 25A. In my view to subject section 11(3)(cc)(i) to section 25A would have the effect of negating the objective of the Act and render it a dead letter of the law since directors would simply evade the penal sanctions by simply stepping aside as if they were when faced with imminent action. I therefore do not subscribe to the views that actions cannot be imposed against former directors. In my view former directors are culpable if what is complained of occurred under their watch.”

In the present case what is complained of occurred when the Petitioner was the Managing Director. He has to answer to the same.



Issue No. (ii) Whether the 1st Respondent acted in contempt of Court by going against court orders issued with regard to investigation of the petitioner's personal bank accounts

61. The petitioner further asserted that the 1st respondent was in breach of the various stay orders issued in High Court Constitutional Petitions No.79 of 2017 Dr.Evans Kidero v EACC and other; No.372 of 2017 DR.Evans Kidero v Paul Muthaura and 4 others and Petition No.467 of 2017 Peter Hongo, and 2 others v Paul Muthaura and 4 others. This was opposed to by the 1st respondent who informed that the orders issued in Petition No.79 of 2017 related to a matter not in relation to MSC and it was not a party in the proceedings. Likewise that the orders in Petition No.372 of 2017 and Petition No.467 of 2017 were issued after the investigations had been done and the Notice issued.
62. A perusal of the Orders in Petition No.78 of 2016 dated 1st Mach 2016 as issued by the late Hon. Justice Onguto divulge that the orders were specifically directed at the Ethics and Anti-Corruption Commission and hence the petitioner's argument that these orders apply in rem is unfounded.
63. On the other hand, the conservatory orders dated 26th September 2017 issued by Justice Mwita in Petition No.467 of 2017 were to the effect that the 1st respondent and its officers were prohibited from investigating the petitioner's bank accounts until the petition was determined. Equally, the conservatory orders dated 1st August 2017 as issued by Justice Mwita in Petition No.372 of 2017 were on an interim basis until the petition was heard.
64. What is clear from the facts herein is that the Notice to show cause was issued when the investigations had already been conducted by the 1st respondent. The only pending part was conclusion of the investigations which in effect was barred with issuance of the conservatory orders in Petition No.372 of 2017 and Petition.No.467 of 2017.
65. In order to ascertain existence of contempt of Court the Court in the case of Charity Mpano Ntiyione v China Communications Construction Company Limited & National Environment Management Authority (2017) eKLR observed as follows:

“In the case of North Tetu Farmers Co. Ltd v. Joseph Nderitu Wanjohi (2016) eKLR where Justice Mativo stated that: ' writing on proving the elements of civil contempt, learned authors of the book Contempt in Modern New Zealand have authoritatively stated as follows:-

‘there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant's conduct was deliberate.’

I note there are three elements that must be proved in contempt proceedings:

- a. Applicant must demonstrate terms of orders.
- b. Applicant must demonstrate knowledge of terms by respondent.
- c. Applicant must demonstrate failure of respondent to comply with court order.”



66. In the instant case, it is discernible that while the orders in Petition No.78 of 2016 were not applicable to the 1st respondent, the orders in Petition No.372 and 467 of 2017 were issued long after the investigations had begun and the Notice to show cause issued. The 1st respondent as such was not in breach of the said orders.
67. What was essential however was for the petitioner to prove failure on the part of the 1st respondent after the orders were issued not to conclude the investigations as directed by the Court. This element was neglected by the petitioner who chose to focus on instigation of the investigations instead of conclusion of the investigations by the 1st respondent hence not establishing contempt. This inevitable conclusion therefore is that the 1st respondent was not in contempt of the conservatory orders issued in Petition No.372 and 467 of 2017.

Whether the 1st Respondent breached the Petitioner's constitutional right to access information under Article 35 of the Constitution.

68. Turning to the key issue in this matter, the petitioner submitted that the 1st respondent had failed to issue him with the requisite documents to enable him make an effective response to the allegations meted out in the Notice. The 1st respondent in disagreement stated that it had issued the petitioner with all the relevant documents in relation to the investigation against him. The 1st respondent pointed out that the petitioner was employing delaying tactics as the information sought was not relevant to the case and also not in its possession but MSC.
69. The right to access information is a universal right that is upheld in various international instruments. Nationally, this right finds its roots in the Constitution under Article 35 of the Constitution. The relevant part in this case provides as follows:
1. Every citizen has the right of access to--
 - a. ...
 - b. information held by another person and required for the exercise or protection of any right or fundamental freedom.
70. Article 35 of the Constitution is effected by the Access to Information Act No.31 of 2016. Section 4 of the Act expounds this right as follows:
1. Right to information
Subject to this Act and any other written law, every citizen has the right of access to information held by—
 - a. the State; and
 - b. another person and where that information is required for the exercise or protection of any right or fundamental freedom.
 2. Subject to this Act, every citizen's right to access information is not affected by—
 - a. any reason the person gives for seeking access; or
 - b. the public entity's belief as to what are the person's reasons for seeking access.



70. The Supreme Court discussing the essence of this right in the case of Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR opined as follows:

“(13) Article 35(1)(a) and (b) of the Constitution, read with Section 3 of the Access to Information Act would thus show without unequivocation that all citizens have the right to access information held by the state, or public agencies including bodies such as the 2nd respondent. In addressing that issue, the Court in Petition No. 479 of 2013 Rev. Timothy Njoya v. Attorney General & Another; [2014] eKLR, it was held;

“A plain reading of Section 35(1)(a) reveals that every citizen has a right of access to information held by the State which includes information held by public bodies such as the 2nd respondent. In Nairobi Law Monthly v. Kengen (supra) the Court dealt with the applicability of the right to information as follows;

“The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest... this, I believe, is the import of Article 35(3) of the Constitution of Kenya which imposes an obligation on the state to 'publish and publicise any important information affecting the nation', but also to provide open access to such specific information as people may require from the state”.

72. Bearing this principle in mind, the facts of this case reveal that the genesis of this matter was an inquiry conducted by the 1st respondent on MSC and later on an investigation carried out on the petitioner and other senior management officials. This as has been discussed is its mandate under the Capital Markets Act. Following its investigation of the petitioner the 1st respondent issued the impugned Notice.

73. The petitioner responded to the Notice in letters dated 31st July 2017 and 2nd August 2017 through his advocates. They sought information and various documents in view of the 1st respondent's findings. This was subsequently responded to by the 1st respondent's Chief Executive Officer on 3rd August 2017. He informed that the questions raised would be responded to in detail and suspended the deadline of 9th August 2017 to file a response to the Notice. The petitioner through its advocate sent a further letter dated 16th August 2017 seeking furnishing of the documents initially sought.

74. It is appreciated that the 1st respondent in the Notice letter enclosed all the pertinent information and evidence in relation to the allegations made against the petitioner. In particular the information included the J.Miles Report; the implicated bank statements, the internal and external reports in respect of the investigation, particulars of the excessive discounts in form of credit notes granted by the petitioner, the specific board report minutes of MSC for the period from 2006 to 2012, the bank accounts statements relating to Samson Peter Hongo account no.0803464006 for the period of 2010 and 2012 and cheques on the petitioner's irregular benefits.

75. The Notice in essence supplied the facts and particulars of the petitioner's actions that were alleged to be offensive, the legal provisions deemed to have been breached and the evidence relied on to support the claims. The petitioner in its response through its advocates dated 20th September 2017 was dissatisfied by the response as all the documents and information sought had not been supplied.



76. A reading of this correspondence makes a few things known. First the 1st respondent did issue information and the documents that informed their conclusion before issuing the notice. The second issue is that whilst the petitioner through its advocate sought additional information and documentation to the one furnished, failed to demonstrate how the supplementary information which was stated in general terms was related to the investigations and findings of the 1st respondent to necessitate compliance with Article 35 of the Constitution. There was need for demonstration of the nexus between the sought information and documents and the 1st respondent's ultimate finding. This would have then proved the link between the two hence indicating that indeed there was violation of the petitioner's right to access information. Regard should be had to Article 35(1)(b) which informs that a person seeking information held by another person other than the State has the duty to show that the information is required for the exercise or protection of any right or fundamental freedom.
77. In my humble view even as the State is required without reservation to issue information (of course subject to limitations under Section 6 of the Access to Information Act), information held by another person does not subscribe to a similar scope. Access to such information is not automatic but permissible to the extent that one can show that the information is required to exercise or protect a constitutional right.
78. I find it prudent to further emphasize that the burden to demonstrate violation is held by the petitioner. The reason for this is that once it was shown that the relevant documents were furnished in compliance with the dictates of Article 35 of the Constitution, it was incumbent on the petitioner to show that the said documents were not sufficient in relation to the allegations meted out. The opine in the case *Edward Akong'o Oyugi & 2 others v Attorney General* [2019]eKLR described this element as follows:
- “73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[38] :-
- “The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”
74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”
79. It is my humble finding that in view of the material placed before this court, and the 1st respondent's assertion that it supplied the pertinent information and documentation that was required for the petitioner to make a response to the Notice, the petitioner had a duty to show that this material was not adequate. This was not proved. Accordingly, I find that the petitioner's constitutional right under Article 35 was not violated by the 1st respondent.



80. On the contrary, and in a scenario where it could have been found that the sought information was necessary to allow the petitioner respond to the allegations in the Notice, I must point out that it would not have been the duty of the petitioner to access the information from MSC as proposed by the 1st respondent. This is because the obligation to issue all the relevant information in light of the allegations made is placed on the 1st respondent and not the petitioner. This is made manifest under Section 13 of the *Capital Markets Act*.
81. That said, the petitioner equally alleged violation of Articles 47 and 50 of the *Constitution*. It is however clear that the petitioner was granted an opportunity to be heard and present his case before the 1st respondent. The proceedings before the 1st respondent are yet to commence hence it is premature to determine whether his right to a fair hearing has been violated or not.
82. Lastly, the petitioner also brought this case against the 2nd respondent. Upon perusal of the Petition I find it clear that the case against the 2nd respondent was not specifically particularized in conformity with the threshold set out for constitutional petitions. Infact there is nothing said about the 2nd Respondent.
83. The sum total is that the Petition dated 16th October, 2017 lacks merit and is hereby dismissed with costs.
84. Orders accordingly

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 31ST DAY OF OCTOBER, 2023 IN OPEN COURT AT NAIROBI.

H. I. ONG'UDI

JUDGE

