



**Kidero v Muthaura & 4 others (Petition 372 of 2017) [2023] KEHC 24447 (KLR)
(Constitutional and Human Rights) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24447 (KLR)

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

PETITION 372 OF 2017

HI ONG'UDI, J

OCTOBER 31, 2023

BETWEEN

EVANS KIDERO PETITIONER

AND

PAUL MUTHAURA 1ST RESPONDENT

CAPITAL MARKETS AUTHORITY 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

INSPECTOR GENERAL OF POLICE 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

Capital Markets Authority’s investigative mandate is constitutional, necessary, and proportionate to safeguard public interest

The petition challenged section 11(3)(b) of the Capital Markets Act as unconstitutional for permitting the Capital Markets Authority (CMA) to investigate persons without prior notice, allegedly violating the right to fair administrative action. The petitioner, Hon. Dr. Evans Kidero, objected to investigations into his personal bank accounts linked to Mumias Sugar Company. The respondents argued the investigations were lawful, supported by statute, and sanctioned by court warrants. The court held that CMA’s mandate was constitutional, necessary, and proportionate to safeguard public interest. The petitioner failed to prove violation of rights. The petition was dismissed with costs.

Reported by John Wainaina

Constitutional Law - fundamental rights and freedoms - right to fair administrative action - investigative powers of the Capital Markets Authority - whether section 11(3)(b) was unconstitutional and offensive to the right to fair administrative action since it gave the Capital Markets Authority power to investigate any person without giving such persons prior written notice before taking the adverse action - Constitution of Kenya articles 10, 25(a)



and (c), 27, 28, 29, 31, 39(1), 40, 47(1) and (2), 48, 50, and 259; Capital Markets Act (Cap 485A) section 11(3)(b), and 13.

Brief facts

The petition was about the alleged contravention of the petitioner's constitutional rights. The petitioner, Hon. Dr. Evans Kidero, averred that on 23 October 2015, the Capital Markets Authority (CMA) invited him for an interview regarding investigations into Mumias Sugar Company (MSC), where he had served as Managing Director. A subsequent interview on November 12, 2015 was conducted by auditors from BDO LLP, after which a report was prepared. The petitioner stated that the interview did not raise issues of fraud.

On January 12, 2017, CMA again sought his attendance, this time requesting details of his personal bank accounts. The petitioner claimed that despite complying, he received no further feedback. He later learnt that on July 20, 2017, CMA had resolved to investigate his personal bank accounts covering the period 2006–2016, with assistance from the Directorate of Criminal Investigations (DCI). He contended that the decision was illegal, unconstitutional, and discriminatory as he was singled out among MSC's former directors.

The respondents opposed the petition, asserting that the investigations were lawful, sanctioned by statute, and supported by court-issued warrants upon reasonable suspicion of financial impropriety involving MSC.

Issues

Whether section 11(3)(h) was unconstitutional and violated the right to fair administrative action since it gave the Capital Markets Authority power to investigate any person without giving such persons prior written notice before taking the adverse action.

Held

1. Whereas it was contended in the submissions that the applicable law in was the Companies Act, 2015 with specific focus on sections 238 to 242. That the sections repealed the operation of section 11(3)(h) and (m) of the Capital Markets Act, with reference to the Capital Markets Authority's (CMA) mandate to investigate the financial improprieties of publicly listed companies in the securities exchange sphere. Each party was at liberty to frame their case in their own way while paying regard to the rules of drafting pleadings. They were ultimately bound by the manner in which the pleadings were drafted. A party could not be allowed to raise a different or fresh case without an amendment to the pleading/pleadings. The court refrained from addressing the issue.
2. A misjoinder of a part was not fatal to a petition. However, the (the Act) under section 10 barred institution of legal suits against its officers in view of carrying out their functions as spelt out in the Act in good faith. The 1st respondent's joinder was contrary to the law.
3. While the petitioner was keen on bringing a case against the 1st and 3rd respondents, he neglected to particularize his case against them in line with the threshold set out for constitutional petitions.
4. The Constitution should be interpreted in a manner that promoted its spirit, principles, advanced rule of law and human rights. Statutes were presumed to be constitutional until the contrary was proved. The court was required to examine the purpose and effect of a statutory provision.
5. Most industries boast of comparable authorities whose purpose was on behalf of the Government to exercise control over the spheres they regulated in provision of the goods and services rendered to the citizens. The authorities ensured the public's interest was protected by ensuring that the actions taken within its industry were conducted in accordance with the standards set out in law. That was the objective and purpose of the government in establishing such bodies.
6. Section 13B of the Act gave CMA the authority to investigate any offences believed to have been committed under the Act. Section 13B was supplemented with sections 118 and 121(1) of the Criminal Procedure Code and section 180 of the Evidence Act. There was no legal requirement on the 2nd respondent or DCI to issue prior notice in line with article 47 of the Constitution to a person being investigated.



7. The purpose of section 11(3)(h) of the Act was to regulate Capital Markets business in Kenya whilst safeguarding public interest. Primarily the effect was that the government through CMA controlled the regulation by arming the CMA with broad intervention powers designed to both avoid and respond to the failure of a public listed company that dealt in securities exchange. The language of the Act was clear in that regard with no ambiguity articulated in the impugned provision with reference to CMA's power to investigate such companies. That was in line with the purpose of the Act as enshrined in the preamble.
8. Public participation was a fundamental element in our constitutional democracy. The Capital Markets Act was enacted before the enactment of the Constitution. The repealed Constitution did not provide for that requirement and hence the legislature while making laws did not make reference to it.
9. CMA's mandate to investigate on its own motion the affairs of a public company whose securities were publicly offered was bestowed by the Parliament back in 1989. The impugned provision contrary to the petitioner's allegation was not required to have undergone public participation before its enactment.
10. Although the impugned provision appeared to limit the constitutional rights, the limitation was appropriately justified in line with article 24 (1) of the Constitution. Additionally, the limitation was proportionate to the interests stated in article 24 (1) (d) keeping in mind the purpose and effect of the statute in question. The impugned provision was necessary in the interest of the public to uphold sound regulation in the capital markets sector. Section 11 (3) (h) of the Capital Markets Act was constitutional.
11. The petitioner did not demonstrate how his rights to fair administrative action, human dignity, privacy, security of the person, to property, access to justice and fair trial were breached.

Petition dismissed with costs.

Citations

Cases

1. Amin Akberali Manii & 2 others v Altaf Abdulrasul Dadani & another (Civil Appeal 101 of 2004 ; [2015] KECA 356 (KLR)) — Mentioned
2. Anarita Karimi Njeru v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR)) — Mentioned
3. AOO & 6 others v Attorney General & another (Petition 570 of 2015; [2017] KEHC 6022 (KLR)) — Explained
4. British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party) (Petition 5 of 2017; [2019] KESC 15 (KLR)) — Explained
5. Busia County Government v Ethics and Anti-Corruption Commission (Petition 382 of 2015; [2016] KEHC 8206 (KLR)) — Explained
6. Cecilia Wangechi Ndungu v County Government Of Nyeri & Cecilia Wangechi Ndungu v County Government Of Nyeri (Petition 1 of 2014; [2015] KEELRC 1142 (KLR)) — Explained
7. Center for Rights Education and Awareness & anothers v John Harun Mwau & 6 others (Civil Appeal 74 & 82 of 2012; [2012] KECA 249 (KLR)) — Explained
8. Coalition for Reform and Democracy (CORD) & Kenya National Commission on Human Rights (KNCHR) v Republic of Kenya & Attorney General (Petition 628 & 630 of 2014; [2015] KEHC 6984 (KLR)) — Explained
9. Commission for the Implementation of the Constitution v Parliament of Kenya, Attorney General, Ethics and Anti-Corruption Commission, Inuka Kenya, Katiba Kenya & Transparency International (Petition 454 of 2012; [2013] KEHC 6313 (KLR)) — Explained
10. Eric Gitari v Non-Governmental Organizations Co-ordination Board and 4 others (Petition No 440 of 2013) — Explained
11. Federation of Kenya Women Lawyers (FIDA – K) and others v Attorney General and others (Petition 102 of 2011; [2011] KEHC 2099 (KLR)) — Mentioned



12. Geothermal Development Company Limited V Attorney General and 3 others (Petition 352 of 2012) — Mentioned
13. Husus Mugiri v Music Copy Right Society of Kenya & Independent Electoral and Boundaries Commission (Petition 25 of 2018; [2018] KEHC 2074 (KLR)) — Explained
14. Independent Electoral and Boundaries Commission & another v Mule & 3 others (Civil Appeal 219 of 2013; [2014] KECA 890 (KLR)) — Explained
15. Institute of Social Accountability & another v National Assembly & 4 others (Petition 71 of 2013; [2015] KEHC 6975 (KLR)) — Applied
16. Judicial Service Comission v Mbalu Mutava & another (Civil Appeal 52 of 2014; [2015] KECA 741 (KLR)) — Explained
17. Kenya Small Scale Farmers Forum, Moses Shaha, Omar Kutara, Justus Lavi, Esther Jepkogei Bett, Kenya Human Rights Commission & Paul Kungania Rukaria v Republic of Kenya, Attorney General & Kenya National Commission on Human Rights (Petition 1174 of 2007; [2013] KEHC 6747 (KLR)) — Explained
18. Keroche Industries Limited v Kenya Revenue Authority & 5 others (Miscellaneous Civil Application 743 of 2006; [2007] KEHC 3680 (KLR)) — Mentioned
19. Leonard Otieno v Airtel Kenya Limited (Petition 218 of 2017; [2018] KEHC 9063 (KLR)) — Explained
20. Manfred Walter Schmitt and another v Republic and another (Criminal Revision 569 & 2326 of 2012; [2013] KEHC 5455 (KLR)) — Mentioned
21. Martin Wanderi & 19 others v Engineers Registration Board of Kenya, Attorney General, John Waweru Gakunga, Masinde Muliro University Of Science & Technology, Moi University & Egerton University (Petition 248 of 2012; [2014] KEHC 1519 (KLR)) — Mentioned
22. Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (with dissent - JB Ojwang & NS Ndungu, SCJJ) (Presidential Election Petition 1 of 2017) — Explained
23. Otieno Mak'onyango v Attorney General and another (Civil Case 845 of 2003; [2012] KEHC 5476 (KLR)) — Applied
24. Paul Ng'ang'a Nyaga & 2 others v Attorney General & 3 others (Petition 518 of 2012; [2013] KEHC 6095 (KLR)) — Followed
25. Pearlberg vs. Varty ([1972] 1 WLR 534) — Explained
26. Rehankantil Shah v Director of Public Prosecutions, Inspector General of Police, Director of Criminal Investigations Division & Officer in Charge Anti - Narcotics Police Unit (Petition 179 of 2016; [2016] KEHC 8361 (KLR)) — Mentioned
27. Republic v Commission on Administrative Justice & National Land Commission Ex Parte Samson Kegengo Ongeru (Judicial Review 429 of 2014; [2015] KEHC 3791 (KLR)) — Mentioned
28. Republic v Council of Legal Education & Commission for University Education Ex-Parte Mount Kenya University (Miscellaneous Civil Application 16 of 2016; [2016] KEHC 7535 (KLR)) — Mentioned
29. Republic v Council of Legal Education & Commission for University Education Ex-Parte Mount Kenya University (Miscellaneous Civil Application 16 of 2016; [2016] KEHC 7535 (KLR)) — Mentioned
30. Robert N. Gakuru & Others v Governor Kiambu County & 3 others (Petition 532 of 2014; [2014] KEHC 7516 (KLR)) — Mentioned
31. R v Big M Drug Mart Ltd ([1985] 1 SCR 295) — Explained
32. Samura Engineering Limited and 10 others v Kenya Revenue Authority (Petition 54 of 2011; [2012] KEHC 5672 (KLR)) — Explained



33. Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others (Civil Appeal 148 of 2017; [2019] KECA 655 (KLR))
34. Standard Newspapers Limited & Baraza Limited v Attorney General, Commissioner of Police & Minister In charge of Internal Security & Interested party- International Commission of Jurists (Petition 113 of 2006; [2013] KEHC 6707 (KLR)) — Mentioned
35. Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission, Michael Kasilon, Eustace Waweru, Julius Muraya, Chief Magistrate, Kibera Law Courts & Directorate of Public Prosecutions (Petition 122 of 2015; [2016] KEHC 7343 (KLR)) — Mentioned
36. Borbet South Africa (Pty)Ltd and others v Nelson Mandela Bay Municipality ((3751/2011)(2014) ZAECPEHC 35) — Mentioned
37. Doctors for Life International v Speaker of the National Assembly and Others ((CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)) — Mentioned
38. Francis Coralie Mullin v Administrator, Union Territory of Delhi ([1981] SCR (2)(516)) — Mentioned
39. Hamdard Dawakhana v Union of India Air ([1960] AIR 554; 1960 SCR (2)671) — Explained
40. Ndyanabo v Attorney General ([2001] EA 495) — Explained
41. Olum and another v Attorney General ([2001] EA 495) — Explained

Statutes

1. Capital Markets Act (cap 485A) — section 11(3)(h)(m); 13(1); 31 — Interpreted
2. Companies Act (No. 17 of 2015) — section 238 – 242 — Interpreted
3. Constitution of Kenya — article 2, 3, 10, 19(1)(2); 20(1)(2); 21(1); 22(1); 23; 25(a)(c); 27; 28; 29; 31; 39(1); 40; 47(1)(2); 48; 50; 258(1); 259(1) — Interpreted
4. Criminal Procedure Code Act (cap 75) — section 118, 121(l) — Interpreted
5. Evidence Act (CAP. 80) — section 118, 121(1); 180 — Interpreted

Advocates

None mentioned

JUDGMENT

1. The petition dated 27th July 2017 was filed under articles 2, 3, 10, 19(1) and (2), 20(1) and (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 petitioners seek the following orders:
 - i. A declaration that the respondents have violated articles 2, 3, 10, 19(1) & (2), 20(1) & (2), 21(1), 27, 28, 31 and 47 of the Constitution.
 - ii. A declaration that section 11(3)(h) of the Capital Markets Authority Act cap 485A is unconstitutional as it violates articles 10 and 47 of the Constitution.
 - iii. A declaration that the purported investigation of the petitioner’s personal bank accounts is illegal for being conducted in violation of sections 13(1) of the Capital Markets Act cap 485A.
 - iv. A declaration that the purported investigation of the petitioner’s personal bank accounts is illegal and unconstitutional as it violated the petitioner’s rights under articles 27, 28, 31 and 47 of the Constitution.



- v. A permanent injunction restraining the respondents herein and any other agent or servant of the respondents acting under their authority to stop any alleged investigation of Hon. Dr. Evans Kidero's personal accounts.
- vi. A judicial review order of certiorari quashing the entire investigation and/or any illegal findings of respondents pursuant to the illegal investigation of the petitioner's personal bank accounts herein.
- vii. An order for full compensation for general and aggravated damages.
- viii. Costs of this petition.
- ix. And any other or further relief as this honourable court may deem fit to grant.

The Petitioner's case

2. The petition is supported by the petitioner's affidavit of even date where he deposes that sometime on 23rd October 2015, the 2nd respondent wrote to him inviting him for an interview concerning its investigation of Mumias Sugar Company (MSC). The 2nd respondent soon after through its auditors BDO LLP wrote to him again on 3rd November 2015 seeking to interview him as the former Managing Director of MSC. He notes that the interview was aimed at understanding the governance practices with a view to revive MSC.
3. He accepted the invitation and presented himself for the interview on 12th November 2015. The interview was conducted by Andrew Maclay, Yusuf Abdoollah and Nikhil Desai of BDO LLP. He deposes that the final report following this interview was forwarded to the 2nd respondent. He avers that the interview did not raise any issue of fraudulent use of the company's funds.
4. He avers that later on 12th January 2017, the 2nd respondent invited him for another interview. The difference this time was that the 2nd respondent wanted the petitioner to avail information of his personal bank accounts in addition to information about his tenure as the Managing Director. The 2nd respondent in the communication also detailed all the information it required from him. In compliance he attended the interview. He makes known that he did not receive further information from the 2nd respondent after this.
5. He deposes that to his shock on 20th July 2017, the 2nd respondent made a unilateral decision to investigate all his personal bank accounts for the period between 2006 – 2016. To do so it sought the assistance of the Directorate of Criminal Investigation and its Fraud Investigation Unit. He further deposes that this act was alleged to be carried out under section 11(3) of the *Capital Markets Act*. He avers that this section is unconstitutional for its failure to comply with the principle of public participation under article 10 of the *Constitution*. Likewise, that the section is offensive to article 47 of the *Constitution* since it gives the 2nd respondent power to investigate any person without giving such persons prior written notice before taking the adverse action. He adds that this section is also contrary to section 13(1) of the *Capital Markets Act* which states that written notice should be issued and section 13(2) which obliges the investigator to keep the information acquired confidential.
6. In view of this, he deposes that the 1st, 2nd, 3rd and 4th respondents' act of investigating his personal bank accounts is illegal. That the act constitutes a malicious fishing expedition hence abuse of office. Secondly, that the investigation is discriminatory as he was singled him out of the other Board of Directors in violation of article 27 of the *Constitution*.



7. Additionally, he avers that the investigation is aimed at intimidating and harassing him contrary to his right to dignity under article 28 of the Constitution. Likewise that the investigation is being done contrary to the principle of sub-judice in view of Constitution Petition No.78 of 2017 *Dr.Evans Kidero v Ethics and Anti-corruption Commission* and other which also challenged the investigation of his personal bank accounts. To this end he argues that without this court's intervention his constitutional rights under articles 27, 28, 31, 47 and 50 of the Constitution are under threat of violation.

The 1st and 2nd Respondent's case

8. In response the 1st and 2nd respondents filed a replying affidavit dated 5th September 2017 through its Chief Executive Officer, Paul Muthaura. He began by noting that the petitioner had instituted this suit against him in his personal capacity. He makes known that he is safeguarded against such proceedings under section 10 of the Capital Markets Act. In view of this and there being no allegation against him in the petition, he argues that the suit against him ought to be dismissed.
9. He states that the 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 to initiate investigations of embezzlement on its own motion or upon receiving a complaint. He deposes that MSC is a public listed company whose shares are traded at the Nairobi Securities Exchange. Considering this, the 2nd respondent has oversight over matters of the company. He notes that MSC started having financial and operational challenges around 2014, and the 2nd respondent started investigating the company in 2015 under section 11(3)(h) of the Capital Markets Authority Act.
10. He deposes that the 2nd respondent enlisted the services of BDO LLP (UK) and later on M/s John Miller Arbitration Investigations and Consultancy Limited to conduct the forensic audit inquiry of MSC. BDO LLP's contract was subsequently terminated due to their failure to meet the agreed deliverables and Terms of Reference. This termination occurred before completing its assignment hence the alleged final report was never submitted to the 2nd respondent.
11. He informs that the 2nd respondent received the report of M/s John Miller Arbitration Investigations and Consultancy Limited when it concluded its investigations. Owing to the findings, the 2nd respondent conducted further investigations which focused on a number of areas including the role played by the petitioner in the company.
12. He deposes 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 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.
13. He further states that while interrogating the company's bank statements for the period from March 2010 to May 2012, they noted suspicious and substantial cash inflows from the customers who had received the excessive discounts. The outflows went to the petitioner (and others) from Peter Hongo's (the then Head of Sales) account. This prompted the 2nd respondent through the assistance of the DCI to receive a court order to search account numbers 0803464006/3000049902 under the name of Samson Peter Otieno Hongo at Prime Bank Limited.
14. This investigation revealed that Mr.Hongo received cash and cheque deposits from its customers such as YH Wholesalers which 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 the MSC. It was also noted that this was not the only bank account that was used to channel such funds.

15. He deposes 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 2nd respondent as a result sought the assistance of the Fraud Investigations Unit of the DCI to obtain information on bank accounts not only for the petitioner but also the persons who had served in the Management and board of MSC. The warrants to investigate were obtained after an application was filed before the Nairobi Chief Magistrate Court.
16. He further avers that the 2nd respondent conducted the inquiry and investigations in a fair and transparent manner. Following the investigation, the 2nd respondent issued the petitioner with a Notice to show cause dated 26th July 2017 asking him to respond to the allegations in writing. The petitioner responded to the Notice seeking further information and an extension of time to file his response.
17. In response to the allegation of the unconstitutionality of section 11(h) of the *Capital Markets Act*, in view of the public participation principle, he deposes that this was well covered under Amendment No. 37 of 2011 to the Finance Bill. He likewise denies the petitioner's allegations on the 2nd respondent's powers and authority to investigate. He further deposed that Petition 78 of 2016 is distinguishable from the instant petition as concerns the EACC'S investigation on the petitioner's alleged action of transferring public funds into his personal bank accounts in relation to a different circumstance not MSC. He concluded by stating that the petition has no basis and as such ought to be dismissed with costs.

The 3rd Respondent's case

18. In reply to the petition the 3rd respondent filed the following grounds of opposition dated 16th October 2017:
 - i. Pursuant to section 11(3) *Capital Markets Act*, cap 485, the Capital Market Authority may exercise, perform or discharge, the following power; duties of functions; h) "inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it has granted a license and any Public Company the securities of which are publicity offered or traded on an approved securities exchange or on an over the counter market".
 - ii. Pursuant to section 13A *Capital Market Act*, the 2nd respondent powers to obtain warrants for search, entry and obtaining documents held by a bank and to initiate investigations on embezzlement on its own motion or upon receipt of a complaint.
 - iii. An application was filed in Nairobi Chief Magistrates Court pursuant to section 118 & 121(l) *Criminal Procedure Code* and section 180 *Evidence Act* cap 80 for warrants investigating the petitioner's bank account while investigating affairs of Mumias Sugar Company Ltd.
 - iv. Section 11(3)(h) *Capital Market Act* cap 485A is constitutional and does not offend articles 2, 3, 10, 19(1), & (2), 20(1), & (2), 21(1), 27, 28, 31 and 47.
 - v. The warrants to investigate the accounts of the petitioner were lawfully issued pursuant to section 180 of *Evidence Act* cap 80 as read with section 118 & 121 of the *Criminal Procedure Code* cap 75.



- vi. The petitioner's rights under article 31, 40, 47, 50(1) are subject to constitutional limits enshrined in article 24 of the Constitution so as to protect public interest underlying the detection, prevention and prosecution of crimes.
- vii. article 24(3)(a)(i) of the Constitution is clear that property such as personal account can be properly searched, and such a search, if properly founded, cannot be a basis for breach of right of privacy.
- viii. The purpose of warrants is to protect the right of a person from unreasonable searches and seizures and unnecessary arrest in tandem with protections conferred by articles 29 and 31 of the Constitution. Therefore the duty imposed on the Judiciary to issue warrants of search and seizure is a constitutional safeguard to protect the rights and fundamental freedoms of an individual. The court ought to be satisfied that reasonable course is established in order to issue search warrants.
- ix. There was reasonable basis upon which the investigator sought to investigate the Bank Accounts as was based on the reasonable suspicion alluded to in the affidavit.
- x. Though article 40(1) of the Constitution protects any property that is capable of being owned by any person including bank account, the petitioners' bank accounts have not been frozen, they have not been denied access or money appropriated from their accounts. Thus there is no violation of the right to property. In any event the petitioner's right to property under article 40 of the Constitution does not extend to any property that has been found or suspected to be unlawfully acquired.
- xi. The petitioner asserts breach of the right to issue a prior notice pursuant to section 31 of Capital Markets Authority Act, yet a clear reading of section 180 of the Evidence Act Cap 80 for an application for warrants to investigate accounts does not require a prior notice.
- xii. The petitioner has not demonstrated prima facie case with likelihood of success that there is real or threatened, abrogation, breach or violation of the Constitution or fundamental rights and freedom and/or any other written law.

The 4th and 5th Respondents' Case

- 19. The 4th and 5th respondents did not file any response or written submissions in this matter.

The Parties submissions

Petitioners' submissions

- 20. The firm of Tom Ojienda and Associate Advocates for the Petitioner filed written submissions dated 7th February 2019. Counsel commenced by submitting that the Companies Act, 2015 is the governing Statute in relation to regulating and governing the affairs of companies as such the 2nd respondent's actions ought to have been governed under the framework of the Companies Act not the Capital Markets Authority Act.
- 21. In essence Counsel asserted that a law governing a specific subject matter overrides a law that only governs general matters as stated in the principle of *lex specialis* versus *lex generalis*. In support reliance was placed on the case of MJ VNK and another (2017)eKLR where it was observed that when a general law and a special law dealing with some aspect dealt with by the general law are in question, the rule



- adopted and applied is one of harmonious construction whereby the general law to the extent dealt with by the special law is impliedly repealed.
22. Counsel therefore argued that the relevant provisions that should have been invoked are sections 238 to 242 of the *Companies Act* which provide a comprehensive mechanism for accountability of the leaders of a company. He as well submitted that new laws are given preference in the case of inconsistency with the older laws as discussed in the principle of *leges posterior resprioris contrarias abrogant*. Counsel stressed that this was the case in view of the *Capital Markets Act* which came in effect on 15th December 1989 and the *Companies Act*, 2015 which came in effect on 15th September 2015. Counsel indicated that this principle was applied in the case of *Martin Wanderi and 19 others v Engineers Registration Board of Kenya and 5 others*(2014)eKLR which was cited in support.
 23. According to Counsel section 11(3)(h) and (m) of the Capital Markets Authority Act which empowers the 2nd respondent to investigate financial improprieties of a publicly listed company was repealed by sections 238 – 242 of the *Companies Act*.
 24. On the allegation of violation of constitutional rights counsel submitted that the 2nd respondent's action of investigating the petitioner's bank account violated his rights under article 47(1) and (2) of the *Constitution*. This is because the purpose of the interview differed from what they investigated hence the 2nd respondent had not been transparent about the process that they were intent on taking. Further that there is no evidence of the other Board of directors being interviewed. Additionally, that the petitioner was not given an opportunity to present his case against the 2nd respondent's allegations and no prior notice was granted to him before the investigations begun.
 25. To buttress this point reliance was placed on the case of *Geothermal Development Company Limited V Attorney General and 3 others*(2013)eKLR where it was held that as a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it and be given full information on the case against him. Also see the cases of: *Republic v Commission on Administrative Justice and another ex parte Samson Kegengo Ongeru*(2015)eKLR, Tom Ojienda t/a Tom Ojienda and Associates Advocates v Ethics and Anti- corruption Commission and 5 others(2016)eKLR, (ii) *Keroche Industries Limited v Kenya Revenue Authority and 5 others*(2007)KLR 240.
 26. Discussing the alleged unconstitutionality of section 11(3) (h) of the *Capital Markets Act*, counsel citing the case of *Coalition for Reforms and Democracy and 2 others v Republic and 10 others* (Petition No.628,630 of 2014 and 12 of 2015) in support submitted that there can be no presumption of constitutionality of a statute that limits fundamental rights without meeting the dictates of article 24 of the *Constitution*.
 27. Relying on the case of *Institute of Social Accountability and another v National Assembly and 4 others* (2015)eKLR counsel submitted that the Court is enjoined under article 259 of the *Constitution* to interpret the *Constitution* in a manner that promotes its purposes, values and principles. See the case of *Otieno Mak'onyango v Attorney General and another* (2012) eKLR, Lyomoki and others v Attorney General(2005) 2 EA 127.
 28. The constitutionality of this provision is challenged on the premise that it does not provide for prior notice as envisaged under article 47 of the *Constitution* and lack of adherence to the principle of public participation under article 10(2)(a) of the *Constitution*. In support of the essence of the public participation principle the case of *Doctors for Life International v Speaker of the National Assembly and others* (CCT12/05) (2006) ZACC 11 was cited. Similarly reliance was placed on the cases of *Borbet South Africa (Pty)Ltd and others v Nelson Mandela Bay Municipality* (3751/2011)



- (2014) ZAECPHC 35 and [*Robert N. Gakuru and others v Governor Kiambu County and 3 others*](#)(2014)eKLR.
29. Turning to the alleged violation of the right to privacy under article 31(a) of the [*Constitution*](#), counsel submitted that the 2nd respondent's action of investigating the petitioner's bank accounts which is his property violated this right. In the case of [*Samura Engineering Limited and 10 others v Kenya Revenue Authority*](#) (2012) eKLR it was held that the right to privacy enshrined in our Constitution includes the right to not have one's person or home searched one's property searched or possessions seized. He further relied on the cases of: [*Coalition for Reform and Democracy \(CORD\) and 2 others v Republic of Kenya and 10 others*](#) (2015) eKLR, [*Manfred Walter Schmitt and another v Republic and another*](#) Criminal Revision No.569 of 2012 and [*Standard Newspaper Limited and another v Attorney General and 4 others*](#) (2013)eKLR.
30. Moving onto the alleged violation of the right to equality and freedom from discrimination under article 27(1) and (4) of the [*Constitution*](#), counsel submitted that it is only the petitioner among the former Board of Directors who was being investigated as the 2nd respondent did not adduce evidence to show that other former Board Members were also undergoing investigation. According to counsel this act was geared towards victimizing the petitioner over decisions that were made jointly as a Board. To support this observation counsel placed reliance on the case of [*Eric Gitari v Non-Governmental Organizations Co-ordination Board and 4 others*](#) (2015)eKLR where the Court emphasized that article 27 is clear on this right and there is no internal qualifier in terms of equal enjoyment of all rights and fundamental freedoms.
31. On the right to dignity under article 28 of the [*Constitution*](#) counsel submitted that the right to human dignity is the foundation of all other rights and together with the right to life, it forms the basis for enjoyment of all other rights as held in the cases of: [*Francis Coralie Mullin v Administrator, Union Territory of Delhi*](#) (1981) SCR (2)(516)., [*Rebankantilal Shah v Director of Public Prosecutions and 3 others*](#) (2016)eKLR and [*Federation of Kenya Women Lawyers \(FIDA – K\) and others v Attorney General and others*](#) (2011)eKLR.
32. On the reliefs sought counsel submitted that article 23 of the [*Constitution*](#) makes known that this court may grant any appropriate relief. He further pointed out that this court can also grant compensatory relief for general and aggravated damages as seen in the case of [*Otieno Mak'Onyango*](#) (supra). He urged the court to grant the reliefs sought in the Petition as well as compensation.

The 1st and 2nd Respondents' Submissions

33. The 1st and 2nd respondents' through the firm of Mohammed Muigai LLP filed written submissions and a list of authorities dated 29th June 2020, raising the following issues:
- i. The propriety of the petition;
 - ii. The applicability of section 11(3)h of the [*Capital Markets Act*](#), Cap 485 of the Laws of Kenya, and
 - iii. Whether the petitioner's rights have been infringed and or violated.
34. Counsel on the first point took issue with the joinder of the 1st respondent in this suit as it was done at a personal level yet the petition makes no allegation of malice or provides any particulars on the part of the 1st respondent, in view of the investigations carried out against the petitioner. It was stressed that section 10(1) of the [*Capital Markets Act*](#) insulates the 1st respondent against such suits and so the case against him should be dismissed with costs.



35. On the second issue, Counsel submitted that the challenge on the applicability of section 11(3) h of the *Capital Markets Act* was with reference to the assertion that the said section was repealed following the enactment of the *Companies Act*, 2015 specifically sections 238 to 242 and second, that the said provision suffers from procedural and substantive unconstitutionality.
36. Counsel on the first challenge submitted that for a later statute to be deemed as impliedly repealing a pre-existing statute there must be a clear inconsistency in the provisions of the two statutes. This argument was premised on the case of *AOO & 6 others v Attorney General & another* (2017)eKLR where it was held that according to principles of construction, if the provisions of a later Act are so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier Act stands impliedly repealed by the latter Act. This position was also taken in the cases of *Republic v Council of Legal Education & another Ex-Parte Mount Kenya University* (2016)eKLR and *Republic v Council of Legal Education & another Ex-Parte Mount Kenya University* (2016)eKLR.
37. Considering the above, counsel submitted that there was no inconsistency between the provisions of the *Companies Act* 2015, and the *Capital Markets Act*, in the circumstances of this case. He submitted that the listed sections 238 to 242 of the *Companies Act* formed part of derivative actions, as an exception to that rule, that enable a member of the company to institute proceedings on behalf of the company, where, the wrongs against the company have been done by individuals who have control over the company as affirmed by the Court of Appeal in *Amin Akberali Manii & 2 others v Altaf Abdulrasul Dadani & another* (2015) eKLR which is not the case in this suit. Nonetheless, it was noted that the petitioner had not made any attempt to cite the specific provisions from sections 238 to 242 of the *Companies Act* that are deemed to be in conflict with the *Capital Markets Act*. This was said to be in breach of the threshold set out in the case of *Anarita Karimi Njeru v Republic* (1979)eKLR.
38. Moving on to the second challenge on lack of public participation, Counsel informed that section 11(3) h of the *Capital Markets Act* was enacted in 1989 long before the legal principle was mandatorily applied. Furthermore that the amendments referred to by the petitioner were enacted in 2011 and did not impact on the already existing power of the 2nd respondent to inquire into the affairs of the petitioner. In particular the amendment dealt with the addition of the words "or on an over the counter market." Moreover this amendment was subjected to public participation as seen in the 1st respondent's replying affidavit.
39. In support counsel cited the case of *Commission for the Implementation of the Constitution v Parliament of Kenya & 5 Others* (2013) eKLR where it was held that the National Assembly has a broad measure of discretion in how it achieves the object of public participation. How this is affected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public.
40. On the petitioner's allegation that the impugned section also violates the right to a fair administrative action for lack of prior notice and right to privacy, counsel submitted that that these rights are not absolute in the context of article 24 of the *Constitution* as observed by the Court of Appeal in the case of *Judicial Service Commission v Mbalu Mutava & Another* (2015)eKLR. He submitted that section 11(3) h of the *Capital Markets Act* imposes a limitation to prior notice and the Act does not require the 2nd respondent to issue such a notice. According to Counsel this safeguards against tampering of evidence. He pointed out that similar limitations to prior notice are imposed by sections 118 and 121(1) of the *Criminal Procedure Code*, and section 180 of the *Evidence Act*. These sections allow the courts to issue warrants for investigation, without notice to the person being investigated.



41. To buttress this point reliance was placed on the case of *Busia County Government v Ethics and Anti-Corruption Commission* (2016)eKLR where it was held that article 47 is not absolute. The statutory framework of the *Criminal Procedure Code* also limits the provisions of article 47 and justifiably, so with clear criteria that the court must be satisfied on oath that there are reasonable and solid grounds for the warrants to be issued. The investigations undertaken in the circumstances of this case were not judicial or quasi-judicial in nature to warrant the application of article 47 of the *Constitution*. Also see Tom Oiienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others (2016) eKLR. Counsel to that end submitted that the limitation imposed in the impugned section is reasonable and justifiable in an open and democratic society.
42. On the third issue as to whether the 2nd respondent violated the petitioner's rights, counsel submitted that in addition to the finding that the right to a fair administrative action and right to privacy were not violated, the right to equality and freedom from discrimination and to Human dignity had not been violated. In this regard, Counsel pointed out that the petitioner's speculation of being the only former Board member of MSC to be investigated was false because the 1st respondent in his affidavit made clear that numerous persons had been subjected to the same investigations. This was also the finding in the case of Tom Ojienda t/a Tom Ojienda & Associates Advocates (supra) cited in support.
43. In conclusion counsel submitted that the petition is an attempt to elevate individual constitutional rights and freedoms over public interest and performance of public functions by statutory bodies which this court should refrain from entertaining. He thus urged the court to dismiss the petition with costs.

The 3rd Respondent's Submissions

44. The 3rd respondent filed written submissions dated 10th May 2023 through its Counsel Becky Arunga. She identified the issues for determination as follows:
 - i. Whether the 3rd respondent violated the rights of the petitioner; and
 - ii. Whether the petitioner is entitled to the reliefs sought.
45. On the first issue counsel submitted that where a party alleges a constitutional breach the same must satisfy the threshold set out in *Anarita Karimi Njeru* (supra). According to her, the petitioner had neither provided the particulars of the alleged complaint against the 3rd respondent nor indicated the manner in which the 3rd respondent purportedly infringed his rights.
46. In the same breath, Counsel pointed out that the investigations into the petitioners account were legally authorized by the Milimani Chief Magistrate's Court following an application made under sections 118 & 121 of the *Criminal Procedure Code* and section 180 of the *Evidence Act*. In this regard, Counsel emphasized that the petitioner's rights under article 31, 40, 47, 50 (1) are subject to constitutional limits as allowed under article 24 of the *Constitution* so as to protect public interest. She thus stressed that this Court ought to be satisfied that these warrants were issued once reasonable probable course was established.
47. To buttress this argument Counsel cited the case of *Leonard Otieno v Airtel Kenya Limited* (2018)eKLR where it was held that 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. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Constitution* and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is



essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon unsupported hypotheses. Reliance was placed on the case of *Paul Ng'ang'a Nyaga –vs- Attorney General & 3 Others* (2013)eKLR.

48. Turning to the second point, counsel submitted that the petitioner had failed to demonstrate any action done by the 3rd respondent that is ultra vires the *Constitution* or illegal or unlawful, to warrant the intervention of this Court. On this premise she urged the Court to dismiss the petition with costs.

Analysis and Determination

49. Before commencing this determination, I find it prudent to highlight an issue underscored by the petitioner's Counsel in the written submissions. One of the issues raised was that the applicable law in the context of this case is the *Companies Act*, 2015 with specific focus on sections 238 to 242. According to Counsel, these sections repealed the operation of section 11(3)(h) and (m) of the *Capital Markets Act*. This is with reference to the 2nd respondent's mandate to investigate the financial improprieties of publicly listed companies in the securities exchange sphere.
50. A perusal of the petition and the petitioner's affidavit discloses that this issue was not pleaded. Equally, the petitioner did not file a further affidavit to introduce the issue. The issue was first introduced in the petitioner's written submissions contrary to the rule that parties are bound by their pleadings.
51. The Supreme Court in the case of *Raila Amolo Odinga & Stephen Kalonzo Musyoka v Independent Electoral and Boundaries Commission, Chairperson Independent Electoral and Boundaries Commission & Uhuru Muigai Kenyatta* (Election Petition 1 of 2017) [2017] KESC 31 (KLR) (Election Petitions) (28 August 2017) (Order) affirming this position observed as follows:

“(62) Having addressed our minds to the above issues, it is our view that first, we note that as correctly argued by Counsel for the 3rd Respondent, a party must be bound by its pleadings... Any prayer in the application that would seem to be an expansion of the case for the Petitioners or which would in effect be a fishing exercise to procure fresh evidence not already contained in the petition would and must be rejected.”

52. Correspondingly, the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014]eKLR citing the Nigerian Supreme Court with approval observed that:

“First ,in *Adetoun Oladeji (NIG) Ltd vs. Nigeria Breweries PLC S.C. 91/2002*, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;

“it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus;

“ In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on



the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

....

As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce.”

53. Evidently each party is at liberty to frame their case in their own way while paying regard to the rules of drafting pleadings. In the end they are ultimately bound by the manner in which the pleadings are drafted. As such a party cannot be allowed to raise a different or fresh case without an amendment to the pleading/pleadings. Taking this into consideration, this court owing to the legal principles set out in this issue ought to refrain from making a determination on this issue.
54. With that in mind, I have carefully perused the pleadings and submissions of the parties herein and in my considered view the issues that arise for determination are as follows:
- i. Whether the 1st and 3rd respondents’ were properly joined in this suit.
 - ii. Whether section 11(3)(h) of the Capital Markets Authority Act, CAP 485A is constitutional.
 - iii. Whether the petitioner’s rights under articles 10,25(a) & (c), 27, 28, 29, 31, 40, 47(1) & (2),48 and 50 were violated by the 2nd respondent.
 - iv. Whether the petitioner is entitled to the reliefs sought.

Issue No. (i) Whether the 1st and 3rd Respondents’ were properly joined in this suit.

55. The 1st and 2nd respondents opposed the joinder of the 1st respondent in the instant suit in his personal capacity and not as the Chief Executive officer of the 2nd respondent. It was argued thus that the case against him ought to be dismissed. The petitioner on his part did not oppose the averment neither cite reasons for including him in reply or in his submissions.
56. It is imperative to first underscore that misjoinder of a party is not fatal to a petition. The Court of Appeal in the case of *Speaker of the National Assembly v Centre for Rights Education & Awareness & 7 others* (2019)eKLR made this clear by observing as follows:

“...Rule 5 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 addresses the issue of non-joinder and misjoinder of parties. It is apt to reproduce the entire provision.

“ 5. Addition, joinder, substitution and striking out of parties

The following procedure shall apply with respect to addition, joinder, substitution and striking out of parties—

- a. Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondents is liable, and to what extent, may be determined as between all parties.



- b. A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.
- c. Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.
- d. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—
 - i. order that the name of any party improperly joined, be struck out; and
 - ii. that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.
- e. Where a respondent is added or substituted, the petition shall unless the court otherwise directs, be amended in such a manner as may be necessary, and amended copies of the petition shall be served on the new respondent and, if the court thinks, fit on the original respondents.”

Under the rules, a petition for enforcement of fundamental rights cannot be defeated merely because of misjoinder or non-joinder and the court is enjoined, as much as possible, to hear and determine the substantive dispute.”

57. That said, it was rightly submitted by the 1st and 2nd respondents, that the *Capital Markets Act* under section 10 bars institution of legal suits against its officers in view of carrying out their functions as spelt out in the Act in good faith. This section provides as follows:

Protection from legal action

1. Neither the Authority, any of its members, officers nor servants shall be personally liable for any act which is done in good faith or purported to be done by such person, on the direction of the Authority or in the performance or intended performance of any duty or in the exercise of any power under this Act or the regulations guidelines or notices made thereunder.
2. Any expenses incurred by any person referred to in subsection (1) in any suit or prosecution brought against him before any court in respect of any act which is done or purported to be



done by him under the Act or on the direction of the Authority shall, if the Court holds that such act was done in good faith, be paid out of the general fund of the Authority, unless such expenses are recovered by him in such suit or prosecution.

58. I need not emphasize this matter any further. The 1st respondent's joinder in his personal capacity was done contrary to the dictates of the law.
59. The 1st and 3rd respondents equally submitted that whilst the petitioner had joined them in this suit, no case has been made out against them or particulars of their violations to the petitioner's rights underscored. It is worthy to emphasize that a party that alleges violation of his or her rights must plead with reasonable precision the manner in which the rights have been violated. This was appreciated by the court in the case of *Husus Mugiri v Music Copy Right Society of Kenya & another* [2018] eKLR where it was held as follows:

“18. In order for a petition to qualify to be a constitutional petition that seeks to enforce or protect fundamental rights and freedoms under the bill of rights, it must meet the test set in *Anarita Karimi Njeru vs. Republic* [1979] eKLR. That is, the applicant must specify which specific provisions of the *Constitution* that declare the rights, the specific rights and freedoms that have been or are threatened to be infringed or violated and the manner in which the respondent has infringed the subject rights. This position has been reiterated time and again.”

60. An examination of the petition makes it apparent that while the petitioner was keen on bringing a case against the 1st and 3rd respondents he neglected to particularize his case against them in line with the threshold set out for constitutional petitions.

Issue No (ii) Whether section 11(3) (h) of the Capital Markets Authority Act, CAP 485A is constitutional

61. The heart of the petition revolves around the 2nd respondent's act of investigating the petitioner's bank accounts. This was caused by the investigation into the affairs of MSC as a public listed company in Kenya when the company started having financial problems. It was the findings of this inquiry that prompted the 2nd respondent to then seek to investigate the petitioner's and former directors and board members accounts. The findings in particular indicated that there had been fraudulent misappropriation of MSC's accounts by some of the persons in the senior management.
62. The 2nd respondent asserted that the authority to investigate the personal bank accounts is anchored in section 11(3) (h) of the Capital Markets Authority Act. This section is impugned by the petitioner for being unconstitutional, on two components. First, the petitioner asserts that this section was not subjected to public participation as required by article 10 of the *Constitution* and second, the section violates article 47 of the *Constitution* as no prior notice was issued before the accounts were investigated. This action as well is alleged to have caused a number of violations on the petitioner's constitutional rights.
63. The 2nd and 3rd respondents vehemently opposed this assertion. The 2nd respondent averred that there is no legal requirement to issue a notice before carrying out an investigation. Further that the section although enacted in 1989 had complied with the principle under article 10 of the *Constitution* under Amendment No. 37 of 2011 under the Finance Bill which was subjected to public participation.
64. The 3rd respondent in addition to this argued that the application for the search of the petitioner's accounts was done lawfully under sections 118 and 121(1) of the Criminal Procedure Code and section 180 of the *Evidence Act*. It was noted that this law does not dictate for prior notice before such



- an investigation is carried out. Nonetheless both argued that the petitioner’s rights were subject to limitation under article 24 of the *Constitution*.
65. Determination of this issue requires an interpretation of the impugned section which is alleged to be unconstitutional and a reading of the relevant provisions of the *Constitution* that are purported to have been violated. It is accordingly vital to bear in mind the relevant guiding principles in interpretation of both the *Constitution* and an Act of Parliament.
66. The principles to be considered in interpreting the *Constitution* were reiterated by the Court of Appeal in the case of *Center for Rights Education and Awareness & Another v John Harun Mwau & 6 others* [2012] eKLR as follows:
- a. It should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance as provided by article 259.
 - b. The spirit and tenor of the *Constitution* must preside and permeate the process of judicial interpretation and judicial discretion.
 - c. It must be interpreted broadly, liberally and purposively so as to avoid “the austerity of tabulated legalism.”
 - d. The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).”
67. Equally, there are a number of well-established principles that are employed in the interpretation of an Act of Parliament and making of a declaration of the constitutionality or lack thereof of a statute or a provision. The first is that there is a general presumption that every Act of Parliament is constitutional and as such this court must always be guided on that basis when faced with such questions.
68. This principle was captured in the Court of Appeal of Tanzania decision in the case of *Ndyanabo vs. Attorney General* [2001] EA 495 being a restatement of the law in the English case of *Pearlberg vs. Varty* [1972] 1 WLR 534. It was opined that:
- “Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative”
69. Discussing the presumption of constitutionality of a statute, the Supreme Court of India in the case of *Hamdard Dawakhana vs. Union of India Air* (1960) AIR 554, 1960 SCR (2)671 stated that:-
- “In examining the Constitutionality of a statute it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment.”



70. Turning over to another fundamental guiding principle, this court is required to examine the purpose and effect of the impugned provision. This principle was indicated in the case of *R v Big M Drug Mart Ltd* (1985)1 S.C.R.295 as follows:

“Both purpose and effect are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of legislation, object and its ultimate impact are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation’s object and thus the validity.”

71. This principle was also applied by the Constitutional Court of Uganda in the case of *Olum and another v Attorney General*(2002)EA where it was noted that:

“To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the *Constitution*, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the *Constitution*, the impugned statute or section thereof shall be declared unconstitutional...”

72. In addition, this court is required to interrogate the intention articulated in drafting the Act of Parliament as guided by the Court of Appeal in the case of *County Government of Nyeri & another v Cecilia Wangechi Ndungu* (2015)eKLR where it stated as follows:

“The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context...”

73. As a starting point it is necessary to interrogate the object and purpose of this Act to align it with the context of the impugned provision. This is divulged in the preamble of the Act which provides as follows:

An Act of Parliament to establish a Capital Markets Authority for the purpose of promoting, regulating and facilitating the development of an orderly, fair and efficient capital market in Kenya and for connected purposes.

74. Regulation of various sectors in Kenya is not a foreign concept. In the same way existence of regulatory authorities is not a new feature in Kenya. Most industries boast of comparable authorities whose purpose is on behalf of the Government to exercise control over the spheres they regulate in provision of the goods and services rendered to the citizens. These authorities accordingly ensure the public’s interest is protected by ensuring that the actions taken within its industry are conducted in accordance with the standards set out in law. This as can be discerned is the objective and purpose of the government in establishing such bodies.

75. In this case, the Capital Markets Authority, (the 2nd respondent) is charged under section 11(1) of the Act with the principal objective to:



- a. the development of all aspects of the capital markets with particular emphasis on the removal of impediments to, and the creation of incentives for longer term investments in, productive enterprises;
 - b. to facilitate the existence of a nationwide system of securities commodities market and derivatives market and brokerage services so as to enable wider participation of the general public in the securities commodities market and derivatives market;
 - c. the creation, maintenance and regulation of a market in which securities can be issued and traded in an orderly, fair and efficient manner, through the implementation of a system in which the market participants are self-regulatory to the maximum practicable extent;
 - d. the protection of investor interests;
 - e. the facilitation of a compensation fund to protect investors from financial loss arising from the failure of a licensed broker or dealer to meet his contractual obligations; and
 - f. the development of a framework to facilitate the use of electronic commerce for the development of capital markets in Kenya.
76. The 2nd respondent's powers, duties and functions are then listed under section 11(3) of the Act. The impugned provision, section 11 (3) (h) falls under this category and provides as follows:

Inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it has granted a licence and any public company the securities which are publicly offered or traded on an approved securities exchange or on an over the counter market.

77. To enable it carry out this mandate the Act provides the following powers:

Section 13 (1): Furnishing of information to the Authority

The Authority or any person officially authorized in that behalf by the Authority may, by notice in writing, require any person to furnish to the Authority or to the authorized person, within such period as is specified in the notice, all such returns or information as specified in such notice.

Section 13A: Power of entry and search.

- (1) The chief executive officer may authorise an officer of the rank of Senior Officer or above to inquire into the affairs of a person under this Act.
- (2) An officer authorised under subsection (1) may, where he is satisfied that a person has committed or is reasonably suspected of committing an offence under this Act in Kenya or elsewhere, apply to a magistrate for a warrant to search the premises of that person.
- (3) The magistrate may issue a warrant authorizing the officer to exercise all or any of the following powers—
 - (a) to enter any premises between sunrise and sunset to search for money, documents or other assets relevant to the inquiry;
 - (b) to seize money, documents or assets which may be necessary for the inquiry or for which the purpose of civil or criminal proceedings and to retain them for as long as they are so required; and



- (c) to direct any person who has control over such assets to take any action with respect to such assets as the Authority may reasonably require with a view to protecting the assets until the court determines the appropriate course of action.
- (4) In the interest of bank confidentiality, the powers of the officer in respect of any documents held by a banker shall be limited to making copies or extracts therefrom.

Section 13B: 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.

78. It is discernible from an analysis of these preceding provisions supplemented with sections 118 and 121(1) of the *Criminal Procedure Code* and section 180 of the *Evidence Act* that the there is no legal



requirement on the 2nd respondent or DCI to issue prior notice in line with article 47 of the Constitution to a person being investigated.

79. Undoubtedly, the Constitution under article 24 informs that limitation of rights is permissible as long as it is in conformity with the structures provided therein. This article provides as follows:

1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including--
 - a. the nature of the right or fundamental freedom;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
 - e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
2. Despite clause (1), a provision in legislation limiting a right or fundamental freedom --
 - (a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;
 - (b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and
 - (c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.
- (3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this article have been satisfied.

80. Unmistakably, article 24(3) of the Constitution imposes a duty on the State to demonstrate to the Court that the requirements of this article have been satisfied. In this case the 2nd respondent's justification was explained to be aimed at protecting the persons in the public who may be desirous to invest in MSC securities. The lack of prior notice is thus limited and well justified within the purpose and object of the Capital Markets Authority.

81. Evidently the impugned section deals with the power of the 2nd respondent to intervene in cases such as those experienced by MSC as the regulatory body. A reading of the impugned provision makes it clear that the purpose of this law is to regulate Capital Markets business in Kenya whilst safeguarding public interest. Primarily the effect is that the government through the 2nd respondent controls this regulation by arming the 2nd respondent with broad intervention powers designed to both avoid and respond to the failure of a public listed company that deals in securities exchange. The language of the Act is clear in this regard with no ambiguity articulated in the impugned provision with reference to the 2nd respondent's power to investigate such companies. In my opinion this is in line with the purpose of the Act as enshrined in the preamble.



82. The next point of contention is the petitioner’s argument that the impugned provision failed to uphold the principle of public participation under article 10 (2)(a) of the *Constitution*. The Supreme Court in the case of *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tobacco Kenya Limited (The Affected Party)* [2019] eKLR while discussing this principle opined as follows:

“(85) Public participation has been entrenched in our Constitution as a national value and a principle of governance under article 10 of the *Constitution* and is binding on all State organs, State officers, public officers and all persons whenever any of them: (a) applies or interprets the *Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. As aptly stated by the Appellate Court, public participation is anchored on the principle of the Sovereignty of the People “that permeates the *Constitution* and in accordance with article 1(4) of the *Constitution* is exercised at both national and county levels”.

83. Essentially this is a fundamental element in our constitutional democracy. What is imperative to note however is that the *Capital Markets Act* was enacted before the enactment of the *Constitution* of Kenya, 2010. The repealed Constitution did not provide for this requirement and hence the legislature while making laws did not make reference to it.

84. The impugned section in the enacted Act, 1989 appeared under section 11(2)(g) which provided as follows:

To inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it has granted a licence and any public company the securities of which are traded on an approved securities exchange.

85. It is visible that the two sections read verbatim save for the additional statement at the end ‘...or on an over the counter market’. Clearly the 2nd respondent’s mandate to investigate on its own motion the affairs of a public company whose securities are publicly offered was bestowed by the Parliament back in 1989. The impugned provision contrary to the petitioner’s allegation was not required to have undergone public participation before its enactment. The court in the case of *Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others* [2013]eKLR also noted this as follows:

“43.The repealed Constitution did not contain express provisions requiring the State to ensure public participation in public policy decisions.”

86. This would perceptibly have been different if the law was enacted after the 2010 dispensation. Being that there was no legal basis for public participation before enactment of the 2010 Constitution, I find that the allegation that Parliament must have complied with a non-existent law is untenable. Bearing this in mind, it is apparent that the petitioner’s argument in this regard cannot stand.

87. From the foregoing analysis, although the impugned provision appears to limit the constitutional rights, the limitation is appropriately justified in line with article 24 (1) of the *Constitution*. Additionally, the limitation is proportionate to the interests stated in article 24 (1) (d) keeping in mind the purpose and effect of the Statute in question. In my view, the impugned provision is necessary in the interest of the public to uphold sound regulation in the Capital Markets sector. It is my humble finding therefore that section 11 (3) (h) of the *Capital Markets Act* is constitutional.



Issue No. (iii) Whether the Petitioner’s rights under articles 10, 25(a) & (c), 27, 28, 29, 31, 40, 47(1) & (2), 48 and 50 were violated by the 2nd Respondent

88. The petitioner’s other key contention is the allegation that the 2nd respondent violated his constitutional rights as cited above. This is with reference to the impugned provision and the manner in which the 2nd respondent carried out its mandate.
89. The 2nd and 3rd respondents on the other hand vigorously disputed these assertions arguing that the allegation of violation of constitutional rights was unjustified. In their view no particulars had been provided to show how the application of the respondents’ statutory mandate amounted to violation adding that article 24 of the Constitution makes room for limitation of rights in a manner that is reasonable and justifiable. If anything they noted that they had exercised their power and mandate in good faith and under the strict confines of the law while investigating the petitioner.
90. At face value a reading of the Constitution against the impugned provision makes it reasonable to conclude that it restricts the petitioner’s rights. According to article 24 of the Constitution this is not acceptable unless one seeking to occasion the restriction can justify the limitation. This was aptly demonstrated by the 2nd respondent in the manner it carried out its mandate. The limitation of the cited rights was by the Capital Markets Act, the Evidence Act and the Criminal Procedure Code in the manner it was carried out. This inevitably limited the petitioner’s rights such as prior notice under article 47 of the Constitution.
91. All things considered, the constitutional threshold under the Anarita Karimi Njeru case is to the effect that a petitioner must underscore which specific provisions of the Constitution have been violated and the manner in which the respondent has infringed the subject rights. The Court in the case of 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.”
92. This in essence means that the petitioner in all the alleged constitutional violations is expected to first discharge his burden of proof before the burden shifts to the respondents. Discharging this burden as such entails showing how the specific rights were violated. A perusal of the material before this court shows that other than the constitutional rights, such as articles 10 and 47 of the Constitution which



were limited automatically by operation of article 24 of the Constitution, the petitioner had the onus to show how the other rights were violated.

93. To begin with, the petitioner stated that his right against discrimination under article 27 of the Constitution was violated because he was the only one among the former Board of Directors that was investigated. Other than making this allegation the petitioner did not show that he was the only one, he merely argued that it was the 2nd respondent who ought to prove this. A simple testimony of the other former directors and senior management ascertaining that they had not been interviewed and investigated would have sufficed in this matter. The respondent's evidence is that the Petitioner and the other directors were all subjected to investigation.
94. In the same manner the petitioner asserted that his rights against torture and cruel treatment under article 25(a); right to human dignity under article 28; right to security of person under article 29; right to privacy under article 31; protection of the right to property under article 40; access to justice under article 48 and right to a trial under article 50 of the Constitution were violated.
95. It is clear that the petitioner did not properly and with the required precision demonstrate how these rights were infringed by the 2nd respondent herein. He simply quoted the provisions of the Constitution but did not precisely or sufficiently demonstrate by way of evidence how those rights were infringed by the 2nd respondent.
96. In my humble conclusion I find that the petitioner herein failed to prove his case to the required standard. The upshot is that the petition dated 27th July, 2017 lacks merit and is accordingly dismissed with costs.
97. Orders accordingly.

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

H. I. ONG'UDI

JUDGE

