



REPUBLIC OF KENYA



KENYA LAW
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**Kisire v Capital Markets Authority & another (Petition 192 of 2018)
[2022] KEHC 533 (KLR) (Constitutional and Human Rights) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 533 (KLR)

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

PETITION 192 OF 2018

HI ONG'UDI, J

MAY 31, 2022

IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 165(3)

(B), (D) (I) & (II) AND 258 OF THE CONSTITUTION

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION

ACT, 2015

AND

IN THE MATTER OF THE CAPITAL MARKETS ACT

AND

**IN THE MATTER OF CONTRAVENTION OF THE
PETITIONER'S RIGHTS AND FUNDAMENTAL FREEDOMS**

UNDER ARTICLES 25, 27, 28, 29, 35, 47, 48 AND 50 OF

THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF A PETITION AGAINST THE CAPITAL
MARKETS AUTHORITY SEEKING RELIEF FOR VIOLATING
THE PETITIONER'S RIGHTS AND FUNDAMENTAL
FREEDOMS, INCLUDING THE RIGHT TO NATURAL JUSTICE**

AND TO FAIR HEARING

BETWEEN

CHRIS KISIRE PETITIONER



AND

CAPITAL MARKETS AUTHORITY 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

The dictates of the right to fair hearing is not applicable administrative hearings

The High Court dismissed a constitutional petition challenging the administrative enforcement actions taken by the Capital Markets Authority (CMA) against the petitioner. The petitioner alleged violations of his constitutional rights, including fair administrative action, fair hearing, and access to information, during CMA's issuance of a Notice to Show Cause and a subsequent enforcement action. The court held that the CMA acted within its statutory mandate and found no breach of the petitioner's rights under articles 35, 47, or 50 of the Constitution. It accepted the CMA Board Chair's explanation for the redacted documents and noted that the petitioner was not barred from calling or cross-examining witnesses. The court further observed that the issues raised were subject to ongoing criminal proceedings, and any determination would fall under the trial court's purview. The petition was accordingly dismissed in its entirety with costs.

Reported by John Ribia

Constitutional Law – fundamental rights and freedoms – right to fair trial – right to fair administrative action – right to access information – allegations that the Capital Markets Authority had issued the petitioner with a Notice to Show Cause (NTSC) that did not disclose the allegations with precision to allow the petitioner to defend itself – where criminal charges were preferred from the outcome of the NTSC - whether the Capital Markets Authority violated the petitioner's rights to fair trial, fair administrative action, and right to access information by issuing the petitioner with a Notice to Show Cause and documents at hearing that included a redacted affidavit that did not disclose the allegations with sufficient particularity to the petitioner to enable him comprehend the charges against him - whether the Director of Public Prosecutions violated the petitioner's rights to fair trial, fair administrative action, and right to access information by preferring criminal charges against the petitioner pursuant to the decision of the Capital Markets Authority that was based on a redacted affidavit - Constitution of Kenya, articles 19, 20, 21, 22, 23, 165(3)(b),(d)(i), (d)(ii) and 258; Capital Markets Act (Cap 485A) sections 2, 11, 13B, and 34; Fair Administrative Action Act (Cap 7L) sections 4.

Administrative Law – administrative hearings – requirements – applicability of the right to fair trial to administrative hearings - whether the dictates of the right to fair hearing were applicable to an administrative hearing – Constitution of Kenya, article 50.

Constitutional Law – constitutional bodies – Director of Public Prosecutions – role and mandate – mandate in prosecuting crimes arising from the capital markets laws – role of the Capital Markets Authority - whether the Director of Public Prosecutions in charging persons with crimes related to capital markets law was to do so under the direction of the Capital Markets Authority - Constitution of Kenya, articles 19, 20, 21, 22, 23, 165(3)(b), (d)(i), (d)(ii) and 258.

Brief facts

The petitioner, Chris Kisire, was the Chief Finance Officer of National Bank of Kenya (NBK) until April 2015. In 2018, he filed a constitutional petition challenging the actions of the Capital Markets Authority (CMA) following investigations into an alleged fraudulent deposit mobilization scheme at NBK in 2014–2015. CMA issued a Notice to Show Cause (NTSC) to the petitioner, alleging that he was involved in the irregular payment of approximately Ksh. 991 million to deposit mobilization firms—Edge Capital Consultancy Ltd and Advest Company Ltd—under the guise of improving bank liquidity. Kisire argued that the NTSC lacked sufficient detail, denied him access to key evidence, and deprived him of adequate time to prepare a defense. CMA upon consideration of the oral and written submissions came to the conclusion that the petitioner had approved



the payments to be made to the deposit mobilization agents. That was without conducting actual checks to ensure that the agents had legitimately mobilized the deposits. He in addition had directed the agents to make the payments to the advocates.

He further challenged a subsequent enforcement notice dated April 3, 2018, claiming that CMA violated his constitutional rights, including the right to fair hearing, fair administrative action, and access to information.

The petitioner's case involving the 2nd respondent (Director of Public Prosecutions (DPP) revolved around the fact that the DPP instituted criminal proceedings against him owing to the facts arising from the impugned NTSC and the evidence there of. The DPP in its grounds of opposition objected citing their constitutional mandate under the Constitution. DPP contended that the petitioner had not demonstrated that the criminal proceedings were mounted with ulterior motives or in excess of their power or that substantial injustice would result if the criminal proceedings ensued.

Issues

- i. Whether the Capital Markets Authority violated the petitioner's rights to fair trial, fair administrative action, and right to access information by issuing the petitioner with a Notice to Show Cause and documents at hearing that included a redacted affidavit that did not disclose the allegations with sufficient particularity to the petitioner to enable him comprehend the charges against him.
- ii. Whether the Director of Public Prosecutions violated the petitioner's rights to fair trial, fair administrative action, and right to access information by preferring criminal charges against the petitioner pursuant to the decision of the Capital Markets Authority that was based on a redacted affidavit.
- iii. Whether the dictates article 50 of the Constitution on the right to a fair hearing were applicable to an administrative hearing.
- iv. Whether the Director of Public Prosecutions in charging persons with crimes related to capital markets law was to do so under the direction of the Capital Markets Authority.

Held

1. The petitioner's innocence or lack thereof was not a matter for the court to determine. The constitutional court while adjudicating the matter had a duty of review of an administrative body's action in light of the constitutional principles. There was an ongoing criminal proceeding, (Nairobi Criminal Case No. 935 of 2017), the court was inclined to refrain from making a determination that would prejudice the trial court's final determination.
2. The question before the court accordingly was one of fact. It called for an examination of the circumstances under which the petitioner's case was dealt with by the Authority. A judicial review court was concerned with the decision making process and whether the process afforded by the Capital Markets Authority (CMA) was one that complied with the dictates of the right to fair administrative action.
3. The CMA had the mandate to carry out its overlapping role as empowered by the Capital Markets Act (the Act) and as guided by the Supreme Court's direction in *Alnashir Popat & 7 others v Capital Markets Authority* [2020] eKLR. The 1st respondent was empowered to exercise its powers with respect to all that were under its authority.
4. The 1st respondent's administrative action left room for one to wonder whether the fair administrative principles were judiciously adhered to. The issue of incomplete affidavits and documents was raised by the petitioners.
5. Article 35 of the Constitution granted every citizen the right of access to information held by the State and information held by another person and required for the exercise or protection of any right or fundamental freedom. The manner in which the 1st respondent carried out its proceedings and made a determination may not have met the standards of fairness guaranteed under article 47 of the Constitution in turn violating article 35 of the Constitution. An explanation was given and



- investigations carried out by the 2nd respondent leading to the criminal case the petitioner was facing. He had the platform to challenge the evidence.
6. The dictates of the right to fair trial were not applicable in the context of an administrative proceeding.
 7. The constitutional mandate of the Director of Public Prosecutions (DPP) was drawn from article 157 of the Constitution. Under article 157(10) the DPP did not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, nor was it under the direction of any person or authority.
 8. The High Court was reluctant to interfere with the mandate of the CMA unless the petitioner had clearly demonstrated that it acted without due regard to public interest, acted against the interests of the administration of justice or it did not take account of the need to prevent and avoid abuse of court process.
 9. Other than joining the DPP as a party with the intent to stop any proceedings with relation to the CMA's Notice to show cause, no case was made out against the DPP.
 10. For a constitutional petition to succeed, it had to state with precision the nature of the allegations or wrongs it complained of and the articles of the Constitution violated. The petitioner had not made out a case against the DPP to warrant the High Court's intervention under its supervisory jurisdiction. The DPP did not violate the petitioner's constitutional rights.
 11. There was no violation of the petitioner's constitutional rights in him being served with the Notice to Show Cause by CMA. CMA acted in line with the provisions of the Capital Markets Act. They acted on a complaint received and worked on. The petitioner had sufficient time to prepare for his case. His request for an adjournment was granted.
 12. The petition against the DPP did not succeed as the reason for failure to issue complete documents was fully explained by the Board's chair. Secondly, nobody stopped counsel for the petitioner from calling witnesses for cross examination. The petitioner was investigated and later charged with a criminal offence. The trial court would make a determination on the same.

Petition dismissed with costs.

Orders

- i. *Declaration issued that the Notification of Enforcement Action National – Bank of Kenya dated April 3, 2018 be quashed was declined.*
- ii. *Prayer for quashing of the Notice to Show Cause dated February 9, 2019 was declined.*
- iii. *Prayer for order prohibiting CMA and DPP from giving effect to the criminal charges was declined.*

Citations

Cases

1. Anarita Karimi Njeru v Republic (No1) ([1979] KLR 154; [1976- 80] 1 KLR 1272) — Explained
2. Capital Markets Authority v Alnashir Popat & 8 others (Civil Appeal 35 of 2017) — Explained
3. Judicial Service Commission v Mbalu Mutava & another (Civil Appeal 52 of 2014; [2015] KECA 741 (KLR)) — Explained
4. Justus Mwenda Kathenge v Director Of Public Prosecutions, Attorney General & Chief Magistrate's Court, Nairobi (Petition 372 of 2013; [2014] KEHC 7714 (KLR)) — Explained
5. Lalji, Diamond Hasham & another v Attorney General & 4 others (Civil Appeal 274 of 2014; [2018] eKLR) — Explained
6. Matem, Mumo v Trusted Society of Human Rights Alliance & 5 others (Civil Appeal 290 of 2012; [2013] eKLR) — Explained
7. Municipal Council of Mombasa v Republic & another (Civil Appeal 185 of 2001; [2002] eKLR) — Explained
8. Nkatha Joy Faridah Mbaabu v Kenyatta University (Petition 411 of 2015; [2016] eKLR) — Explained
9. Popat & 7 others v Capital Markets Authority (Petition 29 of 2019; [2020] KESC 3 (KLR)) — Explained



10. Republic v County Government of Makueni & another Ex parte Georline Enterprises Ltd & another (Miscellaneous Civil Application 29 of 2015; [2016] eKLR) — Explained
11. Republic v CS, In Charge of Internal Security & 3 others Ex-Parte Jean Eleanor Margaritis Otto (Miscellaneous Application 271 of 2015; [2015] eKLR) — Explained
12. Robert Akumu Asembo v Political Parties Tribunal & 2 others (Miscellaneous Civil Application 61 of 2013; [2013]eKLR) — Explained
13. Solomon Muyeka Alubala v Capital Markets Authority; National Bank of Kenya Ltd (Interested Party) (Judicial Review Application 251 of 2018; [2019] eKLR) — Explained
14. Stephen Nendela v County Assembly of Bungoma, Select Committee of the Assembly of the County of Bungoma, Clerk to the Assembly of Bungoma County, Governor of Bungoma & Governors' Council (Constitutional Petition 4 of 2014; [2014] KEHC 2723 (KLR)) — Explained
15. Tata Chemicals Magadi Limited v Commissioner of Domestic Taxes (Large Taxpayers) (Petition 476 of 2013; [2014] KEHC 7797 (KLR)) — Explained
16. Pastoli v Kabale District Local Government Council & Others ([2008] 2 EA 300) — Explained

Statutes

1. Capital Markets Act (cap 485A) — section 2, 11, 13(b), 34, 138 — Interpreted
2. Constitution of Kenya — article 10, 11, 19, 20, 21, 23, 25, 27, 29, 31, 35, 47, 48, 50, 157(11), 165(2)(3)(b)(d)(i)(ii), 258 — Interpreted
3. Fair Administrative Action (cap 7L) — section 4(3)(g)(4) — Interpreted
4. Oaths and Statutory Declarations Act (cap 15) — section 4(1) — Interpreted

Advocates

None mentioned

RULING

1. The petition dated May 15, 2018 was filed under articles 19, 20, 21, 22, 23, 165(3)(b),(d) (i) & (ii) and 258 of the *Constitution* of Kenya as well as the substantive provisions of Article 25, 27, 29, 35, 47, 48 and 50 of the *Constitution*. Accordingly, the petition seeks the following orders:
 - i. A declaration be issued that the Capital Markets Authority violated the petitioner's right to fair trial under article 50(2)(b) of the *Constitution* by issuing the Notice to Show Cause (NTSC) letter dated February 9, 2019 to the petitioner, as it did not disclose the grounds or allegations with sufficient particularity to the petitioner to enable him comprehend the charges against him.
 - ii. A declaration be issued that the Capital Markets Authority violated the petitioner's right to fair trial under Articles 35 and 50(2)(j) of the *Constitution* by withholding from him evidence and documents prior to the hearing of the NTSC.
 - iii. A declaration be issued that the Capital Markets Authority violated the petitioner's right to fair trial under article 50(2)(c) by denying him adequate time and facilities to prepare his defense to the NTSC.
 - iv. A declaration be issued that the Capital Markets Authority defeated the petitioner's rights to fair trial in reaching an erroneous decision to penalize him through the letter dated 3rd April 2018 subject: Notification of Enforcement Action-national Bank of Kenya issued to the petitioner.



- v. An order of certiorari be issued to remove into this Court for purposes of quashing the NTSC letter dated February 9, 2019, together with the letter dated April 3, 2018 subject: Notification of Enforcement Action-national Bank of Kenya issued to the petitioner.
- vi. An order of prohibition be issued to restrain the Capital Markets Authority and the Director of Public Prosecutions whether by themselves, their servants, agents, representatives or whosoever otherwise from enforcing, implementing, executing or in any other manner giving effect or preferring any criminal charges against the petitioner pursuant to the decision of the Capital Markets Authority communicated vide its letter dated April 3, 2018 subject: Notification of Enforcement Action-national Bank of Kenya issued to the petitioner.
- vii. Costs of this petition be awarded to the petitioner.
- viii. Any other or further orders that this Honourable Court deems just and fit to grant

The Petitioner's Case

2. The petitioner's case as supported by the averments in his sworn affidavit of even date is that, the petitioner together with other management members of National Bank of Kenya (NBK) are alleged to have devised and operated a fraudulent scheme. This was supposedly under the guise of a deposit mobilization exercise in 2014 and 2015 through which Ksh.991,592,296.42 was embezzled from NBK.
3. The petitioner avers that he was an employee of NBK where he served as the Chief Finance Officer until April 2015. He deposes that he received a letter on March 5, 2015 from the 1st respondent whose contents were a Notice to Show Cause. This Notice was based on an allegation that he had committed various offences under the *Capital Markets Act*. He says that the Notice to Show Cause informed that:
 - a) The NBK management had devised a fraudulent scheme under the guise of commissioning a deposit mobilization exercise in 2014 and 2015 for the purpose of increasing the bank's liquidity operated through procuring deposit mobilization agents including Edge Capital Consultancy Ltd and Advset Company Limited to render the deposit mobilization services.
 - b) A total of Ksh.991, 592, 296.42 was irregularly paid to the deposit mobilization agency firms and further distributed as per the petitioner's direction to select beneficiaries within the management and Board of NBK.
 - c) The petitioner approved payments made to Edge Capital Consultancy and Advset Company Limited without verifying that they had legitimately mobilized deposits in NBK's favour.
 - d) The petitioner had directed the agents on various occasions to deposit at least Ksh.17200000 in to Kiplagat & Company Advocates accounts.
4. He deposes that the Notice to Show Cause did not identify any specific provision in the *Capital Markets Act* that had been breached to invoke the 1st respondent's jurisdiction under Section 11 and 34 of the Act. Moreover, that the 1st respondent failed to identify any provisions in law to the effect that the Notice was based on a criminal or civil wrong. Likewise, he contends that the allegations in the notice were not supported by any evidence.
5. In view of this he deposes that the allegations made out against him have no merit and any process that ensued thereafter was irrational and unreasonable for the reasons that:



- a) According to the NBK corporate structure it is the NBK Treasury Department who report directly to the NBK Board who are mandated with implementation of the scheme not the Chief Finance Officer.
 - b) Deposit mobilization does not fall under the Chief Finance Officer's supervisory mandate.
 - c) He was not involved in sourcing of the agents for deposit mobilization neither the deposit mobilization exercise.
 - d) He did not have control over the deposit mobilization agents neither could he give directives on distribution of the money.
6. He depones that following the Notice to Show Cause hearing conducted on March 22, 2018, the 1st respondent on April 3, 2018 resolved to penalize him with a fine of Ksh.1000000. Additionally he was disqualified from holding office as a key officer in a public listed company for 3 years. Likewise the 1st respondent notified the 2nd respondent to consider prosecuting him for the said allegations.
 7. It is his disposition that the 1st respondent abused his right to procedural justice and fairness thus violating his right to a fair hearing. This is because it failed to furnish him with the full particulars to enable him respond to the allegations. Additionally since the 1st respondent ambushed him with various documents at the hearing including a redacted affidavit violating his right to reasonable access to the evidence to be relied upon.
 8. He further deposes that in view of the presented information he protested continuation of the hearing which was declined by the 1st respondent. Furthermore, he avers that the 1st respondent failed to issue him with a written notification and / or reasons for its determination which he only came to know about through the media.
 9. It is the petitioner's case accordingly that the 1st respondent's actions violated his rights. He as well deposes that the 1st respondent's action of holding him responsible for other people's actions is contrary to the principle of liability which ought to be personal and not inferred.

The 1st Respondents' Case

10. The 1st respondent filed a relying affidavit dated August 24, 2018 sworn by Abubakar Hassan Abubakar, the 1st respondent's Investigation and Enforcement manager. He avers that the Authority is charged with the responsibility to ensure that listed companies such as NBK comply with the regulatory obligations that govern corporate governance, establishment and implementation of effective internal control systems and disclosure of financial and material information to members of the public.
11. He deposes that the petitioner was a key employee of NBK and thus the 1st respondent is statutorily empowered to conduct investigations into the affairs of the bank which extends to inquiries into the conduct of key officers such as Chief Finance Officers. Further that the 1st respondent received information from a whistleblower on various issues at NBK. There were also negative media reports about the bank. This information pointed to a possible breach of the capital markets regulatory obligations. In view of this the Authority proceeded to conduct an independent investigation into the affairs of NBK.
12. He avers that the investigation revealed that during the 2014/2015 period, some of the persons in management had devised a scheme where approximately Ksh. 1 billion was fraudulently siphoned out



- of the bank for services not rendered to it. This was under the guise of commissions for a deposit mobilization exercise.
13. He deposes that the operations of the deposit mobilization scheme involved procurement of two deposit mobilization agents, Edge Capital Consultancy Limited and Advest Company Limited to render the services. He avers that the deposit mobilization exercise was deceptively presented to the Board of directors of NBK as one to increase the bank's liquidity.
 14. He explains that a total of Ksh.991,592,296.42 was paid to the deposit mobilization agencies vide bogus invoices for provision of the deposit mobilization services. It is averred that the funds being allegedly mobilized related to deposits made by various government agencies in the usual course of business. Further that the government agencies concerned confirmed that they had not been approached by the deposit mobilization agencies nor made any deposit in connection with the agencies.
 15. He avers that the petitioner approved the total amount Ksh.229, 249,348 raised by the deposit mobilization agents vide the questionable invoices without conducting any due diligence on whether the deposits were indeed made. He adds that the investigation established that the implementation of the deposit mobilization scheme led to payment for invoices where no deposits had been mobilized in favour of NBK. Furthermore, that the monies were subsequently withdrawn by the deposit mobilization agents with 90% of the same being paid directly or indirectly to senior management of the bank.
 16. He avers that the 1st respondent upon establishing these actualities issued the petitioner with the Notice to Show Cause and summons to appear before it. He informs that the same was to grant the 1st petitioner an opportunity to present his case and clarify the established issues before a determination could be made. He makes known that the petitioner was granted an opportunity to be accompanied by legal counsel at the hearing.
 17. He deposes that in response the petitioner vide a letter dated 10th March 2018 requested to be granted another date to allow his advocate to be present. The 1st respondent in reply informed him that he was at liberty to make this request through an application before it at the hearing. He however notes that the petitioner on the material day wrote an email requesting for an adjournment. The hearing was accordingly rescheduled to March 22, 2018 at 2:00pm.
 18. He avers that the 1st respondent upon consideration of the oral and written submissions came to the conclusion that the petitioner had approved the payments to be made to the deposit mobilization agents. This was without conducting actual checks to ensure that the agents had legitimately mobilized the deposits. He in addition had directed the agents to make the payments to the advocates.
 19. It is his disposition that in reaching this determination, the 1st respondent was guided by a number of reasons. To begin with the petitioner as the Chief Finance Officer was responsible for the approval of payments made on behalf of the bank hence was required to exercise a reasonable level of due care and diligence. Secondly, the petitioner was involved in the procurement of the deposit mobilization agents as he signed the contract and commercial sign off forms for the agents.
 20. Furthermore the petitioner approved the commission payments to the deposit mobilization agents. Likewise the petitioner had directed the deposit mobilization agents to make deposits of Ksh.17200000 to an account belonging to Kiplangat and Company Advocates. On inquiry of the received funds David Kipkorir Kiplangat the owner of the firm informed the 1st respondent that the monies were received and held on behalf of Richard Langat who was a member of the Board of Directors of NBK for the period up to April 2015, the same period the petitioner left the bank.



21. In addition, he avers that the petitioner was at all times a signatory to the Marketing Commission Controls & Governance framework which laid out his duties with regard to the deposit mobilization scheme. He discloses as well that some of the 1st respondent's evidence was received from the deposit mobilization agents who cooperated in the investigations. They informed the 1st respondent that they received instructions from the petitioner to deposit the Ksh.17,200,000.
22. He deposes that all the information regarding this matter was shared with the petitioner before the hearing. Additionally the petitioner was issued with the notification of enforcement of action on April 4, 2018 via email before publication of the decision. Accordingly, it is the 1st respondent's case that it upheld the principles of a fair administrative process in compliance with the provisions of the *Fair Administrations Act* (No.4 of 2015). It is his averment therefore that the petition lacks merit and amounts to an abuse of the Court process.
23. The 1st respondent filed a further affidavit dated January 21, 2021 in reply to the petitioner's response. This affidavit was similarly sworn by Abubakar Hassan Abubakar who repeated the averments in his replying affidavit.

The Petitioner's response

24. The petitioner filed further affidavits dated February 14, 2018 and November 11, 2021 in response to the respondent's replying affidavit and response. The affidavits in essence maintained and reiterated his case as set out in his supporting affidavit dated May 15, 2018.
25. In addition, he deposed that contrary to the 1st respondent's averments NBK sometime in 2014 faced liquidity challenges. In light of this the bank through its board of directors adopted a deposit mobilization scheme where third parties would be used to mobilize funds and channel the same to the bank for a commission.
26. He notes that it is apparent that an employee cannot authorize large sums of money neither can he implement policies without approval of the Board of Directors of NBK. Similarly, that all procurement decisions were made by the procurement department. In essence, he argues that these facts absolve him from the allegations against him by the 1st respondent. He as such deposes that he cannot be victimized for discharging the functions of his office.
27. Furthermore, he deposes that the 1st respondent's process was a sham due to the foregone conclusion that had a predetermined outcome. According to him this is because the 1st respondent intentionally failed to understand the approval process for the payment of the impugned deposit mobilization schemes and his role in the process. He contends therefore that the 1st respondent is accusing him of the operational and policy weaknesses whilst overlooking the Board of Directors functions in its entirety.

The Petitioner's Submissions

28. The petitioner through the firm of Rachier & Amollo Advocates filed two sets of written submissions dated February 14, 2019 and November 11, 2021. Counsel submits that from the facts of this case it is clear that the 1st respondent violated various provisions of the *Constitution*.
29. To begin with it is submitted that the 1st respondent acted outside the scope of its statutory mandate. This is since the facts of this case do not describe any wrong doing on the part of the petitioner. Even so, Counsel notes that even if there was wrongdoing on the part of the petitioner the 1st respondent is required to demonstrate how the wrong doing constitutes a violation of the cited provisions of the *Capital Markets Act* to invoke its jurisdiction against him. As such he argues that no provision of the



- Act was cited as having been breached. In light of this Counsel argues that the 1st respondent acted outside its mandate.
30. Moving on to the second point, Counsel submits that the weight of the evidence before the 1st respondent proves that the petitioner is innocent and has not violated any provisions of the Act. In addition he notes that no loss has been proved to have been sustained by depositors. He submits that since NBK is under the regulatory authority of Central Bank of Kenya not the 1st respondent, if any breach had occurred then it is the Central Bank that would have taken action. Counsel argues thus that the 1st respondent's actions were done for it to gain political mileage and with an ulterior motive.
 31. He further submits that the 1st respondent's lack of objectivity and impartiality was seen in the way it handled the matter and made its decision. Speaking to Article 47 of the Constitution as read with the Fair Administrative Actions Act, Counsel submits that the petitioner was entitled to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Owing to the facts illustrated in his affidavits, Counsel submits that the petitioner's rights under this provision were violated.
 32. Counsel further submits that the petitioner's right to a fair trial was violated by the 1st respondent. This is since it failed to furnish him with all the particulars to enable him answer the allegations, subjected him to a trial by ambush by producing documents he had not been supplied with before, it insisted on proceeding with the hearing based on perjured documents despite his protests, the finding was hastened and based on untrue allegations, it failed to supply a written notification of the decision and reasons for the adverse decision made against him.
 33. In view of this he faults the 1st respondent's assertion that the dictates of Article 50 of the Constitution did not apply in the matter since it was not a criminal proceeding. It is submitted that this is a misplaced notion since the Court in the case of Stephen Nendela v County Assembly of Bungoma [2014] eKLR noted that the dictates of Article 50 did not only refer to an accused person.
 34. In the further submissions, Counsel submitted that 1st respondent had completely excused the Board of Directors of NBK when it is clear that it is this Board which had the legal mandate to formulate and enforce policies. Further this Board is required to be accountable for the financial management of the bank as posited in the Code of Corporate Governance Practices for the Issuers of Securities to the Public 2015.
 35. On the second point Counsel submitted that the 1st respondent violated the petitioner's rights to fair administrative action and trial in its entirety as espoused in the earlier submissions by failing to allow the petitioner to cross-examine the deponents on the incomplete and retracted affidavits. Additionally, it irregularly and illegally shifted the burden of proof to the petitioner.
 36. In view of this, he submits that the 1st respondent withheld crucial documents for instance the letter from Kiplagat and Company Advocates which cleared the petitioner of the allegation that he instructed the depositing of funds in the advocates account. Similarly the 1st respondent failed to disclose that there were earlier affidavits of Kioko Kanini and Zavai Kiziri Onzere which did not implicate the petitioner.
 37. Considering this, Counsel submits that the petitioner had a disadvantage throughout despite raising the issue of lack of information and documentation in the petitioner's reply to the Notice to Show Cause which was never addressed. As such, Counsel submits that this Court should find that the 1st respondent violated the petitioner's rights to access documents and to fair trial as provided under Articles 35, 50(2)(c) and 50(2)(j) of constitution the Constitution.



38. He submits that the Notice to Show Cause did not inform the petitioner of his right under Section 4 (3) and (4) of the Fair Administrative Action Act to cross-examine the deponents of the affidavits which adversely mentioned him. This was contrary to the fair administrative process and fair trial as espoused by the Court in the case of Nkatha Joy Faridah Mbaabu v Kenyatta University [2016] eKLR. Considering this it is argued that the 1st respondent violated the petitioner's right to a fair trial as provided under Article 50(2)(c) of the Constitution as read with Section 4(3) and (4) of the FAAA.
39. Counsel submits that the affidavits relied on by the 1st respondent were commissioned by Julie Odeck, an employee of the 1st respondent who was the Directorate of Market Operations Manager of the 1st respondent. He notes that Julie Odeck, was not only interested in the investigation and prosecution of the petitioner but also actively participated in the process.
40. Considering this, Julie Odeck was thus prohibited by dint of Section 4(1) of the Oaths and Statutory Declaration Act to take the alleged witness statement. In support reliance was placed on the case of Robert Akumu Asembo v Political Parties Tribunal & 2 others [2013] eKLR where it was held that the court should not shut its eyes to a violation of the rights underpinned by Articles 47 and 50 of the Constitution.
41. Lastly, Counsel submits that the 1st respondent lacked jurisdiction to interrogate the possible commission of a criminal offence. In support reliance was placed on the case of Solomon Muyeka Alubala (supra) where it was held that where there are allegations of serious misconduct bordering on criminal offences and which may lead to criminal culpability and punitive action or imposition of criminal sanctions, it may be constitutionally prudent that the matter proceeds before another regulator such as the Director of Public Prosecutions.
42. Counsel submits that it is certain that any action that is contrary to the Constitution is void and thus prays that the Notice to Show Cause and Notification of Enforcement Action be quashed for having been issued contrary to the Constitution and in violation of the petitioner's rights. Furthermore that the Court do issue an order of prohibition restraining the respondents from enforcing in any other manner or preferring any criminal charges against the petitioner pursuant to the decision of the 1st respondent as was held in the case of Republic v County Government of Makueni & another Ex parte Georline Enterprises Ltd & another [2016] eKLR.

The 1st Respondent's Submissions

43. The 1st respondent through its advocate Githendu Eric Timothy filed written submissions and a list of authorities dated July 21, 2021. Counsel submits the issues for determination to be:-
 - i. Whether the 1st respondent had jurisdiction to take the administrative action including investigations and Enforcement action against the petitioner;
 - ii. The constitutionality and lawfulness of the 1st respondent's actions;
 - iii. Whether the 1st respondent lawfully exercised its powers of inquiry and taking enforcement action; and
 - iv. Whether provisions of Article 50 of the Constitution were relevant in the matter.
44. Counsel on the first issue submits that NBK is a regulated person within the meaning of Section of 2 of the Capital Markets Act. As such the 1st respondent acted within its powers because the petitioner was a key personnel at all material times relevant to the inquiry into the affairs of NBK which was a listed company hence a regulated person. Additionally, Counsel notes that the investigations into the affairs



- of NBK which is a juridical person were pursuant to Section 138 of the Act and so the investigations extended into the conduct of the key officers who were controlling the affairs of the Bank.
45. Counsel notes that similar arguments on jurisdiction and propriety of the Notice to Show Cause were considered in the case of *Solomon Muyeka Alubala V Capital Markets Authority and National Bank* [2019] eKLR. Where the Court had held that the time when the alleged misconduct occurred was material to the facts, and in this respect it was not disputed that in 2014/2015 the Applicant was an employee of the Interested Party. Therefore the respondent properly brought enforcement proceedings against the Applicant, which action was within its jurisdiction.
 46. Counsel submits that their mandate to carry out the investigations is anchored in Sections 11(1) and Section 13B of the Act which provide that the 1st respondent has powers to investigate embezzlement, fraud or misfeasance on its own motion or as a result of a complaint. In light of this he submits that the 1st respondent received a complaint about a fraudulent scheme in the Bank where Kshs. 1 Billion was fraudulently siphoned out. With a view to protect the interests of the investors the 1st respondent commenced investigations into the complaint in line with the cited provisions.
 47. On that note, he submits that the absence of an explicit provision in the *Capital Markets Act* referring to operationalization of a fraudulent scheme did not ouster the jurisdiction of the 1st respondent to conduct investigation into the affairs of NBK and take the necessary action.
 48. Turning to the second issue, Counsel submits that the 1st respondent from its affidavits clearly demonstrated that it was totally impartial and presumed the petitioner to be innocent. He likewise submits that the 1st respondent maintains that the allegations framed in the Notice to Show Cause were proper and lawful. The allegation that the 1st respondent did not supply the relevant documents and information is false. This is since the 1st respondent supplied all information, materials and evidence to be relied upon in making the decision as required by Section 4(3) (g) of the *Fair Administrative Action Act*. This can be seen from the catalogue of evidence that was forwarded to the petitioner's Notice to Show Cause dated March 5, 2018.
 49. Furthermore, the flow of the administrative action by the 1st respondent demonstrates that the petitioner was given adequate notice of the allegations and sufficient time to reply to the same. Likewise, the 1st respondent upheld the petitioner's right to privacy under Article 31 of the *Constitution*. This is because it did not publicize the Notice to Show Cause hearings and gave sufficient written reasons for its decision in the Notification for Enforcement Action. On this note Counsel submits that the 1st respondent discharged its statutory obligations.
 50. On the third issue he submits that the petitioner misapprehended the nature of powers accorded to the 1st respondent. This is since he argued that by conducting investigations as well as the hearing and meting out the enforcement action, the 1st respondent was biased and violated the rules of natural justice. Counsel argues that this is not the accurate position.
 51. He submits that this fact was determined by the Court of Appeal in the case of *Capital Markets Authority v Alnashir Popat & 8 others* [2019] eKLR where it was affirmed that the 1st respondent could make unprejudiced judgment in matters that it had investigated without reasonable apprehension of bias arising and consequent breach of the rules of natural justice. As such he submits that the 1st respondent cannot be held to have violated the petitioner's rights to natural justice because of the overlap of functions authorized by the *Capital Markets Act*.
 52. On the final issue, Counsel submits that the Notice to Show Cause proceedings were not criminal proceedings. Accordingly, the 1st respondent was not under a duty to comply with the provisions of



- Article 50(2)(b) or(j) of the Constitution. Considering this, Counsel submits that the 1st respondent was only under a duty to uphold Article 47 of the Constitution as it was purely an administrative action.
53. To buttress this argument, he submitted that this position has been confirmed by the Court of Appeal in a number of cases. One being the case of Judicial Service Commission v Mbalu Mutava & another [2015] eKLR where the Court held that fair hearing as employed in Article 50 (1) of the Constitution is a term which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts.
54. As a consequence therefore in the matter the right to fair hearing under Article 50 did not apply to the decision of the Judicial Service Commission rather would apply to the proceedings of the tribunal appointed by the President. Additional support was placed on the Court of Appeal case of County Assembly of Bungoma & 2 others v Stephen Nendela & 2 others [2017] eKLR. Accordingly Counsel submits that the 1st respondent cannot be said to have violated the rights of the petitioner under Article 50(2) of the Constitution.
55. This court notes that the 2nd respondent only filed undated grounds of opposition. They were filed on 15th October 2018 and are enumerated as follows:-
- (i) The prayers sought by the petitioner are unconstitutional as they seek to prevent the respondents from exercising its mandate as provided under Article 157 of the Constitution. The prayers if granted would result to a greater injustice in the criminal justice system and public interest.
 - (ii) The petitioner has not adduced reasonable evidence to show that criminal proceedings are mounted for an ulterior purpose and have not demonstrated how the Respondents have acted without or in excess of powers conferred upon them by law.
 - (iii) The petitioner must demonstrate that substantial injustice would otherwise result if any carnal proceedings proceed. In any event, Article 50 of the Constitution provides for safeguards against such injustice.
 - (iv) It is in the public interest that complaints are investigated and the perpetrators of crimes charged and prosecuted.
 - (v) The application discloses no cause of action as against the 2nd respondent as the orders sought are not tenable against the 2nd respondent
 - (vi) The application is without merit, an abuse of court process and should therefore be dismissed with costs to the respondents.

Analysis and Determination

56. I have considered the pleadings, rival submissions, cited cases and the law and in my view the issues for determination are:
- i. Whether the respondents violated the petitioner's right under Articles 35, 47 and 50 of the Constitution; and
 - ii. Whether the petitioner is entitled to reliefs sought.



Whether the respondents violated the petitioner's right under Articles 35, 47 and 50 of the Constitution.

The 1st Respondent

57. The petitioner's contention against the 1st respondent revolves around the impugned Notice to Show Cause that gave rise to the proceedings before the 1st respondent. Essentially the petitioner asserts that the process did not uphold the constitutional principles under Articles 35, 47 and 50 of the Constitution}}, and claims that he is innocent.
58. The petitioner's innocence or lack thereof is not a matter for this Court to determine. I say so because the constitutional court while adjudicating this matter is minded of two aspects. First is its duty of review of an administrative body administrative action in light of the constitutional principles. This fact was well addressed by the Court in the case of *Pastoli v Kabale District Local Government Council & others* [2008] 2 EA 300 which was cited with approval in the case of *Solomon Muyeka Alubala (supra)* as cited by the 1st respondent. The Court held that:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Babikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. *Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876.”

59. Secondly being that there is an ongoing criminal proceeding, (Nairobi Criminal case No. 935 of 2017), this Court is inclined to refrain from making a determination that would prejudice the trial court's final determination. This was articulated in the case of *Republic v CS, In Charge of Internal Security & 3 others Ex-Parte Jean Eleanor Margaritis Otto* [2015] eKLR where it was held that:

“The principles which guide the grant of the orders in the nature sought herein are now well crystallised in this jurisdiction. What is important is the application of the same to the facts of each case. Several decisions have been handed down which, in my view, correctly set out the law relating to circumstances in which the Court would be entitled to prohibit, bring



to a halt or quash criminal proceedings. However while applying the said principles to a particular case, the Court must always be cautious in its findings so as not to prejudice the intended or pending criminal proceedings so as not to transform itself into a trial court. The Court in judicial review proceedings is therefore not permitted to delve into the merits or otherwise of the criminal process as that would amount to unnecessarily trespassing into the arena specially reserved for the criminal or trial Court. This Court in determining the issues raised therefore ought not to usurp the Constitutional and statutory mandate of the Respondents to investigate and undertake prosecution in the exercise of the undoubted discretion conferred upon them.

As was held by the Court of Appeal in *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* Civil Appeal No. 185 of 2001:

“The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision...”

60. In view of the foregoing, this Court will focus on the question as to whether the 1st respondent’s proceedings violated the petitioners rights under the cited Articles. It is also noted that the main contention that gives rise to the alleged violation of Articles 35 and 50 of the *Constitution* arises from the 1st respondent’s administrative process which falls under Article 47.
61. The question before this Court accordingly is one of fact. This calls for an examination of the circumstances under which the petitioner’s case was dealt with by the 1st respondent. The Court in this context is concerned with the decision making process and whether the process afforded by the 1st respondent was one that complied with the dictates of Article 47 of the *Constitution*.
62. In light of this the *Constitution* under Article 47 provides that:-
 - (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
63. This principle spelt out Section 4 was noted by the Court in the case of *Tata Chemicals Magadi Limited v Commissioner of Domestic Taxes (Large Taxpayers)* [2014] eKLR as follows:

“The purpose of Article 47 is to uplift the standards of administrative action by providing constitutional standards (see *Dry Associates Limited v Capital Markets Authority and another* Nairobi Petition No. 328 of 2011 [2012] eKLR). The national values and principles of governance articulated in Article 10 among them good governance, integrity, transparency and accountability must be infused in administrative action. In regard to processing of VAT refund claims, Ojwang’ J., (as he then was) in the case of *Republic v Kenya Revenue Authority ex-parte L.A.B International Kenya Limited (Supra)* observed that, “In practical terms, Government has a public duty to effect change to any unprogressive arrangements, such as those that may characterize the operational linkage of the respondent to slothful structures, so as to render the respondent, as well as such structures, capable of responding to the overriding demands of the *Constitution*; and in this regard, ordinary statutory arrangements cannot qualify the constitutional provisions.”



64. The 1st respondent stated that the case against the petitioner was in line with its mandate as spelt out under the Capital Markets Act (CMA). The purpose of the 1st respondent's mandate is captured in the preamble of the Act as promoting, regulating and facilitating the development of an orderly, fair and efficient capital market in Kenya and for connected purposes. Section 11(1) of the CMA provides for its objectives while Section 11(3) sets out its mandate.

65. Furthermore Section 13B empowers the 1st respondent to conduct investigations. The said Section 13B was amended under Section 4 of the CMA (Amendment) Act, 2018 to read as follows:-

Section 13B of the CMA was amended — .

(a) in subsection (1), by deleting paragraph (b) and substituting therefor the following new paragraph -

(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.

(c) by adding the following new subsection immediately after subsection (3)-

(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.

66. The petitioner among his arguments questioned the 1st respondent's overlapping role which he said occasioned bias in the determination and affected the fairness of the process. The Supreme Court in answering a similar issue where the question was the effect of the 1st respondent's overlapping mandate on a parties rights and the 1st respondent's authority in the case of Alnashir Popat & 7 others v Capital Markets Authority [2020] eKLR opined as follows:

“ [38] ...we would like to observe that the importance of capital markets cannot be over-emphasized. The capitals markets are “a fundamental component of the financial sector in achieving a robust and sustaining economic development.”

[39] Due to these fundamental roles that the Capital Markets Authority plays in a country's economy, sound and effective regulation to foster public and investor confidence in the integrity, growth and development of securities markets is imperative.³ Effective regulation also serves the purposes of “protecting investors, reducing systemic risk and ensuring that markets are fair, efficient and transparent.”⁴ It is for these reasons that capital markets world over are highly regulated.

67. The Court went further to note that:-

(46) Is this overlap unconstitutional? In other words, does the overlap foul the nemo judex in causa sua esse principle and is thus unconstitutional as the petitioners argue?



- (47) We do not think that the overlap per se is unconstitutional. The rights to fair administrative action and fair hearing are universal. The natural justice *nemo iudex in causa sua esse* principle is one of the fundamental principles in literally all common law jurisdictions.....
- (49) Having so stated, we would also agree with counsel for the respondent that there are exceptions to most principles. An important exception to the *nemo iudex in causa sua esse* principle raised in this case is where the overlap of functions is a creature of statute and as long as the constitutionality of the statute is not in issue. Enunciating this exception in the Canadian case of *Re W. D. Latimer Co. and Attorney-General for Ontario* (1973), 2 O.R. (2d) 391, affirmed sub nom. *Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129, Dubin, JA stated:

“Where by statute the tribunal is authorized to perform tripartite functions, disqualification [on the ground of bias] must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task.”

68. The Court proceeded to note that:

- “(55) In the circumstances, we find and hold that Section 11(3) (cc) & (h) of the CMA Act is not unconstitutional. The overlapping mandate does not per se render the Section unconstitutional. What might turn out to be unconstitutional is the discharge of that dual mandate.
- (56) Is that the case in this matter? Did the respondent, in its attempt to adjudicate over the issues raised in this matter act or was likely to act unconstitutionally?
- (57) These questions thrust to view the critical qualifications given in both the *Brosseau* and *Latimer* Cases that the exception to the *nemo iudex in causa sua esse* principle is on the assumption that “the constitutionality” of the statute is not in issue and in the discharge of its overlapping mandate, a tribunal does not go “beyond the performance of the duties imposed upon it by the empowering legislation.”
- (58) Besides the universal application of the *nemo iudex in causa sua esse* principle, in our system, the principle is also entrenched in our 2010 Constitution. The rights to fair administrative action and fair hearing are constitutionally underpinned under Articles 47(1) and 50(1) of the 2010 Constitution.”

69. In the end the Court held that:-

- “(67) In this case, we find and hold that in the discharge of its mandate under the CMA Act, the respondent must always first determine whether or not its act or decision is judicial or quasi-judicial and whether or not it is likely to adversely affect the rights the persons or bodies under investigation. If it is either of the two or both, it must comply with the requirements of impartiality and independence under Articles 50 (1) and 47 of the *Constitution*. And it has no difficulty in doing so as Sections 11A(1) and 14(1) of the CMA Act empowers



the respondent to delegate its functions and powers to other bodies or persons.
As such, the objectives of the CMA Act will still be realized.”

70. From the foregoing discussion it is undeniable that the 1st respondent does indeed have the mandate to carry out its overlapping role as empowered by the Act and as guided by the Supreme Court’s direction. Moreover, that the 1st respondent is empowered to exercise this power to all under its authority. The question that remains therefore is whether in carrying out this role in the process the 1st respondent breached the constitutional principles, of fair administrative action.
71. From the evidence placed before this Court it is apparent that there were concerns raised concerning NBK’s affairs. The 1st respondent in its bundle of documents shows their investigative steps in the matter spanning from the year 2017. Following the investigations, the 1st respondent issued the Notice to Show Cause dated March 5, 2018 to the petitioner outlining the reasons for their decision. The 1st respondent makes known that a catalogue of the evidence relied upon was attached to the Notice. The petitioner in his response dated March 10, 2018 alluded to affidavits and other documents, not being clear and complete.
72. It is further noted that the petitioner during the hearing as can be seen from the minutes attached to the 1st respondent’s replying affidavit, brought up the issue of incomplete documentation such as the affidavits and missing information that was being relied upon during the proceeding. His Counsel opposed the production of evidence he had not been issued with prior and yet expected to make a response to it on his feet.
73. The petitioner during the hearing also informed the panel that he was not aware of the payment made to Kiplagat and Company Advocates. It can be seen from Mr. Kiplagat’s response that the payment was not made in favour of the petitioner but Richard Langat who was the firm’s client and member of the NBK Board. No witnesses were cross examined, as his advocates never made any such request. The proceedings continued and were concluded. This was followed by an email dated April 5, 2018 of the 1st respondent’s notification of enforcement of action.
74. Owing to the facts presented in this case I am of the considered view that the 1st respondent’s administrative action left room for one to wonder whether the fair administrative principles was judiciously adhered to. From the proceedings annexed to the replying affidavit its shown that the issue of incomplete affidavits and documents was raised by the Petitioners counsel. A response by one James Ndegwa is very strange. His response is as follows:-
- “But in terms of applicable evidence, that I want to assure you, it has been the evidence which we will be looking at for considering your client’s case is what has been provided to you. I am imagining what has been blanked off means it is not actually relevant to your client. It must be referring to other persons who are caught up in this matter. But I think the management will be able to further clarify.”
75. Mr. Ndegwa was the chairman of the Board and he was admitting that indeed the affidavits and documents had some parts missing and he gave the reason for the missing portions as they related to other people not parties to the proceedings. No wonder the petitioner’s counsel did find it necessary to pursue this line. Before this Court the affidavits and other annexures to the replying affidavit by Mr. Abubakar Hassan Abubakar are complete and very clear.
76. Article 35 in essence provides:-
- (1) Every citizen has the right of access to--



- (a) information held by the State; and
 - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
- (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

77. I find the decision of the Court of Appeal with regards to Article 47 of the Constitution in the case of *Judicial Service Commissioner vs. Mbalu Mutava & another (supra)* key to underscore the necessity of the right to a fair administrative action. The Court observed as follows:-

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

78. From the foregoing discussion of the law and case law, the elements on how to conduct a fair administrative action are fundamental constitutional rights and all administrative bodies are required to adhere to them without fail. I am convinced that the manner in which the 1st respondent carried out its proceedings and made a determination may not have met the standards of fairness guaranteed under Article 47 of the Constitution in turn violating Article 35 of the Constitution. An explanation was given and investigations carried out by the 2nd respondent leading to the criminal case the petitioner is facing. He has the platform to challenge the evidence.

79. That said I am inclined to agree with the 1st respondent on the issue that the dictates of Article 50 are not applicable in the context of an administrative proceeding. This was well articulated by the Court of Appeal in the case of *Judicial Service Commission v Mbalu Mutava & another (supra)* where it was observed as follows:

“(22) That leads me to the consideration of articles 47 and 50 of the Constitution. The complexity of this appeal has partly been caused by the simultaneous invocation of the right to fair administrative action under article 47(1), the right to fair hearing under article 50(1) and natural justice – the right to fair hearing under the common law.

Although on the surface, the three principles appear to refer to the same thing, on deeper examination they are of different legal character and their application may not be necessarily the same. Without attempting to lay an exhaustive distinction, the right to fair administrative action under article 47 is a distinct right from the right to fair hearing under article 50(1). Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a



fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law. “Fair hearing” in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body.

It is clear that fair hearing as employed in article 50 is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By article 25 that right cannot be limited by law or otherwise.”

The 2nd Respondent

80. The petitioner’s case involving the 2nd respondent revolves around the fact that the 2nd respondent instituted criminal proceedings against him owing to the facts arising from the impugned Notice to Show Cause and the evidence there of. The 2nd respondent in its grounds of opposition objected this notion citing their constitutional mandate under Article 157 of the *Constitution*. It was added that the petitioner had not demonstrated that the criminal proceedings were mounted with ulterior motives or in excess of their power or that substantial injustice would result if the criminal proceedings ensued.

81. The constitutional mandate and power of the 2nd respondent is drawn from Article 157 of the *Constitution* where sub-article 6 provides that:-

The Director of Public Prosecutions shall exercise State powers of prosecution and may--

- (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
- (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
- (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

82. In this regard the 1st respondent is able to perform its functions independently as empowered by sub-Article (10) which provides that:-

- (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

83. The 1st respondent is in the same way required to exercise its power and carry out its mandate while observing the principles set out under sub-Article 11 which provide:

In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

84. The Courts have similarly recognized the 1st respondent’s constitutional mandate as seen in the case of *Justus Mwenda Kathenge vs. Director of Public Prosecutions & 2 others* [2014] eKLR where the court



while addressing its mind on the mandate of the respondent under Article 157 of the Constitution opined as follows while citing similar cases with approval:

It is now trite that Courts cannot interfere with the exercise of the above mandate unless it can be shown that under Article 157(11);

- (i) he has acted without due regard to public interest,
- (ii) he has acted against the interests of the administration of justice,
- (iii) he has not taken account of the need to prevent and avoid abuse of Court process.

The reasoning in all the above cases would lead to only one conclusion; whereas the DPP has the ultimate discretion in determining which complaint should lead to a criminal prosecution, where that power is seen to have been manifestly abused, the High Court can intervene by powers conferred by Articles 165(3)(d)(ii) of the Constitution and stop that abuse, including where the Court system is being used to settle scores and to put an accused person to great expense in a case which is clearly not otherwise prosecutable.

85. The Court of Appeal in the case of Diamond Hasham Lalji & another v Attorney General & 4 others [2018] eKLR also addressing the mandate of the 1st respondent held as follows:

“(33) From the foregoing, there cannot be any doubt that the prosecutorial discretion of DPP is not absolute. It is limited by Article 157(11) which specifies the mandatory considerations that underlie the exercise of discretion; by the constitutional principles to which we have referred and by statute.”

86. The Court went on to state that:-

“(34) It is also indubitable that the constitutional prosecutorial power of DPP is reviewable by the High Court as Article 165(2)(d)(ii) of the Constitution ordains. However, the doctrine of separation of powers should be respected and the courts should not unjustifiably interfere with the exercise of discretion by DPP unless it is exercised unlawfully by, inter alia, failing to exercise his/her own independent discretion; by acting under the control and direction of another person; failing to take into account public interest or interest of the administration of justice in all their manifestations; abusing the legal process; and by acting in breach of fundamental rights and freedoms of an individual.

The DPP is entitled to make errors within his constitutional jurisdiction and the decision will not be reviewed solely on the ground that it was based on misapprehension of facts and the law. (*Matululu and Anor v DPP* [2003] 4 LRC 712). Further, authority show that courts are generally reluctant to interfere with prosecutorial decisions made within jurisdiction.”

87. As guided by the cited authorities it is clear that this Court will be reluctant to interfere with the mandate of the 1st respondent unless the petitioner has clearly demonstrated that it acted without due regard to public interest, acted against the interests of the administration of justice or it did not take account of the need to prevent and avoid abuse of Court process.

88. From the facts of this case, it is observed that other than joining the 2nd respondent as a party with the intent to stop any proceedings with relation to the 1st respondent’s Notice to show cause, no case is



made out against the 2nd respondent. For a constitutional cause to succeed reference must be made to the guiding principles on the required threshold as set out in the case of *Anarita Karimi Njeru v The Republic* [1976-1980] KLR 1272. In this regard the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR held as follows:-

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

89. The Court went on to opine that:

“Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

90. From the foregoing I find that the petitioner has not made out a case against the 2nd respondent to warrant this Court’s intervention under its supervisory jurisdiction. Accordingly I find that the 2nd respondent did not violate the petitioner’s constitutional rights as alleged.

91. Further I do not find any violation of the petitioners constitutional rights in him being served with the Notice to show cause by the 1st respondent. They acted in line with the provisions of the *Capital Markets Act*. They acted on a complaint received and acted on. The petitioner had sufficient time to prepare for his case. His request for an adjournment was granted.

Whether the petitioner is entitled to the reliefs sought

92. From the above analysis and having addressed my mind on the matters herein I find as follows:-

- (1) The petition against the 1st respondent doesnot succeed as the reason for failure to issue complete documents was fully explained by the Board’s chair. Secondly nobody stopped counsel for the petitioner from calling witnesses for cross examination. The petitioner was investigated and later charged with a criminal offence. The trial court will make a determination on the same.
- (2) A declaration that the Notification of Enforcement Action National – Bank of Kenya dated April 3, 2018 be quashed is declined.
- (3) Prayer no. (iv) for quashing of the Notice to Show Cause dated February 9, 2019 is declined.
- (4) Prayer no. (vi) is declined.
- (5) The petition is dismissed with costs.



Orders accordingly.

DELIVERED VIRTUALLY, SIGNED AND DATED THIS 31ST DAY OF MAY, 2022 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

