



Ahmed v Capital Markets Authority (Judicial Review Application 269 of 2018) [2019] KEHC 10497 (KLR) (21 January 2019) (Ruling)

Munir Sheikh Ahmed v Capital Markets Authority [2019] eKLR

Neutral citation: [2019] KEHC 10497 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW APPLICATION 269 OF 2018

P NYAMWEYA, J

JANUARY 21, 2019

IN THE MATTER OF ARTICLES 10, 47 & 50 OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF SECTIONS 4, 6, 7, 9, 11, & 12
OF THE FAIR ADMINISTRATIVE ACTION ACT**

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE
TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS**

BETWEEN

MUNIR SHEIKH AHMED APPLICANT

AND

CAPITAL MARKETS AUTHORITY RESPONDENT

RULING

The Application

1. A ruling was delivered by this Court on 13th December 2018, on an oral application made by counsel for the Applicant herein that the Respondent’s Supplementary Affidavit sworn on 24th August 2018 by



Abubakar Hassan Abubakar either be expunged from the record, or that the Respondent be compelled to produce the full minutes annexed thereto. This application was made arising from the fact that the Respondent had redacted, by way of blanking out, a substantive part of the minutes that were annexed to the said Supplementary Affidavit.

2. This Court in its ruling made the following orders upon hearing the parties on the said application:
 - a) The Respondent's Supplementary Affidavit sworn on 24th August 2018 by Abubakar Hassan Abubakar is hereby expunged from the record for reasons of being incomplete in material respects as regards the minutes of the relevant Respondent's Board's meetings.
 - b) The Respondent shall, within three days of the date of this ruling, file and avail only to the Court at the first instance, three copies of a fresh supplementary affidavit annexing inter alia the accurate and complete minutes of all its meetings and discussions leading to the decision to issue the impugned Notice of Enforcement Action dated 3rd April 2018 against the Applicant.
 - c) The Court shall make its ruling on disclosure of the said minutes, and shall receive submissions on and rule on any redactions if necessary, at a hearing to be held on 17th December 2018 at 2.30 p.m at the Mombasa High Court, where this Court is currently sitting.
 - d) The substantive hearing of the Applicant's Notice of Motion shall thereafter proceed on 18th December 2018 at 2.30 pm at Mombasa High Court.
 - e) The costs of the instant application shall be in the cause.
3. The Respondent duly availed three copies of a fresh supplementary affidavit to the Court that was filed on 17th December 2018, and on the same day this Court made a ruling that various minutes of the Respondent's Board meetings held on 23rd July 2017, 29th November 2017, 11th December 2017, 30th January 2018, 16th March 2018 and 23rd March 2018 were relevant and should be disclosed. Some minutes were also found not to be relevant and the Respondent was allowed not to disclose and to redact them.
4. The Court thereupon set the matter for hearing to hear submissions on the redaction or otherwise of the minutes it had ruled should be disclosed. At the said hearing held on 19th December 2018, Mr. Githendu, the counsel for Respondent, submitted for further redaction of sections of the minutes of the Respondent's Board meetings of 13th July 2017, 29th November 2017, 11th December 2017, 30th January 2018, 16th March 2018 and 23rd March 2018 .
5. The grounds for the redaction put forward by Mr. Githendu are firstly, that some of the minutes do not mention or concern the Applicant; secondly, that some of the minutes were on the management's presentations to the Board and were thus not the Board's deliberations; lastly that there were some minutes which were on a presentation by the Respondent's auditors.
6. Mr. Issa Mansur, the counsel for the Applicant, in response submitted that the minutes sought to be suppressed were relevant to show the process of decision making by the Respondent, which is one of their complaints. Further, that the said minutes were not minutes of the management meetings but minutes of meetings of the Respondent's Board as shown by their title, and were therefore minutes showing deliberations by the Respondent's Board. In addition, that the position that it is only minutes where the Applicant is mentioned that should be disclosed is irrational, as the investigation by the Respondent was of the National Bank of Kenya, of which the Applicant as the Chief Executive Officer was found culpable, which is also one of their complaints.



The Determination

7. The main issue before this Court is whether the Respondent can further redact minutes of meetings held by its Board that have been found by this Court to be relevant to the proceedings herein. This Court in its ruling of 13th December 2018 referred to the duty of candour owed by a defendant in judicial review proceedings to give a full and accurate explanation of its decision-making process, and found that the Respondent is thus under a duty to disclose to this Court its decision making process as regards the Notice of Enforcement Action dated 3rd April 2018, and to produce the necessary Board minutes in this regard, to aid this Court reach a just and fair decision on the issue. It is on this basis that it ordered disclosure of the minutes now sought to be further redacted by the Respondent.
8. The specific principles that apply to the redaction of a document were the subject of the Canadian decision by the Supreme Court of Victoria in *Gunns Ltd and Ors v Alexander Marr and Ors*, (2008) VSC 464, where it was held that in assessing the claim of a party to be entitled to mask up part of a discovered document, it is important to ensure that the redaction of irrelevant parts of the document does not create gaps affecting the intelligibility or meaning of the remaining portions of the document which are produced on inspection. The Court in this respect held as follows:

“There is a serious risk that too assiduous a masking of documents on the grounds of irrelevance will create gaps affecting the ready comprehensibility of the remaining portions of the document and of the context in which those portions appear. If for this, or any other, reason, masking on the ground of irrelevance would detract from a proper understanding of the meaning and significance of the admittedly relevant parts of the document, then such masking is not justified.”
9. It is also notable that section 6 and 7 of the Kenyan *Evidence Act* provide as follows in this regard on relevancy of a fact:
 - “6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places.
 7. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity for their occurrence or transaction are relevant.”
10. In the present application, the reasons proffered by the Respondent’s counsel for redacting parts of the minutes already found to be relevant by this Court would present the risk of the disclosed minutes not aiding the Court, as the context in which they are made would not be clear. It is in this regard notable that the decision by the Respondent Board as regards the Applicant was reached in its 293rd Special Meeting held on Friday, 23rd March 2018 and is recorded in Minute 4/293/2018 of the minutes of the said meeting under an item titled “Enforcement Action to be taken by the Board on the National Bank of Kenya matter”.
11. Therefore, any presentations, discussions and decisions made on, or in relation to this item will be relevant and provides the context for the Respondent’s decision as against the Applicant. This will include the presentations made on this item by the management to the Board, or by auditors, and whether or not the Applicant is explicitly mentioned in the discussions on the said item, as the said



presentations and discussions ultimately informed the decisions made by the Respondent's Board on the Applicant .

12. In the premises, I decline the Respondent's application for further redaction of the minutes of Respondent's Board meetings of 13th July 2017, 29th November 2017, 11th December 2017, 30th January 2018, 16th March 2018 and 23rd March 2018, that were ordered to be disclosed by this Court in its ruling of 17th December 2018. The costs of the said application shall be in the cause.
13. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF JANUARY 2019

P. NYAMWEYA

JUDGE

