



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO. 606 OF 2016

IN THE MATTER OF ARTICLE 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF SECTIONS 4, 5 AND 6 OF THE FAIR ADMINISTRATIVE ACTION
ACT OF 2015**

AND

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW
REFORM ACT CAP 26 OF THE LAWS OF KENYA**

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE CAPITAL MARKETS ACT

AND

IN THE MATTER OF APPLICATION FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

VERSES

CAPITAL MARKETS AUTHORITY.....RESPONDENT

EX PARTE: JOYCE OGUNDO

JUDGEMENT

Introduction

1. By a Notice of Motion dated 9th December, 2016, the *ex parte* applicant herein, **Joyce Ogundo**, seeks

the following orders:

1. That the Honourable court be pleased to issue an order of Certiorari to remove into this honourable court for the purposes of quashing the Notice to Show Cause dated 31st August 2016.
2. That the Honourable court be pleased to issue an order of Prohibition restraining the Respondent by themselves, their agents or employees from proceeding with the Notice to Show Cause dated 31st August 2016 or purporting to undertake any other disciplinary procedure against the applicant contrary to the provisions of the law.
3. That any other order that the honourable court deems fit and appropriate to grant.
4. The costs of this Application be provided for.

Ex Parte Applicants' Case

2. According to the applicant, she at one time directors of **Uchumi Supermarkets Limited** (hereinafter USL) but ceased to be directors more than one year ago. On 31st August 2016, the Respondent herein, **Capital Markets Authority** (hereinafter referred to as "CMA") brought allegations against her that, by reason only of having sat in USL board meetings, she had violated certain provisions of the **Capital Markets Act** (hereinafter referred to as "the Act"), the **Capital Markets (Securities) (Public Offers Listing and Disclosures) Regulations** (hereinafter referred to as "the Regulations") and the **Capital Market Guidelines on Corporate Governance by Public Listed Companies** (hereinafter referred to as "the Guidelines"). Accordingly, the Respondent issued a Notice to Show Cause (hereinafter NTSC) calling upon her to appear before it and show cause why sanctions should not be issued against her in accordance with sections 25A and 11(3)(cc) of the Act.

3. It was averred that the NTSC alleged that the applicant sat as a member of the Board of Directors of USL when certain decisions were allegedly taken which according to the Respondent violated certain provisions of the Act as well as some regulations and guidelines made thereunder.

4. It was the applicant's case that the minutes of the meetings which she is alleged to have attended, however, revealed the following;

a. That no substantive resolutions were made as the board simply received reports from the management as well as consultants on various matters that came up for deliberation before the board and which are referred to in the NTSC.

b. That she did not attend some of the meetings.

c. That the issues that the respondent alleged were discussed in the said meetings were started by the previous board of directors and were completed by the board of directors that succeeded them in circumstances that make it impossible to ascertain precisely which board was at fault if at all.

d. That some directors who also sat in the aforesaid USL board of directors have not been subjected to the same sanctions and penalties as she had thereby pointing at deliberate discrimination.

5. It was therefore the applicant's case that the respondent wished to;

a. Punish her personally for wrongs allegedly committed by the Board of Directors while acting collectively and on the basis of information and professional advice received in good faith from the management of USL as well as the professional advisors of USL.

b. Punish a person who was not a director of a listed company who does not fall within their regulatory ambit.

c. Punish her simply for having sat as directors of a listed company that faced liquidity challenges without any allegations or proof whatsoever to the effect that the liquidity challenges were caused or contributed to by any decisions that she took either collectively as a board or individually.

d. Punish her individually because she sat in a board of directors meetings where the board members held different professional opinions on the matters raised in the NTSC from those of the respondent.

6. The applicant averred that despite objections from her, the Respondent and summoned her to appear before it on 7th December 2016 for hearing which hearing, if allowed would not only violate her Fundamental Rights and Freedoms but also that it would be illegal , *ultra vires* for reasons:

- a. Section 25A empowers the CMA to impose sanctions and penalties *inter alia* on issuers of listed securities and directors of listed companies for proved violations of provisions of the Act. The applicant was not a Substantive Director of Uchumi Supermarkets Limited but rather an alternate to the Principal Secretary.
- b. The CMA has no jurisdiction to impose sanctions and/or penalties against a person who is not a substantive director, who has no rights to attend all meetings but only attends some and upon request.
- c. That the CMA has no jurisdiction to sanction a civil servant who would attend board meetings only upon request and who received neither communications nor correspondences.
- d. That being a civil servant, her presence on the Board was not by virtue of any technical competence but merely as an agent of the Principal Secretary.
- e. Being a civil servant and while acting in the course of her employment, she cannot be held personally culpable. Under the **Government Proceedings Act**, it is the government through the Attorney General which takes responsibility for acts and omissions of Civil Servants while acting in an official capacity.
- f. That the CMA has no jurisdiction to impose sanctions under Section 25A against a director with respect to decisions taken at a meeting which the director did not attend.
- g. That the Respondent has no jurisdiction under section 25A(C) of the Capital Markets Act to impose any sanctions or penalties against a person who is not a current sitting director of a listed company. The applicant was not a current sitting directors of a listed company at the time of the proceedings.
- h. Section 25A empowers the CMA to impose sanctions and penalties *inter alia* on issuers of listed securities and directors of listed companies for proved violations of provisions of the Capital Markets Act.
- i. Violations by issuers of listed securities can only be committed by the Board of Directors of the said issuers acting as a Board of Directors of the said issuers while violations by directors can only be committed by persons who are currently serving as directors of the said issuers while acting in a personal capacity.
- j. CMA intends to proceed against the applicant herein personally for alleged violations of the **Capital Markets Act** by Uchumi Supermarkets Limited (an issuer of listed securities securities) inspite of the fact that;
 - i. Where it is alleged that a provision of the Capital Markets Act has been violated by an issuer of listed securities , then CMA can only impose sanctions and penalties on the said issuer;
 - ii. The applicant herein is not a director of Uchumi Supermarkets Limited (the issuer) and accordingly do not fall within the regulatory ambit of CMA.
 - iii. Section 25A of the Act does not empower the CMA to issue sanctions and/or penalties upon a person who is not a director of listed companies.
 - iv. By purporting to summon and try the applicant for alleged commissions of criminal offences by Uchumi Supermarkets Limited (acting through its Board of directors) under sections 30D (1)(a) and 34(b) of the Capital Markets Act, CMA will purport to exercise an original criminal jurisdiction which is reserved solely for the High Court and Magistrate's Court under Article 165(3) of the Constitution and section 6 of the **Magistrate Courts Act, 2015**.
 - v. By purporting to summon and any attempt to impose punitive penalties and sanctions against a

former director of an issuer of listed securities for decision taken by a former Board of Directors of the said issuer in numerous successive board meetings some of which were not attended by the applicant herein, CMA is not only punishing directors individually and personally for decisions taken by the Board of Directors acting collectively, and in some cases on the basis of the advice given by the management as well as professional advisors (which is clearly contrary to law) but is also punishing directors for decisions taken in meetings which they did not attend.

7. The applicant lamented that notwithstanding the foregoing illegalities, the Respondent summoned her on 30th November 2016 to appear before it and undergo the illegal proceedings. She disclosed that she was being charged and tried for the alleged contravention of the ***Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya of 2002*** which regulations had since been repealed by ***The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015***, hence she would be subjected to illegal proceedings.

8. For these reasons, the Applicant was constrained to institute these proceedings to protect her interests lest she was subjected to irreparable damage.

9. It was submitted on behalf of the applicant through her legal counsel, **Mr. Arwa**, that though the Respondent claims to derive jurisdiction to issue the NTSC and proceed with its hearing from section 11(3)(cc) as read with section 25A of the Act, section 11(3)(cc) gives the Respondent jurisdiction to impose sanctions for breach of the provisions of the Act, or regulations made thereunder or for non-compliance with the authority's requirements or direction. According to the applicant, this section makes it clear that the Respondent can only issue sanctions where the following conditions are fulfilled; to wit, where a provision of the said Act, or regulations made thereunder has been breached (or where any directions or requirements given by the Respondent) have been breached (which is not relevant for the purposes of this case).

10. It was submitted that section 25A of the Act on the other hand proceeds to define the scope of the powers donated under section 11(3)(cc) of the Act and that from the said provisions, the sanctions and/or penalties can only be imposed on licensed or approved person, listed company, employee of a listed, licensed or approved person or director of a listed licensed or approved person. To the applicant, before the Respondent can claim to have jurisdiction to impose sanctions against any person under section 25A as read with section 11(3)(cc) of the Act, there must be a breach of a provision of the Act or Regulations made thereunder and the person against whom the sanctions and/or penalties are sought to be imposed must be the person who committed the alleged breach. In this case it was submitted that both of these conditions have not been fulfilled.

11. It was submitted that in this case no breach of a statute or legislative instrument is possible where the legislative provisions alleged to have been breached do not exist and the legislative provisions alleged to have been breached do not impose any duty whatsoever capable of being breached on the person alleged to have breached it as is the position in this case.

12. It was submitted that while the NTSC alleged that the applicant (or USL Board) had breached sections 30D(1)(a) and 34(b) of the Act, the particulars of charges levelled against the applicant in the NTSC itself indicated that the applicant was accused of breaching totally different laws which actually do not exist, whether in the Act itself or elsewhere in the Laws of Kenya. It was submitted that although section 30D(1)(a) of the Act provide that "A person who makes a false, misleading or deceptive statement in a prospectus commits an offence", the offence with which the applicant (or USL Board) were charged with in the NTCS is that of "*Facilitating or omitting to prevent "the provision of misleading or deceptive statement in the information memorandum"*" which is not outlawed by the same or any other provision. Similarly, while section 34(b) criminalises furnishing or publishing information or return the content of which are known to be untrue, incorrect or misleading because of material omission", the crime with which the applicant has been charged and of which she is required to show cause is that of "*Facilitating and/or omitting to prevent the furnishing or publishing of information known to be untrue, incorrect or misleading*", an offence not outlawed by the said section.

Respondent's Case

13. The application was however opposed by the Respondent.

14. According to the Respondent, on December 18th, 2015, CMA received a complaint concerning the affairs of Uchumi Supermarkets Limited (hereinafter referred to as “USL”) from USL, a listed company at the Nairobi Securities Exchange and as such, falls under the oversight of the CMA under *the Act*. The allegations contained in the complaint had the effect, or potential effect, of negatively affecting the performance of the USL shares at the Securities Exchange. It was therefore imperative for CMA to conduct an inquiry into the said allegations with a view to securing investor interests. CMA commenced inquiry into the affairs of USL for the period of 2012 to 2015.

15. It was averred that CMA’s inquiry into the affairs of USL was narrowed down to the following specific areas:

- i. Whether the Rights Issue proceeds floated in November, 2014 were actually received and used for the intended purposes as disclosed in the approved Information Memorandum (IM);
- ii. Whether the asset sale and lease back agreements entered by USL with a company called Rent Co.
 - a) Were sanctioned by the USL’s Board;
 - b) The resultant funds were received by USL;
 - c) How the proceeds were used;
 - d) Whether the transactions were in the best interest of USL; and
 - e) Whether the relevant required disclosures were made and approvals obtained;
- iii. Whether the financial statements filed with CMA and shared with the public and potential investors for the period between the year 2010 to the period ended June 30, 2014 (which were relied upon by USL to raise funds through the Rights Issue and subsequent financial statements for the period ended December 2014) were free from misstatements; and
- iv. Whether there were breaches of fiduciary duties and conflicts of interest by the USL Board and Management in their conduct of the affairs of USL.

16. According to the Respondent, in the course of conducting the inquiry, it interviewed various persons of interest, including the *ex Parte* Applicant, who would have information that would be useful to shed more light into the matters under investigations. Upon appraising the information gleaned from the said inquiry, the Respondent formed the view that the *ex parte* Applicant, as an alternate director of USL at the material times under inquiry ought to be issued with a Notice to Show Cause (hereafter “NTSC”) to enable her give her responses to specific matters which the CMA established needed to be responded to or otherwise clarified by the former directors and managers of USL. The CMA consequently issued the *ex parte* Applicant with a NTSC dated 31st of August 2016, in which the *ex parte* Applicant was provided with background information on the basis of which the framed issues were pegged. The NTSC framed the specific questions with clarity that the *ex parte* Applicant was expected to respond to and *ex parte* Applicant was given fourteen (14) days within which to respond to the allegations therein in writing.

17. It was further averred that the *Ex parte* Applicant was informed of the procedure to be followed upon receipt of her written response to the allegations. That she would be afforded a formal oral hearing before the CMA with a view to allowing her elaborate her responses as appropriate. The CMA would also seek any clarifications if need be. It was averred that on 9th September 2016, the *ex parte* Applicant through her Advocates, **Rachier and Amollo Advocates** sought an extension of the time limited for filing her

response to the NSTC which request was granted for a further ten (10) days, to 24th September 2016. By the letter dated 16th September 2016, the *ex parte* Applicant through her Advocates subsequently sought documentation informing the NTSC including the KPMG Report. The *ex parte* Applicant caused a further letter dated 19th September 2016 to be written to the CMA seeking specified documentation. Further the *ex parte* Applicant alleged that the matters alluded to in the NTSC were still under investigations and that they were matters in any event raised by Ernst and Young in Court in High Court Constitutional Petition Number 385 of 2016. The said letters were responded to by the CMA on September 23, 2016.

18. It was averred that the *ex parte* Applicant through her said advocates, filed with the CMA a Notice of Preliminary Objection contesting the CMA Board's jurisdiction to entertain the NTSC, amongst other objections which objection was heard on 24th October 2016 and upon consideration dismissed on the ground that the matters raised therein were either evidential matters that would be more effectively addressed through the requested hearing or matters raised based on a misinterpretation or inadequate appreciation of the statutory mandate of CMA.

19. Upon being informed of the dismissal and required to appear before the CMA on 30th November 2016, the *ex Parte* Applicant requested CMA for more time to enable her appear as the above said date was not convenient to her and her legal counsel. She further requested that the matter be adjourned to a later date preferably after 7th December 2016 which request was acceded to and the CMA set the date for the hearing on 7th December, 2016. Instead of appearing or exercising her right of appeal against decisions by the CMA before the Capital Markets Tribunal, the Ex parte Applicant filed the instant proceedings to stop the proceedings scheduled for 7th December 2016.

20. It was the Respondent's position that:

a. In respect of the allegation by the *ex parte* Applicant that she was not a substantive director of USL and therefore purportedly not liable to be held accountable under the CMA's mandate under the Act, under Article 84 of the USL Articles of Association, an alternate director is not deemed to be an agent of the substantive director appointing him/her but deemed to be "*an officer of the company and shall not be deemed to be the agent of the director by whom (they are) appointed*". To the Respondent, the USL Articles of Association is the instrument which empowered the *ex parte* Applicant to sit in the USL Board. She is therefore bound by its provisions;

b. The CMA can impose sanctions and penalties upon a director, including an Alternate director, of a public listed company, under section 25a of the **Capital Markets Act** for breach of his/her fiduciary duty and for breach of the provisions of the **Capital Markets Act**, Regulations, Rules, Guidelines, Notices or Regulations. The *Ex parte* Applicant cannot legitimately claim that she was an agent of another director. A Director, Alternate or Otherwise, is also obliged to be alert, diligent and to articulate his/her conscientious opinion, which may be a dissenting one, especially where the board of directors is likely to make wrong decisions;

c. At all material times under inquiry into the affairs of the USL, the *ex parte* Applicant was a Board member of USL. The matters that form the subject of the inquiry as against the *ex parte* Applicant took place during her tenure in the USL Board. Since the USL is a listed company, its Board of Directions at all material times fall within the supervisory mandate of the CMA. Consequently, the CMA has a mandate to inquire into matters that took place when the *ex parte* Applicant was a Board member of the USL Board regardless of whether she is a current sitting director of the USL Board. It is misguided for the *ex parte* Applicant to suggest that since she is no longer a USL Board member, she cannot be held accountable for acts or omissions committed during the period when she held such a position and properly fell within the supervisory mandate of the CMA;

d. In so far as the *ex parte* Applicant alleges that she did not attend the meetings where the matters under inquiry were discussed and approved, this is part of what the *ex parte* Applicant is entitled to raise before the CMA during the hearing opportunity granted to her and that this petition seeks to

postpone or otherwise prevent. It is a matter of evidence for consideration on its merits. The *ex parte* Applicant attended USL full board meetings and committee meetings after her appointment on September 26, 2013 wherein the issues raised in the NTSC were discussed which meetings were held on November 11, 2013, February 27, 2014, July 31, 2014, October 29, 2014, February 20, 2015 and March 25, 2015.

e. The question of whether substantive resolutions were made during the said Board meetings is once again a question of fact for determination by the CMA and not this Court. The said Minutes will speak for themselves on this question;

f. The Respondent was of the view that the *ex parte* Applicant cannot hide behind presentations by management or experts appearing before the Board. Ultimately, the Board makes informed decisions with the Board members going on record for their decisions arising thereof. The *ex parte* Applicant has not suggested that she did not understand what was happening before the Board or that she dissented and cast a dissenting vote to the resolutions in question;

g. The Respondent further believed that the *Ex parte* Applicant is responsible for whatever decisions she made while sitting in the USL Board. She can neither hide behind the Attorney General nor the Principal Secretary who weren't sitting in the USL Board nor claim that she was not in a position to make or otherwise participate in those decisions as a duly appointed alternate director in attendance at the relevant meetings.

h. It was the Respondent's case that the *ex Parte* Applicant's innocence or culpability in respect of the allegations in the Show Cause Letter can only be established after she is subjected to the Show Cause Hearing and CMA is allowed to objectively consider her oral and written submissions.

21. According to the Respondent, it has jurisdiction under section 25A of The Act to impose sanctions or penalties on a director for breach of the provisions of the Act so long as the director has been found culpable of contributing or otherwise participating in actions resulting in regulatory infractions. This jurisdiction ranges from former and current directors so long as the subject matter in question arose during the tenure of the said former director.

22. It was contended that the Respondent may impose sanctions or penalties upon a director who was privy to the discussions / attended a board meeting where the decisions that infringe the Capital Markets Regulatory framework were made including decisions the director approved by circularization.

23. To the Respondent, the allegation that it acted as the accuser, prosecutor and judge is misplaced. The CMA has administrative powers donated by law to investigate any complaints of breach of its Act and regulations and to impose administrative enforcement action as appropriate. The action taken by the CMA does not constitute a usurpation of the powers donated to the High Court and the Magistracy to impose penal sanctions that are criminal in nature as such actions are purely administrative in nature.

24. In its view, it is incorrect for the *Ex parte* Applicant to suggest that she has been sanctioned illegally using repealed guidelines since the ***Corporate Guidelines on Governance Practices by Public Listed Companies in Kenya (2002)*** (now repealed) (hereinafter "the Guidelines") were in force at the time when the *ex Parte* Applicant committed the regulatory breaches. Therefore, they were the applicable Guidelines to the allegations facing the *ex parte* Applicant. It was disclosed that the ***Capital Markets (Code of Corporate Governance Practices for Issuers of Securities to the Public 2015)*** (hereinafter "the 2015 Guidelines") was gazetted on 4th March 2016 vide Gazette Notice No. 1420 while the events forming the basis of the allegations against the *ex parte* Applicant took place before the 2015 Guidelines came into effect hence the 2015 Guidelines cannot form the basis of the allegations put to the *ex parte* Applicant as to do so would be to give the 2015 Guidelines retrospective effect.

25. The Respondent contended that the *ex parte* Applicant is not the subject of protection under Section 4 of the ***Government Proceedings Act***. At all material times, she was a director of a listed company and by virtue of the provisions of section 25A, the Authority can exercise its powers and subject her to the

hearing of the Show Cause Letter as part of the administrative action against her.

26. It was submitted on behalf of the Respondent that the Act sets up various markets through which both local and international investors are facilitated to invest in public and private companies in Kenya. The Act also sets up a regulatory framework through which investors' interests are protected. This is important given that the investors are not involved in the everyday management of the companies in which they have invested. It was contended that the Capital Markets Authority ('the Respondent' or 'CMA') is set up under the Act with the prime responsibility of supervising, licensing and monitoring the activities of market intermediaries, including the stock exchange and the central depository and settlement system and all the other persons licensed under the Act. The CMA plays a critical role in the economy by facilitating mobilization and allocation of capital resources to finance long term productive investments. The Act grants the CMA various powers to oversee the capital markets and enforce such regulatory measures as will ensure the protection of the investment of the investors.

27. After reiterating the averments in the replying affidavit, it was submitted that most of the complaints made by the Applicant in the Application call for a review of the merits of the allegations against the Applicant in the NTSC. These were listed as whether the Applicant committed any violations of the Act, Regulations, Guidelines or Directives; whether the Applicant was being punished for decisions made by the USL Board of Directors where she was not present; whether the Respondent seeks to punish the Applicant for decisions made by USL Management; whether the decisions by the USL Board of Directors in general, and the Applicant in particular, were made in good faith and based on professional advice by the Management; whether the USL Board of Directors collectively exercised oversight over the USL Management and whether the Applicant can be held accountable for her role therein; whether the Applicant should be asked to show cause when she alleges that she has no material with which to show cause; whether the ***Capital Market Guidelines on Corporate Governance for Listed Companies (2002)*** apply to a director of a listed company yet they cannot be performed or breached by the director to the exclusion of other directors; and whether Regulations 6(2) and 19(3) of the Regulations impose a duty that can be performed/breached by a director.

28. It was submitted that all these questions go into the merits of the allegations made against the Applicant in the NTSC. As the Respondent has not made any decision against the Applicant, it is premature for this Court to be called upon to pronounce itself on these matters as it will be supplanting the Respondent and its statutory mandate as vested under the Act.

29. In support of its submissions, the Respondent referred to the decision by **Mativo, J** in **Ernst and Young LLP vs. Capital Markets Authority Nairobi Petition No. 385 of 2016**.

30. It was submitted that Parliament has in its wisdom granted statutory mandate to the Respondent to promote, regulate and facilitate the development of an orderly, fair and efficient capital markets in Kenya as provided in the preamble to the Act and to facilitate this mandate, the Respondent relied on sections 11(3), 25A(1) and 26(8) of the Act.

31. Based on the foregoing provisions, it was submitted that it is clear that the mandate to enforce compliance with the provisions of the Act, including taking administrative action in the event of breaches is reposed in the Respondent. The Court was therefore urged to exercise judicial deference and decline the invitation by the Applicant to usurp the powers granted to the Respondent by law. In this respect, reference was made to the decision by the Court of Appeal in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012**, where it was held that;

“It is not in doubt that the doctrine of separation of powers is a feature of our Constitutional design and a per-commitment in our Constitutional edifice. However, separation of power does not only proscribe organs of Government from interfering with the other’s functions. It also entails empowering each organ of Government with countervailing powers which provide checks and balances on actions taken by other organs of Government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function.”

32. Further reliance was placed on **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** and **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** for the proposition that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

33. On the authority of **Republic vs. The Council of Legal Education ex parte Keniz Otieno Agira & 23 Others [2013] eKLR** in which **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarsteth [1985] LRC** was cited with approval as well as well as **Susan Mungai vs. Council of Legal Education & 2 Others [2012] eKLR** and **Republic vs. The Council of Legal Education ex parte James Njuguna** it was submitted that there is a long line of authority that judicial review orders are not available against what was done pursuant to the law.

34. It was submitted that judicial precedent is unanimous that the administrative bodies when exercising statutory powers in conducting inquiries or investigations and taking the attendant action enjoy procedural discretion as to the manner in which to conduct the same provided the processes are substantively fair. In this respect the Respondent relied on **Judicial Service Commission vs. Mbalu Mutava and Another [2015]** in which **Githinji, JA** quoted the decision by **Lord Denning MR** in **Selvajan vs. Race [1976] 1 ALL ER 12** and section 4 of the ***Fair Administrative Actions Act*** and it was submitted that the Respondent enjoys discretion as to the manner in which it conducts investigations and inquiries preceding to taking administrative action. Ultimately the Respondent is obliged to be procedurally and substantively fair in its conduct of its proceedings.

35. The Court was therefore urged to dismiss the Application on the basis that it is premature and is intended to encroach on the statutory mandate of the Respondent which is yet to be exercised in respect of the Applicant.

36. As to whether an alternate director of a listed company falls within the Respondent's supervisory mandate, it was submitted that the Applicant cannot lawfully seek to be immunized from accountability arising out of her possible actions or inactions by reason only of being an alternate director representing a permanent secretary in the USL Board of Directors. An alternate director sits in board meetings, deliberates on matters that come up and makes decisions including voting just like other substantive directors. The only distinction is that such director sits on the board courtesy of a substantive director who may be unavailable to attend the subject meeting. In the present case, the alternate attended the gross majority of meetings and during her term participated in 67% of all meetings. Alternate directors enjoy the benefits that accrue with serving as director including earning allowances for attending Board Meetings. Consequently, an alternate director has similar fiduciary duties to the company whenever she sits in the Board of Directors as do substantive directors. The Applicant must therefore be held to account for her acts or omissions while sitting in the USL Board.

37. In this respect the Respondent relied on section 2 of the Act as read with section 2 of the ***Companies Act***.

38. Based on the foregoing definition, it was submitted that an alternate director is deemed a director at the material times when the alternate director occupies the position of a director. The name ascribed to the person occupying the position of director at the relevant time is immaterial in determining whether one is a director. Consequently, at the time when the Applicant occupied the position of director as an alternate, she is deemed by law to be a director. The law recognizes as directors persons occupying the office of director irrespective of the names by which they are called. An alternate director enjoys the rights, privileges and also suffers the burdens and responsibilities associated with being a director. As such, alternate directors are liable for their commissions and omissions as directors.

39. In this respect the Respondent relied on the decision of the High Court of New Zealand in **Strathmore Group Limited vs. Fraser & Ors (1991) 5NZCLC 67, 163**, the decision of the High Court of Queensland in **Markwell Bros Pty vs. CPN Diesels (Old Pty Ltd) (1982) 7 ACLR 425**, Article 84 of the ***Uchumi Supermarkets Limited's*** Articles of Association and averred that the Applicant qualifies as

an officer of the company and thus amenable to the jurisdiction of the Respondent (CMA) under section 25A of the Act.

40. In the Respondent's view, it has the ultimate mandate to enforce compliance with the provisions of the Act, regulations, guidelines or directives made thereunder against, inter alia, directors of a listed company. USL was a listed company at the material time when the Applicant sat as a director thereof. It follows therefore that there can be no valid challenge of the Respondent's jurisdiction and powers to enquire into the Applicant's conduct as a director of USL. For this reason, this ground of challenge has no basis and ought to be dismissed.

41. With respect to the allegation that the NTSC violates section 4 of the **Government Proceedings Act** which immunizes Civil Servants from liability while in the ordinary course of employment, the Respondent was of the view that the provisions of the **Government Proceedings Act** do not apply in the present case, the *ex parte* Applicant's role as a director of USL was separate from her role as a Civil Servant in her capacity as the Director of Trade in the Ministry of Trade and Industry. She earned separate Board allowances for her role as a Board Member of USL which allowances were distinct from her salary as a civil servant.

42. As to whether the Respondent's decision was illegal, the Respondent relied on **De Smith's Judicial Review** where it is stated at page 225 as follows:

“An administrative decision is flawed if it is illegal. A decision is illegal if it;

- a. Contravenes or exceeds the terms of the power which authorizes the making of the decision;***
- b. Pursues an objective other than that which the power to make the decision was conferred;***
- c. Is not authorized by any power;***
- d. Contravenes or fails to implement a public duty.”***

43. It was submitted that the Applicant bears the responsibility to demonstrate that the foregoing test has been satisfied in the circumstances. However, the issues raised by the Applicant under this head will be determined by the Respondent hence the Applicant ought to pursue her claims before the Capital Markets Tribunal.

44. As to whether the Respondent has jurisdiction to entertain the Notice to Show Cause, the Respondent relied on section 26(8) of the Act.

45. To the Respondent, the NTSC contains allegations against the Applicant and the Respondent is obliged under section 26(8) of the Act to afford the Applicant a right to be heard before taking action under section 25 and 26 of the Act. Consequently, it is inaccurate to state, as the Applicant does, that the jurisdiction to entertain the NTSC is premised on sections 25A and 11(3)(cc) of the Act and that sections 25A and 11(3)(cc) of the Act empower the Respondent to impose sanctions and take such other enforcement action against persons or entities in breach of the provisions of the Act, regulations, guidelines or directives.

46. With respect to the contention that the repeal of the **Capital Market Guidelines on Corporate Governance for Listed Companies (2002)** [hereinafter 'the 2002 Guidelines'] the breach of which the Applicant is alleged to have contravened, renders the NTSC defective, it was submitted that the NTSC makes allegations against the Applicant that took place between the year 2010 and 2015 during which time the Applicant was a director in the USL Board. Therefore the applicable Guidelines during the period were the 2002 Guidelines and not the **Capital Markets (Code of Corporate Governance Practices for Issuers of Securities to the Public 2015)** [the 2015 Guidelines] which only came into force one year after their gazettelement on 4th March 2016 as per Gazette Notice No. 1420.

47. In this respect the Respondent's case was hinged on the provisions of the ***Interpretation and General Provisions Act***, Cap. 2 of the Laws of Kenya.

48. Regarding the issue whether Regulations 6(2) and 19(3) of the Regulations impose a duty that can be performed/breached by a director, it was submitted that this issue calls this Court to conduct a merit based analysis of the issues raised in the NTSC and should be dismissed for the reasons adverted to above.

49. To the Respondent, as is apparent from the foregoing, the issuer (in this case, USL) has specific obligations placed on them under the Regulations. Being an inanimate legal entity, USL acts through decisions of its Board of Directors and its Management. They are its directing mind and if USL fails to comply with the law, this is likely due to a failure by the directors or its management to take appropriate steps to ensure that USL complies. USL as an inanimate being cannot take any action on its own. The Applicant is therefore being asked to explain whether as a director of USL she discharged her fiduciary duties to USL in so far as compliance with the Regulations is concerned.

50. It was submitted that the Directors owe a fiduciary duty to the company which fiduciary duties are broadly defined to include a duty of loyalty and a duty of care whose main elements include (i) that the directors must remain within the scope of the powers which have been conferred upon them (ii) that directors must act in good faith in what they believe to be in the best interest of the company (iii) that they must not fetter their discretion as to how they shall act (iv) that they shall not put themselves in a conflict of interest situation out of a transaction with the company, out of the director's personal exploitation of the company's property, information or opportunities, or out of receipt from a third party a benefit for exercising their directorial functions in a particular way. See ***Paul L. Davies in Gower and Davies' Principles of Modern Company Law, 7th Edition, Sweet and Maxwell, 2003, London at page 380-392.***

51. In this respect the Respondent relied on Article 84 of the USL Articles of Association provides that "[t]he business of the Company shall be managed by the Directors.." as well as the case of **Peter O. Ngoge T/A O P Ngoge & Associates vs. Ammu Investment Company Limited [2012] eKLR.**

52. Based on the foregoing, it was submitted that the Respondent was well within its rights to put allegations to the *ex parte* Applicant as part of the board of directors of USL regarding whether she took steps to ensure that USL complies with the Regulations as aforesaid in the discharge of her fiduciary duties to USL.

53. As regards the allegation of *ultra vires* of the NTSC in respect of section 25A of the Act based on the fact that the applicant being former directors of USL, the Respondent has no power to impose sanction on her, it was submitted that as is clear in the NTSC, the allegations against the Applicant relates to her acts or omission while she was a director of USL. The mandate of the Respondent under sections 11(3)(cc), 25A of the Act allows it to impose sanctions for breaches of the Act, Regulations, Guidelines or Directives by, *inter alia*, a director of a listed company. The Applicant was a director of a listed company and she was being called to account for her acts or omissions while acting as such. The fact that the Applicant has since left office, does not absolve her from accountability for actions or omissions while she was in office. To argue otherwise would leave room for a person to commit a wrong while in office and then quickly resign to defeat accountability.

54. To the Respondent, the decision of **R vs. Vetting of Judges and Magistrates Board ex parte Nicholas R Ombija** cited by the Applicant is not authority for the proposition that the Applicant has purported to give it. The *ratio decidendi* in that decision is distinguishable from this case. The reason why the Vetting Board was found to have acted *ultra vires* is because it purported to vet a Judge who had since resigned from office and would therefore not "*continue to serve*" as a judge. The Constitution at schedule 6 section 23(1) which was being construed by the Court provides that:

"Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with

the values and principles set out in Articles 10 and 159.”

55. Consequently, to purport to vet a Judge who had resigned and therefore will not continue serving as such was clearly *ultra vires* the provisions of the Constitution and the powers donated to the Vetting Board. There are no similar strictures in the circumstances of this case.

56. The Respondent denied that it has usurped the legislative mandate of Parliament and asserted that the allegations for which the Applicant was asked to respond to are provided for either in the Act, Regulations or Guidelines. To the Respondent, the Applicant, when she sat as a director of USL, owed certain fiduciary duties to USL and its shareholders to ensure due compliance by USL with the Act, Guidelines and Regulations. Some of those duties included that when approving the issuance of the Information Memorandum the same is accurate and approved in accordance with, *inter alia*, Regulations 6(2) and 19(3) of the **Capital Markets (Securities) Public Offers, Listing and Disclosure Regulations**. As the directing mind of USL, the directors had a duty to discharge in ensuring such compliance by USL. She can therefore not escape scrutiny in this respect.

57. Regarding the alleged application of vicarious liability in criminal matters, it was submitted that this allegation is one that requires this Court to delve into matters of merit in the NTSC. A determination as to the Applicant's culpability will be made by the Respondent's procedurally. Further, and in any event, the Applicant has the obligation to demonstrate the allegation that the Respondent holds her criminally liable vicariously. This obligation has not been discharged. No material has been placed before this Court to support the allegation made.

58. As to whether the NTSC illegally holds directors of USL personally liable for collective actions of the USL Board, it was submitted that this allegation has no merit for the following reasons;

- a. The first decision relied on by the Applicant is ***In Re Cardiff Savings Bank (1892) 2 Ch. 100*** is used for the proposition to quote the Applicant's submissions "*that a director cannot be held liable for alleged wrongful acts of his fellow directors in which he did not participate.*" [Emphasis supplied]. This decision is clear that no personal liability will befall a director if he *did not* participate in the wrongful acts. Conversely, if *he did* participate, there would be liability. Whether the Applicant participated in any wrongful acts of his fellow directors is a question of fact going to the merits of the allegations and on which a determination will be made by the Respondent. This Court ought not to delve into the merits of the allegations.
- b. The decision in ***P.K Langat & Others v Raphael M.A. Juma*** relied on by the Applicant in this respect does not support the Applicant's submission. The question in that decision was whether a director can be held personally liable for contracts entered into in the name of the company. In this case however, there is no contract made by the directors of USL which is in dispute and for which she is being called to be personally liable. What was in during the hearing and determination of the NTSC allegations was whether or not as a director of USL the Applicant discharged her fiduciary duties as required by the Act, Regulations and Guidelines.
- c. Reliance is also placed by the Applicant on the decision of ***In Re Forest of Dean Coal Mining Company (18178-79) Vol. X Ch. R 451***, to support the same proposition. The decision does anything *but* support the proposed position by the Applicant. The starting paragraph quoted by the Applicant says "*On the one hand, I think the court should do its utmost to bring fraudulent directors to account...*" This is a clear statement that there *can* be liability on a director dependent on the facts and circumstances. The Respondent's Board has not yet a determination regarding the Applicant's culpability which will be based on the material before it. Quite apart from general reliance on the decisions distinguished above, the Applicant has failed to demonstrate how the decision by the Respondent's Board is legally wrong.

59. On irrationality, the Respondent relied on ***Civil Servants Union vs. The Minister for Civil Service [1985] AC*** and ***Associated Provincial Picture Houses Ltd, vs. Wednesbury Corporation [1948] 1 K.B. 223*** and submitted that as is apparent from the definition of irrationality, it would be impossible to make a determination of whether the Respondent has acted irrationally without the Applicant leading evidence to demonstrate the irrationality. This has not been done in the substantive application. To the examples set

by the Applicant as the acts of irrationality the Respondent responded as follows;

a. Charging the board with impropriety for doing what they were entitled to do by reason only that a subsequent action meant to be taken by another person was not taken – This complaint raises various factual questions on the merits that this Court ought not to delve into. For instance, did the Board take the action that they were required to take as suggested by the Applicant? If so, what action did they take? Was there a duty on the part of the Board to ensure that the Management acted in accordance with its directions? If so, did the Board give directions to the Management in this respect?

b. Purporting to punish members of the USL Board personally for holding contrary professional opinions on whether the Branch Network Expansion programme was prudent etc. The decision by the Respondent was based on the material placed before it. No evidence has been placed before this Court to demonstrate its irrationality. **Ms. Mbatha Mbithi**, a former director of USL, was also issued with a NTSC and who after appearing and explaining her role in the deliberation of the Board of USL at the material times, was cleared by the Respondent. The burden is on the Applicant to demonstrate that the decision by the Respondent is irrational. That a former director was acquitted by the Respondent does not of itself demonstrate irrationality. In any event, this issue is not raised in the Applicant's substantive application to enable the Respondent substantively respond to it in affidavits. It has been raised for the first time through the Applicant's written submissions;

c. Whether the Applicant was a party to or aware of the changes to the Information Memorandum after the approval by the Respondent – The Applicant's knowledge at the material time and her conduct in that respect are matters of fact that will be assessed during the hearing of the NTSC.

60. As regards the allegation that the Respondent was acting as the "*complainant, investigator, prosecutor and judge*" in respect of the NTSC contrary to the principle that "*no man shall be a judge in his own cause*" the Respondent contended that as stated in the Replying Affidavit sworn by **Abubakar Hassan Abubakar**, the complaint leading to its investigations came from USL Management. It is therefore incorrect for the Applicant to suggest that the Respondent is the complainant. Notwithstanding the above, sections 11, 12A, 13B, 25A, 26 of the Act give the Respondent the mandate to discharge a multifaceted role as the regulator and that the constitutionality of those provisions has not been challenged in these proceedings. Consequently, the Respondent cannot be deemed to be acting outside the law. In the Respondent's view, the Kenyan Court of Appeal in **Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR.**

61. According to the Respondent, the facts of this case neither raise any reasonable apprehension of bias or unfairness as alleged by the Applicant nor do they undermine public confidence in the impartiality of the Respondent as the authority charged with ensuring public confidence in the capital markets. The actions taken by the Respondent actually serve to enhance public confidence in the capital markets by signalling to the public that the authority is proactive and keen on ensuring integrity of markets. The Court was urged, in the light of the foregoing, to consider the special character of the Respondent, by deferring to the authority afforded by its founding statute and taking into consideration the functions and duties it undertakes on behalf of the public. In this respect the Respondent relied on the judgment in **Ernst and Young LLP vs. Capital markets Authority Petition No. 385 of 2016.**

62. Regarding the allegation that the Applicant has been denied access to information that she can use to defend herself by being denied access to its records to be able to defend herself as she is no longer in the USL Board, the Respondent responded as follows;

i. The Applicant was provided with various documents in the NTSC and subsequently to enable her prepare her responses. A catalogue of documents provided is attached to the Replying Affidavit. The Applicant did not make any specific request for documentation/information that was not positively responded to by the Respondent.

ii. It is instructive to note that the Applicant does not make any specific reference to an identifiable/named document or documents which she had not been supplied to enable her defend herself. One cannot complain of a breach of a right to access to information before she makes a request for the said information and more importantly, when she cannot identify the document which she sought to be availed. This is a red herring and this Court should treat it as such;

63. It was therefore the Respondent's case that through the NTSC, the Applicant was given a factual background on the basis of which allegations have been put to her for her response. The Applicant was supplied with all the documents/information she requested for to enable her respond to the allegations. The Applicant was granted various opportunities to respond to the allegations; in writing and orally by herself and through her legal representatives. The Applicant was also allowed to make final written submissions.

64. It was however contended the Applicant has made omnibus and vague complaints against the Respondent in a bid to immunize herself from accountability through these proceedings. The proceedings were fair as required by law and the enforcement action taken is within the law.

65. The Court was therefore urged to dismiss the Application as lacking any legal basis and allow the Respondent to continue discharging its legal mandate in accordance with the law.

Determinations

66. After considering the foregoing this is the view I form of the matter.

67. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, it was held by the Court of Appeal that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...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...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”

68. Judicial review, it has therefore been held time and again, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is *inter alia* to ensure that the individual is given fair treatment by the authority to which he has been subjected and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285 and Chief Constable of the North Wales Police vs. Evans (1982) 1 WLR 1155.

69. It was in this light that **Majanja, J** in **Republic vs. Kenya Revenue Authority & Another Ex-Parte Bear Africa (K) Limited** while quoting with approval the decision of **Githua J** in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR** expressed himself as follows;

“It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it

has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.”

70. Therefore, judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

71. I also associate myself with the expressions in **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 others [2013] eKLR**, that:

“...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision...I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or ‘wrongness’ or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a ‘wrong’ decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter...”

72. In **JR. Misc. Application No. 477 of 2014: Republic vs. Public Procurement Administrative Review Board & 2 Others** this Court expressed itself as follows:

“...the issue for judicial review is not whether the decision is right or wrong, nor whether the Court agrees with it, but whether it was a decision which the authority concerned was lawfully entitled to make since a decision can be lawful without being correct. The Courts must be careful not to invade the field of policy entrusted to administrative and specialized

organs by substituting their own judgment for that of the administrative authority. They should judge the lawfulness and not the wisdom of the decision. If the decision was wrong, it should be remedied by an appeal which allows the appellate court to engage in an intrusive analysis of evidence by the trial tribunal and review the merit of the decision in question...In my view the Respondent was entitled to find that the supplementary grounds did not contain fresh issues or otherwise. The mere fact that it made one decision and not the other does not justify this Court in the exercise of its judicial review jurisdiction in interfering therewith. Similarly, the Respondent's finding that the 2nd interested party did not comply with its directions issued in the respondent's earlier decision is a matter which would go to the merit rather than the process".

73. Republic vs. Public Procurement Administrative Review Board & Another ex parte Gibb Africa Ltd & Another [2012] eKLR where the court set out the established reach of judicial review in Kenya thus:

"In judicial review therefore, the court's jurisdiction is limited to applying the three tests of "legality", "rationality" and "procedural propriety" to the decision under review and once the decision passes the tests the court has no business taking any further step in respect of that decision. There is always a temptation to descend into the arena and substitute the judge's decision with that of the public body whose decision is under attack. A judge should, however, avoid this temptation by all means lest he be accused of abusing the powers given to him to review the decisions of subordinate courts and tribunals. The Court of Appeal in *Grain Bulk Handlers Limited v J. B. Maina & Co. Ltd & 2 others [2006] eKLR* summarized the purpose of judicial review by stating that:-

"Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is the legality of such decisions."

From the foregoing it is clear that in judicial review, the court does not exercise its appellate powers. It mainly looks at the decision-making process to ensure that the citizen who has come into contact with an administrative body or tribunal has been treated fairly. But as observed by Lord Diplock in the already cited *Civil Service Unions vs Minister for the Civil Service case*, the court can quash the decision if the same is so unreasonable to the extent that a reasonable tribunal addressing its mind to the facts of the case would not have arrived at such a decision. In doing so, I submit, the court will have descended into the arena of decision-making. For a court to justify such action it must be clearly obvious that the decision is truly and obviously unreasonable which I submit is not the case here."

74. That the duty of the judicial review court is to check the respondent's impugned decision for any illegalities, unreasonableness or procedural improprieties, that is non-compliance with the rules of natural justice was restated by the Court of Appeal in **Oluoch Dan Owino & 3 Others vs. Kenyatta University [2014] eKLR** where the court relied on the finding in **Civil Appeal No. 180 of 2013- Isaack Osman Sheikh -vs- IEBC & Others** that:

"A judicial review of administrative, judicial and quasi-judicial action and decisions of inferior bodies and tribunals by the High Court in exercise of its supervisory jurisdiction flowing from Article 165(6) of the Constitution is not in the nature of an appeal. It concerns itself with process and is not a merit review of the decision of those other bodies. And it does not confer on the High Court a power to arrogate to itself the decision-making power reserved elsewhere."

75. In **Hangsraz Mahatma Gandhi Institute & 2 Others [2008] MR 127** it was stated that;

"Judicial Review is not a fishing expedition in unchartered seas. The course had been laid down in numerous case laws. It is that this court is concerned only with reviewing, not the

merits of the decision reached, but of the decision making process of the authority concerned. It would scrutinize the procedure adopted to arrive at the decisions to ascertain that it is in uniformity with all elements of fairness, reasonableness and most of all its legality. It must be borne in mind and which had been repeated many times by this court that it is not its role to substitute itself for the opinion of the authorities concerned. This court on a judicial review application does not act as a court of appeal of the decision of the body concerned and it will not interfere in any way in the exercise of the discretionary power which the statute had granted to the body concerned. However it will intervene when the body concerned had acted ultra vires its powers, reached a decision which is manifestly unreasonable in the *Wednesbury* sense; had acted in an unfairly manner and the applicant was not given a fair treatment.”

76. *The Code of Civil Procedure*, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla states:

“The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper.”

77. In *Penina Nadako Kiliswa vs. Independent Electoral & Boundaries Commission (IEBC) & 2 Others (2015) eKLR*, Supreme Court of Kenya held at paragraph 28:

“The well-recognized principle in such cases is that the court’s target in judicial review is always no more than the process which conveyed the ultimate decision arrived at. It is not the merits of the decision, but the compliance of the decision-making process with certain established criteria of fairness. Hence, an applicant making a case for judicial review has to show that the decision in question was illegal irrational or procedurally defective.”

78. In this case, it was the applicant’s case that the minutes of the meetings which she is alleged to have attended, however, revealed that no substantive resolutions were made as the Board simply received reports from the management as well as consultants on various matters that came up for deliberation before the board and which are referred to in the NTSC; that she did not attend some of the meetings; that the issues that the respondent alleged were discussed in the said meetings were started by the previous board of directors and were completed by the board of directors that succeeded them in circumstances that make it impossible to ascertain precisely which board was at fault if at all; and that some directors who also sat in the aforesaid USL board of directors have not been subjected to the same sanctions and penalties.

79. It is clear that the aforesaid grounds challenge the merit findings by the Respondent. Accordingly, the said grounds in my view fall outside the ambit of the judicial review jurisdiction. Whereas in certain cases the Court is entitled to delve into a limited merit investigations in order to determine whether the decision is *Wednesbury* unreasonable, it is trite that it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the *Wednesbury* test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of *Wednesbury* unreasonableness.

80. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on *Administrative Law*, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475:**

“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.”

81. In my view the Respondent’s decision, in respect of the aforesaid grounds, does not meet the threshold of irrationality in order to justify interference by a judicial review Court.

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

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

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

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

(a)

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

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

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

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.”

85. Under section 2 of the *Interpretation and General Provisions Act*, a “written law” is defined to

include “any subsidiary legislation for the time being in force.” Therefore the Guidelines fall within the definition of a “written law” and as the alleged culpability arose during the subsistence of the 2002 Guidelines, the applicable law was the one comprised in the said Regulations. Therefore nothing turns on that issue.

86. In support of her case the applicant relied on sections 11(3), 25A and 26(8) of the Act. The said sections provides as hereunder:

11(3). “For purposes of carrying out its objectives, the Authority may exercise, perform or discharge all or any of the following powers, duties and functions-

(cc) impose sanctions for breaches of the provisions of this Act or the regulations made thereunder, or for non-compliance with the Authority’s requirements or directions, and such sanctions may include-

.....

(h) inquire, either on its own motion or at the request of another 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 publicly offered or traded on an approved securities exchange or on an over the counter market;”

25A. “Without prejudice to any other provision of this Act, the Authority may impose the following sanctions or levy financial penalties in accordance with this Act, for breach of any provisions of this Act, the regulations, rules, guidelines, notices or directions made thereunder, or the rules of procedure of a securities exchange, by a licensed or approved person, listed company, employee or a director of a licensed or approved person or director of a listed company as provided under section 11(3)(cc)....”

26(8) “The Authority shall, in all cases where the Authority takes action under sections 25 and 26, give the person affected by such action an opportunity to be heard.”

87. It was the applicant’s case that sanctions can only be imposed upon a sitting director and as she was no longer a director of USL, the Respondent’s action of imposing sanctions against her had no legal basis.

88. The question here is whether the word “director” applies only to serving directors or also encompasses former directors. In order to answer this issue, it is necessary to restate the principles guiding statutory interpretation. As was appreciated by the Court of Appeal in Kimutai vs. Lenyongopeta & 2 Others Civil Appeal No. 273 of 2003 [2005] 2 KLR 317; [2008] 3 KLR (EP) 72 while citing with approval *The Discipline of Law* 1979 London Butterworth at page 12 by *Lord Denning*:

“The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the “purposive approach”. In all cases now in the interpretation of statutes such a construction as will “promote the general legislative purpose” underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, “There is nothing we can do about it”. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.”

89. It is an elementary principle of statutory interpretation that in order to arrive at the true intention of the legislature, a statute must be considered as a whole and sections of an Act are not to be read in isolation and that when a question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision as a whole. All the constituent parts of a statute are to be taken

together and each word, phrase or sentence is to be considered in light of the general purpose of the Act itself hence the words, phrase occurring in a statute are to be taken not in isolation or in a detached manner dissociated from the context, but are to be read together and construed in the light of the purpose and object of the Act itself. See **Republic vs. Disciplinary Tribunal of the Law Society ExParte Patrick Lubanga, J.R Application No. 443 of 2013.**

90. In **Alfred Muhadia Ngome & Another vs. George W. Sitati & 2 Others Civil Application No. Nai. 268 of 1999**, it was held that:

“The duty of the Court in construing a statute is to ascertain and to implement the intention of the Parliament as expressed therein. Where Parliament has used non-technical legislation (sic) words which, in their ordinary meaning cover the situation before the Court, the Court will generally apply them literally provided that no injustice or absurdity results. In such case it is a reasonable presumption that Parliament or its draftsman has envisaged the actual forensic situation.”

91. This was the position adopted in **Osogo vs. Shikanga Election Petition No.5 of 1998**, where the Court held as follows:

“In applying the construction of section 20(1) of the Act.....where the language of an Act is clear and explicit, we must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the Parliament.”

92. This is the position of *Maxwell on the Interpretation of Statutes*, 10th Edition which states that:

“The first and most elementary rule of construction is that it is assumed that words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise, in their ordinary meaning; and secondly that the words and phrases are to be construed according to the rules of grammar. It is very desirable in all cases to adhere to the words of an Act of Parliament, giving to them that sense which is their natural import in the order in which they are placed. From these presumptions it is not allowable to depart where the language admits of no other meaning. Nor should there be any departure from them where the language under consideration is susceptible of another meaning, unless adequate grounds are found, either in the history or cause of the enactment or in the context or in the consequences which would result from the literal interpretation for concluding that that interpretation does not give the real intention of the legislature. If there is nothing to modify, nothing to alter, nothing to qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences...The underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expressions used therein rather than from any notions which may be entertained by the court as to what is just or expedient...However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. When once the meaning is plain, it is not the province of a court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words.”

93. However in **Alfred Muhadia Ngome & Another vs. George W. Sitati & 2 Others** (supra) the Court appreciated that:

“...in many cases it will seem probable that Parliament or its draftsman have not envisaged the actual situation before the Court; and the duty of the Court in such circumstances will be to surmise, as best as it can, what Parliament would have stipulated if it had done so...A number of rules, founded on common sense have been evolved to assist the Courts in this task - e.g. Parliament will be presumed not to intend injustice or absurdity or anomaly; but the most useful approach was laid down as long ago as Hydon’s Case that the Court will ascertain what was the pre-existing “mischief”, (that is to say, defect) which Parliament was endeavouring to remedy; this will often give a guide to what remedy Parliament has

provided, and to its extent and its sanction. See F. VS. F. (1970) 1 ALL ER 200 at 204 and 205.”

94. Lord Coke formulated what came to be known as the *Mischief Rule* Heydon’s Case, [1584] 76 ER 637 at 638, when he stated thus:

“.....And it was resolved by them, that for the sure and true (a) interpretation of all statutes in general (be they penal (B) or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:- (b)1st What was the common law before the making of the Act, (c) 2nd What was the mischief and defect for which the common law did not provide. 3rd What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, 4th The true reason of the remedy; and then the office of all the Judges is always to make such (d) construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro private commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono public....”

95. As was held by the Court of Appeal in Italframe Ltd vs. Mediterranean Shipping Co. [1986] KLR 54; [1986-1989] EA 174:

“It is not competent to any court to proceed upon an assumption that Parliament has made a mistake, there being a strong presumption that Parliament does not make mistakes. If blunders are found in legislation, they must be corrected by legislature, and it is not the function of the Court to repair them. Thus while terms can be introduced into a statute to effect to its clear intention by remedying mere defects of language and to correct obvious misprints or misnomers no provision which is not in the statute can otherwise be implied to remedy an omission... It is one thing to introduce terms into an Act of Parliament in order to give effect to its clear intention by remedying mere defects of language. It is quite another thing to imply a provision which is not in the statute in order to remedy an omission, without any ground for thinking that you are carrying out what Parliament intended. It is not the function of the Courts to repair the blunders that are to be found in legislation. They must be corrected by the legislature.”

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

97. It is similarly my view that going by the said definition, an alternate director is a director for the purposes of the section since the section describes a director as including any person occupying the position of director by whatever name called. An alternate director is clearly a director and must be held responsible for his or her actions, while acting as such. It is not alleged that an alternate director has no power to make independent decisions other than those which he or she is directed to make by the substantive director. It is in this respect that Article 84 of the *Uchumi Supermarkets Limited’s* Articles of

Association must be understood when it provides that “[e]very person acting as an Alternate Director shall be an officer of the Company and he shall not be deemed to be the agent of the Director by whom he was appointed.” Therefore Article 85 of the USL Articles of Association properly provides that “an alternate director shall be entitled to receive notices of all meeting of the Board and to attend and vote as a director at any such meeting at which the director appointing him is not personally present and to perform all the functions of his appointor as a director in his absence, including that of being counted as part of a quorum at any such meeting.”

98. The foregoing position is restated in by the High Court of New Zealand in **Strathmore Group Limited vs. Fraser & Ors (1991) 5NZCLC 67, 163** where it was held that:

“...an alternate director is a director pro tem. When he or she is acting as a director, he or she has the rights, powers, privileges, duties and responsibilities of a director. When he or she is not acting as a director, then he or she has no legal status.”

99. It was in the same vein that the High Court of Queensland in **Markwell Bros Pty vs. CPN Diesels (Old Pty Ltd) (1982) 7 ACLR 425** held that though possessed of little control over the company, alternate directors in the eyes of the law are in the same position as any other director and are as subject to the normal duties which a director owes to his company.

100. With respect to the allegation that the NTSC violates section 4 of the ***Government Proceedings Act*** which immunizes Civil Servants from liability while in the ordinary course of employment, it was not contended that the appointment of the applicant as an alternate director was by virtue of her position in the civil service. In the absence of such allegation it must be presumed that the Ex parte Applicant’s role as a director of USL was separate from her role as a Civil Servant in her capacity as the Director of Trade in the Ministry of Trade and Industry. This is evidenced by the fact that she earned separate Board allowances for her role as a Board Member of USL which allowances were distinct from her salary as a civil servant.

101. It was contended that by purporting to impose sanctions and penalties for alleged commissions of criminal offences by **Uchumi Supermarkets Limited** (acting through its Board of directors) under sections 30D (1)(a) and 34(b) of the ***Capital Markets Act***, the CMA has purported to exercise an original criminal jurisdiction which is reserved solely for the High Court and Magistrate’s Court under Article 165(3) of the Constitution and section 6 of the ***Magistrate Courts Act, 2015***. To my mind section 11(3) (cc)(i) of the Act is clear in its terms. It expressly empowers the Respondent to impose sanctions for breach of the provisions of the Act or the regulations made thereunder, or for non-compliance with the Authority’s requirements or directions, and such sanctions may include levying of financial penalties, proportional to the gravity or severity of the breach, as may be prescribed. As to whether such a provision is constitutional, it is not within the ambit of these proceedings for the Court to make such a determination since no such relief is sought in these proceedings.

102. In my view the holding by the Court of Appeal in **Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR** which cited with approval the decision by the Canadian Supreme Court in **Brosseau vs. Alta Securities Commission [1989] 1 S.C.R. 301** with respect to allegations of bias in respect of the dual roles played by a Securities Commission, whose functions are in *pari materia* to the Respondent’s herein sets out the correct legal position. That holding at p. 303 is to the effect that:

“Securities commissions, by their nature, undertake several different functions. The Commission’s empowering legislation clearly indicates that the Commission was not meant to act like a court in conducting its internal reviews and certain activities which might otherwise be considered “biased”, form an integral part of its operations...A security commission’s protective role, which gives it a special character, its structure and responsibilities, must be considered in assessing allegations of bias...”

103. That an entity in the nature of the Respondent herein has a special role was appreciated by **Mativo, J** in **Ernst and Young LLP vs. Capital Markets Authority Petition No. 385 of 2016** at page 20 where he

expressed himself as hereunder:

“I also find that the first Respondents functions were authorized by the relevant statute and that the statute authorizes overlapping functions. Administrative bodies are created for a variety of reasons and to respond to a variety of needs. In some cases, the legislature may decide that in order to achieve the ends of the statute, it is necessary to allow an overlap in functions that would, in normal judicial proceedings, have to be kept separate. If a certain degree of overlapping is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to any reasonable apprehension of bias test, unless reasonable possibility of the bias has been sufficiently demonstrated.”

104. With due respect those sentiments express the correct legal position.

105. It was submitted on behalf of the applicant that though the Respondent claims to derive jurisdiction to issue the NTSC and proceed with its hearing from section 11(3)(cc) as read with section 25A of the Act, section 11(3)(cc) gives the Respondent jurisdiction to impose sanctions for breach of the provisions of the Act, or regulations made thereunder or for non-compliance with the authority’s requirements or direction. According to the applicant, this section makes it clear that the Respondent can only issue sanctions where the following conditions are fulfilled; to wit, where a provision of the said Act, or regulations made thereunder has been breached (or where any directions or requirements given by the Respondent) have been breached (which is not relevant for the purposes of this case). It was submitted that in this case no breach of a statute or legislative instrument is possible where the legislative provisions alleged to have been breached do not exist and the legislative provisions alleged to have been breached do not impose any duty whatsoever capable of being breached on the person alleged to have breached it as is the position in this case.

106. In my view, to make a finding in the manner submitted by the applicant would amount to this Court sitting on a merit decision of the Respondent, and as already discussed above, that is not the function of a judicial review Court.

107. As regards the question whether the manner in which the applicant was treated offended the rules of natural justice, it is clear that the applicant is being called upon to show cause before the decision is arrived at. It is not in doubt that under section 26(8) of the Act the Respondent had powers to entertain the Notice to Show Cause. The said section provides as follows:

The Authority shall, in all cases where the Authority takes action under sections 25 and 26, give the person affected by such action an opportunity to be heard.”

108. What is required is an opportunity of being heard as was restated by the Court of Appeal in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** where the Court expressed itself as hereunder:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

109. That a notice to show cause is an opportunity of being heard was rightly in my view emphasized by **Mativo, J** in **Ernst and Young LLP vs. Capital Markets Authority Nairobi Petition No. 385 of 2016** in the following words:

“The above section, that is section 26(8) which guarantees the opportunity to be heard was clearly quoted in the notice to show cause dated 31st August 2016. In fact, the petitioner was clearly required to respond in writing within 14 days from the date of the letter. The letter contained specific allegations which the petitioner was required to respond to. The petitioner was given up to 14th September 2016 to respond but instead of responding on 15th September 2016 he filed this petition. I find that the petitioner moved to court “too early” to stop the process and as at the time of filing this petition, there was nothing to show that the steps hitherto taken by the Respondent were contrary to the statutory mandate of the first petitioner nor has the petitioner proved infringement of any fundamental rights or threats to the infringement to warrant this courts intervention.”

110. As to whether the directors of a corporation can be held criminally liable for the actions of the corporation the law is clear. As properly stated by *Paul L. Davies in Gower and Davies’ Principles of Modern Company Law, 7th Edition, Sweet and Maxwell, 2003, London at page 380-392*, directors owe a fiduciary duty to the company which fiduciary duties are broadly defined to include a duty of loyalty and a duty of care whose main elements include (i) that the directors must remain within the scope of the powers which have been conferred upon them (ii) that directors must act in good faith in what they believe to be in the best interest of the company (iii) that they must not fetter their discretion as to how they shall act (iv) that they shall not put themselves in a conflict of interest situation out of a transaction with the company, out of the director’s personal exploitation of the company’s property, information or opportunities, or out of receipt from a third party a benefit for exercising their directorial functions in a particular way.

111. Since Article 84 of the USL Articles of Association provides that “[t]he business of the Company shall be managed by the Directors..” , the case of **Peter O. Ngoge T/A O P Ngoge & Associates vs. Ammu Investment Company Limited [2012] eKLR** was properly relied upon by the Respondent. In that case the Court expressed itself as follows:

“The general law, however, is that a corporation is an artificial legal entity. Accordingly it must of necessity act through agents, usually the Board of Directors. In other words the corporation’s brain is the Board of Directors who make decisions on behalf of the company. A company may in many ways be likened to a human body; it also has hands which hold the tools and act in accordance with the directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by law as such. The day to day management of the company may, however, be handled by specific officers tasked to do so on behalf of the Board. However, the ultimate responsibility rests with the directors. It therefore follows that the management of the corporation must be deemed to be carried by or on behalf of the Board save in cases where the ultra vires principle applies.”

112. Apart from the foregoing section 23 of the *Penal Code*, provides as follows:

Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with, or concerned or acting in, the control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or about to be committed, or that he took all reasonable steps to prevent its commission.

113. In this case the applicant admit that at the material times she was an alternate director of USL representing the PS and she has not contended that she was not charged with, or concerned or acting in, the control or management of the Company. Even if she did so, that is an issue for determination by the Respondent. She however claimed that other persons were also involved in the said management hence

she ought not to have been selectively charged. It will be upon the applicant to show that through no act or omission on her part, she was not aware that the offence was being or were intended or about to be committed, or that she took all reasonable steps to prevent their commission at the time she is called upon to show cause. Whether or not she did so and whether or not she will be believed cannot be a ground for judicial review as opposed to an appeal.

114. My view is in fact supported by the decision in In Re Forest of Dean Coal Mining Company (supra) where **Jessel, MR** expressed himself as follows:

“I am quote clear about this case. One must be very careful in administering the la of joint stock companies not to press so hardly on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at a. On the one hand, I think the Court should do its utmost to bring fraudulent directors to account, and, on the other hand, should also do its best to allow honest men to act reasonably as directors.”

115. In other words, the directors are not absolutely immune from culpability for their actions, though to prove them culpable certain conditions must be met. As to whether the same will be met is not within the scope of judicial review proceedings.

116. As regards, selective process, the Respondents countered that all former directors of USL and some senior managers were issued with Show Cause Letters; subjected to show cause hearing and after an objective assessment of their submissions CMA determined the culpability and issued them the appropriate enforcement sanctions. Therefore based on the material before me I cannot conclusively determine that the applicant is being unfairly subjected to a selective process. It was for example averred that **Ms. Mbatha Mbithi**, a former director of USL, was also issued with a NTSC and who after appearing and explaining her role in the deliberation of the Board of USL at the material times, was cleared by the Respondent.

117. This Court is aware of the decision in George Joshua Okungu & Another vs. The Chief Magistrate’s Court Anti-Corruption Court at Nairobi & Another [2014] eKLR, to the effect that:

“Where therefore the prosecution has been commenced or is being conducted in an arbitrary, discriminatory and selective manner which cannot be justified, that conduct would amount to an abuse of the legal process. Similarly, where the prosecution strategy adopted is meant to selectively secure a conviction against the petitioner by ensuring that certain individuals from whom the petitioner derived his decision making power are unjustifiably shielded therefrom, it is our considered view that such prosecution will not pass either the constitution or statutory tests decreed hereinabove. It is even worse where from the circumstance of the case, the same persons being shielded could have been potential witnesses for the petitioner and who have, with a view to being rendered incompetent as the petitioner’s witnesses have been in a way enticed to be prosecution witnesses. That strategy we hold constitutes an unfair trial under Article 50 of the constitution. Here for example, the petitioners contend that they took all the necessary steps to obtain the requisite legal advice and approvals or authorizations. To turn round and institute criminal proceedings against the petitioners while making the very persons who authorized the petitioner’s actions into prosecution witnesses, in our view, amounts to selective and discriminatory exercise of discretion. In such an event the director of the public prosecution cannot be said to have been guided by the requirement to promote constitutionalism as mandated under the constitution and the Office of the Director of Public Prosecutions Act. To the contrary the DPP would be breaching the constitution which inter alia bars in Article 27 discrimination “directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status...Accordingly it is our view that where such opinion is given by persons who are legally authorized to give the same and acted upon by persons under their authority, it would amount to selective application of the

law to charge the persons to whom the opinion or advice was given while treating the persons who gave that opinion as a prosecution witness”.

118. That decision with due respect sets out the legal position as far as this Court is concerned. However, the circumstances of this case are distinguishable from those that prevailed in **George Joshua Okungu and Another vs. the Chief Magistrate Court and Others**. In this case, the Applicant has not disclosed the role if any played by the other directors of USL in the subject transaction in order to justify this Court in finding that by not levying charges against the said Directors, a position the Respondents have denied, the charges levied against the Applicant is selective. In ***Okungu’s Case***, the petitioner clearly outlined the role played by those who had been left out. Unless the Respondent’s decision was shown to violate the provisions of the Constitution in the manner in which persons were being selected to face charges, the Respondent’s decision cannot be faulted merely on the basis that some Directors were allegedly left of the hook. In other words I cannot say, based on the material placed before me in these proceedings, that the roles played by the persons whom the State intended to call as its witnesses in the subject transaction in ***Okungu’s Case*** are the same or similar as the role, if any, played by the other Directors of USL. The Respondent, as long as its decision does not violate the letter and the spirit of the Constitution is entitled to determine whom to charge, based on its own review of the evidence and the mere fact that it makes one decision and not the other is not a ground for interference. It was in recognition of this fact that the House of Lords in **Director of Public Prosecutions vs. Humphreys [1976] 2 All ER 497 at 511** cautioned that:

“A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval...If there is a power...to stop a prosecution on indictment *in limine*, it is in my view a power that should only be exercised in the most exceptional circumstances.”

119. In this case, I cannot be seen to make adverse comments against the said Directors for the obvious reason that they are not parties to these proceedings. To expect the Court to make adverse determinations against the said persons would amount to a violation of the rules of natural justice which this Court is sworn to protect.

120. An issue was taken as regards whether Regulations 6(2) and 19(3) of the Regulations impose a duty that can be performed/breached by a director. Regulations 6(2) provides as follows:

“6(2) Issuer to publish prospectus

(1)

(2) The issuer shall, before the time of publication of the prospectus, obtain approval of the Authority that the information memorandum with these Regulations and shall deliver a copy thereof to the Registrar for registration.”

121. Regulation 19(3) on the other hand provides as follows;

“19. Continuing obligations

(1) ...

(2) ...

(3)The information required to be disclosed under these Regulations shall be disclosed within twenty-four hours of the event, simultaneously to the Authority, the securities exchange at which the issuer’s securities are listed, if applicable, and to the public during non-trading hours of the relevant market segment.”

122. It is clear that the said regulations do impose an obligation on the issuer which may well be a basis of an action under the Act whether against the Company itself or its Directors as appropriate.

123. It was submitted that while the NTSC alleged that the applicant (or USL Board) had breached sections 30D(1)(a) and 34(b) of the Act, the particulars of charges levelled against the applicant in the NTSC itself indicated that the applicant was accused of breaching totally different laws which actually do not exist, whether in the **Capital Markets Act** itself or elsewhere in the Laws of Kenya. It was submitted that although section 30D(1)(a) of the Act provide that “A person who makes a false, misleading or deceptive statement in a prospectus commits an offence”, the offence with which the applicant (or USL Board) was charged with in the NTCS is that of “Facilitating or omitting to prevent “the provision of misleading or deceptive statement in the information memorandum” which is not outlawed by the same or any other provision. Similarly, while section 34(b) criminalises furnishing or publishing information or return the content of which are known to be untrue, incorrect or misleading because of material omission”, the crime with which the applicant is charged and for which she is required to show cause is that of “Facilitating and/or omitting to prevent the furnishing or publishing of information known to be untrue, incorrect or misleading”, an offence not outlawed by the said section.

124. In this case, however, the charges levelled against the applicant were that she:

1. *Facilitated and/or omitted to prevent the provision of misleading and deceptive information in the IM contrary to the provisions of section 30D(1)(a) of the Capital Markets Act; and*
2. *Facilitated and/or omitted to prevent the furnishing and/or publishing of information which you knew to be untrue, incorrect and/or misleading contrary to section 34(b) of the Capital Markets Act;*
3. *Failed to meet the obligations set out under Article 3.1.1(ii) of the Capital Markets Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya which requires the Board to inter alia oversee the management accounts on a regular basis; and*
4. *Failed to meet the obligations set out under Article 3.5.3(ii) of the Capital Markets Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya by failing to collectively as a Board to ensure that the Audit Committee of the Board was an informed, vigilant and effective overseer of the financial reporting process and the Company’s internal controls.*

125. Section 30(D)(1)(a) of the Act provides that:

A person who—

(a) makes a false, misleading or deceptive statement in a prospectus; or

.....

commits an offence and shall be liable on conviction—

(i) in the case of an individual, to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding seven years or to both; and

(ii) in the case of a company, to a fine not exceeding thirty million shillings.

126. It is therefore clear that what is prohibited under the said section is the making of a false, misleading or deceptive statement in a prospectus as opposed to the facilitation or omission to prevent the provision of misleading or deceptive statement in the information memorandum.

127. Similarly, section 34(b) of the Act provides that:

A person who—

furnishes or publishes for the purpose of this Act or in connection with an issuer whose securities are listed or quoted to be listed on a securities exchange, or issued or to be issued to the public or

.....

shall be guilty of an offence.

128. However, there is no question of facilitation and/or omission to prevent the furnishing or publishing of information known to be untrue, incorrect or misleading constituting an offence under the said section. As held in Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629, where the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language. See London County Council vs. Aylesbury Dairy Company Ltd [1899] 1 QB 106 at 109; Muini vs. R through Medical Officer of Health, Kiambu [2006] 1 KLR (E&L) 15; Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.

129. It is therefore clear that whereas the actions of the Applicant may well have constituted an offence under other statutes or provisions of the law, she is certainly not a candidate for a charge pursuant to which she is required to show cause.

130. The Respondent contends that since the Applicant is yet to show cause this application is premature. In other words despite the patent defect in the charge, the Respondent urges the Court to allow the process however defective to continue. In Stanley Munga Githunguri vs. R [1986] eKLR at page 18 and 19 a three judge bench High Court constituted of Ag. Chief Justice Madan and Justices Aganyanya and Gicheru expressed itself as follows:

“But from early times... the Court had inherently its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing – the Court had the right to protect itself against such an abuse...The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own procedure...every Court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the Court...Mr Chunga argued that to grant the application would be tantamount to curtailing or interfering with the powers of the Attorney-General under section 26 of the Constitution. This argument of his compels us to say that he kept freewheeling for a long time before us because perhaps he did not understand the real purport of the application. No one has made any challenge to the powers of the Attorney-General, nor would any one succeed if he were to say that the Attorney-General’s powers under section 26 can be interfered with. What this application is questioning is the mode (emphasis ours) of exercising those powers...No one will succeed in convincing us that the Court does not have inherent powers to exercise supervisory jurisdiction over tribunals and individuals acting in administrative or quasi-judicial capacity...A prosecution is not to be made good by what it turns up. It is good or bad when it starts. The long and short of it is that in our opinion it is not right to prosecute the applicant as proposed.”

131. On the issue of prejudice, the same Court expressed itself as hereunder:

“Mr Chunga argued that the applicant acquiesced in his own prosecution. The applicant appeared in Court in answer to the summons, perhaps he was taken there under escort. He pleaded not guilty to the charges. No accused person acquiesces in his own prosecution on a criminal charge, not even for riding a bicycle without light. An accused person goes into a criminal Court trembling. He comes out somewhat shredded and

shorn. He has no other option. It is not acquiescence, it is submission to the power of the law.”

132. Similarly in R. vs. The Judicial Commission into the Goldenberg Affair and 2 Others exp Saitoti HC Misc Appl. 102 of 2006, it was held that:

“It is not good for the DPP to argue that the Applicant should be arrested and charged so that he can raise whatever defences he has in a trial court. The Court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicants’ fundamental rights.”

133. To permit the proceedings in question to proceed in the circumstances of this case is, in my respectful view, likely to violate the applicant’s fundamental rights.

134. In Republic vs. Kenya National Examinations Council ex parte Geoffrey Githinji and 9 Others Civil Appeal No. 266 of 1996 it was held:

“the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment.”

135. It is clearly irrational, unfair and an abuse of power to subject a person to criminal or quasi criminal proceedings in respect of an act which does not in law constitute an offence or an offence under the legal provisions he is charged. Where public authorities abuse their powers, act unfairly or irrationally the Court is empowered to intervene and bring to an end such action.

136. Accordingly the impugned proceedings ought not to be permitted to proceed in the manner contemplated.

Order

137. In the result there is merit in this application and I issue the following orders:

- 1. An order of Certiorari removing into this Court for the purposes of quashing the Notice to Show Cause dated 31st August 2016 which Notice is hereby quashed.**
- 2. An order of prohibition restraining the Respondent by themselves, their agents or employees from proceeding with the Notice to Show Cause dated 31st August 2016.**
- 3. As the merits of the allegations has not been determined, there will be no order as to costs.**

138. It is so ordered.

Dated at Nairobi this 16th day of January, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Munyua for Mr Arua for the Applicant

Mr Angwenyi for Mr Imende for the Respondent

CA Ooko