REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 299 OF 2015

BETWEEN

MARTIN HENRY FORSTER.....PETITIONER

AND

CAPITAL MARKETS AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. The petition, **Martin Henry Forster**, was the Group Managing Director and Chief Executive Officer of CMC Holdings Limited, (**CMC),** a motor vehicle dealer and assembly company formerly listed in the Nairobi Securities Exchange, and regulated by The Capital Markets Authority **(CMA),** the respondent herein, established under section 5 of the Capital Markets Authority Act, (the Act) until 14th March 2011. After his departure, there ensued wrangles and disputes within the Board of Directors of **CMC** pitting directors against one another amid allegations of non-compliance with corporate governance guidelines, conflict of interest and fraud. In view of the said wrangles and disputes, the respondent intervened and took administrative actions including suspending CMC's shares from trading in the Nairobi Stock Exchange.

2. On 14th November 2011 the respondent, in exercise of its powers under section 11(3) (m) of the Capital Market's Act, CAP 485A (the Act) appointed **Webber Wentzel**, a South African law firm, to conduct forensic investigations into certain aspects of financial operations of **CMC. Webber Wentzel** carried out investigations and submitted its report (**the Webber Report**) to the respondent on 31st January 2012, raising various allegations against the petitioner and other directors of CMC which led the respondent to take administrative actions against the petitioner prompting this petition.

The Petition

3. In a petition dated 30th June 2015 and filed in Court on 16th July 2015, and supported by an affidavit worn on the same day, the petitioner averred deposed that on 28th March 2012, he received a letter from the respondent enclosing a copy of the **Webber Report** informing him that the respondent's Board had resolved to appoint an ***Ad hoc Committee*** under section 14(1) of the Act, consisting of five members with a majority being independent members chaired by Retired Justice Aaron Ringera to hear him. The petitioner stated that he was informed that the ***Ad hoc Committee***, was convened pursuant to sections 25A and 26(2) of the Act, to give the affected persons including him an opportunity to be heard.

4. The petitioner stated that he was asked to appear before the ***Adhoc Committee*** on 2nd April 2012 in 'respect of various allegations contained in the investigation report but the letter did not disclose reasons why he was to appear before the ***Adhoc Committee*** or the nature of allegations he was required to defend himself against. The petitioner averred that he later received a letter dated 30th March 2012 from the respondent informing him that the meeting had been rescheduled to 4th April 2012.

5. The petitioner averred that letter contained a number of allegations attributed to him in the **Webber report**, including allegations over operation of a scheme where manufacturers(Land Rover, Jaguar and Nissan UD) over-invoice CMC Motors by 2% and 1.5% respectively which was contrary to directors' fiduciary duty under article 3.1.1 of Capital Markets Guidelines on Corporate Governance Practices by Public Listed Companies, establishing a feeder bank account namely Corival (1996) in Jersey which was funded by the over-invoiced amount charged by the manufactures, establishing a Fair Valley Trust which received funds from the Corival Bank Account which were later invested for personal benefit of a select group of employees contrary to fiduciary duties of directors.

6. Other allegations were, using the Corival (1996) funds during the years 1999 to 2000 to lend money to CMC at an interest contrary to fiduciary duty of directors and Approval of credit extension beyond the limit set by the board without the board's approval resulting into loss to the company. The report further stated that machinery worth Kshs 26 million was sold to Kirinyaga Construction company Ltd but payment was deferred without charging interest which was un businesslike.

7. According to the petitioner, it was also alleged that board members, including him adopted a risky business model where the company would borrow to lend but they failed to implement an asset/liability management process to monitor, manage and hedge risks associated with the borrowing to lend activity contrary guidelines. There was a further accusation that the petitioner and other board members appointed a company secretary who was not qualified and provided false information to the public regarding the qualification of that company secretary contrary to regulations of the Capital Markets (Securities) Regulations 2002 and Section 34 (1) of the Capital Markets Act.

8. The petitioner stated that they were also accused of failing to exercise effective oversight management of the company as evidenced by weak internal audit and internal controls on the operations of the company contrary to the Capital Markets Guidelines on corporate Governance Practices. and that as a member of the board, he failed to disclose the extent of the company's compliance with the Corporate Governance guidelines issued under the Act and further that he failed to explain areas of non-compliance in the annual report of the company contrary to the Regulations issued by the respondent.

9. Finally, the petitioner stated that it was alleged that he signed accounts for the year 2009 and 2010 which had not been prepared in compliance with internal financial reporting standards contrary to the respondent's guidelines on corporate governance. The petitioner stated that he wrote to the respondent in April 2012 complaining about the unreasonable and inadequate notice, difficulty in obtaining documents to enable him effectively and meaningfully participate in the meeting and that he also requested to be furnished with evidence, materials and documents to be relied upon before the ***Ad hoc Committee*** hearing and a 30-days adjournment of the proceedings to enable him prepare and instruct a counsel which was declined .

10. The petitioner averred that despite the requests, and concerns, he was directed to appear before the committee on 4 th April 2012. He averred that on the basis of the above failings on the part of the respondent, his rights and fundamental freedoms were violated and therefore, filed tis petition seeking the following reliefs;

i. A declaration that the respondent has breached the Petitioner's fundamental rights and freedoms enshrined in Article 47(1) of the Constitution.

ii. A Judicial Review order of Certiorari to bring into this Honourable Court and quash;

a) The forensic investigation Report into the affairs of CMC Holdings Limited by Weber Wentzel dated 31 January 2012 and all allegations, findings, determinations and recommendations contained therein in so far as they relate to the Petitioner;

b) The proceedings of the Ad hoc Committee held on 4th April 2012 and all consequential findings, report and recommendations of the said Committee.

c) The report and Resolutions of the Capital Markets Authority Regarding the Investigation into the Affairs of CMC Holdings Limited dated 3 August 2012 and all allegations, determinations, findings and resolutions contained therein in so far as they relate to the Petitioner.

d) The letter dated 3rd August 2012 entitled 'Enforcement Action' and all allegations, findings, determinations, sanctions, offences and penalties imposed against the petitioner therein; and

e) The letter dated 3rd August 2012 entitled 'CMC HOLDINGS LIMITED (CMCH)-DISQUALIFICATION OF DIRECTORS' in so far as the same relates to the petitioner.

iii. A declaration that to the extent that the same concerns the petitioner:-

a) The Forensic Investigation Report into the affairs of CMC Holdings Limited by Webber Wentzel dated 31 January 2012 and all allegations and recommendations against the petitioner therein is inconsistent with or in contravention of the Constitution of Kenya 2010 and invalid.

b) The proceedings of the Ad hoc Committee of 4th April 2012 and all consequential reports, findings and recommendations to the board of CMA are inconsistent with the Constitution of Kenya 2010 and invalid.

c) The report and Resolutions of the Capital Markets Authority Regarding the Investigation into the Affairs of CMC Holdings Limited dated 3 August 2012 and all allegations, determinations, findings and resolutions contained therein is inconsistent with the or in contravention of the Constitution of Kenya 2010, and invalid.

d) The letters dated 3rd August 2012 entitled 'Enforcement Action' and CMC Holdings Limited (CMCH)-Disqualification Of Directors' and all allegations, findings, determinations, sanctions, offences and penalties imposed against the petitioner therein is inconsistent with or in contravention of the Constitution of Kenya 2010, and invalid.

Response to the petition

11. The petition is opposed through a replying affidavit by ***Wycliffe Shamallah,*** the respondent's director of marketing sworn on 15th September 2015 and filed in court on 16th September 2015, and a further affidavit by the same deponent. There is also another affidavit by Rose Lumumba of even date. It is the Respondent's case that prior to the investigations undertaken by the respondent, CMC had engaged ***Deloitte, KPMG*** and ***Price Waterhouse Coopers (PWC)*** to undertake a review in respect of various aspects of its operations and dealings with related parties.

12. It was deposed that in September 2011 there were widely publicized board wrangles and media reports of various allegations against the board, management and shareholders of CMC. That a preliminary investigation on CMC by the respondent during the period September/October 2011 raised several concerns including; allegations of criminal activity against the company's directors, management and shareholders; Suspected foreign bank accounts through which company's funds were said to have been siphoned; conflict of interest in the dealings between shareholders, directors and the company; and violations of the Capital Markets Guidelines on Corporate Governance Practices by Public Listed Companies which necessitated the action taken by the respondent. The deponent denied wrong doing by the respondent and specifically denied violating the petitioner's rights and fundamental freedoms. It was also deposed that the petitioner was given information contained in the **Webber Report** and that he had been given sufficient time and opportunity to be heard by the ***Ad hoc committee.***

Petitioner's submissions

13. Mr. Kiplagat, learned counsel for the petitioner, submitted that the petitioner's main complaints revolve around three questions namely; whether the investigative process was lawful, whether it was procedurally fair and whether it offended the rule of law. Learned counsel submitted first; that the respondent's action violated Article 47(1) of the Constitution and referred to the case of ***Dry Associates Ltd v Capital Markets Authority and Another*** Petition No 528 of 2011 (para 62) to submit that Article 47(1) intended to subject administrative actions to Constitutional discipline. He submitted that Article 47(1) subjects exercise of administrative power to constitutional control. Learned counsel further submitted that the investigative action was illegal and relied on the case of ***Parstoli v Kabale District Local Government Council & Others*** 2008 EA 300 on what amounts to illegality.

14. On the legality of the appointment of ***Webber Wentzel*** under section 11,(3) (m), learned counsel submitted that the respondent violated section 11(3) (m) since the section provides for appointment of an ***auditor*** and not a ***forensic investigator***. Counsel relied on the definition of words "***auditor***", ***"audit"***, "***investigator***" and "***forensic investigation"*** and made reference to the case of ***Abai Sitar Yusuf & Another v The Attorney General & 2 Others*** 2013eKLR for the proposition that in interpreting a statute words used in the statute should be given their ordinary meaning.

15. Counsel argued that being a law firm, **Webber Wentzel** could not carry out mandate under section 11(3) (m) which, in his view, required an audit firm. He urged the Court not to follow ***Capital Markets Authority v Jeremiah Kereimi & Another*** **CA No 9 of 2014** since the issue of the legality of **Webber Eentzel'**s appointment and fair administrative action were not determined in that case.

16. Learned counsel also challenged the legality of the ***Ad hoc Committee*** and submitted that although under section 14(1), the respondent can appoint a committee and indeed it meeting appointed ***Mahmood Manji, Rose Detho, Gituro Waitheira, Caroline Kigen*** *and* ***Justice Aron Ringera*** to the Committee, the committee that eventually conducted the proceedings on 4th April 2012 and issued the impugned report was differently constituted by- ***Justice Ringera,*** (Chair) ***Jackline Kamau***, ***James Boyd Mcfie***, ***Rose Detho*** **a**nd ***Mahmood Manji.*** In that regard, counsel submitted that this committee was not properly and legally constituted because it had two members, ***Jackline Kamau*** and ***James Boyd Mcfie*** who had not been appointed as members of the committee in terms of section 14 (1). Counsel contended that the absence of lawfully appointed members of the committee (***Mr. Waingira*** and ***Miss Kigen)*** deprived the committee jurisdiction to conduct the proceedings of 4th April 2012.

17. On the unfairness of the procedure for enforcement, learned counsel submitted that the respondent violated Article 47(1) of the Constitution and relied on the Canadian case o*f* ***Baker v Canada*** **(1999) 2 SRC.** In that case, the ***Supreme Court*** of Canada stated that in order "***to ensure administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision maker.***"

18. Counsel further referred to sections 25A and 26(2) of the Act which require the respondent to give a person to be affected by the action, an opportunity to be heard to support this position. According to learned counsel, the action by the respondent not only violated Article 47(1) but also sections 25 A and 26(2) of the Act. He referred to the case of ***Canada (Attorney General) Mavi*** [2011]2SCR 504 (para 42) on the duty to act fairly.

19. Regarding failure to accord the petitioner proper and adequate notice, learned counsel submitted that the petitioner was served with two notices dated 28th and 30th March 2012. According to counsel the notice of 30th March notified the petitioner that the purpose of the committee was to afford him an opportunity to be heard in accordance with the sections 25 A and 26(2) of the Act which counsel submitted, was not the sole mandate of the committee since it did not disclose the investigative mandate in its terms of reference which included (i) determination of the validity of the allegations made against directors of CMC,(ii) giving recommendations to the board on the actions to be taken, if any, against directors and management of CMC and (iii) that the recommendations of the committee were to be considered by the board for enforcement and other appropriate actions.

20. Counsel contended that the notices issued to the petitioner were inadequate and relied on the decision in the case of ***Geothermal Development Company Ltd v Attorney General & 5 others [***2013]eKLR for the proposition that it is important that a party has reasonable opportunity to know the basis of allegations against him, even where no actual hearing is to be held, and that information provided in relation to administrative proceedings must be sufficiently precise to put an individual on notice of exactly what the focus of any forthcoming inquiry or action will be.

21. To that extent, Mr. Kiplagat submitted that the petitioner requested disclosure of evidence to be relied on in an email of 1st April 2012 without success. This, counsel contended, was despite the fact that the committee and the respondent in making their findings relied on recommendations and resolutions relied on specific evidence which had never been disclosed to the petitioner. Counsel relied on the case of ***Kanda v The Government of Federation of Malaysia*** (1962) UKPC 2 for the proposition that one must know what evidence has been given and what statements have been made affecting him, and that he must be given a fair opportunity to correct or contradict them. Counsel contended that this did not happen in the present case.

22. Learned counsel further argued that there was lack of prior notice and opportunity to be heard when the respondent, through the enforcement letter, imposed summary sanctions and penalties against the petitioner. According to counsel, failure to give the petitioner notice of proposed penalties and sanctions amounted to an act of procedural unfairness. He relied on the case of ***Ahmed Isaac Hassan v Auditor General*** [2015] eKLR for the submission that that the ordinary rule which regulates all procedures is that persons likely to be affected by the proposed or likely action must be afforded an opportunity of being heard as to why that action should not be taken.

23. Learned counsel also referred to the case of ***Capital Market Authority v Jeremiah Gitau Kiereini & Another*** [2014]eKLR where it was stated that what deserved a Constitutional challenge was the summary imposition of sanctions and other penalties before giving Kiereini an opportunity to be heard in mitigation.

24. Finally Counsel submitted that the investigative process and impugned enforcement action is in breach of the rule of law. Counsel cited Article 10 of the Constitution that all persons should apply the law properly and submitted that the respondent is a "person" and in that context, it was applying sections 11(3) (m) and 14(1) of the Act and that the action was taken pursuant to the respondent's interpretation of sections 11 (CC), 25 A and 34 A. Counsel went on to submit that the respondent violated the principle of legality derived from Article 10 (2) (d) of the Constitution and relied on the cases of ***Fedsue Life Assurance Limited & others v Greater Johannesburg*** and ***Pharmaceutical Manufacturers Association of south Africa and Another*** in ***Re exparte President of the Republic of South Africa & others*** for the submission that one of the Constitutional controls is that flowing from the principle of legality. According to Counsel, the enforcement was ***ultra vires*** sections 11(3) (m), 14(1), and 26(2) of the Act, sections 18,19,22 and 24 of the Accountants Act 2008 and Article 47(1) of the Constitution.

Respondent's submissions

25. Mr. Kanjama, learned Counsel for the respondent, submitted that the decision having been made in August 2012 and in accordance with the Act, the petitioner should have challenged that decision before the ***Capital Markets Appeals tribunal***.(CMAT), Counsel relied on the decision in***Republic v The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi*** *HCMISC. Application No. 1235 of 1998.* for the submission that a party should use the alternative remedy where one is provided for. Counsel further submitted that if the petitioner wanted to go to Court, he should have filed a Judicial review to challenge the fair administrative action under Order 53 of the Civil Procedure Rules and the Law Reform Act but not to through a constitutional petition.

26. In that regard, counsel contended that the petitioner is abusing court process by using the court to shield himself from liability by relying on the provisions Articles 22, 23, and 47 of the Constitution, andthat the court is being used to occasion injustice to CMC's shareholders since the directors had breached their fiduciary duty. Counsel relied on the case of ***Jetlink Express Limited v East African Safari Air Express Ltd [2015] eKLR*** for the submission that abuse of the process occurs when one's intention is to accomplish some improper purpose that is collateral to the proper object of the process which in the end offends justice; and/or when proceedings permitted by the rules of court to facilitate the pursuit of truth are used for purposes extraneous to that objective. According to counsel, the petitioner had trivialized the court's constitutional jurisdiction by needlessly invoking the same while other statutory remedies exist.

27. Learned Counsel submitted that under the Fair Administrative Act 2015, a challenge to an administrative action should be by way of judicial review and only if there is no other remedy. Counsel contended that the respondent's action involved several members of the board of CMC and according to him, the firm that conducted forensic investigations made a report and various committees were constituted to deal with the issues raised in that report. Mr. Kanjama argued that one of the directors affected challenged the action in court and the decision of the High Court was challenged in the Court of Appeal in ***Capital Markets Authority v Jeremiah Gitau Kiereini & Another*** (supra) and the Court of Appeal upheld the forensic investigation as well as the findings of the ***Ad hoc committee*** of the board. (Para 74 of the Judgment).

28. Counsel contended that the respondent properly constituted the ***Ad-Hoc committee*** in accordance with section 14(1) of the Act composed of five members, a majority being independent members and chaired by Retired Justice Aaron Ringera, and that the that the Committee was set up purposely to afford the petitioner an opportunity to be heard as required by sections 25 A and 26(2) (now section 26(8)) and notice was given to that effect.

29. According to learned counsel, the only issue that was not approved by the Court of Appeal was the sanctions and penalties on the basis that Kiereini had not been given an opportunity to be heard before the sanctions were imposed on him. Mr. Kanjama contended that although the decision of the Court of Appeal related to Kiereini only it however upheld the validity of the proceedings of the ***Ad hoc committee***. Learned counsel submitted that the letters had all the documents including the ***Webber Report*** which the petitioner attached to his petition, and that those investigation had been upheld by the Court of Appeal. Learned Counsel pointed out that the Court of Appeal had also acknowledged the importance of the respondent (Para 66) and what was important according to counsel, was the right to be informed for purposes of mitigation which the respondent had done.

30. Mr. Kanjama went on to submit that in the letter of 28th March 2012, the board made reference to section 14(1) of the Act and specified that the ***Ad hoc committee*** was convened to give the petitioner an opportunity to be heard. Counsel further contended that there was clear reference to section 25 A of the Act and the fact that the ***Ad hoc committee*** could propose sanctions. Counsel pointed out that the supplementary affidavit by Rose Lumumba, annexed minutes of the meeting of 8th March 2012 by the board and the documents show specific delegation of authority to that committee to deal with sanctions and that at page 7 the document it shows reconstitution of the ***Ad hoc committee*** done on 15th March 2012.

31. Learned counsel argued that the forensic investigation was upheld by the Court of Appeal, and, in his view, it is not mandatory that the investigation be done by an ***auditor***, but that what was important was the ability and expertise of the body to perform the task. Mr. Kanjama contended that the Act does not specifically state that the ***auditor*** must be an accountant hence there was nothing wrong with the appointment of ***Webber Wentzel***, a law firm so long as it could do the work which it did.

32. Regarding **Fair Administrative Action**, counsel denied that the respondent had violated Article 47(1) of the Constitution, that its actions were ***ultra-vires*** its powers under the Act, or were unreasonable. According to counsel, due process was followed from the onset. On the mandate of the respondent as a regulator, counsel contended that under Section 11 of the Act the respondent is the sole regulator of capital Markets in Kenya and has a duty to protect interests of shareholders and investors. Counsel relied on the decisions in ***Jeremiah Gitau Kiereini v Capital Markets Authority & Another*** *(supra)* and ***Cementia Holding Ag & Another v Capital Markets Authority & 3 Others*** *[2014] eKLR* to contend that the Respondent neither acted ***ultra vires*** nor breached Article 47 of the Constitution. Counsel denied that the respondent's action was also unreasonable. In counsel's view, the petitioner was accorded an opportunity to make his case the only way the court could fault the respondent is if there was total absence of or failure by an administrative body to meet the requirements of Article 47(1) but not otherwise.

33. Counsel went on to pointed out that constitutional rights are not absolute but co-exist parallel with rights of others. He contended that the petitioner's claim is a right that must be weighed against rights of shareholders to what is rightfully theirs hence the petitioner's claim ought to fail. Mr. Kanjama argued that rights and fundamental freedoms cannot be absolute and may be limited as provided for under Article 24 and relied on the case of ***Githunguri v Republic*** [1986] e KLR to highlight the respondent's position, adding that since the petitioner was on the wrong side of a statutorily mandated process, any limitations to his rights were justifiable.

Determination

34. I have considered this petition, the response thereto, submissions by counsel for the parties and authorities relied on. From all this I have identified three issues for determination. First whether the appointment of the Forensic investigator was lawful; whether the appointment of the ***Ad hoc committee*** was ***ultra vires*** powers of the respondent's Board and whether the respondent violated the petitioner's right to fair administrative action.

35. But before delving into the main issues raised in this petition, I should first dispose of the preliminary issue raised by the respondent that the petitioner should have appealed to the Capital Markets Tribunal established under section 35A of the Act instead of filing this petition. The respondent's counsel further contended that the petitioner should have filed a judicial review under Order 53 of the Civil Procedure Rules to challenge the administrative action. In essence the respondent contended that this court is not the proper forum for dealing with the petitioner's complaints.

36. Section 35 A (1) sets out the powers of the tribunal as follows;

> ***"1) Any person aggrieved by any direction given by the Authority to such person or by a decision of the Authority or by the Investor Compensation Fund Board—***
>
> ***(a) refusing to grant a licence;***
>
> ***(b) imposing limitations or restrictions on a licence;***
>
> ***(c) suspending or revoking a licence;***
>
> ***(cc) refusing to approve a public offer of securities;***
>
> ***(d) refusing to admit a security to the official list of a securities exchange;***
>
> ***(e) suspending trading of a security on a securities exchange; or***
>
> ***(f) requiring the removal of a security from the official list of a securities exchange;***
>
> ***(g) refusing to grant compensation to an investor who has suffered pecuniary loss resulting from failure of a licensed stockbroker or dealer, to meet his contractual obligations or pay unclaimed dividends to a beneficiary who resurfaces, may appeal to the Capital Markets Tribunal against such directions, refusal, limitations or restrictions, cancellations, suspension or removal, as the case may be, within fifteen days from the date on which the decision was communicated to such person."***

37. *A reading of section 35A would seem to suggest that the actions targeting the petitioner are outside the ambit of the tribunal given that the section deals with shares in the Stock Exchange. However there is section 35A (4) which is more general and gives the tribunal mandate to deal with appeals from decisions of the respondent, its officers and or committees. The sub- section provides that* ***the Tribunal shall, upon an appeal made to it in writing by any party or a reference made to it by the Authority or by any committee or officer of the Authority, on any matter relating to this Act, inquire into the matter and make an award thereon, and every award made shall be notified by the Tribunal to the parties concerned, the Authority or any committee or officer thereof, as the case may be.****. It is therefore clear that the tribunal has power to deal with appeals from such decisions as the respondent or its committees may make without any distinction.*

38. However in the present case the petitioner complains that the actions by the respondent are invalid and illegal and further that his rights under Article 47(1) of the constitution have been violated. In the context of section 35A, the tribunal cannot deal with issues of legality,

validity and or constitutionality of actions either of the respondent, its officers or committees which is the mandate of the court. Further, a closer scrutiny of the **Fair Administrative (Act No. 4 of 2015)** which was enacted to give effect to Article 47(1) of the Constitution, defines administrative action to include **(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates .** Section 7(1) of the Act provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court or tribunal to challenge that administrative decision. According to the section, the court or tribunal will review the administrative action where the person who made the decision-(i) **was not authorized to do so by the empowering provision;(ii) acted in excess of jurisdiction or power conferred under any written law;(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;(iv) was biased or may reasonably be suspected of bias; or (v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case** among others.

39. Section 9 has a caveat and states that the court cannot review administrative actions where the alternative remedy provided for in the Act has not been exhausted. However, section 9(4) gives the court discretion to hear a challenge to an administrative action if satisfied that it will be for the interest of justice. Looking at the petition, the petitioner alleges breach of his fundamental rights and freedoms and also questions the fairness, *validity, legality and constitutional propriety* of the respondent's administrative action. It is for this reason that this Court has been called upon to intervene. For that reason therefore, this is a proper case for this court to assume jurisdiction and investigate the alleged violations bearing in mind the above provisions. It is important to note that there is now a thin difference between judicial review and constitutional petitions given the express constitutional provision in Article 23 (3) that one of the remedies the court can grant ***when considering applications for redress of denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights is judicial review.***

40. More importantly, this court has unlimited original jurisdiction in civil and criminal matters in terms of Article 165 (3) of the Constitution and not least 165(3) (b) which gives this court jurisdiction to determine a question of whether a right or fundamental freedom in the Bill of Rights has been denied violated infringed or threatened. The petitioner has in effect alleged that by taking those administrative actions, the respondent has violated his fundamental freedoms. *For the above reasons, I find and hold that the petition is properly before this court for adjudication.*

41. In doing so, I take note of the observation by the Court of Appeal in the case of ***Capital Markets Authority v Jeremiah Gitau Kiereini & another (supra)*** where the court stated that;

> "***The existence of an alternative remedy, in this case the Tribunal, would not be efficacious because the High Court does not share with it the powers under Article 165 of the Constitution. We are satisfied that the issue laid before the High Court under Article 47 was constitutional in form and substance and consequently the right forum for its adjudication was the High Court".(emphasis).-(See also Alnashir Popat & 8 Others v The Capital Markets Authority [2016] eKLR).***

Appointment of Webber Wentel the Forensic Investigator

42. Turning to the main issues in this petition, the petitioner has challenged the respondent's decision to appoint ***Webber Wentel*** as a forensic investigator and its subsequent report which found the petitioner and other members of the board of directors of CMC culpable of various misdeeds which had affected the operations of CMC, a firm listed in the Stock Exchange and therefore, under the respondent's scrutiny, and the legality of the ***Ad hoc committee*** set up pursuant to its powers under the Act.

43. Counsel for the petitioner contended first, that the appointment of **Webber Wentel,** as the Forensic investigator was illegal as it was not done in accordance with the statutory provisions and for that reason, that the respondent had acted ***ultra vires*** its mandate and that it also violated the petitioner's rights and fundamental freedoms. In particular, it was contended that the respondent did not adhere to statutory provisions when constitution the ***Ad hoc Committee*** because members of the committee were outsiders and finally that the respondent violated the petitioner's right to fair administrative action contrary to Article 47(1) of the Constitution, The respondent was also accused of failing to give the petitioner information and adequate time to enable him defend himself before the ***Ad hoc committee.*** The respondent denied any wrong doing and contended that the petition was an abuse of the court process since the petitioner had other mechanisms for pursuing a remedy under the Act. It was also contended that the petitioner's right to fair administrative action or any of his rights was violated.

44. The petitioner has questioned the appointment of **Webber Wentel,** a Law firm as a forensic investigator instead of an ***auditor*** as required by the Act thus contended that the respondent violated section 11(3), of the Act. The petitioner argued section 11 (3) is clear that the respondent should appoint an ***auditor*** carry out investigations and not a law firm to carry out forensic investigations. In his view, this appointment was unlawful and invalid. To address this we have to examine the applicable statutory provisions,

45. Section 11 provides for the principle objectives of the respondent. Section 11 (3) (h) allows the respondent to ***inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it has granted a licence and any public company the securities of which are publicly offered or traded on an approved securities exchange or on an over the counter market".*** Section 11(3) (m) provides that the respondent may ***appoint an auditor to carry out a specific audit of the financial operations of any collective investment scheme or public company the securities of which are traded on an approved securities exchange, if such action is deemed to be in the interest of the investors, at the expense of such collective investment scheme or company*; *(emphasis).***

46. I understood the petitioner to contend that the appointment of ***Webber Wentezel*** a South African law firm to carry out forensic investigations on the activities within CMC was in violation of section 11(3) (m) of the Act because it was not an ***auditor*** or ***audit*** firm. The Act neither defines the word ***"auditor"*** nor "***audit"*** which leaves the issue in the hands of the respondent. What is important however, is that the section states that the respondent may appoint an ***auditor*** to carry out specific audit of financial dealings of a publicly listed firm. The respondent appointed a forensic investigator to do the work it wanted done. The petitioner did not adduce evidence to show that ***Webber Wentezel*** did not possess the requisite experience to undertake the work it was assigned to do. For the petitioner to succeed, he would have to

show through evidence that the respondent took an action that was prohibited by law and not merely that it appointed a forensic investigator as opposed to an auditor.

47. The petitioner relied on the dictionary definitions of the words ***auditor***, ***audit,*** and ***Forensic investigation*** to argue that the respondent acted ***ultra vires*** its powers in appointing a forensic investigator, which in his view, is not contemplated by the Act. However, in a case like this which calls for interpretation of provisions of a statute, one must look at the wider purpose of the Act or statutory provision rather than give a section of a legislation a dictionary interpretation which may most likely distort the meaning of the provision thus the intention of the legislature. In that regard the Court of Appeal stated in the case of ***The Engineers Board of Kenya v Jesse Waweru Wahome & others*** Civil Appeal No 240 of 2013 that;

> ***"One of the canons of statutory interpretation is a holistic approach… no provision of any legislation should be treated as 'stand -alone' An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act."***

48. **Schreiner J A** on his part, observed in ***Jaga v Donges No and Another*** **[1950] (4) SA 653(a) that;**

> ***"…the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that the context as here used is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is matter of the statute its apparent scope and purpose and within limits of its back ground"(emphasis).***

49. The position taken in the above decisions is that the statute or statutory provision should be given a purposive interpretation by looking at the entire statute in order to ascertain the true legislative intent in enacting that particular legislation. In ***Reserve Bank of India* v. *Peerless General Finance and Investment Co. Ltd.*, 1987 SCR (2) 1 the Supreme Court of India expressed the view that;**

> ***"A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."(emphasis)***

50. It is also important to stress that that ***the court should examine every word of a statute in its context and must use context in its widest sense.***(***Commercial Tax Officer, Rajasthan v M/s Binan Cement Ltd*** [2014] SCR,).

51. Applying the principles flowing from the above decisions, it behooves this court to give the statute a holistic examination including looking at its preamble to the Act to discern the legislative intent of enacting the Act. The preamble to the Act states that the Act establishes a Capital Markets Authority for the purpose of ***promoting regulating and facilitating the development of an orderly, fair and efficient capital Markets in Kenya and for connected purpose.***

52. Section 11 provides for the principle objectives of the respondent while Section 11 (3) (h) allows the respondent to ***inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it has granted a licence and any public company the securities of which are publicly offered or traded on an approved securities exchange or on an over the counter market".*** Section 11(3) (m) on the other hand provides that the respondent may ***appoint an auditor to carry out a specific audit of the financial operations of any collective investment scheme or public company the securities of which are traded on an approved securities exchange, if such action is deemed to be in the interest of the investors, at the expense of such collective investment scheme or company***;

53. Taking the preamble into context as well as the objectives of the respondent under the Act, section 11 (3) (m) gives the respondent mandate to appoint an ***auditor*** to check the financial dealings of a listed public company the object being to establish whether the financial institution complies with regulations if such action is deemed to be in the best interest of the investors. Furthermore, section 11 (3) (w) gives the respondent mandate ***to do all other acts as may be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its power under the act.***

54. It is also important to note that section 13B of the Act is wide enough for it allows the respondent whether on its own motion or upon a complaint, and if it has reason to believe that there may be an offence or malfeasance committed in a regulated company, ***to appoint a suitably qualified person to conduct investigations into the matter on behalf of the Authority***. With that in mind, what the respondent did was to take action to establish whether CMC, a listed company, was conducting its affairs in conformity with the law regulating listed companies following the revelations that all may not be well within that company. To that extent, therefore, the respondent acted within its mandate and there would be no basis to hold that her action was ***ultra vires***, illegal or invalid simply because it appointed a forensic investigator as opposed to an auditor.

55. In my view, the respondent, while exercising its mandate under section 11 in general and section 11 (3) (m) in particular, and taking into account section 11(w), the appointment of a forensic investigator was deemed to be suitable and for the best interest of investors and it would be improper to take a narrow interpretation of the word "***auditor"*** to exclude a forensic investigator bearing in mind that the respondent's overall mandate is to ***promote regulate and facilitate the development of an orderly, fair and efficient capital Markets in the country***.

56. I am therefore, unable to agree with the petitioner that the respondent violated section 11(3) (h) or (m) when it appointed ***Webber Wentel***

to undertake forensic investigations in the affairs of CMC. Its actions were not ***ultra vires*** either, because the law allows the Authority to take actions that are deemed to be in the best interest of investors, for that is why the respondent exists. In the circumstances, there are also no sufficient grounds to persuade the court to hold that the appointment of ***Webber Wentel*** to conduct forensic investigations was unreasonable under the ***Wednesbury*** principle as contended by the petitioner since this was an action the respondent was allowed by statute to take and there was nothing unreasonable about it.

57. In arriving at this conclusion, , I am guided by the Court of Appeal's observation in ***Capital Markets Authority v Jeremiah Gitau Kirieini & another*** (supra) that;

> ***"[65]. Under section 11(3) of the Act, no less than 29 wide 'powers, duties and functions of the Authority (also referred to as "the Board") established under Section 5 of the Act are listed. Section 11(3) (w) makes such powers unlimited as the Board may "do all other acts as may be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under this Act". Very wide powers indeed and therefore the reason for caution in the manner of exercising them to avoid abuse."***

58. The petitioner also complained that there were no terms of reference to the ***ad hoc committee*** at the time it was appointed. According to the petitioner, the ***ad hoc committee*** should have been given terms of reference and in his view, failure to do so rendered the appointment unlawful. I have perused the applicable sections and the respondent's response that the committee's purpose was to give the petitioner an opportunity to be heard in terms of sections 25A and 26(2) of the Act regarding the findings of the **Webber wentel** forensic investigations Report. Sections 25A and 26 allow the respondent to impose sanctions against employees, director or listed companies for breach of provisions of the Act, regulations or guidelines made thereunder.

59. **According to the respondent's *Ad Hoc Committee Rules of Procedure,* the relevant terms of reference for the Committee** were in summary to consider the ***Webber Wentzel*** investigation findings and determine the validity of the allegations against directors of CMC, to give a fair and reasonable opportunity for the past and current Directors (whether executive or no-executive) of CMC and any other person the committee may deem necessary to be heard and defend themselves on the allegations attributed to them, the ***ad hoc committee*** was to give recommendations to the Board of the Authority on action to be taken, if any, against the past or current directors of CMC (both executive an non-executive) or any other person, on ways to improve the Capital Markets. The recommendations of the ***ad hoc committee*** were to be considered by the Board for enforcement or other appropriate action.

60. It is clear that the Committee's role was to consider the allegations, give the parties adversely affected a hearing and make recommendations to the respondent for possible enforcement. The ***ad hoc committee*** was not to take and did not take enforcement action. It was upon consideration of the recommendations that the respondent would then take enforcement action if any. Indeed after the respondent received the recommendation of the ***ad hoc committee,*** the issued the petitioner with the enforcement action dated 3rd August 2012.

61. To my mind, the petitioner's contention that all allegations, determinations, resolutions, sanctions, penalties and offences imposed against him are illegal, unconstitutional and invalid is too general to be correct. Such a general finding would in effect invalidate the court's earlier finding that the appointment of the forensic investigator (**Webber Wentel**) was properly done and therefore, its investigations and the report are valid. I therefore find and hold that the appointment of ***Webber Wentel*** to carry out forensic investigation was within the mandate of the respondent and was therefore lawful and valid.

Appointment of the Adhoc Committee

62. Second, the petitioner contended that the respondent violated sections 11 A (1) and 14 (1) of the Act in the appointment of the ***ad hoc Committee.*** The petitioner's complaint was that the respondent appointed a committee comprised of members from outside the Board which is not contemplated by section 14 (1). The respondent on the other hand saw no misdeed in that appointment and argued that the petitioner's complaint was misguided. For better appreciation of the contention by either side, it is important to reproduce section 14(1). It provides as follows;

> ***"(1)The Authority may appoint committees, whether of its own members or otherwise, to carry out such general or special functions as may be specified by the Authority, and may delegate to any such committee such of its powers as the Authority may deem appropriate. "***

63. Section 14 (1) gives the respondent mandate to appoint a committee to deal with general or specific functions specified by the respondent. From a reading of the section, the committee does not necessarily have to be that of the Board because the section is clear that the respondent may appoint a committee of its own or otherwise. That means members of the committee can be from within or without. If the legislature's intention was that members of the committee must be from within the Board only, nothing could have been easier than saying so. That is the legislature could not have used the words "***The Authority may appoint committees, whether of its own members or otherwise,"***

64. In pursuit of that interpretation, the petitioner contended that the respondent had resolved to appoint a committee of the Board but acted ***ultra vires*** its resolution by appointing outsiders to the committee who were; ***Mr. Justice Aron Ringera, Jackline Kamau*** and ***James Boyd Mcfie***. The petitioner further contended that the respondent acted ***ultra vires*** its powers under section 11A (1) by delegating its function to a committee that was not composed of its own members. The petitioner went on to query what special or general functions were to be carried out by the committee and which powers were delegated. The petitioner was of the view that the proceedings and determinations of the committee were illegal and unconstitutional hence invalid.

65. Section 11 A (1) of the Act allows the respondent to delegate any of its functions to "***(a) a committee of the Board; (b) a recognized self -regulatory organization; or (c) an authorized person***." It is true that initially the respondent appointed a committee comprising of ***Mahmood Manji, Rose Detho, Gituro Waitheira, Caroline Kigen*** *and* ***Justice Aron Ringera.*** However the committee that eventually heard

the petitioner and submitted a report was composed of ***Justice Ringera,*** (Chair) ***Jackline Kamau***, ***James Boyd Macfie***, ***Rose Detho*** **a**nd ***Mahmood Manji.*** Jackline Kamau and James Boyd Macfie were not in the original committee and the respondent's explanation was that the committee was reconstituted.

66. A reading of sections 11A (1) and 14 (1) of the Act is clear that the two sections give the respondent leeway to delegate its functions to various persons including a Committee either of the Board or otherwise to perform functions on behalf of the respondent. For that reason, I am satisfied that the respondent was within its mandate when it appointed the ***ad Hoc Committe***e. I am also unable to fault the respondent for delegating its functions to the ***ad hoc committee*** to consider the forensic investigations report submitted by ***Webber Wentel*** by invoking its statutory powers under the Act. In enacting sections 11 A and 14 , the legislature must have been conscious of the fact that for the respondent to effectively discharge its wide statutory functions of promoting, regulating and facilitating the development of an orderly, fair and efficient capital market, it was necessary to give it discretion to appoint ***ad hoc committees*** from within and without and delegate its functions to such committees for effective discharge of the delegated functions, otherwise the respondent on its own would be overwhelmed in the performance of those duties. Moreover such discretion would enable the respondent call on persons with relevant expertise to perform some tasks on its behalf for purposes of fulfilling its wide mandate under section 11(3) of the Act.

67. In that respect, interests of investors are paramount and the respondent must bear in mind those interests when taking such actions. To my mind, I do not find anything wrong in the respondent's decision to appoint some persons from outside the Board into the ***Ad hoc committee*** and such an appointment could not be illegal, invalid or unconstitutional in so far as the respondent acted pursuant to powers conferred to it by the Act. The appointment was within the law and the respondent exercised its mandate as required by statute hence there was no illegality. Moreover, section 13B is also wide enough to cover the respondent's actions. The ***Ad hoc committee*** was also properly constituted and the petitioner's suggestion that the constitution of the committee was done ***ultra vires*** the Board's mandate is without basis. In that regard therefore, there cannot be generalization of all actions taken by the respondent and term them illegal and invalid. The Court of Appeal had similarly found in ***Capital Markets Authority v Jeremiah Gitau Kireini & Another*** (supra) that the appointment was valid hence lamping together all the respondent's actions and term them illegal and invalid is unsustainable.

Fair Administrative Action

68. Lastly, the petitioner contended that the impugned decisions were not procedurally fair as required under Article 47(1) of the Constitution. The petitioner argued that the respondent did not give him adequate notice, the nature, focus and reasons for the ***adhoc committee***'s hearing of 4th April 2012. It was the petitioner's case that he was also not informed that the decisions had the potential of adverse consequences on him once he appeared before the ***adhoc committee***. He further argued that he was not informed that the ***adhoc committee*** would consider the **Webber Report**, determine validity of the allegations made against him in that report, that the ***adhoc committee*** would make recommendations to the respondent for possible sanctions against him, and that the ***adhoc committee'***s recommendations would be considered by the respondent for purposes of enforcement against him.

69. The requirement for fair administrative action is now a constitutional right pursuant to Article 47(1) of the constitution. Article 47(1) provides that ***Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair***. The purpose of Article 47(1) is to subject administrative actions by administrative bodies to constitutional test of speed, efficiency, lawfulness, reasonableness and procedural fairness in order avoid administrative bodies applying caprice or surprise when taking administrative action against those under them. In that regard, the Court of Appeal stated in the case of ***Judicial Service Commission v Mbalu Mutava & another*** [2014] eKLR that;

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

70. In the case of ***Dry Associates Ltd v Capital Markets Authority and Another,*** [2012] eKLR the Court also observed that **Article 47** is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the ***Law Reform Act (Cap 26 of the Laws of Kenya)*** but is to be measured against the standards established by the Constitution. And in the case of ***Kenya Anti-corruption Commission v Lands Limited and Others*** **[2008] eKLR** the Court stated that ***the right of hearing are of fundamental importance to our system of justice and even when they are not expressed specifically in any law the supreme position of the Constitution must be implied in every Act especially, the right to due process and it cannot be taken away. Constitutional rights cannot be taken away without due process.***

71. The fact that the right to fair administrative action is now firmly embedded in the constitution was stated in the South African case of ***Pharmaceutical Manufacturers Association of South Africa & Another: exparte President of the Republic of South Africa & Others (CCT) 31/99) [2000] ZACC 1; 2000 (2) ZA 674*** thus

> ***"…the Constitution itself has conferred fundamental rights to administrative justice and through the doctrine of Constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause has the effect of 'constitutionalizing' what had previously been common law grounds of judicial review of administrative action. This means that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action or adjudication of a refusal of a request to provide reasons for administrative actions involves the direct application of the constitution."***

72. The Court of Appeal reiterated the duty to give reasons by an administrative body in the case of ***Judicial Service Commission v Mbalu Mutava & another***(supra) as a way of enforcing the right to fair administrative action when it stated:

> ***"[40] The duty to give reasons and the nature and extent of the reasons envisaged by article 47(2) is dependent on the character and limits of the administrative discretion conferred on the administrator by the Constitution or law and its application to the facts of the case. So, when article 47(2) is considered together with the role of JSC under article 165(4), it is clear that JSC is not required to keep a detailed official record of the proceedings nor does it have a legal duty to provide its internal working documentation to the 1st respondent. It follows that the request for the full report, recommendations and reasons for the decision, was misconceived in the circumstances of this case. Furthermore, the right to be given written reasons under article 47(2) arises, if the right has been or is likely to be adversely affected by the administrative action. In other words, the administrative action must have adversely affected the right or is likely to adversely affect the right."***

73. I have considered these complaints and the submissions made on behalf of both the petitioner and the respondent. The ***ad hoc committee*** was appointed to give the petitioner a hearing before actions contemplated in sections 25A and 26(2) of the Act. According to depositions at paragraph 17 of the affidavit by ***Wycliffe Shamiah*** sworn on 15th September 2015, after the respondent received the final report of the forensic investigations from ***Webber Wentel,*** it forwarded it to CMC for onward transmission to its directors. It was also deposed that it was after the report had been received by the respondent that the Board resolved to appoint the ***ad hoc committee*** to give the affected persons an opportunity to be heard. There is further deposition that the petitioner was personally informed of the Constitution of the ***ad hoc committee*** and the fact that he was to appear before that committee and once again the **Webber Report** was sent to him.

74. The petitioner did not deny that the report earlier sent to the directors of CMC reached him. He did not also deny that he received the letter inviting him to appear before the committee and the enclosed report. It is also evident that the petitioner eventually appeared before the ***ad hoc committee*** and was thus given a hearing by the ***committee*** before making its recommendations to the respondent. Taking all this into account, the element of speed as contemplated by Article 47(1) of the constitution cannot be faulted. In fact the petitioner deposed in his affidavit in support of the petition that the respondent informed him on 18th January 2012 that it had appointed Webber Wentel to carry out forensic investigations. The report came out on 31st January 2012 and he was informed on 28th March that he would have to appear before the ***ad hoc committee*** on 2nd and 3rd of April but the dates were changed to 4th April and the petitioner was informed accordingly. From those facts, it is clear that the petitioner was given the report as soon as the respondent received it. Furthermore, the petitioner has not challenged the efficiency of the actions taken by the respondent save to question the lawfulness of the respondent's action in the appointment of the forensic investigator as well as the ***ad hoc committee*** which I have however determined to have been in order.

75. The petitioner laid more emphasis in questioning procedural fairness of the respondent's action contending that the action was procedurally unfair thus unconstitutional. The test for procedural fairness of an administrative action was stated in the case of ***Pastoli v.Kabale District Local Government Council and Others [2008] 2 EA 300*** thus;

> ***"..Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or failure to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."***

76. In the case of ***Selvarajan v Race Relations Board [1976] 1 ALL ER 12, Lord Denning*** put the position thus:

> ***"... The investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it. The investigating body is however the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only."***

77. In attacking procedural fairness as I understood it, the petitioner's contention was that he was not informed that the decisions by the ***ad hoc committee*** would likely have adverse consequences against him, that the committee would also make recommendations to the respondent and that the recommendations may include penalties. He also complained that he was not given sufficient time to prepare and further that he was not given notice of the allegations made by the forensic investigator-**Webber Wentel.**

78. As observed elsewhere in this judgment, the petitioner had received the report and therefore he knew its contents and must have known its likely consequences. The letter of 28th March 2012 to the petitioner referred to ***adhoc committee's*** hearing and specifically stated that the forensic investigation has been completed and a report had been sent to CMC to be availed to all directors. The letter went as far as stating that the ***adhoc committee*** was to give the petitioner and all persons expected to appear before it an opportunity to be heard pursuant to sections 25A and 26(2) of the Act in the meeting scheduled for 2nd April 2012.

79. The letter of 30th March 2012 informed the petitioner of change of the date and venue of the meeting and that the meeting had now been rescheduled to 4th April 2012 at the respondent's Offices. The letter once again contained allegations attributed to the petitioner in the **Webber Report** which had earlier been sent to CMC to be availed to directors. The petitioner did not deny that he had been given the report through CMC as the letter of 28th March intimated. This implies that having received the report the petitioner was aware of the allegations made against him, and any further information was in addition to what he had already knew. Furthermore, according to the affidavit of ***Rose Lumumba*** sworn on 15th September 2015, the petitioner was given sufficient time by the ***adhoc committee*** and even made written submissions before the committee made its recommendation.

80. It clear from the record that it was after the respondent received recommendations by the ***ad hoc committee*** that the Board resolved to take certain administrative actions against the petitioner and duly informed him. According to the record, by letter dated 28th February 2017 the respondent invited the petitioner to show cause and to a hearing by the Board over the recommendations by the ***ad hoc committee.*** The

petitioner was given 7 days to respond to the allegations to enable the respondent arrive at an objective assessment of his potential capability.

81. In my respectful view, I am satisfied that the petitioner was given an opportunity to be heard and that in terms of Article 47(1) of the Constitution, the respondent acted expeditiously, lawfully and fairly. The notice given to the petitioner was also reasonable given that the petitioner was aware of the allegations and indeed appeared before the ***adhoc committee*** and made submissions which were considered by the committee. In that regard, the petitioner cannot claim that he was not given a hearing. In any case, if the petitioner felt that the notice requiring him to appear before ad hoc committee was too short, he could still appear before it and ask for an adjournment since the matter was now in the hands of that committee.

82. In that regard, I agree with the observation by **Onguto J** in the case of ***Alnashir Popat & 8 Others v The Capital Markets Authority [2016]eKLR*** that;

> ***"[81]As regards the issue of an inconvenient date, it is a matter of practice even in a court of law or before any tribunal for that matter, when an inconvenient date is given, a party may appear before the body and request for an adjournment. There is no reason why such practice cannot be extended and fetched upon any adjudicator or decision maker. I have been unable to understand why this was or would have been so difficult to the Petitioners or their counsel."***

83. In conclusion, from my evaluation of the facts of this case, evidence and the law and considering precedent, I am satisfied that the respondent acted in accordance with the provisions of the Act when it appointed the forensic investigator ***Webber Wentel*** hence its report is valid and legal. Further, the appointment of the ***ad hoc committee*** by the respondent was also done in compliance with the provisions of the Act. I am also satisfied that the petitioner was accorded an opportunity to be heard and indeed appeared before the ***ad hoc committee*** which gave him a hearing and he even made written submissions in so far as can be seen from depositions in the respondent's officers' affidavits. In doing so I take the view expressed by the Court of Appeal in the case of ***Commissioner General, Kenya Revenue Authority v. Silvanous Onema Owaki t/a Marenga Filling Station*** **(Kisumu Civil Appeal No. 45 of 2000 that;** ***the right to be heard must be determined according to the statutory scheme which sets out the duties of the statutory corporation and the rights of the subject.*** I am satisfied that this was followed.

84. Having come to that conclusion, the upshot is that the petition dated 30th June 2015 is declined and is hereby dismissed with costs.

Dated, Signed and Delivered this Day 29th of November, 2017

E C MWITA

JUDGE