



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 245 OF 2016

BETWEEN

ALNASHIR POPAT.....1ST PETITIONER
OMUREMBE IYADI.....2ND PETITIONER
JINIT M. SHAH.....3RD PETITIONER
ANWAR A. HAJEE.....4TH PETITIONER
HANIF SOMJI.....5TH PETITIONER
VISHNU DHUTIA.....6TH PETITIONER
ERIC G. BENGI.....7TH PETITIONER
CHRISTOPHER DIAZ.....8TH PETITIONER
MUKESH K.M. PATEL.....9TH PETITIONER

AND

THE CAPITAL MARKETS AUTHORITY.....RESPONDENT

JUDGMENT

Introduction

1. Imperial Bank Limited (in receivership) (“the Bank”) is a limited liability company duly incorporated under the Companies Act (Cap 486 Laws of Kenya). It was put under receivership in late 2015. The events and public revelations which followed startled the Banking sector and the Kenyan public. Indeed, the story of the Bank is well known and has been within the public domain for some while now.

2. The Petitioners are directors of the Bank. The Respondent is the Capital Markets Authority (also herein “the CMA”), established under the provisions of Section 5 of the Capital Markets Act (Cap 485A Laws of

Kenya). It is charged with the responsibility of *inter alia* promoting, regulating and facilitating the development of an orderly, fair and efficient capital markets in Kenya.

3. The Petitioners have filed this Petition challenging the administrative proceedings being undertaken by the Respondent in respect to the Bank's receivership. They claim that in carrying out its investigation, the Respondent has violated or is likely the Petitioners' fundamental rights and freedoms, in particular the right to equality and freedom from discrimination under Article 27, the right to access information under Article 35, the right to fair administrative process under Article 47 and the right to fair trial under Article 50 of the Constitution.

Factual background

4. It may well light the path of the reader if, at this early stage, I relate in detail the facts leading to the Petition as well as the parties' respective cases. As I relay the parties' respective cases, I will say a little more than usual on the facts which are largely common.

5. In April 2015, the Bank submitted an application for approval to the Respondent to undertake a Ksh. 2 billion bond issue to the public. Upon consideration of the information and disclosure submitted by the Bank and four months later, the Respondent issued its approval on 12 August 2015.

6. On 13 October 2015, two months after the bond approval, the Central Bank of Kenya ("the CBK"), acting pursuant to its statutory mandate, placed the Bank in receivership. Upon doing so, the CBK appointed the Kenya Deposit Insurance Corporation ("the KDIC") to assume the management and control of the Bank pursuant to the provisions of section 34(2) (b) of the Banking Act and sections 43 and 53(1) of the Kenya Deposit Insurance Act. Subsequently, the Respondent instructed the Nairobi Securities Exchange to suspend the listing of the bond. After the suspension of the bond, the Respondent resolved to investigate the manner in which the bond process had been conducted.

7. The Respondent received enquiries from bond investors who had participated in the bond. A meeting with the Petitioners then followed on 13 January 2016. Four months later, the Respondent issued to the Petitioners notice to show cause letters dated 6 May 2016. In the notice, the Respondent set out in detail the alleged contravention of the law by the Petitioners.

The Petitioners' case

8. The Petitioners' case is contained in their Petition dated 13 June 2016. The affidavit in support of the Petition sworn on the same day by the 1st Petitioner and his further affidavit sworn on 11 July 2016 further detail the factual aspect of the claim.

9. In his affidavit, the 1st Petitioner states that over the years, the Bank had grown steadily and profitably as a financial institution. The Bank recorded a pre-tax profit of approximately Ksh. 2.7 billion for the financial year ending 31 December 2014 and as at 30 June, 2015 the Bank had net assets of approximately Ksh. 8.4 billion.

10. He avers that the Bank had in place a Board of Directors ("the Board") made up of one executive managing director, six non-executive directors and three independent non-executive directors.

11. He claims that vide the minutes of the Board dated 30 March 2015, the Board ratified the recommendations of its consultant with the approval of the shareholders of the Bank to proceed with the issuance to the general public of a corporate bond in the amount of Ksh. 2 billion. By the same minutes, Dyer and Blair Investment Bank Ltd was appointed as the Bank's Transaction Advisor for the bond issue. All the meetings and correspondences on the bond issue were handled by the then group managing director Mr. Abdulmalek Janmohamed, the then chief finance officer Mr. James Kaburu, members of the transaction advisory team comprising Dyer and Blair, Hamilton, Harrison and Mathews Advocates and other relevant authorities being the CBK, the Nairobi Securities Exchange ("the NSE"). The Respondent was also involved as regulator in the bond issue. Allegedly all communication in regard to the bond was

handled by the aforesaid people without any direct involvement of the board or individual directors of the Bank.

12. On 13 August 2015, the Bank's chief finance officer informed the Petitioners that the Respondent's acting chief executive officer had approved the issuance of the bond.

13. Then on 15 September 2015, Mr. Abdulmalek Janmohamed passed on. A new group managing director, Mr. Naeem Shah was appointed in his place on 16 September 2015. Mr. Shah informed the 1st Petitioner on 21 September 2015 that Mr. Abdulmalek Janmohamed, had for many years, and on numerous occasions authorized irregular disbursements of vast amounts of money belonging to the Bank. These disbursements had allegedly been concealed from the Petitioners.

14. Consequently, the board on 7 October 2015, appointed the firm of FTI Consulting LLP of London to carry out a forensic audit with a view to ascertaining the accurate assessment of the Bank's financial situation. The Board also passed a resolution not to utilize the proceeds of the bond issue pending the outcome of the investigations.

15. The Board received a preliminary report on 12 October 2015, which revealed among other things that the former group managing director had been running a scheme of fraudulent and illegal disbursements within and outside the Bank. The scheme had been made without having gone through the credit review and approval process as required by the prudential guidelines issued by CBK and in line with the Bank's established lending procedures and policies. Following the report, the Board reported the findings to CBK, on 13 October 2015. As a result, CBK appointed KDIC as the receiver for the Bank for a period of 12 months. The Respondent also instructed NSE not to proceed with the listing of the Bank's bond on the fixed income securities market segment.

16. On 6 May 2016, the Respondent issued a notice to show cause to the Petitioners. Mr. Popat states that the Petitioners responded to the notice to show cause vide a letter dated 13 May 2016 where they stated that the seven-day period given to prepare written responses was inadequate. They stated that they did not have access to the records, minutes and documentations that they would require to respond as the same were under the control of the KDIC.

17. Subsequently, the Respondent by a letter dated 16 and 17 May 2016 insisted that the Petitioners had to respond to the issues raised in its notice to show cause. On 20 May 2016, the Petitioners reiterated their inability to respond in the absence of critical documents, records and minutes not in their possession. In its response dated 23 May 2016, the Respondent informed the Petitioners of its decision to move the hearing from 24 May 2016 to 31 May 2016.

18. On 31 May 2016, the Petitioners' advocates appeared before the Respondent and sought for an alternative date. Allegedly 16 June 2016 was imposed despite protests from the Petitioners counsel on their unavailability on that day.

19. The Petitioners filed this Petition on 13 June 2016 claiming that the failure by the Respondent to adhere strictly to the provisions of the Constitution and the Fair Administrative Act taints the Respondent's purported enforcement proceedings and constitutes a breach of the Petitioners' fundamental rights.

20. In their submissions, the Petitioners submit that the process they are being subjected to by the Respondent is vague, uncertain and unclear thus compromises their ability to defend themselves effectively. In that regard they claim that the Respondent has failed to clarify to them among other things; the form of the hearing to be adopted, the rules of procedure to be employed, the capacity in which the Petitioners would be appearing, the nature of proceedings i.e whether investigatory, inquisitorial or adversarial, whether all persons relevant to the bond issue would be summoned, whether documentation earlier requested by the Petitioners would be availed and on how the Respondent would handle the fact that it was a player in the bond issue.

21. It is therefore the Petitioners' contention that the alleged enforcement proceedings fall within the meaning of administrative action and the Respondent was bound to notify the Petitioner of the nature of the proceedings it was conducting. They contend that they can defend themselves effectively if they are informed with clarity the nature of the administrative process they are being subjected to. In their view therefore, the failure of the Respondent to clarify the nature of the proceedings to which they are subjected to compromises their rights substantially hence rendering the entire process unconstitutional.

22. The Petitioners further claim that the Respondent has violated their right to fair trial in various ways.

23. Firstly, they claim their right to be informed of the charge against them in sufficient detail as is provided for under Article 50(2)(b) of the Constitution. Secondly, their right to be presumed innocent until proven otherwise has been violated. In this regard, they contend that the Respondent had pre-judged the issues before it for investigation and accordingly presumed culpability on the part of each of the Petitioners' through the notice to show cause. In their view, the Respondent had arrived at its conclusion without according them a hearing. That they were convicted without a trial and the notice to show cause amounts to mitigation before sentence. It is therefore their submission that the violation of the Petitioners' right to presumption of innocence compromised the enforcement proceedings fatally and rendered the same unsustainable in law.

24. Thirdly, they contend that the Respondent has selected narrow, limited and contentious evidence that shall be used in the inquisitorial hearings and or proceedings. It is their contention that by insisting on relying on the contentious allegations contained in the affidavits in *HCCC NO. 523 of 2015*, the Respondent has breached Article 50(2)(k) of the Constitution which grants the Petitioners the right to adduce and challenge evidence presented in a trial. They claim that they had not been given an opportunity to challenge the evidence in *HCCC NO. 523 of 2015* and the same ought not to have been adduced as evidence in the inquisitorial proceedings.

25. Fourthly, they claim that they were not accorded sufficient or reasonable time to prepare their defence. They allege that they were subjected to a rushed hearing that is in violation of the Petitioners' right to a fair hearing. That following the issuance of the notice to show cause, the Petitioners were within unreasonable time expected to proceed with the hearing despite their protests.

26. Fifthly, it is the Petitioners further submission that the Respondent has violated their right to legal representation. That the Respondent insisted on proceeding with the hearing on 16 June 2016 in the absence of the Petitioners' counsel. That the Respondent ignored the Petitioners' request for convenient dates and failed to provide evidence on why it refused to accommodate their advocates. The Petitioners therefore contend that the unilateral fixing of hearing date and the disregard of the Petitioners' advocates unavailability on the imposed dates breached the Petitioners' right to choose and be represented by an advocate of their choice in violation of Article 50(2)(g) of the Constitution.

27. Lastly on this issue, the Petitioners' submit that the Respondent has constituted itself as the accuser, prosecutor and judge in the alleged enforcement proceedings. According to the Petitioners, the Respondent is apparently bias. The Petitioners allege that the Respondent approved the bond issue by approving the information contained in the final information memorandum. In the Petitioners' views, the Respondent as the industry regulator participated in various capacities of the bond issue and it is conflicted therefore making it practically impossible for it to conduct a fair and objective process. Relying on the case of **Magill Porter vs. Weeks (2001) UKHL 67** submitted that the test to be applied in determining impartiality is not of real danger but that of perception of a real possibility of bias from the view point of a fair minded observer.

28. It is the Petitioners' further submission that the Respondent's actions are unlawful and in breach of the provisions of Article 47 of the Constitution. That its actions violate Article 47 for having failed to accord the Petitioners an administrative action that is expeditious, efficient, lawful and reasonable. That the unilateral and narrow approach adopted by the Respondent in selecting the evidence to be relied upon deprived the proceedings of any semblance of a fair, reasonable and lawful process.

29. In regard to the violation of Article 35 of the Constitution, the Petitioners' submit that the fact that they were expected to defend themselves without the benefit of the relevant information and documents, whilst the Respondent had at its disposal the documents that it had selected unilaterally to prosecute the Petitioners breaches the principle of equality of arms.

30. It is their further submission that Article 35 of the Constitution provides for right to access information held by another person. That had the Respondent been keen on conducting a fair, balanced and transparent process, it would have used those powers vested in it under section 13 B (2) of Capital Markets Act to procure the necessary documents from those parties holding the same especially the Receiver of the Bank. They claim that despite their numerous efforts, the Respondent has failed to procure from the relevant parties the documents that would ensure an objective and effective investigation into the bond issue. They relied on the case of **Benson Wachira Muthiga vs. Nairobi City County Public Service Board and another [2015]eKLR** where it was held that right to access information promotes the attainment of the values enshrined under Article 10 of the Constitution. It is the Petitioners' contention therefore that they have throughout the enforcement proceedings been placed at a disadvantage thus denying them their constitutional right.

31. It is the Petitioners' further contention that they have been subjected to discrimination and/or unequal treatment in the conduct of the inquisitorial proceedings. That due to the outcome of the meeting held on 13 January 2016, the Petitioners' had a legitimate expectation that full and comprehensive investigations would be conducted into the bond issue involving all parties so that the whole truth could be established. The Petitioners allege that the Respondent has failed to show that parties who are potentially culpable in the bond issue such as the transaction advisors as well as the Respondent's own officers have been asked to show cause and have been subjected to enforcement proceedings like the Petitioners'. It is therefore the Petitioner's submission that they have been discriminated against and subjected to unequal treatment in violation of the provision of Article 27 of the Constitution.

32. The Petitioners have therefore sought the following orders from this Court;

a) An order do issue compelling the Respondent to avail and deliver up to the Petitioners and each of them all such documents in its possession as related to the bond issued in 2015 by Imperial Bank Limited (in receivership) to the general public for an amount of Ksh. 2 billion.

b) An order do issue compelling the Respondent to invoke and enforce those powers vested in it under the law and to call for and obtain all such documents as may be in the possession and or control of third parties to the bond issued in 2015 by Imperil Bank Limited (in receivership) to the general public for an amount of Ksh. 2 billion.

c) An order compelling the Respondent to avail and deliver up to the Petitioners and each of them the documents obtained by the Respondent from third parties pursuant to order No. 3 above.

d) A declaration that in its purported enforcement proceedings against the Petitioners:

(i) The Respondent has breached the requirements of Articles 10, 20 and 232(1)(a), (c) and (f) of the Constitution.

(ii) The Respondent has violated the fundamental rights and freedoms of the Petitioners and each of them as regards the right to equality and freedom from discrimination under Article 27 of the Constitution, the right to access information under Article 35, the right to fair administrative process under Article 47 of the Constitution and under the Fair Administrative Action Act, 2015 and the right to fair hearing under Article 50 of the Constitution.

e) An order of compensation directed at the Respondent compelling it to compensate the Petitioners for the damage caused to them by its actions and the quantum of such compensation

to be determined by this Honourable Court.

f) Such further orders as this Honourable Court deems mete and just.

g) The costs of this Petition be awarded to the Petitioners.

The Respondent's case

33. In response to the Petition, the Respondent filed a replying affidavit sworn on 27 June 2016 by Mr. Paul Muthaura.

34. Mr. Muthaura avers that the Respondent's sole focus in the impugned process is to inquire into the matters relating to the Bank's corporate bond issue and determine whether there were contraventions of the Respondent's regulatory requirements. And that matters relating to the operations of the Bank are not within the Respondent's mandate but are within the CBK mandate. In that regard, he claims that in the notice to show cause, the Respondent informed the Petitioner of their entitlement to submit any information of the alleged contraventions including mitigating information, invitation to appear before the board and the option of being accompanied by legal counsel.

35. He depones that arising from the failure and/or delay on the part of the Petitioners to file their submissions by 20 May 2016, the Respondent postponed the notice to show cause hearing to 31 May 2016. It also extended the period accorded to the Petitioners for preparation and submissions of their written response. In its letter dated 23 May 2016, the Respondent notified the Petitioners that they would be allowed to make oral submissions at the hearing, that the Respondent will allow them to rely on the documents, availed earlier to it which documents were specifically listed and copies shared. He claims that the Respondent undertook to make copies and furnish them to the Petitioners.

36. On 31 May 2016, when the notice to show cause proceedings came up, the Petitioners' advocates appeared before the Respondent and sought an adjournment of the hearing to 15 June 2016. He avers that upon considering the application as well having taken into account the closest possible dates the Respondent's Board could be duly constituted, it adjourned the matter and extended time for preparation and submission of written responses by the Petitioners. The matter was then fixed for hearing on 16 June 2016. This date he states was fixed after the Petitioners' advocates had indicated was convenient for them. He therefore states that the request made for adjourned by the Petitioners' advocates was in bad faith and intended to frustrate and defeat the show cause hearing. In his view, the Respondent has to the greatest extent sought to accommodate the Petitioners.

37. He further states that the meetings held on 13 January 2016, the notice to show cause issued to the Petitioners' by the authority on 6 May 2016, the documents furnished to the Petitioners ahead of the hearing, the adjournments and accommodation granted to the Petitioners on both filing of submissions and on appearance for hearings, the grant of opportunity to be represented by counsel demonstrates that the Respondent subjected the Petitioners to a fair process.

38. In regard to the Judicial Review Application No. 43 of 2016, Mr. Muthaura states that neither the Respondent nor the Petitioners are parties to that suit. And in those proceedings the shareholders of the Bank have sought orders against CBK as the regulator of the Banking sector and KIDC as the statutory body designated as the receiver and not against the Respondent. He states that that suit does not relate to governance and compliance information related to the bond issue offered by the Bank to the public.

39. He states that the Petitioners in proper execution of their statutory and fiduciary duties arising from the bond issue, and being in receipt of material information impacting on the validity or reliability of the bond, failed to notify the Respondent and the investing public that the bond would be suspended to prevent losses to and damage public investors, and also safeguard the credibility of the wider capital markets.

40. He also avers that the Petitioners have admitted that they did not participate in the bond issuance

process and thus the request made for board minutes and resolutions, board members declarations relating to the Bank approval and terms of reference for the transaction advisers do not exist. In his view, the Petitioners are seeking the production of documents some of which they very know are non-existent with the intent of delaying, frustrating and obstructing the enforcement proceedings commenced against them. It is his averment in any event that the Respondent has provided the Petitioners with the complete list of documents that it would rely on at the hearing and they have failed to demonstrate that there are any documents in possession of the authority which have not been supplied to them and which they need.

41. In their submission the Respondent submits that it is the regulator of the capital markets and is charged with the responsibility of ensuring that firms intending to undertake public issues comply with the listing and eligibility requirements as well as the regulatory obligations.

42. It submits that the issuers whose securities have been issued in accordance with the proved offer are required to keep the Respondent, shareholders and other holders of its securities, the listing exchange and members of the general public informed as soon as is practicable of any information which is necessary to enable them appraise the financial position and state of corporate governance of the issuer, necessary to avoid the establishment of a false market in the securities and might be reasonably expected to affect market activity in the price of its securities.

43. It is the Respondent's position therefore that it has the statutory authority mandate under the Capital Markets Act to regulate the creation, maintenance and regulation of the capital markets in which the securities can be issued and traded in an orderly, fair and efficient manner. It therefore claims that the decision and acts of the Respondent to inquire into and summon the Petitioners to answer questions whether the bond was done within its statutory mandate. On that submission, it relied on the case of **Cementia Holding Ltd vs. Capital Markets Authority & 3 other [2014]eKLR** where it was held that the Respondent has the powers to regulate capital markets generally and has the power to ensure that the security market is orderly, fair and efficient.

44. The Respondent further submits that its decision to undertake administrative action on the bond issue and to summon the Petitioners is because of the obligations they owed as former directors of the Bank. Allegedly, on the face of it, the Petitioners breached the regulatory requirements relating to the bond issue with respect to the applicable regulatory obligations on public issue of securities and corporate governance oversight standards expected of issuing companies. It is its position that its sole focus in the intended proceedings is to provide the Petitioners with an opportunity to be heard on the matter relating to the bond issue and determine whether there were any contraventions of the Respondent's requirements. In that regard it relies on the case **Ajay Shah vs. Deposit Protection Fund Board as Liquidator of Trust Bank Limited (In liquidation) [2016]eKLR** where the Court of Appeal held that the directors of a company have a fiduciary duty of loyalty and good faith and duty of care and skill. Reference is also made to the Australian case of **Australian Securities and Investment Commission, In the matter of Sino Australia Oil and Gas Ltd vs. Sino Australia Oil and Gas Limited (2016) FCA 934** where it was held that the failure of a director to inform himself of disclosure requirements meant that he did not discharge the degree of care and diligence that a reasonable person would exercise as a director and chairman of the company.

45. It is the Respondent's further submission that the investigations it is undertaking do not relate to the conduct and status of the bond issue as it does not fall within the CBK's mandate. It submits that in undertaking its administrative actions, it is not required to execute its mandate in line with the investigations undertaken by CBK as alleged by the Petitioners. Its position is that it executes its mandate independently in line with its statutory objectives.

46. The Respondent claims that the Petition is premature and that the Respondent has the statutory mandate to investigate the matter. It contends that the Court ought to allow it to exercise its mandate without being usurped. In its view, a determination on the merit of the allegations and the accusations as levelled against the Petitioners' by this Court would usurp the Respondent's statutory mandate. It states that the issues being raised by the Petitioners in this Court are the same as those they raised before the Respondent's Board. The Respondent therefore urged the Court to allow it to proceed with the

administrative process commenced as against the Petitioners.

47. It is its case that even if this Court has jurisdiction to determine violation of fundamental rights and freedoms, it must give an opportunity to other relevant bodies established by law to deal with the dispute as provided for in the statute. For that submission, it relied on the cases of **Cementia Holding Ag & Another vs. Capital Markets Authority** (*supra*) and **Benard Murage vs. Fineserve Africa Limited & 3 Others** [2015]eKLR for the position that not every violation ought to be addressed through a constitutional petition especially where there exists an alternative remedy through statutory law.

48. In any event, the Respondent submits that the Petitioners had the alternative of applying for an adjournment of the hearing and if aggrieved by the Board's determination, lodge an appeal to the Capital Market's Tribunal. It claims that any decision of the Respondent could be subject to an appeal or reference to the Capital Markets Tribunal as is established under section 35A of the Capital Markets Act. It relied on the case of **Shah Munge & Partners Ltd & 4 others vs. Capital Markets Authority** [2008]eKLR where the court considered the nature of the proceedings before the Capital Markets Appeal and held that it is equivalent to a re-hearing of the matter. In its view, the law is clear that if there is an alternative remedy provided for by statute, it should be implored before approaching the court. On that submission, it relied on the cases of **Bernard Samuel Kasinga vs The Attorney General & 7 others** **Petition No. 402 of 2012**, **Republic vs. National Environment Management Authority** [2011]eKLR, **Rich Productions Limited vs. Kenya Pipeline Company & another** [2014]eKLR and **Vania Investments Pool Limited vs. Capital Market's Authority & others** **High Court Misc CA No. 139 of 2014**.

49. It is the Respondent's further position that the Respondent was conducting its proceedings fairly and within the requirements of Article 47 of the Constitution and the Fair Administrative Action Act. That under section 11(3)(h) of the Capital Markets Act, the Respondent is empowered to inquire into the affairs of any person which it has approved or to which it has granted a licence and any public company which its securities are traded on the securities exchange. It claims that it has acted fairly to the Petitioners because by way of the notice to show cause, it notified them of the allegations against them, afforded them an opportunity to be heard and make representations, notified them to avail witnesses and their documents, furnished them with information, material and evidence to be relied upon at the hearing and notified them of the right to legal representation.

50. It is the Respondent's submission that it has not made a determination on the guilt or otherwise of the Petitioners. That their submission that they had been presumed guilty before hearing is a misrepresentation of facts. It claims that the Petitioners' right to fair hearing has not been violated. That Article 50 of the Constitution does not apply to the nature of the proceedings conducted by the Respondent since they are not criminal in nature. On that submission reliance was placed on the cases of; **Diana Kethi Kilonzo vs. Independent Electoral & Boundaries Commission & 10 others** [2013]eKLR and **Dry Associates Limited vs. Capital Markets Authority** (*supra*) where the court distinguished the applicability of Article 47 and 50 of the Constitution. The Respondent claims that the administrative proceeding it is subjecting the Petitioners to is within the meaning of Article 47 of the Constitution and the Fair Administrative Action Act. It is therefore its case that the intended proceedings are within its statutory mandate and in particular section 11(3)(h) of the Capital Markets Act.

51. As regards the submission that the Respondent has constituted itself as the accuser, prosecutor and a judge, the Respondent submits firstly; that it is conducting the proceedings pursuant to its statutory mandate as spelt out in the Capital Markets Act. Secondly, under the Capital Markets Act, the Respondent is vested with both investigative and enforcement powers. Thirdly, the Respondent's approval of the public issue was based on the expectation that the Petitioners had met their statutory obligations not to present misleading information. Fourthly, under section 10 of the Capital Markets Act, the Respondent and its officers are protected from liability in respect of decisions and actions they take in the execution of their statutory mandate. That the Petitioners have failed to demonstrate any interest the Respondent's officials may have had in the proceedings. Also that the Petitioners have failed to offer any evidence that demonstrate conflict of interest on the part of the Respondent in regard to the bond issue.

52. In response to the Petitioners' submission that the Respondent should be barred from holding the notice to show cause proceedings in view of the pending suit in *JR No. 43 of 2016*, the Respondent submits firstly, it is not a party to the judicial review cause. That case is between various companies which have shareholding in Imperial Bank and CBK and KDIC as Respondents and Commercial Bank and Diamond Trust Bank as Interested Parties. Also none of the Petitioners is a party to that suit. Thirdly that in the judicial review case, the parties have challenged decisions which have been taken by CBK and KDIC and seeks orders against them. It is therefore the Respondent contention that the pendency of the litigation in JR No. 43 of 2016 should not be used as a ground for stopping the Respondent from exercising its statutory mandate. It relied on the case of **Jeremiah Kiereni vs. Capital Markets Authority (supra)** where it was held that mere existence of civil suit in the High Court cannot prevent Capital Market's Authority from carrying out its statutory duties.

53. On the submission made that the Respondent is prosecuting the Petitioners' selectively, the Respondent submits firstly, it summoned the Petitioners in their capacity as directors of the Bank and that they have not stated any of the Bank's directors has been left out. Secondly, in the notice to show cause hearing, the Petitioners will have every opportunity to present credible evidence of any other person culpability. Thirdly, the Petitioners have only been summoned for a hearing which does not necessary mean that a determination had been made against them. Fourthly, the Petitioners have acknowledged that the Respondent also summoned other parties including the Transaction Advisors and PKF Kenya as the auditors to appear before the authority. The Respondent urged the Court to follow the jurisprudence established in the case of **Joshua Chelelgo Kulei vs. Republic & 9 others [2014]eKLR** where it was held that failure by the Director of Private Prosecutions to prefer charges against persons perceived by an accused as co-accused does not render the prosecution of such a person discriminatory.

54. In response to the claim made by the Petitioners that they have been denied access to documents and information, the Respondent submits that it has categorically informed the Petitioners that it will rely only on those documents availed to it by the Petitioners and on affidavits filed in court in the cases where Petitioners have been enjoined as parties. Also that it has availed copies of all the documents to be relied on to the Petitioners. In addition, the Respondent has also informed the Petitioners of their right to object at the hearing to any documents or to reliance on any such information regarding non-availability of documents they consider relevant to their case.

55. It is the Respondent's position therefore that the allegation that it has denied the Petitioners access to information and thus a violation of Article 35 of the Constitution is without merit. That the Petitioners have failed to disclose to this Court that the Respondent has provided them with the complete list of documents that it would rely on at the hearing and provided copies thereof. Also that some of the documents are in the possession and control of another entity – CBK and its appointed receivers. It also claims that the Petitioners are seeking the production of some documents some of which they very know are non-existent with the sole intent of delaying the proceedings that have been commenced against them.

56. In any event it claims that attending the hearing would have provided the Petitioner with the perfect opportunity to raise all the issues on the documents they are raising in this Petition. On that submission, they relied on the case of **Francis Kakai Kissinger vs. Judicial Service Commission [2016]eKLR** where the Court held that it was unnecessary for the Petitioner to abandon the disciplinary hearing on the basis of non-provision of documentation to assist in his defence.

57. It is the Respondent's submission that right to access information is not absolute, it has limitations. It relied on the case of **Timothy Njoya vs. Attorney General & another [2014]eKLR** where it was held that the right to access to information must be exercised in the framework of public interest and subject to the rights and interests of other people. According to the Respondent, it has furnished the Petitioners with the documents in its possession it intends to rely during the hearing.

58. It is its further position that it cannot obtain documents from a third party – KDIC and deliver them to the Petitioners. It claims that would be an adverse order against a third party and such an order is without any legal basis.

59. Finally, the Respondent urged the Court to take judicial interest of the immense public interest involved in the Bank bond issue. It is its position that it would be in the best interest of the public to allow the Respondent as the regulatory body charged with the responsibility of supervising, licensing and monitoring the capital markets in Kenya to be allowed to continue with the administrative process into the bond issue which the members of the public invested a colossal sum worth Ksh. 2 billion.

Determination

60. The Petitioners' case against the Respondent is that the manner in which it is conducting the investigations it has subjected the Petitioners' to violates their right to equal protection of the law, fair administrative action, fair hearing and the right to access information. For that reason, they have asked this court to intervene and stop the intended inquisitorial hearing being conducted by the Respondent.

61. According to the Respondent, the Petitioners have basically filed this petition in an attempt to seek judicial immunity from facing the proceedings being undertaken by the Respondent as the statutory regulator of capital markets in Kenya. Its case is that the Petitioners as directors of a listed company have certain statutory obligations to which they must be held accountable. It also claims that it has conducted its proceedings fairly and within the requirements of the Constitution and the law. In its view, the Petition is pre-mature because it has the statutory authority to undertake investigations in the circumstances of this case. It claims that the Petitioners have an alternative remedy outside the realms of this Court which they ought to pursue first.

Issues

62. Having considered each parties case and the pleadings before me, I am of the view, there are three issues for determination in this Petition, and they are as follows;

- (a) Whether the Petition is properly before this Court
- (b) Whether the inquisitorial and enforcement proceedings the Petitioners are being subjected to by the Respondent is in violation of the Petitioners' fundamental rights and freedoms as alleged.
- (c) What remedy is available to the Petitioners'.

Whether the Petition is properly before this Court

63. The Respondent submitted that this Petition was prematurely lodged before this Court. Further that the Respondent has the statutory mandate to carry out the intended investigation. And also that the matters touching on the merits of the allegations made in this petition are pending before the Respondent. It is the Respondent contention therefore that the present proceedings are premature.

64. The Respondent is a statutory body created under Section 5 of the Capital Markets Act to regulate the capital markets in Kenya. Its objectives are set out in section 11(1) of the as follows;

(a) the development of all aspects of the capital markets with particular emphasis on the removal of impediments to, and the creation of incentives for longer term investments in, productive enterprises; ?

(b) to facilitate the existence of a nationwide system of securities market and derivatives market and brokerage services so as to enable wider participation of the general public in the securities market and derivatives market; ?

(c) the creation, maintenance and regulation of a market in which securities can be issued and traded in an orderly, fair and efficient manner, through the implementation of a system in which the market participants are self-regulatory to the maximum practicable extent;?

(d) the protection of investor interests;

(e) The operation of a compensation fund to protect investors from financial loss arising from the failure of a licenced broker or dealer to meet his contractual obligations; and

(f) the development of a framework to facilitate the use of electronic commerce for the development of capital markets in Kenya.

65. No doubt the Respondent has a broad statutory mandate. In order to carry out its functions the CMA has been endowed with wide powers to enable it undertake its statutory mandate. These functions, powers and duties are set out in section 11(3) of the Act as follows;

(a) advise the Minister on all aspects of the development and operation of capital markets; ?

(b) implement policies and programmes of the Government with respect to the capital markets; ?

(c) employ such officers and servants as may be necessary for the proper discharge of the functions of the Authority; ?

(cc) impose sanctions for breach 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—

(i) levying of financial penalties, proportional to the gravity or severity of the breach, as may be prescribed; ?

(ii) ordering a person to remedy or mitigate the effect of the breach, make restitution or pay compensation to any person aggrieved by the breach; ?

(iii) publishing findings of malfeasance by any person; ?

(iv) suspending or cancelling the listing of any securities or exchange-traded derivatives contracts, or the trading of any securities or exchange-traded derivatives contracts, for the protection of investors;

(d) to issue guidelines and notices on all matters within the jurisdiction of the Authority under this Act;

(e) to grant a licence to any person to operate as a stockbroker, derivatives broker, dealer or investment adviser, fund manager, investment Bank, central depository or authorised securities dealer, and ensure the proper conduct of that business;

(f) to grant approval to any person to operate as a securities exchange derivatives exchange, credit rating agency, registered venture capital company or to operate in any other capacity which directly contributes to the attainment of the objectives of this Act and to ensure the proper conduct of that business;

(g) recognize any person duly licensed by a prescribed foreign authority to carry on any licensed activity in Kenya which requires a license or an approval under this Act;

(h) register, approve and regulate collective investment schemes;

(i) 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;

- (j) give directions to 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;**
- (k) conduct inspection of the activities, books and records of any persons approved or licensed by the Authority;**
- (l) deleted by Act No. 9 of 2007, s. 46(b)**
- (m) deleted by Act No. 9 of 2007, s. 46(b)**
- (n) 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 publicly offered or traded on an approved securities exchange or on an over the counter market, if such action is deemed to be in the interest of the investors, at the expense of such collective investment scheme or company;**
- (o) grant compensation to any investor who suffers pecuniary loss resulting from the failure of a licensed broker or dealer to meet his contractual obligations;**
- (p) have recourse against any person whose act or omission has resulted in a payment from the Compensation Fund;**
- (q) act as an appellate body in respect of appeals against any self regulatory organization securities or exchange-traded derivatives contracts exchange, derivatives exchange or central depository in actions by parties aggrieved thereby;**
- (r) co-operate or enter into agreements for mutual co-operation with other regulatory authorities for the development and regulation of cross-border activities in capital markets;**
- (s) regulate and oversee the issue and subsequent trading, both in primary and secondary markets, of capital market instruments;**
- (t) regulate the use of electronic commerce for dealing in securities or offer services ordinarily carried out by a licensed person;**
- (u) trace any assets, including Bank accounts, of any person who, upon investigation by the Authority, is found to have engaged in any fraudulent dealings in securities or insider trading;**
- (v) in writing, order caveats to be placed against the title to such assets or prohibit any such person from operating any such Bank accounts as may be directed by the Authority, pending determination of any charges instituted against that person;**
- (w) prescribe notices or guidelines on corporate governance of a company whose securities have been issued to the public or a section of the public;**
- (x) do all such 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.**

66. There is no doubt that the Respondent has the statutory power to regulate, promote and facilitate the development of an orderly and efficient capital market in Kenya. In doing so Section 11(3) of the Act confers it with various powers which include carrying out investigations and imposing sanctions for breach of the provisions of the Act. It is clear thus that CMA has the power to undertake the investigation subject of this petition.

67. Having clarified that issue, the Respondent has challenged the jurisdiction of this Court. It claims that the Petitioners' ought to have challenged the decision of the Respondent by way of an appeal to the

Capital Markets Tribunal. It contends that the Capital Markets Tribunal is the appropriate body challenged with the mandate to determine the issues raised in this Petition.

68. Before I determine that aspect of the Petition, it is crucial to understand the events that led to the filing of this petition.

69. As stated earlier in this judgment, CBK placed the Bank under statutory receivership on 13 October 2015. On the same day, the Respondent instructed Nairobi Stock Exchange (NSE) not to proceed with the listing of the Bank's bond on the securities market. The Respondent invited the Petitioners for a meeting on 13 January 2016 allegedly to deliberate on the circumstances prevailing at the Bank from the period between the approval and closure of the bond. At the end of the meeting, allegedly the Respondent informed the Petitioners that should it commence any specific enforcement process, then it would issue specific summons for the same. Four months later, the Respondent issued a notice to show cause letters to each of the Petitioners. The Petitioners were requested to show cause in relation to seven allegations set out as follows;

(a)Failed to exercise effective oversight over the management of the Bank by allowing preparation and publication of the information memorandum without the approval of the board and thereby were negligent in the conduct of their expected role as directors of the Bank with particular regard to the material offer of the Ksh. 2 billion bond issue by the Bank, contrary to Article 2.1 and 3.1 of the Capital Markets Guidelines on corporate governance practice by public listed companies in Kenya.

(b)and/or in the alternative failed to ensure that the Bank established and maintained a sound internal control system to authenticate the reliability and accuracy of financial statements, leading to publication of false, misleading and deceptive statements in the IM as well as the omission of material information required by investors for purposes of guiding decisions in regard to the bond issue, contrary to the provisions of Regulation 12 of the Capital Markets(Securities) (Public Offers, Listing and Disclosures) Regulations, 2002 and article 2.4.2 and 3.1.1 (v) of the Capital Markets Guidelines on Corporate Governance Practices by public listed companies in Kenya.

(c)Failed to promptly notify the investing public and the authority that the IM was published without their knowledge or consent on becoming aware of its publication, in the event that they indeed did not approve the bond issuance, contrary to section 30 E(3)(b) of the Capital Market Act, thereby displaying significantly substantial dereliction of their expected role to oversee the management of the Bank.

(d)Failed to promptly disclose to the Authority and the investing public within one day of 21 September 2015 and or within a reasonable period thereafter upon confirmation of the existence of material information of the fraudulent activities, irregular Banking operations and the concealment of material facts and misrepresentation of financial statements taking place at the Bank, all of which had led to the presentation of misleading material information to members of the public in the IM issued by the Bank contrary to the provisions of section 30(F) (1)(c) of the Capital Markets Act.

(e)Failed to appear and submit to the Authority a supplementary information memorandum containing the particulars of the material information immediately after 21 September 2015, and or within a reasonable period thereafter upon confirmation of the existence of material information of the fraudulent activities, irregular Banking operations and the concealment of material facts and misrepresentation of financial statements taking place in the Bank contrary to regulation 13 of the Capital Markets (Securities) Public Offers, Listing and Disclosures) Regulations, 2002.

(f)Failed to take cautionary measures and call for the suspension of the offer transaction prior to allocation settlement and creation of investors' accounts, to prevent the collection of investor funds after coming to the knowledge of the fraud that was taking place at the Bank contrary to the

fiduciary duties of care as enshrined in article 3.1.1 of the Capital Markets Guidelines on corporate governance practices by public listed companies in Kenya; and

(g) Allowed the investing public to rely on the untrue and misleading statements contained in the prospectus who suffered loss as a result, contrary to the fiduciary duty of care enshrined in article 3.1.1 of the Capital Markets Guidelines on corporate governance practices by public listed companies in Kenya and breach of section 30(e) (2) of the Capital Markets Act.

70. Following the show cause notice, the Petitioners informed the Respondent that it was unable to respond because they did not have any crucial evidence and/or documents they would rely on since they were in the custody of the receiver. Despite protests from the Petitioners, the Respondent scheduled the show cause hearing for 31 May 2016. The Petitioners objected to this hearing date as they were unavailable. On that date, the Petitioners lawyers appeared before the Respondent and sought for an adjournment. Allegedly, their plea for convenient date was disregarded by the Respondent and it proceeded to impose an un-inconvenient date on the Petitioners being 16 June 2016. The Petitioners are aggrieved with that decision. They claim that the failure by the Respondent to adhere strictly to the provisions of the Constitution and the Fair Administrative Act in the conduct of the proceedings touching on the Petitioners violates their constitutional rights.

71. On their part the Respondent contend that the Petitioners ought to have appealed against that decision to the Capital Markets Tribunal.

72. It is clear under Section 11(3)(i) the Respondent has the power 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”***. This provision in my view gives the Respondent as the chief regulator of the capital markets, the power to inquire into the affairs of the Bank regarding its security traded at NSE.

73. Happily, that is not in contest here.

74. What is heavily contested is whether the Capital Markets Tribunal is the appropriate forum to determine the issue. The Capital Markets Tribunal is established under Section 35A (1) of the Act. Its powers are set out under Section 35 (1) which reads 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.

75. The Petitioners contend that the jurisdiction of the Tribunal is limited to appeals in regard to the decisions of the Respondent or the Investor Compensation Fund Board in regard to issues to do with licensing and trading securities and not a direction given by the Respondent. They claim that the issues they are aggrieved with do not fall into any of the categories listed in Section 35 (1) above. On its part, the Respondent contends that the Tribunal has much wider jurisdiction and that the Petitioners ought to have ventilated their issues first before the Tribunal.

76. On closer review of the provisions of Section 35(1) above, I tend to agree with the Petitioners. That provision deals with matters of licensing and or trading of securities. However, the Tribunal has further functions as can be gleaned under Section 35A (4) of the Act. It states as follows;

35A (4) 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. (emphasis)

77. In my understanding, firstly, a person may appeal to the Tribunal in regard to any decision made by the CMA in relation to any matter relating to the Capital Markets Act.

78. As I found elsewhere above, the Authority has the power to inquire into the affairs of any company that it has approved to trade its securities in NSE. In my understanding, that matter falls within the provisions of the Capital Markets Act and any person aggrieved by its decision may appeal to the Tribunal in accordance with the provision of section 35 A (4) of the Act. Likewise, the CMA could itself prompt the Capital Markets Tribunal on the same matter and without dealing with it, and it would still not amount, in my view, to an abdication of duty.

79. Secondly, and more importantly, the Tribunal has an original jurisdiction. The original jurisdiction may however only be prompted by the CMA or by any of its ad hoc committees or any other person who exercises delegated authority for and on behalf of CMA by way of a reference. Once again such reference may relate to any matter under the Capital Markets Act. To my mind therefore, the Tribunal has both appellate and original jurisdiction. The appellate jurisdiction is triggered by way of an appeal by any aggrieved person. The original jurisdiction is triggered by the Authority, its *ad hoc* committee or any person exercising delegated authority for and on behalf of the Authority through a reference.

80. Having said so, I understood the Petitioners to be aggrieved by the Respondent's actions on two fronts. First, with the date imposed for hearing which they claim was inconvenient. Second, that the administrative process they are being subjected to violates their fundamental rights and freedoms.

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. In addition, if the Petitioners were so aggrieved with the hasty manner in which the date was imposed, they ought to have set up a challenge by way of an appeal against the decision of the Authority to the Capital Markets Tribunal which would be properly seized of the matter as I have held elsewhere above.

82. I do not find or see any merit on that ground as to inappropriate or inconvenient date. I so hold.

83. The second complaint the Petitioners have is that the process they are being subjected to violates their fundamental rights and freedoms.

84. At this point, I must juxtapose that submission *vis-a vis* the Respondent's position that there exists an alternative remedy for the Petitioners in the Capital Markets Act.

85. The starting point would have to be Section 9 of the derivative Fair Administrative Action Act which deals with the review of administrative decisions and actions. Generally, a party aggrieved by an administrative action or decision ought to apply for review of that decision to a tribunal with requisite jurisdiction. Section 9 reads;

9(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

86. The tenor and import of Section 9(2) and (3) above is clear – where there is an alternative remedy prescribed under legislation, that procedure must first be explored before invoking the jurisdiction of the Court. There are several cases that espouse that principle. See **Bernard Samuel Kasinga vs. The Attorney General & 7 others Petition No. 402 of 2012**, **Rich Productions Limited vs. Kenya Pipeline Company and Another [2014]eKLR**, **Narok County Council vs. Trans Mara County Council [2000] 1 EA 161** and **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425**.

87. However, the provision of Section 9(3) above grants special jurisdiction to the High Court in the sense that the Court may in exceptional circumstances exempt a party from exhausting the alternative statutory remedy. In that context the Court of Appeal in the case of **Republic v National Environment Management Authority (2011) e KLR** held as follows;

“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exceptional should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it”.

88. Applying the above test in the present petition, this Court has been called upon to intervene in what the Petitioner alleges to be a breach of his fundamental rights and freedoms by the Respondent. This would clearly be within the jurisdiction of the High Court by virtue of Article 22(1), 165(3)(b) and 3(d) (ii) of the Constitution. The Capital Markets Tribunal has no such original mandate : see also the Court of Appeal in **Capital Markets Authority vs. Jeremiah Gitau Kiereini & Another [2014] eKLR** where the court held that the High Court's powers under Article 165 are not shared with the Capital Markets Tribunal.

89. I therefore find and hold that this matter, as far as it concerns allegations of violation of the Constitution, is properly before this Court. I shall now turn to determine whether the Petitioners' rights have been violated as alleged.

Whether the Petitioners fundamental rights have been violated

90. Under this level of inquiry, I examine the manner in which the Respondent discharged its statutory

mandate and whether it did so in violation of the Petitioners' fundamental rights to equality, fair administrative action, access to information and fair hearing as alleged.

Right to Equality

91. The Petitioners claim that they are being discriminated against because the Respondent has failed to ask all parties including its officers involved in the transaction leading to the bond issue to show cause. The Respondent has denied that it has selectively 'prosecuted' the Petitioners and subjected them to unequal treatment.

92. In that regard, Article 27 of the Constitution enshrines the right to equality and freedom from discrimination in the following terms;

“(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”

93. The principle of equality and non-discrimination has its underpinnings in various international conventions which now form part of our laws by dint of Article 2(5) and (2)(6) of the Constitution. The ***United Nations Universal Declaration on Human Rights (UDHR)*** provides at **Article 1** that

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

94. Article 7 of the UDHR further states that;

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

95. Discrimination, on the other hand, has been defined in the case of **Peter K. Waweru vs. Republic [2006]eKLR** as follows:

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by...sex whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured”.

96. In the cases **Willis vs. The United Kingdom, No.36042/97, ECHR 2002 – IV** and **Okpisz vs Germany, No. 59140/00, 25th October 2005** the European Court of Human Rights observed that discrimination means treating differently without any objective and reasonable justification, persons in relatively similar situations.

97. Applying therefore the standard as established by the European Court of Human Rights and the High Court in the **Peter K. Waweru case**, I am unable to find that the Petitioners were discriminated against by the Respondent. The Petitioners have not shown, in the circumstances, that there was arbitrary differentiation which imposed burdens, disadvantages and obligations not imposed on others: see **Andrews -v- Law Society of British Columbia [1989] I SCR 143** cited with approval in the case of **Githunguri Dairy Farmers Cooperative Society Ltd vs. Attorney General & 2 Others [2016]eKLR**. In my view, the differentiation if any appears to have been objective.

98. The Respondent summoned the Petitioners in their capacity as directors of the Bank. For a party to claim discrimination, he must demonstrate by evidence or argument how he has been discriminated against: See **Dry Associates Limited vs. Capital Markets Authority & Another (supra)**. I did not hear the Petitioners allege that the Respondent acted selectively by failing to summon some of the directors of the Bank.

99. I however understood the Petitioners to be saying that the Respondent ought to have summoned every person who allegedly participated in the preparation of the bond issue. However, in their Petition, the Petitioners have admitted that various parties including the transaction advisers and PKF Kenya who were the auditors were summoned to appear before the Respondent to allegedly shed light into the bond issue. Whether they should have been given a notice to show cause is not a matter that this Court can determine as it is not in a place to do so. Neither can the Petitioners at this stage decide who ought to be summoned by the Respondent or not. In any event, in making this allegation, the Petitioners may well have jumped gun.

Fair administrative action

100. The Petitioners claim that the Respondent has violated their right to fair administrative action for having failed to accord the Petitioners an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. On its part, the Respondent has insisted that it observed the right to fair administrative action as it sent the Petitioners notice to show cause setting out the particulars of the allegations made against them. That it also granted them sufficient time to prepare a response and gave them an opportunity to appear before the Respondent to be heard. It also claims that the investigation process was continuous.

101. Article 47 of the Constitution demands an ‘**expeditious, efficient, lawful, reasonable and procedurally fair**’ administrative action. The question for consideration on this aspect of the Petition is whether the Respondent’s action meets this constitutional obligation. Looking at the dispositions made in this petition and all the material evidence before me, I find that the Petitioners were sufficiently informed of the nature of the proceedings the Respondent was undertaking. As may be gathered from the notice to show cause, the Petitioners were informed that the Respondent was undertaking enforcement proceedings against them pursuant to the provisions of Section 25 and 26 of the Capital Markets Act. It follows that the intended enforcement proceedings are administrative in nature and Article 47 applies.

102. From the record before me, the Respondent summoned the Petitioners to appear before it on 13

January 2016. In this meeting, the Respondent allegedly obtained certain information and documentation from the Petitioners that was later used as basis for the notice to show cause. In the notice to show cause, the Respondent informed the Petitioners sufficiently of the allegations against each of them. It also accorded them, an opportunity to appear before the Respondent's Board for hearing. There was expedition and the intended action was pursuant to a statutory provision. It was lawful. I am therefore unable to find a violation of Article 47 of the Constitution in so far as expedition, lawfulness and reasonableness are concerned.

103. I did not hear the Petitioners complain that the administrative action sought to be undertaken by the Respondent was not efficient. I however gathered the Petitioners to have been complaining that the administrative action was not procedurally fair in so far as the Respondent had constituted itself as the accuser, the prosecutor and the judge.

104. Procedural fairness is an aspect of both Article 47 and Article 50 of the Constitution, and I will now consider it in light of the right to fair administrative action.

105. I start by stating that the importance of a decision to an individual affected or to be affected by a decision, constitutes a significant factor affecting the content of the duty of procedural fairness. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be invited and imposed.

106. As Sedley J. (as he then was) stated in **R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery**, [1994] 1 All E.R. 651 (Q.B.), at p. 667:

In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since Ridge v. Baldwin [1963] 2 All E.R. 66, [1964] A.C.40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

107. Procedural fairness has embedded in it the age old natural justice requirements that no man is to be a judge in his own cause, no man should be condemned unheard and that justice should not only be done but seen as done: see **Kanda vs. Government of Malay** [1962] AC 322,337 (per Denning LJ). Effectively, procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker. The Petitioners argue that the Respondent cannot be impartial.

108. The Petitioners argue that the Respondent is the one that approved of the bond issue. The approval was after the Respondent had for over a period of four months vetted and undertaken due diligence on the intended bond issue as well as the documents and information disclosed. The Respondent does not deny involvement in the bond issue. Indeed, it is stated that in exercise of its powers under the Capital Markets Authority (Securities)(Public Offers Listing & Disclosures) Regulations 2002 duly considered and satisfied itself that public rights issue merited the Respondent's approval. According to the Petitioners the Respondent was part of the process in so far as it was involved in the scrutiny, consideration and approval of the specific disclosures. The Petitioners then chip in that the Respondent will not investigate its own follies or those of its officers, if at all, and will simply condemn and penalize the Petitioners, hence the phrase "accuser, prosecutor and judge".

109. In my view, the duty to act fairly and therefore in a manner that does not give rise to an apprehension of partiality or bias applies to all persons who play a significant role in the making of or process leading to decisions, whether they are simply subordinates reviewing the evidence or are those who make the final decision.

110. The test for apprehension of partiality or bias for decision makers was well set out in **Jasbir Singh Rai & 3 Others vs. Tarlochan singh Rai & 4 Others** [2013]eKLR where the Supreme Court stated that

disqualification of a decision maker was imperative even in the absence of a real likelihood of bias or actual bias if a reasonable man would reasonably suspect bias. M.K.Ibrahim J, writing separately, expressed himself as follows;

“The court has to address its mind to the question is whether a reasonable and fair minded man sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible”

111. I see no reason why the same test may not be applied to any other decision-maker where partiality or bias is alleged. This test of a fair minded and informed observer which was also embraced in the case of **Musiara Ltd vs. Ntimama [2005] 1 E A 317 (CAK)** would certainly apply to the Respondent as well and in context. In the context of our constitutional dispensation, a person facing a decision maker ought not be left dissatisfied and bearing a sense that justice might not or would not be done.

112. The context herein is that the Respondent is a statutory regulator. It has various chores in the capital, securities and financial market. It is intended to facilitate an orderly fair and efficient capital market. It grants licences to the capital market players and may suspend or revoke such licenses. It also disciplines its licensees. It approves securities. It protects the public. It has a wide oversight role. It has investigative and enforcement powers. It may impose sanctions and penalties. Such penalties or sanctions include the levying of financial penalties and the disqualification of any director of a listed company from appointment as a director of a listed company. The sanctions may be dire and severe and may include an order for restitution to any aggrieved person(s).

113. The instant case revolves around the role played by the Petitioners in the bond issue. The Petitioners are accused of having been derelict in the process of bond issue. The Respondent was, from the perspective of a regulator involved in the process. I did not hear the Respondent to suggest that it merely rubber-stamped its seal of approval to the process. Nay, the architecture of the Capital Market Act would not allow that. Indeed, the Respondent admits to having considered and satisfied itself that the approval was merited. The Respondent was expected to, and I believe did, move through the motions of due diligence on the Bank before granting its approval and thus when the Respondent serves a notice to show cause upon the petitioners and lodges accusations touching on non or fraudulent disclosure, a question may reasonably be posed as to what the Respondent and its officers did in the process.

114. I appreciate that while the test of reasonable apprehension of bias is well set, it is an objective test. The standard may thus consequently vary, just like other aspects of procedural fairness, depending on the context and function to be performed by the decision maker. The context in the instant case is where the regulator must ultimately make a decision that is of great import to the individual Petitioners. The decision is also critical to the regulator itself. It is simply not about punishment but also culpability which may be fetched on officers of the regulator itself. There is need for sensitivity to the fact that our history is replete with instances where some regulators have not lived to their billing. Because the decisions to be made not only relates to a specific sector of people but will touch on the wider public interest (it involved the issuance of a bond to the public) the process demands extra sensitivity by the decision makers in the sense that the decision maker must not be seen to have turned its back or turned its eye the other way at all on any aspect.

115. In my view, a well informed and fair minded observer given all facts would conclude that there exists a possibility of bias in the circumstances of the instant case. If the particulars as outlined in the notices to show cause were to be aligned to the statutory provisions as well as all the process that the regulator goes through prior to granting its approval to a bond issue and handed over to the well informed fair minded observer, I do not believe the fair minded observer would conclude that the Respondent in this case would approach the decision making process with the impartiality appropriate to the decision. I conclude that the circumstances denote a reasonable apprehension of bias.

116. I am mindful of the fact that deference ought to always be accorded to statutory bodies with statutory mandates. Such bodies must however operate within the confines of the Constitution and Article 47 of the Constitution invites procedural fairness upon such bodies as well. A complaint of premeditated bias or

perceived bias would be enough to trigger the mandate of this court where a petitioner adds that the right to an impartial adjudication process has been violated or is about to be violated.

117. Having returned the verdict that there is, in the circumstances of this case, perceived bias and exercising deference to Respondent as a statutory mandate undertaking a statutory mandate, I will shortly address the question as to whether it would be in the interest of justice to grant the orders sought. I must however first, in the context of the claim as to impartiality address the allegations of violation of the right to fair hearing under Article 50 of the Constitution.

Fair Hearing

118. Article 50 of the Constitution makes provision for fair hearing. At the outset, I consider it important to differentiate between the normative content of the rights protected under Article 50(1) and 50(2). It has been held by this court variously that Article 50(1) deals with matters of a civil nature while Article 50(2) deals with criminal trials :see for example **Jeremiah Gitau Kiereini vs. Capital Markets Authority (supra)** and also **Diana Kethi Kilonzo and Another vs. Independent Electoral and Boundaries Commission (supra)**.

119. In the instant circumstances, the Petitioners are not being subjected to criminal proceedings but civil proceedings. The Petitioners are being invited to appear before the Respondent's board as directors of the Bank, and in their capacity as such. They are to be heard on the circumstances prevailing before and after the Bank's bond issue and the allegations that have been attributed to them pursuant to Section 26(8) of the Act. It follows that the Petitioners' allegations as regards the violation of various rights founded on the provision of Article 50(2), including the right to be informed of a charge in sufficient detail, right to be presumed innocent, right to adduce and challenge evidence presented in the trial, right to be given sufficient reasonable time to prepare their defence and right to legal representation must be rejected as they are not applicable. All these alleged rights apply in criminal trial and not in civil proceedings or proceedings of an administrative nature as the one concerning the Petitioners and I so find.

120. The Petitioners also claimed that their rights under Article 50(1) of the Constitution are being or about to be violated. As already indicated, the Petitioners claimed that the Respondent has constituted itself as the accuser, prosecutor and judge in the alleged enforcement proceedings and it is or would therefore not be impartial.

121. Article 50(1) provides that;

Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

122. There is no doubt that the Respondent is the statutorily mandated regulator of capital markets in Kenya. The nature of the administrative proceedings and enforcement proceedings to be undertaken by the Respondent must however be distinguished from those that may be undertaken by the independent Capital Markets Authority Tribunal. In the instant case, the Respondent as the regulator it was involved in the bond transaction. It is the body that approved the issuance of the bond. It is now conducting enforcement proceedings against the Petitioners. Under Section 11(3)(i) of the Act, the Respondent has the power 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”.

123. Whereas it is clear that the Respondent has the statutory mandate to regulate the capital markets including approving securities to be listed on the NSE, under the Act it is vested with both investigative and enforcement powers in relation to the same mandate it exercises. In the present case, the Respondent

as the industry regulator approved the bond issue by approving the information contained in the final information memorandum. It has now sought to investigate the circumstances that led to the approval of the bond issue. In the notice to show cause, it states that; “the authority has accordingly noted that there were various shortcomings with respect to the conduct of the oversight and governance role of the Board in relation to the issue of the bond”. The Respondent however says nothing of the role it played or the role its officers played in the run in to the approval of the bond issue. That aside, the Respondent is not a body or tribunal constituted to resolve disputes in public through the application of the law.

124. Under Article 50(1) the Petitioners would have a right to be heard in public before an independent and impartial tribunal or body. The Petitioners in the instant case were being subjected to an administrative process and in my view the provisions of Article 50(1) would not be applicable. Rather and as already considered above, the provisions of Article 47 would be. The Petitioners grievances were with the administrative processes they were being subjected to and only the provisions of Article 47 are relevant and applicable: see **Dry Associates Limited vs. Capital Markets Authority [2012]eKLR**.

Access to information

125. The Petitioners submit that the Respondent demanded that they defend themselves without the benefit of the relevant information and documents. They claim that despite their numerous efforts, the Respondent has failed to procure from the relevant parties the documents that would ensure an objective and effective investigation into the bond issue.

126. The right of access to information is found under the provisions of **Article 35** of the **Constitution** which states as follows;

35(1) Every citizen has the right of access to—

a. Information held by the state; and

b. Information held by another person and required for the exercise or protection of any right or fundamental freedom.

(2) Every person has the right to correction or deletion of untrue or misleading information that affects the person.

(3) The state shall publish and publicise any important information affecting the nation.

127. The Access to Information Act, 2016 has additionally sought to promote this Article.

128. The importance of the right to access to information cannot be overemphasized and as the Court stated in **Famy Care Limited vs. Public Procurement Administrative Review Board & Another (supra)**;

The right of access to information is one of the rights that underpin the values of good governance, integrity, transparency and accountability and the other values set out in Article 10 of the Constitution. It is based on the understanding that without access to information, the achievement of the higher values of democracy, rule of law, social justice set out in the preamble to the Constitution and Article 10 cannot be achieved unless the citizen has access to information.”

The Court went on to state that;

The right of access to information is also recognized in international instruments to which Kenya is party. The Declaration of Principles of Freedom of Expression in Africa adopted by the African Commission on Human and Peoples’ Rights (32nd Session, 17 – 23 October, 2002: Banjul, The Gambia) gave an authoritative statement on the scope of Article 9 of the African

Charter on Human and Peoples' Rights which provides, "Every individual shall have the right to receive information." The Commission noted that right of access to information held by public bodies and companies will lead to greater public transparency and accountability as well as to good governance and the strengthening of democracy."

129. Access to information is therefore fundamental to the realization of the rights guaranteed in the Bill of Rights. Access to information is crucial to the right to freedom of expression which includes the freedom to receive or impart information or ideas. For a person to enforce the right of access to information, he must establish that he has sought the information and access to such information has been denied. This principle was expressed as follows in **Nairobi Law Monthly Ltd vs. Kenya Electricity Generating Company Ltd (supra)**;

"Finally, in order to facilitate the right to access to information, there must be a clear process for accessing information, with requests for information being processed rapidly and fairly, and the costs for accessing information should not be so high as to deter citizens from making requests.

However, this petition succeeds to the extent that I have found that the 1st respondent (Kenya Electricity Generating Company) has an obligation, on the request of a citizen, to provide access to information under Article 35(1)(a) of the Constitution. A natural person who is a citizen of Kenya is entitled to seek information under Article 35(1)(a) from the Respondent and the Respondent, unless it can show reasons related to a legitimate aim for not disclosing such information, is under a Constitutional obligation to provide the information sought. (Emphasis added)

130. The above, in my view, is a correct exposition of the law in addition to the now prescribed procedure under the Access to Information Act, 2016.

131. In the instant case, and from the evidence availed to me and on record, the Petitioners admittedly requested for information. The Respondent provided the Petitioners with a complete list of documents that it would rely on at the hearing and provided copies thereof vide its letter of 23 May 2016. In the circumstances, I find that the Petitioners were provided with all the essential documents necessary to enable them attend the show cause hearing.

132. In any event, the Respondent has admitted that some of the documents requested are not in its possession but are in control of the CBK and KIDC. While I am in agreement with the Petitioners that the Respondent has powers to summon the production of those documents, I do not think that it can demand that of the Petitioners yet. The hearing is yet to commence. It is thus my finding that the Respondent has not unduly hindered the Petitioner in preparation of their defence in the intended hearing by failing to provide crucial information.

Conclusion and summary of findings

133. I have come to the end of this judgment.

134. It is abundantly clear that the Petition partly succeeds and partly fails. I have found that the Respondent cannot undertake impartial proceedings in regard to the bond issue as it was involved in the process of issuing and approving the bond and that additionally the unique circumstances of this case would dictate that the Respondent does not get involved in any investigatory and enforcement proceedings .

135. I have also come to the conclusion and finding that the Petitioners right to equality and of access to information has not been violated and neither are the rights under threat of violation. The Petitioners' right to fair administrative action, it is my finding, is however under an imminent threat of violation due to the perceived bias of the Respondent.

Reliefs

136. I now wind up with the question as to whether the Petitioners are entitled to the orders sought and the effect thereof.

137. Ordinarily a court or adjudicator will disqualify itself once premeditated or perceived bias is shown. The public interest nature of the matter before me and the need to have it concluded cannot however be overemphasized. I have found that in the instant case there is perceived bias on the part of the Respondent and consequently, that it should not execute its mandate as it had commenced to.

138. I have looked at the scheme and structure of the Capital Markets Act. Unlike judges who do not choose their cases and litigants who do not choose their judges, the Respondent has the option of choosing whether or not to execute its mandate and over which entity. Under the Capital Markets Act, the Respondent may delegate its functions to other persons including a recognized self regulatory organization bodies: see Section 11A. Likewise, the Respondent may file a reference to the Capital Markets Tribunal on any matter relating to the Capital Markets Act: see Section 35A (4) of the Capital Markets Act. It may therefore not be argued that the Respondent's regulatory mandate will be hampered and voided where it is found, as in this case, that the Respondent is conflicted. I have no doubt that the legislature, in its wisdom, did not provide for delegation as well as reference by the Respondent to the Capital Markets Tribunal without reason or good cause. Instances like the present one were anticipated.

139. In the result, I hold the view that the orders sought are deserved to the extent of the success of the Petition. I make the following orders in consequence;

- i) There shall issue a declaration that the Petitioners' rights under Article 47(1) of the Constitution are under a threat of violation when the Respondent seeks to undertake and proceed with the administrative and enforcement action against the Petitioners yet the Respondent who seeks to execute its statutory mandate is apparently conflicted in the circumstances of this case.***
- ii) There shall issue an order of certiorari to remove into this court and quash the Notice To Show Cause letters issued by the Respondent to the Petitioners on 6 May 2016.***
- (iii) Orders accordingly.***

140. Orders accordingly.

141. The Petition has partially succeeded in re the constitutional issues raised and I consequently direct that each party will bear its own costs of the Petition.

142. I finally thank both counsel for their research and prolific submissions in this matter. The exhaustive reading was worth the while and lack of reference to any case-law cited by counsel was not intentional.

Dated, signed and delivered at Nairobi this 19th day of December, 2016.

J.L.ONGUTO

JUDGE