IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPL. NO. 139 OF 2014

IN THE MATTER OF AN APPLICATION FOR

LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW

AND

IN THE MATTER OF THE CAPITAL MARKETS ACT (CAP 485A OF THE LAWS OF KENYA)

AND IN THE MATTER OF THE

CAPITAL MARKETS (TAKE-OVERS AND MERGERS REGULATIONS), 2002

AND IN THE MATTER OF THE TAKE-OVER OF

REA VIPINGO PLANTATIONS LIMITED

BETWEEN

VANIA INVESTMENTS POOL LIMITED…..…… APPLICANT

AND

CAPITAL MARKETS AUTHORITY …….. RESPONDENT

AND

REA TRADING LTD ……..…….1ST INTERESTED PARTY

CENTUM INVESTMENTS LTD….. 2ND INTERESTED PARTY

TAUSI ASSURANCE CO. LTD…….3RD INTERESTED PARTY

G.A. INSURANCE LTD……..….4TH INTERESTED PARTY

SAVCO STORES LTD…….5TH INTERESTED PARTY

KENYALOGY.COM LTD……..…….6TH INTERESTED PARTY

RULING

1. The ex-parte applicant ("the applicant") has moved the Court by the Chamber Summons dated 8th April 2014 brought under ***Order 53 rules 1,2*** and ***4*** of the ***Civil Procedure Rules*** for leave to apply for the following orders;

a. *AN ORDER OF PROHIBITION stopping the Respondent from taking any further step or implementing any timetable it has set for completing the takeover of REA Vipingo Plantations Limited based on the direction that offers made could not be varied after 28th of February 2014.*
b. *AN ORDER OF CERTIORARI removing to this Honourable Court for the purpose of the same being quashed, the Respondent's directions contained in the notice published on the 5th of February 2014 in the Daily Nation setting the deadline for new offers and variation of offers already made on the takeover of REA Vipingo Plantations Limited.*
c. *AN ORDER OF MANDAMUS to compel the Respondent to approve such variation of offer as the Applicant will make to the offer it has already made for takeover of REA Vipingo Plantations Limited.*
d. *AN ORDER OF MANDAMUS to compel the Respondent to allow the Applicant to submit the Takeover document as provided in Regulation 13(2) of the Regulations and make such changes as are allowed by the Regulations*

2. The application is supported by the verifying affidavit sworn on 8th April 2014 by Dilesh Somchand Bid, a director of the applicant and the statutory statement filed with the Summons. The 3rd, 4th, 5th and 6th interested parties notified the court through their advocate that they oppose the application.

3. The application is opposed by the replying affidavit sworn on 15th April 2014 by Ms Rose Lumumba, the Director, Corporation Secretary and Communication of the Capital Markets Authority ("CMA"). The respondent's position is supported by the 1st interested party through the affidavit of Richard Robinow, its Managing Director and the 2nd interested party through the affidavit of Mical Agina, the Senior Legal and Tax officer.

Background and facts

4. The facts of this case are largely uncontested. The application before the court relates to the legal implication of the ***Capital Markets (Take-Overs and Mergers) Regulations, 2002*** ("the ***Regulations***") issued under the ***Capital Markets Act (Chapter 485A of the Laws of Kenya)*** ("the ***Act***") in respect of directions issued by the CMA in respect of the take-over of Rea Vipingo Plantations Limited ("RVPL").

5. RVPL is a public company listed at the Nairobi Securities Exchange ("NSE"). By a notice dated 13th November 2013 issued under ***Regulation 4(1)***, R.E.A Trading Liming ("REAT"), a shareholder of RVPL announced that it intended to make a cash offer to acquire all the issued ordinary shares of RVPL not already owned by and registered in its name.

6. The expressed intention of REAT led other companies to make similar cash offers to acquire all the issued ordinary shares not owned by them. On 2nd December 2013, Centum Investments Company Limited ("Centum") published a notice of its intention. On 21st December 2013, WWW.Bid Investment Company Limited ("WBICL") published its notice of its intention and on 30th January 2014, the applicant published its notice of intention. Its notice also discontinued the offer of WBICL as WBICL is a subscriber and shareholder of the applicant.

7. The ***Regulations*** germane to these proceedings may be summarised as follows;

a. Under ***Regulation 4(1)***, the company (offeror) which intends to acquire the effective control of the

listed company (offeree) shall not later than 24 hours of resolving to take over the offeree announce the proposed offer by a notice published in the press and serve a notice of intention, in writing of the take-over scheme, to the offeree, CMA, NSE and Commissioner of Monopolies and Prices.

b. Under ***Regulation 4(4)***, the offeror shall serve on the offeree its statement of the take-over scheme within 10 days from the date of the notice of intention referred to in ***Regulation 4(1)*** which statement shall be approved by the CMA.
c. Under ***Regulation 4(6)*** the CMA may, on application of the offeror, permit the offeror at any time prior to the offeror serving the take-over document, to amend, in writing, any notice or statement lodged pursuant to ***Regulation 4(1)*** and ***(4)*** or substitute in writing a fresh notice or statement lodged with the offeree on terms approved by the CMA.
d. Under ***Regulation 7(1)***, the offeror shall within 14 days of service of the offeror statement submit to the CMA for approval the take-over document which CMA is required to approve within 30 days or such time as CMA may determine. The document is required to be served on the offeree within five days of approval by CMA.
e. ***Regulation 13(1)*** provides that where a decision has been reached to competing take-over offers, all provision in the Regulations relating to the take-over procedures shall apply *mutatis mutandis* except the notice period to the competing offer.

8. After REAT issued its notice of intention on 12th November 2013, CMA suspended trading of RVPL shares at the NSE. REAT proceeded to comply with the Regulations and on 28th November 2014, the duly approved notice of receipt of the offeror's statement was issued to the press. Centum on its part complied with the regulations and its public announcement of receipt of the offeror's statement was issued in the press on 20th November 2014.

9. As regards the applicant, it made an application to take over the initial application made by WBCIL. After publishing its notice of intention on 30th January 2013, it applied for and its draft offeror's statement was approved by CMA on 14th February 2014 and on the same day its transaction adviser, Standard investment bank, served the statement on RVPL.

10. In view of the various competing offers received, CMA published a notice in the Daily Nation of 5th February 2014 ("the Notice') stating that any person intending to make a new offer should issue the notice of intention by 28th February 2014. The Notice further stated in the case of where an offeror intended to vary the existing offers, notice of variation should be done by the 28th February 2014.

11. After the notice there was a flurry of correspondence between the CMA and offerors seeking clarification on aspects of the Notice and in particular whether offeror would be permitted to vary their offers. Both Centum and the applicant made inquiries to which CMA responded that variation of existing offer and any new offers should be made to the offeree by 28th February 2014.

12. On 28th February 2014, Centum submitted its variation to its offer statement and amended its price to Kshs 75 per share. REAT submitted it variation to its offer document and amended its offer price to Kshs 15 with an option of a further payment of Kshs 15 per share. On it part, the applicant wrote to CMA to reconsider the 28th February 2014 deadline. On 3rd March 2014, CMA approved an announcement by RVPL on the various take-over offers made pursuant to ***Regulation 6***. CMA also wrote to all the offerors notifying them that it would apply a synchronised timeline on the take-over transaction considering the two competing offers that had been received.

13. On 11th March 2014, CMA received an amended statement dated 10th March 2014 from Standard Investment Bank on behalf of the applicant. The applicant's amended offer price was Kshs 80 per share. On 12th March 2014, CMA wrote to the applicant declining to approve the amended

documents as they were submitted outside the stipulated deadline of 28th February 2014. On 14th March 2014, Centum and REAT submitted their documents for consideration by CMA.

14. The applicant, in the meantime, wrote a letter dated 13th March 2014, seeking clarifications on the issues dealt with by CMA in its letter of 12th March 2014. Following this, a meeting was held on 14th March 2014 between CMA and the applicant's representative seeking clarification on the timelines. By a letter dated 19th March 2014, the CMA advised the applicant that its position regarding the deadline indicated in the Notice would not change.

The applicant's Case

15. The applicant case is that CMA implemented a timetable for the takeover of RVPL based on an administrative direction that it gave contained in the Notice that stopped new offers being made or existing offers being amended after 28th February 2014.

16. It argues that the Notice is in breach of ***Regulation 13***. It contends that the ***Regulation*** permits the offeror of the competing offer to serve or issue all documents required but that it is not required to fit into the time lines provided by the preceding regulations. It argues that the offeror of the competing offer is then required to serve the competing take-over document at least 10 days prior to the closure of the offer period set by the 1st offeror and that this period applies to the revision that may be made to the competing offer. As a result of adoption of Notice, the applicant contends that it has been blocked from amending its offer to take over shares in RVPL as such it will be effectively shut from improving it bid.

17. The applicant argues that the Notice is *ultra vires* the ***Regulations*** and therefore void. That it was made in excess of jurisdiction and it is unreasonable and inimical to fair procedure. The applicant further argues that the Notice is based on irrelevant considerations and it is in breach of rules of natural justice as the applicant was not heard.

18. Mr Ogunde, counsel for the applicant, submits that the applicant had an arguable case in the circumstances and that leave should be granted. He maintains that the court need not go into the merits of the case and that the case of the applicant is not frivolous. Counsel cites ***Njuguna v Minister for Agriculture*** **[2000]1 EA 184** and ***Kariuki v Attorney General*** **[1990 – 1994]EA 156** to support his contention.

19. The applicant contends that although **section 35A** of the ***Act*** establishes the Capital Markets Tribunal ("the Tribunal") to hear appeals from decisions of the CMA, it was unable to invoke the same as the Tribunal does not have a quorum to hear grievances as the tenure of majority of its has expired and no new members have been appointed. Mr Ogunde submits that in any case the failure to invoke an alternative remedy is not a bar to these proceedings.

20. As regards the prayer whether leave should operate as a stay, Mr Ogunde submitted that the Court should ensure that the Motion is not rendered nugatory. Counsel cited the case of ***Taib A. Taib v Minister for Local Government and Others*** **MSA HC Misc. Appl. No. 158 of 2006 (Unreported)**. Counsel also called in aid the provisions of **section 35A(17)** of the Act which provides that upon any appeal to the Tribunal, the *status quo* of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined. In the circumstances, counsel urged that it was entitled to an order of stay as it had approached the court instead of the Tribunal and that the grant of an order of stay would accord with the legislative intent.

21. Mr Kahonge, counsel for the 3rd, 4th and 5th interested parties, submitted that the court should grant leave and stay as the interested parties were interested in receiving the best price for their shares and as such the applicant should have been given an opportunity to urge his case to be allowed to make an amended offer.

22. The applicant's case was also supported by the Kilifi County government through its counsel, Mr Kithi.

Respondent's Case

23. The respondent opposed the application and was naturally supported by REAT and Centum in this respect.

24. The thrust of the respondent's argument is that it is empowered by statute to regulate capital markets. It relies on the preamble of the ***Act***, which states that CMA is established, *"for the purpose of promoting, regulating, facilitating the development of an orderly, fair and efficient capital market in Kenya .."* It avers that under **Section 11(w)** of the ***Act*** it is empowered, in addition to the specific powers conferred on it, to, *"do all such 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."* Mr Mungai, counsel for the respondent, cited the case of ***Peter Muthoka v CMC Holdings Limited and Others*** **Milimani HCCC No. 154 of 2012 [2012]eKLR** where Musinga J., held that **section 11(w)** of the ***Act*** is similar to **sections 3 and 3A** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** which saves the inherent jurisdiction of the court to make such orders as may be necessary to meet the ends of justice or to prevent an abuse of the process of the court.

25. The respondent argues that under the ***Regulations*** where there are competing take-over offers, ***Regulation 13*** mandates that the preceding ***Regulations*** applicable to a take-over be applied *mutatis mutandis*, that is that they are applied with all necessary and appropriate modifications to cater for the circumstances of the competing offers except the notice period for the competing offer which is the very first step that requires the offeror to give notice of intention within 24 hours. It is the petitioner's position that apart from the regulation itself, **section 11(w)** of the ***Act*** is sufficient authority for it to modify the regulations to accord with the objects of the ***Act***. Hence Mr Mungai argues that it was necessary to prescribe a time-table for the process and since the ***Regulations*** do not prescribe a detailed timetable for competing offers as the CMA has discretion derived from ***section 11*** of the ***Act*** to modify the regulations.

26. The respondent submits that it was necessary to create a deadline in order to ensure that shareholders are not confused by different offers and recommendations being made at different times and that they are provided with comprehensive information in an orderly fashion. It also maintains that it was necessary to treat all the constituents of the take-over fairly and without discrimination and to ensure no one party is given undue advantage over the other.

27. Mr Mungai emphasises that the take-over transaction does not involve the applicant alone but other players who have put in effort, time and money to comply with CMA directions and they should not be prejudiced by one actor who has wilfully failed to comply with the regulations. As the trading of shares has been stopped, the respondent's position is that substantial prejudice will result to shareholders and any stay issued will have serious ramifications on investor confidence in the capital markets in Kenya.

28. The respondent also argues that the application for leave ought to be rejected on the ground that the applicant should to have pursued an alternative remedy by filing an appeal to the Tribunal which has the necessary expertise to deal with the matter. It discounts the fact that the Tribunal is not properly constituted as the applicant did not make any effort to file the appeal before the Tribunal.

29. The 1st interested party represented by Mr Kuyo and the 2nd interested party represented by Mr Oraro support the respondent. They contend that the applicant is undeserving of discretion as it deliberately ignored the well-publicised and stipulated timelines and purported to submit its amended offer statement after the 28th February 2014 deadline when it already had knowledge of the other offers. They submit that the application is not brought in good faith but is intended to

steal a match on the 1st and 2nd interested parties who have strived to comply with the ***Regulations***.

Determination

30. The issue for determination in this matter is whether I should grant leave to commence judicial review proceedings and if so, whether leave should operate as a stay. The principle upon which the court acts to grant leave was well enunciated in the case of ***Njuguna v Minister for Agriculture*** **(Supra)** where the Court of Appeal held that, *"the test whether leave should be granted to an applicant for judicial review is, without examining the matter in any depth, whether there is an arguable case that the relief sought might be granted on the hearing of the substantive application."* In other words, a court will refuse to grant leave if it is clear from the facts that the intended application is frivolous, or that it is so hopeless or weak that it cannot possibly succeed.

31. I do not read the Court of Appeal to be saying that the Court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in ***Oceanfreight Transport Company Ltd v Purity Gathoni and Another*** **Nairobi HC Misc. Appl JR No. 249 of 2011 [2014]eKLR**, *"In my view, the reference to an "arguable case" in* ***W'Njuguna's Case*** *is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view."* The duty of the court to consider the facts is not lessened by the mere fact that the application is one for leave. The court can only come to the conclusion that the case if frivolous, or that leave is underserved by examining the facts (See ***Re Mukhonye Community Based Organisation*** **KSM CA Civil Appeal No. 22 of 2013 [2014]eKLR**). Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose.

32. Apart from considering whether the applicant presents an arguable case, it must always be recalled that the grant of leave is, as are judicial review remedies, still discretionary. The court may reject the application on the ground that there is an alternative remedy available or that the applicant has failed to disclose material facts or that the conduct of the applicant is such that it is undeserving of discretion or that there has been undue or unreasonable delay or that hardship will result to third parties or that good administration or public interest will be affected. The list of factors is neither exhaustive nor closed and at the end of the day, the decision to grant leave depends on a judicious application of these principles to the peculiar facts and circumstances of the case.

33. It is clear that the applicant is aggrieved by the Notice published by CMA which set the deadlines for the varying offers. It contends that the CMA has no power to impose a deadline in light of ***Regulation 13(1)*** which governs competing offers. The respondent on the other hand states that it empowered by the ***Regulation 13(1)*** to vary the rules *mutatis mutandis* and to prescribe conditions that will lead to a fair process for all the parties in light of the overall objects of the ***Act*** and powers under **section 11(w)**. As this is an application for leave, I am not prepared to say that the applicant has raised a frivolous argument, it is not one that may succeed at the end of the day but it is one that is not entirely hopeless. This though is not the only consideration when granting or refusing an application for leave.

34. The respondent has opposed the application on the ground that the applicant has an alternative remedy. This general principle that finds acceptance in our court was articulated by the Court of Appeal in ***Speaker of National Assembly v Njenga Karume*** **(1990 – 94] EA 546** where the Court stated that where there is a clear procedure for redress of any particular grievance provided by the Constitution or an Act of Parliament, that procedure should be strictly followed. Likewise in ***Republic v National Environment Management Authority ex-parte Sound Equipment Limited*** **CA Civil Appeal No. 84 of 2010 [2011]eKLR**, the Court of Appeal observed that judicial review is a remedy of last resort and parties aggrieved by the administrative actions of public or statutory bodies should first pursue alternative remedies before instituting judicial review proceedings unless it can be demonstrated to the satisfaction of the court that judicial review was more

convenient, beneficial and efficacious than the alternative remedy available to the applicant.

35. The Tribunal is established under **section 35A** of ***the Act*** and under **section 35** it has jurisdiction to hear appeals from any person aggrieved by any direction given by the CMA to such a person in respect of any direction, refusal, limitation and the like within 15 days from the date which the communication is made. The matter in issue, which the applicant proposes to challenge, is a technical matter relating to the take-over of a listed company which the legislature has entrusted to the CMA for determination subject to the right of appeal to the Tribunal.

36. In my view, the Tribunal ought to have been the first port of call. The applicant argues that the Tribunal is not quorate but I think there is nothing that prevented it from filing his appeal within the time provided by the Act. In the event the matter could not be dealt with the applicant would be at liberty to seek appropriate relief from this Court. Permitting the matter to proceed to substantive hearing would be to impose on the Court the mandate of the Tribunal contrary to the general principle I have cited.

37. The issue of failure to invoke alternative remedies is intricately linked with the issue of delay. Applications seeking leave to commence judicial review proceedings must be made promptly as soon as grounds giving rise to the need for judicial review become known. Undue and inordinate delay in applying for judicial review is a major factor for consideration. Lord Hope of Craighead in ***Regina v London Borough of Hammersmith and Fulham (Respondents) and Other Exparte Burkett & Another (FC) (Appellants)*** **[2002] UKHL 23** noted the need for the applicant to move the court promptly when he observed that, "*[64] On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in* ***O'Reilly v Mackman [1983] 2 AC 237, 280-281*** *to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision ……. But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in* ***Swan v Secretary of State for Scotland 1998 SC 479, 487****:"It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass."*

38. Under **section 35** of the ***Act***, the period for challenging a decision by CMA is fifteen days from the date when the decision is communicated. What the applicant seeks to impugn is the Notice published on 5th February 2014. Its right of appeal under the ***Act*** to challenge the Notice at the Tribunal would have expired on 21st February 2014. The inference I draw here is that by filing the application herein on the 8th April 2014, the applicant was well beyond the statutory limit intended by the legislature to challenge decisions of the CMA.

39. The deadline of 28th February 2014 contained in the Notice provided ample time for any person, who was interested in making a new offer or vary an existing offer, to do so. The applicant had sufficient time to challenge the power of the CMA either before the Tribunal or at the material time in court if the Tribunal could not be moved for whatever reason. The applicant was well aware of these processes given the fact that it was an active participant in the process beginning December 2013 through its related company.

40. The timelines in the ***Regulations*** are a relevant consideration when considering the issue of delay. A take-over transaction relating to a publicly listed company is not a trifling matter. It is a time bound process as illustrated by ***Regulations*** which impose 24 hour, 5 day, 10 day, 14 day and a maximum of 30 day limits for doing certain acts. A period exceeding thirty days in the context of matters dealing with take-overs is inordinate. These time limits, including the 15 day limit imposed for moving the Tribunal, are not idle, they are necessary due to the fact that the business

of capital markets is always time sensitive and a minute, day, week or month lost imposes a heavy cost on the market participants.

41. The applicant, according to the affidavit of Dilesh Somchand Bid, continued to engage the CMA even after the 28th February 2014 deadline had passed. So that even if I take a favourable view of the applicant's case, the last letter written by CMA to the applicant reiterating its decision to reject amended offer is dated 19th March 2014. Why the applicant waited until 9th April 2014 to move the court is not explained and in my view such delay in these matters should not be countenanced.

42. The issue of time and delay are important in the overall scheme of take-overs and the duty of the CMA to develop an orderly, efficient and fair capital markets. Take-overs are time sensitive transactions given that market dynamics are subject to changes at any time. CMA has stopped the trading of RVPL shares at the NSE and the effect of further court proceedings would have a deleterious effect on the confidence of investors and shareholders who would have to wait until the matter is finalized. The scheme of the ***Act*** in providing a dispute resolution process and timelines for specific actions to be taken under the ***Regulations*** is to ensure that matters are dealt with expeditiously and efficiently in line with the objects of the ***Act***.

43. The take-over process does not involve the applicant alone, the 1st and 2nd interested parties have invested substantial, time, money and effort in complying with the ***Regulations*** and directions issued by the CMA. The applicant, on the other hand has had the advantage of increasing its proposed offer soon after the 28th February 2014 deadline after it has had knowledge of competing offers. It would be gaining an unfair advantage over its competitors by not complying with the directions of CMA. To permit it to validate it offer through the court would distort the market and undermine a level playing field offered by the ***Regulations*** and direction issued by CMA.

44. The shareholders of the offeree are entitled to have the process come to an end so that they can be make decisions regarding their shares. At the end of the day, they are entitled to accept or reject the offers made. Permitting these proceedings to go ahead would cause considerable doubt on the process already underway. I have noted the concerns of the 3rd, 4th, 5th and 6th interested parties whose wish is to have the best price on the table for consideration. Such a price can only be achieved within the framework of the ***Regulations*** and directions set by the CMA and not by an open ended process that stifles their decision making and denies them the opportunity to assess the information available to make their choices. Holding the matter in abeyance while it is being litigated would cause hardship to third parties and the public at large.

45. The matters I have outlined fortify the element of public interest which is a necessary consideration in matters of judicial review as judicial review is a public law remedy. I am required to weigh the applicant's interest and the public interest and in light of what I have outlined, I find and hold that it is not in the public interest for the Court to sanction a situation that may dent or diminish investor and public confidence in the Capital Markets. A situation that may throw the take-over that has been in the works since November 2013 into doubt and undermine the entire process of take-overs.

Disposition

46. In summary, I find and hold that the applicant did not invoke the alternative remedy provided under the ***Capital Markets Act***. It filed the application before the Court after undue and unreasonable delay in the circumstances and that the grant of leave would cause hardship to third parties and would not be in the public interest.

47. The application for leave is therefore refused with the consequence that the Chamber Summons dated 8th April 2014 is dismissed with costs to the respondent and 1st and 2nd interested parties.

DATED and DELIVERED at NAIROBI this 17th day of April 2014

D.S. MAJANJA

JUDGE

Mr Ogunde instructed by Walker Kontos Advocates for the ex-parte applicant.

Mr Mungai instructed by Muriu Mungai and Company Advocates for the respondent.

Mr Kuyo instructed by Coulson Harney Advocates for the 1st interested party.

Mr Oraro instructed by Oraro and Company Advocates for the 2nd interested party.

Mr Kahonge instructed by Macharia Kahonge Advocates for the 3rd, 4th, 5th and 6th interested parties.

Mr Kithi instructed by Steve Kithi and Company Advocates for the Kilifi County Government.

Mr Gachuhi instructed by Kaplan and Stratton Advocates for Rea Vipingo Plantations Limited