



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 371 OF 2012

BETWEEN

JEREMIAH GITAU KIEREINI PETITIONER

AND

CAPITAL MARKETS AUTHORITY..... 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. This decision relates to disclosure of documents and the application for consideration is the petitioner's Chamber Summons dated 11th January 2013 which seeks the production of the following documents;
 - (a) *the two interim reports prepared by Webber Wentzel; and*
 - (b) *the 1st respondent's letter to CMC Holdings Limited dated 28th March 2012 referred to in the letter dated 4th April 2012 from Mr Joel Kibe, Chairman CMA, which latter letter was produced as part of CMA's sealed bundle of documents (No. 3) filed in court on 20th December 2012.*
2. The parties agree that the document (b) has been produced so that this inquiry is limited to the two interim reports prepared by Webber Wentzel.
3. The issue of disclosure of documents was settled by a consent order dated 8th October 2012 on the following terms;
 1. *The 1st respondent shall within 10 days of today's date file and serve an affidavit producing the documents in prayer 5(1) to (e) of the Chamber Summons application dated 25th August 2012.*
 2. *The petitioner shall within 7 days of service file a further affidavit in response to the 1st respondent affidavit disclosing documents.*
 3. *It is hereby directed that the document produced shall be for the exclusive use of the petitioner and that the same shall not be disclosed or released to any party without further orders of the*

court.

4. ***The advocates for both parties shall be in control for the documents and the documents shall be filed in a sealed envelope and which shall not be unsealed by anyone except the judge.***
5. ***Mention on 29th October 2012 for further directions.***
4. Pursuant to the consent order, the 1st respondent, the Capital Markets Authority (“CMA”), filed its documents and in the index of documents filed in ***“Sealed Documents No. 3”*** where it objected to production of, ***“The two (2) interim reports prepared by M/s Webber Wentzel”***. The ground of objection was stated as follows, ***“During the investigations, there were two (2) teams which produced 2 interim reports complementing each other. After the interim reports were finalized, these interim reports were merged to form a consolidated Webber Wentzel Report which was the one availed to Mr Kiereini and which contains all the findings and recommendations.”***
5. It is the petitioner’s case that in light of the consent on disclosure and the reference to the two interim reports, the CMA was obliged to deliver to the petitioner the two interim reports which it objected to producing. The petitioner argues that justice and fair play would have dictated that all reports completed for investigations before whom the petitioner appeared, whether interim, final, consolidated or of whatever description, be disclosed to the petitioner. The petitioner would then form his own view of the (2) interim reports *vis-a-vis* the Webber Wentzel report.
6. The CMA opposes the application on the ground that petitioner has an erroneous appreciation of the word *“interim”* referred to in the index of documents and as disclosed the reports of the two teams were merged into one report which has been produced. The CMA contends that all charges leveled against Mr Kiereini were extracted from the consolidated Webber Wentzel Report and this is the only basis from which the ultimate decision reached by the CMA can be assessed.
7. I have considered the oral arguments of the parties, the depositions and skeleton arguments and I take the following view of the matter.
8. In the disclosure document, the CMA clearly referred to two interim reports prepared by two teams commissioned to investigate the matters concerning inter alia, the petitioner. If the documents did not exist, why then did the CMA deem it fit to object to their production? If there is any confusion on the part of the petitioner as to the nature of these documents, as argued by the CMA, I think it can only be attributed to the CMA which was clear that the two documents existed hence it declined to provide the same.
9. According to the affidavit of Abubakar Hassan Abubakar sworn on 22nd January 2013, ***“the interim reports were preliminary and draft reports of which the CMA no longer maintains records, in light of the conclusiveness of the final report submitted to it by M/s Webber Wentzel.”***
10. In light of this disclosure, the court would be acting in vain to order disclosure of documents which the CMA admits it no longer has a record. It is therefore unnecessary to consider whether, in fact, the court could order disclosure of records which are preliminary in nature.
11. Notwithstanding what I have stated, I would be remiss if I did not record the fact that in the disclosure index, the CMA objected to the production of two interim reports. Almost a month later, the legal officer depones that CMA no longer maintains records such as the interim reports. The court would be engaging in an academic exercise for the court to grant orders whose enforcement is clearly frustrated. It is for these reasons that the CMA’s conduct must be deprecated. Was this an attempt by the CMA to undermine the court process? Were these reports destroyed to take them out of reach of the court? I will say no more!
12. It is for these reasons that I am constrained to decline the orders sought in the Chamber Summons dated 11th January 2013 but the 1st respondent shall pay the costs of the application.

DATED and **DELIVERED** at **NAIROBI** this 12th March 2013

D.S. MAJANJA

JUDGE

Mr Regeru instructed by Njoroge Regeru and Company Advocates for the petitioner.

Mr Ngacha instructed by Waweru Gatonye Advocates for the 1st respondent.