



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 KIHEREINI PETITIONER

AND

CAPITAL MARKETS AUTHORITY..... 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner in this case has challenged the decision of the Capital Markets Authority to take enforcement action against him. He complains that the enforcement action and the investigative process leading up to it was an infringement of his fundamental rights and freedoms protected by the Bill of Rights.
2. The petitioner is a well-known Kenyan. He was once the Permanent Secretary in the Office of the President, Head of the Civil Service and Secretary to the Cabinet. He later joined the private sector where he served as a Chairman of many companies including publicly listed companies.
3. At the time material to this suit, the petitioner served as member of the Board of Directors as the Non-Executive Chairman of CMC Holdings Limited (“CMCH”), a position he held until he voluntarily resigned in March 2011. CMCH is a company that has been involved in motor dealership and assembly in Kenya since the 1940s.
4. The Capital Markets Authority (“CMA”), the 1st respondent, is a statutory body created pursuant to **section 5** of the *Capital Markets Act (Chapter 485A of the Laws of Kenya)* (“*the Act*”) and whose mandate includes the promotion, protection, and regulation of the Capital Markets in Kenya.

Factual Background

5. This matter concerns the extent of the exercise of authority by the country’s capital markets

- regulator and its role in ensuring good corporate governance in the sector. The petition was triggered by CMA's enforcement action against the petitioner. The impugned enforcement action was preceded by an investigation by an *ad hoc* Committee ("the Committee") appointed by CMA.
6. The material facts leading up to the enforcement action are not in dispute and are set out in the parties respective depositions.
 7. On or about 8th September 2011, CMA received notification from CMCH that Mr Joel Kibe had been appointed the chairman of the Board of Directors to replace Mr Peter Muthoka in a bid to comply with CMA's corporate governance guidelines. Thereafter, allegations of non-compliance with corporate governance, conflict of interest and fraud were leveled against certain directors of the company including the petitioner.
 8. Following boardroom wrangles between rival directors of CMCH which spilled into the public domain, CMA took the decision to suspend the trading in CMCH's shares on the Nairobi Stock Exchange ("NSE") pending investigations on 16th September 2011. The initial suspension was for a period of 7 days. It was later extended for a further period of 90 days and thereafter further extensions were effected and remain in force. In the meantime, CMA began conducting its own internal investigation of CMCH.
 9. Prior to intervention by CMA, CMCH had instructed PricewaterhouseCoopers ("PWC") to carry out a forensic investigation covering some specific areas of its business. The PWC team carried out its forensic audit over a ten week period from the 23rd September 2011 to 20th December 2011 culminating in a report dated 23rd January 2012 titled, "**Forensic investigation at CMC Holdings Limited-Final Report.**" The petitioner avers that he was invited to give his views to the PWC forensic consultants which related to how CMCH handled the award of certain contracts.
 10. At about the same time on 14th November 2011, CMA commissioned Webber Wentzel, a South African firm, to conduct a forensic investigation into defined aspects of the financial operations of the CMCH and its trading subsidiaries. The scope of the investigation was later amended to exclude an investigation into irregularities affecting the procurement of logistics services from Andy Forwarders Services Limited as this matter was the subject of the PWC Report. Webber Wentzel was asked to review the PWC Report and comment on the methodology applied and the conclusions drawn by PWC. This investigation culminated into a report dated 31st January 2012 titled, "**Forensic Investigation Report into the Affairs of CMC Holdings by Webber Wentzel**" ("the Webber Report").
 11. The CMA sent the petitioner a copy of the Webber Report by a letter dated 28th March 2012 and notified by him through that letter that, "*The Board of Authority during its 215th meeting resolved to appoint an ad hoc committee of the Board under section 14 of the Capital Markets Act. The Committee will consist of five persons with a majority of independent members and will be chaired by Retired Justice Aaron Ringera. The Ad hoc committee has been convened to give an opportunity to be heard, in accordance with section 26(2) of the Capital Markets Act, to persons requested to appear.*" The petitioner was requested to appear before the Committee between 4th April 2012 and 5th April 2012 in "*respect of various allegations in the investigation report.*"
 12. The letter was followed by another one dated 30th March 2012 in which the CMA informed the petitioner of "*allegations attributed to him in the Webber Report*" as follows:
 1. *Operation of a scheme where manufacturers (Land Rover Jaguar and Nissan UD) over-invoiced CMCH Motors by 2% and 1.5% respectively contrary to fiduciary duty of a director under Article 3.1.1 of Capital Markets Guidelines on Corporate Governance Practices by Public Listed Company in Kenya;*
 2. *Establishment of feeder bank account namely Corival (1996) in Jersey. The account was funded*

- by the over invoiced amount charged by the manufacturers contrary to fiduciary duty of a director under article 3.1.1 of Capital Markets Guidelines on Corporate Governance Practices by Public Listed Company in Kenya;
3. Establishment of a Fair Valley Trust which received funds from the Corival Bank account. The funds were later invested for personal benefit and the benefit of a select group of employees contrary to fiduciary duty of a director under Article 3.1.1 of Capital Markets Guidelines on Corporate Governance Practices by Public Listed Company in Kenya;
 4. Use of the Corival (1996) funds during the periods of 1999-2000 as a vehicle to lend money at interest at CMC Motors contrary to fiduciary duty of a director under Article 3.1.1 of Capital Markets Guidelines on Corporate Governance Practices by Public Company in Kenya;
 5. Together with the other members of the board adopting a risky business model for the Company of borrowing to lend and failed to implement an “asset/liability” with the activity of borrowing to lend contrary to Article 3.1.1 (iii) of the Capital Markets guidelines on Corporate Governance Practices by Public Listed Company in Kenya;
 6. Together with the other members of the board he appointed a company secretary who was not qualified and provided false information to the public on the status of the company secretary contrary to regulation F.06 of the 5th schedule of the Capital Markets (Securities) (Public offers, Listing and Disclosure) Regulations 2002 and section 34(1)(b) of the Capital Market Act;
 7. As a member of the board he failed to exercise effective oversight over the management of the company as evidenced by weak internal audit function and weak internal control on the operations of the company contrary to Article 3.1.1(ii) and (v) of the Capital Markets Guidelines on Corporate Governance Practices by Public Listed Company in Kenya;
 8. As a member of the board he failed to disclose the extent of the company’s compliance with the Corporate Governance Guidelines issued under the Capital Markets Act and further failed to explain areas of non-compliance in the annual report of the company contrary to regulation F.01 and F.08 of the Capital Markets (Securities) (Public officers, listing and Disclose) Regulations 2002;
 9. As a member of the board he signed off the accounts which were not prepared in compliance with Internal Financial Reporting Standards in the year 2009 and 2010 contrary to article 2.4.1 of the CMA guidelines on Corporate Governance; and
 10. Any additional related matters as may arise in the course of the interview sessions.
13. The petitioner, through his advocates on record Messrs Njoroge Regeru and Company Advocates, responded to the CMA by a letter dated 2nd April 2012 raising several pertinent issues which would enable him appraise the Committee’s request for him to appear before it. Among the issues raised by counsel were the existence of civil suits relating to the very subject of the investigation and affecting the petitioner, the nature, scope and effect of the hearing particularly its mandate, procedure and objective of the hearing, the fairness of the Committee given the CMA’s involvement in litigation before the court in the subject matter of investigation and the fact that the proceedings constituted harassment of the petitioner given that he had given all necessary information to PWC which information was in possession of CMA.
14. CMA responded by the letter dated 3rd April 2012 stating, *inter alia*, that the issues raised by his Advocates would not affect the matters under consideration by the Committee. The petitioner was assured that he would be given a fair opportunity to be heard on the issues raised in the Webber Report and that he should appear before the Committee to make the necessary requests.
15. On 17th April 2012, the petitioner’s advocate, Mr Njoroge Regeru, appeared before the Committee and made submissions on behalf of the petitioner. These submissions were supplemented by written submissions dated 17th April 2012. In essence, the petitioner raised the issues which he had raised in his letter dated 2nd April 2012 written to the CMA. At para. 2 of its submissions the petitioner raised the following pertinent issue;

[2] Related to No.1 above is the nature, scope and effect of the Committee. The letters received by our client from CMA are either unclear or altogether silent on these, and other issues critical to

the hearings of the Committee including:-

(a) The mandate of the Committee and the general or special functions for which it has been appointed.

(b) The terms of reference of the Committee.

(c) The procedure to be adopted during the hearings.

(d) The capacity in which our client would appear before the Committee, that is, whether a party under investigation or inquiry, whether as a witness or any other capacity.

(e) Whether our client would be entitled to present any evidence and/or call witnesses in support of his position.

(f) The ultimate objective intended to be achieved or pursued after the business of the Committee had been concluded.

It will be readily appreciated that any hearing conducted in the absence of clarity on the above-listed matters, duly formulated in writing and communicated to interested parties such as our client, would not meet the legal, indeed constitutional threshold, of a fair hearing.

16. The issues raised by the petitioner were heard at the Committee's sitting on 17th April 2012 and after hearing the petitioner's advocate, the Committee, through its Chairman, Retired Justice Aaron Ringera clarified the issues concerning its constitution and procedure. It stated that its terms of reference were, *"To consider the Weber Wenzel investigation findings and determine the validity of the allegations against the Directors of CMC Holdings Ltd."* It is also stated that, *"The Committee shall give recommendations to the Board of the Authority on actions to be taken, if any, against the past or current Directors and Management of CMC Holdings Ltd."*

17. The Committee also took the view that the proceedings in the High Court could not affect its own proceedings as it was performing a statutory function, related to the Webber Report and not the PWC Report which was the subject of the proceedings in the High Court. It found that the petitioner would not be subjected to double jeopardy by participating in its proceedings despite having appeared before Webber Wentzel investigators. Finally, the Committee directed the petitioner to appear before it on 30th April 2012.

18. After the Committee gave its directions, the petitioner's advocates wrote to the Committee on 27th April 2012 informing that, *"[O]ur client is of the view that his participation in the proceedings of the Committee would occasion grave prejudice to him and to Court proceedings which are either pending or are likely to be instituted. We therefore have instructions to notify you, as we hereby do, that our client will not be appearing before the Committee and will henceforth not participate in its proceedings in any way."*

19. The Committee then granted the petitioner an opportunity to appear before it and call witnesses on 30th April 2012 but the petitioner, in view of his advocate's letter of 27th April 2012 did not appear before the Committee. The Committee then considered the evidence before it and presented to the CMA Board.

20. On 3rd August 2012, CMA issued a press release announcing that it had taken enforcement action against executive and non-executive directors allegedly found to have flouted the capital markets' legal and regulatory requirements in relation to the affairs of CMCH. Further that the petitioner had been disqualified from any appointment as director of any listed company or licensed or approved person, including a securities exchange in the capital markets in Kenya.

21. The CMA informed the petitioner by its letter of 3rd August 2012, that enforcement action had been taken against him on the following terms:
- a. *On the allegation that he operated offshore arrangements contrary to fiduciary duties of a director, the Authority established that he breached his fiduciary duties as a director of the Company based on the following reasons:*
 - i. *That in addition to being aware of the existence of the offshore arrangements he was also intimately involved in the operations of those offshore arrangements and that he benefited from the offshore arrangements to the detriment of the Company and its shareholders;*
 - ii. *That although the offshore trust had been established for the benefit of the past, current and future members of staff of the company, he curiously benefited there from despite having been a member of staff of the Company; and*
 - iii. *That he was a signatory to some of the correspondence touching on the operation of those offshore arrangements.*
 - b. *On the allegation that he together with the other members of the Board of the Company adopted a risky business model for the Company of borrowing to lend and failed to implement an “asset/liability management process to monitor, manage and hedge all such risks associated with the activity of borrowing to lend; the Authority established that he breached his fiduciary duties as a director of the company based on the following reasons;*
 - i. *That the company’s external auditors in the year 2006 had clearly brought to the attention of the Board of the Company the risky nature of the business of the company.*
 - ii. *That there was no evidence that the Board of the Company was monitoring the implementation of the business model through hedging of the risk associated with the model.*
 - iii. *That no evidence was provided to demonstrate that the Board had taken any action over the management for failure to implement policies that it had established despite some of the director’s incessant concerns on how the Company was run; and*
 - iv. *That the Company was borrowing money from financial institutions to purchase vehicles from overseas manufacturers and thereafter use the borrowed funds to fund credit extension to drive sales volume. This was noted to have been done without the existence of the necessary infrastructure to support the business model thereby exposing the Company to great risk and impacted negatively on the profitability the company.*
 - c. *On the allegation that a member of the Board of the Company the failed to exercise effective oversight over the management of the Company as evidenced by a weak internal audit function and weak internal controls in the operations of the Company; the Authority established that he breached his fiduciary duties as a director of the Company based on the reasons that the Board of the Company established that there were grave weaknesses in the internal controls of the Company under Mr Martin Forster’s watch who had commissioned an internal audit assessment survey by Deloitte and whose recommendations were never implemented. The Board of the Company thus failed in its duty to monitor the implementation by the Management of the Company of the recommendations made.*
 - d. *On the allegation that he together with the other members of the Board of the Company appointed a Company Secretary who was not qualified and provided false information to the public on the status of the Company Secretary, this allegation was not established since there was no proof of appointment of an unqualified Company Secretary.*
 - e. *On the allegation that as a Member of the Board he failed to disclose the extent of the Company’s compliance with the guidelines on Corporate Governance Practices by Public Listed Companies in Kenya and further failed to explain areas of non-compliance in the annual report of the Company; the Authority established that although he was not an expert, that did not exonerate him from such responsibility and that as the Chairman of the Company (by then), he should have taken responsibility to ensure compliance.*
 - f. *On the allegation that as a Member of the Board of the Company he signed off the accounts which were not prepared in compliance with IFRS in the year 2009 and 2010. The authority found the*

allegation as established although it took cognizance of the fact those non executive directors, save for accountants, may not be knowledgeable in IFRS. That however did not exonerate the petitioner from such a responsibility, concluded the Report.

22. According to the *Report and Resolutions of Capital Markets Authority Board on the Investigations into CMC Holdings Limited* (“the CMA Report”) dated 3rd August 2012, the CMA made the following recommendations and resolutions;

- a. *To disqualify the petitioner from appointment as a director of any listed company or licensed or approved person including a securities exchange in the capital markets in Kenya pursuant to section 25A(1)(c)(i) of the Act;*
- b. *CMCH and relevant government agencies to conduct further investigations to establish the quantum in the offshore arrangements for purposes of recovery and restitution;*
- c. *Once the quantum has been established, to initiate recovery from Mr. Forster (Presumably a typographical error therefore read the petitioner) an amount equivalent to two times the amount of benefit accruing to him by reason of breach of section 25A(1)(c)(ii) of the Act;*
- d. *Once the quantum has been established, to require the petitioner reconstitute CMCH pursuant to Section 25A(2) and (3) of the Act;*
- e. *To reprimand the petitioner for signing off the accounts for the year ended September 30, 2009 and 2010 not prepared in compliance with International Financial Reporting Standards and for non-disclosure in the Annual Report on the extent of CMCH compliance with the guidelines on Corporate Governance.*

21. As part of the enforcement action commenced on 3rd August 2012, the CMA proceeded to notify the various parties of the petitioner’s disqualification under **section 25A(1)(c)(i) of the Act**, including the Registrar of Companies, the Nairobi Securities Exchange, the Central Depository & Settlement Corporation Limited and CMC Holdings Limited. By letters dated 7th August 2012, CMA notified the CFC Insurance Holdings Limited and Unga Group Limited, both listed companies, of the petitioner’s disqualification as a director.

Petitioner’s Case

22. The petitioner’s case is that the Constitution and his fundamental rights and freedoms have been violated by the conduct of the CMA. He avers that in arriving at the resolutions and findings it did, the CMA was in breach of his fundamental rights. The petitioner is aggrieved by the CMA’s action to pass sentence and impose sanctions which, apart from having far-reaching implications on his rights as a citizen, have brought his name into disrepute.

23. The petitioner contended that the CMA’s actions violated the principles of governance enunciated under **Article 10** of the Constitution. He averred that his right to dignity guaranteed under **Article 28** was infringed as he was now curtailed from exercising his right to associate with his peers, business associates, fellow investors and shareholders to participate in free enterprise which is dehumanizing. Further, that his rights to freedom of security of the person under **Article 29(d) and (f)** and right to privacy under **Article 31(c)** were violated. He also stated that his right to access to information protected by **Article 35** was denied by the CMA deliberately failing to give him several documents relating to the proceedings against him despite several requests.

24. The petitioner contends that the entire proceedings were carried out in breach of **Article 47(1)** which protects his right to fair administrative action and **Article 50** which guarantees every person the right to a fair hearing. He also alleges that he has suffered discriminatory practice thereby denying him the right to equal protection and benefit of the law contrary to **Article 27**. Further, that the enforcement action taken against him is a threat to his right to own property enshrined by **Article 40**.

25. Mr Regeru, learned counsel for the petitioner, attacked the PWC and Webber Reports that formed the substratum of the findings against the petitioner. He submitted that the PWC Report was self-

qualifying to the extent that the authors denied that was a comprehensive review of the evidence. Counsel submitted that since the report was the subject of protracted litigation in the High Court, CMA could not take action based that report as this was premature, contemptuous of the court process and prejudicial to the petitioner.

- 26.Regarding the Webber Report, counsel stated that it should not have formed the basis of sanctions by CMA against the petitioner as it lacked authenticity and was lopsided. He contended that a key term of reference of Webber Wenzel investigation was to interrogate the PWC Report and that the report was critical of CMA in certain respects. Counsel argued that though the petitioner had appeared before the Webber Wentzel team and tendered evidence, it did not feature in the report. Furthermore, the Webber Report recommended further investigations locally and abroad, before the petitioner could he held liable.
- 27.The petitioner submitted that the Committee failed to meet the constitutional threshold required for it to carry out a procedurally and substantively fair process. The petitioner was concerned about the impartiality of the Committee as two of CMA's directors were part of the Committee and that this implicated the Committee in terms of fairness and appearance of bias. The petitioner submitted that under the Act, the Committee could include directors of CMA but in these circumstances, it was unfair as CMA was directly and substantially interested. That in this case, the CMA appointed the Committee itself and that any reasonable person would not be satisfied that justice would be done. It was also the petitioner's contention that the Committee omitted material particulars relating to the petitioner's evidence.
- 28.The petitioner also took issue with the Committee proceeding with its investigation yet there were pending High Court cases litigating the subject of investigation. The petitioner argued that since CMA was involved in all these proceedings, he would suffer prejudice.
- 29.On the issue of fair hearing, counsel submitted that there was no hearing accorded to the petitioner in respect of restitution contrary to the statute. That for a fair hearing, the Committee should have framed a charge of restitution which would in turn have entitled the petitioner to defend himself. It was his case therefore that the letter dated 3rd August 2012 set out the conviction and sentence without following due process.
- 30.The petitioner generally impugned the sanctions intended to be meted on him by the CMA saying that the same lacked evidence and further investigations needed to be carried out before the sanctions were pronounced. That the sanctions imposed by the CMA also recognised need to carry out further investigations yet the CMA had already established liability against the petitioner. He contended that no investigation referred to has been commenced to date and the sanction of restitution could not be ordered without a proper investigation.
- 31.Mr Regeru also pointed to the documents that were not made available to the petitioner-the two Webber interim reports. The two reports, counsel submitted had the petitioner's evidence before the PWC and called on the court to make an adverse reference stating that the reports must have exonerated the petitioner.
- 32.In the petition filed on 27th August 2012, the petitioner sought, *inter alia*, the following reliefs from this Honourable court:

[3] A declaration that the 1st Respondent has breached the Petitioner's Fundamental Rights as enshrined in Articles 10, 10(2) B, 10(2)(C), 28, 29, 29 (D), 29 (F), 31, 31 (C), 35, 35 (1) (B), 47, 47 (1), 50, 50(1), 50 (2) (A), 50 (2) (K), 50 (2) (L), 27, 27 (1) of the Constitution of the Republic of Kenya.

[4] A declaration that the 1st Respondent's breach of the Petitioner's Fundamental Rights as above has caused the Petitioner damage to his reputation and good name.

[5] A declaration that to the extent that the same concerns the Petitioner, the Report and Resolutions by the Board of Directors of the 1st Respondent dated 3rd August 2012 Regarding the investigation into the affairs of CMC Holdings Limited is unlawful and unconstitutional.

[6] A declaration that to the extent that the same concerns the Petitioner, the Report and Resolutions by the Board of Directors of the 1st Respondent dated 3rd August 2012 regarding the investigation into the affairs of CMC Holdings Limited was:

- a. In breach of the Petitioner's legitimate expectations.
- b. Disregarded material and pertinent facts relating to the affairs of CMC Holdings Limited.
- c. Unfair.
- d. Unprocedural.
- e. Unreasonable and Irrational.
- f. In Breach of the Wednesbury Principles.

[7] A Judicial Review Order of Certiorari to bring into this Honourable Court and quash the following resolutions contained in the Report and Resolutions of the 1st Respondent dated 3rd August 2012 regarding the investigation into the affairs of CMC Holdings Limited

[8] A Judicial Review Order of Prohibition restraining the 1st Respondent acting by itself, its employees and or agents or through such person as may act on its authority from implementing any and all the determinations and/or resolutions contained in the Report and Resolutions by the Board of Directors of the 1st Respondent dated 3rd August 2012 Regarding the investigation into the affairs of CMC Holdings Limited touching on or affecting the Petitioner in any manner whatsoever.

[9] An order of compensation directed at the 1st Respondent compelling it to compensate the Petitioner for the damage caused to him by its actions and the quantum of such compensation to be determined by this Honourable Court.

1st Respondent's Case

33. CMA argued that its investigation was justified because it was done pursuant to the exercise of its statutory powers geared at ensuring the integrity of the capital markets and maintenance of corporate governance standards. CMA contended that it conducted itself in accordance with its statutory powers throughout the process in carrying out investigations and making findings thereof, constituting the Committee and that it was also within its power to take the enforcement action. It submitted that further investigations to ascertain the quantum of loss had been concluded and that it would act in accordance with **section 25A(2) and (3)** of the Act.
34. Mr Ngaca, learned counsel for the CMA, submitted that this was not an appeal and that this court should confine itself to addressing the constitutional concerns raised in the petition.
35. CMA denied violating the petitioner's rights, arguing that the petitioner was in fact given an opportunity to be heard. It was its contention that after the Webber Wenzel investigation, the CMA extracted charges and allegation specifically relating to the petitioner and that in so doing afforded the petitioner an opportunity to respond in respect of the findings and to test the validity of the allegations made against him.
36. CMA countered the allegation by the petitioner that his right to fair administrative action guaranteed under **Article 47** and the right to fair hearing under **Article 50** had been violated by contending that the procedure it adopted was fair and just not only within its role under the Act but in terms of fairness and professionalism as a capital market regulator. Further, that its decision including the subsequent enforcement action was reasonable and rational as any other capital markets regulator directing itself to the law and facts in relation to the affairs of CMC holdings

would have arrived at the same decision. CMA urged court to consider the correspondence between the parties particularly the letters dated 30th March 2012 and 3rd April 2012 which set out specific allegations against the petitioner.

37. Regarding the issue of due process and enforcement action, it was argued that its decision of 3rd August 2012 was in two parts; the disqualification and the reprimand. While the decision took effect immediately, CMA submitted that the decision to recover the amounts and restitution was subject to further ascertainment and investigations and thus the penalty had not accrued and the petitioner would be afforded the opportunity to be heard prior to recovery and restitution actions are effected.
38. Mr Ngaca submitted that the petitioner was re-assured to the greatest possible extent of the objectivity of CMA during the whole process and given no less than three opportunities to present his case. That by the letter dated 27th April 2012, the petitioner, through his advocate waived his right to make any representations before the Committee hence there was no denial of the right to a fair hearing.
39. Mr Ngaca submitted that the petitioner having waived his right to make representations before the Committee, the Committee concluded its hearing after giving the other adversely mentioned directors of CMCH the opportunity to be heard, and after its own deliberations forwarded its recommendations to the Board, to enable it make final findings on the charges against the petitioner and determine appropriate action, if any, to be taken.
40. The CMA also submits that due to the sensitivity of the matter, and for the purposes of open and frank discussions among the Committee members, it was always understood that all material reflecting the opinions, recommendations and deliberations of the Committee and the Board would remain confidential and privileged under **section 13 of the Act** both before and after the actions were taken and only the ultimate decision of the CMA would be published to protect the public against confusion that might result in divergent reasons and rationales given by individual members that were not ultimately the grounds for CMA's actions but also to safeguard the privacy of members. The CMA takes the position that so long as the Committee's recommendation were part of a continuous process of the CMA's decision making authority, then they would remain privileged, both before and after the CMA made its decision.
41. CMA's case was that these letters constituted sufficient notice to the petitioner of the allegations made against him. Mr Ngaca urged the court to take into account that enforcement proceedings were a continuous process and the petitioner knew what was happening all along.
42. On the whole the CMA denies that the petitioner's rights were denied and or violated as alleged or at all.

2nd Respondent's Case

41. The Attorney General supported CMA's position and opposed the petition on the basis of grounds of opposition filed on 5th September 2012.
42. Mr Moimbo, learned counsel representing the Attorney General submitted that **section 35A of the Act**, established the Capital Markets Tribunal ("the Tribunal") vested with powers to hear appeals made by a party or references made by the authority. Learned Counsel submitted that the petition was an abuse of the court process and was improperly before court as it was based upon a decision of the CMA's Committee with which the tribunal had jurisdiction to deal with. It was his case that the court could only be invited to review the decision of the Tribunal rather than that of the Committee. Counsel relied on several cases; *The Speaker of the National Assembly v The Hon James Njenga Karume, Civil Application No 92 of 1992 (Unreported)* and *Harrikisson v A.G. [1979] 3 WLR* to buttress his point that this court was not the appropriate forum to deal with the

matter.

Analysis and Determination

43. The issue for determination in this matter is whether the CMA breached the petitioner's fundamental rights and freedoms in the discharge of its mandate. However, before proceeding any further, I must deal with the question of jurisdiction as the issue was raised by the Attorney General.

The Jurisdictional question

44. The Attorney General contended that this court lacks jurisdiction to handle the matter and that the court ought to desist intervening in view of the tribunal established under the **section 35A** of the Act.

45. The issue of jurisdiction has been subject of several decisions of the courts. The Supreme Court in **Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others Application No. 2 of 2011 [2012] eKLR** where it was stated at paragraph 68 that: *"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law..."* (See also Supreme Court advisory opinion **In The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 [2011] eKLR**).

46. Jurisdiction flows from the Constitution and the law and the power of this Court rests in **Article 165(3)** which provides in part that the High Court has *"jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened"* and *"the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution"*

47. I must at this early opportunity correct the submission by Mr Moimbo that this Court is not the appropriate forum to *"review"* the decision of the Committee or the CMA. This court has been called upon to intervene in what the petitioner alleges to be a breach of his fundamental rights and freedoms and a contravention of the constitutional provisions by the respondents. This is clearly within the jurisdiction of the High Court by virtue of **Article 165(3)(b)** and **3(d)(ii)**. The Capital Markets Tribunal has no such mandate.

48. I would also add that holding otherwise would be tantamount to this court shirking from its very primary mandate and responsibility. As per the court of Appeal in **R (G) v Immigration Appeal Tribunal [2005] 1 WLR 1445**: *"It is the role of the judges to preserve the rule of law. The importance of that role has long been recognized by Parliament. It is a constitutional norm recognized by statutory provisions that protect the independence of the judiciary....The common law power of the judges to review the legality of administrative action is a cornerstone of the rule of law in this country and one that judges guard jealously..."* Similarly, Lord Browne-Wilkinson in **R v Hull University Visitor, ex parte Page [1993] AC 682, 701** had this to say, *"The fundamental principle...is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In [most] cases...this intervention...is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a Wednesbury sense, reasonably. If the decision-maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is Wednesbury unreasonable, he is acting ultra vires his powers and therefore unlawfully."*

49. I find and hold that this matter is properly before this court and that this court has jurisdiction to hear and determine it.

Whether CMA violated petitioner's fundamental rights and freedoms

50. The petitioner has alleged that several of his fundamental rights and freedoms were violated. In my view, the issue at the heart of this case is the investigation and enforcement process which led to sanctions being imposed on the petitioner. The violation of several rights and fundamental freedoms has been prayed in aid of the petition but I think that all these rights are implicated in the process of investigation and enforcement and whether or not they have been violated depends on whether or not the process of investigation and enforcement by CMA was, “**expeditious, efficient, lawful, reasonable and procedurally fair.**” In my view, this case falls squarely within the purview of **Article 47(1)** of the Constitution.

Application of Article 50

51. This brings me to the provision of **Article 50** which the petitioner has invoked. **Article 50(1)** provides that; “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

52. Considering the difference between **Articles 47** and **50**, the court, in **Dry Associates Limited v Capital Markets Authority and Another Nairobi Petition 328 of 2011 (Unreported)**, stated as follows, “[62] **Article 47** and **50(1)** protect separate and distinct rights which should not be conflated. Although the two rights embody and give effect to the general rules of natural justice they apply to different circumstances. **Article 50(1)** applies to a court, impartial tribunal or a body established to resolve a dispute while **Article 47** applies administrative action generally. **Article 50(1)** deals with matters of a civil nature while the rest of the Article deals with criminal trials. **Article 47** is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the **Law Reform Act (Cap 26 of the Laws of Kenya)** but is to be measured against the standards established by the Constitution.”

53. More recently, the application of **Article 50** was discussed in **Diana Kethi Kilonzo and Another v Independent Electoral & Boundaries Commission (IEBC) & 2 others, Nairobi Petition No. 359 of 2013 [2013]eKLR** where the court stated; “[119] We believe the latter part of this complaint pertaining to the alleged breach of Ms. Kilonzo's rights under **Article 50(2)(a)(c)(j)** and **(k)** can be easily disposed of. Ms. Kilonzo was not on trial in the proceedings before the Committee, which is not a court that exercises criminal jurisdiction to try offences. Consequently...the provisions of **Article 50(2)** in their entirety have no application to the matters at hand. This Clause is clear that it has application to an accused person facing criminal charges.... It is clear from its wording that the provision is intended to apply to accused persons facing criminal charges.”

54. In the circumstances, I do not find any fault in the Committee's words when it remarked as follows in its directions as per its verbatim proceedings; “...we wish to emphasize that this is not a criminal or civil proceeding. There is no accused person, there is no defendant, there is no prosecutor, there is no plaintiff, our proceedings do not take the form of case for the prosecution or the plaintiff, case for the defence and so on and so forth. There is no examination-in-chief, there is no cross-examination, there is no re-examination. Mr. Kiereini like other current or former Directors is invited to appear before the Committee in his capacity as such, a former Director, Chairman of the CMC to be heard on the findings of the Webber report and the allegations attributed to him in that report, pursuant to Section 26 of the Act. The opportunity is to afford him his right to natural justice.”

55. It follows therefore that the petitioner's arguments regarding the application of the rule against double jeopardy founded on the provisions of **Article 50(2)** must be rejected. **Article 50(2)(o)** states that; “Every accused person has the right to a fair trial which includes the right-(o) not to be tried for an offence in respect of an act or omission for which the accused person has

previously been either acquitted or convicted.”

56. The double jeopardy rule strictly applies to criminal offences and not disciplinary proceedings or proceedings of an administrative nature such as the one concerning the petitioner. In the case of **Republic v Public Service Commission of Kenya Ex parte James Nene Gachoka, Nairobi Misc. Application 516 of 2005 [2013] eKLR**, in which the question was whether *the Public Service Commission could commence disciplinary proceedings against an employee for gross misconduct or negligence upon acquittal by the Court of an offence related to employment and based on the same facts, the court stated as follows; “[12] The prohibition contemplated by the provision is that of a person undergoing trial for the same offence for which he was tried, convicted or acquitted....[14] The phrase ‘tried for that offence or for any other criminal offence’ found in section 77(5) of the repealed Constitution necessarily mean that the proceedings must be before a court or a judicial tribunal and not mere administrative or civil proceedings. Disciplinary proceedings cannot be equated to a ‘trial for an offence’ so as to attract the defence of double jeopardy doctrine. As such, disciplinary action, professional or otherwise, being of a civil nature, is not a punishment given by a court. The Supreme Court of the United Kingdom in case of R (on the application of Coke- Wallis) v Institute of Chartered Accountants of England & Wales [2011] UKSC1 noted that principles of autrefois acquit did not apply to disciplinary matters, which were civil not criminal proceedings. Lord Collins noted that, “[60] The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain public confidence in the integrity of the profession and to uphold proper standards of behaviour.” (See also Daniel Ndung’u v Director of Public Prosecutions and another Nairobi Petition No. 69 of 2012 [2013] eKLR).*

57. **The PWC and Webber Wenzel teams were involved in carrying out forensic audits which cannot be equated to a criminal process and which did not result in finding the petitioner guilty of an offence. The fact that there were previous investigations did not preclude CMA from appointing the Committee to test the veracity of the issues emanating from the forensic report or affording the persons mentioned in the report an opportunity to respond to the allegations. Furthermore, the investigation by the CMA in these circumstances does not constitute harassment of the petitioner as it was carrying out its statutory mandate. What is important is that even where there have been previous investigations, the process adopted by CMA must be fair and whether such a process is fair depends on the circumstances of each case.**

Existence of other suits

58. **The petitioner contested the Committee’s action against him on the ground that there were in existence civil suits relating to the very subject of the investigation and affecting him. I do not think this fact of itself would disentitle the CMA from exercising its statutory mandate and I agree with the position taken by the Committee that the existing suits would not affect its mandate. In Dry Associates Limited v Capital Markets Authority and Another (Supra), a similar argument was raised that the continued investigation of the petitioner in that case as long there were cases pending were sub-judice. The court rejected the argument as follows, “[77] The petitioner has also raised the issue that the investigation and decision by the CMA are subjudice in so far as there are civil proceedings pending in the High Court. CMA is not party to those proceedings hence the sub judice argument is devoid of merit. To uphold it would mean that the regulatory authority of CMA would be stultified by a party implicated in wrongdoing filing suits in which CMA was not party and impleading those suits as a defence to regulatory investigation. The mere existence of High Court civil suits cannot prevent CMA from carrying out its statutory duties.”**

CMA’s Mandate

59. In order to determine whether there was a violation of **Article 47(1)**, I think it is essential to revisit the statutory mandate of CMA and its constitutional obligations. This is the milieu against which its actions are to be gauged.

60. The Capital Markets Authority is a statutory body created pursuant to **section 5** of *the Act*. The objectives of the authority as set out under **section 11** of *the Act* which include developing the capital markets, facilitating participation of the general public in the stock market, imposing sanctions for breach of the provisions of the Act or the regulations made thereunder, or for non-compliance with the Authority's requirements or directions and the protection of investor interests. The conclusion to be drawn from **section 11** of *the Act* is that the CMA is established as the chief regulator of the capital markets including protecting the investor interests in those markets. It is in public interest and in line with the principles of good governance that the capital markets be properly regulated.

61. In order to carry out its duties effectively, CMA is endowed with various powers which include carrying out investigations and imposing sanctions for breach of the provisions of the Act. It is therefore not in doubt that the CMA was within its powers in carrying out the investigation and enforcement action against the petitioner. The next level of inquiry examines the manner in which the CMA discharged its statutory mandate and whether it did so in tandem with the constitutional requirements.

The ad hoc Committee

62. The petitioner challenged the composition of the *ad hoc* Committee. **Section 11A** of *the Act* also permits the CMA to delegate any of its functions to the Committee of the Board. The section reads thus;

11A. (1) The Authority may delegate any of its functions under this Act to-

(a) a committee of the Board;

(b) a recognized self regulatory organization; or

(c) an authorized person.

Section 14 of *the Act* further provides as follows:

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

(2) Without prejudice to the generality of subsection (1), the Authority shall establish -

(a) a committee to hear and determine complaints of shareholders of any public company listed on an authorized securities exchange, relating to the professional conduct or activities of such securities exchange, or any other person or such public company under the jurisdiction of the Authority and recommend actions to be taken, in accordance with rules established by the Authority for that purpose; and

(b) a committee to make recommendations with respect to assessing and awarding compensation in respect of any application made in accordance with rules established by the Authority for that purpose.

63. **Section 11A and 14 of the Act permit the CMA to delegate its functions to various persons including a Committee of the Board and I therefore** find that CMA was within its powers in appointing an *ad hoc* Committee to consider investigations carried on its behalf.

64. The petitioner has argued that the Committee's composition meant that the petitioner was denied a

right to a fair hearing by an independent and impartial tribunal. The Committee was composed of two members of the CMA Board and three independent members. The issue of the composition was raised at the hearing and the Committee's directions on the issue according to the verbatim record of the proceedings of the committee filed before this court was that the exercise was in tandem with CMA's role as a market regulator. The Committee ruled on the matter as follows; "As regards the concern that the Capital Markets Authority and/or this Committee cannot be an independent body because the(sic) exercise investigatory as well as enforcement action, our view of the matter is that the Authority and the Committee are exercising statutory functions conferred by the Capital Markets Authority Act. No regulator is expected to be independent in the sense that it cannot investigate and "prosecute" and "take enforcement action". In other words, regulators by their very function are in slang investigator, prosecutor, judge and jury. So we are satisfied we can continue with our functions."

65. I agree with the Committee's finding that its process was in line with CMA's mandate of regulating the capital markets industry.

Whether the process was fair

64. **Article 47** demands an 'efficient, lawful, reasonable and procedurally fair' administrative action. The question for consideration is, did CMA's action meet this obligation in its conduct towards the petitioner? The CMA has insisted that it observed the right to fair administrative action as it sent the petitioner correspondence setting out the particulars of the allegations against him. It argued that the process of investigation was continuous and that at all material times, the petitioner was aware of these allegations and that the correspondence constituted notices of the action.

65. **Article 47** contains an implicit flexibility that enables bodies exercising administrative authority to meet the demands of modern administration (See *Dry Associates Limited v Capital Markets Authority and Another (Supra)*). The application of the substance of the rules of natural justice depends on the facts of each case and I would adopt the words of Lord Morris of Borth-y-Gest in *Furnell v Whangarei High Schools Board [1973] AC 660* where he stated, "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the inquiry is acting, the subject matter and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice that have been used from time to time, but whatever standard is adopted, one essential is that the person must have a reasonable opportunity of presenting his case." (See also Lord Pearson in the case of *Pearlberg v Varty (Inspector of Taxes) [1972] 1 WLR 534,547*). In the case of *Commissioner General, Kenya Revenue Authority v. Silvanous Onema Owaki t/a Marenga Filling Station (Kisumu Civil Appeal No. 45 of 2000 (Unreported))*, the Court of Appeal held that the right to be heard must be determined according to the statutory scheme which sets out the duties of the statutory corporation and the rights of the subject.

66. **The determination of this matter turns on the mandate of the Committee and its relation to the CMA Board which made the ultimate decision to take enforcement action against the petitioner.**

67. **According to CMA's Ad Hoc Committee Rules of Procedure, the relevant terms of reference for the Committee were as follows;**

[9]...consider the Webber Wentzel investigation findings and determine the validity of the allegations against directors of CMC Holdings Ltd.

[10]...give a fair and reasonable opportunity for the past and current Directors (whether executive or no-executive) of CMC Holdings and any other person the committee may deem necessary to be heard and defend themselves on the allegations attributed to them.

[16]The ad hoc committee shall give recommendations to the Board of the Authority on action to be taken, if any, against the past or current directors (whether or non-executive) of CMC Holdings Limited or any other person on ways to improve the Capital Markets.

[17]Recommendation of the ad hoc committee shall be considered by the Board of the Authority for enforcement or other appropriate action.

66. An appreciation of the mandate of the Committee was that its function was investigatory. This fact was appreciated by the members in the decision which I have set out at paragraph 54 above. The Chairman, in fact disclaimed the contention that the petitioner was the accused before the Committee. Its mandate was clear that it was to authenticate the findings of the Webber Report, hence, ***“Mr. Kiereini like other current or former Directors is invited to appear before the Committee in his capacity as such, a former Director, Chairman of the CMC to be heard on the findings of the Webber report and the allegations attributed to him in that report, pursuant to Section 26 of the Act. The opportunity is to afford him his right to natural justice.”***
68. It is clear from the mandate of the Committee that it was not entitled to take enforcement action but rather make recommendation to the Board of CMA. It is upon consideration of such recommendation that the CMA Board would then take and indeed took enforcement action.
69. While I agree with the CMA that the petitioner was indeed given an opportunity to be heard during the investigation but that he waived this right by his advocate’s letter of 27th April 2012, I do not think this is the end of the matter. The Committee’s mandate was purely investigative. After investigation, it would make recommendations to the Board which would then consider the recommendations and thereafter take enforcement action. Hence the waiver applied only to the proceedings before the Committee and not the entire process. In any case, the petitioner cannot have waived his right to appear or make representations before the Board when such an opportunity had not been provided.
70. I find that the petitioner was entitled to be heard before enforcement action was taken against him by the Board. The CMA has argued that the letter to the petitioner set out the nature of the charges against the petitioner’s but it must be recalled that these notices were in reference to the mandate of the Committee which was to validate the findings of the Webber Report. Part of the mandate of the Committee was to, ***“give a fair and reasonable opportunity for the past and current Directors (whether executive or non-executive) of CMC Holdings and any other person the committee may deem necessary to be heard and defend themselves on the allegations attributed to them.”*** These allegations were those attributed to the petitioner and other directors by the Webber Report and not the charges that would form the basis of taking enforcement action.
71. What the Committee was called upon to do was to, ***“consider the Webber Wentzel investigation findings and determine the validity of the allegations against directors of CMC Holdings Ltd.”*** At no time was the Committee required to take enforcement action on behalf of the Board. The Board did not delegate its enforcement authority to the Committee, that power to take enforcement action against the petitioner, in the circumstances could only be exercised by the Board.
72. The letter dated 3rd August 2012 titled ***“Enforcement Action”*** informing the petitioner of the Board decisions refers to a ***“summary of allegations that were levelled against you vide our letter dated March 30, 2012.”*** In my view, the letter of 30th March 2013 did not set out charges that the petitioner was supposed to answer. It stated, ***“kindly find below the allegations of commissions and omissions attributed to you in the Webber Wenzel Investigation Report.”*** [Emphasis mine] This statement was consistent with the Mandate of the Committee to examine the Webber Report and make recommendations to the Board. Furthermore the letters dated 28th March 2012 and 30th March 2012 did not allude to the fact that the result of the inquiry by the Committee would to lead

to sanctions against the petitioner if indeed this is what was intended.

73. Although the process of investigation and imposition of sanctions was a continuous process, it is clear that the two stages were separated by the mandate imposed on the Committee and the ultimate authority of the Board to impose sanctions for infractions of **the Act**. The fact that the Committee and the Board were entitled to keep material reflecting opinions, and deliberations confidential and privileged under **section 13** of **the Act** did not discharge the obligation to the petitioner to inform him of the charges before taking enforcement action against him.
74. Once the Committee made the recommendation for enforcement action against the petitioner, the petitioner was entitled to be informed of the formal findings against him or the charges which he was to face and given adequate opportunity to make representations on those findings before enforcement action would be preferred.
75. In the circumstances of this case, I find that the CMA breached the petitioner's right to fair administrative action by failing to accord him a fair opportunity to respond to the findings made by the Committee before taking enforcement action and before the same were made public.
76. In the same breath, I also find that there was no proper notice for purposes of enforcement action. What the CMA terms as a notice of the allegations against the petitioner includes the enforcement action that had been determined against him. The letter of 3rd August 2012 is a cocktail of a number of things-in one breath, it informs the petitioner of the allegations levelled against him by reference to the letter of 30th March 2012 and which I have found was in respect of the allegations in the Webber Report and which was subject of the Committee's investigation. It contains the findings of the Committee on those allegations and also lays out the sanctions that the CMA has imposed against the petitioner in light of the findings. Clearly, there was no opportunity afforded the petitioner to answer to the findings before imposing the sanctions. It is on this same day that CMA issued a press release announcing that it had taken enforcement action against executive and non-executive directors found to have flouted the Capital Markets' legal and regulatory requirements in relation to the affairs of CMCH including the petitioner.
77. The subsequent letter dated 10th August 2013 from CMA to the petitioner went further to inform him of the availability of the report and resolutions on its website. The letter stated in part that, *"The Authority wishes to inform you that it uploaded the August 3, 2012 Report and Resolutions of Capital Markets Authority Board on the Investigations into CMC Holdings Limited on its website (www.cma.or.ke) on August 6, 2012."* All this unfolding of events reveals that the petitioner was denied an opportunity to rebut the evidence before the disciplinary measures were effected and publicised.
78. It is no defence that the petitioner knew of the allegations against him or that an opportunity to be heard had been presented to the petitioner earlier on before the Committee with a mandate to carry out investigations before a determination on the sanctions was ultimately made by the Board. As I have found, the mandate of Committee before which he was supposed to appear was one whose mandate did not include taking enforcement action. Whether or not the adverse allegations against the petitioner were in fact true or fictitious is irrelevant. It is also no defence that there are no statutory provisions that expressly require an opportunity be given to an affected party to respond before adverse publications following an inquiry are made against them. All this does nothing to exonerate the CMA of its constitutional duty to accord the petitioner a procedurally fair process even before drawing the conclusions on matters subject to further investigation.

Conclusion

75. In view of the findings I have outlined, I now summarize my conclusions as follows:

- a. That the CMA was in terms of **sections 11A** and **14** of the **Capital Markets Act** entitled to delegate its authority to an *ad hoc* Committee and the Committee constituted in this case was

- properly constituted and had the capacity and authority to carry out its mandate.
- b. The proceedings before the Committee did not violate the principle against double jeopardy as the process was not a criminal trial and the petitioner was not the “accused” hence **Article 50** of the Constitution could not apply in the circumstances.
 - c. Although the petitioner was afforded a fair opportunity to be heard by the *ad hoc* Committee and that opportunity waived by the petitioner in his advocate’s letter dated 27th April 2012, the waiver did not apply to proceedings before the Board of the CMA which was entitled to take enforcement action against the petitioner.
 - d. The mandate of the Committee was to make recommendation to the Board which would then take enforcement action. The petitioner was not given an opportunity to rebut or respond to the findings of the Committee which formed the basis of the Board taking enforcement action against the petitioner.
 - e. The CMA was in breach of the petitioner’s right to fair administrative action under **Article 47** of the Constitution. Lord Diplock in ***O’Reilly v Mackman [1983] 2 AC 237*** at 276 stated that, the right of a man to be given “*a fair opportunity of hearing what is alleged against him and of presenting his own case is so fundamental to any civilized legal system that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement.*” As such, the decision reached by CMA in breach of the requirement of the rules of natural justice must be invalidated.
76. The consequence of my findings is that the decision of the CMA taking enforcement action against the petitioner must be set aside. Since this decision is limited to an examination of the process upon which the decision was reached, it is unnecessary to examine the substantive findings of the PWC Report and the Webber Report including whether in fact the petitioner was exonerated. The substantive aspect of the reports and the allegations against the petitioner are matters within the statutory mandate of the CMA to deal with.
77. For the avoidance of doubt, the Committee’s findings are not set aside as the process was investigatory and the petitioner waived his right to appear before it. The Board of CMA shall be at liberty to take action against the petitioner upon giving him reasonable opportunity to be heard on the findings of the Committee and to defend himself on the basis of any charges or allegations that may lead to enforcement action being taken against him.
78. I have declined to address myself to the allegations relating to production of the documents and in particular the application of **Article 35**. During the proceedings, I directed the CMA to file and serve the petitioner with the relevant documents necessary for determination of this case.

Disposition

79. I now dispose of this matter as follows;
- a. I declare that the petitioner’s rights under **Article 47(1)** of the Constitution were violated by the Capital Markets Authority when it took enforcement action against the petitioner in the letter dated 3rd August 2012.
 - b. I quash the Report and Resolutions by the Capital Markets Authority dated 3rd August 2012 regarding the investigation into the affairs of CMC Holdings Limited in as far as they relate to the petitioner, **JEREMIAH GITAU KIEREINI** including the enforcement action taken thereon and more particularly set out in the letter dated 3rd August 2012 issued by the Capital Markets Authority.
 - c. The 1st respondent shall pay the petitioner’s costs of the petition.
80. I thank the counsel for their well-prepared submissions. I apologise for the delay in delivering this decision caused by the fact that I was assigned to deal with election petitions at the Machakos High Court.

DATED and **DELIVERED** at **NAIROBI** this 22nd day of **August** 2013

D.S. MAJANJA

JUDGE

Mr Regeru instructed by Njoroge Regeru & Company Advocates for the Petitioner .

Mr Ngaca instructed by Waweru Gatonye & Company Advocates for the 1st respondent.

Mr Moimbo, Litigation Counsel, instructed by the State Law Officer for the 2nd respondent.