REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

JR. MISC. CIVIL. APPLICATION NO.223 OF 2011

IN THE MATTER OF: THE CAPITAL MARKETS ACT *(CHAPTER 485 A OF THE LAWS OF KENYA)*

AND

IN THE MATTER OF: THE DEMUTUALIZATION OF THE NAIROBI STOCK EXCHANGE

AND

IN THE MATTER OF: FRANCIS THUO & PARTNERS LIMITED

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CAPTIAL MARKETS AUTHORITY.....RESPONDENT

AND

NAIROBI STOCK EXCHANGE LIMITED.....INTERESTED PARTY

EXPARTE

FRANCIS THUO & PARTNERS LIMITED

R U L I N G

On the 16th September 2011, the Exparte Applicant herein Francis Thuo and Partners Ltd filed a Chamber Summons application under a Certificate of Urgency seeking leave to commence Judicial Review proceedings against the Respondent and the Interested party for orders of **mandamus** and **prohibition** in terms of Prayers 2(a), 2(b) and (3) of the application. The exparte applicant also sought in Prayer 4 that the leave granted does operate as stay of the process of demutualization of the interested party in the Nairobi Stock Exchange pending the hearing and determination of the substantive application. The

application was heard exparte before J. Gacheche on 16th September, 2011 who granted leave to institute judicial review proceedings as prayed and ordered that the leave granted do operate as stay in terms of Prayer 4 until further orders of the court.

Being aggrieved by the Exparte orders, the interested party and the respondent the Capital Markets Authority separately filed applications to set aside the said leave and to have the orders of leave operating as stay of the demutualization of the interested party discharged. The interested party filed its application on 19th October 2011 seeking mainly the following orders:

(1) The ex parte order made on 19th September, 2011 granting leave to the applicant to take out judicial review proceedings by way of mandamus and prohibition be set aside.

(2) The ex-parte order made on 19th September, 2011 granting leave to operate as stay of the demutualization of the Nairobi Stock Exchange be set aside.

(3) The Ex-parte Applicant's Notice of Motion dated 19th September 2011 be struck out.

(4) The Costs of this application be awarded to the Interested Party.

The Application is supported by an affidavit sworn by one Mr. Nicholas Gitonga, a manager in the Legal and Compliance department of the interested party.

The Application is premised on nine grounds which are stated on the face of the application and which for convenience can be summarized into the following main grounds:

(1) The application filed by the applicant is incompetent and is an abuse of the court process as the Interested Party is a limited liability company not a public body performing public functions and is therefore not amenable to judicial review.

(2) Any rights and obligations accruing to or from the NSE fall in the realm of private laws and ought to be determined thereunder. The subject matter of these proceedings does not fall within the purview of Judicial Review. The demutualization of the NSE is not an administrative, judicial or quasi-judicial action, but rather the action by and of a private limited liability company. The application is only intended to arm twist the Interested party into considering the Exparte Applicants demand.

(3) The Respondent is a regulator and not a party to the demutualization of the NSE which has its own policies and regulations. It is a further abuse of the court process for the Ex-parte Applicant to purport to institute judicial review proceedings against the Respondent for orders whose real effect and consequence is to affect the demutualization of the NSE.

(4) The Applicant's has no locus standi to make the application as it lost its membership in the NSE upon non-renewal of its licence in 2008 by the Respondent by operation of section 29 (3) of the Capital Markets Act.

(5) As a result of the order for stay granted herein, NSE is unable to complete its demutualization including completing the allotment of 999,900 ordinary shares to each of its Members and allotting shares to the Government of Kenya and the Investor Compensation Fund as resolved at the NSE's Extraordinary General Meeting on 6th July 2011.

The Respondent's Notice of Motion was filed on 21st October, 2011. Prayer I of the said application is now spent and the only Prayers remaining for determination by this court are the following:

1. THAT on the inter partes hearing of this application this Honourable Court be pleased

(a) To set aside or discharge the ex parte leave granted to the Applicant on 19th September, 2011, to apply for Judicial Review orders and all other or consequential orders made as prayer for in the Applicant's Chamber Summons dated 16th September, 2011 and to dismiss the said Chamber Summons with costs; or

(b) Alternatively, to set aside or discharge order number 3 of the said ex parte Orders made on 22nd November 2004, namely the order directing that "leave granted do operate a stay of the process of demutualization".

2. THAT the costs of and occasioned by this application be borne by the Applicant in any event.

The Application is supported by an affidavit sworn by one Stella Kilonzo, the Chief Executive of the Respondent and is premised on four grounds but I chose to highlight only two of them.

These are that the court has no jurisdiction to entertain the proceedings commenced by the Exparte Applicant as neither the Nairobi Stock Exchange Limited nor the process of demutualization of the interested party is amenable to judicial review and that the Exparte leave was obtained pursuant to the non-disclosure by the applicant of several material facts which it was under an absolute duty to make full and frank disclosure. Those facts are clearly spelt out on the face of the application.

Both applications are opposed by the Exparte applicant through a replying affidavit sworn by Peter Gachigi Thuo, a director of the Applicant Company.

By consent of the parties, both applications were heard together on 22nd November 2011 and 5th December 2011. Prior to 22nd November 2011, advocates appearing for the parties had filed elaborate and comprehensive written submissions which they highlighted before me on 22nd November 2011 and 3rd December 2011 which I have carefully considered.

Before delving into the arguments made by the parties herein regarding the merits or otherwise of the two applications filed by the Interested party and the Respondent which I propose to consider together since they seek basically the same orders, I think it is important to set out the prayers in the Chamber Summons dated 16th September 2011 which formed the basis of the orders the Interested party and the Respondent now want this court to set aside and the filing of the Notice of Motion dated 19th September 2011 which the Interested party wishes to have struck out with costs. It is my view that this is necessary inorder to better understand the issues raised in the current two applications.

In the Chamber Summons filed under a certificate of urgency on 16th September 2011, the Exparte Applicant sought the following orders:

1) That this application be certified as urgent

2) That leave be and is hereby granted for the applicant to apply for an order of mandamus to compel the Respondent and or the Interested party to:

a. Furnish the Applicant with the monthly reports of the Interested party's and the Respondent's activities in the management of the Applicant's business from March 5, 2007 to date as required by Section 33A (6) of the Capital Markets Act.

b. Notify the Applicant of any extension of the period of appointment of the statutory manager of the Applicant as may have been granted by the High Court pursuant to the provisions of Section 33A(3) of the Capital Markets Act.

3) That leave be and is hereby granted for the applicant to apply for an order of prohibition prohibiting the Respondent and the Interested Party from going on with the process of demutualization that does not recognize and treat the Applicant as a seat bearer at the Nairobi Stock Exchange.

4) That the grant of leave does operate as a stay of the process of demutualization of the Nairobi Stock Exchange pending the hearing and determination of the substantive application herein.

5) That the costs of this application be provided for.

The application was predicated upon a statutory statement dated 16th September 2011 and a verifying affidavit sworn by Peter Gachigi Thuo, a director of the Exparte Applicant.

As stated earlier, the application was heard exparte before Gacheche, J who granted leave as sought in prayer 2 and 3 with a direction that leave granted operates as stay in terms of prayer 4 till further orders. The Judge also directed that the substantive motion be filed and served within 21 days. Pursuant to these orders the Applicant filed the substantive Notice of Motion on 20th September 2011.
It is these orders that the two applications filed by the Interested party and the Respondent now wish to have set aside. The Interested party made an additional prayer that the Notice of Motion filed on 20th September 2011 be struck out with costs.

Having set out the background against which the two applications were made, let me now turn to the preliminary points raised by Mr. Ongoya for the Applicant regarding the validity or competence of the two applications.

On the Interested party's application, Mr. Ongoya submitted that the same was incompetent and bad in law and ought to be struck out on two grounds namely

- ***that it is founded on the provisions of Section 1A and 1B of the Civil Procedure Act while as the judicial review jurisdiction of this court is a special jurisdiction governed exclusively by Order 53 of the Civil Procedure Rules and all other provisions of the Civil Procedure Act and Rules do not apply to it.***

For this preposition Mr. Ongoya relied on the authority ofDickson Miricho Muriuki –vs- Central Provincial Land Disputes Appeal Committe and Six Others, Nyeri High Court Misc. Civil App. No.112 of 2008 ***which I may add is of persuasive authority to this court.***

- ***Secondly, that the application is incompetent as it was prepared by an advocate who was not formally appointed to represent the Interested party since on the face of it, the application is dated 18th October 2011 while the notice of appointment of the Interested party's Advocates is dated 19th October 2011.***

On the application filed by the Respondent, the applicant submitted that it was incompetent in the light of prayer 2(b) which sought to set aside or discharge an order made on 22nd November 2004 which did not exist.

On the first issue, case law abounds even from the Court of Appeal holding that in exercising its judicial review jurisdiction under Section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules, the High Court exercises a special jurisdiction which has been described as ***"sui generis"*** and that the Civil Procedure Act or Rules do not apply to it and that judicial review proceedings that invoke the Civil Procedure Act or Rules are incompetent – *see***Hotel Kuntse Ltd vs Commissioner of Lands.**

However, on the face of it, the Interested party's application is expressly premised on Section 1A, 1B of the Civil Procedure Act and the inherent power of the court. It does not exclusively invoke the

jurisdiction of the court under the Civil Procedure Act but also invokes the inherent jurisdiction of the court which is the correct jurisdiction to be invoked by applicants seeking to set aside leave obtained to commence judicial review proceedings – see Aga Khan Education Service Kenya –vs- Republic & Others Civil Appeal No.257 of 2003.

To the extent that the application invokes the inherent powers of the court, I find that it is neither incompetent nor fatally defective as to warrant its strucking out as prayed.

On the issue of dates on the application and the notice of appointment of Advocates, I find that the date appearing on the notice of appointment of advocates generally shows the date on which a firm of advocates formally comes on record in the proceedings for a party but it cannot be taken to be the date on which the advocate was formally appointed or instructed to represent a party in proceedings. The date on which an advocate is formally appointed to represent a party is a matter of evidence and there is no evidence in this case to prove that the firm of Hamilton Harrison & Mathews had not been formally appointed to represent the Interested party either on or before 18th October 2011. I think what Mr. Ongoya meant in his objection is that by the time the application was drawn the advocates were not formally on record but looking at the date on the filing stamp on the face of the application, it is clear that the said advocates were on record by the time the application was filed on 19th November 2011. That is to say that the note of appointment of advocates was filed on the same day as the application.

For the foregoing reasons, I find no merit in the preliminary objections raised by Mr. Ongoya to the Interested party's application. I find that these are technical objections which do not go to the substance of the application and in the new constitution on dispensation, such objections should not be used to prevent a party from proceeding with its case on its merits.

Under Article 159(2)(d) of the Constitution of Kenya 2010, the courts have been enjoined to administer substantive justice without undue regard to procedural technicalities such as the ones raised by Mr. Ongoya in this case. The same holding goes to the objection raised to prayer 2(b) in the Respondent's application since the order sought to be set aside or discharged is clearly described and identified in a way that there is no room for confusing it with any other order. The date of the order being challenged as indicated in the said prayer *i.e.* 22nd November 2004 when the prayer is considered as a whole is clearly on inadvertent mistake.

Turning now to the merits or otherwise of the grounds upon which the two applications are premised, I find that three main issues emerge for determination by this court which are the following:

1. Whether the Interested party is amenable to Judicial Review and whether the subject matter of litigation in this case falls within the purview of judicial review.

2. Whether the Exparte Applicant is guilty of non-disclosure of material facts which would disentitle it from taking advantage of orders obtained exparte.

3. And lastly, whether the Exparte applicant has demonstrated sufficient cause to persuade the court to find that the leave granted ought not to be set aside and that the substantive motion should proceed to full hearing.

Starting with the first issue, it is common ground that the Interested party is a limited liability company initially limited by guarantee but subsequently converted into a private company limited by shares. Being a limited liability company, it is governed by its memorandum and Articles of Association and not by the provisions of any statute. Though it is properly joined in these proceedings as an interested party considering its role as the applicants statutory manager and its stake in the demutualization process which forms the backbone of the Exparte Applicant's complaint in this case, it is my finding that since it is not an inferior tribunal, a public or statutory body, the Interested party is not amenable to the supervisory jurisdiction of the High Court which is exercised through judicial review.

In the case of Total Kenya Limited –vs- Permanent Secretary Ministry of Energy & 14 Others [2006]

eKLR at page 22, J. Anyara Emukule when discussing the scope of judicial review adopted the definition of judicial review contained in Halsbury's Laws of England, 4th Edition page 91 wherein it is stated

……..”Judicial Review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decision of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public duties…….”

Since clearly the Interested party is not an inferior court, a tribunal or public body performing either quasi-judicial functions or public duties, it is obviously not amenable to the judicial review jurisdiction of this court.

The orders of mandamus and prohibition sought by the Exparte Applicant against the Interested party are therefore not available to the Exparte Applicant and leave to institute judicial review proceedings in respect of those orders ought not to have been granted by this court in the first place.

It is noted that though leave had been obtained to apply for orders of mandamus to compel both the Respondent and the Interested party to furnish the applicant with monthly reports of their activities in the management of the applicant's business from March 5, 2007 todate, it is clear from Section 33(A)(b) of the Capital Markets Act that it is only the statutory manager in our case, the Interested party and not the Respondent and the Interested party jointly who were statutorily required to furnish the Exparte Applicant with monthly reports relating to the management of its business. Infact the Respondent being the regulator of the Capital Markets in Kenya was supposed to be a recipient of the said monthly reports. If there was any failure to furnish the said reports to the Applicants, then it was a failure by the Interested party not by the Respondent or by the Respondent and Interested party jointly. As stated earlier, the Interested party is a private company which is not amenable for judicial review and any grievances against it by the Exparte Applicants can only be adjudicated upon in the ordinary civil court's jurisdiction and not by way of judicial review.

Lastly, on the prayer for leave for orders of prohibition, it is noted that the said orders were directed at the ongoing process of demutualization of the Interested party as required by Section 20 of the Capital Markets Act as amended by the Finance Act 2010.
It is clear from the depositions in Mr. Nicholas Gitonga's affidavit sworn on 18th October 2011 that the process involves restructuring the NSE to a company limited by shares, inclusion of the Government of Kenya and the Investor Compensation Fund as members of the NSE and allocation of shares to both trading and non-trading shareholders.

The major complaint by the Exparte Applicant is that the process of demutualization is proceeding without it being allocated shares though it is allegedly a seat bearer at the Nairobi Stock Exchange. With much respect to the Exparte Applicant, this is a dispute between a company and its dissatisfied shareholder who is aggrieved by the way the company is running its affairs and it is within the realm of private law not public law which is the concern of judicial review. In my opinion, the Exparte Applicant's remedy lies in private law and should be enforced through the civil jurisdiction of the High Court and not the judicial review jurisdiction of the court.

Before concluding on the issue of the Interested party, I find that it is doubtful whether in view of the provisions of Order 53 Rule 6 of the substantive Civil Procedure Rules, Judicial Review orders can be issued against an Interested party irrespective of whether it is a public body or a private company.

On the issue of non-disclosure of material facts, I find that it is now settled law that a party who approaches the court exparte has a heavy burden and duty of making a full and frank disclosure of all material facts to the matter in question whether or not they favour his case. It is also trite that any orders obtained as a consequence of non-disclosure of material facts are liable to be set aside as happened in the case of Total Kenya Ltd –vs- The Permanent Secretary, Ministry of Energy & Others (supra) and Re

Kenya National Federation of Co-Operatives Ltd & Others [2004] EA 128.

In the instant case though the Exparte Applicant has denied that it is guilty of non-disclosure of material facts, I do find that from the pleadings herein and from the affidavits sworn by the parties, there are facts which were material to the application for leave to institute judicial review proceedings which were or ought to have been within the knowledge of the applicant which it failed to disclose to the court hearing the application exparte.

Most of the material facts not disclosed by the Applicant at the leave stage have been clearly pointed out by both Mr. Kiragu Kimani and Mr. Amoko for the Applicants but for purposes of just demonstrating that the applicant was guilty of non-disclosure of material facts, I will single out just three important facts not disclosed to Gacheche, J which in my view had they been brought to her attention, she may not have made the Exparte orders being challenged by the two applications filed by the Respondent and the Interested party.

To start with, the Exparte applicant did not disclose to the court that the Interested party against whom it was seeking leave to apply for orders of mandamus and prohibition was infact a ***Limited Liability Company.***

Secondly, though the Exparte Applicant complained in its statutory statement paragraph 3:6 that the Respondent did not give it an opportunity to be heard before appointing a statutory manager, it failed to disclose that the Respondent had given its management ample opportunity to be heard – ***see paragraph 14 and 15 of Stella Kilonzo's affidavit and Exhibit SK6*** which were not contraverted in the applicant's replying affidavit. As the averments by Stella Kilonzo regarding giving the applicant opportunity to be heard were not denied by the Applicant, they are deemed to have been admitted and these were facts that were in the knowledge of the Applicant which it was duty bound to disclose at the Exparte stage but it did not do so.

Thirdly, the applicant did not disclose to the court what the process of demutualization was all about though it was claiming a stake in it and obviously knew that it involved restructuring of a private company and allotment of shares to both trading and non-trading shareholders.

It is my firm and considered opinion that had all these material facts among others been disclosed to J. Gacheche, she may have reached a different conclusion from the one that she did on 19th September 2011. In view of the foregoing, this court is satisfied that the applicant obtained the Exparte orders herein by suppression or non-disclosure of material facts. The Exparte Applicant consequently failed the test of absolute good faith expected of a party seeking exparte orders and in the circumstances it cannot be allowed to continue taking advantage of the benefit of such orders.

Just like in the Total Kenya Limited case cited earlier and **Republic –vs- Kenya National Federation of Co-operatives Ltd case [Supra],** the Exparte orders of leave and stay are candidates for setting aside.

Lastly, on the issue of whether the Respondent ***(Exparte Applicants)*** have demonstrated sufficient cause to warrant salvaging the Exparte orders or saving the applicants suit given that the courts discretion to set aside such exparte orders should be used sparingly and cautiously, it is my finding that no such grounds have been shown to exist as from the pleadings filed herein, no arguable case has been made even against the Respondent, the Capital Markets Authority which being a creature of statute is amenable to judicial review. It is not disputed that the Respondent as a regulator in the Capital Market in this Country has an oversight role in the management of the Nairobi Stock Exchange and its members. It had a statutory duty under Section 20 of the Capital Markets Act ***(hereinafter referred to as the Act)*** as amended by the Finance Act 2010 to approve and oversee the demutualization of the Nairobi Stock Exchange and to put the applicant under statutory management in accordance with Section 33A of the Act. Though there had been a complaint that the Respondent did not give the applicant a hearing before putting it under statutory management, the Respondent has demonstrated that it fully complied with the requirements of Section 33A of the Act and this has not been denied by the Applicant in the replying affidavit sworn on its behalf.

Though Mr. Ongoya in his submissions maintained that the Applicant's complaint related to the misconduct of the Respondent and the Interested party after the Applicant was put under statutory management, the alleged misconduct was not specified and though sweeping allegations were made about the Respondent and Interested party having violated the law, no single violation of any of the provisions of the Capital Markets Act or any other law was pointed out against the Respondent. The law is that the court cannot be used to prohibit a statutory body from performing its statutory roles and functions. Judicial Review as a remedy is only available where it can be shown that either an inferior tribunal or public body has acted either illegally or without or in excess of its jurisdiction, irrationally or unreasonably or is guilty of procedural impropriety which includes failure to observe the rules of natural justice.

None of these grounds were ***prima facie*** demonstrated before Gacheche, J by the applicant before leave to commence judicial review proceedings was obtained exparte.

In discussing the court's jurisdiction to set aside orders of leave to commence judicial review proceedings obtained exparte, the Court of Appeal stated in the case of Aga Khan Education Service Kenya –vs – Republic and Others, Civil Appeal No.257 of 2003

"we would, however, caution practitioners that even though leave granted ex parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners form routinely following the grant of leave with applications to set leave aside"

Being mindful of this principle enunciated by the Court of appeal concerning the courts limited jurisdiction to set aside leave granted exparte, and considering all the reasons stated earlier in this ruling particularly the fact that the Interested party is not amenable to judicial review though substantive orders were sought against it in the application for leave and the fact that no specific act or omission has been made out ***prima facie*** against the Respondent entitling the Applicant to the remedy of judicial review, I find that this is a suitable case for setting aside the orders issued by Gacheche, J exparte on 19th September 2011 since in my view, even if the case was to proceed for substantive hearing, it has no prospects of success.

In the circumstances, I find merit in the two applications filed by the Interested party and the Respondent herein and they are hereby allowed.
Consequently, I hereby set aside and discharge the orders of leave and stay granted by this court on 19th September 2011 and since the Notice of Motion dated 19th September 2011 and filed in court on 20th September 2011 cannot stand on its own without leave, it is hereby struck out with costs.

Costs for the two applications will be borne by the Exparte Applicant.

DATED and DELIVERED at Nairobi this 3rd day of February, 2012

C. W. GITHUA
JUDGE
Court Clerk - Florence

M/s Muhanda holding brief for Thongori for Exparte Applicant
M/s Ogala holding brief for Amollo for Respondent
Mr. Kirago Kimani for Interested Party