



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 355 & 356 of 2012

REPUBLIC.....APPLICANT

AND

CAPITAL MARKETS AUTHORITY.....RESPONDENT

EXPARTE

JOSEPH MUMO KIVAI.....EX-PARTE APPLICANT

CONSOLIDATED WITH

JUDICIAL REVIEW APPLICATION NO. 356 OF 2012

BETWEEN

REPUBLIC.....APPLICANT

AND

CAPITAL MARKETS AUTHORITY.....RESPONDENT

EXPARTE

PETER W. MUTHOKA.....EX-PARTE APPLICANT

RULING

Introduction and background

1. CMC Holdings Limited (hereinafter “CMCHL”) has been embroiled in a lot of litigation lately and these matters stem from investigations carried out by the Capital Markets Authority (CMA) into the affairs of the company. In its report dated 3rd August 2012, titled, “***Report and Resolutions of the Board of Directors of the CMA Regarding the Investigations carried out into the affairs of CMC Holdings Limited***” (hereinafter “the Report”), the CMA made certain findings against the *ex-parte* applicants.

2. Joseph Mumo Kivai, a director of Andy Forwarders Services Limited (AFSL), joined the CMCHL

Board of Directors in March 2011. AFSL is a shareholder of CMCHL. He was accused by the CMA of several regulatory infractions including having participated in the appointment of Peter W. Muthoka as chairman of the CMCHL Board while knowing that he was non-independent director in breach of the Guidelines on Corporate Governance. The CMA found him guilty and resolved to disqualify him from appointment as a director of CMCHL pursuant to **section 25A(1)(c)(i)** of the **Capital Markets Authority Act (Chapter 485A of the Laws of Kenya)** (the **CMA Act**).

3. Peter W. Muthoka is a former Director and Chairman of the Board of CMCHL until he was removed on 8th September 2011. He is also a director of AFSL. He was accused of several regulatory infractions including breach of the **Capital Markets (Takeover and Mergers) Regulations, 2002**, breaching fiduciary duties as a director of CMCHL, failing to disclose the extent of the Company's compliance with the Guidelines on Corporate Governance, as a member of the CMCHL Board, signing off accounts which were not prepared in accordance with International Financial Reporting Standards and allowing himself to be appointed Chairman of the CMCHL Board while knowing he was a non-independent director in breach of the Guidelines on Corporate Governance. After conducting an investigation, the CMA found him guilty and resolved to disqualify him from appointment as a director of any listed company or licenced or approved person, including a security exchange in the Capital Markets in Kenya pursuant to **section 25A(1)(c)(i)** of the **CMA Act**. The CMA also required that AFS and associated persons to comply with the requirements of the **Capital Markets (Takeover and Mergers) Regulations, 2002**. Mr Muthoka was also reprimanded for allowing the accounts for the year ended 20th September 2009-2010 to be signed while not prepared in compliance with the International Financial Reporting Standards and for non-disclosure in the Annual Report on the extent of CMCHL compliance with the Guidelines on Corporate Governance.

4. Naturally the ex-parte applicants were displeased with the findings and decision of the CMA contained in the Report. They moved the court seeking leave to commence judicial review proceedings. The applicants sought orders of certiorari to quash the decision of the CMA. They also applied for leave to operate as a stay of the decisions of the CMA.

5. The grounds common to both applications are that the CMA, in reaching its decision took into account irrelevant considerations or failed to take into account relevant considerations. The ex-parte applicants accuse the CMA of breaching the rules of natural justice and that the procedure adopted to reach the decisions affecting them was fundamentally flawed and lacked impartiality. They also accuse the CMA of acting in bad faith in order to render nugatory the subject matter of **High Court Civil Case No. 149 of 2012 Andy Forwarders Service Limited and Peter Muthoka v PricewaterhouseCoopers Limited and Others**. The CMA, they contend, acted without jurisdiction in disqualifying the ex-parte applicants and that it breached the principle of legitimate expectation that a fair process would be used. They further contend that in view of the various legal proceedings against the CMA, the court process should be given a chance to make a determination of the matters in controversy before proceeding with regulatory action.

6. On 27th September 2012, Honourable Justice Warsame granted leave for the ex-parte applicants to apply for judicial review and for such leave to operate as a stay of the decisions made by the CMA in the Report. Pursuant to the leave granted the ex-parte applicants have now lodged their substantive applications for orders of judicial review.

7. Aggrieved by the ex-parte orders issued by Honourable Justice Warsame, the CMA has now moved the court to vacate the orders of stay issued by the learned judge. The applications are vigorously opposed by the ex-parte applicants through oral and written submissions.

8. Although the CMA sought to discharge the orders of stay and have the application argued *de novo*, Mr Ngacha, counsel for the respondent, stated that his arguments would be limited to discharging the orders of stay. Both parties made arguments on the basis that what was sought was an application to discharge the stay orders and it is this basis that this decision is made. There are two issues for considerations;

a) Whether the Court has jurisdiction to set aside the ex-parte orders of stay.

b) Whether there are sufficient grounds for setting aside the ex-parte orders of stay.

Jurisdiction to set aside ex-parte orders

9. The issue of jurisdiction was raised by the ex-parte applicants. Mr Adan, counsel for the ex-parte applicants, contended that **Order 53** of the **Civil Procedure Rules** did not countenance a situation where a party could apply to set aside a stay given ex-parte without applying to discharge the leave so granted. He submitted that **Order 53** now allows a judge to separate the question of leave from stay and that such direction should be made before hearing of the application for leave and stay. He argued that the challenge presented by the CMA is whether the Court retains inherent jurisdiction to set aside stay granted ex-parte and fix the application for leave to operate as a stay de novo. That the question of challenging leave can only arise where the judge had directed that the question of leave and stay be determined separately. As no such directions were given in the matter, the Court has no jurisdiction to consider setting aside the stay independent of leave as there is neither substantive nor procedural law to support such an application.

10. In response to this argument, Mr Ngacha submitted that **Order 53 rule 1(4)** of the **Civil Procedure Rules** is in itself sufficient to resolve the issue of challenge to jurisdiction. Counsel submitted that the grant of leave under the rules is independent from the grant of stay and that **Order 53 rule 4** makes it abundantly clear that the grant of leave may, if the court directs, operate as a stay of proceedings in question until the determination of the application or until the judge otherwise directs, thus giving the Court residual jurisdiction to set aside stay orders issues in deserving cases. Mr Ngacha further submitted that the High Court has unlimited jurisdiction to discharge any order to protect itself and prevent an abuse of its process. Counsel relied on the case of **R v Kensington Inland Revenue Commissioner ex-parte Polignac [1917] 1 KB 486** cited with approval in **Bao Investments and Office Management Services v Housing Finance Company of Kenya CA Nairobi Civil Application No. 171 of 2006 [2006] eKLR**.

11. In considering whether the court has jurisdiction to set aside orders of stay granted ex-parte under **Order 53** of the **Civil Procedure Rules**, I would reiterate what was stated by Hon. Justice Warsame in the case of **Consumer Federation of Kenya (COFEK) and Others v Attorney General and Others Nairobi JR Misc. Appl. 185 of 2011 (Unreported)** where he stated that, **“It is also important to restate that, in judicial review matter, court must resist being rigidly chained to the past situation and strict compliance with the procedure. A court of justice must intervene to stop acts in contravention of good governance and accountability in the field of administrative action.”**

12. The pertinent rule, **Order 53 rule 1(4)** provides as follows;

The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of proceedings in question until the determination of the application or until the judge orders otherwise.

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter parties before the grant of leave. Provided further that where the circumstances so require the judge may direct that the questions of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days. [Emphasis mine]

13. I agree with Mr Ngacha that by providing that leave so granted may operate as a stay of proceedings **“until the judge orders otherwise,”** the rule contemplates that the Court has jurisdiction to vacate or vary the order of stay granted ex-parte. Further it has been recognized, the court has inherent jurisdiction to set aside ex-parte orders to do justice and to prevent an abuse of the court process. In the case of **Aga Khan Education Service Kenya v Republic Nairobi Civil Appeal No. 257 of 2003 (Unreported) [2004]eKLR** the Court of Appeal stated, **“[B]y their very nature ex-parte orders are provisional and can be set aside by the judge who granted it, of course, if the judge is still available to do so. We think that if the judge who granted leave cannot sit, for one reason or the other, then another judge would be perfectly entitled to hear the application to set aside the grant of leave, for the jurisdiction is available to all judges of the superior courts.”** (See also **R v Attorney General and Kenya Airways Limited Civil Appeal No. 8 of**

2006 (Unreported) [2006] eKLR and *Judicial Commission of Inquiry into the Goldenberg Affair and Others v Kilach* [2003] KLR 249).

14. The jurisdiction to set aside orders of leave or stay granted ex-parte in Kenya is now well entrenched and I am therefore satisfied that I have jurisdiction to consider and determine the application whether or not to discharge the orders of stay issued by Justice Warsame on 27th September 2012.

General Principles

15. The principles upon which the Court exercises its jurisdiction to set aside ex-parte leave was considered in the ***Aga Khan Education Service Kenya v Republic (Supra)*** where the Court of Appeal stated, “*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*” Although the cases referred to an application to set aside leave, I think the same position applies to order of stay granted ex-parte under **Order 53** of the ***Civil Procedure Rules***.

16. The Court is entitled to discharge orders of stay issued ex-parte on several grounds including the non-disclosure of material facts or that the application was an abuse of the court process or that it is in public interest to discharge the orders (see ***The Owners of the Motor Vehicle “Lilian S” [1989] KLR 1, Uhuru Highway Development Limited v Central Bank of Kenya and Others CA Civil Application No. NAI 140 of 2005 (Unreported), Nipun Nagindas Patel v Attorney General and Others Nairobi HC Misc. Appl. 463 of 2005 (Unreported) [2007] eKLR***).

17. The issue then is whether the applicant, CMA, has made out a case for the discharge of the order of stay, that is, whether it has satisfied the court that there are clear and exceptional circumstances warranting the court to intervene in the circumstances.

18. Both applications raised similar issues of fact and law and I directed the parties to argue them together.

Application against Joseph Mumo Kivai

19. The effect of the decision contained in the Report against Mr Kivai was to disqualify him from appointment as a director of CMCHL from 3rd August 2012. The effect of the order issued by Hon. Justice Warsame was to stay the resolution to disqualify him from holding the directorship.

20. The Notice of Motion dated 8th October 2012 is supported by the affidavit of Abubakar Hassan Abubakar, a Senior Legal Officer at CMA sworn on 8th October 2012. The affidavit broadly sets out the arguments in support of the application. I must state from the outset, that the practice of setting out legal arguments and opinions in affidavits is to be deprecated as it obscures the facts. Affidavits should be confined to facts from which inferences and arguments are made in submissions (See ***Meme v Republic [2004] 1 KLR 645, Tito Alai Okumu v Commissioner of Customs and Another Nairobi Petition No. 240 of 2011 (Unreported)***).

21. The basis upon which the CMA seeks relief from the ex-parte orders are as follows. Firstly, that the findings and the decision of the CMA contained in the Report cannot be stayed and the disqualification of Mr Kivai under the provisions of the ***CMA Act*** has already taken place by the CMA taking enforcement action. A letter transmitting the decision dated 3rd August 2012 had already been dispatched to the Registrar General to effect the action. The CMA contends that enforcement action having taken place, granting the orders of stay would, in the factual context, amount to not only de facto revocation of the CMA’s disqualification in exercise of its statutory powers but also a de facto revocation reinstatement of the applicant’s directorship in the affected listed companies.

22. Secondly, the CMA complains that an objective assessment of the ex-parte applicant’s depositions do not disclose any basis for the grant of orders of stay as the ex-parte applicant did not furnish sufficient

grounds and material from which the court could conclude that an order of stay was warranted. It is argued that, on the substance on the matter, the court ought not have exercised its discretion in favour of the applicant.

23. The third ground is that the ex-parte applicant failed to disclose material facts. The CMA contends that Mr Kivai complains of the breach of the rules of natural justice yet he waived the right to appear before the Ad Hoc Committee and the reasons he advances are not relevant to his case in so far as he relies on the protestations by Mr Muthoka. It is also contended that the Verifying Affidavit is grounded on the allegations that the actions by the CMA were in breach of the **Companies Act (Chapter 486 of the Laws of Kenya)** yet he failed to disclose that the subject of his disqualification was controlled by the **CMA Act** which supercedes the **Companies Act** in matters of regulation of the capital markets. The CMA also discounts the fact that **High Court Civil Case No. 149 of 2012 Andy Forwarders Service Limited and Peter Muthoka v PricewaterhouseCoopers Limited and Others** had anything to do with the allegations leveled against Mr Kivai as such the subject of this matter is not *res subjudice*. Furthermore, the Courts have never dealt with regulatory action relating to the specific charges against Mr Kivai.

24. The fourth ground is that the public interest considerations arising from the stay orders significantly outweigh any prejudice that can be asserted by the ex-parte applicant, if the court were to set aside the orders for stay. The CMA contends that the unexplained delay from 3rd March 2012 when the Report was issued and the time the application was filed in September negates any sense of urgency on the applicant's part and no prejudice that would be occasioned if the order of stay is discharged. According to CMA, the Court ought to give the CMA due deference which has conducting a long investigatory process and the Court should not, at interlocutory stage without appreciating the facts, issue an order of stay. It is contended that the grant of an order of stay is sending confusion to the industry and other stakeholders and have already implemented the enforcement action.

25. The application is opposed by Mr Kivai through the affidavit sworn on 23rd October 2012. It is his contention that the Court in issuing the orders of stay exercised its discretion and what the applicant now seeks amounts to an appeal against the said order. The ex-parte applicant denies that he failed to disclose material facts. He disclosed the fact that there were proceedings ongoing in the High Court where AFSL has challenged the directives of the CMA meant that the CMA was carrying out a parallel process and the CMA should not have taken regulatory action while litigation was ongoing.

26. The ex-parte applicant avers that he is aggrieved by the entire process which led to his disqualification that he is entitled to apply for judicial review on the grounds proffered. He states that he will suffer irreparable loss if the stay order is discharged.

Application against Mr Peter Muthoka

27. The Report made three adverse decisions against Mr Peter Muthoka. First, he was disqualified from holding any directorship in any public listed company licenced or approved person or security exchange in Kenya. Second, he was directed to comply with the **Capital Markets (Takeover and Mergers) Regulations, 2002**. Third, he was reprimanded in respect of the CMCHL accounts issued for the year 2009/2010 which were issued in the without complying with the International Financial Reporting Standards. The effect of the order of 27th September 2012 was to stay this decision.

28. The Notice of Motion dated 8th October 2012 seeks to discharge the said orders and it is supported by the affidavit of Abubakar Hassan Abubakar sworn on 8th October 2012. The thrust of the argument by CMA is the decision made in respect of the ex-parte applicant in the Report which cannot be stayed as it has already taken effect and enforced by informing the relevant authorities, that is the Registrar of Companies, the Nairobi Securities Exchange, the Central Depository and Settlement Corporation Limited and CMCHL to effect the decision. That the grant of an order of stay would amount to not only a de facto revocation of CMA's disqualification in exercise of its statutory power but also a reinstatement of the applicant's directorship in the affected publicly listed companies.

29. The CMA states that the reason why Mr Muthoka was found to be in breach of the **Capital Markets (Takeover and Mergers) Regulations, 2002** was that he controlled more than 25% of the shares of a listed company contrary to the regulations. According to Mr Ngacha, the fact that Mr Muthoka, through AFSL, his son and wife controlled 25.07% the shareholding of CMCHL contrary to the regulations was not disclosed to the court.

30. According to the **Capital Markets (Takeover and Mergers) Regulations, 2002**, Mr Muthoka, as a person under whose directions and control of 25.07% is exercised was and is still required by law for approval from CMA to take over CMCHL if at all that was his intention to apply for exemption from the regulations. Mr Ngacha argued that since Mr Muthoka has done neither, the practical implication of the order of stay was to grant him immunity from compliance with the law to the detriment of the public who expect the CMA to protect their interests.

31. The CMA position is that the facts relating to infraction of the **Capital Markets (Takeover and Mergers) Regulations, 2002** were not disclosed to the court. Also not disclosed was the fact that the report by Webber Wenzel into the affairs of CMCHL did not fully absolve Mr Muthoka but found sufficient grounds for recommending his suspension.

32. As regards allegations of illegality, the CMA states that the exercise of its statutory mandate to intervene in the affairs of CMHL was upheld as proper by the court in a ruling delivered on 2nd August 2012 by Justice Lenaola in **Andy Forwarders Services Limited v Capital Markets Authority and Others Nairobi Petition No. 216 of 2011**. The CMA also contends that the existing litigation did not in any manner affect the regulatory action taken by the CMA. It is also the case by CMA that the ex-parte applicant did not disclose the existence and effect of **Peter Muthoka v CMC Holdings Limited, Capital Markets Authority and Others HCCC No. 154 of 2012** where Justice Musinga declined to grant an injunction to restrain Mr Muthoka's removal as a director of CMCHL.

33. The CMA also argues that it would be in public interest to discharge the ex-parte orders in order to protect the capital markets. CMCHL were suspended from trading on the basis of the lack of good corporate governance and to maintain the orders of stay would negatively affect the process of lifting the suspension if the disqualified directors are reinstated based on the stay orders.

34. Mr Muthoka denies that the CMA is entitled to an order discharging the ex-parte orders in his replying affidavit sworn on 12th October 2012. In his affidavit, Mr Muthoka denies that he failed to disclose material facts as these facts were all before the court when the application for stay was made and that the arguments made by CMA are based on the selective reading of all the material that was placed before the court. For example, Mr Muthoka contends that the Webber Wenzel Report did not recommend his disqualification. Mr Muthoka contends that the allegations leveled against him by the CMA as basis for considering regulatory action are the basis for the judicial review application and these are the issues which the Court is called upon to adjudicate.

35. As regards, the **Capital Market (Takeover and Mergers) Regulations, 2002**, Mr Muthoka states that the decision to comply with the regulations has been suspended and the issue of whether he or related parties hold more than 25% of the shares in CMCHL is matter for the court's decision and in any case CMA's power is subject the court's review in this respect. He also depones that since he challenges this decision, it cannot be argued that he failed to disclose the fact that he owns more than 25% of the shares in CMCHL.

36. Mr Adan submitted that the arguments regarding public interest amount to blackmail on the exercise of judicial power and the court should not divest itself of jurisdiction on this basis as the court had the duty to hear the dispute between the parties as a neutral arbiter in disputes concerning private rights and public interest and to maintain the status quo between the parties where necessary pending the proceedings.

Determination and disposition

37. The issue for determination is whether the applicant has made a clear cut case or come within the exceptional circumstances required for me to discharge the orders of stay granted by Hon. Justice Warsame. I shall consider the application to discharge the stay orders under the following heads; non – disclosure of material facts, nature and purpose of the stay order and the public interest.

Non –disclosure of material facts

38. The duty to disclose material facts during ex-parte proceedings cannot be over-emphasized. However, the record in this case shows that counsel for the ex-parte applicant did not appear before the judge to urge the application. The learned judge considered the documents before him and found merit in granting leave and stay. In the case of ***Consumer Federation of Kenya (COFEK) and Others v Attorney General and Others (Supra)***, the learned judge granting the ex-parte orders had set out reasons for coming to the decision he did and in considering whether or not to discharge the orders of stay it was easy to weigh the reasons against the material presented and come to a conclusions one way or another. Although no reasons were proffered such a course does not render the decision or exercise of its discretion valid. In ***Grain Bulk Handlers Limited v J. B. Maina and Company Limited CA Civil Appeal No. 295 of 2003 (Unreported) [2006]eKLR***, the Court of Appeal stated, “*Mr Nowrojee further contended that the learned Judge did not refer to the principles for granting stay nor give reasons for granting stay and that the absence of reasons is evidence that the discretion was erroneously exercised. We do not, with respect agree, with that submission. Failure to state the principles for the exercise a discretion or to give reasons for the exercise of discretion does not per se prove that the discretion has been wrongly exercised.*”

39. The case of non-disclosure in this matter must be determined on the available material and evidence. The ex-parte applicants have placed before the court all the relevant reports and material they allege affects them. They have also deposed how these matters affect their case and the learned judge considering the application for leave and stay was entitled to come to the conclusion he did. Before the Judge was the Report that gave rise to the disqualification, the ***Forensic Investigation at CMC Holdings Limited Final Report*** prepared by PricewaterhouseCoopers and the ***Forensic Investigation Report into the Affairs of CMC Holding Limited*** prepared by Webber Wenzel and which the judge gave due consideration.

40. In my view, the contentions of the CMA in the application for discharge are based on an interpretation of the material and whether a case has been made out by the ex-parte applicants on an objective basis. The ex-parte applicants have exercised their legal right to challenge the findings made against them and they are entitled to take a view of the evidence that would entitled them to relief. The contents of these reports will be subjected to detailed scrutiny during the hearing and I am reluctant to conduct an examination of the minutiae of the findings in order to determine whether my brother would have come to a different conclusion based on an interpretation of the various facts presented.

41. A cause for concern though is the fact that Mr Muthoka did not make any disclosure of the case of ***Peter Muthoka v CMC Holdings Limited, Capital Markets Authority and Others HCCC No. 154 of 2012***. Although, no reference was made to this case in Mr Kivai’s Verifying Affidavit, it was referred to in a letter dated 30th March 2012 from Mr Muthoka’s advocates, *Messrs Ochieng’ Onyango Kibet and Ohaga Advocates*, informing the CMA of the multiplicity of suits and informing it that he will not appear before the CMA Ad Hoc Committee investigating the affairs of CMCHL. Mr Kivai, in his verifying affidavit associates himself with the sentiments stated in the said letter.

42. Unfortunately neither of the ex-parte applicants deemed it fit to annex copies of the pleadings or of the ruling of Justice Musinga delivered on 24th May 2012. In the case Mr Muthoka applied, inter alia, for “***[A]n injunction be and is hereby granted restraining the defendants herein from preventing the plaintiff from acting as a director of the First Defendant***” The issue at hand was whether the CMA had authority under the ***CMA Act*** to appoint directors to the interim Board of directors for CMCHL. The result of the appointment of interim directors was that both Mr Muthoka and Mr Kivai lost their position on the board of directors. The learned Judge in considering whether or not to grant an injunction held that the CMA had the statutory mandate to reconstitute the board of directors CMCHL

where the circumstances so warranted. In the circumstances, the learned judge declined to grant the orders of injunction requested by Mr Muthoka.

43. The ex-parte applicants have also made reference to ***Andy Forwarders Service Limited v Capital Markets Authority, CMC Holdings Limited and Others Nairobi Petition No. 216 of 2011***. On 16th November 2011, Lady Justice Ngugi declined to grant a conservatory to AFSL to restrain the CMA from interfering with its right to call an Extraordinary General Meeting but issued an injunction restraining AFSL from proceeding with the Extra-ordinary General Meeting and ordered the status quo of the board to remain pending determination of the petition. The beneficiaries of this meeting would be Mr Muthoka and Mr Kivai who were attempting to assert the right to membership of the board of directors. After the order by Justice Ngugi was granted, the CMA proceeded to issue directions that the board of directors of CMCHL be reconstituted. This fact was confirmed by a letter dated 12th March 2012 from the Chairman of CMCHL informing CMA that a resolution has been passed by the Board and seven directors nominated to join the interim board resulting in the removal of Mr Muthoka and Mr Kivai. This led to ASFL to commence contempt proceedings against CMA alleging breach of the orders of the Lady Justice Ngugi.

44. The application for contempt was heard by Hon. Justice Lenaola and dismissed on **2nd August 2012** on the ground that the status quo orders issued by Lady Justice Ngugi did not affect the composition of the interim Board of Directors since a change of directors and the composition of the board was not one of the matters covered by the orders of status quo made by the Judge.

45. Despite the fact that the litigation was material to this case, the decisions by Justice Musinga, Lady Justice Ngugi and Justice Lenaola were not annexed to the Verifying Affidavits. The rulings, in my view, are material because they demonstrate and confirm the regulatory authority of the CMA. More importantly, in the case ***Peter Muthoka v CMC Holdings Limited, Capital Markets Authority and Others HCCC No. 154 of 2012***, the court has specifically declined to issue an injunction in favour of Mr Muthoka in light of the exercise of the powers by the CMA. Justice Musinga and Ngugi addressed themselves to the primacy of the ***CMA Act*** vis-à-vis the ***Companies Act*** which is a material consideration in this case. This fact of the decisions and the reasons propounded by them were material and ought to have been set out and disclosed by the ex-parte applicants.

46. The refusal by Justice Musinga to grant an injunction in favour of Mr Muthoka would, to my mind, have been a decisive factor in considering whether or not to grant an order of stay of the CMA decisions. Just as the courts had declined to grant an injunction to restrain the exercise of a statutory function, Justice Warsame may well have been disinclined to order the stay which would affect regulatory action had the rulings made by the learned Judges been brought to his attention.

47. It is true that the none of the cases deal with a direct challenge of the regulatory decision that are now subject of the judicial review proceedings but all the cases are interconnected. As I understand, the ex-parte applicants argue that the CMA ought not to have dealt with subject matter in view of the existing cases and this is in fact the tenor of the letter dated 30th March 2012 from Mr Muthoka's advocates to the CMA. How can the ex-parte applicants then approach the court without disclosing the nature and tenor of the cases and more particularly disclosing the rulings delivered?

48. I find and hold that failure by the ex-parte applicants to disclose the rulings in ***Peter Muthoka v CMC Holdings Limited, Capital Markets Authority and Others HCCC No. 154 of 2012*** and ***Andy Forwarders Service Limited v Capital Markets Authority, CMC Holdings Limited and Others Nairobi Petition No. 216 of 2011*** amounts to non-disclosure of material facts.

Nature of Stay and practical implication of the order

49. The purpose of an order of a stay is to preserve the status quo so that the application is not rendered nugatory. The effect or implication of the stay order is a necessary consideration for the grant of stay orders (See ***Grain Bulk Handlers Limited v J. B. Maina and Company Limited (Supra)***).

50. A stay contemplates that an order is being implemented or carried out. In this case, it is not in dispute both Mr Kivai and Mr Muthoka have been disqualified and the decision already communicated to the other regulatory bodies. Nothing else remains to be done about that and in this respect I agree with the submissions of Mr Ngacha that granting the stay would amount to setting aside the decision and upsetting the status quo. Mr Adan argued that the stay merely suspends the action but in the particular case of disqualification the act of disqualification has already taken effect and nothing else remains to be done hence there is nothing to suspend.

51. The ex-parte applicants argue that they are not directors of CMCHL and that they have not applied for any other directorships of any publicly listed companies and therefore the public and the CMA loses nothing. The court orders are not bouquets of flowers, they serve a purpose and if the ex-parte applicants admit that no purpose will be served by the orders then the orders must now be discharged.

Considerations of Public interest

52. The matter before the court is an application for orders of judicial review. Judicial review proceedings are public law proceedings for vindication of private rights. In this respect, I disagree with Mr Adan that public interest should not be considered as relevant consideration in granting of stay orders.

53. In the case of ***R v Permanent Secretary Ministry of Local Government and Others ex parte Immaculate Transporters Limited and Others Nairobi HC Misc. Appl. No. 133 of 2008 (Unreported) [2008] eKLR***, the court discharged ex-parte orders of stay on account of public interest because the stay order issued against implementation of rules to govern transport within the Nairobi Central Business District would affect order and traffic flow and lead to chaos unless discharged.

54. The CMA is the body charged with regulation of Capital Markets in Kenya. Market confidence is key to the success of the capital markets. In this case the two ex-parte applicants have been subjected to an investigative process in which findings and decisions were made. Given the nature of the decisions and taking into account that the existing litigation concerning the matters concerning CMCHL, I do not think it would be public interest to maintain the orders of stay.

Disposition

55. For the reasons I have given above, I allow the applications filed by the respondent as follows;

(a) In respect of ***HC JR Misc. Application No. 355 of 2012***, I direct that the order of Hon. Justice Warsame issued on 27th September 2012 that ***“leave do operate as a stay of the resolution to disqualify the Applicant from holding directorship in CMC Holdings Limited”*** be and is hereby discharged.

(b) In respect of ***HC JR Misc. Application No. 356 of 2012***, I direct that the orders of Hon. Justice Warsame issued on 27th September 2012 that, ***“leave do operate as a stay of the resolution to disqualify the Applicant from holding any directorship in any public company, licenced or approved person or security exchange in Kenya”*** and ***“leave do operate as a stay of the resolution directing the Applicant to comply with the provisions of the Capital Markets (Takeovers and Mergers) Regulations 2002”*** be and are hereby discharged.

(c) The costs of the applications shall abide by the judgment in the respective motions.

DATED and DELIVERED at NAIROBI this 3rd day of December 2012.

D.S. MAJANJA

JUDGE

Mr A. Adan, instructed by Wetangula, Adan and Makokha Advocates for the ex-parte applicant

Mr Ngacha instructed by Waweru Gatonye and Company Advocates for the respondent.