REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 240 of 2007

CAPITAL MARKETS AUTHORITY.....APPELLANT

VERSUS

BOC KENYA LIMITED.....RESPONDENT

RULING

The appellant has invoked this Courts' appellate jurisdiction by way of an appeal filed on 5.4.2007 arising from an award made by the Capital Markets Tribunal. The award was made in pursuant to the provisions of Section 35 A(22) of the Capital Markets Act). The Act) the appeal is pending hearing.

The appellant has moved to this Court vide an interim application by way of notice of motion brought under Section 3A of the Civil Procedure Act and Order XLI rule 22(1) (b), Order L rule 1 of the Civil Procedure Rules seeking two reliefs namely:-

(1) The original minutes of the meeting of 3rd April, 2006 referred to in the award and

(2) Report made by Jeremiah M. Nyegenye in connection with capital markets tribunal appeal no 1 of 2006 and submitted by letter to the secretary of capital markets Tribunals dated 5th March 2007 be produced and form part of the record of appeal.

Counsels for both parties filed written skeleton arguments as well as authorities relied upon in support of their arguments for and against the interim application. The two major reasons advanced by the Appellant/Applicant in wishing to have those documents form part of the record are two namely that the minutes were referred to in the award and are therefore crucial to the appeal as they were definitely taken into consideration when preparing the award. Secondly that the tribunal solicited and secured the services of a researcher to assist it sum up the evidence, I identify points for determination and make comments on each and as such the contents of the said report formed the basis of the award and so it should form part of the record of the appeal despite its non production at the trial as it was sourced after the conclusion of the proceedings before the Tribunal. On the law, the appellant/applicant relied on Section 3A Civil Procedure Act by which this court has inherent powers at its disposal to make orders for ends of justice to be met or to prevent abuse of the due process of the Court. Further relies on order 41 rules 22(1) (b) 10(2) to show that this Court has power to do what it is being asked to do. Further that the documents being sought qualify to be called public documents in terms of the provisions of Section 79 of the evidence Act and so they are open to public scrutiny in a Court of Law and are not exempt from such production as they do not fall within the class of documents capable of being with held from production. They also rely on the case of **REPUBLIC VERSUS CITY OF WEST MINISTER ASSSESSMENT COMMITTEE GROSE VENOR HOUSE (PARKLAND LTD (1941) 110 LJ6.**

In response to the respondents objection, the applicants Counsel contents that the objection raised by the respondents counsel do not answer the requirements in order 41 rule 10(2) and 22(1), that the Court has power to call for all relevant documents and have them placed before it for the disposal of the appeal, that the test to be applied is the relevance and materiality of the said documents to the matters in issue and not whether they had been produced or not produced. It is their stand that both documents are relevant and maternal to the proceedings as the minutes are referred to in the award and the terms of referenced for the research report show that the report was called for specifically for purposes of the Tribunal proceedings and so it is therefore important that it too form part of the record of appeal.

The Respondent filed a replying affidavit to that application on the basis of which written skeleton arguments were made. The major points in opposition are:-

(i) That the tribunal is not a party to these proceedings and as such no corecive orders can be directed against it more so when such a move will be contrary to the rules of natural justice as the tribunal is incapable of being heard in these proceedings firstly, and secondly matters in respect of which the said coercive orders are intended to be issued for were simply a routine internal office matter between the tribunal and the person commissioned to do research for it. The action taken by the Tribunal to commission a researcher was within the powers of the Tribunal conferred upon it by virtue of section 35 A(22) of the Capital Market Act by which it has power to regulate itself and its procedures.

(ii) That the appeal is purely on points of law and as such this court should not concern itself with matters of fact. What is being sought herein are matters of fact.

(iii) It is their stand that material sought to be brought, to be introduced are not proper or necessary for purposes of making a decision on the appellate points of law that the court should properly be concerned with.

(iv) Order XLI Rule 8A (B) (4) only requires production of proceedings and exhibits and not the process by which the decision was reached. For this reason the report by Mr. Ngegenye should not be ordered to be produced as it is extraneous.

(v) The Respondent is concerned about how the appellant gained access to documents relating to the internal working of the Tribunal and this should not be allowed to stand as it is meant to undermine the internal workings of the Tribunal as well as also undermine the procedural impartiality and independence of the Tribunal. The move will also be un fair, a surprise and a breach of the rules of natural justice.

(vi) Order 41 rule 22 Civil Procedure Rules does not apply to the application as it is the Tribunal which is being ordered to adduce evidence and not the parties to the proceedings. Neither has it been alleged that the report by Mr. Nyegenye either proves or disproves any facts in dispute as it deals solely with issues of law.

(vii) Production of the report is unnecessary as the award deals solely with the issues argued by the parties and evidence adduced by the parties and does not deal with the requested report.

(viii) They contend that the report sought to be introduced is not a public document in terms of the Evidence Act as it is an extraneous act.

(ix) The authority relied upon by the appellant/applicant does not apply because the Tribunal was applying the law as it interpreted it and secondly the said authority dealt with judicial review which deals with the process of decision making where as herein the appeal is dealing with the merit of the decision.

(x) The Timina of the application is meant to delay the disposal of the appeal.

On the Courts assessment of the facts herein, it is clear that the court is seized of this matter in its appellate jurisdiction and that being so it's task in resolving this matter is to determine whether the legal provisions as far as appellate jurisdiction is concerned allow or do no allow the granting of the relief

sought. It is to be noted that the applicant has relied on Section 3A of the Civil Procedure Act which deals with the inherent jurisdiction of the Court and the provisions dealing with appeals. The evidence Act as well as the legal authority relied upon by the applicant, this gives rise to four simple questions for determination by this Court namely:-

(1) Whether Section 3A of the Civil Procedure Act is applicable to this application.

(2) Whether jurisdiction exists under the provisions of Order XLI cited to grant the releifs sought.

(3) Whether the documents sought to be produced qualify to be classified as public documents and are therefore capable of being ordered to be produced in judicial proceedings.

(4) Whether the authority relied upon by the applicant is relevant.

(5) And lastly what are the final orders on the application.

As regards the application of Section 3A of the Civil Procedure Act, circumstances under which the inherent powers of the Court enshrined in that Section can be invoked has now become trite law. The Section itself provides "*nothing in this section shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuses of the process of the court"* The power donated to this Court is not unlimited. It has limitation. Kneller J.A. as he then was in the case of **WANJAU VERSUS MURAYA (1983) KLR 276** held inter alia that Section 3A of the Civil Procedure Act (Cap.21) although saving the inherent powers of the court to make such orders as may be necessary for ends of justice or to prevent the abuse of the power of the Court, should not be cited where there is an appropriate section or order and rule to cover the relief sought. This means that Section 3A will only apply herein if the appellate provisions do not cover the situation herein adequately.

Order (41) XLI rule 22 (1) (b) cited provides "*The parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary in the court to which the appeal is preferred: but if (b) the Court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced or witness to be examined.*

(3) *whenever additional evidence is allowed to be produced by the court to which the appeal is preferred, the court shall record the reason for its admission". C*onstruction of the above provision shows that the appellate court has jurisdiction to admit additional evidence or documentary exhibits on condition that it is needed for the pronouncement of the judgment or other substantial cause. The criteria of purpose of pronouncement of judgment do not arise as the court is not dealing with the appeal on merit. It is the criteria of 'or for any other substantial cause" which applies here. There are two documents sought the original minutes of 3rd April, 2006 and the report of Mr. Nyegenye. The complaint of the applicant concerning the minutes is that the original minutes were referred to in the proceedings and in the award but they were not produced and are not part of the record. The respondent does not deny that these were referred to. All they state is that copies were produced and no objection was raised to that production, but does not state what prejudice will be suffered by them if the original minutes are produced for perusal on appeal more so when there is no denial that these minutes forms the basis of the award as they have been referred to at page 5, 6 and 7 of the award.

As for the report by Mr. Nyegenye, the applicant's insistence on its production is that since it forms the basis of the legal opinion in the award, then it ceased being a private document and instead became a public document just as the award is. The stand of the respondent, is that this is a solely private report sourced by the Tribunal for its own private use. The respondents have not denied sourcing for that report vide annexture A. The terms of reference are clear. It is clear that the services were being sought for purposes of the proceedings pending before the tribunal and the impending award. There is no explicit denial that these findings were not used by the Tribunal for the benefit of the writing of the award. In the absence of such a denial it is only proper that both parties benefit from such a legal opinion and if need be seek an opportunity to provide their own for ends of justice to be met to both parties. Indeed the

sourcing of the report was an entirely private matter. But it ceased being a private matter the moment those findings went to have bearings or to make or have an impact on public proceedings.

There is an argument advanced that ordering its production will be in breach of the rules of natural justice in so far as the Tribunal is concerned, as the Tribunal is not a party to these proceedings. It is the finding of this court that no such a breach will arise as in this courts opinion, the Tribunal as an adjudicating body is expected to be an impartial body and when its decision is being questioned in another forum, it is imperative that all that it had at its disposal in the form of tools which were employed to enable it write the ruling should be brought on board and be availed to both parties should such need arise.

Counsel for the respondent used on an analogy of research material used by a court in preparation of a judgment or ruling. This court has judicial notice of the fact that research material for preparation of a ruling or judgment is usually in the form of submissions on the evidence and authorities relied on by parties to the proceeding which are usually exchanged and filed in Court. Where the court, sources its own, these are usually reflected in the ruling or judgment. In the event of an appeal all parties have a right tot access all that the court relied upon to write its ruling or judgment whether these form the basis of the attack on the decision or not.

As regards authority relied upon, it is only of persuasive value. It is this courts opinion that there is sufficient power donated to this court by order 41 rules 22(1) (b) to enable it grant or deny the relief's sought herein.

For the reasons given in the assessment the court makes the following orders:-

(1) Section 3A of the Civil Procedure Act does not apply here as sufficient power exists under Order 41 rule 22(1) I(b) to enable this Court either grant or deny the relief sought.

(2) Jurisdiction exists under Order 41 rule 22(1) (b) to enable this Court Order the production of the documents sought to be produced for reason of "any other substantial cause". The substantial cause being that the original minutes sought to be produced have been referred to in the award and no justification has been shown for denial to have them produced nor prejudice shown to exist to be suffered if the original minutes are produced.

(b) As for the report by Mr. Jeremiah Makokha Nyegenye, it is clear from the terms of reference that it was intended for purposes of writing of the award. In the absence of that denial, it is only fair that it be availed to the other party as well as the appellate court when the merits of the award is being inquired into.

3. The Tribunal as an impartial adjudicating body can never suffer as a result of breach of rules of natural justice to it, as it was not expected to be partisan as in the proceedings. Where the merits of its decision comes into question in another from it is only proper and fair to all the parties that submitted to its jurisdiction, to have access to all the tools it used in assessing the evidence as well as arriving at its decision being challenged.

4. The application dated 26th September, 2007 and filed on 17th October 2007 be and is hereby allowed as prayed with costs to applicant.

5. Parties to fix the time frame within which the said documents are to be availed.

DATED, READ AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2007.

R.N. NAMBUYE

JUDGE