



**Gesicho v Capital Markets Authority & another (Appeal 022 of 2023)
[2025] KEHC 4353 (KLR) (Commercial and Tax) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4353 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
APPEAL 022 OF 2023
BK NJOROGE, J
APRIL 3, 2025**

BETWEEN

DAVID O GESICHO APPELLANT

AND

CAPITAL MARKETS AUTHORITY 1ST RESPONDENT

CFC FINANCIAL SERVICES LIMITED 2ND RESPONDENT

JUDGMENT

1. This is a Judgment arising out of the Ruling and orders of the Capital Markets Tribunal delivered by J. Kipkemoi Kibet (Chairman), Karumba Kinyua (Member) and Kennedy Nyamweya (Member) on the 1st August 2017. This is in respect of Appeal No. 4 of 2007.
2. The Appellant is the Applicant/Appellant before the Capital Markets Tribunal. The Respondents are still the Respondents before the Tribunal.

Background Facts

3. The matter is before the Capital Markets Tribunal pursuant to Section 35 (1) of the [Capital Markets Act](#) Cap 485 of the Laws of Kenya. It is on an Appeal against the decision of the Capital Markets Authority. The Capital Markets Authority is the 1st Respondent in this Appeal.
4. When this matter came up for the hearing of that Appeal, the Appellant filed an application by way of a Notice of Motion dated 31st May, 2012. The Appellant in that motion sought for the following orders;
 - a. That the Respondent/CFC Stanbic Financial Services Limited be ordered to produce for scrutiny by the Tribunal all the Appellant/Applicant's purchase and sale orders in respect of



CDS No. 2168073/Li from the date of opening up to date and all related information in respect of the aforesaid CDS account.

- b. That witness summons do issue to Joseph Biwott of CFC Stanbic Financial Services Ltd Eldoret Branch to attend the Tribunal for cross-examination on his dealings with the Appellant/Applicant's CDS account No. 2168073/Li.
 - c. That an order do issue to compel to direct the Respondent CFC Stanbic Financial Services Ltd and or its authorized employees, workers and servants to receive orders placed by the Appellant/Applicant in respect of CDS Account No, 2168073/Li and or to trade in his shares pending the hearing and determination of the Appeal filed herein.
 - d. A declaration that the freezing of the Appellant's/Applicant's CDS Account No. 2168073/Li with the Respondent CFC Stanbic Financial Services Ltd is unlawful and in contradiction of Section 35 (A) 17 of the Capital Markets Act.
5. This Application was opposed by the 2nd Respondent CFC Stanbic Financial Services Limited who filed grounds of opposition. They raised the following grounds;
- a. The Applicant has failed to set out the basis for the production of the documents stated in the said application.
 - b. This Honourable Tribunal's jurisdiction is limited to considering the documents that were produced before the first Respondent as the Honourable Tribunal is hearing an Appeal against the 1st Respondent's decision.
 - c. There is no provision in law that would enable this Honourable Tribunal to compel a witness to attend before the Tribunal purely for cross-examination.
6. The Capital Markets Tribunal ruled on that application as follows: -

We have perused the 1st Respondent's letter dated 20th August, 2007 against which the appeal is filed. The said letter confined itself to orders to purchase 400 ICDC (I) shares said to have been purchased on 19th October, 2006 and 500 ICDC (I) shares purchased on 25th October, 2006. In respect to both transactions, the appellant wrote to the 1st respondent on the 4th June, 2007 seeking a cancellation of both transactions. By its said letter dated 20th August, 2007, the 1st respondent party acceded to the appellant's complaint and ordered a cancellation of the order for purchase of 500 ICDC (I) shares and directed that the appellant's account be credited with the sum of Ksh.249,150. It appears from the appellant's said letter that it arrived at its decision based on the ground that it was not able to obtain supporting written instructions neither from the 2nd respondent nor from the appellant. It is clear therefore that there was no documentary evidence and that is why the transaction was ordered reversed.

In respect to that transaction, we are unable to make an order for production of the documents because such an order would be in futility. With regard to the purchase of 400 ICDC (I) shares, the decision of the 1st respondent suggests that there were some written instructions by way of a purchase order. Accordingly, there should be no harm or prejudice to be suffered if we order that the said purchase order be produced for purposes of this appeal and we so order.

In regard to the question of witnesses, we are not satisfied that the appellant has made out a case for us to summon any witnesses. In any event, the appellant has not shown that he



has served any witness summons on Mr. Biwott and that the said Mr. Biwott has disobeyed the summons. There is therefore no reason to order attendance of a witness now. With regard to the prayer for declaration on the freezing of the account that will be a matter to be determined at the full hearing of the appeal.

In the end, we allow the appellant's application in respect only to the purchase of the 400 shares purchased on 19th October, 2006. The rest of the prayers in the application are disallowed for the reasons stated"

7. It is this Ruling that has triggered the Appeal herein. The Appeal herein was admitted and directions granted that it be disposed of by way of written submissions.
8. The Appellant is acting in person and has been representing himself through out the commencement of the dispute. He has filed a Memorandum of Appeal which raises eight (8) grounds. The Court doing the best it can summarize them as follows;
 - a. The Capital Markets Tribunal erred in law and in fact in arrogating upon itself the status of an Appellate court. This is because the Capital Markets Authority is not a Court as by law established, hence appeals to the Tribunal are not in the nature of Appeals contemplated under the *Civil Procedure Act*.
 - b. It failed to read into Section 35 A (5) (6) of the *Capital Markets Act*, that it had power to summon witnesses, take evidence, administer oaths and call for production of evidence.
 - c. Failing to call for production of evidence by 2nd Respondent by way of documentation relating to CDS No. 2168078/Li.
 - d. Giving a contrary Ruling, refusing to call for evidence relating to no. 2168078/Li yet calling for production of documents relating to purchase order of 400 shares on 19th October, 2016.
 - e. Failing to issue witness summons to Joseph Biwott an employee of the 2nd Respondent.
9. The Court has seen and perused the Appellant's written submissions dated 2nd August, 2024 as well as the 2nd Respondent's written submissions dated 5th November, 2024. The Capital Markets Tribunal has not filed any submissions.

Issues for Determination

10. Having perused the Record of Appeal as well as the submissions filed herein, the Court frames a single issue for determination;
 - a. Whether the Capital Markets Tribunal erred in exercise of its discretion in declining to allow for production of further evidence or issue witness summons to Joseph Biwott as a witness.

Analysis

11. This is a 2nd appeal. The jurisdiction of this Court as a Second Appellate Court is set out in the in the case of *Pithon Waweru Maina V Thuka Mugiria* [1983] KECA 117 (KLR);

“This is a second appeal so only a point of law may be taken. Section 72 *Civil Procedure Act*. If the High Court has upheld a resident magistrate on a question of whether or not he exercised his discretion judicially it is a question of law whether he was right or wrong to do so.”



12. Further in *Stanley N Muriithi & another v Bernard Munene Ithiga* [2016] KECA 821 (KLR), the Court of Appeal restated this position as follows;

“Our reading of Section 72(1) of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, which provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court, indicates that the appeal must be on matters of law.”

13. The Jurisdiction of this Court as a second Appellate Court is restricted to matters of Law only. It will not entertain matters of fact.
14. The Court says so, because Appeals from the Capital Markets Tribunal are regulated under Section 35 (22) of the *Capital Markets Act* Cap 485 A of the Laws of Kenya, which states as follows;

“Any party to proceedings before the Tribunal who is dissatisfied by a decision or order of the Tribunal on a point of law may, within thirty days of the decision or order, appeal against such decision or order to the High Court.”

There is a clear emphasis that Appeals to this Court from the Capital Markets Tribunal are limited. They can only lie from dissatisfaction on a point of law. A point of law has the same meaning assigned to matter of law. The Courts have emphasized the separation of matters or points of law from matters of fact on second appeals in *Kenya Breweries Limited -vs- Godfrey Odoyo* [2010] eKLR as follows;

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

15. The decision in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 defines a point of law as follows;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

16. To this Court, a point of law that could be challenged on a second Appeal would also include the interpretation of a statute, the application of the law, the legality of the proceedings, jurisdiction, exercise of discretion and such like matters.
17. For the avoidance of any doubt, the dispute before the Capital Market Tribunal was an appeal. It was an appeal against the decision of the Capital Markets Market’s Authority. Such an appeal is provided for under Section 35 of the *Capital Markets Act* as follows;

35A. Establishment of the Capital Markets Tribunal

- (1) There is established a tribunal to be known as the Capital Markets Tribunal which shall consist of the following members and the secretary appointed by the Cabinet Secretary—
- (a) a Chairperson who at the time of his appointment shall be an advocate of not less than seven years standing;



- (b) one lawyer having at least seven years' experience in the commercial and corporate sector;
 - (c) one accountant who shall have been in practice for a period of not less than seven years; and
 - (d) two persons who have demonstrated competence in the field of securities;
 - (e) the secretary shall be an advocate with at least five years' experience commercial law.
- (2) All appointments to the Tribunal under subsection (1) shall be by notice in the Gazette issued by the Cabinet Secretary and shall be for a period of three years.
- (3) The office of a member of the Tribunal shall become vacant—
- (a) at the expiration of three years from the date of his appointment;
 - (b) if he or she accepts any office the holding of which, if he or she were not a member of the Tribunal, would make him ineligible for appointment to the office of a member of the Tribunal;
 - (c) if he or she is removed from membership of the Tribunal by the Cabinet Secretary for failure to attend three consecutive meetings of the Tribunal or is unable to discharge the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour; or
 - (d) if he or she resigns from the office of a member of the Tribunal.
- (4) The Tribunal shall, upon an appeal made to it in writing by an aggrieved party following a determination by the Authority on any matter relating to this Act, inquire into the matter and make an award thereon, and every award made shall be notified by the Tribunal to the parties concerned and the Authority as the case may be.
- (5) For the purposes of hearing an appeal, the Tribunal shall have all the powers of the High Court to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.
- (6) Where the Tribunal considers it desirable for the purposes of avoiding expenses or delay or any other special reasons so to do, it may receive evidence by affidavit and administer interrogatories within the time specified by the Tribunal.
- (7) In its determination of any matter the Tribunal may take into consideration any evidence which it considers relevant to the subject of an appeal before it, notwithstanding that such evidence would not otherwise be admissible under the law relating to evidence.
- (8) The Tribunal shall have power to award the costs of any proceedings before it and to direct that costs shall be taxed in accordance with any scale prescribed.
- (9) All summonses, notices or other documents issued under the hand of the Chairperson of the Tribunal shall be deemed to be issued by the Tribunal.
- (10) Any interested party may be represented before the Tribunal by an advocate or by any other person whom the Tribunal may admit to be heard on behalf of such party.
- (11) The Tribunal shall sit at such times and in such places as it may appoint.



- (12) The proceedings of the Tribunal shall be open to the public save where the Tribunal, for good cause, otherwise directs.
- (13) Except as expressly provided in this Act or any rules made thereunder, the Tribunal shall regulate its own procedure.
- (14) For the purposes of hearing and determining any cause or matter under this Act, the Chairperson and two members of the Tribunal shall form a quorum.
- (15) A member of the Tribunal who has an interest in any matter which is the subject of the proceedings of the Tribunal shall not take part in those proceedings.
- (16) Upon any appeal, the Tribunal may—
 - (a) confirm, set aside or vary the order or decision in question;
 - (b) exercise any of the powers which could have been exercised by the Authority or any of its committees in the proceedings in connection with which the appeal is brought; or
 - (c) make such other order, including an order, for costs, as it may deem just.
- (17) The Tribunal shall hear and determine an appeal within ninety days from the date of filing of the appeal.
- (18) The Tribunal shall have power to award the costs of any proceedings before it and to direct that costs shall be paid in accordance with any scale prescribed for suits in the High Court or to award a specific sum as costs.
- (19) Where the Tribunal awards costs in an appeal, it shall, on application by the person to whom the costs are awarded, issue to him a certificate stating the amount of the costs.
- (20) Every certificate issued under subsection (19) may be filed in the High Court by the person in whose favour the costs have been awarded and upon being so filed, shall be deemed to be a decree of the High Court and may be executed as such.
- (21) The Chief Justice may make rules governing the making of appeals and providing for the fees to be paid, the scale of costs of any such appeal, the procedure to be followed therein, and the manner of notifying the parties thereto; and until such rules are made, and subject thereto; the provisions of the *Civil Procedure Act* (Cap. 21) shall apply as if the matter appealed against were a decree of a subordinate court exercising original jurisdiction.
- (22) Any party to proceedings before the Tribunal who is dissatisfied by a decision or order of the Tribunal on a point of law may, within thirty days of the decision or order, appeal against such decision or order to the High Court.
- (23) No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or where the appeal has been commenced until the appeal has been determined.
- (24) Upon the hearing of an appeal under this section, the High Court may—
 - (a) confirm, set aside or vary the decision or order in question;
 - (b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;



- (c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or
 - (d) make such other order as it may deem just, including an order as to costs of the appeal of earlier proceedings in the matter before the Tribunal.
- (25) There shall be paid to the Chairperson, secretary and the members of the Tribunal, such remuneration and allowances as the Cabinet Secretary shall, from time to time, determine.
- (26) All expenses of the Capital Markets Tribunal shall be charged to the general fund of the Authority.

a. Whether the Capital Markets Tribunal Erred in Exercise of its Discretion in Declining to Allow for Production of Further Evidence or Issue Witness Summons to Joseph Biwott as a Witness.

18. The powers of the Tribunal while hearing an appeal are in the nature of an inquiry. Section 35 (4) of the Act states as follows;

The Tribunal shall, upon an appeal made to it in writing by an aggrieved party following a determination by the Authority on any matter relating to this Act, inquire into the matter and make an award thereon, and every award made shall be notified by the Tribunal to the parties concerned and the Authority as the case may be.

19. The use of the word “inquire into the matter and make an award thereon”, means that the Tribunal has wide powers to relook and carry out its own inquiries into the dispute, so that it can arrive at its own independent and fresh conclusion. It can then uphold or set aside the decision of the Capital Markets Authority.

20. As to the power to deal with witnesses and documents, that power is donated by Section 35 (5) of the Act. It states as follows;

For the purposes of hearing an appeal, the Tribunal shall have all the powers of the High Court to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents.

21. It is that power that the Appellant sought to invoke in his Notice of Motion dated 31st May, 2012. His complaint is that the Tribunal is clothed with such immense powers like a High Court. It can summon witnesses, take evidence on oath or call for production of documents. His complaint is that the Tribunal declined to exercise such power and authority in his favour.

22. The Appellant as we hear him to submit states that he was denied an opportunity to either produce or call for evidence or witnesses. Such evidence or witnesses will assist him in prosecuting his Appeal that is still pending before the Tribunal.

23. The 2nd Respondent on the other hand submits that such power is not absolute. It has to be exercised within the confines of the law and procedure. That an Appeal remains an Appeal. It cannot be used as an opportunity to rehear and re-try a case afresh. It cannot be used as an opportunity to fill in gaps or gloss over or correct mistakes made at the initial case. It cannot be an opportunity to take a second bite at the cherry, so as to speak.

Were the Orders Sought Discretionary?

24. An answer to this question would assist this Court in determining this appeal.



25. Rule 17 of the Capital Markets Tribunal rules state as follows;
17. Tribunal may adopt Civil Procedure Rules
- In matters of procedure not governed by these Rules or the Act, the Tribunal may adopt the Civil Procedure Rules (sub. leg) made under the Civil Procedure Act (Cap. 21).
26. In its ruling of 1st August, 2017, it is clear that the Tribunal applied in matters of procedure Order 42 of Rule 27 of the Civil Procedure Rules as follows;
- “ 11. An Appellate body no doubt, has the power to call for and admit new evidence on Appeal. The substantive applicable law are the provision of the Act referred to above. Section 78(1) (d) of the Civil Procedure Act which provides thus;
1. Subject to such conditions and limitation as may be prescribed, an appellate court shall have power-
- (d) to take additional evidence or to require the evidence to be taken;
12. Order 42 Rule 27 of the Civil Procedure Rules to which the Tribunal is entitled to refer to by dint of its Rules made under section 35(A) (21) provides as follows:
1. 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-
- (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
- (b) the court to which the appeal is preferred requires any document to be produced or any witnesses to be examined to enable it to pronounce judgement, 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.
2. Wherever 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.
13. We must point out that this is not a discretion that is resorted to or arrived at easily on the application of a party to have new evidence admitted. Appellate Courts have been known to shy away from its exercise. We fully associate ourselves with the words of Justice F. Gikonyo in Civil Appeal No. 15 of 2014 Geoffrey Muriungi & Another vs Runkungam Imony (2017) eKLR where he states that;
- ...doubtless the court has the power to call for and admit additional evidence on appeal, but that power should be utilized sparingly only in apt cases where exceptional circumstances exist. This approach is



to avoid giving the party who was not successful at the trial a second bite of the cherry to patch up the weak points in his case and or fill up omissions and gaps in the Appeal and or make out a fresh case in his appeal.”

27. The Court is satisfied that from the decisions cited by the Tribunal in its Ruling, it was aware that it was acting in exercise of discretion.
28. This Court is reminded that it should tread with caution when seeking to interfere with the exercise of discretion of another decision maker. So long as that decision is exercised judiciously and not capriciously, this Court will not interfere with such discretion. It matters not that if this Court was hearing the application, it would have exercised its discretion differently. That it would have reached a different decision. That is not a matter for appeal to this Court. See *Mbogoh & Another v. Shah* [1968] EA 93.
29. We note that there was no blanket denial of orders. The Tribunal allowed the production of evidence of the acquisition of the 400 shares purchased on 19th October, 2006.
30. As regards summoning a witness, the Tribunal was of the considered opinion that the Appellant had not even attempted to serve witness summons upon Joseph Biwott. Having failed to do so, the Tribunal saw no reason to order attendance of witness at that juncture. It is not clear to this Court how the Appellant read this to mean that the door had been shut to his face. All we read from the Tribunal’s Ruling is that he was being told that his application was premature as he had not first sought to summon the witness to Court.
31. Regarding the purchase of the 500 ICDC (I) shares, the Tribunal declined to grant the order sought. This is because there was no proof of instructions to acquire such shares. It is for that reason that the transaction was reversed and monies credited back to the Appellant. It would therefore be flogging a dead horse to call for production of documents or for instruction that were neither given nor said to exist.
32. This Court warns itself that this is an interlocutory appeal. The 1st Appeal is yet to be heard before the Tribunal. The Court hence proceeds with caution to avoid making any conclusions. Such conclusions may have the unintended effect of infecting the mind of the Tribunal, which is yet to hear the 1st appeal.
33. Having looked at the decision of the Tribunal, the Court notes that it was well aware of its duty to inquire into the decisions of the Capital Markets Authority. It is also aware of its duty to make its own decision in the matter.
34. What is now left is for the Appellant to move back to the Tribunal and move it to inquire into the Capital Markets Authority’s decision.
35. The case has taken a while in the Court system. This Court sincerely apologizes for the delay in delivering this judgment. Any inconveniences to the parties are regretted.
36. To avoid further delays, the tribunal file should be released back to the Tribunal. The hearing of the appeal should be prioritized.
37. As to costs, the same follow the event. The costs of the appeal are awarded to the 2nd Respondent.

Determination

38. The appeal is dismissed in its entirety.



39. The costs of the appeal are awarded to the 2nd respondent.
40. The original Tribunal file is to be released back to the Tribunal so that the hearing of the appeal by the Tribunal can be prioritized.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF APRIL, 2025

NJOROGE BENJAMIN K

JUDGE

In the presence of;

..... for the Appellant

..... for the 1st Respondent

..... for the 2nd Respondent

Luyai – Court Assistant

