Kivunira v Capital Markets Authority (Commercial Appeal E177 of 2024)
[2025] KEHC 4441 (KLR) (Commercial and Tax) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4441 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E177 OF 2024

BM MUSYOKI, J

APRIL 8, 2025

BETWEEN

WYCLIFFE LIDONGA KIVUNIRA ..... APPELLANT

AND

CAPITAL MARKETS AUTHORITY ..... RESPONDENT

(Being an appeal from the judgment of the Capital Markets Tribunal delivered on the 5th June 2024 in its appeal No. E 003 of 2018)

CMA sanctions quashed for breach of fair trial rights over withholding of information

The appeal concerned the enforcement action taken by the Capital Markets Authority (CMA) against the appellant, a former acting Chief Finance Officer of the National Bank of Kenya, arising from allegations of financial misreporting and governance breaches. The appellant contended that his right to fair hearing and fair administrative action were violated when he was denied access to crucial documents and found culpable and sanctioned on grounds not included in the notice to show cause. The court held that CMA, while acting within its investigative mandate, breached principles of natural justice. The tribunal's decision was overturned, and the sanctions imposed were set aside.

Reported by John Wainaina

Capital Markets Law *– powers of the Capital Markets Authority – investigatory and quasi-judicial functions – duty to furnish with information before charging - whether the Capital Markets Authority, in exercising its investigative and quasi-judicial functions under section 13B of the Capital Markets Act, complied with the rules of natural justice and constitutional guarantees of fair hearing and fair administrative action - whether, considering that the impugned investigations and sanctions by the Capital Markets Authority arose from events dating back to 2015 and that the concerned bank had since undergone substantial restructuring, the appropriate remedy was to remit the matter to the Authority for reconsideration with due regard to the appellant's rights, or to set aside the Authority's decision and the sanctions imposed – Capital Markets Act (Cap 485A) sections 5, and 35A.*

Constitutional Law *– fundamental rights and freedoms – right to fair trial – investigative and quasi-judicial functions of the Capital Markets Authority – where one was not furnished with information that formed basis of the charges faced - whether the appellant's right to a fair trial was violated when he was denied access to documents forming the basis of the charges and was convicted on charges not included in the notice to show cause – Constitution of Kenya articles 25(1) and 50; Fair Administrative Action Act (Cap 7L) section 4(3).*

Brief facts

The appellant, formerly the acting Chief Finance Officer of the National Bank of Kenya from April 2015 to April 2016, was terminated over alleged breaches of financial and fiduciary duties. The Capital Markets Authority (CMA) investigated and issued a notice to show cause of financial misreporting, loan restructuring, and alleged embezzlement. Despite requesting documents from the bank to prepare his defence, access was denied. CMA proceeded, found him culpable on two counts, and imposed a Kshs 1,000,000 penalty. Aggrieved, the appellant filed the instant petition claiming that failure to be supplied by the information was a breach of he rights to fair trial, administrative action, and access to information.

Issues

i. Whether the Capital Markets Authority, in exercising its investigative and quasi-judicial functions under section 13B of the Capital Markets Act, complied with the rules of natural justice and constitutional guarantees of fair hearing and fair administrative action.

ii. Whether the appellant's right to a fair trial was violated when he was denied access to documents forming the basis of the charges and was convicted on charges not included in the notice to show cause.

iii. Whether, considering that the impugned investigations and sanctions by the Capital Markets Authority arose from events dating back to 2015 and that the concerned bank had since undergone substantial restructuring, the appropriate remedy was to remit the matter to the Authority for reconsideration with due regard to the appellant's rights, or to set aside the Authority's decision and the sanctions imposed.

Held

1. Section 13B(1) of the Capital Markets Act (the Act) empowered the Capital Markets Authority (CMA) to initiate investigations where it had reasonable cause to believe an offence had been committed, misconduct had occurred, or a licensee's conduct was against the interests of clients or the public. CMA acted within its mandate by summoning the appellant to show cause following information received from a whistle-blower. However, while exercising both its investigative and quasi-judicial functions, CMA remained bound by the rules of natural justice and constitutional guarantees of fair administrative action and hearing.
2. CMA, in its investigative role, was obligated to act objectively and without a predetermined target. Its determination of culpability could only lawfully be reached after granting exhaustive representation to the appellant, the bank, and other witnesses. By precluding the appellant from participating in the audit that produced reports implicating him, despite his role as head of finance, the Authority denied him a fair opportunity to contest or clarify the evidence. The respondent was required to treat all evidence objectively and allow the appellant to challenge its relevance before reaching a decision. Failure to do so amounted to a violation of the appellant's right to be heard.
3. By withholding documents that formed the basis of the charges, the respondent undermined the appellant's right to a fair hearing, contrary to established principles of natural justice. Fairness required disclosure of documents forming the basis of charges, even outside criminal proceedings. The tribunal erred in holding that the appellant should have invoked section 35A(5) of the Act to compel the bank to produce the documents. That reasoning was misplaced. The Tribunal's role was not to retry or enforce sanctions but to review the legality and fairness of CMA's earlier decision. Since the appellant was denied access to internal documents, some of which he had authored, he was deprived of an opportunity to meaningfully respond to the allegations. The respondent was bound to ensure

a fair process by granting the appellant access to the documents before making its quasi-judicial determination.

4. The respondent came up with the result for charges concerning which the appellant had not been given a chance to defend himself because they were not part of the notice to show cause. The respondent convicted the appellant of charges which were not the subject of the trial or investigations and if they were, it investigated the appellant on charges he had not been informed of and as such his right to defend himself effectively was compromised. It was not just a matter of procedure for the law to require that a person be informed of the charges he would face in advance. It was a constitutional requirement which went to the core of the trial and administrative action. The respondent was carrying out a quasi-judicial function which had binding legal consequences and should have in the circumstances ensured that the appellant's rights were respected, especially noting that it was both the investigator and the judge in the same cause. It amounted to violation of the appellant's right to a fair trial which under article 25(c) of the Constitution could not be limited. The violation rendered the respondent's process to have been against the rules of natural justice and breach of the appellant's right to a fair administrative action.
5. Section 8 of the Access to Information Act provided the procedure for getting information from an institution or person holding the same and where such information was not supplied the applicant may make an application for review and thereafter file an appeal to the High Court. The appellant had not shown any letter written to the bank which held the information. The respondent was not the holder or custodian of the documents and as such could not have supplied the same and in the circumstances. The respondent did not violate the appellant's right of access to information.
6. Whereas it was desirable in public interest to remit the matter to the respondent for reconsideration, with the rights of the appellant being respected and upheld, the issues which were under litigation arose in 2015 which was ten years ago. The bank had undergone substantial restructuring and with this state of affairs, taking that route would amount to double jeopardy as the circumstances had changed. The orders that shout for fairness was to set aside the sanction meted on the appellant as a result of the flawed process.

Appeal allowed.

Orders

I. *The judgement of the Tribunal dated June 5, 2024 upholding the respondent's decision dated April 3, 2018 was set aside.*
II. *The respondent's decision rendered on April 3, 2018 and the sanctions therein were set aside.*
III. *The respondent was to pay the costs of the appeal and in the tribunal.*

Citations

Cases

1. Mahamud v Mohamad & 3 others (Petition 7 & 9 of 2018 (Consolidated); [2018] KESC 62 (KLR)) — Explained
2. Postal Corporation of Kenya v Andrew K. Tanui (Civil Appeal 127 of 2015; [2019] KECA 489 (KLR)) — Explained

Statutes

1. Access to Information Act (cap 7M) — section 8 — Interpreted
2. Banking Act (cap 488) — In general — Cited
3. Capital Markets Act (cap 485A) — section 5; 13B(1); 35A(5),(22) — Interpreted
4. Constitution of Kenya, — article 25(c); 50 — Interpreted
5. Fair Administrative Action Act (cap 7L) — section 4(3) — Interpreted

Advocates

None mentioned

JUDGMENT

1. The appellant was an employee of the National Bank of Kenya (hereinafter referred to as 'the bank') where from 1-04-2015, he was appointed as the acting Chief Finance Officer a position he held until 13th April 2016 when he was terminated amid allegations of breach of financial and fiduciary duties. The respondent, is a statutory body established under Section 5 of the *Capital Markets Act* whose functions include to promote, regulate and facilitate the development of an orderly, fair and efficient capital market in Kenya.

2. After the appellant was terminated, the respondent initiated its own investigations and called upon the appellant to provide information on financial management at the bank. Following the investigations, the respondent issued a notice to show cause to the appellant to answer changes which it framed as follows;

    i. Willfully preparing and publishing false and misleading financial statement for the bank by reporting a gain in disposal of assets of Kshs 847,920,000.00 for the quarter ended 30th June to 30th September 2015.

    ii. Irregularly restructuring and rebooking loans without informing and seeking approval of the board of directors, in order to avoid bank obligations to make provisions for non-performing loans amounting to Kshs 2,595,303,848.00 and recognizing interest subsequently written off amounting to Kshs 680 million contrary to provisions of the guidelines on corporate governance practices by public listed companies.

    iii. Potential involvement in the embezzlement of funds through commissioning a deposit mobilization exercise in 2014 and 2015.

3. The appellant responded to the notice to show cause but asked to be supplied with several documents and information then held by the bank to enable him prepare his defence. In response to the request, the respondent wrote to the bank asking it to supply the documents requested by the appellant. After several back and forth correspondences of the request, the respondent informed the appellant that the bank had declined the request for some of the documents citing protection of confidentiality under the *Banking Act* and Prudential Guidelines by the Central Bank of Kenya. The respondent nevertheless completed its investigations by hearing the appellant without the appellant having been supplied with the documents and on 3-04-2018 reached the following decisions;

    a. The appellant acted in contravention of Regulation B.06 of the 5th Schedule of the Capital Markets (Securities) (Public Offers, Listing and Disclosure) Regulations 2002 by failing to prepare interim accounts for the period 30th June 2015 in accordance with International Financial Reporting Standards (IFRS);

    b. The appellant acted in contravention of Article 2.1.3 of the Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya, 2002 by failing to supply the board with relevant, accurate and timely information to enable the board discharge its duties;

    c. There was no evidence to link the appellants to the alleged embezzlement scheme; and

    d. The appellant was slapped with a penalty of Kshs 1,000,000.00

4. The appellant appealed to the tribunal citing grounds that the respondent erred in finding him guilty and having violated his rights to fair hearing, access to information and fair administrative action

because it failed to use its powers to ensure that the appellant received the documents he requested to enable him mount his defence. He also complained that the respondent made a determination on matters which the appellant had not been charged with and therefore had not adequately defended himself. The tribunal dismissed the appeal which provoked this appeal on the following grounds;

1. The Honourable Tribunal erred in law by denying the appellant a fair hearing, thus infringing on the appellants rights and fundamental freedoms as envisaged under Section 35A of the *Capital Markets Act* and Article 50 of *the Constitution*.

2. The Honourable Tribunal erred in law by upholding the enforcement decision of the respondent, without considering the fact that the enforcement decision substantially differed from the issues adduced in the Notice to Show Cause issued to the appellant.

3. The Honourable Tribunal erred in Law by considering issues that were not subject of the appeal and neither in the Notice to Show Cause that led to the respondent's hearing and enforcement decision.

5. This appeal was disposed of by way of written submissions. In the appellant's submissions dated 2nd December 2024, he has identified three issues for determination viz;

   a. Whether the appellant's rights were infringed upon by the respondent in the trial process.

   b. Whether the appellant breached his fiduciary duty as Chief Finance Officer of National Bank of Kenya Limited.

   c. Whether the respondent enforcement decision should be upheld.

6. On its part, the respondent has identified the following issues;

   a. Whether the respondent upheld the appellant's rights in the administrative process.

   b. Whether the appellant violated his fiduciary duty as the Chief Finance Officer of the National bank of Kenya; and

   c. Whether the respondent's enforcement action should be upheld.

7. From the issues drawn separately by the parties and the submissions which I have read, this court is of the opinion that the two sets of issues though in different words are the same. The issues oscillate between the appellant's rights to access to information, fair hearing and fair administrative action and whether there was proof that the appellant had breached his fiduciary duty to the bank. Section 35A(22) of the Capital Market Act allows appeal to this court on matters of law only. In my considered view, the issue of whether there was proof of breach of fiduciary duty is a matter of fact. I will therefore not delve into that as I have no jurisdiction to do so. I am left with the issue of violation of the rights of the appellant and whether the respondent's enforcement action should be upheld.

8. The first ground of appeal suggests that the tribunal did not grant the appellant a fair hearing but reading through the submissions of both parties, they have centred on the violation of rights by the respondent. I have also not seen anything on the tribunal's proceedings which would suggest that the appellant was denied rights to be heard or fair hearing. I believe that the ground was meant to read that the respondent and not the tribunal had violated the appellant's rights. The respondent has proceeded with the matter on that understanding and I see no prejudice if this court proceeded to write judgement on the same basis.

9. Section 4(3) of *Fair Administrative Action Act* states;

> ‘ Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–
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> a. prior and adequate notice of the nature and reasons for the proposed administrative action;
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> b. an opportunity to be heard and to make representations in that regard;
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> c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
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> d. a statement of reasons pursuant to section 6;
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> e. notice of the right to legal representation, where applicable;
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> f. notice of the right to cross-examine or where applicable; or
>
> g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.’

10. It is clear from the above Section that provision of materials and evidence to the person likely to be affected is a component of a fair administrative action. What constitutes a fair hearing was tacitly defined by the Supreme Court of Kenya in *Mahamud v Mohamad & 3 others* (2018) KESC 62 (KLR) thus;

> ‘ In this regard, what then are the norms or components of a fair hearing? In the matter of Indru Ramchand Bharvani & Others v. Union of India & Others, 1988 SCR Supl. (1) 544, 555, the Supreme Court of India, found that a fair hearing has two justiciable elements:
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> (i) an opportunity of hearing must be given; and
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> (ii) that opportunity must be reasonable (citing Bal Kissen Kejriwal v. Collector of Customs, Calcutta & Others, AIR 1962 Cal. 460). It is important to restate that a literal reading of the provisions of *the Constitution* of Kenya show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that: “it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court.’

11. In context of the above holding, I would say that a fair hearing is not limited to hearing before courts of law and for an administrative action to be fair, it must incorporate the component of a fair hearing whatever procedure the administrator adopts.

12. It is clear from the above that provision of information, materials and evidence to be relied in making a decision is a component of a fair administrative action. Further, it is not disputed that the right to be supplied with all documents necessary to defend oneself is a constitutional tenet. It is also common ground that the appellant asked and requested for documents he considered vital for his

defence and was denied. It is also undisputed that the documents were in custody of the bank and available. The appellant has submitted that his numerous and continuous requests for production of critical documents, perennially failed and blames the respondent for that because it failed to exercise its mandate and power vested under the statute, to ensure that the same documents were supplied.

13. The respondent does not deny that the appellant asked to be supplied with pertinent documents but takes stand that the documents were considered confidential by the bank and thus they could not be released to the applicant. The respondent adds that it was nevertheless given access to the documents and made a decision that the same were not relevant to the appellant's case or defence. This raises a point of concern on the role of the respondent in the process.

14. Section 13B(1) of the *Capital Markets Act* provides that;

> ' Where the Authority has reasonable cause to believe, either on its own motion or as a result of a complaint received from any person, that-
>
> a. an offence has been committed under this Act; or
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> b. a director, manager or employee of a licensee, approved person or an issuer or any other person, may have engaged in embezzlement, fraud, misfeasance or other misconduct in an issuer, licensee or approved person in connection with its regulated activity; or
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> c. the manner in which a licensed or approved person has engaged or is engaging in the regulated activity is not in the interest of the person's clients or in the public interest, the Authority may in writing depute a suitably qualified person to conduct investigations into the matter on behalf of the Authority.'

15. By summoning the appellant to show cause after receiving information from a whistle-blower, the appellant was exercising the above investigative powers and later quasi-judicial function when it heard the appellant and issued sanctions on him. In the two processes, the respondent was bound to exercise and apply the rules of natural justice and accord the appellant and any other person involved their constitutional rights to fair administrative action and hearing.

16. In view of the above provision, I form opinion that the respondent acts as an investigator and should carry out those duties objectively without a predetermined target. In that case, the respondent could only make a decision of the culpability of the appellant after hearing exhaustive representation by the appellant, the bank and any other witness. The applicant claims that he was precluded from participating in the audit which came up with reports implicating him yet he was the head of the finance. The respondent was bound in law to treat evidence received from either side objectively. Whether the documents were relevant or not was not for the respondent to decide on behalf of the appellant. It could only determine the relevance of the documents after hearing representation from the parties particularly the appellant who was to be affected by its decisions or action.

17. The respondent has submitted and argued that it did not have authority or powers to compel the bank to release the documents to the appellant. One needs to check the powers donated to the respondent by the Act. The respondent has powers to require production of the documents from the bank and if need be obtain court warrants to secure the same. These powers are donated under Section 13B(2) of the Act which states;

> ' An investigator appointed under subsection (1) may require any person whom the investigator reasonably believes or suspects to be in possession or in control of any record

or document which contains, or which is likely to contain, information relevant to an investigation under this section-

a. to produce to the investigator, within such time and at such place as the investigator may require in writing, any record or document specified by the investigator which is, or may be, relevant to the investigation, and which is in the possession or under the control of that person;

b. to give an explanation or further particulars in respect of any record or document produced under paragraph *(a)*;

c. to attend before the investigator at the time and place specified in writing by the investigator, and to the best of his ability under oath or affirmation answer any question relating to the matters under investigation as the investigator may put to him or her; and

d. to assist the investigator with the investigation to the best of the person's ability.

18. The respondent confirmed that the bank allowed it to access the documents and one would wonder why the appellant could not be allowed to access the documents the same way. It should not be lost to anyone that the investigations by the respondent should not only cover the applicant but also the bank itself including the board of directors. There should be a justification why the respondent zeroed on the appellant based on an audit and financial records which the appellant was not able to comment on because of lack of access. In *Postal Corporation of Kenya v Andrew K. Tanui* (2019) KECA 489 (KLR), the Court of Appeal had a chance to consider circumstances where proceedings before a Board of Directors were conducted without the employee being supplied with an audit report. The Court held that;

> ‘ The Board had in its possession the very document that formed the basis of the charges framed against the respondent but kept it away from him. Even in criminal trials, which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting. The respondent faced serious indictments which could torpedo his entire career and destroy his future.’

19. In its judgment, the tribunal analysed evidence and found that by the nature of documents the appellant had asked for, they were not confidential but simply internal documents and some of them had actually been originated by the appellant. The tribunal however held that, the appellant should have invoked his right to have the tribunal summon the bank for production of the documents under Section 35A(5) of the *Capital Markets Act* and since he failed to do so, the appeal could not succeed on that basis. I find this holding to be off the mark. What was before the tribunal was a challenge to a decision which had already been made by the respondent in its quasi-judicial function. The tribunal was not trying the appellant and was not expected to issue the enforcement verdict against the appellant. Its function was to interrogate whether the respondent’s decision had been reached through a lawful and fair process.

20. The issue is compounded by the appellant’s complain that the respondent came up with result for charges the appellant had not been given a chance to defend himself because they were not part of the notice to show cause. This complaint is not farfetched. A look at the verdict of the respondent, it is clear that the respondent convicted the appellant of charges which were not the subject of the trial or investigations and if they were, it investigated the appellant on charges he had not been informed of and as such his right to defend himself effectively was compromised. It is not just a matter of procedure for the law to require that a person be informed of the charges he would face in advance.

It is a constitutional requirement which goes to the core of the trial and administrative action. The respondent was carrying out a quasi-judicial function which had binding legal consequences and should have in the circumstances ensured that the appellant's rights were respected especially noting that it was both the investigator and the judge in the same cause. In my assessment, the totality of all this amounted to violation of the appellant's right to a fair trial which under Article 25(c) of *the Constitution* cannot be limited. This violation renders the respondent's process to have been against the rules of natural justice and breach of the appellant's right to a fair administrative action.

21. On the issue of failure to supply information, I have not seen evidence that the appellant exercised his right through the right process. Section 8 of the *Access to Information Act* Provides the procedure for getting information from an institution or person holding the same and where such information is not supplied the applicant may make an application for review and thereafter file an appeal to the High Court. The appellant has not shown this court any letter written to the bank which held the information. The respondent was not the holder or custodian of the documents and as such could not have supplied the same and in the circumstances, I hold that the respondent did not violate the appellant's right to access to information.

22. Having found that the investigations and hearing before the respondent was tainted with unfairness, violation of the appellant's right to fair administrative action and in breach of the rules of natural justice, what orders are appropriate in this matter? Whereas it is, in my opinion, desirable in public interest to remit the matter to the respondent for reconsideration, with the rights of the appellant being respected and upheld, I note that the issues which are under litigation arose in 2015 which is ten years ago. I also take judicial notice as a matter of public notoriety that the bank has undergone substantial restructuring and with this state of affairs, it is my opinion that the taking that route would amount to double jeopardy as the circumstances have obviously changed. In the premises, it is my considered view that the orders that shout for fairness is to set aside the sanction meted on the appellant as a result of the flawed process. This appeal is therefore allowed in the following terms;

    a. The judgement of the tribunal dated 5th June 2024 upholding the respondent's decision dated 3-04-2018 is hereby set aside.

    b. The respondent's decision rendered on 3-04-2018 and the sanctions therein are hereby set aside.

    c. The respondent shall pay the costs of this appeal and in the tribunal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Kibet holding brief for Mr. Owino for the appellant and Miss Mbinya for the respondent.