



REPUBLIC OF KENYA



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**Riungu v Capital Markets Authority (Petition E482 of 2022) [2025] KEHC 9926 (KLR)
(Constitutional and Human Rights) (10 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E482 OF 2022

LN MUGAMBI, J

JULY 10, 2025

BETWEEN

KENNEDY MURIITHI RIUNGU PETITIONER

AND

CAPITAL MARKETS AUTHORITY RESPONDENT

CMA acted unfairly by notifying an employer that it was investigating its employee before granting the employee a fair hearing and by delaying due process

The petition challenged the Capital Markets Authority's (CMA) handling of the petitioner's Fit and Proper Applications, which were necessary for senior appointments at Genghis Capital Limited and Mayfair Asset Managers Limited. The petitioner argued that CMA unreasonably disclosed to his prospective employer that he was under investigation, despite the complaint being unverified, and subsequently delayed for eight months before issuing him a Notice to Show Cause. He contended that this conduct violated his right to fair administrative action under article 47 of the Constitution, leading to the loss of employment at Genghis Capital. The High Court found that CMA acted unfairly by notifying the employer prematurely without affording the petitioner an opportunity to respond and by delaying unreasonably in initiating a formal process. It held that these actions prejudiced the petitioner's employment prospects. The court quashed CMA's indefinite abeyance decision and directed it to conclude the pending Fit and Proper Application and awarded compensation of Kshs. 7,500,000.

Reported by John Wainaina

Constitutional Law - fundamental rights and freedoms - right to fair administrative action - contention that the Capital Markets Authority in notifying a person and his employer of investigations it was conducting against the person and waiting 8 months before giving the person an opportunity to defend himself or to do a fit and proper test - whether the Capital Markets Authority, by notifying the employer of pending investigations but delaying for eight months before giving the petitioner an opportunity to respond and undergo the Fit and Proper assessment, breached the petitioner's right to fair administrative action - whether the Capital Markets Authority acted unreasonably and prejudicially to the petitioner's employment prospects by notifying his prospective employer



that he was under investigation at a time when the complaint was unverified and still the subject of ongoing inquiries - Constitution of Kenya article 47; Capital Markets Act (Cap 485A) section 24A(3).

Administrative Law - *unreasonable delay - time the Capital Markets Authority took in making a decision to issue a Notice to Show Cause or to issue a Fit and Proper Test - whether the Capital Markets Authority, in taking 8 months before giving a person the opportunity to defend himself after having notified the person and his employer of the investigation, was unreasonable and amounted to inordinate delay - Constitution of Kenya article 47; Capital Markets Act (Cap 485A) section 24A(3).*

Employment Law - *dismissal - dismissal owing to a regulatory body conducting investigations against an employee for breach of the law - Capital Markets Authority (CMA) - investigative mandate of CMA - whether CMA was under a duty to notify an employer that it was investigating its employee before concluding investigations or giving the person an opportunity to defend himself - whether dismissal from employment owing from the Capital Markets Authority notifying the employer that the person in question was under investigation was attributable to the Capital Markets Authority premature disclosure of adverse information to the employer before affording the petitioner a chance to be heard - Constitution of Kenya articles 43, and 47; Capital Markets Act (Cap 485A) section 24A(3).*

Brief facts

The petitioner, a professional in the financial services sector, challenged the Capital Market Authority's (CMA) alleged inaction in processing his fit and proper applications lodged on 14 September 2018 through Genghis Capital Limited and on 25 March 2022 through Mayfair Asset Managers Limited. He asserted that CMA's failure to act caused him to lose both positions, thereby violating his rights to earn a living and to fair administrative action. He sought declaratory reliefs, compensation of Kshs. 45,946,366, and orders compelling CMA to determine the applications.

The petitioner further complained that while the applications remained pending, CMA issued a Notice to Show Cause (NTSC) on 10 July 2020 relating to alleged misconduct during his tenure at Sanlam Investments Limited. He claimed CMA withheld crucial documents, frustrating his ability to respond. Despite intervention by the Commission on Administrative Justice (CAJ) directing release of documents, the petitioner alleged non-compliance.

CMA maintained that the delay stemmed from ongoing investigations into complaints lodged by Sanlam Group PLC alleging fraud and professional negligence. It alleged that the fit and proper applications were lawfully placed in abeyance pending inquiries. CMA argued it had substantially furnished documents, issued a licence to Mayfair Asset Managers, and acted within its statutory mandate.

Issues

- i. Whether the Capital Markets Authority acted unreasonably and prejudicially to the petitioner's employment prospects by notifying his prospective employer that he was under investigation at a time when the complaint was unverified and still the subject of ongoing inquiries.
- ii. Whether the Capital Markets Authority, by notifying an employer of pending investigations but delaying for eight months before giving the petitioner an opportunity to respond and undergo the Fit and Proper assessment, breached the petitioner's right to fair administrative action.
- iii. Whether the Capital Markets Authority, in taking 8 months before giving a person the opportunity to defend himself after having notified the person and his employer of the investigation, had acted unreasonably and that conduct amounted to inordinate delay.
- iv. Whether CMA was under a duty to notify an employer that it was investigating its employee before concluding investigations or giving the person an opportunity to defend himself.
- v. Whether dismissal of employment owing to the Capital Markets Authority notifying the employer that the person in question was under investigation was attributable to the Capital Markets Authority premature disclosure of adverse information to the employer before affording the petitioner a chance to be heard.



Held

1. The petitioner had *locus standi* (right to appear before a court). Although the application for a fit and proper application was lodged by the petitioner's new employer, the actual impact of that decision was on the prospects of the petitioner's employability or suitability for the job hence had a direct bearing on the petitioner. The petitioner had a direct legal interest which he was entitled to defend.
2. *Locus standi* had enlarged scope in regard to enforcement of Bill of Rights under the Constitution. Article 47 of the Constitution provided the broad principles for the administrative action by stating that it must be expeditious, efficient, lawful, reasonable and procedurally fair. Expeditious administrative action meant that the decision maker had a responsibility to make a timely decision. Where the time for making the decision was fixed, the decision had to be made within the stipulated time but even where there was no fixed time, such a decision was to be made within reasonable time. Reasonable time was a question of facts and was better determined on a case by case basis.
3. At the time the respondent wrote to Genghis Capital giving information that the petitioner was under investigation, it had just met Sanlam Senior Executives on 13 September, 2018 who were yet to get tangible evidence to lodge a formal complaint against the petitioner that was why even when the Capital Markets Authority (CMA) wrote to Sanlam on 4 October, 2018, Sanlam responded by stating that it was still carrying out forensic investigations.
4. Section 24A (3) of the Capital Markets Act (the Act) stated that CMA shall give a person an opportunity to be heard before determining whether the person was fit and proper for the purposes of the Act. CMA acted with lack of concern for potential consequences in regard to the risk or impact of its decision at very early stage in the process and put the petitioner in a very prejudicial position.
5. CMA could not thus be heard to say it had no control over what Genghis Capital would do with the information. CMA was simply reckless and malicious and never bothered to consider potential harmful effect of its actions when no proper complaint had been properly laid before it at the time. That was clear in that by 29 October, 2018; CMA was in fact the one soliciting for information against the petitioner from Sanlam Group PLC. At the time, Sanlam did not even have the information because it wrote on indicating that it was still carrying out its in depth audit meaning the complaint had not crystallized yet, they were still hoping to find evidence against the petitioner.
6. The action by CMA was reckless and ill informed. It was unreasonable and unjustifiable in the circumstances. CMA's claim that the petitioner did not demonstrate that the investigations and administrative action commenced CMA caused Genghis Capital to rescind its decision to retain the petitioner as the CEO was unacceptable given the circumstances of the case. The petitioner had aptly explained that the actions of CMA cost him his role at Genghis Capital and forced him to vacate the acting status of the role to prevent Genghis Capital Investment and himself from being in breach of CMA Act.
7. CMA did not explain why having finally received the formal complaint on and informing the petitioner's employer, Genghis Capital, the following month, that was the action it justified by saying that it 'was just a factual confirmation that the petitioner was under investigation while indicating that it was prudent to refrain from confirming the petitioner before conclusion of its own investigations which concerned the petitioner's suitability.' There was a question as to why it took almost eight months to formally give the petitioner the Notice To Show Cause that kicked off the process of defending himself against the allegations of regulatory infractions so that CMA could objectively assess if the petitioner conducted himself in a fit and proper manner per section 24A(1)(d) and (e) of the Act.
8. Due to the weight of the matter, the petitioner had long resigned following notification to his employer yet by then CMA had not even bothered to establish his position about the allegations before notifying his new employer. The actions of not giving the petitioner a chance to defend himself within reasonable time before involving his employer was not unexplained by CMA. CMA took eight months from the date of receipt of the complaint to invite the petitioner to defend himself yet CMA was so quick



- to notify the employer about the investigations. CMA could not hide under the excuse that it was acting at the mercy of the sources or references of the information since even after receiving the formal complaint complete with information, it did not see the need to seek the petitioner's response before getting his employer into the matter.
9. The reasonableness of a decision depended on the circumstances of each case and involved an examination of a range of factors such as whether the decision maker considered the interests of those involved or the impact of the decision on those affected and if there were reasons provided. CMA did not demonstrate fairness in the manner it treated the petitioner, it did not take into account the impact of providing prejudicial information to the employer which it was under a duty to objectively assess first and further, it did not explain the delay in getting the petitioner to respond so that it could make that objective assessment.
 10. Article 47 of the Constitution was meant to ensure public power was exercised in a manner that upheld the constitutional standards of administrative justice by protecting persons from harmful effects improper use of power. Not only did CMA expose the petitioner to pre-judgment long before it had even offered him the opportunity for a hearing but it was in fact, long even before the complaint had properly laid before it. The conduct by the respondent violated the petitioner's right to fair administrative action under article 47 of the Constitution.
 11. Regarding Mayfair Asset Managers Limited, the petitioner's allegations with reference to Mayfair Asset Managers Ltd was unfounded. CMA's response on the licence application was made without making any adverse reference on the petitioner's status hence the MayFair issue had nothing to do with the petitioner's predicament.

Petition partly allowed.

Orders

- i. *Declaration issued that CMA violated the petitioner's right to fair administrative action under article 47 of the Constitution by unreasonably failing to notify and/or require the petitioner to answer or respond to the adverse information against him to enable CMA's objective assessment prior to notifying his employer thus unfairly prejudicing the petitioner's employment and with inordinate and unexplained delay issued him a Notice To Show Cause (eight months later) despite receiving and informing the employer within a month of receipt the said information.*
- ii. *The decision to hold in abeyance for indefinite period the petitioner's Fit and Proper Test communicated vide the letter dated 16 January, 2019 was quashed.*
- iii. *Mandatory order issued directing the Capital Markets Authority to consider and make a decision on the pending application for the petitioner's Fit and Proper Test in respect to Genghis Capital Limited dated 14 September 2018 and any other such application affecting the petitioner within 60 days and upon completion give a copy of its decision to the petitioner.*
- iv. *Compensation to the tune of Kshs. 7,500,000.*
- v. *Costs of the petition.*

Citations

Cases

1. ABDULHAMID EBRAHIM AHMED vs MUNICIPAL COUNCIL OF MOMBASA (Civil Suit 290 of ??; [2004] KEHC 1984 (KLR)) — Explained
2. CMM (Suing as the Next of Friend of and on Behalf of CWM) & 6 others v Standard Group & 4 others (Petition 13 (E015) of 2022; [2023] KESC 68 (KLR)) — Explained
3. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR)) — Mentioned
4. Daykio Plantations Limited v National Bank of Kenya Limited, Alfred Mbali Kilonzo & Joseph Njoroge Ndungu (Environment & Land Case 222 of 2018; [2019] KEELC 37 (KLR)) — Explained



5. Enrico Quercioli & another v Director of Public Prosecutions, DCIO Malindi Subcounty & Chief Magistrate; Maria Angela (Interested Parties) (Constitutional Petition 13 of 2020; [2021] KEHC 4437 (KLR)) — Mentioned
6. Gitobu Imanyara, Njehu Gatabaki & Bedan Mbugua v Attorney General (Civil Appeal 98 of 2014; [2016] KECA 557 (KLR)) — Explained
7. Godfrey Julius Ndumba Mbogori & Karimi Business Associates Ltd v Nairobi City County (Civil Appeal 55 of 2012; [2018] KECA 702 (KLR)) — Explained
8. Grace A. Omolo v Attorney General & 3 others (Petition 252 of 2011; [2012] KEHC 5420 (KLR)) — Mentioned
9. Judicial Service Commission v Ochenja (Civil Appeal 312 of 2019; [2020] KECA 3 (KLR)) — Mentioned
10. Kamal Jadv Vekaria v Director General, Kenya Citizens and Foreign Nationals Management Service (Petition 534 of 2015; [2016] KEHC 7951 (KLR)) — Mentioned
11. Kenya Hospital Association t/a Nairobi Hospital v Medical Practitioners and Dentists Board, Professional Conduct Committee, Bartilol Kigen, Gerald Moniz & John Paul Odero (On behalf of the late Sylbil Masinde Odero (deceased) (Judicial Review 398 of 2016; [2018] KEHC 7996 (KLR)) — Mentioned
12. Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board (Petition 495 of 2015; [2016] KEHC 5405 (KLR)) — Explained
13. MSA v KMKA (Civil Application E123 of 2024; [2024] KECA 1222 (KLR)) — Explained
14. Peter Ndegwa Kiai t/a Pema Wines & Spirits v Attorney General & 2 others (Civil Appeal 243 of 2017; [2021] KECA 328 (KLR)) — Explained
15. Randu Nzai Ruwa & 2 others v Secretary, the Independent Electoral and Boundaries Commission, Independent Electoral and Boundaries Commission, Clerk to the National Assembly, Registrar of Societies, Commission on Revenue Allocation, Minister for Transport, Minister for Energy, Minister for Environment and Mineral Resources, Minister for Planning & Attorney General (Civil Appeal 9 of 2013; [2016] KECA 371 (KLR)) — Explained
16. Republic v Capital Markets Authority Ex parte: Joyce Ogundo (Miscellaneous Application 606 of 2016; [2018] KEHC 8857 (KLR)) — Mentioned
17. Republic v Kenya Revenue Authority Ex-Parte: Cosmos Limited (Judicial Review Miscellaneous Application 478 of 2014; [2016] KEHC 4712 (KLR)) — Mentioned
18. Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO (Miscellaneous Civil Application 461 of 2016; [2019] KEHC 10312 (KLR)) — Mentioned
19. Timothy Nchoe Sironka v Judicial Service Commission (Petition 20 of 2020; [2020] KEELRC 503 (KLR)) — Mentioned
20. Baker v Canada (Minister of Citizenship and Immigration) ([1999] 2 SCR 817) — Explained

Statutes

1. Access to Information Act (Cap 7M) — section 9 — Cited
2. Capital Markets Act (Cap 485A) — section 2, 11(3)(cc); 23; 24(8); 24A(1); 24A(2); 24A(3); 26(8) — Interpreted
3. Capital Markets (Licensing Requirements) (General) Regulations, 2002 (Cap 485A) — regulation 52 — Interpreted
4. Constitution of Kenya — article 35, 43, 47 — Interpreted
5. Fair Administrative Action Act (Cap 7L) — In general — Cited

Advocates

None mentioned



JUDGMENT

Introduction

1. The Petition dated 17th October 2022 is supported by the Petitioner's affidavit in support of similar date and further affidavits dated 30th May 2023 and 12th June 2023.
2. The Petition is founded on alleged inaction by the Respondent in processing the Fit and Proper Application required under the *Capital Markets Authority Act* for the key personnel thereby causing the Petitioner to lose employment opportunities at Genghis Capital Limited and Mayfair Asset Managers Limited.
3. Consequently, the Petitioner asserts that the Respondent violated his right to earn a living under Article 43 of the *Constitution* and right to a fair administrative action under Article 47 of the *Constitution*.
4. Accordingly, the Petitioner seeks the following reliefs against the Respondent:
 - a. A declaratory order declaring that the Respondent is in breach of the Petitioner's right to fair administrative action under Article 47 of the *Constitution* for taking an inordinately and an unjustified long time to make a decision on the Petitioner's "Fit & Proper" Applications made on 14th September 2018 and on 25th March 2022.
 - b. A declaratory order declaring that the Respondent is in breach of the Petitioner's right to earn a living as entailed in his economic and social rights guaranteed under Article 43 of the *Constitution* by the inordinate and unjustified delay in making a decision on the Petitioner's "Fit & Proper" Applications made on 14th September 2018 and on 25th March 2022 leading to him missing out on two significant employment opportunities with Genghis Capital Investment Bank and Mayfair Asset Managers Limited respectively.
 - c. An order for compensation in the sum of KES 45,946,366 against the Respondents to compensate the Petitioner for loss of income from the lost employment opportunities due to the inordinate and unjustified delay in a decision on the Petitioner's "Fit & Proper" Applications made on 14th September 2018 and on 25th March 2022 leading to him missing out on two significant employment opportunities with Genghis Capital Investment Bank and Mayfair Asset Managers Limited respectively.
 - d. Interest on the monetary sums above (3) at court rates from the date of filing suit until full settlement.
 - e. A declaratory order declaring that the Respondent is in breach of the Petitioner's right to fair administrative action under Article 47 for placing in abeyance a decision on the Petitioner's "Fit & Proper" Application made on 14th September 2018 and in its place unfairly and unreasonably instituting unfounded disciplinary proceedings against the Petitioner by way of a Notice to Show Cause issued on 10th July 2020.
 - f. A declaratory order that there is a threat to the Petitioner's right to fair administrative action and to fair hearing by the intent of the Respondent to make a decision in respect of the Notice to Show Cause issued on 10th July 2020 against the Petitioner notwithstanding the pendency of the Petitioner's request for a review of the Respondent's decision refusing to provide the



Petitioner with information and documents that are necessary for the petitioner to effectually respond to the Notice to Show Cause.

- g. A prohibitory injunction and/or order restraining the Respondent from making decision in respect of the Notice to Show Cause issued on 10th July 2020 against the Petitioner pending the hearing and determination of the Petitioner's request for a review of the Respondent's decision refusing to provide the Petitioner with information and documents that are necessary for the petitioner to effectually respond to the Notice to Show Cause.
- h. An order of certiorari quashing the decision made by the Respondent in its letter dated 16th January 2019 holding in abeyance a decision on the Petitioner's Fit and Proper Application dated 14th September 2018 with respect to Genghis Capital Limited.
- i. An order of mandamus directing the Respondent to make a decision the Petitioner's Fit and Proper Application dated 14th September 2018 with respect to Genghis Capital Limited and 25th March 2022 with respect to Mayfair Asset Managers Limited.
- j. Such further or other orders as it may deem just and expedient for the ends of justice.

Petitioner's Case

5. The Petitioner described himself as a professional in the Finance Services and Investments Industry. By way of background, he stated that he left his employment at Sanlam Investment Limited in December 2017 to begin his new role at Genghis Capital Limited.
6. On 14th September 2018, he made an application for the 'Fit and Proper' assessment with the Respondent through his new employer. This was in line with the requirement under the [Capital Market Authority Act](#) wherein the Respondent is required grant approval or objection for key personnel in companies licensed under the [Act](#).
7. The Petitioner is aggrieved that the Respondent did not make that assessment. Instead, the Respondent in a confidential letter dated 16th January 2019 informed Genghis Capital Limited that his application had been held in abeyance.
8. The Petitioner decries that as a consequence of the Respondent's inaction; he lost his position at Genghis Capital Limited. This is because he was forced to vacate the acting status in the role to avoid contravening the [Act](#).
9. On 25th March 2022, the Petitioner filed another 'Fit and Proper' application in relation to May Fair Asset Managers Limited where again was subjected to the same treatment.
10. The Petitioner contended that as a result of the Respondent's delay in considering the Applications is in violation of Article 47 of the *Constitution* and as a consequence, he has lost income estimated at Ksh.45,946,366-.
11. In a turn of events, the Petitioner alleged that the Respondent despite not responding to his applications, went ahead and issued him a Notice to Show Cause on 10th July, 2020 in relation to disciplinary proceedings arising from a complaint that had been filed by Sanlam Life Insurance Limited against the Petitioner during his tenure as the Chief Executive Officer at Sanlam Investments Limited.
12. In a letter dated 11th August 2020, the Petitioner sought relevant documents concerning the said complaint. The Respondent did not respond to this request despite sending a follow up letter dated 24th September 2021. The Petitioner avers that the Respondent in view of this fact violated his right under Article 35 of the *Constitution* as read with Section 9 of the *Access to Information Act*.



13. On 26th May 2022, the Respondent invited him to a meeting that was held on 7th June 2022. The Petitioner avers that the Respondent did not provide the requested information in that meeting; instead, on 29th August 2022 he was sent the were a misrepresentation of the content of the proceedings of 7th June, 2022.
14. On the said 29th August 2022, along with the impugned minutes, the Respondent also some documents in purported compliance with the Petitioner's request for information. It did not provide all the requested documents. On 5th September 2022, the Petitioner wrote to the Respondent insisting on the request for information and rejecting the false minutes.
15. The Petitioner states that despite the follow ups; the Respondent neglected to provide the information sought. The Petitioner thus lodged a complaint with the Commission of Administrative Justice (CAJ) on 5th October 2022. As a result, on 18th October, 2022; the Respondent threatened to make a decision on the Notice to Show Cause.
16. The Petitioner avers that the CAJ in a Ruling dated 31st January 2023 directed release of the following documents:
 - a. My recorded statement taken in the course of the investigations carried out by the Respondent prior to the issuance of the NTSC dated 10 July 2020;
 - b. Portions of financial accounts that were presented to Sanlam's Board audit committee meetings at the two meetings of 3 August 2017 and 7 November 2017 as well as the complete minutes for the two Board Audit Committee meetings.
 - c. Investment Reports for all Sanlam Life Portfolios sent monthly by Sanlam Investments Limited to the management of Sanlam Life Insurance for the months of June, July, August and September 2017 together with the cover emails.
 - d. Correspondence between the Authority and Sanlam Investments Ltd with regard to my Fit and Proper Application made in September 2018
 - e. With reference to the notice on revocation of the license for Sanlam Investments Ltd, issued by CMA in 2018 in Kenya Gazette Notice No 2548, dated 16 March 2018, copies of complaints, received by the Authority from Sanlam Life Insurance Ltd.
 - f. Information on the position relating to my fit and proper application with respect to Genghis Capital and Mayfair.
17. He asserts that the Respondent did not honour the foregoing orders causing the CAJ to issue further orders on 16th March 2023 as follows:
 - a. A redacted or an abridged version of thereof and supply such redacted or abridged version of the Investigation report
 - b. Copies of the complaints lodged with Authority or in the alternative, the information contained in the complaints in a manner that allows compliance with the law.
18. The Petitioner contends that the Respondent similarly failed to provide these documents causing him to send further correspondence through his Counsel on 13th April 2023.
19. The Petitioner equally contends that the Respondent did not comply with the timelines set out under its Citizen's Service Delivery Charter. In light of the foregoing, the Petitioner asserts that the Respondent's actions have violated his constitutional rights.



Respondent's Case

20. The Respondent filed his Replying Affidavit through its Senior Manager, Investigations and Enforcement Department, Lawrence Mumina, sworn on 26th April 2023.
21. With reference to the Petitioner's application for the 'Fit and Proper evaluation,' the Respondent stated that the Petitioner was the Chief Executive Officer of Sanlam Investments Limited between November 2012 and December 2017. At the time, Sanlam Investments Limited was undertaking fund management on behalf of Sanlam Life Insurance. Both companies were under the umbrella of Sanlam Group Kenya PLC.
22. The Respondent stated that the Fit and Proper Test Application was lodged by Genghis Capital Limited on 5th September 2018 and not the Petitioner as is alleged in this Petition. It stated that Genghis Capital applied for the 'letter of no objection' in respect of the Petitioner's employment as its General Manager, Asset Management.
23. Upon the receipt of the application by Genghis Capital, the Respondent embarked on the fit and proper exercise pursuant to Section 24A of the *Capital Markets Authority Act* and Regulation 52 of the *Capital Markets (Licensing Requirement) (General) Regulations, 2022*. The Respondent wrote to the then Chief Executive Officer (CEO) of Sanlam Investment Limited, Jonathan Stitchbury on 4th October 2018.
24. That even before that, the Respondent had already received complaints on 13th September 2018 from the senior executives at Sanlam Group Kenya PLC, concerning the Petitioner's conduct during his tenure at Sanlam but at the time, Sanlam Group PLC was still undertaking forensic investigations. In that meeting, it was agreed that the Respondent would contact Mr. Patrick Tumbo of Sanlam Kenya PLC since those allegations were being conducted forensically through an investigation commissioned by Sanlam Group. In or about October, 2018; the Respondent appraised Genghis Capital Limited about the progress made in respect of 'fit and proper exercise' which disclosed to the Petitioner vide email dated 12th October, 2018.
25. On 29th October, 2018 the Respondent wrote Mr. Patrick Tumbo of Sanlam Group PLC seeking further information on investigations. In a letter dated 9th November 2018, the Respondent was informed by Sanlam in-depth investigation focussing on operations at Sanlam Investments Limited were still on and was not able to respond to propriety and fitness of the Petitioner at that moment.
26. At the conclusion of its investigations, Sanlam Group PLC lodged a formal complaint against the Petitioner with the Respondent on 20th December 2018 on the claims of fraud and professional negligence.
27. In a further update vide letter dated 21st January 2019, the Respondent informed Genghis Capital Limited that its application for fitness and propriety on the Petitioner ('no objection letter') will be held in abeyance to enable it complete its investigations into Sanlam Group PLC complaint against the Petitioner.
28. In view of the stated account, the Respondent avers that it cannot be faulted with delay in conducting the fit and proper evaluation as it was not indolent in conducting reference checks as it was relied on information in the hands of others which was beyond the Respondent's control. Furthermore, it was not in control of the nature of feedback the Petitioner's former employer would provide as in this case which came in form of complaint against the Petitioner for potential fraud professional negligence



- that raised concerns about Petitioner's suitability hence the Respondent had a duty to investigate by putting in abeyance the 'no objection approval application.'
29. He argues that the Petitioner's allegations that the Respondent's conduct cost him his role at Genghis Capital Investment's is baseless as all the Respondent did was to give an update of the factual confirmation that the Petitioner was under active investigation and that it thought it wise to withhold confirming his fitness before concluding the propriety and fitness test as is expected under Section 24 of the Act.
 30. He depones that once the Respondent concluded its investigations, it issued the Petitioner the Notice to Show Cause (NTSC) dated 20th July 2020. He states that the letter informed the Petitioner of the outcome of its investigations being, materially understating the investments made by Sanlam Investments Limited through Sanlam Life Insurance Limited thus was required to issue a response. He informs that the NTSC also contained the relevant evidence in the matter.
 31. He depones that the Petitioner also requested additional documents through a letter dated 1182020.
 32. In the meeting dated 7th June 2022, he asserts that the Respondent explained why it was unable to share the requested supplementary information. Nonetheless, he avers that the information was later on furnished to the Petitioner on 29th August 2022.
 33. Thereafter, the Respondent asked the Petitioner respond to the NTSC on 12th September 2022.
 34. It is emphasised that instead of making a response to the NTSC, the Petitioner lodged a complaint with CAJ through a letter dated 5th October, 2022 arguing that the Respondent had not provided some of the relevant documentation he required.
 35. The Respondent filed its response in the matter on 20th February 2023.
 36. In its finding dated 16th March 2023, the CAJ affirmed that the Respondent had taken all the necessary lawful and reasonable steps in furnishing the Petitioner with the relevant documents and addition delivered two addition documents being the redacted complaint and the Investigation Report dated 4th April 2023 per CAJ order.
 37. Turning to the Petitioner's allegations concerning May Fair Asset Managers Limited, he asserts that the same is equally unfounded. This is because the Respondent issued the sought licence vide a letter dated 4th August 2022, without issuing any adverse reference to the Petitioner's fit and proper evaluation. He notes that May Fair Asset Managers Limited nonetheless in its own independent determination resolved to recall the Petitioner's employment as its Head Business Development personnel.
 38. Taking these averments into consideration, he maintains that the Respondent did not violate the Petitioner's rights under Article 43 and 47 of the *Constitution* as claimed. Additionally, he stressed that the Respondent had acted within its jurisdiction lawfully. For this reason, he argues that the Petition should be dismissed.

Petitioner's Submissions

39. AKO Advocates LLP for the Petitioner filed submissions dated 3rd September 2023 and underscored the issues for determination as: whether the Petitioner has *locus standi* in the matter, whether the delay in making a decision on the Petitioner's Fit and Proper Applications amounts to breach of the Petitioner's constitutional rights, whether the Petitioner has suffered loss as a result of the delay and thus entitled to the relief sought.



40. Counsel submitted that the Respondent in stating that the application for fit and proper was made by Genghis Capital Limited argued that the Petitioner lacks the requisite *locus standi*. Counsel in reaction submitted that this allegation is false as is evident from the Petitioner's annexure at Page 19 in his supporting affidavit. Counsel emphasised thus that the Petitioner rightly instigated this suit as as the Respondent's purported indecision directly affected him.
41. Reliance was placed in [Enrico Quercioli & another v Director of Public Prosecutions & 2 others; Maria Angela \(Interested Parties\)](#) [2021] eKLR where it was held that:
- “As a consequence, *locus standi* is required in a litigation involving violation of fundamental rights, to be capable of sustaining the petition. In my humble view, if a petitioner applies to the Court to declare a law or a decision by a public body invalid, he or she must be able to prove to the Constitutional Court not only is the decision or provisions of the stature invalid but if no remedy is availed, heshe will suffer injury as a result of the violation or some other class of persons.
- It is true as stated in various precedent setting decisions that the Question on *locus standi* must not be construed in a narrow and pedantic sense, for a constitution like ours embodies fundamental rights with far reaching consequences when threatened with infringement or violations. In our present reality, the provisions of Article 22 & 23 of the *Constitution* are intended to afford protection to the fundamental rights and freedoms granted to the individual. For this reason, it is desirable that all persons, individuals and organizations should have access to the High Court as a creature of the *Constitution* under Article 165 (2) (b) & (d) and Article 23 to seek redress for any perceived contravention of their rights. These are the attendant provisions of the *Constitution* must therefore be interpreted liberally to give wide access to the Courts under Article 48 of the same constitution. As standing to sue epitomizes the phraseology that the Court is no place for Busy Bodies. Any person who wants to sue either as an individual, organization, body corporate must show that he or she has *locus standi* being the right to sue for a remedy and capacity to pursue it before a Court of law. *locus standi* does not even rest on the consent of parties to litigate on behalf of each other.”
42. Turning to the second issue, Counsel submitted that the Respondent was guilty of inordinate delay. This is owing to the 6 years period it took to issue a response to the Petitioner's fit and proper application. As such, Counsel underscored that the Respondent's delay was unconstitutional.
43. Reliance was placed in [Judicial Service Commission v Daniel Ochenja](#) [2020] eKLR where a delay of 2 and a half years was held to be in violation of Article 47 of the *Constitution*. Like dependence was placed in [Kamal Jadvia Vekaria v Director General, Kenya Citizens and Foreign Nationals Management Service](#) [2016] eKLR, [Grace A. Omolo v Attorney General & 3 others](#) [2012] eKLR and [Timothy Nchoe Sironka v Judicial Service Commission](#) [2020] eKLR.
44. In addition, Counsel submitted that the Respondent had violated the Petitioner's legitimate expectation given the Respondent's own timelines for action in its Service Charter, which is generally not more than 21 days in any matter. Equally, Counsel submitted that the Respondent had not provided an explanation for the delay despite the numerous correspondence issued by the Petitioner.



45. Reliance was placed in *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others* SC Petition Nos. 14, 14A, 14B & 14C of 2014 where it was held that:
- “Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation.”
46. Like dependence was placed in *Republic v Kenya Revenue Authority Ex-Parte: Cosmos Limited* [2016] eKLR and *Kenya Hospital Association ta Nairobi Hospital v Medical Practitioners and Dentists Board & 4 others* [2018] eKLR.
47. In addition, Counsel submitted that the Respondent’s actions had caused the Petitioner economic loss. Counsel in light of the Petitioner’s averments argued that due to the Respondent’s regulatory demands and dictates, both Mayfair and Genghis could not sustain his employment. In fact, Counsel submitted that no other regulated entity in Kenya can employ the Petitioner until the Respondent gives the approval.
48. In light of the foregoing, Counsel submitted that the Petitioner was entitled to the reliefs sought. Counsel pointed out that the Petitioner was set to earn a monthly income of Kshs 850,000 at Genghis limited and Ksh.360,000 at Mayfair Investment. On this premise, Counsel submitted that the Petitioner was entitled to an award of compensation based on the monthly income opportunity lost per month. In respect of Genghis from September 2018 to March 2022 and for Mayfair from March 2022 to date.

Respondent’s Submissions

49. On 12th September 2024, the Respondent’s Counsel, Githendu E. Timothy filed submissions and highlighted the issues for discussion as: whether the Respondent exercised its powers to approvals and licensing powers lawfully and constitutionally, whether the Respondent’s enforcement proceedings commenced vide the Notice to Show Cause (NTSC) dated 20th July, 2020 are lawful and constitutional and whether the Respondent is liable to compensate the Petitioner for supposed lost employment opportunities.
50. Counsel pointed out that the Petitioner was essentially faulting the Respondent’s actions in respect of various processes which work in tandem being licensing and approvals and investigation and enforcement. In this regard, Counsel submitted that the Respondent under Sections 2, 23, 24(8) and 24A of the *Capital Markets Act* and regulation 52, of the *Capital Markets (Licensing Requirements) (General) Regulations, 2002* is mandated to regulate and control activities of intermediaries who participate in capital markets. This includes requirement of the intermediaries to apply for approvals for change of key personnel through an application of ‘no objection’. The threshold for the fitness and probity test is outlined under Sections 24A (1) and 24A (2) of the *Act* and Regulation 52 of the *Regulations, 2002*.
51. Counsel submitted that to make this assessment, the Respondent obtains information about an individual appointee through his self-declaration form and from other 3rd parties or anyone who may provide relevant information. Counsel in view of this, submitted that the Respondent conducted this process as set out in its affidavit.
52. Particularly, Counsel submitted that the Petitioner had no claim concerning Genghis Capital Limited as he did not lodge the said application for ‘no objection’. Counsel enlightened as well that the conduct



- of the fit and proper assessment is part of the review of the said application confirmation. Counsel registered equal sentiments with reference to the Mayfair Asset Managers application.
53. Counsel argued that the Respondent's engagement of Sanlam Group contrary to the Petitioner's allegation was lawful as the Respondent is permitted to engage any person it considers necessary to enable it make a holistic evaluation on the fitness and probity of the designated appointee.
54. Counsel equally contended that there was no delay on the Respondent's part in considering the two applications as is apparent from the averments in the Respondent's affidavit. Counsel also stressed that the argument for legitimate expectation was not viable as the timelines specified in the service charter represents aspirational targets thus not legally binding. Counsel noted moreover that the claim was misleading as the Respondent had already made decisions in the matters.
55. In like manner, Counsel submitted that Respondent's decision to hold Genghis application in abeyance was lawful as was made in view of the ongoing investigations relating to his conduct during his tenure as the Chief Executive of Sanlam Investments Management Kenya Ltd and its own pending investigations.
56. Nonetheless, Counsel submitted that the purported legitimate expectation was applicable to Genghis and Mayfair not the Petitioner. Counsel equally relied in *Communications Commission of Kenya* (*supra*) in this matter. Additional reliance was placed in *Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex Parte Soweto Residents Forum CBO* (2019) eKLR.
57. On the second matter, Counsel submitted that the Respondent is empowered under Section 25A of the *Capital Markets Act* as read with Section 11(3)(cc) to take enforcement action against any person who violates provisions of the *Act*. This action is preceded by the NTSC which is issued by dint of Section 26 (8) of the *Act* and provisions of the *Fair Administrative Actions Act*, 2015. In this matter, Counsel submitted that the Respondent had received a complaint concerning the Petitioner in December 2018. Investigations were conducted and the NTSC issued. Accordingly, Counsel submitted that the Respondent has jurisdiction over the Petitioner in this regard and thus the issued NTSC was lawful being that the Petitioner is key personnel. Reliance was placed in *Republic v Capital Markets Authority Ex parte: Joyce Ogundo* [2018]eKLR where it was held that:
- "I therefore do not subscribe to the views actions cannot be imposed against former directors. In my view former directors are culpable if what is complained of occurred under their watch."
58. Furthermore, Counsel submitted that the enforcement proceedings do not violate Article 47 of the *Constitution* as the issuance of the NTSC was in line with the dictates of this provision that is being an opportunity for the Petitioner to be heard and granting the Respondent an opportunity to make an objective decision.
59. On the claim that the requested documents and information was not supplied despite CAJ's orders, Counsel submitted that Respondent did indeed issue the sought documents and has also issued all the relevant evidence alongside the NTSC. On the final issue, Counsel submitted in light of the foregoing and Respondent's averments the Petitioner was not entitled to compensation for the supposed lost employment opportunities.

Analysis and Determination

60. In view of the foregoing, it is my considered view that the issues that arise for determination in this matter are as follows:



- i. Whether the Petitioner has the necessary *locus standi*.
- ii. Whether the Respondent's delay in determining the fit and proper application violated the Petitioner's right to a fair administrative process under Article 47 of the *Constitution* in the circumstances of this case.
- iii. Whether the Respondent violated the Petitioner's legitimate expectation.
- iv. Whether the Petitioner is entitled to the relief sought.

Whether the Petitioner has the necessary locus standi

61. The Respondent argued that the fit and proper information was sought by Genghis Capital Limited in respect of the Petitioner on 5th September, 2018 and thus was not the Petitioner's application. That on 4th October, it wrote to Sanlam Group PLC (Petitioner's former employer who had on 13th September approached the Respondent with allegations against the Petitioner) to provide more information on the matter. Sanlam responded on 12th October indicating that it was still carrying forensic investigations which information was passed to Genghis Capital which in turn informed the Petitioner. The long and short of this is that Sanlam upon completion of its investigations eventually lodged a formal complaint against the Petitioner and the Respondent was supposed to investigate and determine as part of considerations for determining the propriety of the Petitioner to serve in a licensed entity under the *Act*.

62. Even without getting deeper into this fact, the argument that the Petitioner lacks *locus standi* in view of this facts is preposterous. It is manifest that although the Application for Fit and Proper Application was lodged by the Petitioner's new employer, the actual impact of that decision was on the prospects of the Petitioner's employability or suitability for the job hence had a direct bearing on the Petitioner. The Petitioner thus had a direct legal interest which he is entitled to defend. In *Daykio Plantations Limited v National Bank of Kenya Limited & 2 others* [2019] KEELC 37 (KLR) defined *locus standi* as follows:

“...In the case of *Law Society of Kenya v Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the Court held that ;-

“*locus standi* signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of *Alfred Njau and Others v City Council of Nairobi* (1982) KAR 229, the Court also held that;-

“ the term *locus standi* means a right to appear in Court and conversely to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such proceedings”.

It is therefore evident that *locus standi* is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’.....”

63. Locus standi has enlarged scope in regard to enforcement of Bill of Rights under the *Constitution* as was explained by the Court in *Randu Nzai Ruwa & 2 others v Secretary, the Independent Electoral and Boundaries Commission, Independent Electoral and Boundaries Commission, Clerk to the National Assembly, Registrar of Societies, Commission on Revenue Allocation, Minister for Transport, Minister for*



Energy, Minister for Environment and Mineral Resources, Minister for Planning & Attorney General
[2016] KECA 371 (KLR) which, citing the relevant Constitutional provisions held as follows:

“Articles 22, 258 and 260 of the *Constitution* are cited to make the point that historical common law restrictions on the standing have been overhauled by the *Constitution of Kenya, 2010*....

The three Articles give an enlarged view of *locus standi* to the effect that every “person” including persons acting in the public interest, can move a court of law contesting infringements of any provision in the Bill of Rights or the *Constitution*.”

Each of the first two Articles starts with the phrase “Every person has the right to institute court proceedings.” They also provide that that person may either bring the proceedings as an individual in his/her own interest. He/she can, in addition bring proceedings in many other capacities, on behalf of persons who cannot act in their own name, or as a member of or in the interest of a group or class of persons, or, like in the above cited Supreme Court case of *Mumo Matemo* (supra), acting in the public interest or, finally an association acting in the interest of one or more of its members can also institute court proceedings for the enforcement of the Bill of Rights.”

64. The contention that the Petitioner lacks *locus standi* is thus unsustainable being the person who is directly impacted by the impugned decision that he alleges violates his rights and fundamental freedoms whether or not he is the one who initiated the request for that information.

Whether the Respondent’s delay in determining the fit and proper application violated the Petitioner’s right to a fair administrative process under Article 47 of the *Constitution* in the circumstances of this case.

65. Article 47 of the *Constitution* provides as follows:
- a. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - b. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
66. The Petitioner is not questioning the Constitutionality of the provisions enabling the Respondent to undertake the fit and proper exercise as authorized by the relevant provisions of the *Capital Markets Authority Act* but the conduct of the Respondent which he complains has been prone to inordinate delay and has thus caused the Petitioner to lose two jobs due to the prejudice caused by the Respondent having communicated that it was carrying investigations but kept the matter in abeyance indefinitely with the result that the Petitioner has been relieved of his employment by the organizations which fear being held non-compliant for employing persons who have not been certified fit and proper. That in my understanding is the bone of contention from the Petitioner’s perspective.
67. The Respondent on the other hand seeks to exonerate itself from blame by claiming that it only conveyed information that was factual at the point it communicated with Genghis Capital, that it had no control with the flow of information from the sources it was seeking to obtain in conducting the due diligence nor did it have any control over what the employers would do upon giving them the information the Respondent had released to them.
68. Article 47 lays down the broad principles for the administrative action by stating that it must be ‘expeditious, efficient, lawful, reasonable and procedurally fair’



69. Exeditious administrative action means that the decision maker has a responsibility to make a timely decision. This would mean that where the time for making the decision is fixed, the decision has to be made within the stipulated time but even where there is no fixed time, the law demands that such a decision be made within reasonable time. Reasonable time is a question of facts and is better determined on a case-by-case basis. In *MSA v KMKA* (Civil Application E123 of 2024) [2024] KECA 1222 (KLR) the Court guided as follows:

“9. In this case, the factual averments are not disputed. In the case of *Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Anor* [2014] eKLR it was appreciated that:

“Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so, on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying court’s mind on the delay, caution is advised for courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.”

10. From that authority, it is clear that the litmus test for inordinate delay is that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. In other words, in determining whether or not the delay is inordinate, it is not a matter of arithmetic. All the surrounding circumstances, including the reason for the delay must be considered by the Court.”

70. In the present case, the time within which the decision was to be made is not fixed hence the Court will have to consider if the timeline taken by the Respondent in processing the fit and proper assessment in respect of the Petitioner expeditious and reasonable in order to determine if Article 47 was violated by the impugned conduct.

71. Also to consider is whether in communicating what the Respondent calls ‘factual progress of the matter’ to Genghis Capital which the Petitioner considers prejudicial, whether that action was reasonable in the circumstances of this case.

72. Starting with the latter, it is evident that at the time the Respondent wrote to Genghis Capital giving information that the Petitioner was under investigation, it had just met Sanlam Senior Executives on 13th September, 2018 who were yet to get tangible evidence to lodge a formal complaint against the Petitioner that is why even when the Respondent wrote to Sanlam on 4th October, 2018; Sanlam responded by stating that it was still carrying out forensic investigations.

73. At that point in time, was it reasonable for the Respondent to notify Genghis Capital about an unverified complaint that it was still seeking full information on considering its prejudicial effect on the Petitioner’s employment without even having informed the Petitioner himself?



74. Section 24A (3) of the *Capital Markets Authority Act* states as follows on the issue of fit and proper assessment:

The Authority shall give a person an opportunity to be heard before determining whether the person is fit and proper for the purposes of this *Act*.

75. In my view, the Respondent acted with lack of concern for potential consequences in regard to the risk or impact of its decision at very early stage in the process and put the Petitioner in a very prejudicial position. The Respondent cannot thus be heard to say it had no control over what the Genghis would do with the information. The Respondent was simply reckless and malicious and never bothered to consider potential harmful effect of its actions when no proper complaint had been properly laid before it at the time. This was clear in that by 29th October, 2018; the Respondent was in fact the one soliciting for information against the Petitioner from Sanlam Group PLC. At the time, Sanlam did not even have the information because it wrote on 9112028 indicating that it was still carrying out its in-depth audit meaning the complaint had not crystallized yet, they were still hoping to find evidence against the Petitioner. The action by the Respondent was thus reckless and ill- informed. It was unreasonable and unjustifiable in the circumstances. The Respondent's claim that the Petitioner did not demonstrate that the investigations and administrative action commenced by Respondents caused Genghis to rescind its decision to retain the Petitioner as the CEO is unacceptable given the circumstances of this case. The Petitioner clearly explains at paragraph 8 of the supporting affidavit that:

“The actions inaction of the CMA cost me my role at Genghis Capital and forced me to vacate the acting status of the role to avoid Genghis Capital Investment and himself in breach of *CMA Act*...”

76. In regard delay in completion of investigations and continued unreasonableness; it is ostensible that the initial steps by the Respondent were swift. Upon receipt of the letter by Genghis Capital on 5/9/2018; it wrote to Sanlam on 4/10/2018; barely three weeks later. The formal complaint was finally laid by Sanlam Group PLC on 20/12/2018. It was then that on 21st January, 2019 that the Respondent wrote to Genghis Capital indicating that it was to put in abeyance the ‘no objection letter pending the outcome of the investigations.’

77. Upon receipt of that information, the Genghis Capital held a meeting with the Petitioner whereupon he resigned on 24/12/2019. Again, the Respondent had conveyed this information to Genghis Capital without having given the Petitioner the opportunity to respond to the allegations contrary to Section 24 A (3) of the *Capital Markets Authority Act*.

78. To make matters worse, it was not until 20th July, 2020 that the Respondent issued the Petitioner with the Notice To Show Cause informing him about regulatory infractions for having allegedly misrepresented and/or materially understated investments made by Sanlam Investment Ltd for Sanlam Insurance Ltd in two commercial papers.

79. The Respondent does not explain why having finally received the formal complaint on 20/12/2018 and informing the Petitioner's employer, Genghis Capital, the following month, that is 2/11/2019 which action it justified by saying that it ‘was just a factual confirmation that the Petitioner was under investigation while indicating that it was ‘prudent to refrain from confirming the Petitioner before conclusion of its own investigations which concerned Petitioner's suitability’ ;then why it took almost eight months, that is on 20/7/2020 to formally give the Petitioner the Notice To Show Cause that kicked off the process of defending himself against the allegations of regulatory infractions so that the



Respondent could objectively assess if the Petitioner conducted himself in a fit and proper manner per Section 24A (1) (d) & (e) of the *Act*. It is noteworthy that due to the weight of the matter, the Petitioner had long resigned following notification to his employer yet by then the Respondent had not even bothered to seek his position about the allegations before notifying his new employer. This action of not giving the Petitioner a chance to defend himself within reasonable time before involving his employer is not unexplained by the Respondent. Why take eight months from date of receipt of the complaint to invite the Petitioner to defend himself yet the Respondent was so quick to notify the employer about the investigations? The Respondent cannot hide under the excuse that it was acting at the mercy of the sources or references of the information since even after receiving the formal complaint complete with information, it did not see the need to seek the Petitioner’s response before getting his employer into the matter.

80. The reasonableness of a decision depends on the circumstances of each case and involves an examination of a range of factors such as whether the decision maker considered the interests of those involved or the impact of the decision on those affected and if there were reasons provided. In the circumstances of this case, I find that the Respondent did not demonstrate fairness in the manner it treated the Petitioner, it did not take into account the impact of providing prejudicial information to the employer which it was under a duty to objectively assess first and further, it does not explain the delay in getting the Petitioner to respond so that it can make that objective assessment.
81. It must be underscored that Article 47 of the *Constitution* is meant to ensure public power is exercised in a manner that upholds the constitutional standards of administrative justice by protecting persons from harmful effects improper use of power. This position was echoed in *Kenya Human Rights Commission v Non-Governmental Organizations Co-Ordination Board* [2016] KEHC 5405 (KLR) as follows:

“As to what constitutes fair administrative action, the court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT1698) 2000 (1) SA 1, stated thus:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

Thus, a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of the Constitution. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to



ensuring that Article 47 is promoted the court is not limited to the traditional judicial review grounds.”

82. In this case, not only did the Respondent expose the Petitioner to prejudgment long before it had even offered him the opportunity for a hearing but it was in fact, long even before the complaint had properly laid before it. I find that the conduct by the Respondent violates the Petitioner’s right to fair administrative action Article 47 of the *Constitution*.
83. Correspondingly, the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 expressed this principle in the following way:
- “The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”
84. In regard to the incident surrounding the Mayfair Asset Managers Limited and as per annexure ‘KR 4’, it was the Company’s application seeking a licence as a Fund Manager. The Respondent in response on 14th April 2022 notified that there were outstanding issues that needed to be clarified before further processing of the application. This *inter alia* included the police clearance certificates of the Petitioner alongside the other personnel.
85. Subsequently, the Respondent issued the Fund Manager Licence in its letter dated 4th August 2022. In my humble view, the Petitioner’s allegations with reference to Mayfair Asset Managers Ltd is unfounded. The Respondent’s response on licence application was made without making any adverse reference on the Petitioner’s status hence this May Fair issue had nothing to do with the Petitioner predicament.

Whether the Petitioner is entitled to any relief?

86. In determining the extent and nature of reliefs, the authorities on grant reliefs in Constitutional Petitions are relevant.
87. The Court of Appeal addressed itself on the issue in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR as follows:

“...the South African Case of *Dendy v University of Witwatersrand, Johannesburg & Others* - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:

“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff’s interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”



88. In *Charles Muturi Macharia & 6 Others v Standard-Group & 4 Others* (SC Petition No.13 (E015) of 2022) the Supreme Court guided:

“(91) By the provisions of Articles 22 and 23 of the *Constitution*, the High Court has the power and authority to enforce and uphold the Bill of Rights in claims of infringements. In proceedings brought by any person claiming that a right or fundamental freedom has been denied, violated or infringed, or is threatened, the court may, under Article 23 grant appropriate relief, including:

- “(a) a declaration of rights
- (b) an injunction
- (c) a conservatory order
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24.
- (e) an order for compensation
- (f) an order of judicial review.”

(92) This Court in the case of *Gitobu Imanyara & 2 Others v. Attorney General*, SC Petition No. 15 of 2017, described Article 23 as

“the launching pad of any analysis on remedies for Constitutional violations”.

This statement has repeatedly been made in other decisions like *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*, SC Petition No. 3 of 2018; [2021] KESC 34 (KLR) and others. As a launching pad, it is acknowledged that the list of six remedies in Article 23(3) is not closed; that the court can grant any other appropriate relief not included in the list; that whether or not to grant a constitutional relief is an act of judicial discretion which must be exercised upon known legal principles and not arbitrarily, whimsically or capriciously.”

89. The Superior Court then concluded:

“(94) To answer directly the question posed by this issue, under common law principles, it is settled that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, like in tortious claims. In situations like those, compensation for personal loss depends on proof of such loss or damage. However, arising out of the violation of constitutional rights and fundamental freedoms of an individual under public law, the nature of the damages awardable are broadly compensatory or vindicatory, as should be apparent from the list of examples of reliefs in Article 23. While it is not necessary to prove loss or damage in cases of constitutional rights violations, the court may consider the extent, nature, gravity and immensity of harm suffered by the aggrieved party when determining the appropriate remedy. In



deserving cases, the redress may be in the form of an award of damages to compensate the victim. In some cases, a suitable declaration, an injunctive or conservatory order, or an order of judicial review will suffice to vindicate the right.

- (95) In assessing the appropriate sum to be awarded as compensation, the court must feel satisfied that the sum will afford the victim adequate redress to vindicate the victim's constitutional right. Assessment of the right quantum for compensation will take into account all the relevant facts and circumstances of the violation and the victim in the particular case, bearing in mind any aggravating features. We stress that the purpose of constitutional relief of an award of compensation is not necessarily intended to punish the violator, but only to vindicate the right of the victim.

....

Therefore, once a petitioner has presented proof on a balance of probabilities that his or her rights were violated, the court must vindicate and affirm the significance of the violated rights, even though the petitioner may not present evidence of any loss or damage suffered as a result of the violation. For these reasons, it can be said that the approach in awarding damages or compensation in constitutional rights violation cases is different from that in tortious claims....”

90. The Court of Appeal in *Peter Ndegwa Kiai ta Pema Wines & Spirits v Attorney General & 2 others* [2021] KECA 328 (KLR) further noted as follows:

- “15. The relevant principles applicable to award of damages for constitutional violations under the *Constitution* were also explained by the Privy Council in the case of *Siewchand Ramanoop v The AG of T&T*, PC Appeal No 13 of 2004. It was held by Lord Nicholls at Paragraphs 18 & 19 that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense as follows:.

“When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not



necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.”

16. The guiding principle to be gleaned from these decisions is that an award of general damages in constitutional petitions is discretionary and will depend on the circumstances of each case, and can indeed be granted as compensation for proven loss.”

91. On punitive damages, the Court of Appeal in *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR guided as follows:

“32. The appellants claimed for exemplary and punitive damages. Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of case in which exemplary damages may be awarded which are:

- i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
- ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
- iii) where exemplary damages are expressly authorized by statute.

Lord Devlin also gave expression to 3 considerations which must be borne in mind in any case in which an award of exemplary damages is being claimed. The first category is that the plaintiff himself must be the victim of the punishable behaviour; the second category is that the power to award exemplary damages must be used with restraint for it constitutes a weapon and can be used either in defence of liberty or against liberty and thirdly, the means of the defendant, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages.”

92. Correspondingly, the Court in *Abdulhamid Ebrahim Ahmed v Municipal Council Of Mombasa* [2004] eKLR the Court observed as follows:

“Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law. They are awarded in actions in tort, and only in three categories of cases. The first category relates to the oppressive, arbitrary or unconstitutional actions of servants of government. This category is not confined to acts of government servants only but includes those of other bodies exercising functions of a governmental character. The case of *Rookes supra* related to the acts of a trade union. The reason why exemplary damages are awarded mainly against the government or bodies exercising functions of a governmental character is because the servants of the government are also servants of the people and the use of their power must always be subordinate to their duty of service.”

93. Having regard to the above; I find that the Petitioner is entitled to the following reliefs:



- a) A declaration is hereby issued that the Respondent violated the Petitioner's right to fair administrative action under Article 47 of the *Constitution* for unreasonably failing to notify and/or require the Petitioner to answer or respond to the adverse information against him to enable the Respondent's objective assessment prior to notifying his employer thus unfairly prejudicing the Petitioner's employment and inordinate and unexplained delay in issuing him a Notice to Show Cause (eight months later) despite receiving and informing the employer within a month of receipt of the said information.
- b) The decision to hold in abeyance for an indefinite period the Petitioner's Fit and Proper Test communicated via the letter dated 16th January, 2019 is hereby quashed.
- c) This Court hereby issues a mandatory order directing the Respondent to consider and make a decision on the pending application for the Petitioner's Fit and Proper Test in respect of Geghis Capital Limited dated 14/9/2018 and any other such application affecting the Petitioner within 60 days and upon completion give a copy of its decision to the Petitioner.
- d) Compensation to the tune of Kshs. 7,500,000=
- e) Costs of this Petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF JULY, 2025.

L N MUGAMBI

JUDGE

