



**Dande v Capital Markets Authority; Cytonn Asset Managers & another  
(Interested Parties) (Petition E283 of 2020) [2025] KEHC 12575 (KLR)  
(Commercial and Tax) (16 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12575 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
PETITION E283 OF 2020  
H NAMISI, J  
SEPTEMBER 16, 2025**

**N THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF THE  
RIGHTS AND FREEDOMS IN ARTICLES 2, 3, 10, 19, 20, 21, 22(1), 23, 27, 28, 40,  
47, 48, 50(1)& (2), 73, 75, 258(1) & 259(1) OF THE CONSTITUTION OF KENYA;**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION OF THE CAPITAL MARKETS ACT;**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION OF THE CAPITAL  
MARKETS (COLLECTIVE INVESTMENT SCHEMES) REGULATIONS 2001;**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**BETWEEN**

**EDWIN H DANDE ..... PETITIONER**

**AND**

**THE CAPITAL MARKETS AUTHORITY ..... RESPONDENT**

**AND**

**CYTONN ASSET MANAGERS ..... INTERESTED PARTY**

**CYTON HIGH YIELD FUND ..... INTERESTED PARTY**



## JUDGMENT

1. The Petitioner is the Managing Partner, Chief Executive Officer and one of the heavy investors in the Cytonn Group of Companies.
2. The Respondent is an independent government regulating agency, established under section 5 of the [Capital Markets Act](#), responsible for supervising, licensing and monitoring the activities of market intermediaries, including the stock exchange and the central depository and settlement system and all other persons licensed under the [Capital Markets Act](#).
3. The 1<sup>st</sup> Interested Party is a licenced Fund Manager by the Capital Markets Authority, licenced to provide Fund Management and Investments Advisory Services to both individuals and corporates. The 2<sup>nd</sup> Interested Party is a Unit Trust Scheme under the Capital Markets (Collective Investments Schemes) Regulations 2001 that offers access to high yield investments to its investors.
4. The gravamen of the dispute originates from a directive issued by the Respondent contained in a letter dated 3 June 2020, which required the 1<sup>st</sup> Interested Party, in its capacity as Fund Manager for the 2<sup>nd</sup> Interested Party, to ensure that its investments in projects related to Cytonn Group of Companies did not exceed a maximum of 10% of the fund's portfolio. The Respondent's directive was premised on its interpretation and application of Regulation 16(2) of the Capital Markets (Collective Investment Schemes) Regulations, 2001
5. The Petitioner presented a Petition dated 10 August 2020 seeking the following reliefs:
  - i. An order of Certiorari be and is hereby issued, to bring into the High Court and quash the Respondent's directive contained in the letter dated 3 June 2020, limiting the Interested Parties to invest only up to a maximum of 10% of funds in their portfolio in Cytonn related projects;
  - ii. An order of Prohibition be and is hereby issued against the Respondent from bringing the 2<sup>nd</sup> Interested Party under the ambits of Regulation 16(2) of the Capital Markets (Collective Investments Schemes) Regulations 2001;
  - iii. A declaration be and is hereby issued that the purported illegal, unlawful and malicious directive issued by the Respondent through a letter dated 3 June 2020 directing that the 1<sup>st</sup> Interested Party do comply with the 10% limit in line with Regulations 16(2) constitutes a violation of the Petitioner's and the Interested Parties' rights under Articles 27, 28, 40, 47 and 50 of [The Constitution](#);
  - iv. A declaration that the Petitioner be compensated a total sum of Kshs 50 million or any other amount that the Court deems sufficient and/or appropriate by the Respondent for the violation of the Petitioner's rights and fundamental freedoms under Article 27, 28, 40, 47 and 50 of [The Constitution](#);
  - v. A declaration that the provisions of Regulation 16(2) of the Capital Markets (Collective Investment Schemes) Regulations 2001 do not apply to special collective investment schemes in which a Fund Manager, Trustee and/or a custodian is not related to each other by either through a holding company or a subsidiary;
  - vi. An order of permanent injunction restraining the Respondents and any other agent or entity acting under its instructions from purporting to classify the 2<sup>nd</sup> Interested Party as falling under Regulation 16(2) of the Capital Markets (Collective Investment Schemes) Regulations 2001;



- vii. Costs of this Petition;
- viii. Any other or further relief as this Honourable Court may deem fit to grant.

### **Brief Background**

6. The 2<sup>nd</sup> Interested Party, Cytonn High Yield Fund, is a fund established and regulated by the Capital Markets (Collective Investment Schemes) Regulations 2001. According to the Petitioner, the formation and operation of the 2<sup>nd</sup> Interested Party was approved by the Respondent. This was done when the promoters of Cytonn Group Companies, being desirous of establishing the special investment vehicle, approached the Respondent towards discussions on establishing the same. On 4 July 2018, the Respondent directed Cytonn Investment Management and the 1<sup>st</sup> Interested Party to set up the 2<sup>nd</sup> Interested Party with the purpose of the 2<sup>nd</sup> Interested Party investing in Cytonn's own projects.
7. On 17 August 2018, drafts of incorporation documents were submitted to the Respondent, with the proposal to have the 1<sup>st</sup> Interested Party become the Fund Manager, National Bank of Kenya as Trustee, and Standard Chartered Bank Kenya Limited as the Custodian. On 12 February 2019, the Respondent wrote to the 1<sup>st</sup> Interested party expressing its satisfaction with the incorporation documents submitted and satisfied that they had complied with the provisions of the Capital Markets (Collective Investment Schemes) Regulations 2001. A certificate of registration was duly issued and the 2<sup>nd</sup> Interested Party commenced its operations on 7 October 2019.
8. The Petitioner pleaded that the 2<sup>nd</sup> Interested Party is particularly authorised to operate as a special fund in line with the Collective Investment Schemes Guidance on Valuation of CIS which states that the asset allocation of special funds shall be clearly described in the formation Memorandum and approved by the Authority on case-by-case basis.
9. Shortly after it began its operations, the Respondent wrote to the 2<sup>nd</sup> Interested Party, vide letter dated 3 June 2020, directing the 1<sup>st</sup> Interested Party, as Fund Manager, to align the investment products and activities of the 2<sup>nd</sup> Interested Party to the ambit and provision of Regulation 16(2) of the Capital Markets (Collective Investment Schemes) Regulations 2001, as read together with Regulation 79 thereof, in that the 1<sup>st</sup> Interested Party can only invest 10% of the funds in its portfolio in Cytonn related projects.
10. Soon thereafter, on 15 June 2020, the 1<sup>st</sup> Interested Party received correspondence from National Bank of Kenya, the Trustee of the 2<sup>nd</sup> Interested Party, making reference to the letter of 3 June 2020 from the Respondent, to the effect that the Trustee should await further clearance from the Respondent before investing any funds.
11. The Petitioner alleges that these erroneous directives limit the investment capacity of the 2<sup>nd</sup> Interested Party and contends that they contravene various constitutional provisions and statutory regulations. It is on this basis that the Petitioner and Interested Parties challenge the directives as being illegal, ultra vires and malicious.

### **Petitioner's Case**

12. It is the Petitioner's case that the directives are illegal and offend various rights in the Bill of Rights. The Petitioner argued that whereas *The Constitution* clearly prohibits discrimination of any sort, the Respondent meted out manifest discrimination of the Petitioner and Interested Parties in various ways. Firstly, the Respondent did not accord the Petitioner and Interested Parties' board of representatives



- the chance to inform the investors who would be fundamentally affected by the sudden halt of investments and change of the investment vehicle and the activities of the 2<sup>nd</sup> Interested Party.
13. Secondly, the Respondent failed to give adequate notice of the nature and reasons of the proposed administrative action, yet the said action adversely affects the rights and fundamental freedoms of each and every investment partner of Cytonn Group of Companies. The Petitioner argued that the decision to limit the investment capacity of the 1<sup>st</sup> Interested Party to 10% without further notice was, therefore, discriminatory.
  14. It is the Petitioner's case that the Respondent, while clearly aware of the provisions of Regulations 127 of Capital Markets (Collective Investment Schemes) Regulations 2001, acted with impunity to interpret that the 2<sup>nd</sup> Interested Party falls under Regulation 16 of Capital Markets (Collective Investment Schemes) Regulations 2001.
  15. Placing reliance on the case of *Ekuru Aukot -vs- IEBC & 3 Others* [2017] eKLR, the Petitioner submitted that the Respondent's actions amount to unfair treatment of the 2<sup>nd</sup> Interested Party, which is a violation of Article 27(1) of *The Constitution*. Further, the Plaintiff argued the issuance of the directive robs the 2<sup>nd</sup> Interested Party of its dignity as a juristic person and imputes bad character on the part of the 1<sup>st</sup> Interested Party and other stakeholders in Cytonn Group of Companies, which is a violation of Article 28 of *The Constitution*. The Petitioner averred violation of other constitutional provisions, including Articles 40 and 50(1).
  16. The Petitioner posited that Regulation 16(2) of Capital Markets (Collective Investment Schemes) Regulations 2001 does not apply to Special Collective Investment Schemes, in which a Fund Manager, Trustee and/or Custodian is not related to each other by either through a holding company or a subsidiary. The interpretation of the provision is that it places a restriction on investing not more than 10% of a CIS portfolio in related projects in a Collective Investment Scheme in which both the Trustee and the Custodian are related by either being subsidiaries or through buying of stakes into one another as provided for under section 154 of the *Companies Act*. These restrictions are meant to limit insider investing where the governing organs of Trustee, Fund Manager and Custodian are related. The Petitioner argued that the regulation does not apply to the 2<sup>nd</sup> Interested Party since the 2<sup>nd</sup> Interested Party has no relation whatsoever to the Trustee or Custodian. Further, the 2<sup>nd</sup> Interested Party is not related or even co-owned by other key players of the Fund either as a subsidiary or a holding company within the meaning of section 154 of the *Companies Act*.
  17. The Petitioner protested what he terms as persistent pursuit, targeting, harassment and whimsical shutting down of Cytonn and its products on erroneous interpretations of the *Capital Markets Act* and the Capital Markets (Collective Investment Schemes) Regulations 2001, yet the Respondent rarely targets other players in the market with its constant harassment. The Petitioner enumerated several suits in which it has challenged the decisions of the Respondent.
  18. The Petitioner challenged the administrative action by the Respondent for its irregularity, illegality and discriminative nature. He posited that fair administrative action in the present-day constitutional dispensation is a concept that cannot be wished away. He relied on numerous authorities including *Judicial Service Commission -vs- Mbalu Mutava & Another*, Civil Appeal No 52 of 2014 [2015] eKLR, *Catherine Chepkemai Mukenyang -vs- Evanson Pkemei Lomaduny & Anor* [2022] eKLR and *Edwin Harold Dande & 3 Others -vs- DPP & 2 others*, Supreme Court Petitions 4, 6 and 8 of 2002 (Consolidated).
  19. It is the Petitioner's contention that he has satisfied the requirements of an order of judicial review as laid out in the Ugandan case of *Pastoli -vs- Kabale District Local Government Canal & others* [2008]



2EA 300, that is by demonstrating that the act complained about is tainted with illegality, irrationality and procedural impropriety. The Petition is, therefore, meritorious and ought to succeed.

### **The Respondent's Case**

20. The Respondent opposes the Petition, arguing that the Court would be overstretching its mandate by granting the orders sought, and, that the Petitioner's rights have not been violated.
21. It is the Respondent's case that on 20 February 2020, the 1<sup>st</sup> Interested Party made an application to the Respondent to exempt the 2<sup>nd</sup> Interested Party from Regulation 78(2)(c) of the Capital Market (Collective Investment Schemes) Regulations, 2001, which restricts investments into single issuer real estate to 25%. Upon discussions by all parties, the Respondent wrote to the 1<sup>st</sup> Interested Party on 3 June 2020 indicating that the request for waiver will not be progressed on account of the 2<sup>nd</sup> Interested Party being a Collective Investment Scheme with exposure of up to 80% in real estate in diversified and non-related entities. The Respondent averred that the decision was informed by the fact that in the event a further waiver is granted as to the limit of investment, the concentration risk would be higher and consequently, the investors would be exposed to not only a single asset class, but also real estate assets of a related entity. The Respondent argued that its decision was further informed by the concentration risk, including, that the same involved public funds pooled and collected by the 2<sup>nd</sup> Interested Party, which are invested into Cytonn Investment Management Plc real estate by the 1<sup>st</sup> Interested Party, which is a regulated affiliate of Cytonn Investment Management Plc.
22. It is the Respondent's case that vide letter dated 24 March 2020, it directed the 1<sup>st</sup> Interested Party to ensure compliance with the provisions of Regulation 78(2)(c) and to ensure that exposure to the single issuer was up to a maximum of 25% of the pooled public funds. It also directed the 1<sup>st</sup> Interested Party to comply with the 10% limit provided under Regulation 16(2). Between 27 July 2020 and 3 August 2020, the parties herein engaged to discuss the investment limits applicable to the 2<sup>nd</sup> Interested Party and the proposal for easing of the 10% limited in related entities as per the Regulations. The Respondent stated that, despite all this, the 2<sup>nd</sup> Interested Party was and still is in breach of the Regulations with respect to the applicable investment limits of 10% in related parties and 25% in single entity.
23. The Respondent asserted that its role as a statutory regulator with broad powers is to ensure the security, efficiency and orderly functioning of the capital markets. Section 11(3) of the *Capital Markets Act* grants it the authority to regulate capital markets and to ensure market security. Section 11(3) (cc) specifically allows it to impose sections for breaches, including ordering remedies or suspending licences, while section 11(3)(i) empowers it to give directions to any person. Its actions, including the impugned directive, were within these statutory powers and were not ultra vires. The Respondent contended that in discharging its duties in this matter, the Respondent is and remains obligated to exercise care and due diligence to protect the investors and all other players within its regulatory jurisdiction.
24. The Respondent further argues that the Petitioner has not adduced sufficient tangible evidence to establish any of the alleged violations of his constitutional rights. Relying on the case of *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* (2019) eKLR, the Respondent contends that it did not infringe on the Petitioner and Interested Parties' right to property under Article 40, but simply required them to comply with well laid Regulations.
25. On the question of fair administrative action, the Respondent submitted that it is evidence that there were several engagements between the parties and that the Respondent actively engaged the Interested



Parties. The documents produced show elaborate communication and engagement between all the relevant parties, thus negating the claim of mala fides, violation of fair administrative action and lack of opportunity to be heard as purported by the Petitioner and Interested Parties.

26. The Respondent urged this Court to take judicial notice of the following:
- i. In I-IC.COMM IP NO. E063 OF 2021; CYTONN HIGH YIELD SOLUTIONS LLP VS. THE OFFICIAL RECEIVER & HC.COMM IP NO. E064 OF 2021; CYTONN REAL ESTATE PROJECT NOTES LLP VS. THE OFFICIAL RECEIVER there was a liquidation order issued against the special investment vehicles managed by the 2<sup>nd</sup> Interested Party wherein the Honourable Court noted that under the Common Law doctrine of tracing, the Creditors would be entitled to trace their funds into projects invested in by the 2<sup>nd</sup> Petitioner herein and directed that the properties be preserved awaiting the realization of the assets these special purpose investment vehicles;
  - ii. On 19<sup>th</sup> January, 2024 the Honourable Court allowed the Official Receiver to sell property owned by Cytonn affiliated companies to recover investors' monies. The Honourable Court in its ruling stated that the doctrine of tracing was applicable in the insolvency petitions as Cytonn Asset Managers Limited collected money from investors and invested it in affiliated companies;
  - iii. Cytonn affiliated companies have been in continuous violation of the *Capital Markets Act* and enabling Regulations unable to pay back their investors and are currently being investigated by the Capital Markets Authority Fraud Investigation unit, under the Director of Criminal Investigations. Consequently the Petitioner and 1<sup>st</sup> Interested Party herein filed suit HC.Comm No. E007 of 2021; Edwin H. Dande & 2 others Vs. Capital Markets Authority & The Director of Criminal Investigations seeking orders to stop being investigated for offences under the Act (which matter is yet to be determined);
  - iv. The Interested Parties and its affiliated companies currently owe investors approximately Kshs. 5.7 billion which remain unpaid to date; and
  - v. The Petitioner and Interested Parties being regulated entities by the Respondent should abide by the rules that govern the space it operates within including adhering to any directions issued by the Respondent.
27. The Respondent submitted that the Petitioner had not exhausted the available internal administrative remedies, pursuant to section 9(2) and (3) of the Fair Administrative Actions Act, before resorting to filing the present suit. The Respondent pointed out that the *Capital Markets Act* established the CMA Tribunal under section 35A, as a dispute resolution mechanism, where aggrieved parties can appeal decisions. The Respondent contended that judicial review should only be a last resort and that the Petitioner had not demonstrated any exceptional circumstances to bypass the exhaustion doctrine. The Respondent considered this suit to be vexatious, premature and an abuse of court process.
28. The Respondent argued that judicial review is concerned with the lawfulness of the decision-making process, rather than the merits of the decision itself. The Respondent distinguished the Pastoli Case (supra) by arguing that its actions were taken in good faith to protect investors and to align with regulatory guidelines. It emphasized that public interest militates against the curtailment of its powers, as the Authority provides important services, and that a suspension of its decisions could create a void.



## Analysis & Determination

29. I have carefully read the pleadings, submissions and authorities cited by the parties. The following issues lend themselves for determination:
- i. Whether the Petition offends the doctrine of exhaustion of remedies;
  - ii. Whether the 2<sup>nd</sup> Interested Party is a collective investment scheme and, therefore, subject to Regulation 16(2) of the Capital Markets (Collective Investments Scheme) Regulations;
  - iii. Whether Respondent's directives violate the Petitioner and Interested Parties' rights to property, fair administrative action and fair hearing;
  - iv. Whether the Respondent's directives were illegal and ultra vires;
  - v. Whether the Petitioner is entitled to the reliefs sought;
  - vi. Who bears the costs of this suit

### A. The Constitutional and Statutory Imperative of Exhaustion

30. The first issue that this Court must determine is whether the Petition offends the doctrine of exhaustion of remedies. This doctrine is not a mere procedural technicality; it is a substantive principle of law, judicial policy and constitutional propriety that goes to the very jurisdiction of this Court to entertain the matter at this stage.
31. The doctrine is firmly anchored in our legal framework. Firstly, regarding fair administration action, Article 47 of *the Constitution* provides as follows:
1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
  2. 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.
  3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
    - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
    - (b) promote efficient administration.
32. The procedure for judicial review is provided for under section 9 of the *Fair Administrative Action Act* as follows:
1. Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
  2. The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.



3. The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1).
  4. Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
  5. A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.
33. This statutory command reflects a clear legislative intent to promote orderly and efficient administration of justice.
34. The Respondent argued that the Petitioner failed to exhaust the available internal administrative remedies provided under the *Capital Markets Act*. It is an established principle that where a statute provides a clear procedure for addressing grievances, that procedure should ordinarily be followed first. The principle was settled by the Supreme Court in the case of *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) SC Petition No 3 of 2016; [2019] eKLR*, where the Court, in giving the doctrine its definitive weight, stated as follows:
- “..... Even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute”.
35. Similarly, the Court of Appeal in *Nyaoga v Chairman Kisii County Assembly & 3 others [2023] KECA 1540 (KLR)* as follows:
- “The doctrine of exhaustion of remedies was created by courts in order to promote an efficient justice system and autonomous administrative state. It is a principle that requires parties to exhaust all available local administrative remedies before seeking redress in a court of law on a constitutional issue. An aggrieved party must first pursue all avenues of relief found within the administrative agency responsible for the issue at hand. The reason for this is to allow administrative agencies to address, and to potentially resolve the issue before escalating the same to the courts.
- Indeed, this Court in *Mutanga Tea & Coffee Company Ltd vs. Shikara Limited & Another [2015] eKLR* cited with approval the case of *Speaker of the National Assembly vs. Karume [2008] 1 KLR 425* where the court stated:
- “where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an act of parliament that procedure should be strictly followed.”
36. In the same case, the Court of Appeal further noted as follows:
- “That having been said, this Court also needs to look at the flip side and discuss the exception to the doctrine of exhaustion before coming to our final conclusion. These exceptions



provide circumstances where an individual may bypass the exhaustion requirement and directly seek redress from court. In *Chief Justice and President of the Supreme Court of Kenya & Another vs. Bryan Mandila Khaemba* [2021] eKLR this Court acknowledged that the doctrine of exhaustion notwithstanding, courts still retain residual jurisdiction to intervene in exceptional circumstances despite existence of alternative remedies where the action complained of is marred by illegality and procedural irregularities.

25. As provided in section 9(4) of the *Fair Administrative Action Act*, there are exceptions to the exhaustion rule in exceptional circumstances [underlined and emboldened for emphasis]. In the case of *Republic vs. National Environmental Management Authority Ex Parte Sound Equipment Ltd*, [2011] eKLR this Court stated:

“...where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only on exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made...it is necessary for the court to look carefully at the suitability of the statutory appeal in context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.”

37. In *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] KECA 304 (KLR), the Court of Appeal held that the exhaustion requirement is in conformity with the constitutional imperative under Article 159(2)(c) to promote alternative forms of dispute resolution, making courts the forum of last resort.
38. Section 9(2) and (3) of the *Fair Administrative Action Act* explicitly state that the High Court or subordinate court shall not review an administrative action unless mechanisms for appeal or review under any other written law are first exhausted. Furthermore, if the Court is not satisfied that the remedies have been exhausted, it shall direct the applicant to first exhaust them.
39. In the present case, Parliament has provided such a mechanism. Section 35A of the *Capital Markets Act* establishes the Capital Markets Tribunal, which is mandated to hear and determine any appeal made by an aggrieved party following a determination by the Authority on any matter relating to the Act.
40. In the instance case, the Petitioner has not demonstrated any attempt at exhausting the internal mechanisms established by the *Capital Markets Act*. Not only is there no evidence of the attempt to settle the matter using the statutory mechanism provided, but the Petitioner’s pleadings and submissions are completely silent on the issue.

## **B: Exceptional Circumstances**

41. Nevertheless, the *Fair Administrative Action Act* provides for an exception to the rule in section 9(4), allowing the Court to exempt an applicant from the obligation to exhaust an internal remedy if there are exceptional circumstances. In such instances, the burden would rest on the applicant to formally apply for such an exemption and demonstrate the existence of these exceptional circumstances. This is not a mere procedural formality. It is a substantive requirement that compels an applicant to formally crystallize their arguments and adduce evidence to persuade the Court that their circumstances are truly exceptional and that granting an exemption is in the best interest of justice.



42. In the present case, the Petitioner has not demonstrated that he sought an exemption under section 9(4), nor has he shown that exceptional circumstances exist to bypass the statutory dispute resolution mechanism. The Petitioner has, therefore, failed to discharge the legal onus placed upon him by this provision. The Petitioner’s counsel’s attempt to differentiate between an appeal and a review in this context is legally flawed, as the doctrine applies where the enabling statute provides a dispute resolution mechanism, whether it is an appeal to a tribunal or review by a higher authority.
43. The Petitioner approached this Court by way of a constitutional petition alleging that the administrative action by the Respondent was not merely a misapplication of regulatory provisions but a violation of a host of fundamental rights and freedoms guaranteed under The Constitution. The Petitioner’s case was strategically framed to invoke this Court’s special jurisdiction under Article 165(3) (b) of The Constitution, which grants it the power to determine questions concerning violation of rights in the Bill of Rights.
44. This Court has considered the Petitioner’s allegations of a pattern of harassment by the Respondent. While such claims, if substantiated, could potentially constitute exceptional circumstances, mere unsubstantiated averments in pleadings are insufficient to meet the high threshold required to bypass a clear statutory remedy. To permit otherwise would be to allow a litigant to circumvent the will of Parliament simply by inserting the words “bias” or “harassment” into their petition. The Petitioner has not placed before this Court any prima facie evidence of malice or bad faith that would render an appeal to the Tribunal a futile exercise.
45. In the Albert Chaurembo Mumba case (supra), in addressing a similar argument advanced by the respondent was that there is no provision in the Retirement Benefits Act that bestows on the CEO the powers to interpret the violations of constitutional or fundamental rights of the pensioners, the Supreme Court opined thus:
- “In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”
46. The core of this dispute is the correct interpretation of Regulation 16(2) of the Regulations. This is a technical question of financial regulation. The Tribunal, being a specialised body composed of experts in capital markets law and finances, is not only a suitable forum but is the most appropriate forum to determine this issue in the first instance. Its powers under Section 35A of the Act are extensive. An order to set aside the directive would achieve the same practical outcome as an order of certiorari, thereby providing the Petitioner with the primary relief sought.
47. Further, the alleged constitutional violations in this Petition are not freestanding. They are entirely contingent upon a preliminary finding: that the Respondent’s interpretation and application of Regulation 16(2) was unlawful. Therefore, the logical and proper judicial sequence is to first allow the Tribunal to determine the non-constitutional question of the Regulation’s meaning. To permit the Petitioner to leapfrog this essential step would be to invite this Court to make premature, possibly unnecessary, constitutional declarations. This would not only be an inefficient use of judicial resources, it would also risk the improper constitutionalization of ordinary regulatory disputes.
48. While the Tribunal cannot make final declarations on the constitutionality of a statute, it is bound by The Constitution. In interpreting the Capital Markets Act and its regulations, the Tribunal must



be guided by the national values in Article 10 and must apply the law in a manner that gives effect to the Bill of Rights, as required under Article 20(3). It is, therefore, a constitutionally-compliant forum capable of hearing and resolving the substantive regulatory dispute.

49. Given the clear statutory framework for dispute resolution and the absence of a demonstrated application for exemption or proof of exceptional circumstances, this Court finds that the Petitioner's application offends the doctrine of exhaustion. This is a fatal flaw to the petition.
50. In conclusion, the Petition dated 10 August 2020 is hereby dismissed on grounds of being premature for failure to exhaust the available statutory remedies. The dismissal is without prejudice to the Petitioner's right to pursue an appeal before the Capital Markets Tribunal in accordance with the provisions of the *Capital Markets Act*.
51. Costs are awarded to the Respondent.

**DATED AND DELIVERED AT NAIROBI THIS 16 DAY OF SEPTEMBER 2025**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

Petitioner & Interested Parties: Mr. Ogada

Respondents: Ms. Odongo

Court Assistant: Lucy Mwangi

