



**Juma v Capital Markets Authority & another (Petition E396 of 2020)  
[2023] KEHC 27654 (KLR) (Constitutional and Human Rights) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 27654 (KLR)

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

**PETITION E396 OF 2020**

**M THANDE, J**

**MARCH 29, 2023**

**BETWEEN**

**JUMAAN MBARAK JUMA ..... PETITIONER**

**AND**

**CAPITAL MARKETS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. By his Petition dated 30.11.2020, the Petitioner seeks the following orders:
  1. A declaration that Sections 11(3) (cc) and (h), 11A, 13A, 13B, 25A, 26 and 26A of the *Capital Markets Act* impede the rights to fair trial.
  2. A declaration that Sections 11(3) (cc) and (h), 11A, 13A, 13B, 25A, 26 and 26A are unconstitutional and thus void.
  3. A declaration that Sections 11(3) (cc) and (h), 11A, 13A, 13B, 25A, 26 and 26A offend the international best practices on the rules on natural justice.
  4. A declaration that the 1<sup>st</sup> respondent's conduct of proceedings before its relevant Board or delegated body acting as prosecutor, fact finder, judge and remedy fashioner, the said model is unconstitutional and void.
  5. A declaration that the 1<sup>st</sup> respondent's conduct of proceedings before its Board or delegated bodies fails the constitutional test for fair hearing, fair administrative action and offends the doctrine of nemo iudex in causa sua, is unconstitutional and void.



6. A declaration that the conduct of judicial functions by the 1<sup>st</sup> respondent's Board or delegated bodies in the manner that 1<sup>st</sup> respondent currently constitutes its proceedings, that such conduct is unconstitutional and void.
  7. A declaration that Section 13A of the *Capital Markets Act* is an affront to Articles 157, 243, 244 and 245 of *the Constitution* and is thus void.
  8. That to the extent that the 1<sup>st</sup> respondent receives a benefit from proceedings before it credited to the General Fund, the said benefit vitiates the proceedings before it, compromises the constitutional ideal of impartiality, is unconstitutional and void.
  9. An order of mandamus to compel the respondents to align the 1<sup>st</sup> respondent's constitutive statute (the *Capital Markets Act*) and its regulatory functions to *the Constitution* within such time as the court will prescribe.
  10. That costs of this petition be provided for.
2. It is the Petitioner's case that the exercise by the 1<sup>st</sup> Respondent of its mandate under Sections 11(3) (cc) and (h), 11A, 13A, 13B, 25A, 26 and 26A of the *Capital Markets Act* (the impugned Sections) of investigation, prosecution and imposition of sanctions is in breach of the constitutional imperatives on fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Petitioner contends that the impugned provisions render the 1<sup>st</sup> Respondent as judge, jury and executioner thereby offending the principle of nemo iudex in causa sua and Article 47 of *the Constitution*. The Petitioner further avers that in spite of the 1<sup>st</sup> Respondent being sued severally by parties urging rights in personam, the Respondents have not deemed it necessary to align the impugned Sections to accord with *the Constitution* and the rules of natural justice and fair administrative action. He has now brought this Petition in the public interest to urge rights in rem on the constitutionality of the impugned Sections of the Act and for the same to be declared unconstitutional and void in keeping with Article 2(4) of *the Constitution*.
  3. In particular, the Petitioner contends that the 1<sup>st</sup> Respondent's powers to launch its own criminal proceedings and impose huge financial penalties and recover the same as civil debts under Section 25(A) cannot pass constitutional muster. He further contends that 1<sup>st</sup> Respondent is a beneficiary of the financial penalties levied on offenders before it. As such, the process is unfair, lacks impartiality and offends Article 47 of *the Constitution*. He further asserts that Section 13A of the Act envisages civil and criminal proceedings and further that the powers vested in the 1<sup>st</sup> Respondent's chief executive officer are quasi-judicial in nature and usurp the judicial power of courts and tribunals, thereby offending Article 159 of *the Constitution*. He summed up by stating that the existence of the impugned Sections in the Act is a continued breach of *the Constitution* and warrants judicial intervention and the grants of the remedies sought.
  4. The Petition is opposed by the Respondents.
  5. In its grounds of opposition dated 16.11.21, the 1<sup>st</sup> Respondent stated that it is vested with powers to investigate, prosecute and issue sanctions for breach of the Act or Regulations, to enable it deal with matters that may dent or diminish investor and public confidence in the capital markets. The special character and mandate of the 1<sup>st</sup> Respondent makes it necessary to have a constitutionally allowed overlap of functions under the impugned Sections. It is the 1<sup>st</sup> Respondent's case that the investigative and enforcement conferred upon it by the impugned Sections are pivotal powers to attainment of its objectives under Section 11 of the Act including the protection of investors. As such, the prayers sought would make it impossible for the 1<sup>st</sup> Respondent to realize this mandate.



6. The 2<sup>nd</sup> Respondent filed grounds of opposition which are not dated. The grounds are that an order declaring that the impugned Sections are unconstitutional would greatly and negatively impact the objective of the Act; that Section 11A is a codification of International Best Practices in the regulation of capital markets; that Section 11A as read with other provisions of the Act, specifically Section 14(1) that authorizes delegation of the 1<sup>st</sup> Respondent's functions and Section 34A(4) that authorizes the Respondent to refer some matters to the Capital Markets Tribunal are meant to take care of unique situations like conflicts of interest and possible complicity; that Sections 11A and 11(3) enable CMA instill discipline, facilitate development of a fair, orderly and efficient capital market, create a bedrock for investor protection and confidence in the Kenyan capital markets. As such, declaring unconstitutional would render CMA's regulation inefficacious; that statutory authorization for overlapping functions is an exception to the *nemo iudex in causa sua*, principle as supported by the cases of *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR and *Ernst & Young LLP v Capital Markets Authority & another* [2017] eKLR; that the Act is deliberately designed to empower CMA to preform overlapping roles in the oversight of Kenyan capital markets and does not constitute violation of Articles 50(1) as read with Article 47(1) of *the Constitution* of Kenya, 2010; that granting the prayers will be inconsistent with Article 159(2)(c) of *the Constitution* by hampering the operations of CMA in investigating and sanctioning errant market players. The Petition is otherwise an abuse of this Court's process and should be dismissed with costs.
7. The gravamen of the Petition is that the impugned provisions impede a fair trial and that the powers granted to the 1<sup>st</sup> Respondent usurp those of the Director of Public Prosecutions (DPP) and the investigative powers of the Inspector General of Police (IG of Police) and the National Police Service under Articles 157, 243, 244 and 245 of *the Constitution*.
8. Section 11(3)(cc) of the Act empowers the 1<sup>st</sup> Respondent to impose sanctions on a defaulting party and lists the nature of the sanctions that may be so imposed as follows:
  3. For the purpose of carrying out its objectives, the Authority may exercise, perform or discharge all or any of the following powers, duties and functions—
    - ac. impose sanctions for breach of the provisions of this Act or the regulations made thereunder, or for non-compliance with the Authority's requirements or directions, and such sanctions may include—
      - i. levying of financial penalties, proportional to the gravity or severity of the breach, as may be prescribed: Provided that the financial penalties shall be recoverable summarily by the Authority as civil debts;
      - ii. ordering a person to remedy or mitigate the effect of the breach, make restitution or pay compensation to any person aggrieved by the breach;
      - iii. publishing findings of malfeasance by any person;
      - iv. suspending or cancelling the listing of any securities or exchange-traded derivatives contracts, or the trading of any securities or exchange-traded derivatives contracts, for the protection of investors;
9. The 1<sup>st</sup> Respondent also has the mandate to inquire either suo moto or upon request into the affairs of any person or company of interest. Section 11(3)(h) mandates the 1<sup>st</sup> Respondent to:
 

inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it has granted a licence and any public



company the securities of which are publicly offered or traded on an approved securities exchange or on an over the counter market;

10. Section 11A confers upon the 1<sup>st</sup> Respondent, the power to delegate its functions as follows:
  1. The Authority may delegate any of its functions under this Act to-
    - a. a committee of the Board;
    - b. a recognized self regulatory organization; or
    - c. an authorized person.
  2. The Authority may, at any time revoke a delegation made under this section.
  3. A delegation made under this section shall not prevent the Authority from performing the delegated function.
11. Section 13A provides for the power of entry and search as follows:
  1. The chief executive officer may authorise an officer of the rank of Senior Officer or above to inquire into the affairs of a person under this Act.
  2. An officer authorised under subsection (1) may, where he is satisfied that a person has committed or is reasonably suspected of committing an offence under this Act in Kenya or elsewhere, apply to a magistrate for a warrant to search the premises of that person.
  3. The magistrate may issue a warrant authorizing the officer to exercise all or any of the following powers—
    - a. to enter any premises between sunrise and sunset to search for money, documents or other assets relevant to the inquiry;
    - b. to seize money, documents or assets which may be necessary for the inquiry or for which the purpose of civil or criminal proceedings and to retain them for as long as they are so required; and
    - c. to direct any person who has control over such assets to take any action with respect to such assets as the Authority may reasonably require with a view to protecting the assets until the court determines the appropriate course of action.
  4. In the interest of bank confidentiality, the powers of the officer in respect of any documents held by a banker shall be limited to making copies or extracts therefrom.
12. The contemplated inquiry into the affairs of a person under Section 13A may be made by a Senior Officer authorized by the 1<sup>st</sup> Respondent. Such officer may, if satisfied that the person has committed an offence, apply to a magistrate for a warrant to search the premises of that person. The warrant issued by the Magistrate authorizes the officer to enter any premises between sunrise and sunset, to search for, seize and retain as necessary, money, documents or other assets relevant to the inquiry or for the purpose of civil or criminal proceedings and to retain them for as long as they are so required. Section 13B provides that the 1<sup>st</sup> Respondent may on its own motion or upon receiving a complaint from any person that an offence has been committed or the Act has been flouted by any person, appoint a suitably qualified person to conduct investigations. The Section proceeds to provide how the appointed investigator will conduct the investigation.



13. Where there is breach of the Act, the regulations, rules, guidelines, notices or directions made thereunder, or the rules of procedure of a securities, commodities or derivatives exchange, Section 25A empowers the 1<sup>st</sup> Respondent to impose sanctions and levy financial penalties in accordance with the Act. Section 26 provides for suspension and revocation of a license by the 1<sup>st</sup> Respondent and lists the circumstances under which this may happen while Section 26A stipulates the effect of the suspension or revocation of a license.
14. The Petitioner takes issue with the impugned provisions as the powers, functions and mandate of the 1<sup>st</sup> Respondent provided thereunder overlap with those of other entities, in particular the DPP and the IG of Police.
15. The issues raised by the Petitioner are not new and have been the subject of consideration by our Courts. This is acknowledged by the Petitioner who however contends that previous cases have urged rights in personam but that his Petition has been brought in the public interest urging rights in rem.
16. The Petitioner submitted that the powers of the 1<sup>st</sup> Respondent to investigate, prosecute and impose sanctions are in breach of the constitutional imperative of fair administrative action.
17. Article 47 of *the Constitution* guarantees to every person, the right to fair administrative action 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.
18. In the case of *Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another* [2018] eKLR, Mwita, J. had this to say about the test that must be met in administrative action:
  40. Taking the above jurisprudence into account, there is no doubt in my mind, that acting as it did, the respondent violated 1st petitioner's right to a fair Administrative Action contrary to Article 47 of *the Constitution*. Administrative Actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness. According a party a hearing before taking action against him is no longer discretionary. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation.
19. Relying on the above case, the Petitioner contended that the 1<sup>st</sup> Respondent continues to issue notices to players in the capital markets to appear before it pursuant to its own investigations. The 1<sup>st</sup> Respondent then prosecutes the cases either directly or through delegation. Accordingly, the powers vested in the 1<sup>st</sup> Respondent by the impugned provisions are unfair, unreasonable, irrational, unprocedural and illegal.



20. Fair administrative action is entrenched in *the Constitution* and calls for administrative action that is devoid of caprice or anything that would occasion abuse of authority. In the Kenya Human Rights Commission case, the complaint was the deregistration of the 1<sup>st</sup> petitioner therein by the respondent without being accorded an opportunity to be heard. In the present case however no such thing has happened. Indeed the Petitioner states in his complaint that the 1<sup>st</sup> Respondent continues to issue notices to parties to appear before it.
21. The Act gives a person under investigation, an opportunity to be heard. Under Section 13B(2), such person is required to produce to the investigator, documents that are necessary for the investigation, to give an explanation or further particulars in respect thereof, to attend before the investigator and answer any question relating to the investigation and to assist the investigator.
22. The 1<sup>st</sup> Respondent's case is that the existence of overlapping functions under the impugned provisions is not unconstitutional. According to the 1<sup>st</sup> Respondent, the exercise of investigative and enforcement powers under the impugned provisions is pivotal to the attainment of the 1<sup>st</sup> Respondent's objectives. It was further submitted that the debate on the constitutionality of overlapping functions was extinguished by the Supreme Court, in the celebrated and landmark case of *Alnashir Popat & 7 others v Capital Markets Authority* [2020] eKLR.
23. I have looked at that case. The petitioners therein contended that by vesting both inquisitorial, investigative and enforcement functions in the 1<sup>st</sup> Respondent under Section 11(3)(cc) & (h) of the CMA Act is unconstitutional for being inconsistent with Articles 47(1) and 50(1) of *the Constitution*. The Court also considered whether the overlap offends the principle of *nemo iudex in causa sua esse*.
24. The issues raised by the petitioners in that case are on all fours with the issues raised by the Petitioner herein. The Supreme Court held as follows:
  - (46) Is this overlap unconstitutional? In other words, does the overlap foul the *nemo iudex in causa sua esse* principle and is thus unconstitutional as the petitioners argue?
  - (47) We do not think that the overlap per se is unconstitutional. The rights to fair administrative action and fair hearing are universal. The natural justice *nemo iudex in causa sua esse* principle is one of the fundamental principles in literally all common law jurisdictions. It is an exemplification of Lord Hewart, CJ's famous maxim in the case of *R v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, [1923] All ER Rep 233 that justice should not only be done but also be seen to be done.
  - (48) This principle is obviously blurred when one presides in the adjudication of one's cause or in a process one has an interest in. As the US Supreme Court stated in the case of *Re Murchison*, 349 U.S. 133, 136 (1955), cited to us by counsel for the petitioners, no person should be allowed to be a judge in his own cause or in a cause he has an interest in its outcome. Interest here includes a situation where one desires or is keen on obtaining a given result. A prosecutor, for example, has an interest in the conviction of a suspect he hauls into court.
25. The Supreme Court went on to state:
  - (49) Having so stated, we would also agree with counsel for the respondent that there are exceptions to most principles. An important exception to the *nemo iudex in causa sua esse* principle raised in this case is where the overlap of functions is a creature of statute and as long as the constitutionality of the statute is not in issue. Enunciating this exception in the Canadian case of *Re W. D. Latimer Co. and Attorney-General for Ontario* (1973), 2 O.R. (2d) 391, affirmed sub nom. *Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129, Dubin, JA stated:



“Where by statute the tribunal is authorized to perform tripartite functions, disqualification [on the ground of bias] must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task.”

- [50] As the Canadian Supreme Court later stated in the case of *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, “Administrative tribunals are created for a variety of reasons and to respond to a variety of needs.” In the case of securities commissions, that courts added, “By their nature, such commissions [read tribunals] undertake several different functions. They are involved in overseeing the filing of prospectuses, regulating the trade in securities, registering persons and companies who trade in securities, carrying out investigations and enforcing the provisions of the Act.”
- (51) Such bodies will therefore have repeated dealings, in both administrative or adjudicative capacities, with the same parties. It is for this reason and to achieve the efficiency required in the operations of the securities markets, that the legislatures more often than not, allow for an overlap of functions which in normal judicial proceedings would be kept separate.
26. After considering the submissions by the parties and the authorities cited, the Supreme Court stated:
- (53) In its decision in that case, the Canadian Supreme Court held that in assessing allegations of bias, courts must be sensitive to the fact that, in their “protective role”, securities commissions have a special character. As such, it is not enough to merely claim bias because a commission, in undertaking its preliminary internal review, did not act like a court. If it is clear from its empowering legislation that certain activities which might otherwise be considered “biased” form an integral part of its operations and the Commission has not acted outside its statutory authority, the doctrine of “reasonable apprehension of bias” per se cannot be sustained. The Commission’s structure and responsibilities as well as the manner of the discharge of its mandate must, inter alia, be considered.
- (54) We endorse this view. Administrative tribunals are not supposed to operate like courts of law. That is why they are allowed to be masters of their own procedure although they must act fairly. (See Lord Denning’s dictum in *Selvaraj v. Race Relations Board* [1976] 1 ALL ER 12). And that is also why we agree with the respondent that for purposes of efficiency and in the carrying out of the objective of the CMA Act, especially in the expeditious disposal of disputes that arise in the operations of the capital markets, the functions set out in Section 11(3)(cc)(h) cannot be performed by separate bodies. To fragment the discharge of those functions will, in our view, lead to disputes dragging for years on end and thus defeating one of the crucial objectives of the CMA Act: efficiency. As such, these functions have, as of necessity, to be discharged by one body hence the overlap in the mandate granted to CMA.
- (55) In the circumstances, we find and hold that Section 11(3) (cc) & (h) of the CMA Act is not unconstitutional. The overlapping mandate does not per se render the Section unconstitutional. What might turn out to be unconstitutional is the discharge of that dual mandate.
27. The Supreme Court noted the special character of the 1<sup>st</sup> Respondent and was persuaded that the vesting of the impugned functions in the 1<sup>st</sup> Respondent, is critical in meeting the objectives of the Act, the overlap of functions notwithstanding. The Court was also of the view that to split the discharge of



those functions would affect the expeditious disposal of disputes, thereby defeating one of the crucial objectives of the CMA Act, which is efficiency.

28. Having clearly pronounced itself on the constitutionality of Section 11(3)(cc) and (h) of the Act, the decision of the Apex Court is binding on this Court by dint of Article 163(7) of *the Constitution* which provides:

All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

29. The other impugned provisions, namely Sections 13A, 13B, 25A, 26 and 26A are also challenged by the Petitioner on the ground that they vest overlapping powers and functions upon on the 1<sup>st</sup> Respondent. The contest is similar to that in respect of Section 11(3)(cc) and (h). Accordingly, my finding is that the Supreme Court finding in the case of *Alnashir Popat & 7 others (supra)* applies mutatis mutandis to the remaining impugned provisions.

30. I now turn to Section 11A of the Act which provides that the 1<sup>st</sup> Respondent may delegate any of its functions under the Act to a committee of its Board, a recognized self-regulatory organization or an authorized person. The wording is “any of its functions under this Act”. The power of the 1<sup>st</sup> Respondent to delegate applies to all its functions under the Act and is not restricted to the functions in question herein. The 1<sup>st</sup> Respondent is also authorized to at any time revoke such delegation. In spite the delegation of its functions, the 1<sup>st</sup> Respondent retains the residual power to perform the delegated function.

31. All constitutional petitions are required to be pleaded with reasonable precision, and a party who alleges violation of rights must clearly state the nature of injury, the rights violated and the manner in which they have been violated. This principle was enunciated in the oft cited case of *Anarita Karimi Njeru v Republic [1979] eKLR* in which *Trevelyan and Hancox, JJ*s stated:

We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

32. Flowing from the cited case, it is quite evident that for a constitutional petition to succeed, a petitioner must cite with precision, the constitutional provisions alleged to have been violated or threatened and must also demonstrate the manner in which the said provisions have been violated or are threatened with violation and demonstrate the same with facts and evidence. of the case. In the present case, the Petition as drawn has not indicated with precision, in respect of Section 11A, the nature of injury caused or likely to be caused to the public, in respect of whom he says he brought the Petition, nor has he placed any evidence to demonstrate any violation as required.

33. In the end and in view of the foregoing, I find and hold that the Petition herein lacks merit and is hereby dismissed. The circumstances herein do not call for an award of costs.

**DATED AND DELIVERED IN NAIROBI THIS 29<sup>TH</sup> DAY OF MARCH 2023**

**M. THANDE**

**JUDGE**

In the presence of: -

..... for the Petitioner



..... for the 1<sup>st</sup> Respondent

..... for the 2<sup>nd</sup> Respondent

.....Court Assistant

