



Khan & 2 others v Capital Markets Authority (Commercial Miscellaneous Application E271 of 2022) [2023] KEHC 21562 (KLR) (Commercial and Tax) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21562 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E271 OF 2022**

DO CHEPKWONY, J

JULY 21, 2023

BETWEEN

ZAFRULLAH KHAN 1ST APPLICANT

JAMES MWAURA 2ND APPLICANT

MAKARIOS AGUMBI 3RD APPLICANT

AND

CAPITAL MARKETS AUTHORITY RESPONDENT

Alleged Bias in composition of CMA's Ad Hoc Committee

The applicants sought stay of proceedings before the respondent's Ad Hoc Committee pending determination of their appeal to the Capital Markets Tribunal, arguing that the committee was improperly constituted and tainted by bias, as one member was a director of SBM Bank which had acquired assets of Chase Bank. They contended that it violated their right to a fair hearing and principles of natural justice. The respondent opposed, citing public interest in concluding investigations. The court held that the applicants had demonstrated an arguable appeal and granted stay of proceedings for 180 days, each party bearing its own costs.

Reported by John Wainaina

Civil Practice and Procedure - stay of proceedings - stay of proceedings at the appellate stage - conditions precedent - what was an applicant seeking a stay of proceedings at the appellate stage required to prove.

Capital Markets Law - Capital Markets Authority - Ad Hoc Committee - composition - allegation of bias in composition of Ad Hoc Committee - whether the applicants, having been summoned to appear before the respondent's Ad Hoc Committee to account for Chase Bank's financial transactions, had demonstrated that the committee's impartiality was compromised by the inclusion of a member who was a director of SBM Bank, a beneficiary of Chase Bank's asset acquisition, thereby creating a perception of bias sufficient to justify stay of proceedings.



Brief facts

The applicants filed an application seeking, among other orders, a stay of proceedings before the Capital Markets Authority's (CMA) Ad Hoc Committee pending the hearing and determination of their appeal at the Capital Markets Tribunal (the Tribunal). The applicants, former officers of Chase Bank Kenya Limited (in liquidation), averred that they had earlier appeared before the respondent in 2016 to provide information on the bank's financial transactions and believed that the matter was settled. However, in January 2022, they were re-invited to appear before the Ad Hoc Committee. They objected to its composition, arguing that one member was a director of SBM Bank, which controversially acquired 75% of Chase Bank's assets. Their preliminary objection was dismissed, prompting them to appeal. They contended that the proceedings were tainted by bias and violated principles of natural justice. The respondent opposed the application, arguing that the investigations were lawful and in the public interest.

Issues

- i. What was an applicant seeking a stay of proceedings at the appellate stage required to prove?
- ii. Whether the applicants, having been summoned to appear before the respondent's Ad Hoc Committee to account for Chase Bank's financial transactions, had demonstrated that the committee's impartiality was compromised by the inclusion of a member who was a director of SBM Bank, a beneficiary of Chase Bank's asset acquisition, thereby creating a perception of bias sufficient to justify stay of proceedings.

Held

1. Grant of stay of proceedings at the appellate stage ought to be exercised judiciously and in the interest of justice. The court ought to stretch a notch higher to establish whether the applicant had established: a *prima facie* arguable case/appeal, that the application was filed timeously, that there exist other sufficient cause to establish that it was solely in the interest of justice that the orders for stay of proceedings to be granted. Stay of proceedings should not be imposed unless it was demonstrated that beyond all reasonable doubt the proceedings ought not to be allowed to continue. Such would be a case where the applicant established that the proceedings were frivolous, vexatious and with no cause of action.
2. An appeal would be arguable where a single *bona fide* arguable ground of appeal was raised. An arguable appeal was not one which must necessarily succeed, but one which could be argued fully before a court and one which was not frivolous. *Prima facie* (on the face of it), the right to fair hearing was an arguable ground and so was the challenge taken on constitutionality of the Ad Hoc Committee.
3. A decision given without observing the principles of natural justice was void and it matters not if the same decision would have been arrived at in the absence of the departure from the essential principles of justice. No man could be a Judge in his own cause, and under the principle of *nemo iudex in causa sua*, the presiding tribunal or court was under a duty to reach a decision untainted by bias by complying with requirements of impartiality and independence under article 50(1) and 47 of the Constitution.
4. The court was persuaded that the challenge on the Ad Hoc Committee's jurisdiction for being improperly constituted in a manner that it could not exercise its discretion impartially was a justifiable ground to warrant the stay of proceedings before the said Ad Hoc Committee pending the appeal at the Capital Markets Tribunal.
5. It was unknown which law dictated that a stay of proceedings ought to have been sought vide a constitutional petition or judicial review as alleged by the respondent. In any event, the High Court had inherent jurisdiction and supervisory jurisdiction to consider such an application.

Application allowed.



Orders

- i. *Order issued for stay of proceedings before the Capital Markets Authority Ad Hoc Committee for the Enforcement Hearing in the matter of Chase Bank Kenya Limited (In Liquidation) pending the appellants' appeal filed at the Capital Markets Tribunal.*
- ii. *The appeal was to be prosecuted expeditiously, failing to which the orders in (i) above shall automatically expire upon expiry of one hundred and eighty (180) days from the the date of the instant ruling unless otherwise extended by the court.*
- iii. *Each party bore its own costs.*

Citations

Cases

1. Global Tours & Travels Limited (Winding Up Cause No.43 of 2000) — Explained
2. University of Nairobi v Ricatti Business of East Africa (Civil Application 40 of 2020; [2020] KECA 463 (KLR)) — Mentioned

Statutes

1. Constitution of Kenya, 2010 — article 47,50(1) — Interpreted

Advocates

None mentioned

RULING

1. This ruling determines the applicants' Notice of Motion application dated April 7, 2022 which seeks the following orders:
 - a. Spent;
 - b. Spent;
 - c. That pending the hearing and determination of the Appeal filed by the applicants at the Capital Markets Tribunal, this honourable court be pleased to issue an order for stay of proceedings before the Respondent's Ad Hoc Committee for the Enforcement Hearing in the matter of Chase Bank Kenya Limited (In Liquidation)
 - d. That this honourable court be pleased to set aside the proceedings before the respondent's Ad Hoc Committee for the Enforcement Hearings in the matter of chase Bank Kenya Limited (In Liquidation).
 - e. That the Costs of this Application be borne by the respondent.
2. The applicants' case as adduced in the grounds on the face of the application and in the affidavit of Zafrullah Khan, the 1st applicant herein is that the respondent invited the applicants vide letters dated November 3, 2021, and July 5, 2021 respectively to appear and provide information regarding Chase Bank's financial transactions for the year ended 2014.
3. Accordingly, the Applicant obliged and appeared for interrogations on 14/10/2016, 31st August, 2016 and August 16, 2016 and in their belief, those interrogations were quite sufficient to provide the authority with clarity sought. However, sometimes in January, 2022, the respondent Rre-invited the applicants to appear before the committee to provide further information on the same subject. Further to the foregoing, the applicants raised preliminary objection on the composition of the Ad Hoc Committee appointed to hear the issues under investigation and more specifically that one of the



committee members was a director of SBM Bank which had controversially acquired 75% of the assets of Chase Bank.

4. Nonetheless, the respondent through its Ad Hoc Committee dismissed the notice of preliminary objection on grounds that the Applicants had not persuasively demonstrated that the Committee member complained of would have been impartial or otherwise biased. The applicants further added that the committee in its ruling was informed by an affidavit of the controversial member which had not been served upon the applicants. Aggrieved by this decision, the applicant filed an appeal before the Capital Markets Tribunal and since the same is not an automatic stay to proceedings before the Committee, this court is urged to stay the proceedings in order to preserve the substratum of the Appeal. The applicants further averred that although stay of proceedings can be sought before the Capital Markets Authority, as at the time of filing this application, the tribunal was not properly constituted and lacked quorum.
5. The Application is opposed vide the respondent's replying affidavit sworn by Colin Maweu, its Enforcement Manager on May 10, 2022. He averred that upon the launch of a complaint on constitution of the Ad Hoc Committee vide the Applicants' Notice of Preliminary Objection, the Committee gave priority to hearing of the preliminary objection but dismissed it for want of merit.
6. The matter thereafter scheduled for further hearing but unknown to the respondent, the applicants obtained orders for temporary stay of proceedings. Now the respondents seek the court not to grant the stay being sought since if granted, the same is likely to stall the ongoing investigations and prejudicial to members of the public who suffered loss after Chase Bank was placed under liquidation. According to the respondent, stay of proceedings would only be granted as part of final orders in a substantive suit such as a Judicial Review proceedings or Constitutional Claims.
7. The respondent similarly filed grounds of opposition dated May 10, 2022 reiterating the averments in the replying affidavit as summarized above. The Application was canvassed by way of written submissions with the Applicant filing submissions dated June 20, 2022 while the respondent's submissions are dated September 28, 2022, which I have read through and wish not reproduce the same as they reiterate the grounds in the affidavits sworn by parties.

Analysis and Determination

8. Having carefully considered the application, the affidavits and grounds adduced in support and rebuttal of the same, the rival submissions by the parties as well as the authorities cited by each party, this court finds this being essentially an application for stay of proceedings pending the hearing and determination of an intended appeal to the Capital Markets Tribunal, thus the sole issue for determination is:-
 - a. whether the plaintiffs/applicants have satisfied the considerations to warrant the exercise of this court's discretion in staying proceedings as sought; and if so,
 - b. whether the court can set aside the respondent's Ad Hoc Committee's proceedings.
9. It is widely agreed within our jurisdiction that the grant of stay of proceedings on a matter appealed from is a matter of judicial discretion which ought to be exercised judiciously in the interest of justice. The same has been considered by various courts including the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No.43 of 2000, when Ringera J. (as he then was) that the court ought to stretch a notch higher to establish whether the applicant has established: a *prima facie* arguable case/appeal, that the application was filed timeously, that there exist other sufficient cause to establish that it is solely in the interest of justice the orders for stay of proceedings are granted. In other cases,



courts have taken caution in granting orders of stay of proceedings as being such a serious, grave and fundamental interruption of a litigant's right to conduct his/her litigation its determination on merits in an expeditious manner. In this regard, they hold that stay of proceedings should not be imposed unless it is demonstrated that beyond all reasonable doubt the proceedings ought not to be allowed to continue. Such would be a case where the applicant establishes that the proceedings are frivolous, vexatious, and with no clear cause of action in law or in equity.

10. In the present case, the applicant seek stay of proceedings substantially on reasons that the proceedings before the Ad Hoc Committee were conducted in ignorance of their right to be heard, especially in failing to supply the Applicants with affidavits rebutting the challenge on the Constitution of the Ad Hoc Committee. Further to that, the Applicants apprehension that they would not be accorded a proper chance to be heard if they proceed before a committee whose jurisdiction they have challenged. It is also the applicants case that the intended appeal is arguable because it has challenged the jurisdiction of a member of the committee who seeks to be the accuser and prosecutor of his own case.
11. On the other hand, the respondent has argued that stay of proceedings ought to have been sought either by way of a Judicial Review case or a Constitutional case. Thus, it would be repugnant to justice in seeking to stay proceedings and investigations which touch on interests of a larger public.
12. Having observed above that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts on the right of a party(ies) to an expeditious trial, it can only be granted in this case if it is established that the Appellant has an arguable appeal which may be rendered nugatory if the stay is not granted. Further, that law and equity would only dictate that the orders are granted.
13. In that regard, an appeal would be arguable where a single bonafide arguable ground of appeal is raised. An arguable appeal is not one which must necessarily succeed, but one which can be argued fully before a court and one which is not frivolous. (See University of Nairobi v Ricatti Business of East Africa (2020) eKLR). Prima facie, the right to fair hearing is an arguable ground and so is the challenge taken on constitutionality of the Ad Hoc Committee. It is not denied that a Member of the Ad Hoc Committee is a director of SBM Bank which allegedly acquired 75% of Chase Bank's Assets. The applicants believe that the said committee member has a substantial interest in the matter, and it would be tantamount to allowing the member accused to prosecute himself, if allowed to proceed with the matter.
14. Time and again, it has been stated that a decision given without observing the principles of natural justice is void that it matters not if the same decision would have been arrived at in the absence of the departure from the essential principles of justice. No man can be a Judge in his own cause, and under the principle of nemo judex in causa sua, the presiding tribunal or court is under a duty to reach a decision untainted by bias by complying with requirements of impartiality and independence under article 50(1) and 47 of the Constitution.
15. In view of that, this court is persuaded that the challenge on the Ad Hoc Committee's jurisdiction for being improperly constituted in a manner that it cannot exercise its discretion impartially tis a justifiable ground to warrant the stay of proceedings before the said Ad Hoc Committee pending the appeal to the Capital Markets Tribunal.
16. However, the respondent has submitted that the stay of proceedings ought to have been sought vide a Constitutional Petition or a Judicial Review. Respectfully, it is unknown which law dictates as such. In any event, this court can consider such an application in exercise of its inherent or supervisory jurisdiction on anybody exercising quasi-judicial authority as therespondent herein.



17. In the premises, the Notice of Motion dated April 7, 2022 is merited and succeeds in the manner of the following orders: -
- a. That an order be and is hereby issued for stay of proceedings before the respondent's Ad Hoc Committee for the Enforcement Hearing in the matter of Chase Bank Kenya Limited (In Liquidation) pending the Appellants' Appeal filed at the Capital Markets Tribunal.
 - b. That the appeal be prosecuted expeditiously, failing to which the orders in No.(a) above shall automatically expire upon expiry of one hundred and eighty (180) days from the date herein unless otherwise extended by the court.
 - c. Each party shall bear its own costs.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21ST DAY OF JULY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for and by either party

Court Assistant - Martin

