



REPUBLIC OF KENYA



Shah & 6 others v Capital Markets Authority; BOC Holdings & 3 others (Interested Parties) (Judicial Review Application E066 of 2021) [2021] KEHC 6436 (KLR) (Judicial Review) (17 May 2021) (Ruling)

Anjum Shah & 6 others v Capital Markets Authority; BOC Holdings & 3 others (Interested Parties) [2021] eKLR

Neutral citation: [2021] KEHC 6436 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E066 OF 2021

P NYAMWEYA, J

MAY 17, 2021

BETWEEN

ANJUM SHAH 1ST APPLICANT
JINIT M. SHAH 2ND APPLICANT
MAYUR M. SHAH 3RD APPLICANT
NEEL J. SHAH 4TH APPLICANT
VIKESH J. SHAH 5TH APPLICANT
NIRAJ A. SHAH 6TH APPLICANT
ROHIN CHANDARIA 7TH APPLICANT

AND

CAPITAL MARKETS AUTHORITY RESPONDENT

AND

BOC HOLDINGS INTERESTED PARTY
BOC KENYA PLC INTERESTED PARTY
CARBACID INVESTMENTS PLC INTERESTED PARTY
AKSAYA INVESTMENTS LLP INTERESTED PARTY



Exhaustion of remedies and leave for judicial review

The matter concerned the interplay between statutory remedies under the Capital Markets Act and the Fair Administrative Action Act. The applicant sought judicial review despite a pending appeal before the Capital Markets Tribunal. The court held that the questions of exemption from the Tribunal's jurisdiction and the grant of leave for judicial review could not be determined ex parte. The preliminary issues required inter partes hearing to assess whether the exhaustion doctrine could be justifiably waived.

Reported by John Wainaina

Administrative Law – judicial review – doctrine of exhaustion of remedies – judicial review application filed while there was a pending appeal before a tribunal - whether the High Court may entertain an application for judicial review before the question of exemption from the statutory remedy and leave to commence such proceedings had been determined inter partes – Capital Markets Act (Cap 485A) section 35A; Fair Administrative Action Act (Cap 7L) section 9.

Brief facts

The applicants, shareholders of BOC Kenya Plc, sought judicial review orders challenging the Capital Markets Authority's (CMA) suspension of a proposed takeover of BOC Kenya by Carbacid Investments Plc and Aksaya Investments LLP. They requested leave to commence judicial review proceedings without first exhausting the internal remedy before the Capital Markets Tribunal, arguing that the tribunal was improperly constituted, making its remedy ineffective.

Issues

Whether the High Court may entertain an application for judicial review before the question of exemption from the statutory remedy and leave to commence such proceedings had been determined *inter partes*.

Held

1. Subject to section 35A of the Capital Markets Act, the provisions on exhaustion of internal remedies of appeal and review in section 9 of the Fair Administrative Action Act, and the pending appeal before the Capital Markets Tribunal, the questions of exemption from the remedy provided by the said Tribunal, and of leave to commence judicial review proceedings required to be canvassed *inter partes*.

Court directed that the matter be heard inter partes.

Orders

- i. *The applicants shall serve the respondent and interested parties with the Chamber Summons dated May 17, 2021, skeletal submissions on the said Chamber Summons, a copy of the instant ruling, and a hearing notice with 14 days of the instant date.*
- ii. *The respondent and interested parties were granted leave to file and serve their responses to the Chamber Summons dated May 17, 2021 and skeletal submissions thereon within 14 days of service by the applicant.*
- iii. *The Chamber Summons dated May 17, 2021 was to be heard virtually on June 28, 2021 at 3 P.M.*
- iv. *In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the COVID-19 pandemic, the High Court was to hear and determine the applicant's chamber summons dated May 17, 2021 on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.*
- v. *All the parties were to file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.*
- vi. *The service of pleadings and documents directed by the court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.*



- vii. *The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system*
- viii. *The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's cause list for a virtual hearing on June 28, 2021 at 3 p.m., and shall avail the parties the electronic link for the hearing.*
- ix. *The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the applicants by electronic mail by close of business on Thursday, May 20, 2021.*
- x. *Parties were at liberty to apply.*

Citations

Cases

1. Kiuna Ngugi Kiuna v Capital Markets Authority & 2 others (Tribunal Appeal No 2 of 2021) — Mentioned

Statutes

1. Capital Markets Act (cap 485A) — section 35A(9)(4) — Interpreted
2. Constitution of Kenya — article 165 — Interpreted
3. Constitution of Kenya, 2010 (const2010) — article 165 — Cited
4. Fair Administrative Action Act (cap 7L) — section 9(4) — Interpreted

Advocates

None mentioned

RULING

1. The Applicants herein state that they are shareholders of BOC Kenya PLC, the 2nd Interested Party herein, and they have filed an application by way of a Chamber Summons dated 17th May 2021, in which they are seeking the following orders :
 - i. That this matter be certified as urgent and heard ex parte in the first instance.
 - ii. That this Honourable Court be pleased to grant leave to the Applicants to apply for an order under section 9(4) of the *Fair Administrative Action Act, 2015* for the Applicants to be exempted from exhausting the remedy under section 35A of the *Capital Markets Act* (cap 485A), Laws of Kenya in view of the exceptional circumstances herein.
 - iii. That this Honourable Court be pleased to grant leave to the Applicants to apply for an order of Certiorari to remove into the High Court for the purposes of quashing the Respondent's decision to stay and/or otherwise suspend the transaction related to the Proposed Take Over made by Carbacid Investments PLC and Aksaya Investments LLP to acquire up to 100% of the Issued Ordinary Shares of BOC Kenya Plc ("the Transaction").
 - iv. That this Honourable Court be pleased to grant leave to the Applicants to apply for an order of Certiorari to remove into the High Court, for the purposes of quashing, the Respondent's action and/or decision of 12 March 2021, enforcing, seeking and/or purporting to enforce, section 35A of the *Capital Markets Act* (cap 485A), Laws of Kenya in relation to the Transaction.
 - v. That this Honourable Court be pleased to grant leave to the Applicants to apply for an order of Prohibition preventing the Respondent from enforcing, seeking to enforce and/or relying on section 35A of the *Capital Markets Act* (cap 485A), Laws of Kenya in relation to the Transaction, howsoever arising.



- vi. That this Honourable Court be pleased to grant leave to the Applicants to apply for an order of Mandamus pursuant article 165 of the Constitution for the court to exercise its supervisory jurisdiction and call for the entire record and proceedings in Capital Markets Tribunal Appeal No. 2 of 2021- *Kiuna Ngugi Kiuna v. The Capital Markets Authority & 2 others* and hear and determine the aforementioned Appeal to ensure the fair administration of justice.
 - vii. That this Honourable Court be pleased to grant leave the Applicants to apply for a Declaration that reliance and/or enforcement of section 35A of the Capital Markets Act (cap 485A), Laws of Kenya by any persons is unconstitutional and contrary to the principles of fair administrative action as enshrined in the Constitution and Fair Administrative Action Act, 2015 in view of the Capital Markets Tribunal not being properly constituted as contemplated in section 35A of the Act.
 - viii. That the costs of this Application be provided for.
2. The said application is supported by a statutory statement dated 17th May 2021, and a verifying affidavit sworn on the same date by the 1st Applicant. I note that the Applicants are inter alia seeking to be exempted from exhausting the remedy under section 35A of the Capital Markets Act, pursuant to section (9)(4) of the Fair Administrative Actions Act. Section 35A of the Capital Markets Act establishes, and provides for the duties and powers of the Capital Markets Tribunal, to hear appeals from decisions made by the Capital Markets Authority, which is the Respondent herein.
 3. It is consequently my view that arising from the provisions of Section 35A of the Capital Markets Act, the provisions on exhaustion of internal remedies of appeal and review in section 9 of the Fair Administrative Action Act, and the pending appeal before the Capital Markets Tribunal, the questions of exemption from the remedy provided by the said Tribunal, and of leave to commence judicial review proceedings requires to be canvassed inter partes.
 4. In the circumstances, I hereby direct and order as follows:
 - I. The Applicants shall serve the respondent and interested parties with the Chamber Summons dated 17th May 2021, (ii) skeletal submissions on the said Chamber Summons (iii) a copy of this ruling and (iv) a hearing notice with fourteen (14) days of today's date.
 - II. The Respondent and Interested Parties are granted leave to file and serve their responses to the Chamber Summons dated 17th May 2021 and skeletal submissions thereon within fourteen (14) days of service by the Applicant.
 - III. The Chamber Summons dated 17th May 2021 shall be heard virtually on 28th June 2021 at 3 P.M.
 - IV. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this court shall hear and determine the Applicant's Chamber Summons dated 17th May 2021 on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.
 - V. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.
 - VI. The service of pleadings and documents directed by the court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall



also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

- VII. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system
 - VIII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for a virtual hearing on June 28, 2021 at 3 p.m., and shall avail the parties the electronic link for the hearing.
 - IX. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions to the Applicants by electronic mail by close of business on Thursday, 20th May 2021.
 - X. Parties shall be at liberty to apply.
5. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF MAY 2021

P. NYAMWEYA

JUDGE

