



**Alubala v Capital Markets Authority; National Bank of Kenya Limited (Interested Party) (Judicial Review Application 251 of 2018) [2019] KEHC 4895 (KLR) (Judicial Review) (22 July 2019) (Judgment)**

*Solomon Muyeka Alubala v Capital Markets Authority; National Bank of Kenya Ltd (Interested Party) [2019] eKLR*

Neutral citation: [2019] KEHC 4895 (KLR)

**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW**

**JUDICIAL REVIEW APPLICATION 251 OF 2018**

**P NYAMWEYA, J**

**JULY 22, 2019**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI**

**AND**

**IN THE MATTER OF ARTICLE 47 AND 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CAPITAL MARKETS ACT CHAPTER 485A LAWS OF KENYA AND REGULATIONS MADE THEREUNDER**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO.4 OF 2015**

**AND**

**IN THE MATTER THE DECISION, AND/OR ACTIONS OR DIRECTIONS (THE DECISION) OF THE CAPITAL MARKETS AUTHORITY MADE AGAINST THE APPLICANT AND CONTAINED IN THE NOTIFICATION OF ENFORCEMENT ACTION DATED 3RD APRIL 2018**

**BETWEEN**

**SOLOMON MUYEKA ALUBALA ..... APPLICANT**

**AND**

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



AND

NATIONAL BANK OF KENYA LIMITED ..... INTERESTED PARTY

**The Capital Markets Authority's refusal to provide requested documents for r Response to a notice to show cause is a violation of the rights to fair hearing, fair administrative action, and the right to access information.**

*The applicant, a former Head of Treasury at the National Bank of Kenya, contested sanctions imposed by the Capital Markets Authority (CMA), including a significant financial penalty and a 10-year ban from holding office in public-listed companies. The applicant argued that the CMA acted unlawfully in issuing the Notice to Show Cause without proper authority and that the proceedings violated his right to a fair hearing due to bias, procedural irregularities, and lack of access to key documents. The High Court held that while the CMA had the jurisdiction to investigate the alleged financial misconduct, it breached the principles of natural justice. Specifically, the court found that the CMA failed to provide the applicant with the opportunity to access crucial documents and had engaged in unfair decision-making by allowing those who investigated him to also act as judges in the case. The court emphasized that fairness in administrative proceedings was paramount, especially when substantial sanctions were at stake. As a result, the court annulled the CMA's decision, citing a violation of the applicant's constitutional rights to access information and a fair hearing.*

Reported by John Ribia

**Jurisdiction** – jurisdiction of the Capital Markets Authority – jurisdiction to take action against a person who was neither a licensed or approved person, nor an employee or director of a licensed or approved entity but was a former employee of an approved entity - whether the Capital Markets Authority had jurisdiction to take regulatory action against a person who, at the time of the enforcement proceedings, was neither a licensed or approved person, nor an employee or director of a licensed or approved entity, in respect of alleged infractions committed during their prior employment with an approved entity – Capital Markets Act (Cap 485A) sections 11A and 12

**Constitutional Law** – fundamental rights and freedoms – right to a fair hearing – right to fair administrative action – right to access to information - where the recipient of a notice to show cause in an enforcement administrative action before the Capital Markets Authority was not presented with the evidence that found him culpable in a hearing – where the CMA acted as investigator, judge, and executor - whether the failure of the Capital Markets Authority to provide a person with evidence relied upon in a hearing was procedurally unfair and a violation of the right to a fair trial - whether the failure of the Capital Markets Authority to provide a person with evidence relied upon in a hearing and to act as investigator, prosecutor, and judge was a violation of the right to fair administrative action – whether the Capital Markets Authority's refusal to provide the applicant, who was summoned via a notice to show cause, with the requested documents and information necessary to form their defence, constituted a violation of the applicant's right to access to information - Constitution of Kenya articles 10, 47, 35, and 50; Fair Administrative Action Act (Cap 7L) section 4(3)(g); Access to Information Act (Cap 7M) section 4(2)

**Administrative Law** – bias – enforcement administrative action – Capital Markets Authority – allegations of bias due to CMA acting as the investigator, prosecutor, and judge - whether the Capital Markets Authority decision in an enforcement action brought by way of an administrative hearing was tainted by bias for involving the same parties that participated in the investigation in prosecuting and decision making

**Brief facts**

The applicant previously worked as Head of Treasury of the National Bank of Kenya (the bank) (the interested party). The respondent had taken enforcement action against the applicant its decision dated April 3, 2018 after finding the applicant culpable of regulatory infractions. The respondent penalized the applicant the



applicant by imposing sanctions against the applicant for alleged embezzlement of funds of the Bank: a financial penalty of Kshs. 104,800,000/- being twice the amount of benefit that, purportedly, directly accrued to the applicant; and the disqualification of the applicant from holding office as a key officer of a public listed company and/or issuer, licensee or any approved institution of the Capital Markets Authority for a period of 10 years. The decision was preceded by investigations and several hearings involving other key personnel of the Bank.

Aggrieved the applicant filed the instant judicial review application. The applicant challenged the Capital Markets Authority's (CMA) issuance of a Notice to Show Cause arguing it was illegally issued without a Board resolution and authored solely by the Chief Executive Officer, who lacked authority to act independently. He claimed that the CMA had already made a prejudicial determination against him in a prior Board meeting, and the same individuals later sat on the panel that heard his case, thus violating the rules of natural justice.

The applicant argued that he was not subject to the CMA's jurisdiction, as he was not a licensed or approved person under the Capital Markets Act at the time of the notice. He contended the CMA failed to provide him with all relevant documents before the hearing, compromising his right to a fair hearing. His requests for key documents were denied, and the Authority only disclosed additional documents after receiving his response to the notice.

He alleged the hearing was a sham, with the CMA acting as investigator, prosecutor, and judge. The final decision, delivered in April 2018, was accompanied by further undisclosed documents. He maintained that the decision was *ultra vires*, disproportionate, biased, and breached his legitimate expectation of fair administrative action. He also challenged the jurisdiction and composition of the Capital Markets Tribunal and the legality of its governing rules, asserting he had no viable appeal route. He sought to have the decision declared null and void. He sought, *inter alia*, orders of *certiorari* to quash the respondent's enforcement decision dated April 3, 2018 on several grounds which included allegations of bias, and violations of various constitutional rights like Access to Information and fair hearing and fair administrative actions.

#### **Issues**

- i. Whether the Capital Markets Authority had jurisdiction to take regulatory action against a person who, at the time of the enforcement proceedings, was neither a licensed or approved person, nor an employee or director of a licensed or approved entity, in respect of alleged infractions committed during their prior employment with an approved entity.
- ii. Whether the failure of the Capital Markets Authority to provide a person with evidence relied upon in a hearing was procedurally unfair and a violation of the right to a fair trial.
- iii. Whether the failure of the Capital Markets Authority to provide a person with evidence relied upon in a hearing and to act as investigator, prosecutor, and judge was a violation of the right to fair administrative action.
- iv. Whether the Capital Markets Authority's refusal to provide the applicant, who was summoned via a notice to show cause, with the requested documents and information necessary to form their defence, constituted a violation of the applicant's right to access to information.
- v. Whether the Capital Markets Authority decision in an enforcement action brought by way of an administrative hearing was tainted by bias for involving the same parties that participated in the investigation in prosecuting and decision making.

#### **Held**

1. There were various norms and laws which regulated the manner in which the respondent was required to perform its powers and functions, particularly those introduced by the Constitution, which was promulgated after the enactment of the Capital Markets Act. The Act must be read and interpreted in a manner that was consistent with the Constitution. A number of values, principles, rights and duties in the Constitution directly impacted on the respondent, including the values and principles in article 10 of the Constitution, the right to access to information, and the right to fair administrative action.



2. In order to arrive at the true intention of the legislature, a statute must be considered as a whole and sections of an Act were not to be read in isolation and that when a question arose as to the meaning of a certain provision in a statute, it was not only legitimate but proper to read that provision as a whole. Hence the words, phrase occurring in a statute were to be taken not in isolation or in a detached manner dissociated from the context, but were to be read together and construed in the light of the purpose and object of the Act. The legal meaning of an enactment was also in that respect not determined in the abstract, but in relation to the relevant facts of a case before it.
3. The respondent properly brought enforcement proceedings against the applicant, which action was within its jurisdiction, because the applicant was an employee of the listed company in 2014/2015 when the alleged misconduct occurred.
4. Procedural fairness meant acting fairly in administrative decision making. It related to the fairness of the procedure by which a decision is made, and not the fairness in a substantive sense of that decision. There was no fixed content to the duty to afford procedural fairness. The fairness of the procedure depended on the nature of the matters in issue, and what would be a reasonable opportunity for parties to present their cases in the relevant circumstances.
5. Apart from requirements of natural justice, the right to fair administrative action, and the provisions of the Fair Administrative Act implied a duty to act fairly by a decision maker in any administrative action.
6. At the core of the duty to act fairly and the requirement of fairness was the need to ensure that a person affected by a decision has an effective opportunity to make representations before it was taken, so that he or she had the chance to influence it. The requirement was what informed the key procedural steps set down by the law of giving of notice of an administrative action, and provision of the evidence that would be relied upon during that administrative action. The question of whether failure to observe any of those steps rendered the decision making by an administrator unfair, would depend on how it affected a party's ability to make representations.
7. The applicants letter requesting for further documents and information as made pursuant to article 35 of the Constitution (right to access information), and was required for purposes of advising the applicant of his rights as regards the hearing in response to summons sent to the applicant appear before the respondent in relation to a notice to show cause. The applicant's right to a fair hearing was therefore at stake, in addition to other rights that were likely to be affected by any findings made on the notice to show cause.
8. Citizens had a right to information that in the possession of the state that may had an impact on them for protection of their other interests, and also for accountability reasons. Decisions should also be informed by rational considerations that were explicable to those affected by them. Therefore, there was a constitutional obligation on the part of the respondent, to provide any information that was likely to impact on the applicant during the enforcement proceedings, and also for purposes of fostering the principles of transparency and accountability in the enforcement proceedings.
9. The respondent, contrary to article 35 of the Constitution and section 4(2) of the Access to Information Act, abrogated upon itself the responsibility of deciding whether the said information that was requested was relevant or in the applicant's interest, and went ahead to expressly deny the applicant access to the said information.
10. A purposive interpretation of the Access to Information Act led to the conclusion that disclosure of information was the normal course of action so as to give effect to the constitutional right of access to information, and that the withholding of information was the exception, and was only permitted in on the grounds set out in the Access to Information Act and where it was justified.
11. The burden of persuasion rested on the party resisting disclosure, since such a refusal amounted to a limitation of a constitutional right. The Constitution places the burden of proof on the person seeking to limit the right under Article 24(3) of the Constitution, 2010.



12. The respondent failed to avail to the applicant two affidavits which it relied upon in its findings that he had been involved in embezzlement of funds. The respondent's replying affidavit indicated that these were clearly relied upon by the Respondent and material to the case made against the applicant, and ought to have been disclosed to the Applicant.
13. While the obligation and extent of a decision maker's duty to provide the individual affected by a decision the evidence relied upon would vary with the context of a hearing, where there were allegations of wrong doing or disciplinary actions such as in the proceedings against the applicant, which may and indeed did result in the imposition of sanctions and penalties, the individual must be given sufficient information and notice of all allegations that would be considered. That would also include any other allegations or evidence that influenced the respondent's decision to inquire into the applicant's conduct, so as to give the applicant an opportunity to challenge the same.
14. Where the key and only allegation made against the Applicant in the Notice to Show Cause was the alleged embezzlement of funds through a scheme where monies were fraudulently siphoned out of the interested party for services not rendered under the guise of commissioning a deposit mobilization exercise, the statements of the deposit mobilization agents in the two affidavits were key in the allegations made against the Applicant.
15. The failure by the respondent to provide this evidence to the applicant clearly breached his right to a fair hearing, in light of the reliance on the same by the respondent in its enforcement action against the applicant. The conclusion had been reached bearing in mind the provisions of section 4(3)(g) of the Fair Administrative Action Act which make it an express statutory requirement for the decision maker to make pre-hearing discovery orders.
16. Allegations of embezzlement of funds and fraudulent siphoning of monies out of the Bank in the guise of deposit mobilization were made against the applicant in the notice to show cause. Those allegations were of a criminal nature, and ought to have been pursued through the criminal process where the constitutional and legal thresholds for finding culpability were different, and not an administrative hearing. To that extent the applicant's rights to a fair trial under article 50 of the Constitution were also compromised by the respondent, as the inappropriate legal procedure was thereby followed in determining the applicant's culpability.
17. In considering the issue of bias, the applicable test was whether a fair minded person, who was informed of the circumstances in which the decision against the applicant was made, and having considered the facts, would conclude that there was a possibility that the respondent was biased.
18. The respondent's power to delegate under section 11A and 14 of the Act as alternatives were available to the respondent within its overlapping powers, whereby it could adopt a procedure that did not violate the requirements of natural justice (particularly the rule against bias) and observed the constitutional and legal requirements as to a fair hearing and fair administrative action.
19. The constitutional requirements of fair action dictated that there was a separation of the respondent's functions and functionaries in the processes of investigation, prosecution and decision making during an enforcement action, to ensure independence of mind and action, and therefore impartiality in all the stages of the enforcement process.
20. The test to be applied when determining if a decision maker had a predetermined decision in the context of administrative decision makers was: whether a fair-minded and informed observer, knowing the facts, would think that there was a real possibility that the decision-maker had pre-determined the matter to be decided notwithstanding that administrative decision makers were generally permitted to express strong views about matters that they decide.
21. The minutes of a Special meeting of the respondents Board (where it was resolved that the applicant in addition to others show cause for embezzlement of the interested party's funds in 2015 which was carried through a fictitious deposit mobilization scheme) were reporting observations that there was a suspected offence on the part of the applicant for embezzlement for which he was to be put on his



defence. It could not be said to have created an appearance of predetermination and bias on the part of the respondent Board.

*Application partly allowed.*

### **Orders**

- i. *An order of certiorari was issued to bring into the court for the purposes of quashing, the decision, and/or actions of the respondent contained in the notification of enforcement action dated April 3, 2018 purporting to disqualify the applicant from holding office as a key officer of a public listed company and/or issuer, licensee or any approved institution of the 1<sup>st</sup> respondent for a period of 10 years from the date of the notification; and purporting to impose a financial penalty amounting to Kshs. 104, 800,000/- being twice the amount of benefit that, allegedly, directly accrued to the applicant.*
- ii. *The respondent was to meet the applicant's and interested party's costs of the notice of motion dated July 4, 2018.*

### **Citations**

#### **Cases**

1. Alnashir Popat & 8 others v Capital Markets Authority (Petition 245 of 2016; [2016] KEHC 8398 (KLR)) — Explained
2. Beatrice Wanjiru Kimani v Evanson Kimani Njoroge (Civil Appeal 79 of 1997; [1998] KECA 20 (KLR)) — Explained
3. Capital Markets Authority v Jeremiah Gitau Kiereini & another (Civil Appeal 9 of 2014; [2014] KECA 276 (KLR)) — Mentioned
4. Chadwick Okumu v Capital Markets Authority (Constitutional Petition 510 of 2016; [2018] KEHC 7281 (KLR)) — Explained
5. David Oloo Onyango v Attorney-General (Civil Appeal 152 of 1986; [1987] KECA 56 (KLR)) — Explained
6. Dry Associates Limited v Capital Markets Authority & another; Crown Berger (K) Ltd (Interested Party) (Petition 328 of 2011; [2012] KEHC 5568 (KLR)) — Mentioned
7. Ekeru Aukot v Independent Electoral & Boundaries Commission & 3 others (Petition 471 of 2017; [2017] KEHC 9390 (KLR)) — Mentioned
8. J N N, (a Minor) M N M, suing as next friend v Naisula Holdings Limited t/a N School (Constitutional Petition 198 of 2017; [2018] KEHC 8304 (KLR)) — Mentioned
9. Judicial Service Commission v Mbalu Mutava & another (Civil Appeal 52 of 2014; [2015] KECA 741 (KLR)) — Mentioned
10. Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others (Petition 37 & 49 of 2017; [2017] KEHC 8776 (KLR)) — Explained
11. Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others (Civil Appeal 266 of 1996; [1997] KECA 58 (KLR)) — Explained
12. Kimutai v Lenyongopeta & 2 others (Election Petition 273 of 2003; [2005] KECA 96 (KLR); [2005] 2 KLR 31) — Explained
13. Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011; [2012] KESC 8 (KLR)) — Mentioned
14. Municipal Council of Mombasa v Republic & Umoja Consultants Ltd. (Civil Appeal 185 of 2001; [2002] KECA 8 (KLR)) — Explained
15. Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR)) — Applied
16. Okiya Omtatah Okoiti v Cabinet Secretary, National Treasury & 3 others (Petition 253 of 2018; [2018] KEHC 9439 (KLR)) — Mentioned
17. Rai & 3 others v Rai & 5 others (Petition 4 of 2012; [2013] KESC 21 (KLR)) — Explained



18. Republic v Business Premises Rent Tribunal & another Ex parte Davies Motor Corporation Limited (Miscellaneous Application 67 of 20 of 2012; [2013] KEHC 6808 (KLR)) — Mentioned
19. Republic v Capital Markets Authority & another Ex-Parte Jonathan Irungu Ciano (Miscellaneous Civil Application 62 of 2018; [2018] KEHC 7549 (KLR)) — Mentioned
20. Republic v Capital Markets Authority Ex parte: Joyce Ogundo (Miscellaneous Application 606 of 2016; [2018] KEHC 8857 (KLR)) — Explained
21. Republic v Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees (Judicial Review 304 of 2014; [2015] KEHC 7510 (KLR)) — Mentioned
22. Republic v Kenya Civil Aviation Authority & Kenya Airports Authority ex-parte Elite Earthmovers Limited (Miscellaneous Civil Application 335 of 2014; [2017] KEHC 8305 (KLR)) — Mentioned
23. Republic v National Environmental Tribunal, & 2 others Ex-parte Water Services Board (Miscellaneous Application 217 of 2015; [2015] KEHC 7840 (KLR)) — Mentioned
24. Republic v National Police Service Commission Ex parte Daniel Chacha Chacha (Miscellaneous Application 36 of 2016; [2016] KEHC 7755 (KLR)) — Mentioned
25. Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others (Civil Appeal 46 of 2012; [2016] KECA 729 (KLR)) — Explained
26. Trusted Society of Human Rights Alliance v Matemo & 5 others (Petition 12 of 2013; [2014] KESC 32 (KLR)) — Applied
27. Yusuf Abdi Adan & another v Hussein Ahmed Farah & 3 others (Civil Case 100 of 2016; [2016] KEHC 3794 (KLR)) — Explained
28. Pastoli v Kabale District Local Government Council & others ([2008] 2 EA 300) — Explained
29. Baker v Canada (Minister of Citizenship and Immigration) ([1999] 2 SCR 817) — Mentioned
30. Tanganyika Mine Works Union v The Registrar of Trade Unions ((1961) 1 E.A 629) — Mentioned
31. R (Lewis) v Redcar and Cleveland BC (UKSC/2009/0167; [2008] EWCA Civ 746 (01 July 2008)) — Explained

#### **Statutes**

1. Access to Information Act (cap 7M) — section 4(2) — Interpreted
2. Capital Markets Act (cap 485A) — section 2; 5(3)(f); 11(3)(cc); 11(1)(d); 11(3)(w); 12; 12A; 13B; 25A; 26; 35A — Interpreted
3. Capital Markets Tribunal Rules, 2002 (cap 485A Sub Leg) — In general — Cited
4. Civil Procedure Rules 2010 (cap 21 Sub Leg) — order 1 rule 10(2) — Interpreted
5. Constitution of Kenya — article 10, 20, 24, 35, 47, 50, 260 — Interpreted
6. Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013 (Constitution of Kenya Sub Leg) — rule 7 (2) — Interpreted
7. Fair Administrative Action Act (cap 7L) — section 4(3)(g); 7; 9 — Interpreted

#### **Advocates**

None mentioned

## **JUDGMENT**

### **The Application**

1. The Applicant, Solomon Muyeka Alubala, previously worked as Head of Treasury of the National Bank of Kenya, the Interested Party herein. He has brought proceedings against the Capital Markets Authority (hereinafter “the Respondent”) with respect to a decision made by the said Respondent on 3<sup>rd</sup> April 2018. The Respondent is established by section 5 of the *Capital Markets Act* and is the regulator of the Capital markets industry in Kenya. The impugned decision dated 3<sup>rd</sup> April 2018 was



made by the Respondent pursuant to sections 11(3)(cc), 11(1)(d), 11(3)(w) and 25A of the Capital Markets Act, and was as follows:

- a) The disqualification of the Applicant from holding office as a key officer of a public listed company and/or issuer, Licensee or any approved institution of the Capital Markets Authority for a period of 10 years; and
  - b) The imposition of a financial penalty of Kshs. 104,800,000/- being twice the amount of benefit that, purportedly, directly accrued to the Applicant.
2. Upon being granted leave, the Applicant moved this Court through a Notice of Motion dated 4<sup>th</sup> July 2018 seeking the following orders:
- a) An order of Certiorari to remove to this Court to be quashed the purported decision, and/or actions of the Respondent contained in the Notification of Enforcement Action dated 3<sup>rd</sup> April 2018 purporting to disqualify the Applicant from holding office as a key officer of a public listed company and/or issuer, Licensee or any approved institution of the 1<sup>st</sup> Respondent for a period of Ten (10) years from the date of the notification; and purporting to impose a financial penalty amounting to Kshs. 104, 800,000/- being twice the amount of benefit that, allegedly, directly accrued to the Applicant.
  - b) That the Respondents be ordered to pay the Applicant the costs of this Application.
3. The Application is supported by the Applicant's Statement and Verifying Affidavit dated 20<sup>th</sup> June 2018 as well as Further Affidavit dated 14<sup>th</sup> August 2018. The Applicant's Advocates on record, Prof. Albert Mumma & Company Advocates, also filed written submission on the application dated 29<sup>th</sup> August 2019, which were orally highlighted at the hearing of the application.
4. The Respondent responded to the application by way of a Replying Affidavit sworn on 13<sup>th</sup> July 2018 by Abubakar Hassan Abubakar, its Head of Investigations and Enforcement. Its Advocate on record, Mr. Eric Timothy Githendu, filed written submissions dated 5<sup>th</sup> November 2018, which he highlighted during the hearing of the application. The Interested Party's Advocates on record, Oraro & Company Advocates indicated that they would not file any response to the application as there was no relief sought against the Interested Party and did not participate at the hearing. The Advocates indicated that they would address the issue of their misjoinder in written submissions, which were duly filed on 20<sup>th</sup> January 2019.
5. The Applicant's, Respondent's, and Interested Party's respective cases are as follows.

### **The Applicant's case**

6. The Applicant contends that the Respondent served him with a Notice to Show Cause dated 22<sup>nd</sup> August 2017 which was issued under section 26 of the Capital Markets Act, which notice was to the effect that an inquiry had been conducted by the Respondent itself into the affairs of the Interested Party pursuant to section 13B of the Capital Markets Act. It is contended that the Notice To Show Cause was authored by the Chief Executive Officer of the Respondent who is a member of the Respondent's Board pursuant to section 5(3)(f) of the Capital Markets Act. The Applicant alleges that the Notice did not refer to any Board Resolution of the Respondent's in which it was resolved that action should be taken against him or that the Applicant should be issued with a Notice to Show Cause. Therefore, the Respondent's CEO acted illegally, on his own, without the necessary Board Resolution when he purported to serve the Applicant with the Notice.



7. The Applicant also stated that the minutes of the Respondent's Board meeting of 13<sup>th</sup> July 2017 which were exhibited by the Respondent, and in which it was resolved that he be issued with the Notice to Show Cause showed that a decision had already been made that he had embezzled funds, and the same persons who made that decision in the Board meeting are the same persons who attended the purported hearing of the Notice to Show Cause on 11<sup>th</sup> December 2017
8. It is also the Applicant's case is that according to the Notice to Show Cause, an inquiry conducted by the Respondent had established that the Interested Party's management appears to have devised a scheme where monies were fraudulently siphoned out of the Interested Party for services not rendered, under the guise of commissioning a deposit mobilization exercise. However that the Respondent did not annex a report of the independent inquiry, if any, it purported to have conducted. The Applicant contends that the Notice to Show Cause referred to section 26(8) of the *Capital Markets Act*, which provides that the Respondent is obliged, in all cases where it takes action under sections 25 ( since repealed) and 26, to give the person affected by such action an opportunity to be heard. According to the Applicant, section 26 of the *Capital Markets Act* deals exclusively with the suspension or revocation of a license, and does not give the Respondent jurisdiction over a person like the Applicant who was not an employee of the Interested Party as of 22<sup>nd</sup> August 2017 when he received the Notice to Show Cause. Further, that he was not a licensed or approved person within the meaning of section 2 of the *Capital Markets Act*, and did not have a license that could be suspended or revoked by the Respondent. The effect therefore, is that he was not a person to whom a Notice to Show Cause could issue under section 26 of the *Capital Markets Act* or at all.
9. Accordingly, the Applicant argues that the Respondent, in purporting to issue the Notice to Show Cause to the Applicant, acted without jurisdiction and in abuse of power. Therefore the impugned Notice is tainted with incurable illegality and is null and void for violation of section 7 of the *Fair Administrative Action Act* No. 4 of 2015. This notwithstanding, the Applicant contends that he responded to the Notice to Show Cause vide a letter dated 6<sup>th</sup> September 2017, and that the Respondent, by way of Summons, invited the Applicant to a hearing that was to take place on 11<sup>th</sup> December 2017. That, the said Summons to Appear enclosed additional information and documents. According to the Applicant, the Respondent deliberately omitted to give him all the documents that formed the basis of the Notice to Show Cause, instead waiting to see his reply to the Notice to show cause before deciding which additional documents to furnish him with. Hence, this was an infringement on his legitimate expectation of a fair hearing and fair administrative action.
10. The Applicant contends that on 4<sup>th</sup> December 2017 he requested for certain key documents from the Respondent to enable him answer to the charge as enclosed in the Notice to show cause and Summons to appear of 30<sup>th</sup> November 2017, a request that the Respondent declined for reasons that the request was not in good faith and that I had been provided with all the documents. This the Applicant stated to be untrue and adversely affected his ability to defend himself at the hearing. It is contended that the Respondent accused the Applicant of potential embezzlement of funds which charge could only apply to a licensed or approved person pursuant to the provisions of section 25(1)(b) of the *Capital Markets Act* respectively and not to a former employee such as I was. It is contended that that the Respondent investigated the Applicant and later formulated the charge against him yet the Respondent had a statutory option to delegate the investigative function to a suitably qualified person.
11. The hearing on 11<sup>th</sup> December 2018 is alleged by the Applicant to have been a sham, whereby the three roles of investigation, prosecution and jury were performed by the same person (the Respondent). The Applicant contends that the Respondent delivered to him the impugned decision dated 3<sup>rd</sup> April



2018 together with a bundle of new documents relating thereto, which documents he had not been provided with during the hearing.

12. Based on the foregoing, the Applicant contends that the impugned decision is ultra vires, unlawful, unreasonable, disproportionate and null and void. Further, that the Applicant has no right of appeal to the Capital Markets Tribunal as he is not an aggrieved person within the meaning of section 35 of the Act, even though he filed an appeal at the Capital Markets Tribunal on 17<sup>th</sup> April 2018. The Applicant however contends that the Tribunal is not currently properly constituted as it lacks a chairman. It is also averred that the Capital Markets Tribunal Rules, 2001 which govern the making of appeals to the Tribunal were made pursuant to a non-existent legislation and are therefore unlawful, null and void.
13. The Applicant thus contends that the impugned decision is ultra vires, unlawful, null and void; it was made in abuse of power and in violation of the Applicant's legitimate expectation to a fair hearing and fair administrative action; and in violation of the rules of natural justice and is tainted by bias. Further, that the punishment meted out on the Applicant was unjust, unfair, disproportionate and unreasonable, and has far reaching adverse consequence on the Applicant's future employment prospects.

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

14. The Respondent's case is that at all material times the Interested Party was a listed company in the Nairobi Stock Exchange, and a regulated under the *Capital Markets Act*, and that the Applicant was the Head of Treasury of the Interested Party, and a member of its senior management. The Respondent explained that following a whistle blower's tip in 2015 on various issues at the Interested Party, and negative media reports that pointed to the possibility of breach by the Interested Party of its Capital Markets regulatory obligations as a public listed entity, the Respondent lodged an independent inquiry into the Bank's affairs. Consequently, it noted that during the period 2014/2015, some members of the Interested Party's management appeared to have devised a scheme where monies were fraudulently siphoned out of the Interested Party for services not rendered under the guise of payment of commissions for a deposit mobilization exercise which was purported to be increasing its liquidity. Further, that the operation of the exercise involved the procurement of, inter alia, two deposit mobilization agents, namely Edge Capital Consultancy and Advest Company Limited in 2014 to render the deposit mobilization services.
15. The Respondent claims that the investigations revealed the Applicant's involvement in the procurement of the deposit mobilization agents based on the following evidence that he signed the contract/agreement sign off forms for Messrs. Advest Company Limited and Edge Capital Consultancy who were the deposit mobilization agents and that the contract /agreement sign off forms for one of the mobilization agents (Edge Capital Consultancy) was signed on 5<sup>th</sup> May 2014 whereas the Company was only incorporated on 1<sup>st</sup> September 2014. Further, the Applicant verified and confirmed all questionable invoices from the agents thereby misleading the Interested Party that they were responsible for mobilizing deposits paid into the Bank hence being entitled to receipt of commission calculated on such purported deposits.
16. That the independent inquiry further noted that a total of Kshs. 991,592.296.42 was paid to the deposit mobilization agency firms through fictitious invoices as commissions, notwithstanding the absence of evidence that deposits received by the Interested Party were attributable to deposit mobilization services rendered by the procured firms. According to the Respondent, the Applicant, by virtue of his role as the Interested Party's Head of Treasury, was required to assess deposits received, source of deposit and cost of the commission to be paid to agents. However, that there was no evidence of the agents legitimately mobilizing deposits and in particular that the Director of Advest Company



Limited was approached by the Applicant to sub contract unknown marketers purportedly known to the Applicant and able to mobilize government deposits in exchange for the retention by the Director of Advest of 10% of any commissions subsequently paid; and Edge Capital Consultancy was co-opted into an arrangement similar to that by Advest Company's by the Applicant.

17. The Respondent averred that the investigations showed the fraudulent scheme involved the Applicant prompting the agents to forward invoices to the Interested Party as against unconnected deposits received by the Bank, and that, in each instance it was the Applicant detailing to the agents how much the invoices should be in respect of the specifics of the deposit made, rather than the agent developing such invoice based on deposits they knew were responsible for securing/mobilizing. Further, that the deposits which were subject to the commissions paid to the agents were from Government agencies, and the Respondent however independently sought and received formal confirmations from all the mentioned Government agencies indicating that their funds/deposits were not the product of any mobilization engagement by the identified agents or any other person, and that their deposits were made out of their own volition in the ordinary course of their operations.
18. It is thus the Respondent's case that the Applicant attributed deposited funds to agents and wrongfully forwarded invoices to the Interested Party's Finance Department for payment of commissions. This resulted in the Interested Party making payments of Kshs. 561, 617, 795.70 exclusive of withholding tax to Advest Company and payments of Kshs. 429,974,500.72 exclusive of withholding tax to Edge Capital Consultancy. In addition, that the Respondent's inquiry into and review of the commissions paid to the agents could not be reconciled to verifiable deposits or depositors because the invoices did not give particulars of the depositors and the corresponding amounts deposited. That, having established the possibility of the existence of the deposit mobilization scheme as a means of fraudulently siphoning funds from the Interested Party, the Respondent issued a Notice to show cause dated 22<sup>nd</sup> August 2017 to the Applicant requiring him to appear before the Respondent.
19. On the validity of the said Notice to Show Cause, the Respondent averred that it is not a requirement in law for it to issue a Notice to Show Cause to any person pursuant to a Board resolution, and it is within the lawful domain of the Chief Executive to issue a Notice to Show Cause in exercise of his duties of directing the Respondent's affairs. Further that it would be unreasonable to expect a board resolution before every Notice to Show Cause is issued, and that in any event, there was a Board resolution authorizing the issue of the Notice to Show Cause to the Applicant. The Respondent clarified that the enforcement action against the Applicant was taken pursuant to section 25A of the [Capital Markets Act](#), and the provisions of section 26(8) were used to ensure that the Applicant was given notice and an opportunity to be heard.

### **The Interested Party's Case**

20. The Interested Party filed written submissions dated 18<sup>th</sup> January 2019. It is submitted that the Interested Party was erroneously enjoined in the instant proceedings and ought to be struck out therefrom, as this application arises from a decision made by the Capital Markets Authority while exercising its mandate under the Act. The Interested Party advanced arguments on whether it is a necessary party to these proceedings or was erroneously joined. It was submitted that nothing done by the Interested Party is a subject of the proceedings herein, and proceeded to advance two tests necessary in order to determine the question of who is a necessary party thus:
  - a) there must be a right to some relief against such a party in respect of the matter involved; and
  - b) it should not be possible to pass an effective relief against such a party.



21. It is submitted that Order 1 rule 10(2) of the *Civil Procedure Rules 2010* provides for striking out of a suit of one who is improperly enjoined whether as plaintiff or defendant, and provides that the only party who can be joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. Reference was also made to the *Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013*, wherein an interested party is defined as “A person or an entity that has an identifiable stake or legal interest or duty in the proceedings”. The said rules further provide that a person with the leave of Court may make an oral or written application to be joined as an interested party or the Court, on its own motion, may also join an interested to the proceedings before it.
22. The Interested Party cited the case of *Yusuf Abdi Adan & Another v Hussein Ahmed Farah & 3Others* [2016] eKLR in which the High Court interrogated the issue of joinder of parties and who is an interested party. Reference was also made to *Kenya Medical Laboratory Technicians and Technologists Board & 6 Others v Attorney General & 4 Others* [2017] eKLR where the Court interrogated the principles governing the disposal of an application for joinder of a party as an interested party under rule 7(2) of the *Constitution of Kenya (protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013*. It is the Interested Party’s submission that it does not have an identifiable stake, legal interest or a duty in the proceedings, which is the applicable criteria for joinder, hence ought to be struck out as a party to the same.

### **The Determination**

1. A preliminary issue that requires to be determined at the outset is that raised by the Interested Party as regard whether it was properly joined in these proceedings. the applicable law on joinder of Interested Parties was set out by the Supreme Court in *Francis Kariuki Muruatetu & Others vs Republic & 5 Others* , (2015) e KLR and *Trusted Society of Human Rights vs Mumo Matemo & 5 Others* (2012) eKLR. In *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others*, (*supra*) the Supreme Court held as follows in this regard:-

“...Consequently, an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

2. In *Francis Kariuki Muruatetu & another v Republic & 5 Others* (*supra*) the Supreme Court also down the laid down the following considerations upon which an application for joinder of an interested party is to be considered.
  - a) The personal interest or stake that a party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
  - b) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
  - c) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the others parties will be making before the Court.



3. Therefore, the test is whether the interested party has an identifiable stake, or a legal interest or duty in the proceedings, and a person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. The Interested Party herein is the Bank in which the Applicant was formerly employed, and there are allegations made of misconduct on his part arising from the said employment. Therefore, the Interested Party clearly has an identifiable stake in these proceedings as it is clearly affected by whatever misconduct is alleged to be done by the Applicants in the course of the said employment, and it may be necessary for it to confirm or refute the allegations made by the Applicant or Respondent in this regard. To this extent it is properly joined in these proceedings as an interested party.
23. The Respondent also urged as a preliminary issue, that the Applicant has violated the provisions of section 9 of the *Fair Administrative Action Act* on exhaustion of alternative remedies before commencing judicial review proceedings. This preliminary issue was however conclusively determined by this Court in its ruling delivered on 2<sup>nd</sup> August 2018 when it granted the Applicant leave to commence judicial review proceedings.
24. It is also necessary to point out that there were arguments made by both the Applicant and Respondent as regards whether the Capital Market Tribunal Rules are irregular, unlawful, null and void. It was in this respect submitted by the Applicant that the *Capital Markets Tribunal Rules, 2002* are expressed to have been made by the Chief Justice in exercise of powers conferred by Section 35A of the Capital Markets Authority Act which is a legislation that does not exist. Thus, that the Rules are unlawful, null and void to the extent that they were made pursuant to a non-existent legislation. The Respondent on its part submitted that whereas it may be true that the Rules are expressed to as having been made under the Capital Markets Authority Act, the description of the statute from where the Chief Justice made the Rules was erroneous, but that the erroneous description does not negate the validity of the Rules because the statute number and /or chapter is still the same.
25. My view on these arguments is that this Court having made a decision to grant leave to the Applicant and to hear and determine the Applicant's substantive application, the issue of the legality or otherwise of the Capital Market Tribunal Rules became moot, as these Rules were only relevant in the context of an appeal being made to the Capital Markets Tribunal in lieu of the judicial review proceedings. To this extent the said Rules are not applicable to this application, neither were they a subject of the decision that is impugned by the Applicant. In addition, no specific prayer is sought by the Applicant as regards the legality of the said validity of the said rules, and this Court cannot therefore pronounce itself on an issue which was not specifically pleaded nor prayed for.
26. The outstanding substantive issues that arise for determination for the submissions made by the Applicant and Respondent are as follows:
  - a) Whether the Applicant as a former employee of the Interested Party is subject to the enforcement jurisdiction of the Respondent.
  - b) Whether Respondent acted fairly in making the decision of 3<sup>rd</sup> April 2018
  - c) Whether the decision made by the Respondent on 3<sup>rd</sup> April 2018 was tainted with bias;
  - d) Whether the Applicant merits the reliefs sought.
27. In addressing the said issues, it is necessary to first lay out the legal provisions relied on by the Respondent in making the Enforcement of Action against the Applicant dated 3<sup>rd</sup> April 2018, and the parameters of judicial review in this regard. The Respondent is established under section 5 of the



Capital Markets Act, and section 11(1) of the said Act details the objectives and purposes for which it is established as follows:

- “(1) The principal objectives of the Authority shall be—
- (a) the development of all aspects of the capital markets with particular emphasis on the removal of impediments to, and the creation of incentives for longer term investments in, productive enterprises;
  - (b) to facilitate the existence of a nationwide system of securities commodities market and derivatives market and brokerage services so as to enable wider participation of the general public in the securities commodities market and derivatives market;
  - (c) the creation, maintenance and regulation of a market in which securities can be issued and traded in an orderly, fair and efficient manner, through the implementation of a system in which the market participants are self-regulatory to the maximum practicable extent;
  - (d) the protection of investor interests;
  - (e) the facilitation of a compensation fund to protect investors from financial loss arising from the failure of a licensed broker or dealer to meet his contractual obligations; and
  - (f) the development of a framework to facilitate the use of electronic commerce for the development of capital markets in Kenya.”

28. The Capital Markets Act also bestows the Respondent with various powers and duties to facilitate the achievement of the above stated objectives. Under section 11(3) of the Act, numerous and wide powers, duties and functions are granted to the Respondent to enable it carry out the objectives as follows:

- “(a) advise the Minister on all aspects of the development and operation of capital markets;
- (b) implement policies and programmes of the Government with respect to the capital markets;
- (c) employ such officers and servants as may be necessary for the proper discharge of the functions of the Authority;
- (cc) 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;
  - (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;
- (d) to issue guidelines and notices on all matters within the jurisdiction of the Authority under this Act;
- (e) to grant a licence to any person to operate as a stockbroker, derivatives broker, dealer or investment adviser, fund manager, investment bank, central depository or authorised securities dealer, and ensure the proper conduct of that business;
- (f) to grant approval to any person to operate as a securities exchange, commodity exchange, derivatives exchange, credit rating agency, registered venture capital company or to operate in any other capacity which directly contributes to the attainment of the objectives of this Act and to ensure the proper conduct of that business;
- (fa) regulate spot commodity markets;
- (ff) recognize any person duly licensed by a prescribed foreign authority carry on any licensed activity in Kenya which requires a license or an approval under this Act;
- (g) register, approve and regulate collective investment schemes;
- (h) 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;
- (i) give directions to 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;
- (j) conduct inspection of the activities, books and records of any persons approved or licensed by the Authority;
- (k) deleted by Act No. 9 of 2007, s. 46(b);
- (l) deleted by Act No. 9 of 2007, s. 46(b);
- (m) appoint an auditor to carry out a specific audit of the financial operations of any collective investment scheme or public company the securities of which are publicly offered or traded on an approved securities exchange or on an over the counter market, if such action is deemed to be in the interest of the investors, at the expense of such collective investment scheme or company;



- (n) grant compensation to any investor who suffers pecuniary loss resulting from the failure of a licensed broker or dealer to meet his contractual obligations;
- (o) have recourse against any person whose act or omission has resulted in a payment from the Compensation Fund;
- (p) act as an appellate body in respect of appeals against any self regulatory organization securities or exchange-traded derivatives contracts exchange, derivatives exchange or central depository in actions by parties aggrieved thereby;
- (q) co-operate or enter into agreements for mutual co-operation with other regulatory authorities for the development and regulation of cross-border activities in capital markets;
- (r) regulate and oversee the issue and subsequent trading, both in primary and secondary markets, of capital market instruments;
- (s) regulate the use of electronic commerce for dealing in securities or offer services ordinarily carried out by a licensed person;
- (t) trace any assets, including bank accounts, of any person who, upon investigation by the Authority, is found to have engaged in any fraudulent dealings in securities or insider trading;
- (u) in writing, order caveats to be placed against the title to such assets or prohibit any such person from operating any such bank accounts as may be directed by the Authority, pending determination of any charges instituted against that person;
- (v) prescribe notices or guidelines on corporate governance of a company whose securities have been issued to the public or a section of the public;
- (w) do all such other acts as may be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under the Act.”

29. The Respondent is also granted powers to issue rules and regulations, and guidelines and notices in exercise of its regulatory powers under section 12 and 12A respectively of the Act. In addition, under section 13, the Respondent or any person it officially authorizes has power to require upon notice, any person to provide it with information or returns, and can inquire into the affairs of any person, including powers of entry, search and seizure upon application to, and grant of a warrant by a magistrate. The Respondent has investigatory powers under section 13B of the Act in the circumstances stated therein as follows:

- “ 1) Where the Authority has reasonable cause to believe, either on its own motion or as a result of a complaint received from any person, that—
  - (a) an offence has been committed under this Act; or
  - (b) licensed or approved person may have engaged in embezzlement, fraud, misfeasance or other misconduct in connection with its regulated activity; or



- (c) the manner in which a licensed or approved person has engaged or is engaging in the regulated activity is not in the interest of the person's clients or in the public interest, the Authority may in writing depute a suitably qualified person to conduct investigations into the matter on behalf of the Authority.”

30. As regards the manner it may conduct its functions, section 11A of the Act provides that the Respondent may either perform the functions itself, or delegate the functions to a Committee of the Board, a self regulatory organization, or an authorized person. In addition, under section 12, the Respondent has powers to appoint committees, whether of its own members or otherwise, to carry out such general or special functions as it may specify, and may delegate to any such committee such of its powers as it may deem appropriate . Lastly, under section 25A the Respondent may impose specified sanctions or levy financial penalties for the breach of any provisions of the Act, the regulations, rules, guidelines, notices or directions it may issue. Under section 26 it can also suspend or revoke a license, for such period or until the occurrence of such event as it may specify, if a licensed person.
31. It is necessary to state at the outset that the applicability of the above cited provisions or the powers granted thereby to the Respondent is not in dispute. What is in dispute is the manner of the exercise of the said powers, and of the application of the provisions by the Respondent. There are various norms and laws which regulate the manner in which the Respondent is required to performs its powers and functions, particularly those introduced by the Constitution of 2010, which was promulgated after the enactment of the Capital Markets Act. The Capital Markets Act must now be read and interpreted in a manner that is consistent with the Constitution. A number of values, principles, rights and duties in the Constitution directly impact on the Respondent, including the values and principles in Article 10 of the Constitution, the right to access to information under Article 35 of the Constitution, and the right to fair administrative action in Article 47.
32. Relevant laws that have since been enacted to regulate the content and application of these rights are the Access to Information Act and the Fair Administrative Action Act. It is also notable in this respect that the values and principles in Article 10 apply to all State organs and any person when interpreting or applying the Constitution or any law, or when making or implementing any policy. Likewise, under Article 20 of the Constitution. the rights and corresponding duties in the Bill of Rights binds all state organs and persons. A person is defined under Article 260 of the Constitution to include a company, association or other body of persons whether unincorporated or incorporated. The Respondent is specifically established as a body corporate under section 5 of the Capital Markets Act.
33. The role of judicial review in regulating the exercise of powers by public authorities was stated in the case of *Pastoli vs Kabale District Local Government Council & Others* [2008] 2 EA 300 at pages 303 to 304 thus:

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.....



Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876).”

34. In addition, the parameters of judicial review were addressed by the Court of Appeal in the case of *Municipal Council of Mombasa vs Republic & Umoja Consultants Limited*, Nairobi Civil Appeal No. 185 of 2001, [2002] eKLR as follows:

“The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

35. It was also emphasized by the Court of Appeal in *Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others*, (2016) KLR that while Article 47 of the *Constitution* as read with the grounds for review provided by section 7 of the *Fair Administrative Action Act* reveals an implicit shift of judicial review to include aspects of merit review of administrative action, reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act.
36. This Court will therefore proceed with an analysis of the issues raised by the parties herein in the light of the aforementioned constitutional and legal framework, and judicial review principles.

#### **Whether the Applicant is subject to the enforcement jurisdiction of the Respondent.**

37. Prof. Mumma, the learned counsel for the Applicant, made submissions on the issue of the Respondent’s jurisdiction, and contended that the Respondent derives its powers from the law and that the wording of a statute granting jurisdiction must be strictly construed and should not be given an expansive construction to include the intention of the legislation. Further, that this is especially the case when construing a statute which imposes penal consequences. Prof Mumma cited various judicial decisions in support of this position, namely *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others* (2012) eKLR; *Republic vs Commission on Administrative Justice ex parte National Social Security Fund Board of Trustees* (2015) eKLR; *Republic vs Kenya Civil Aviation Authority & Another ex parte Elite Earthmovers Limited* (2017) eKLR; and *Tanganyika Mine Works Union vs The Registrar of Trade Unions* (1961) 1 E.A 629



38. The learned counsel submitted in this regard that the statutory powers of the Respondent in section 25A of the [Capital Markets Act](#) are limited to a licensed person, listed company, securities exchange or other approved person; an employee of a licensed or approved person, including a securities exchange; or a director of a listed company or a licensed or approved person, including a securities exchange. That at the time the Respondent commenced its investigation, conducted its hearings, made the impugned decision and imposed sanctions on the Applicant, the Applicant not one of the above mentioned persons. Therefore, that the Respondent's jurisdiction is limited by the [Capital Markets Act](#) and cannot act beyond the power conferred thereby, and the section 25A does not confer it with jurisdiction over former/ex-employee of a licensed or approved person or securities exchange.. The Applicant cited the holding in [Republic v Business Premises Rent Tribunal & Another Exparte Davies Motor Corporation Ltd](#) [2013] eKLR; and [Republic v National Environment Tribunal & 2 Others Ex-parte Water Services Board](#) [2015] eKLR that nothing is to be added to what the text states or reasonably implies. Hence, a matter not covered is to be treated as not covered.
39. Mr. Githendu in his submissions reiterated that that the Respondent has jurisdiction over the Applicant since he was key personnel at all material times relevant to the inquiry into the affairs of the Interested Party. That, the Interested Party is a regulated person in the context of section 2 of the Act which according to the Respondent provides: "regulated person" means an operator of an approved person, a listed company or a person approved to offer securities to the public. The Respondent submits that it conducted investigations into the Interested Party's affairs which is a juridical person, pursuant to the provisions of section 13B of the Act. Further, that the said investigations extended into an inquiry into the conduct of key officers who were controlling the affairs of the Bank and part of the management of the listed company, obliged to refrain from engaging in unlawful acts like embezzlement which erode shareholder value and jeopardize investor interests. It is the Respondent's submission that at all material times, the Applicant was the Interested Party's Head of Treasury, and falls within the meaning of "key personnel" under section 2 of the Act.
40. The Respondent contended that the Applicant's argument that he is no longer an employee and /or officer and cannot be held accountable for happenings at the Bank or for his actions during his tenure, is an attempt to avoid accountability. The Respondent cited [Republic v Capital Markets Authority Ex Parte Joyce Ogundo](#), (2018) e KLR to demonstrate that the Courts have rejected similar arguments. The Respondent submits that the interpretation of the Act as advocate by the Applicant would not be in line with the principles and canons of statutory interpretation, and cited the case of [Ekuru Aukot v Independence Electoral and Boundaries Commission & 3 Others](#), (2017) e KLR.
41. It is submitted that such an interpretation would lead to undesired results and erect an accountability firewall around the Applicant as it will not be possible to hold him accountable for his actions as a key employee of the Bank. That in any case, the argument that "a matter not covered is to be treated as not covered" cannot stand as in the present scenario, the matter is undoubtedly covered. The Respondent urged a purposive interpretation of section 25A of the Act and cited the case of [Okiyah Omtatah Okoiti v Cabinet Secretary, National Treasury & 3 Others](#) (2018) e KLR. In this respect.
42. On whether the Notice to Show Cause that was issued by the Respondent was valid, the Respondent submitted that it rebutted this allegation by supplying the requisite resolution by the Respondent's Board to issue the Notice to Show Cause. The Respondent also refuted the submission that there was a pre-determined decision because of the Board's resolution and submitted that the wording of the Notice to Show Cause, and opening remarks of the Respondent during the hearing of the Notice to Show Cause clearly indicate the absence of a predetermined decision. Further, that the mere presence of the same members of the Respondent at the meetings of the Respondent's Board held on 12<sup>th</sup> July 2017 and 11<sup>th</sup> December 2017 does not connote the existence of a pre-determined decision.



43. A determination of this issue of necessity requires an interpretation of section 25A(1) of the *Capital Markets Act*. The said section 25A(1) provides as follows in

- (1) Without prejudice to any other provision of this Act, the Authority may impose the following sanctions or levy financial penalties in accordance with this Act, for the breach of any provisions of this Act, the regulations, rules, guidelines, notices or directions made thereunder, or the rules of procedure of a securities, commodities or derivatives exchange, by a licensed or approved person, listed company, employee or a director of a licensed or approved person or director of a listed company as provided under section 11(3)(cc)—
  - (a) with respect to a licensed person, listed company, securities, commodities or derivatives exchange or other approved person—
    - (i) a public reprimand;
    - (ii) suspension in the trading of a listed company's securities, commodities or derivatives for a specified period;
    - (iii) suspension of a licensed person from trading for a specified period; (iv) restriction on the use of a licence;
    - (v) recovery from such person of an amount equivalent to two times the amount of the benefit accruing to such person by virtue of the breach;
    - (vi) the levying of financial penalties not exceeding ten million shillings;
    - (vii) revocation of the licence of such person;
  - (b) with respect to an employee of a licensed or approved person, including a securities, commodities or derivatives exchange—
    - (i) require the licensed or approved person to take disciplinary action against the employee;
    - (ii) disqualification of such employee from employment in any capacity by any licensed or approved person or listed company for a specified period;
    - (iii) recovery from the employee of a licensed or approved person an amount double the benefit accruing to such person be reason of the breach;
    - (iv) the levying of financial penalties not exceeding five million shillings;
  - (c) with respect to a director of a listed company or a licensed or approved person, including a securities, commodities or derivatives exchange—
    - (i) disqualification of such person from appointment as a director of a listed company or licensed or approved person including, a securities, commodities or derivatives exchange;
    - (ii) the recovery from such person of an amount equivalent to two times the amount of the benefit accruing to the person by reason of the breach;
    - (iii) the levying of financial penalties in such amounts as may be prescribed.



44. The Court of Appeal in *Kimutai vs. Lenyongopeta & 2 Others* [2005] 2 KLR 317, held as follows on the approach to be taken in interpreting statutes:

“The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the “purposive approach”. In all cases now in the interpretation of statutes such a construction as will “promote the general legislative purpose” underlying the provision is to be adopted. It is no longer necessary for the judges to wring their hands and say, “There is nothing we can do about it”. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.”

45. Therefore, in order to arrive at the true intention of the legislature, a statute must be considered as a whole and sections of an Act are not to be read in isolation and that when a question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision as a whole. Hence the words, phrase occurring in a statute are to be taken not in isolation or in a detached manner dissociated from the context, but are to be read together and construed in the light of the purpose and object of the Act. The legal meaning of an enactment is also in this respect not determined in the abstract, but in relation to the relevant facts of a case before it.

46. In the present application, the relevant facts were the inquiry into the affairs of the Interested Party in the period 2014/2015 when the alleged misconduct is alleged to have occurred, and the factual outline was presented by the Respondent in its case. The time when the alleged misconduct occurred is thus material to the facts, and in this respect it was not disputed that in 2014/2015 the Applicant was an employee of the Interested Party. In addition, to hold otherwise would be to avoid the mischief that Parliament intended be remedied by the *Capital Markets Act*, and perpetuation the continuance of the said mischief, which is that of infractions in the governance in the capital markets. The Respondent therefore properly brought enforcement proceedings against the Applicant, which action was within its jurisdiction.

47. This Court in this respect agrees with the holding in *Republic v Capital Markets Authority Ex Parte Joyce Oguno* (*supra*) that:

“In my view to subject section 11(3)(cc)(i) to section 25A would have the effect of negating the objective of the Act and render it a dead letter of the law since directors would simply evade the penal sanctions by simply stepping aside as it were when faced with imminent action. 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. As to whether this was the position is a matter within the powers of the Respondent and not this Court sitting as a judicial review Court.”

### **Whether Respondent acted fairly in making the decision of 3<sup>rd</sup> April 2018**

48. Prof. Mumma further submitted that the Respondent was not procedurally fair, and relied on section 4(3)(g) of the *Fair Administrative Action Act* to urge that the Respondent did not provide the Applicant with the information relied upon to reach its decision. That the Respondent provided the Applicant with piecemeal information as it deemed fit and relevant, notwithstanding the applicant’s right to be provided with all information, materials and evidence to be relied on in making the decision or taking the administrative action as provided for in said section. It is was further submitted that the



- Applicant on 4<sup>th</sup> December 2017 requested the Respondent for documents from the Interested Party that the Applicant believed would demonstrate his innocence. However, that the Respondent declined the same stating the request was not in good faith, yet it is empowered under section 13 of the Capital Markets Act to obtain information from any person they deem fit to furnish information. That, it is also on record that the Respondent contacted the Interested Party and reviewed the documents the Applicant had requested for in the letter dated 4<sup>th</sup> December 2017, made a unilateral decision that these documents were of no use to the Applicant, and chose not to avail the same.
49. Furthermore, that the Respondent responded to the Applicant's letter dated 5<sup>th</sup> April 2018 and enclosed new evidence in the form of affidavits which it had in its possession all along, but claimed it did not rely on in arriving at the impugned decision. However, that the Respondent has annexed those affidavits as part of the documents that it relied on to arrive at the impugned decision, and the Applicant therefore had no opportunity to counter the prejudicial statements contained these affidavits. Hence, it is submitted that there was violation of the Applicant's rights under Articles 47 and 50 of the Constitution and Section 4(3)(g) of the Fair Administrative Action Act. The Applicant submits that fair hearing must be meaningful for it to meet the Constitutional threshold, and in this regard cited the case of Republic vs Capital Markets Authority & Another Ex-parte Jonathan Irungu Ciano (2018) eKLR. The Applicant also cited the cases of Baker vs Canada (Minister of Citizenship & Immigration) 2 S.C.R. 8176, and Republic vs National Police Service Commission ex parte Daniel Chacha Chacha [2016] eKLR.
50. The Respondent submitted that it supplied the Applicant with all the relevant and/or material information that was relied upon in crafting the charges in the Notice to Show Cause and referred the Court to the Catalogue of evidence accompanying the said Notice. It was also submitted that the Respondent on 30<sup>th</sup> November 2017 furnished the Applicant with additional information to further enable him to respond to the Notice to Show Cause. The Respondent submits that it supplied the Applicant evidence relevant to the substratum of the Notice to show cause as follows:
- a) the decision of the Board of the Bank on the Deposit Mobilization Scheme to demonstrate the genesis of the fraud;
  - b) the involvement of the deposit mobilization agents in the process in which the Ex Parte Applicant was involved;
  - c) the formation of the agreements between the Bank and the said deposit mobilization agents as the basis of the subsequent Scheme in which the Ex Parte Applicant was involved;
  - d) evidence of payments to the said deposit mobilization agents on the basis of confirmation and verification conducted by the Ex Parte Applicant; and
  - e) evidence of the movement of funds between several key players in the fraudulent scheme including the Applicant, the agents and advocates.
51. While the Respondent acknowledged that there was a request for further information from the Applicant dated 4<sup>th</sup> December 2017, it is submitted that it replied to the request vide letter dated 7<sup>th</sup> November 2017, and was of the view that the Applicant was fishing for information from the Respondent, as he was unable to detail the specific information he wanted even at the time of the hearing. The Respondent refuted the submission that it provided the Applicant with piecemeal information contrary to his rights under Section 4(3) (g) of the Fair Administrative Action Act. It is submitted that the Respondent provided the Applicant with further information and evidence vide letter dated 30<sup>th</sup> November 2017 which was within reasonable period to enable him consider the information, as the hearing was scheduled for 11<sup>th</sup> December 2017.



52. On the allegation that the Respondent failed to disclose to the Applicant the existence of new evidence in the form of affidavits, it is submitted that the Affidavits in issue were commissioned in October, a month after the Applicant had been served with the Notice to Show Cause, hence had not been relied upon in framing the allegations in the Notice to Show Cause. That in any case the averments therein only provided an explanatory context for the evidence contained in the Whatsapp communication extracts annexed to the summons issued to the Applicant and which in fact constituted further evidence being relied upon.
53. The Respondent further submitted that the right to fair hearing under Article 50 of the *Constitution* did not apply to the Applicant, however, that it did not violate the same nonetheless. According to the Respondent, the instant matter is purely an administrative matter under the purview of Article 47 of the *Constitution* as elaborated under the *Fair Administrative Action Act*. In this respect, the Respondent relied on the cases of *Judicial Service Commission v Mbalu Mutava & Another* (2015) eKLR and *Dry Associates Ltd v Capital Markets Authority & another* (2012) eKLR. It was also submitted that the *Capital Markets Act* provides for enforcement action that the Respondent may take where persons are found culpable of regulatory infractions, and the Respondent's decision to take the particular action was made after objective consideration of the oral and written submissions of the Applicant against the backdrop of meticulous investigations.
54. The Respondent submits that in accordance with the Webster Law Dictionary's definition of the term 'lawful' which means "permissible and/or not contravening a law", the enforcement action taken against the Applicant was in line with the provisions of sections 11(3)(cc), 11(1)(d), 11(3)(w) and 25A was lawful. This is because the Applicant was a key employee at the material time and as it is, the Respondent was within the scope of the Act. The Respondent cited *JNN (a minor) MNM, suing as next friend vs Naisula Holdings Limited t/a as N School* [2018] e KLR.
55. In considering the issue as to whether the Respondent acted fairly, two key legal principles apply. Firstly, the requirements of natural justice that guide all administrative decisions are that a person must be allowed an adequate opportunity to present their case where his or her interests and rights may be adversely affected by a decision-maker. Secondly, that no one ought to be judge in his or her case, which is the requirement that the deciding authority must be unbiased when according the hearing or making the decision. The Court of Appeal in this regard observed as follows in the case of *David Oloo Onyango v Attorney-General* [1987] eKLR:
- “There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore that in applying the material sub-section the Commissioner is required to act fairly and so to apply the principle of natural justice.”
56. In addition, Article 47 of the *Constitution*, and the provisions of the Fair Administrative Act import and imply a duty to act fairly by a decision maker in any administrative action. Article 47 of the *Constitution* provides as follows in this regard:
- (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.



57. Section 4 (3) and (4) of the *Fair Administrative Action Act* lays down the procedure to be adopted by decision makers in administrative actions as follows:

- “(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
  - (b) an opportunity to be heard and to make representations in that regard;
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
  - (d) a statement of reasons pursuant to section 6;
  - (e) notice of the right to legal representation, where applicable;
  - (f) notice of the right to cross-examine or where applicable; or
  - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-
- (a) attend proceedings, in person or in the company of an expert of his choice;
  - (b) be heard;
  - (c) cross-examine persons who give adverse evidence against him; and
  - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

58. Procedural fairness means acting fairly in administrative decision making. It relates to the fairness of the procedure by which a decision is made, and not the fairness in a substantive sense of that decision. There is no fixed content to the duty to afford procedural fairness. The fairness of the procedure depends on the nature of the matters in issue, and what would be a reasonable opportunity for parties to present their cases in the relevant circumstances.

59. The Court (Onguto J.) summarized the requirement of fair procedure in *Alnashir Popat & 8 others v Capital Markets Authority* [supra] as follows:

“104. Procedural fairness is an aspect of both Article 47 and Article 50 of the *Constitution*, and I will now consider it in light of the right to fair administrative action.

105. I start by stating that the importance of a decision to an individual affected or to be affected by a decision, constitutes a significant factor affecting the content of the duty of procedural fairness. The more important the decision is to the lives



of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be invited and imposed.

106. As Sedley J. (as he then was) stated in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), at p. 667:

In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin* [1963] 2 All E.R. 66, [1964] A.C.40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

107. Procedural fairness has embedded in it the age old natural justice requirements that no man is to be a judge in his own cause, no man should be condemned unheard and that justice should not only be done but seen as done: see *Kanda vs. Government of Malay* [1962] AC 322,337 (per Denning LJ). Effectively, procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker."

60. At the core of the duty to act fairly and the requirement of fairness is the need to ensure that a person affected by a decision has an effective opportunity to make representations before it is taken, so that he or she has the chance to influence it. This requirement is what informs the key procedural steps set down by the law of giving of notice of an administrative action, and provision of the evidence that will be relied upon during that administrative action. The question of whether failure to observe any of these steps renders the decision making by an administrator unfair, will depend on how it effects a party's ability to make representations.
61. In the present case, the Applicant in a letter by his Advocates dated 4<sup>th</sup> December 2017 wrote to the Respondent as follows:

"4<sup>th</sup> December, 2017

Chief Executive Officer,  
Capital Markets Authority,  
Embankment Plaza, 3<sup>rd</sup> Floor,  
Longonot Road, Upper Hill,  
Nairobi.

Dear Sirs,

Re; Summons To Appear Before The Authority – National Bank of Kenya

We have been retained by Mr. Solomon Alubala to present in this matter in relation to the Summons to Appear dated 30<sup>th</sup> November 2017.



In the Summons to Appear, you have invited our client to appear before the Board of the Authority for purposes of highlighting the written submissions and providing additional information for consideration by the Authority. Our client has attended to your office in the part upon being requested to appear and he has given you all information that he has in his possession relating to this matter

Accordingly, and prior to our client confirming whether he will be attending the hearing, we have instructions to request the following;

1. The provisions of the law upon the Authority derives the powers to summon our client to attend a hearing before it.
2. The laws and regulations guiding the procedure to be followed at the hearing.

In addition, our client request to be provided with the following documents prior to confirmation of his attendance at the hearing.

1. National Bank of Kenya Executive Management Committee's minutes for the period between 1014 and April 2016.
2. National Bank of Kenya Asset and Liability Committee's minutes for the period between 1014 and April 2016.
3. National Bank of Kenya minutes for the period between 1014 and April 2016.
4. National Bank of Kenya monthly Management Accounts for Corporate and Institutional Department for the period between 1014 and April 2016.
5. National Bank of Kenya Quarterly Financial Statements for the period between 1014 and April 2016

Finally, our client requests a confirmation on whether he is a suspect, whether there has been a complaint lodged against him, the nature of the complaint if any, the grounds of the complaint if any and the identity of the complainant if any.

The request is made pursuant to the provisions of Article 35 of the *Constitution*. We request the above information in order to advise our client on his fundamental rights set out under Article 35, 47 and 50(1) of the *Constitution*.

We believe that this is a reasonable request and your office will hesitate to revert.

Yours faithfully,

Kimani & Muriithi Associates

Dennis Muriithi"

62. It is thus evident that there was a request for information made by the Applicant with the necessary particulars detailed in the letter from his Advocates dated 4<sup>th</sup> December 2017. Further, the letter stated that the request for information was made pursuant to Article 35 of the *Constitution*, and was required for purposes of advising the Applicant of his rights as regards the hearing in response to summons sent to the Applicant appear before the Respondent in relation to a Notice to Show Cause. The Applicant's right to a fair hearing was therefore at stake, in addition to other rights that were likely to be affected by any findings made on the Notice to Show Cause.



63. The Respondent replied in a letter dated 7<sup>th</sup> December 2017 as follows:

“December 7, 2017

Kimani & Muriithi Associates  
Ojjo Plaza, Third Floor, Suite C  
Opposite Parklands Sports Club  
Box 62225-00200  
Nairobi.

Dear Sirs,

Re: Summons to Appear Before The Authority National Bank of Kenya Limited

We refer to your letter dated 4<sup>th</sup> December 2017 and received on 5<sup>th</sup> December 2017 regarding the Summons to appear before the Authority issued to Solomon Alubala and wish to respond as follows:-

1. The allegations made against your client that are the subject matter of the hearing are contained in the Notice to Show Cause dated 22<sup>nd</sup> August, 2017 together with the information in support shared under cover of the Notice to Show Cause and the summons to appear dated 30<sup>th</sup> November 2017;
2. The summon to attend the hearing is for the purposes of providing your client with an opportunity to be heard pursuant to Section 26(8) of the *Capital Markets Act* and Section 4 (3) (b) of the *Fair Administrative Action Act*. Furthermore, as detailed in the Notice to Show Cause dated 22<sup>nd</sup> August 2017, upon consideration of any written response from your client, the Authority confirmed it would schedule a hearing date to provide your client with an opportunity to be heard by way of oral statement for purposes of highlighting the written submissions made;
3. That the Board of the Authority determines its own procedures for the purposes of its administrative hearings. In this regard, please find annexed the procedure for the purposes of this hearing;
4. When your client made his written submissions on 6<sup>th</sup> September, 2017 he did not indicate that there were any documents he required for purposes of responding to the Notice to Show Cause nor to prepare for any intended hearing;
5. It therefore appears that the current request for the various documents may not been made in good faith. The Authority confirms that it has made available to your client all documents it had relied on in issuing the NTSC in accordance with the statutory provisions on fair administrative justice;
6. The documents now requested are not in the possession of the Authority and we further note that your client has not demonstrated that he has requested them from National Bank who is the custodian of the same;
7. That notwithstanding the above, please note that during the hearing your client will be given an opportunity to demonstrate what aspects of the



documentation requested were intended to serve to rebut the allegations and/or contradict the evidence provided as per the Notice to Show Cause and Summons to Appear. The Authority will have due regard to any such explanations in determining the need to call or additional information in making any determination; and

8. Pursuant to Section 34(A) of the Capital Act, any person who contravenes any provisions of the Act or requirements or rule or regulation made thereunder commits an offence. In connection with the same the Authority is accorded the power to inquire on its own motion pursuant to Section 11(3)(h) and 33B of the Capital Markets Act and there after impose administrative action, if any, pursuant Section 11(3) (cc) and 25A (1) (b) of the Capital Market Act

Please note that this response is in supplement to and does not vary the Summons to Appear nor the status of the hearing scheduled for 11<sup>th</sup> December 2017. Your client is advised that he continue to have the opportunity appear on the date and time indicated and in default of which, the Authority retains the option to proceed to consider the matter and make an appropriate determination, his absence notwithstanding.

Yours sincerely

Paul M. Muthaura

Chief Executive

Encls.

64. Before addressing the implications of the Respondent's response in light of the Applicant's right to a fair hearing, it is notable that that the Respondent contrary to Article 35 of the Constitution and section 4(2) of the Access to Information Act, abrogated upon itself the responsibility of deciding whether the said information that was requested was relevant or in the Applicant's interest, and went ahead to expressly deny the Applicant access to the said information.
65. Article 35 of the Constitution which provides as follows as regards access to information:
  - “(1) Every citizen has the right of access to—
    - (a) information held by the State; and
    - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
  - (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
  - (3) The State shall publish and publicise any important information affecting the nation.”
66. Citizens therefore have a right to information that in the possession of the state that may have an impact on them for protection of their other interests, and also for accountability reasons. Decisions should also be informed by rational considerations that are explicable to those affected by them. Therefore there was a Constitutional obligation on the part of the Respondent, to provide any information that was likely to impact on the Applicant during the enforcement proceedings, and also for purposes of fostering the principles of transparency and accountability in the enforcement proceedings.



67. The Access to Information Act reiterates this right and obligation in section 4 thereof, and in addition provides for three principles that are key in interpretation of the Act, namely:
- (a) That every citizen's right to access information is not affected by any reason the person gives for seeking access; or the public entity's belief as to what are the person's reasons for seeking access.
  - (b) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
  - (c) The Act shall be interpreted and applied on the basis of a duty to disclose and non-disclosure shall be permitted only in circumstances exempted under section 6.
68. Therefore, a purposive interpretation of the Act leads to the conclusion that disclosure of information is the normal course of action so as to give effect to the constitutional right of access to information, and that the withholding of information is the exception, and is only permitted in on the grounds set out in the Act and where it is justified. Lastly, the burden of persuasion rests on the party resisting disclosure, since such a refusal amounts to a limitation of a constitutional right, and the Constitution places the burden of proof on the person seeking to limit the right under Article 24(3).
69. The Applicant has also alleged that the Respondent failed to avail to him two affidavits which it relied upon in its findings that he had been involved in embezzlement of funds. This raises the Applicant's entitlement to information, and also his entitlement to a fair hearing. The Respondent did not dispute this averment and alleges that it did not rely on the said affidavits in issuing the Notice to Show Cause.
70. This position however is contradicted by the Respondent in its own pleadings. In paragraph 6G of its replying affidavit sworn on 13<sup>th</sup> July 2018, the deponent thereof stated as follows as regards the findings from its inquiry that led to the issue of the Notice to Show Cause e against the Applicant:
- “The Respondent found that the ex parte Applicant confirmed the invoices raised by the Deposit mobilization agents amounting to KES 991,592,296.42 exclusive of 5% withholding tax. This confirmation was issued by the ex parte Applicant even in circumstance's where there was no evidence of the agents legitimately mobilizing deposits and in particular:
- (a) The Director of Advest Company Limited was approached by the ex parte Applicant to sub contract his company to unknown marketers (purportedly known to the ex parte Applicant) who would be able to mobilise government deposit for a 10% retention of the commission paid;and
  - (b) Edge Capital Consultancy was able to mobilize deposits in the early stages but was still co-opted into an arrangement to Advest Company Ltd, by the ex parte Applicant;
- (Annexed hereto and marked AHA 6 are the sworn statements of the Director of Edge Capital Consultancy Advest Company Limited”
71. The said “Annexure AHA 6” are the affidavits sworn by Kanini Kioko, who described herself as the sole proprietor of Edge Capital, and by Nelson Zavai Kiziri Onzere who described himself as a director of Advest company Limited. The said affidavits were thus clearly relied upon by the Respondent and material to the case made against the Applicant, and ought to have been disclosed to the Applicant.
72. The Respondent was required to provide the Applicant with sufficient information about the issues to be considered to enable him make meaningful representations, and the information in the affidavits



and agents statements were key in the allegations made against the Applicant. In is notable that the key and only allegation made against the Applicant in the Notice to Show Cause was the alleged embezzlement of funds through a scheme were monies were fraudulently siphoned out of the Interested Party for services not rendered under the guise of commissioning a deposit mobilization exercise, which is what the two affidavits speak to. The said affidavits were therefore clearly relevant to the Applicant's case.

73. While the obligation and extent of a decision maker's duty to provide the individual affected by a decision the evidence relied upon will vary with the context of a hearing, where there are allegations of wrong doing or disciplinary actions such as in the proceedings against the Applicant, which may and indeed did result in the imposition of sanctions and penalties, the individual must be given sufficient information and notice of all allegations that will be considered. This will also include any other allegations or evidence that influenced the Respondent's decision to inquire into the Applicant's conduct, so as to give the Applicant an opportunity to challenge the same.
74. The failure by the Respondent to provide this evidence to the Applicant clearly breached his right to a fair hearing, in light of the reliance on the same by the Respondent in its enforcement action against the Applicant. This conclusion has been reached bearing in mind the provisions of section 4(3)(g) of the *Fair Administrative Action Act* which make it an express statutory requirement for the decision maker to make pre-hearing discovery orders; the common law right to disclosure found in the rules on natural justice, which require disclosure of material in the hands of the decision maker, and the express powers given to the Respondent under the *Capital Markets Act* and the *Access to information Act* to order production of evidence during an administrative hearing.
75. In addition to the adoption of a procedure that facilitates a fair hearing within the exercise of its wide powers, the Respondent needs to elect at the commencement of enforcement proceedings, whether, depending on the circumstances of a case, an administrative hearing would be the most appropriate enforcement procedure in securing the constitutional rights of a fair hearing of a party that is subject to enforcement proceedings before it. In certain circumstances where there are allegations of serious misconduct bordering on criminal offences and which may lead to criminal culpability and punitive action or imposition of criminal sanctions, it may be constitutionally prudent that the matter proceeds before another regulator such as the Director of Public Prosecutions. This ensures that the allegations are canvassed in the context of the criminal process, rather than in an administrative hearing, and guarantees the rights of a fair trial that are provided in Article 50 of the *Constitution*.
76. In the present application, allegations of embezzlement of funds and fraudulent siphoning of monies out of the Bank in the guise of deposit mobilization were made against the Applicant in the Notice to Show Cause. These allegations were of a criminal nature, and ought to have been pursued through the criminal process where the constitutional and legal thresholds for finding culpability are different, and not an administrative hearing. To this extent the Applicant's rights to a fair trial under Article 50 of the *Constitution* were also compromised by the Respondent, as the inappropriate legal procedure was thereby followed in determining the Applicant's culpability.

#### **Whether the Respondent's decision was tainted with bias;**

77. Lastly, Prof Mumma submitted that the Respondent's decision was tainted with bias, as the decision to issue the Applicant with a Notice to Show Cause was made by the Respondent in the meeting of the Respondent's Board on 13<sup>th</sup> July 2017, wherein present among others were Abubakar Hassan Abubakar (Manager, Investigation and Enforcement) and Githendu E. Timothy (Legal Officer, Legal Affairs and Corporation Secretary). It is submitted that the Respondent resolved at the said meeting to issue the Applicant with a Notice to Show Cause for embezzlement of the Interested Party's funds in



2015 totaling Kshs. 991,592,296.42, carried out through a fictitious deposit mobilization scheme. For this reason, the Applicant submitted that the Respondent had already determined on or before 13<sup>th</sup> July 2017, that the Applicant was guilty of the alleged embezzlement of funds, hence the subsequent Notice to Show Cause was a mere formality. Therefore, that the hearing on 11<sup>th</sup> December 2017 was conducted merely to rubberstamp an impugned decision that was made long before the hearing.

78. It was also submitted that the very same members of the Respondent's Board were also present at the hearing alongside Abubakar Hassan Abubakar and Githendu E. Timothy (legal officer) who had already passed a guilty verdict. In essence, the Applicant submitted that the impugned decision was made at the beginning of the process and not the end. The Applicant's counsel cited the decision in *Chadwick Okumu v. Capital Markets Authority*, (2018) eKLR in this regard.
79. The Respondent's submissions on the allegations that its actions were tainted by bias because of its multiple statutory functions were that the Applicant's argument that the Respondent acted as prosecutor and judge/jury is an attempt to create the wrong impression that the Respondent was operating like a judicial or quasi judicial body where bias and/or reasonable apprehension of bias would arise if the judicial or quasi judicial officer(s) were to conduct the investigations and hearings. It is submitted that the Respondent is a statutory body created to execute specified functions in the public interest and is vested with diverse powers and functions, which the Courts have taken cognizance of. The Respondent cited the decision in *Capital Markets Authority v Jeremiah Gitau Kiereini & Another* [2014] eKLR in this respect.
80. The Respondent submits that it is conferred with various functions to enable it fulfil its protective function which incorporates three aspects; investigation, hearing of Notices to show cause and imposition of sanctions on regulatory violators. That, the Act empowers the Respondent to execute those functions under Section 13B, 11(3)(h), 26(8), 25(A) as read with Section 11(3)(c). To the extent that the overlapping functions of the Respondent are authorized, it is submitted that a reasonable apprehension of bias or actual bias would not arise so long as the Respondent acts within the powers conferred on it by Parliament, and in any case the dual mandate does not necessarily mean the Respondent will be biased. The Respondent submits that contrary to the Applicant's argument, the provisions of section 13B(1) are to the effect that the appointment of an investigator is discretionary and not mandatory, and that in any case the delegation of the investigative function would not necessarily cure the apprehension of bias since it is no guarantee that the delegates would be independent from the Respondent's control.
81. This Court notes that the allegations of bias made by the Applicant were on two grounds- firstly that there was apparent bias as that the officers of the Respondent who were also the investigators participated in the decision making on the Notice to Show Cause, and the Respondent was therefore influenced by partiality or prejudice in reaching the decision,. Secondly that there was a predetermination by the Respondent, which had already made up its mind on the Applicant's culpability in advance before the hearing of the Notice to Show Cause.
82. Apparent bias arises where a decision maker acts in such a way that would lead a fair-minded and informed observer to conclude that there was a real possibility that he or she was biased. The test for apparent bias was stated in *Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge*, [1995-1998] 1 EA 134 by Lakha, JA as follows: -

“In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at



the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit... There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking, "The judge was biased."

83. The test for apprehension of partiality or bias for decision makers was also set out in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2013] eKLR where the Supreme Court stated that disqualification of a decision maker was imperative even in the absence of a real likelihood of bias or actual bias, if a reasonable man would reasonably suspect bias. M.K.Ibrahim JSC expressed himself as follows;

"The court has to address its mind to the question is whether a reasonable and fair minded man sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible"

84. The applicable test therefore, is whether a fair minded person, who was informed of the circumstances in which the decision against the Applicant was made, and having considered the facts, would conclude that there was a possibility that the Respondent was biased. In the present application, the multiple functions of the Respondent as investigator, jury and judge, is not disputed, and the Respondent submitted that this multiple functions are necessary for it to discharge its regulatory role. The Applicant faults the manner this roles are performed on account of the resultant bias in decision making. The Applicants arguments are based on the holding of Mativo J. in *Chadwick Okumu v Capital Markets*, (*supra*) where the learned Judge held as follows:

" 42. Also important while interpreting statutory provisions is to bear in mind what I would call the legislative intent. The provisions of the statute in question must be read in the context of not one but three different imperatives. The first is to enable CMA to effectively to carry out its specially identified statutory mandate. the *Constitution* and the act clearly envisages an important and active decisional role for the CMA to resolve disputes through the application of the law. At the same time, however, the *Constitution* declares that everyone is entitled to a Fair Administrative Action. In as much as the decisions of the CMA affects the Petitioner, CMA is obliged not to act unfairly. The act must accordingly be construed so as to promote respect the Bill of Rights. A third dimension must also be borne in mind. The *Constitution* envisages the right to be resolved by the application of the law in a fair and public hearing, before a court or if appropriate another independent and impartial tribunal or body.[31] Put differently, it could not have been the intention of the legislature to contemplate a situation whereby CMA would act as an investigator, prosecutor, jury and the hangman. "



85. The judge went on to find as follows after considering similar arguments made by the Respondent that the law permits it to all carry out all the roles of investigator, prosecutor, judge and executor:

“73. This is a case where CMA performed the three roles contrary to the rules of natural justice. To me, it was ill advised for CMA to investigate, prosecute, sit as the jury and convict. This was a proper case for CMA to invoke Section 11A cited above and delegate its functions to an independent body. CMA ought to have delegated some of the functions which is clearly permitted under the law as earlier discussed. I find that the Petitioner has established reasonable apprehension of bias which is a violation of Section 7 (2) of the *Fair Administrative Action Act*[61] which provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.”

86. It was observed by the Judge in that case that there are alternatives available to the Respondent within its overlapping powers, whereby it can adopt a procedure that does not violate the requirements of natural justice, particularly the rule against bias. This position was also alluded to by the Court of Appeal in *Capital Markets Authority v Jeremiah Gitau Kiereini & another* (*supra*) as follows:

“64. There is no controversy regarding the vital role played by CMA in attempting to achieve the aspirations of the *Capital Markets Act* of ‘promoting, regulating and facilitating the development of an orderly, fair and efficient capital market’ in this country. It is only through effective corporate management and regulation that a robust capital market which safeguards the interests of both local and international investors can be assured. That is why CMA is given fairly wide powers and functions under the statute. It is the manner of exercise of those powers that is in question, and it becomes necessary therefore to examine the relevant legislative provisions and the evidence relating to the exercise of the powers.

65. Under Section 11(3) of the Act, no less than 29 wide ‘powers, duties and functions’ of the Authority (also referred to as “the Board”) established under Section 5 of the Act are listed. Section 11(3) (w) makes such powers unlimited as the Board may “do all other acts as may be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under this Act”. Very wide powers indeed and therefore the reason for caution in the manner of exercising them to avoid abuse. There may be some truth in the adage that ‘power corrupts and absolute power corrupts absolutely’.

66. The Act in Section 11A further gives the Board the discretion to delegate its functions to, inter alia, a “Committee of the Board”. Such delegation may be revoked at any time and the delegation does not prevent the Board from performing the delegated function. In other words, the Board and its own committee may carry out the same function simultaneously. There is further general discretion under Section 14(1) of the Act to appoint “Committees, whether of its own members or otherwise, to carry out such general or special functions as may be specified by the Authority and may delegate to any such



committee such of its powers as the Authority may deem appropriate.” Sub-section (2) however, makes it mandatory for the Authority to establish:

- (a) committee to hear and determine complaints of shareholders of any public company listed on an authorized securities exchange, relating to the professional conduct or activities of such securities exchange or such public company, or any other person under the jurisdiction of the Authority and recommend actions to be taken, in accordance with rules established by the authority for that purpose; and
- (b) a committee to make recommendations with respect to assessing and awarding compensation in respect of any application made in accordance with rules established by the Authority for that purpose.(emphasis added)

It is evident from the diverse provisions in those sections of the Act that the Board must make a choice of the form and nature of delegation of its powers and functions. The trial court found and held that CMA was within its powers to appoint the ad hoc committee under Sections 11A and 14 of the Act. With respect, that is not entirely correct. It is only so in so far as the general power exists. The Board must go further and specify which provision of the Act is invoked...”

87. It is evident in the present case that the Respondent did not heed the advice given in the cited cases, and did not thereby observe the constitutional and legal requirements as to a fair hearing and fair administrative action. From the evidence provided of the processes leading to the issuing of the Notice to Show Cause and of the hearing of the same, it is evident that the same members and officials of the Respondent who participated in the investigations also participated in the hearing as prosecutors, and advised and influenced the decision making by the Respondent on the Notice to Show Cause. This leads to an inescapable appearance of a predetermined decision, and a clear appearance of impartiality on the Respondent’s part.
88. While in an enforcement action is brought by way of an administrative hearing, the Respondent must of necessity in its regulatory role participates as a party and must prove the case, it must also ensure that it observes the key tenets of a fair hearing. The constitutional requirements of fair action in this respect dictate that there is a separation of the Respondent’s functions and functionaries in the processes of investigation, prosecution and decision making during an enforcement action, to ensure independence of mind and action, and therefore impartiality in all the stages of the enforcement process.
89. Coming to the allegations of predetermination and the appearance of predetermination, the decision in *R (Lewis) v Redcar and Cleveland BC*, (2008) EWCA Civ 746 sets out the test to be applied when determining if a decision maker had a predetermined decision in the context of administrative decision makers. This test is whether a fair-minded and informed observer, knowing the facts, would think that there was a real possibility that the decision-maker had pre-determined the matter to be decided. However, it was noted in the said decision that administrative decision makers are generally permitted to express strong views about matters that they decide, and what they are not permitted to do, is to predetermine or appear to predetermine the matter to be decided.
90. In the present case, the Applicant relied on minutes of a Special meeting of the Respondents Board on 13<sup>th</sup> July 2017, where it was resolved that the Applicant in addition to others show cause for embezzlement of the Interested Party’s funds in 2015 which was carried through a fictitious deposit



mobilization scheme. This resolution will have to be examined with this distinguishing factor in mind, and an ordinary meaning to that phrase shows that the maker was not making a finding of culpability, but were reporting observations that there was a suspected offence on the part of the Applicant for embezzlement for which he was to be put on his defence. It cannot be said to have created an appearance of predetermination and bias on the part of the Respondent Board.

**Whether the Applicant merits the Orders sought.**

91. The Applicant has sought an orders of certiorari. The holding in *Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge* (1997) e KLR as regards this order is that it can quash a decision already made and will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. The Respondent has been found to have acted unfairly, impartially and in violation of the Applicant's right to access information, and the impugned decision in the Notification of Enforcement Action dated 3<sup>rd</sup> April 2018 cannot therefore stand, and the Applicant is entitled to the order sought of certiorari.
92. This Court will exercise its discretion in favour of the Applicant in this regard, irrespective of the facts that the Respondent was acting pursuant to powers granted to it under the *Capital Markets Act*, and gave reasons for its decision. This is for the reasons that the decision was materially flawed, illegitimate and unjust, arising from the procedure employed by the Respondent in hearing the Notice to Show Cause against the Applicant, rendering the said decision untenable.
93. In the premises this Court finds that the Applicant's Notice of Motion dated 4<sup>th</sup> July 2018 is merited to the extent of the following orders:
  - I. An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing, the decision, and/or actions of the Respondent contained in the Notification of Enforcement Action dated 3<sup>rd</sup> April 2018 purporting to disqualify the Applicant from holding office as a key officer of a public listed company and/or issuer, Licensee or any approved institution of the 1<sup>st</sup> Respondent for a period of Ten (10) years from the date of the notification; and purporting to impose a financial penalty amounting to Kshs. 104, 800,000/- being twice the amount of benefit that, allegedly, directly accrued to the Applicant.
  - II. The Respondent shall meet the Applicant's and Interested Party's costs of the Notice of Motion dated 4<sup>th</sup> July 2018.
94. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY 2019**

**P. NYAMWEYA**

**JUDGE**

