



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 269 OF 2018**

**IN THE MATTER OF ARTICLES 10, 47 & 50 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF SECTIONS 4, 6, 7, 9, 11, & 12 OF THE FAIR ADMINISTRATIVE ACTION ACT**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS**

**BETWEEN**

**MUNIR SHEIKH AHMED..... APPLICANT**

**VERSUS**

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

**RULING**

**The Application**

1. The Applicant, Munir Sheikh Ahmed, is a former Managing Director of the National Bank of Kenya, the Interested Party herein. The Applicant commenced judicial review proceedings against the Capital Markets Authority (the Respondent herein), by way of a Notice of Motion dated 4<sup>th</sup> July 2018, seeking orders with respect to a Notice of Enforcement Action by the said Respondent dated 3<sup>rd</sup> April 2018, which imposed sanctions against him.
2. The Applicant's said Notice of Motion was scheduled for hearing on 5<sup>th</sup> December 2018, and on the said date, Mr. Issa Mansur, the counsel for the Applicant, made an oral application that the Respondent's Supplementary Affidavit sworn on 24<sup>th</sup> August 2018 by Abubakar Hassan Abubakar either be expunged from the record, or that the Respondent be compelled to produce the full minutes annexed thereto.
3. The main ground for the said application was that the said minutes of various meetings of the Respondent's Board of Directors held on 22<sup>nd</sup> March 2018, 16<sup>th</sup> March 2018, 30<sup>th</sup> January 2018, 19<sup>th</sup> January 2018, 11<sup>th</sup> December 2018, 29<sup>th</sup> November 2017 and 13<sup>th</sup> July 2017, which were annexed as "Annexure AHA 1" to the said affidavit, have substantial portions thereof redacted. Further, that no explanation has been given why the said minutes have been redacted, yet the Respondent has a duty of disclosure, and it shows that the Respondent is not acting in good faith and whatever is being withheld from the Court would be adverse to it.
4. Mr. Issa submitted that no section of the Capital Markets Authority Act gives the Respondent power to withhold information from the Court, and that it is for the Court to make the decision that the documents are confidential and should not be filed. The counsel also submitted that they have raised two issues in their substantive application that require verification from the said minutes, namely the

participation of the Treasury representative at the said meetings, and the issue of bias on the part of the Respondent. However, that the issue of bias or lack thereof will not be able to be shown with the redacted minutes.

5. In response, Mr. Githendu, the counsel for Respondent, submitted that the Respondent is expected to maintain some level of confidentiality as it was discussing other regulatory matters in the said meetings, and the disclosure in the minutes of the meetings was thus restricted only to the issue raised by the Applicant, which was the representation of Treasury as the meetings. Further, that the issue of the nature of the discussions at the said meetings was not raised by the Applicant.

### **The Determination**

6. The main issue before this Court is whether the Respondent is under a duty to disclose the redacted minutes of meetings held by its Board. There are no specific provisions of the law that apply to disclosure of documents in judicial review proceedings, and the only related provision of the law is Order 53 Rule 4 of the Civil Procedure Rules, which provides as follows:

**“4. (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.**

**(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.**

**(3) Every party to the proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing.”**

Order 19 Rule 6 of the rules also provide that the court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.

7. Whereas there may be no specific provisions and/or procedures for formal disclosure of documents in judicial review proceedings in Kenya, various judicial decisions in other jurisdictions have determined that all parties in judicial review proceedings are under a general ‘duty of candour’, requiring them to disclose all information necessary for the court to determine the claim before it. There is thus a duty of candour owed by a defendant in judicial review proceedings to give a full and accurate explanation of its decision-making process, identifying the relevant facts and the reasoning underlying the measure being challenged, as was held in [\*R v Lancashire County Council, ex p Huddleston\* \[1986\] 2 All ER 941](#). This is for the reason that unlike other civil litigation proceedings, the facts in a judicial review are not in issue and the decision that is challenged is being reviewed for its legality and not for its merits.

8. From the decided cases, an order for disclosure enabling a claimant to go behind the contents of a defendant’s statement setting out the relevant events, would initially only be made where there is some material before the court that suggests the statement is inaccurate, inconsistent or incomplete in a material respect. It was however held by the English House of Lords in [\*Tweed v Parades Commission for Northern Ireland\* \[2006\] UKHL 53](#) that while orders for disclosure in judicial review should not be automatic, the true test to be applied is whether, in a given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.

9. This position was also reiterated in [\*Mehan and others v Commissioners for HM Revenue & Customs\* \[2015\] EWHC 2569 \(Admin\)](#), where the English High Court considered the claimants’ application for a further response to a request for information and a request for specific disclosure and found that it could order for such further information or disclosure as was necessary to resolve the matter fairly and justly.

10. Coming to the present application, Order 53 Rule 4(3) implies a duty of candour on the parties in judicial review proceedings. In addition, section 1A of the Civil Procedure Act specifically states that overriding objective of the Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act, and parties to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act. Lastly, the inherent power of this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court is saved by section 3A of the Civil Procedure Act.

11. It is also notable that the Constitution now provides for the right to access to information held by another person and required for the exercise or protection of any right or fundamental freedom under Article 35, and a duty to disclose that information is imposed on public entities by the Access to Information Act, Act No. 31 of 2016. Section 5(1)(a) of the Access to Information Act specifically provides as follows in this regard:

**“(1) Subject to section 6, a public entity shall—**

**(a) facilitate access to information held by such entity and which information may include—**

**(i) the particulars of its organization, functions and duties;**

**(ii) the powers and duties of its officers and employees;**

- (iii) the procedure followed in the decision making process, including channels of supervision and accountability;
- (iv) salary scales of its officers by grade;
- (v) the norms set by it for the discharge of its functions;
- (vi) guidelines used by the entity in its dealings with the public or with corporate bodies, including the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions; and
- (vii) a guide sufficient to enable any person wishing to apply for information under this Act to identify the classes of information held by it, the subjects to which they relate, the location of any indexes to be inspected by any person...

12. The Limitations on access to information and permitted non-disclosure by public entities is provided in section 6(1) of the Act as follows:

**“(1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—**

- (a) undermine the national security of Kenya;**
- (b) impede the due process of law;**
- (c) endanger the safety, health or life of any person;**
- (d) involve the unwarranted invasion of the privacy of an individual, other than the applicant or the person on whose behalf an application has, with proper authority, been made;**
- (e) substantially prejudice the commercial interests, including intellectual property rights, of that entity or third party from whom information was obtained;**
- (f) cause substantial harm to the ability of the Government to manage the economy of Kenya;**
- (g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;**
- (h) damage a public entity's position in any actual or contemplated legal proceedings; or**
- (i) infringe professional confidentiality as recognized in law or by the rules of a registered association of a profession.**

13. The above provisions in my view give this Court the necessary powers to make orders as regards disclosure in judicial review proceedings upon application, subject to the limitations stated in the foregoing.

14. It is in this regard evident from the Applicant’s Statement and Verifying Affidavit both dated 2<sup>nd</sup> July 2018 that were filed in support of his Notice of Motion dated 4<sup>th</sup> July 2018, that the Applicant is challenging the Respondent’s decision making process on the grounds that the Respondent’s Board was biased and did not accord him a fair hearing. The Respondent is thus under a duty to disclose to this Court its decision making process as regards the Notice of Enforcement Action dated 3<sup>rd</sup> April 2018, and to produce the necessary Board minutes in this regard, to aid this Court reach a just and fair decision on the issue. The impugned Respondent’s Supplementary Affidavit sworn on 24<sup>th</sup> August 2018 by Abubakar Hassan Abubakar fails to meet this threshold as it is clearly incomplete and deliberately withholds information on the Respondent’s processes.

15. On the Respondent’s arguments that the withholding of the information is necessary as the minutes may contain confidential matters that are not relevant to this case, the solution was presented by Lord Bingham in *Tweed v Parades Commission for Northern Ireland [supra]* who put the responsibility of making the decision as to whether to disclose or not in the Court’s hands as follows:

**“4. Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority’s deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says. There may, however, be reasons (arising, for example, from confidentiality, or the volume of the material in question) why the document should or need not be exhibited. The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made.”**

16. The procedure to be followed on disclosure was also addressed by the House of Lords in the said case, where there was consensus that the judge considering disclosure should first receive and inspect the documents in question so that he or she may decide their relevance to justify disclosure in the interests of fair disposal of the case. If the judge decides that disclosure is necessary, then the question of redaction may have to be considered, in which the parties may be invited to make submissions to the court. If the judge decides the contrary in the case

of any of the documents, that documents will not be disclosed to the applicant.

17. I am persuaded that this would be the most appropriate procedure to apply in the circumstances of this application in the interests of justice, and to also verify whether the limitations provided in section 6 of the Access to Information Act are applicable.

18. In the premises, I order as follows:

**1. The Respondent's Supplementary Affidavit sworn on 24<sup>th</sup> August 2018 by Abubakar Hassan Abubakar is hereby expunged from the record for reasons of being incomplete in material respects as regards the minutes of the relevant Respondent's Board's meetings.**

**2. The Respondent shall, within three days of the date of this ruling, file and avail only to the Court at the first instance, three copies of a fresh supplementary affidavit annexing *inter alia* the accurate and complete minutes of all its meetings and discussions leading to the decision to issue the impugned Notice of Enforcement Action dated 3<sup>rd</sup> April 2018 against the Applicant.**

**3. The Court shall make its ruling on disclosure of the said minutes, and shall receive submissions on and rule on any redactions if necessary, at a hearing to be held on 17<sup>th</sup> December 2018 at 2.30 p.m at the Mombasa High Court, where this Court is currently sitting.**

**4. The substantive hearing of the Applicant's Notice of Motion shall thereafter proceed on 18<sup>th</sup> December 2018 at 2.30 pm at Mombasa High Court.**

**5. The costs of the instant application shall be in the cause.**

19. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 13<sup>TH</sup> DAY OF DECEMBER 2018**

**P. NYAMWEYA**

**JUDGE**