



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

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 1 OF 2013**

REPUBLIC.....APPLICANT

VERSUS

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

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

AND

CENTRAL BANK OF KENYA.....INTERESTED PARTY

AND

EX-PARTE

FREDRICK TSOFA MWENI

**JUDGEMENT**

1. At the commencement of these judicial review proceedings in January, 2013, the ex-parte Applicant, Fredrick Tsofa Mweni sought and obtained leave to seek judicial review orders against Capital Markets Authority as the 1<sup>st</sup> Respondent and the Attorney General as the 2<sup>nd</sup> Respondent. However, on 25<sup>th</sup> April, 2013, the Applicant's claim against the Attorney General was withdrawn leaving the Capital Markets Authority as the sole Respondent. On 9<sup>th</sup> September, 2013, the Central Bank of Kenya was by consent of the Applicant and the Respondent allowed to come into these proceedings as an Interested Party.

2. The Notice of Motion application for consideration in these judicial review proceedings is the one dated 11<sup>th</sup> January, 2013 in which the Applicant pray for orders as follows:

**“1) THAT the Applicant be granted an order of certiorari to bring the decision of the 1<sup>st</sup> Respondent made on 21<sup>st</sup> December 2012 disqualifying the Applicant as the Managing Director of Tsavo Securities Limited, from appointment and service as a Director of any listed company or licensed or approved person in the Capital Markets in Kenya with effect from 21<sup>st</sup> December 2012 to this Honourable Court for purposes of being quashed.**

**2) That the costs of this application be provided for.”**

3. The basis of these proceedings is alleged irregular sale of government bonds worth Kshs. 39.5 million.
4. According to the Respondent and the Interested Party three bonds worth Kshs. 39.5 million were allegedly fraudulently created by one of the Interested Party's staffers in favour of Tsavo Securities Limited ("Tsavo") whose Managing Director was the Applicant. As part of its investigation the Respondent, the statutory regulatory body in respect of affairs concerning Nairobi Securities Exchange (NSE), wrote a letter to the Applicant seeking certain information in relation to the alleged fraudulent transactions. It is the Respondent's case that the Applicant and Tsavo did not respond to its requests but instead kept seeking more time to compile the information.
5. It is the Respondent's case that due to the Applicant's failure to comply with this request for information, it decided to take action vide its letter dated 21<sup>st</sup> December, 2012. Infact the Respondent wrote two letters on the same date and I find it imperative to reproduce those letters. One letter which was addressed to the Applicant as the Managing Director of Tsavo states as follows:

**"Dear Mr. Mweni**

**RE: ENFORCEMENT ACTION:**

**FAILURE TO RESPOND TO DIRECTIVES AND SUMMONS FROM THE AUTHORITY**

**We refer to the above matter and the Authority's letter dated 29 November 2012 including letters dated 19 and 28 October and 19 and 23 November, 2012.**

**We further refer to the letters from Tsavo Securities Limited dated 29 November 2012 and 3, 4 and 6 December 2012 and the extensive discussions on 5 December 2012 as well your subsequent attendances to the offices of the Authority.**

**The Authority notes that despite the numerous correspondences referred to and your commitments to provide specific information and documents in respect of the fraudulent crediting of government bonds worth Kshs. 39.5 million to the Central Bank of Kenya (CBK) Central Depository System account for Tsavo Securities Limited, you have failed to submit the information required.**

**The above referenced failure to appear and wilful refusal to provide full and conclusive information in response to directives from the Authority amounts to a breach of the obligations imposed under Section 13(1) and 11(3) (i) of the Capital Markets Act. This conduct further constitutes an obstruction of the Authority from performing its statutory duties contrary to Section 34(1) (c) of the Capital Markets Act.**

**In this regard pursuant to Section 11(3) (cc) (i) and Section 25A of the Capital Markets Act the Authority hereby imposes the following enforcement action against you:**

**a) Disqualifies you with immediate effect from appointment and service as a director at any listed company or licensed or approved person in the Capital Markets in Kenya pursuant to section 25A(1) (c) (i) of the Capital Markets Act.**

**This disqualification shall remain in force until the Authority is satisfied that you have fulfilled all your statutory obligations on full and timely co-operation with the Authority in respect of the above referenced information and documentation."**

6. The second letter was addressed to Tsavo's Chairman and it read as follows:

**"Dear Mr. Muhindi**

**RE: ENFORCEMENT DIRECTIVE: FAILURE TO COMPLY WITH DIRECTIVES**

## **AND SUMMONS FROM THE AUTHORITY**

We refer to the above matter and the Authority's letter dated 29 November 2012 including letter dated 19 and 26 October and 19 and 23 November 2012.

We further refer to the letters from Tsavo Securities Limited dated 29 November 2012 and 3, 4 and 6 December 2012 and the extensive discussions on 5 December 2012 as well your subsequent attendances to the offices of the Authority.

Preliminary investigations reveal that the Central Bank of Kenya's (CBK) Central Depository System account for Tsavo Securities Limited was fraudulently credited with government bonds worth Kes. 39.5 million.

The Authority notes that despite numerous correspondences addressed to the Managing Director of Tsavo Securities Limited from the Authority requiring Tsavo Securities Limited to provide specific information and documents in respect of the transactions relating to the securities under reference, the information was not submitted as requested. The Authority further engaged the Board of Directors of Tsavo Securities Limited with a view to securing the cooperation of the Managing Director through the intervention of the Board, this has also not been successful.

In this regard, the Authority is concerned by the Board's lack of, and/or inability to exercise oversight of the conduct of the Managing Director. This is in clear contravention of the Board's responsibilities as set out in the Authority's Regulations on corporate governance and business conduct.

In this regard, pursuant to Section 11(3) (cc)(i) of the Capital Markets Act, the Authority hereby issues the following Enforcement Directives to Tsavo Securities Limited:

- a) To fully co-operate with the Authority in the provision of the above referenced information and documentation;
- b) To ensure that Mr. Fred Mweni ceases to hold office as the Managing Director of Tsavo Securities with immediate effect and to undertake that he will not be appointed to any position as an employee of Tsavo Securities Limited, nor carry out any regulated business for or on behalf of Tsavo Securities Limited.
- c) To submit a detailed Action Plan for the implementation of a Business Continuity and a Management Succession Blueprint for Tsavo Securities Limited; and,
- d) To submit a detailed Internal Controls Framework for Tsavo Securities Limited clearly setting out measures to ensure the highlighted measures will not recur.

**Please note that you are required to submit the above documents, where appropriate, to the Authority within 30 days calendar days from the date of this letter, and in any case not later than 21 January 2013."**

7. The Respondent followed its letters by publishing the enforcement action taken against the Applicant in the daily newspapers. It is the Respondent's enforcement action which the Applicant seeks to quash through these proceedings.

8. The Applicant's case is that through letters dated 18<sup>th</sup>, 19<sup>th</sup> and 26<sup>th</sup> October, 2012 and 19<sup>th</sup>, 23<sup>rd</sup> and 29<sup>th</sup> November, 2012 the Respondent requested Tsavo to provide specific information and documentation in respect to transaction relating to securities in FXD 1/2012/5, FXD 4/2011/12 and FBI/2011/12. The request was responded to by Tsavo vide letters dated 21<sup>st</sup> and 26<sup>th</sup> November, 2012 and 4<sup>th</sup> and 6<sup>th</sup> December, 2012.

9. It is the Applicant's case that, among the documents supplied to the Respondent, were accounts statements, an agency agreement with Kestrel Capital (EA) Limited and a summary of fixed income securities. The Applicant avers that he also attended several meetings with the Respondent and gave out relevant information and even recorded a statement of the Respondent. The Applicant deposes that on 5<sup>th</sup> December, 2012 together with the Board Chairman of Tsavo, they held extensive discussions with the Board of the Respondent. The Applicant avers that during the meeting he undertook to attend the Respondent's offices daily from 10<sup>th</sup> December, 2012 with a view to cooperating with the Respondent.

10. The Applicant states that he was surprised when he saw an advert in the Standard newspaper of 27<sup>th</sup> December, 2012 informing the public of the enforcement action taken against him.

11. According to the Applicant, the said enforcement notice was illegal, unjustifiable and in excess of the Respondent's mandate. The Applicant asserts that the action was against the terms of the agreement arrived at in the meeting of 5<sup>th</sup> December, 2012 and failed to consider the fact that he had entered a settlement agreement with the Interested Party regarding the transaction in issue.

12. In summary, the Applicant's assertion is that the Respondent's action was in excess of jurisdiction, in breach of the Capital Markets Act and contrary to the principles of natural justice.

13. The Respondent answered the application through a replying affidavit sworn on 22<sup>nd</sup> January, 2013 by Michael Wanyika the Head of the Department of Investigations and Enforcement in the Market Operations Directorate of the Respondent.

14. From the affidavit, it emerges that following a report in the daily newspapers in August, 2012 that an employee of the Interested Party had been charged in court in relation with the creation and sale of fraudulent bonds, the Interested Party was requested by the Respondent to provide the facts of the case. It was then that he learned that fraudulent bond transactions involving bonds amounting to about Kshs. 105 million had been created and credited to the Central Depository System (CDS) accounts of Manline Telecommunications and Tsavo. The bonds were sold through the two companies.

15. Wanyika avers that sale of fraudulent bonds FXD 1/2012/5, FXD4/2011/12 and IFB1/2011/12 amounting to Kshs. 39 million were done through Tsavo. He also discovered that an employee of the Interested Party, a director of Manline Telecommunications Ltd and a director of Tsavo who is a brother of the Applicant had been arrested and charged in connection with the creation and sale of the fraudulent bonds.

16. Wanyika deposes that upon receipt of this information the Respondent decided to conduct its own investigations. It wrote a letter dated 18<sup>th</sup> October, 2012 to Tsavo requesting certain information. This was followed by a letter dated 19<sup>th</sup> October, 2012 in which the Respondent requested a meeting with Tsavo to discuss its participation in relation to the fraudulent bonds.

17. On 26<sup>th</sup> October, 2012, the Respondent wrote another letter to Tsavo asking for information on how it paid for the fraudulent bonds and how it received money after selling the bonds. It is the Respondent's case that it proved difficult to get the information as the Applicant was out of the office most of the time and the personnel at Tsavo did not have the relevant information.

18. On 19<sup>th</sup> November, 2012 the Applicant was summoned by the Respondent. The summons contained the particulars of the information that was required from him. The Applicant did not respond to the letter but instead the Administration Manager of Tsavo wrote a letter dated 21<sup>st</sup> November, 2012 stating that the information was being compiled. In the letter, Tsavo requested that the meeting that was to take place on 21<sup>st</sup> November, 2012 be rescheduled to 26<sup>th</sup> November, 2012. The Respondent accepted the request in writing.

19. It is the Respondent's case that on 26<sup>th</sup> November, 2012 the Applicant failed to attend the meeting.

On 29<sup>th</sup> November, 2012 the Respondent summoned the Board of Directors of Tsavo for a meeting to be held on 3<sup>rd</sup> December, 2012. At the same time, the Respondent wrote a notice to show cause letter to the Applicant asking him to explain his failures and asking him to fulfil the directions given by the Respondent or else enforcement action would be taken against him.

20. It is the Respondent's case that the Applicant's failure to comply with its directives contravened the Capital Markets Act. Further, that the Applicant had been asked to show cause why action should not be taken against him. The Respondent asserts that the Applicant did not exhibit the show cause letter and this amounted to material non-disclosure.

21. It is the Respondent's case that on 3<sup>rd</sup> December, 2012 the Board of Tsavo did not turn up for the meeting. Instead the Applicant turned up and agreed to cooperate with the Respondent. He then recorded a statement. The Applicant was given time to provide information. In his statement, the Applicant indicated that one Mr. Thagana had given the bonds to him to sell and he did so. Upon asking Mr. Thagana about the fraudulent bonds, he denied knowledge of the same.

22. The Respondent's case is that the Applicant did not readily attend meetings and neither did he avail all the information required of him. According to the Respondent, the Applicant was given sufficient time to comply but failed to do so. It is the Respondent's case that the enforcement action it took was in compliance with its mandate as provided by the Capital Markets Act, Cap 485A. The Respondent therefore urges the Court to dismiss the Applicant's application.

23. The Interested Party relied on the affidavit in support of enjoinder sworn by Kennedy Kaunda Abuga on 17<sup>th</sup> May, 2013. It is the Interested Party's position that the Applicant did not verify the genuineness of the bonds with it.

24. For record purposes, it is noted that the Applicant swore three further affidavits on 25<sup>th</sup> January, 2013, 29<sup>th</sup> April, 2013 and 26<sup>th</sup> June, 2013. On 6<sup>th</sup> June, 2013 the Applicant was allowed to withdraw his further affidavit sworn on 29<sup>th</sup> April, 2013. This action therefore rendered the Respondent's further affidavit filed on 13<sup>th</sup> May, 2013 by Michael Wanyika of no use as it had been, according to paragraph 2, sworn specifically in response to the Applicant's further affidavit of 29<sup>th</sup> April, 2013. Looking at the papers filed in court by the parties, I find that two issues require the attention of this court. The first issue is whether the Applicant was given a hearing. The second issue is whether the Respondent acted without or in excess of its mandate.

25. The Respondent's case is that the Applicant is guilty of material non-disclosure, that the Respondent acted within its powers in taking enforcement action against him, that the Respondent's actions were not excessive nor were they done in bad faith, that the Respondent did not breach any rules of natural justice in making its decision, and that the Applicant is not without redress under the Capital Markets Act, Cap 485A.

26. The Interested Party based its opposition to the application on three grounds namely that the Applicant is guilty of material non-disclosure, that there existed an alternative remedy that disentitles the Applicant from obtaining the remedies sought, and that the Respondent did not act *ultra vires*.

27. I will start by considering whether the Applicant was given an opportunity to be heard before the drastic action was taken against him.

28. It must be noted from the outset that the action taken by the Respondent resulted in taking away the Applicant's ability to earn a livelihood from a trade. In such a situation the Respondent was expected to strictly comply with requirement of the right to a fair hearing.

29. **B.K. Jones and K. Thompson in Garner's Administrative Law** have stated as follows:

**“We may turn next to the operation of *audi alteram partem* in relation to decisions as to**

privileges, or 'licences'. It is first necessary to note various different kinds of decisions that may be taken in relation to privileges. For example, the decision may be to revoke an existing 'licence', to refuse to review an existing 'licence', or to refuse the initial grant of a 'licence'. In relation to each of these types of decision the expectations of the person affected is of much significance. Did the citizen have legitimate expectation of success, or was he simply 'hoping against hope' of obtaining, retaining, or being granted renewal of, a 'licence'? How do these factors influence the manner of operation of the *audialterampartem* rule?

The revocation of a privilege may generally be regarded as comparable to the act of taking away 'property'. It will usually defeat the privilege-holder's legitimate expectation that it will continue for its initially granted time-span, and accordingly the *audialterampartem* rule will normally apply with some vigour. Such has, for example, been shown in cases where members have been expelled from clubs without the substantial procedural rights which the courts have been prepared to imply into their contracts of membership.

Conversely, one who had no more than a mere hope of favour and failed to obtain it has lost nothing, save an advantage to which he had no legitimate expectation. The demands of procedural justice will in such a case be significantly less great."

30. The Respondent's case is that it did comply. The Applicant insists that it was not given an opportunity to be heard. Further, that the Respondent's action was premature as it continued demanding for information even after enforcement action had been taken against him.

31. In the ex-parte chamber summons application for leave one gets the impression that the Respondent's enforcement action was taken without any preliminaries. However, the Respondent's letter dated 29<sup>th</sup> November, 2012 to the Applicant depicts a different picture. Through that letter the Applicant was addressed as follows:-

"Our ref: CMA.MRT/8/360/E.19/12

29<sup>th</sup> November 2012

Mr. Fred Mweni

Managing Director

Tsavo Securities Limited

Yale Towers, 9<sup>th</sup> Floor

Koinange Street

Nairobi

Dear Sir

**RE: NOTICE TO SHOWCAUSE**

**FAILURE TO RESPOND TO SUMMONS BY THE AUTHORITY**

The above matter and the Authority's letters dated October 19<sup>th</sup>& 26<sup>th</sup> and November 19 & 23, 2012 refer.

In the letters under reference, the Authority has requested your firm to provide specific information and documents in respect of the transaction relating to the securities under

reference, to no avail.

The Authority further scheduled meetings with you on October 22 and 26 and November 21 and 26, 2012 which you failed to attend. Your repeated failure to appear constitutes obstruction of the authority from performing its duties in line with the statutory mandate granted to it, contrary to Section 34(1) (c) of the Capital Markets Act.

Further apparent willful failure to observe and fulfill the Authority's directions to submit specified information constitutes an apparent breach of section 13(1) and 11(3)(i) of the Capital Market Act.

In this regard, pursuant to Section 26(2) of the Capital Markets Act, you are required to respond in writing within two (2) days of this letter, and in any case not later than 3 December 2012, giving a detailed explanation on the above noted failures to enable the Authority arrive at an objective decision on whether enforcement action and/or further action should be considered against you including and not limited to disqualification from directorship of or employment by licensed person.

Kindly note that further and/or continued failure to provide the information and documents requested as per the Authority's prior correspondence herein will be taken into account in determination of the appropriate action to be taken.

Yours faithfully

Wycliffe Shamiah

**DIRECTOR, MARKET OPERATIONS"**

32. At paragraph 10 of his further affidavit sworn on 25<sup>th</sup> January, 2013, the Applicant admits receiving the letter. That admission confirmed that the Applicant had been made aware of the charges, the contemplated action and at the same time given an opportunity to defend himself. The Respondent had therefore acted in compliance with the rules of natural justice.

33. In failing to exhibit the letter dated 29<sup>th</sup> November, 2012, the Applicant breached the requirement of good faith in ex-parte applications. He is guilty of non-disclosure and has not offered any reason why he failed to disclose the letter. The Applicant's failure to disclose the existence of this letter would be good reason for denying him relief.

34. The Respondent and the Interested Party also pointed out that the Applicant without any reason failed to explore an alternative remedy that was available to him. **Grahame Aldons** and **John Alder** in **Applications for Judicial Review, Law and Practice of the Crown Office** at pages 122 and 123 discusses this issue as follows:

**"The governing principle is that the court will refuse to grant a judicial review remedy where another suitable remedy is available. The general principle applies to all remedies, but its application may differ in particular contexts. Unless the other remedy is clearly made exclusive the court will treat the matter as one of discretion. It seems that the applicant must show at the leave stage some special reason for not using the statutory machinery but the matter can also be argued in depth at the hearing."**

35. The Court of Appeal agreed with that legal principle when it stated in **Republic v National Environmental Management Authority, Court of Appeal at Nairobi, Civil Appeal No. 84 of 2010** that:

**"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in**

**exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.”.**

36. It is therefore clear that where there is an alternative remedy, an applicant is under a duty to explore that alternative remedy before resorting to judicial review which is a remedy of last resort.

37. As pointed out by the Respondent and the Interested Party, there is indeed a remedy provided by Section 35A (1) of the Capital Markets Act. Under that section the Capital Markets Tribunal is established and its mandate includes hearing complaints by aggrieved persons whose licenses have been suspended or revoked – see Section 35(1) (c). The Applicant did not inform the Court at the leave stage about the existence of this remedy and neither did he give any reason why he opted for judicial review before exploring this remedy. The Respondent and Interested Party have thus established a case for denying the Applicant remedy.

38. The remaining question is whether the Respondent acted beyond its jurisdiction. Section 11(3) (i), 13 (1), 26 (2) and 34(1)(c ) of the Capital Markets Act empowers the Respondent to take the action it took against the Applicant.

39. Section 11(3)(i) authorizes the levying of financial penalties, proportional to the gravity or severity of the breach that has occurred.

40. Section 13(1) gives the Respondent or any person officially authorized by the Respondent power to require in writing such returns or information as specified in such notice.

41. Section 26(1) allows the Respondent to suspend or revoke a licence, for such period or until the occurrence of such event as the Respondent may specify.

42. Section 34(1)(c) creates an offence for wilful obstruction of the Respondent in the performance of its duties under the provisions of the Act.

43. The Respondent cannot therefore be accused of acting without jurisdiction.

44. However, Section 26 which allows the suspension or revocation of a licence provides as sub-section 2 that:

**“A suspension of a license under this section shall not exceed a period of three months:**

**Provided that the Authority may, if the Authority considers necessary, extend the suspension for a further period not exceeding three months.”**

45. Considering what I have stated above, it follows that the Applicant’s case should fail save for the reason that the decision of the Respondent on the length of his suspension did not comply with Section 26(2) of the Capital Markets Act, Cap 485A. For that reason alone the Applicant’s disqualification is quashed. The matter is remitted to the Respondent to impose a disqualification that meets the requirements of the law.

46. The Applicant’s case having partly succeeded, I direct that the parties will meet their own costs of the proceedings.

Dated, signed and delivered at Nairobi this 1<sup>st</sup> day of July, 2016.

**W. KORIR,**

**JUDGE OF THE HIGH COURT**