



REPUBLIC OF KENYA



**Nganga & 10 others v Capital Markets Authority (Civil Appeal E1175 of 2024)
[2025] KEHC 13493 (KLR) (Civ) (30 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13493 (KLR)

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

CIVIL

CIVIL APPEAL E1175 OF 2024

AC MRIMA, J

SEPTEMBER 30, 2025

BETWEEN

NICHOLAS NGANGA 1ST APPELLANT
GRAHAM HAROLD MCLEAN 2ND APPELLANT
ANDREW NDEGWA NJOROGE 3RD APPELLANT
KETAN RAMESHCHANDRA 4TH APPELLANT
DANIEL M NDONYE 5TH APPELLANT
CHRISTOPHER JOHN FLOWERS 6TH APPELLANT
STEPHEN WARUHIU 7TH APPELLANT
DR JOHN KIMANI 8TH APPELLANT
BENJAMIN OKIRING 9TH APPELLANT
ANDREW KIRAGU 10TH APPELLANT
KAKUZI PLC 11TH APPELLANT

AND

THE CAPITAL MARKETS AUTHORITY RESPONDENT

(Being an appeal from the judgment and decree of the Capital Markets Authority Tribunal delivered on 18th September 2024 arising from the Capital Markets Appeal No. 12 of 2022)



JUDGMENT

Introduction and Background:

1. This is an appeal from the judgment of the Capital Markets Tribunal [hereinafter referred to as ‘the Tribunal’] between the parties herein which decision was rendered on 18th September 2024. It is a second appeal from an inquiry undertaken by the Capital Markets Authority, the Respondent herein, on its own motion, into the affairs of the Kakuzi PLC, the 11th Appellant herein, arising from the Respondent’s findings and recommendations on the 11th Appellant’s Governance Assessment Audit for the Financial Year 2019 [hereinafter referred to as ‘the Audit’].
2. Whereas the audit was still current, the Appellants alleged to be variously aggrieved by the process, a result of which they preferred an appeal before the Tribunal. The appeal was determined against the Appellants, and again aggrieved, the Appellants preferred the instant appeal.
3. The appeal was heard by way of both written submissions and oral highlights, hence, this judgment. The gist of the parties’ submissions and the background of this appeal shall be ingrained in the analysis part of this decision, but first a look at the appeal.

The Appeal:

4. In a Memorandum of Appeal dated 11th October 2024, the Appellants preferred the following 14 grounds of appeal: -
 1. The Tribunal erred in law in failing to uphold the Appellants’ Constitutional rights to information and particulars under the summons dated 14th June 2021 and 1st September 2022. [Paragraphs 53, 66 and 67 of the judgment].
 2. The Tribunal erred in law in holding that the Appellants were not entitled to be given any reasons by the Respondent for withholding the information and particulars of the inquiry. [Paragraph 67 of the judgement].
 3. The Tribunal erred in law in holding that Article 47 of the *Constitution* and section 4 of the *Fair Administrative Action Act*, 2015 are suspended or inapplicable at the inquiry stage. [Paragraph 68 of the judgment].
 4. The Tribunal erred in law in failing to find that the withholding of information and particulars of the allegations of financial impropriety by the Respondent violated the Appellants’ Constitutional rights enshrined in Article 35 (1) of the *Constitution* and section 4 (2) of the *Access to Information Act*.
 5. The Tribunal misinterpreted the decision in *Judicial Service Commission v. Mbalu Mutava & Another* [2014] eKLR. The Court held that the Appellant was entitled to the particulars of the complaints received, as long as there was a likelihood that the Appellants’ rights would be adversely affected by the administrative action [Paragraph 69 of the judgment].
 6. The Tribunal erred in law in holding that the entire process was fair and met the constitutional threshold. [Paragraph 70 of the judgment].
 7. The Tribunal erred in law in failing to find that it was bound by the decision of this Honorable Court in *Munir Sheikh Ahmed v Capital Markets Authority* fJudicial Review Application



269 of 2018) [2019] KEHC 4811 (KLR) (Judicial Review) (22 July 2019) (Judgment) which decision held that a person was entitled to all the information held by the Respondent at the time of inquiry.

8. The Tribunal erred in law in holding that the Appellants' request for particulars of the alleged financial impropriety referred to in the Respondent's letter to the Appellants dated 1st September 2022 was premature. [Paragraph 71 of the judgement].
 9. The Tribunal erred in law in failing to appreciate that the inquiry was commenced by the Respondent under sections 13(1) and 13 B (2) (a) and (b) of the Capital Markets Authority Act which provide for penal consequences in the event of a default by the person under inquiry.
 10. The Tribunal erred in law in failing to appreciate and give effect to the following provisions of the Constitution of Kenya:
 - a. Article 2 (1): the Constitution is the supreme law of the Republic and binds all persons and all State organs,
 - b. Article 20 (2): Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
 - c. Article 20 (3): in applying a provision of the Bill of Rights, a court shall-
 - i. Develop the law to the extent that does not give effect to a right or fundamental freedom; and
 - ii. Adopt the interpretation that most favours the enforcement of a right or fundamental freedom
 - d. Article 20 (4): In interpreting the Bill of Rights, a court, tribunal or other authority shall promote-
 - i. The values that underlie an open and democratic society based on human dignity, equality, equity and freedom and
 - ii. The spirit, purport and objects of the Bill of Rights.
 11. The Tribunal erred in law in failing to find that the Respondent violated each of the Appellants' Constitutional rights enshrined in Article 35 (1) (a) of the Constitution and were entitled to the particulars of the complaints received and information relating to conflict of interest and financial impropriety held by the Respondent even at the inquiry stage.
 12. The Tribunal erred in law by upholding the Respondent's refusal and/or failure to provide the Appellants with written reasons for the administrative action in the inquiry thereby violating the Appellants' Constitutional rights under Articles 47 (2) and 50 of the Constitution.
 13. The Tribunal erred in law in failing to find the process of the inquiry was incurably flawed, procedurally unfair, unreasonable, unlawful and unconstitutional as set out hereinabove.
 14. The Tribunal in failing to enforce the provisions of the Constitution set out herein above further violated Article 163 (7) of the Constitution as it was bound by the Supreme Court decision of Alnashir Popat & 7 Other v Capital Markets Authority. Petition No. 29 of 2019.
5. On the basis of the above grounds, the Appellants prayed for the following reliefs: -



- a. This Appeal be allowed.
 - b. The Judgement and order of the Tribunal delivered on 18th September 2024 be set aside in its entirety and be substituted with an order allowing the Appellants' Amended Appeal dated 7th December 2022 by granting prayers (a) and (b) (i) and (ii).
 - c. The costs of the proceedings before the Respondent, the Tribunal and in this Appeal be awarded to the Appellants.
 - d. Any other order that this Honorable Court may find fit and just to grant.
6. As stated elsewhere above, the parties filed detailed submissions for and against the appeal where several decisions were referred to.

Analysis:

7. Having carefully considered the record alongside the parties' submissions and the respective decisions referred to therein, the sum of the Appellants' contention is that the inquiry undertaken by the Respondent ought to be terminated on two main grounds. The first main ground is that the process is veiled with egregious and fragrant contravention of the Appellants' rights and fundamental freedoms guaranteed under the Constitution and the law. The second main ground is that the issues under inquiry were all settled in a subsequent Report on the status of the 11th Appellant's Corporate Governance standing dated 15th November 2022.
8. As this Court now renders on the said two grounds, suffice to state that the background of the dispute between the parties was comprehensively captured in the impugned judgment and as such, this Court hereby adopts that history as part of this judgment by way of reference.

(a) Whether the inquiry is constitutionally-flawed:

9. As a starting point, this Court is reminded that the Respondent is a legal entity created under the Capital Markets Act, Cap. 485A of the Laws of Kenya [hereinafter referred to as 'the Act'] vested with the regulation of the capital markets industry. The Act's preamble states as follows: -

An Act of Parliament to establish a Capital Markets Authority for the purpose of promoting, regulating and facilitating the development of an orderly, fair and efficient capital market in Kenya and for connected purposes.

10. The Respondent's main principal objectives are *inter alia* provided in Section 11[1] of the Act as follows: -
- (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.
11. To enable the Respondent discharge its above mandate, the Act vests it with various powers including carrying out inquiries and investigations either on its own motion or on the basis of proffered complaints. In this case, the Respondent initiated an own-inquiry. The sequence of events between the parties in this case were enumerated in the judgment under review. It is those events that the Appellants contended that they did not align with Articles 35[1], 47 and 50 of the Constitution as well as the Act, the Fair Administrative Actions Act and the rules made thereunder.
12. Therefore, in terms of proof of infringement, in order to succeed on this claim, the Appellants bore the burden of proof of the infringement in terms of Sections 107(1), (2) and 109 of the Evidence Act. The provisions state as follows: -
- 107
- (1). Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
- and
109. Proof of particular fact
- The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
13. The issue of the burden of proof on a party alleging constitutional infractions was addressed by the Supreme Court in Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR as under: -
- Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in *Anarita Karimi Njeru vs. Republic*, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.
14. Having carefully considered the Appellants' quest, this Court finds that, at all material times, the Appellants were made well aware of the inquiry. The summons date 14th June 2021 were clear on the purpose and the extent of the inquiry. The summons also called for specific documents which the Appellants provided followed by a meeting between the Appellants and the Respondent to aid the Respondent further the inquiry. All along, the Appellants co-operated with the Respondent although it seems they filed the instant appeal in between. In other words, the parties have all along related



cordially since there is nothing on record to suggest otherwise. Of more importance is that there is ample evidence on record showing that whenever any issue arose, the parties discussed and eventually agreed on the best way forward. Indeed, all the requests for information made by the Respondent were in writing and the purposes clearly disclosed. Further, the Respondent made it apparent to the Appellants that it was only carrying out an inquiry under the Act and that the Appellants would be kept abreast of every development and that if at all the inquiry will reveal anything that the Respondent would wish to indict the Appellants on, then such will be formally communicated to the Appellants under an appropriate notice.

15. This Court, therefore, finds it a tall order to fault the on-going process on account of procedural impropriety whether under the *Constitution* or the law. The Appellants have failed to prove any infraction of their rights and fundamental freedoms under the *Constitution* as to warrant this Court's intervention. The Appellants' actions also seem to be premature. As such, the contention is for rejection.

(b) Whether the inquiry be terminated on account of the Corporate Governance Report dated 15th November 2022:

16. The Tribunal meticulously dealt with this issue in the judgment. The Tribunal, correctly so, demonstrated how the inquiry was different from the Report. It further amplified why the findings of the Report, which Report is an annual requirement in law, cannot compromise the inquiry which was initiated pursuant to an audit.
17. This Court, therefore, affirms the position that the inquiry and the Report are very distinct processes in law and as such one of them cannot stand on the way of the other.
18. The ground, hence, equally fails.

Disposition:

19. As I come to the end of this judgment, I remain grateful to the parties' contributions in this matter including the elaborate submissions and reference to various decisions and if I did not specifically point out an argument or a decision, then it is not that such was irrelevant, but it is because the issue was well driven home and was, no doubt, considered in arriving at this decision.
20. Deriving from the foregoing and having fully canvassed the issues raised in this appeal, this Court finds that the appeal is unmerited and makes the following final orders: -
 - (a) The appeal is hereby dismissed.
 - (b) Given that the inquiry was instituted way back in 2021, the Respondent shall expedite its determination.
 - (c) The Appellants shall jointly and severally bear the costs of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2025.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of:

Mr. Bett, Learned Counsel for the Appellants.



Mr. Mumu, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.

