Kuria v Capital Markets Authority (Civil Appeal E244 of 2024)
[2025] KEHC 13971 (KLR) (Commercial & Admiralty) (7 October 2025) (Judgment)

Neutral citation: [2025] KEHC 13971 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND ADMIRALTY

CIVIL APPEAL E244 OF 2024

JK NG'ARNG'AR, J

OCTOBER 7, 2025

BETWEEN

MUTHONI KURIA .... APPELLANT

AND

CAPITAL MARKETS AUTHORITY .... RESPONDENT

(Being an appeal from the Judgment of the Capital Markets Tribunal in Appeal No. 8B of 2022)

JUDGMENT

Background

1. The appellant herein, Muthoni Kuria filed an appeal before the Tribunal challenging the decision of Capital Markets Authority dated 2nd August 2022. The brief background of this appeal is that on 6th February 2015, Chase Bank Kenya Limited (CBKL) applied to the Capital Markets Authority (CMA) for a Kshs. 10 billion Mid Term Note (MTN) to support its various initiatives. The purpose of the MTN was to expand CBKL's branch network, strengthen the capital base, invest in IT and product development initiatives and support onward lending. The Appellant was engaged as a non-executive board member and a member of the Audit and Risk Committee.

2. The Respondent approved by CMA on 22nd April 2015 after reviewing it along with the accompanying Information Memorandum (IM). The first tranche of the MTN, amounted to 3 billion with a provision for two a billion shillings green shoe option which was then listed at the Nairobi Stock Exchange (NSE) on 22nd June 2015.

3. According to the appellant, CBKL was thereafter declared insolvent and placed under receivership by the Central Bank of Kenya (CBK) on 7th April 2016 and the trading of the MTN at NSE was suspended on 8th April 2016. The CMA, the Respondent herein, launched investigations into the CBKL's affairs

and it flagged issues on the preparation of false and misleading financial statements, and failure to disclose material information in the Information Memorandum (IM) published for investors in the MTN. The Respondent placed the blame on the appellant among others for the collapse of CBKL in their various capacities as the then members of the board of CBKL.

4. Subsequently, the Respondent issued a Notice to Show Cause (NTSC) to the appellant among others requiring them to address the alleged failures in relation to the insolvency of the CBKL. The appellant Notice to show cause was dated 5th July 2021 and was required to address overstatement of interest of cash balance with the Central Bank, Overstatement of interest income and non-disclosure of related party loan advances.

5. The appellant as a board member failed to ensure the disclosure of material information on bonus payment to Mr. Zafrullah Khan in the Information Memorandum (IM). Further as a member of the Audit and Risk Committee of CBKL board she failed to oversight roles as specified under Capital Markets legal and regulatory framework.

6. The Appellant through her advocates in detailed response dated 25th February 2022 responded to the Notice to show cause addressing all allegations raised. The said response was completely disregarded and the Appellant subjected to a hearing.

7. The Respondent constituted an Ad Hoc committee under Section 25A (1) (C) (iii) as read with Section 11(3) (cc) of the *Capital Markets Act*, to determine the culpability or otherwise of the Appellant. The committee found the Appellant culpable on all allegations in the NTSC and imposed a financial penalty of Ksh. 2,500,000/=. Dissatisfied with the decision, the Appellant with one other person jointly appealed to the Capital Markets Tribunal (Tribunal), who, vide a decision dated 26th July 2024, upheld the Ad hoc Committee's decision in its entirety.

The Appeal

8. The appellant being dissatisfied with the judgment of the Capital Markets Tribunal preferred an appeal vide a Memorandum of Appeal dated 23rd August, 2024 setting out the following grounds That;

    i. The Capital Markets Tribunal erred in law in breaching the Appellants' right to fair administrative process by dismissing their Appeal and consequently making an erroneous decision in allowing the Ad Hoc committee's decision despite their concerns of impartiality.

    ii. The Capital Markets Tribunal erred in law and misdirected itself in dismissing the Appeal despite holding that the Respondent was obligated to ensure that the proceedings it undertakes are conducted impartially.

    iii. The Capital Markets Tribunal erred in law in dismissing the appeal despite its reliance on the fact that bias is not considered from the mind of the judge but the mind of a reasonable person.

    iv. The Capital Markets Tribunal erred in law and misdirected itself in allowing that the inclusion of Dr. McFie as a panel member of the Ad Hoc committee was proper in spite of him being a director in SBM bank that acquired assets of CBKL upon its liquidation, making him a conflicted party having access to information touching on CBKL's internal affairs.

    v. The Capital Markets Tribunal erred in law in dismissing the Appeal on allegations that no information was adduced to show bias in the Ad Hoc Committee when in fact the tribunal had in a similar case and same facts of Khan & 2 others v Capital Markets Authority.

vi. The Capital Markets Tribunal erred in law when it failed to take into consideration that the Ad Hoc Committee had been improperly constituted therefore in breach of the Appellant's right to fair administrative action.

vii. The Capital Markets Tribunal erred in law in dismissing the Appeal despite holding that the legal test of bias is that of a reasonable person and has to be viewed from the prevailing circumstances.

viii. The Capital Markets Tribunal erred in law in and misdirected itself on the matter before itself in relying on hearsay evidence and in particular failed to consider that the Financial Statements which formed the subject of the Ad Hoc Committee's decision had not been signed and had not been made available by the Auditor to the Appellant in her position as a director.

ix. The Capital Markets Tribunal erred in law by wrongly evaluating the evidence on record, hence coming to a wrong conclusion.

x. The Capital Markets Tribunal failed in law by its failure to consider that the Appellant had not been given an opportunity by the Ad Hoc Committee to review the Forensic Report by Deloitte and cross examine the authors which report the Ad Hoc Committee relied on in making its decision.

xi. The Capital Markets Tribunal erred in law in and misdirected itself on the matter before itself on relying on the allegation that the Appellants had not raised the failure of the Ad Hoc Committee to allow them cross examine without having regard that the obligation to allow the cross examination rested on the Ad Hoc Committee.

xii. The Capital Markets Tribunal erred in law and in breach of the Appellant's right enshrined in Article 47 of *the constitution* by failing to consider ground no. 20 of the Appellant's appeal to wit that the Ad Hoc Committee's decision is null and void for failure to meet the required threshold of majority votes as per the Capital Market Authority's Terms of Reference.

xiii. The Capital Markets Tribunal erred in law in breaching the Appellants right to fair administrative action that is fair and expeditious in dismissing the appeal despite stating that the issuing of the NTSC letters approximately 6 years after the fact was too lone and contrary to its own investigation and enforcement.

xiv. The Capital Markets Tribunal erred in law by failing to appreciate the complex nuances of directorship, director indemnity, duty of care, fiduciary relationship, auditor duty of care and chronology of reporting requirements and steered clear of pronouncing itself on these very complex legal issues which if the Tribunal had an appreciation would reached a different judgment.

xv. The judgment of the Capital Markets Tribunal issued on 26th July 2024 is wholly erroneous in law and fact, contrary to equity, judicial precedent and a gross miscarriage of justice.

9. The appellant prayed for the following ORDERS that;

a. The appeal be allowed.

b. The Judgment of the Capital Markets Tribunal Appeal No. 8B of 2022 dated 26th July 2024 be set aside in its entirety.

c. The notification of enforcement Action decision dated 2nd August be set aside in its entirety.

d. An order that the costs of this appeal be awarded to the appellant.

e. Any other orders this court may deem fit and just be granted.

10. This appeal proceeded by way of written submissions. The appellant's submissions are dated 7th March 2025 whereas the Respondent's submissions are dated 2nd June 2025.

Appellant's submissions

11. On whether the Ad Hoc Committee had been properly constituted, the appellant challenges *the constitution* of the Capital Markets Authority's (CMA) Ad Hoc Committee, arguing that it was biased and irregular. The committee had seven members: three CMA board members who had earlier investigated and drafted charges against the appellant, and four external members. This, the appellant argues, breached the principle of nemo judex in causa sua (no one should be a judge in their own cause). One external member, Dr. McFie, was a director at SBM Bank, which had acquired assets and liabilities of CBKL (linked to the case). His participation raised a clear conflict of interest and reasonable apprehension of bias. Despite the appellant raising this concern in writing, it was ignored.

12. It was argued that courts have emphasized impartiality and the need for justice to be seen to be done. Previous rulings, including by the Supreme Court and Tribunal in similar CBKL-related cases, recognized that Dr. McFie's position created apprehended bias. However, inconsistently, in the appellant's case, the Tribunal dismissed the bias claim. The appellant argues that the inclusion of Dr. McFie and the three CMA board members rendered the committee improperly constituted, violating Articles 47 and 50 of *the Constitution*. This irregularity invalidates the committee's decision and undermines the right to a fair administrative process. The appellant prays that the tribunal's decision upholding the committee's ruling be set aside.

13. On the issue of impartiality, the appellant challenges the impartiality of the CMA Ad Hoc Committee. She submitted that before the proceedings began, the CMA board published an adverse newspaper article portraying Chase Bank directors as guilty, which suggested pre-judgment. The appellant argues that this undermined the committee's impartiality, especially since the same board considered the NTSC. *The Constitution* guarantees under Articles 25(c), 47, and 50, as well as the *Fair Administrative Action Act*, require impartial and fair hearings. The committee failed this standard: three conflicted CMA board members and Dr. McFie (a director of SBM Bank, which took over CBKL's assets) participated despite a clear risk of bias.

14. It was urged that the Tribunal, in similar facts in Khan & 2 Others vs CMA (2024), found Dr. McFie's presence created apprehended bias, but inconsistently dismissed this argument in the appellant's case without justification, undermining legal certainty and precedent. Courts, including the Supreme Court, stress that justice must not only be done but be seen to be done.

15. The tribunal further erred in holding that because objections were not raised during proceedings, bias could not be imputed, effectively shifting the duty of ensuring fairness from the respondent to the appellant. This contravened Articles 25, 47, and 50, which impose an absolute duty on administrative bodies to guarantee impartiality. The appellant prays that the Court finds the tribunal erred in law by upholding a biased process, sets aside its decision, and affirms that the proper test of bias is whether a fair-minded and informed observer would perceive a real possibility of bias in the circumstances.

16. In regards to appellant's right to fair trial, the appellant argues that her right to a fair trial was violated because she was denied the chance to cross-examine witnesses and authors of financial documents relied on by the Ad Hoc Committee. She had expressly requested cross-examination in her response to the NTSC, but this was ignored. The Tribunal wrongly held that she had not raised the

issue. The appellant stresses that under Articles 25(c) and 50(2)(k) of *the Constitution*, and the *Fair Administrative Action Act*, the right to a fair trial and to challenge evidence is absolute and cannot be waived. Reliance was placed on the case of Anyona vs Wells Oil Ltd (2023) Wells Oil Limited & 2 others (Civil Appeal E091 of 2022) [2023] KEHC 26833 (KLR) (20 December 2023) (Judgment), the Court emphasized that cross-examination is central to fairness and truth-finding. Therefore, by denying the appellant this right, the Respondent failed in its duty to ensure a fair hearing, rendering the proceedings unconstitutional. The appellant therefore prays that the Tribunal's decision be set aside and her appeal allowed.

17. On whether the Ad Hoc Committee had met the required threshold for majority votes, the appellant submitted that the Ad Hoc Committee's decision is invalid because it was not reached through a majority vote as required by clause 9 of its Terms of Reference, which expressly mandated that all issues be decided by majority vote without a casting vote from the Chairman. It was urged that this issue formed ground 20 of the appeal before the Tribunal, but the Tribunal failed to properly consider it and gave no reasons for disregarding it, contrary to its statutory duty under Section 35A of the *Capital Markets Act* and constitutional requirements of fair administrative action. The appellant submits that failure to vote on the decision rendered the Committee's action nullity ab initio. Furthermore, the Tribunal's omission to address this ground undermined transparency, accountability, and judicial reasoning, amounting to arbitrariness. The appellant contends that since the decision was not voted on by a majority, it was unlawful, unconstitutional, and incapable of being sustained.

18. On the issue of hearsay evidence by Capital Markets Tribunal, the Appellant urged that the Capital Markets Tribunal erred by relying on hearsay evidence, particularly concerning unsigned financial statements that were not presented by the Auditor. The appellant assert violations of constitutional rights to a fair hearing and the right to challenge evidence. The Appellant claimed the restated financial accounts were inconsistent and not approved by them, as highlighted in their response to the NTSC, which indicated financial misclassifications and lack of clarity on the figures' derivation. The Tribunal is further criticized for accepting the financial statements without the Appellant's signature, contravening the *Companies Act*'s requirements for authenticity. Additionally, it is noted that Deloitte, the firm that prepared the statements, was not called as a witness, classifying its evidence as hearsay, which undermines the Tribunal's findings. The Appellant contends that the Tribunal should have disregarded the Ad Hoc Committee's decision based on this inadmissible evidence.

19. The appellant raised the issue that the suit as instituted at the Ad Hoc Committee was statute barred. On this issue, the Appellant contends that the Tribunal improperly dismissed the appeal, arguing that a six-year delay in issuing NTSC letters was excessive and contrary to *the Constitution* of Kenya, specifically Articles 47 and 50(2)(e), which mandate fairness, efficiency, and expediency in administrative actions. The Capital Markets Authority's Investigation and Enforcement Manual stipulates that high-priority matters should be resolved within six months, a requirement allegedly breached in this case, leading to a legitimate expectation for timely investigations. The Appellant asserts that the significant delay, coupled with an inability to access necessary evidence post-office cessation, infringed upon their right to a fair hearing as protected under Article 50(2)(k). The Supreme Court's previous rulings reinforce this perspective, underscoring the necessity of reasonable opportunities for hearing in both judicial and administrative contexts. The Appellant requests a declaration that the Tribunal's actions constituted a legal error, violating the principles of fair administrative action.

20. On whether the Tribunal appreciated the complex legal nuances of the appellant's position in CBKL, it is argued by the appellant that the Tribunal overlooked key legal complexities associated with directorship and director responsibilities under the *Companies Act*. The Appellant contends that the Tribunal erred by not recognizing her compliance with statutory duties, such as acting in good faith

and with diligence as stipulated in the Act. Key issues include the unauthorized bonus payment to Mr. Zafrullah Khan, which the Appellant claims was an ultra vires act by management, and her subsequent corrective actions. The Appellant asserts that she adhered to all relevant legal requirements and cannot be held personally liable for alleged misconduct, as the corporate veil provides separate legal identity to the company. This position is supported by case law establishing the principles surrounding corporate personality and the lifting of the corporate veil under specific circumstances.

21. Lastly on the issue of costs, the appellant cited Section 27 of the *Civil Procedure Act* that the court has the authority to distribute costs as it deems fit, but must provide written reasons if costs do not follow the event. The principle that costs typically follow the event is affirmed by case law, including Delilah Kerubo Otiso v Ramesh Chander Ndingra [2018] eKLR, which asserts that the successful party generally receives costs unless a compelling reason dictates otherwise. Under Kenyan legal framework, courts cannot deny the Applicant costs without evidence of misconduct, and discretion must be based on clear legal principles. The Supreme Court in Jasbir Singh Rai & others vs Tarlochan Singh Rai & 4 others [2014] eKLR further clarified that awarding costs is aimed at reimbursing the successful party for their expenditures, emphasizing that such awards are not punitive. Consequently, the Appellant should be compensated for the costs incurred in pursuing this appeal, which arose from a misdirection by the Respondent.

22. In conclusion, Your Lordship, the judgment of the Capital Markets Tribunal on 26th July 2024 is legally erroneous, contrary to equity, and constitutes a miscarriage of justice. The Appellant's appeal is meritorious and should be upheld, leading to the complete annulment of the Tribunal's judgment and the Notification of Enforcement Action dated 2nd August 2022, with costs awarded to the Appellant.

Respondent's submissions

23. On the first issue of whether the Respondent's Ad Hoc Committee was properly constituted in accordance with the law and principles of natural justice, the Respondent argues that the Committee was properly constituted under legal frameworks and principles of natural justice, challenging the Appellant's claims of bias. The Respondent submits that the Committee consisted of seven members, including four independent external members, ensuring fairness and impartiality. The Respondent relied on Section 11(3) of the *Capital Markets Act*, which grants the Authority broad powers to protect investors and regulate the capital market in Kenya.

24. The issue of potential bias against the Committee concerning the participation of three CMA Board members in the hearings. The Respondent contends that the protective role of the CMA allows for a necessary overlap of investigative and enforcement functions, which would typically raise concerns of bias, yet is permissible under specific statutory authorizations. This position is supported by previous case law, including the Supreme Court's ruling in Alnashir Popat & 7 others vs Capital Markets Authority (2020) eKLR, which emphasized the unique character of securities commissions and their operational mandates.

25. Reliance was placed on the High Court's decision in Jeremiah Gitau Kiereini vs Capital Markets Authority (2013) eKLR, affirming that the Committee's mixed composition (including CMA Board members and independent members) does not violate the right to a fair hearing or independence. The court recognized that regulatory bodies cannot operate detached from their investigatory and enforcement roles, a view supported by established judicial principles highlighting the necessity for efficiency in regulatory processes.

26. The Respondent posits that the overlap of functions within the Ad Hoc Committee aligns with statutory expectations and facilitates effective regulation in capital markets. Total independence

from investigatory and enforcement powers is deemed impractical, with the document arguing that delegating the Committee's functions to an entirely independent body would compromise operational efficiency. This perspective aligns with the Supreme Court's rationale that administrative tribunals are not equivalent to courts and must operate fairly within their procedural frameworks.

27. In regards to the appellants right to a fair administrative action, the Respondent submitted that concerning the composition of the Ad Hoc Committee, the Appellant has failed to prove any breach of legal requirements or demonstrate improper quorum due to the participation of certain members. According to the Respondent, the burden of proof lies with the Appellant and no sufficient evidence has been proved. The Respondent admits fair administrative rights and principles against bias but argues that the Appellant's references to a newspaper publication and previous cases like Khan are misplaced. The Tribunal found that there was no evidence linking the Respondent to the publication and differentiated the circumstances from the Khan case. The Tribunal also assessed bias based on the conduct during proceedings and determined that the Appellant did not satisfy the legal standards regarding bias on committee composition. Additionally, while acknowledging the right to a fair hearing under Articles 25(c) and 50 of *the Constitution*, the Respondent contends that this right is not absolute and must be contextualized within procedural history. Thus, the Appellant's claims lack merit according to the specific facts and established legal principles in this matter.

28. In assessing whether the Appellant suffered prejudice by not having the chance to cross-examine evidence before the Ad Hoc Committee, it is crucial to reference Article 47 of *the Constitution*, which ensures administrative actions are expeditious, lawful, and fair. The right to cross-examination, while significant in protecting the right to a fair hearing, is not absolute. The Appeals Chamber in Prosecutor V Milan Martic Case No. 17-95-11-AR73.2, established that the admissibility of evidence does not solely depend on cross-examination, which suggests that context and relevance are essential in determining fairness.

29. The Respondent argued that simply requesting cross-examination of specific individuals does not guarantee that a fair hearing was denied. The Tribunal must evaluate context, relevance of the request, and any potential delay or prejudice. In the case of Dry Associates Limited V Capital Markets Authority Another Interested Party Crown Berger(K)Ltd, Court was of the view that procedural fairness can be flexible, as too strict adherence to procedural safeguards may hinder efficiency.

30. According to Michael Fordham, Judicial Review Handbook 4th edition emphasizes that procedural fairness varies with circumstances and does not follow rigid rules, while Paul Craig's Administrative Law highlights the necessity of providing a fair opportunity to contend charges, regardless of the presence of cross-examination. Likewise, W.R. Wade & C.F. Forsyth state that an oral hearing must consider all relevant evidence, inform parties of evidence, allow questioning, and permit comments on the evidence.

31. In the case of Joseph Mbalu Mutava vs Attorney General, the High Court underscored that procedural fairness requires that parties are informed of witness testimonies and provided opportunities to contest these testimonies. Ultimately, the Court concluded that the Petitioner's rights under Article 47 were violated due to a lack of access to witness testimonies and the ability to comment on them, thus affirming the principle that adequate information is paramount for effective participation in administrative proceedings. Hillary Delany further notes that while cross-examination is important in court settings, that necessity can be more flexible in administrative contexts, underscoring that fairness can still be achieved through alternative means of contesting evidence.

32. The Respondent raised the issue of whether the decision of the Respondent was valid, having met the required threshold for majority votes as stipulated in its Terms of Reference. The Respondent

urged that the Terms of Reference for the Ad Hoc Committee mandated that decisions be made by a majority vote of its members. The Respondent asserts that the Ad Hoc Committee's decision was indeed reached through such a majority vote. The Tribunal addressed the Appellant's claims regarding the right to fair administrative action and implicitly ruled that the decision-making process was appropriate, despite not outlining every argument in detail. It underscores that the lack of explicit discussion of all grounds of appeal does not imply neglect; rather, the judgment indicates a thorough consideration of the main issues raised by the Appellant. Furthermore, the Respondent argues that there is no evidence to dispute the legitimacy of the majority vote within the Ad Hoc Committee, and the Appellant's claim of a breach of legitimate expectation lacks factual support regarding adherence to voting procedures as established in the Terms of Reference.

33. On the fifth issues as raised by the Respondent, it was submitted that the crucial role of the Board of Directors in ensuring the integrity of financial and capital markets, particularly in Kenya. It emphasizes that strong board oversight is essential for maintaining fairness and efficiency, which are vital for attracting and retaining investors. A well-composed board with diverse expertise is deemed necessary for navigating regulatory complexities and ensuring market integrity.

34. Furthermore, it stresses that directors must actively engage in their management roles, including a thorough understanding of financial statements before approval, a responsibility underscored by the Federal Court of Australia. It is stated that accurate financial disclosures are critical for informed investment decisions and that the Appellant, as a director of CBKL, had a personal obligation to ensure a true and fair presentation of the company's finances. There are specific duties regarding the review of financial statements, asserting that these responsibilities cannot be delegated. The Appellant's failure to adequately fulfil these duties, including scrutinizing financial inaccuracies and complying with International Financial Reporting Standards (IFRS), is explicitly outlined. The Respondent concludes with a determination of breach due to misleading financial disclosures in the Information Memorandum (IM), emphasizing the prolonged nature of this non-compliance predating 2015.

35. In regards to Capital Markets Tribunal relying on hearsay evidence, the Respondent submitted that the statements, prepared by reputable audit firm Deloitte, were relevant to CBKL's financial inquiry. In administrative proceedings, evidence rules are relaxed, focusing on probative value over strict admissibility protocols. The Appellant acknowledged the financial statements in her response to the Notice to Show Cause; her concerns about their accuracy and her involvement were assessed by the Tribunal. The Tribunal's decision was based on a comprehensive evaluation of all evidence, with no reliance solely on hearsay.

36. In conclusion, the Respondent asserts that the Kshs. 2.5 million penalties imposed on the Appellant were justified through thorough examination of facts and evidence, adhering to capital markets regulations and principles of natural justice. The Capital Markets Tribunal upheld the findings of the Ad Hoc Committee based on factual breaches of fiduciary duties by the Appellant, which led to misleading financial statements. The Respondent emphasizes the necessity of the fine to maintain investor confidence and uphold regulatory standards. They argue the Tribunal's decision was fair, with no evidence of reversible errors from the Appellant, and request the dismissal of the appeal and cost awards to the Respondent.

Analysis and Determination

37. Having carefully considered the record of appeal, rival submissions by the parties as well as the cited authorities herein, this Court frames the following issues for determination;

    i. Whether the Ad Hoc Committee of the Respondent was properly constituted and impartial?

ii. Whether the appellant was denied the right to a fair hearing, particularly cross-examination of witnesses?

iii. Whether the Ad Hoc Committee's decision was invalid for want of a majority vote?

iv. Whether the Tribunal erred in law by relying on unsigned financial statements and evidence?

v. Whether the orders sought should issue, including costs?

38. Before I turn to determine the issues raised, it is important to note that this being a second appeal, this Court is guided by the principles set out in the case of Pithon Waweru Maina vs Thuka Mugiria [1983] KECA 117 (KLR) where the Court of Appeal held that;

> " This is a second appeal so only a point of law may be taken. Section 72 *Civil Procedure Act*. If the High Court has upheld a resident magistrate on a question of whether or not he exercised his discretion judicially it is a question of law whether he was right or wrong to do so."

39. This is the position under Section 35 (22) of the *Capital Markets Act* which stipulates that;

> " Any party to proceedings before the Tribunal who is dissatisfied by a decision or order of the Tribunal on a point of law may, within thirty days of the decision or order, appeal against such decision or order to the High Court."

40. In determination of this appeal, this court will only restrict itself to matters of law and any invite to delve on matters of facts will not be entertained.

41. In Kenya Breweries Ltd vs Godfrey Odoyo (2010) KECA 498 (KLR) the Court of Appeal held that;

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of Stephen Muriungi and another vs. Republic (1982-88) 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366: -
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> "We would agree with the view expressed in the English case of Martin vs Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

42. On the issue of whether the Ad Hoc Committee of the Respondent was properly constituted and impartial, it was submitted by the appellant that the Ad hoc Committee consisted of three Capital Markets Authority Board members who had participated in investigations and framing of charges and four external members. the appellant contends that Ad hoc Committee. It emerged that one of the external members, Dr. Mc Fie, was a director of SBM Bank which acquired assets of Chase Bank Kenya Limited (CBKL) following its receivership.

43. The appellant submitted that this created actual and apprehended bias contrary to the principle of nemo judex in causa sua. Reliance was placed on Porter vs Magill [2001] UKHL 67, where the House

of Lords held that the proper test is whether a fair-minded and informed observer, having considered the facts, would conclude there was a real possibility of bias. This principle was echoed in the case of Kaplana H. Rawal vs Judicial Service Commission & 2 others [2016] eKLR and Philip K. Tunoi vs JSC & Another [2016] eKLR, where the courts stressed that justice must not only be done but must be seen to be done.

44. The appellant urged that in a similar matter with similar facts, in Khan & 2 others vs Capital Markets Authority (2024), the Capital Markets Authority Tribunal itself acknowledged that Dr. McFie's participation created apprehended bias, yet inconsistently dismissed the same argument in the appellant's case.

45. The Respondent on the other hand argues that overlap of functions in regulatory agencies is permissible. The Respondent cited the case of Alnashir Popat & 7 others vs Capital Markets Authority [2020] eKLR, where the Supreme Court recognised the unique structure of securities commissions.

46. Section 14 of the *Capital Markets Act* provides that;

    1. The Authority may 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.

    2. Without prejudice to the generality of subsection (1), the Authority shall establish—

        a. 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.

47. Further, Section 11A (1) (a) of the Act permits the Capital Markets Authority may delegate any of its functions to (a) a committee of the Board; (b) a recognized self-regulatory organization; or an authorized person.

48. The test of bias or apprehension of bias was well espoused by the Supreme Court of Kenya in the case of Philip K. Tunoi & another vs Judicial Service Commission & another [2016] KECA 715 (KLR) the Court of Appeal stated that;

> " In determining the existence or otherwise of bias, the test to be applied is that of a fair-minded and informed observer who will adopt a balanced approach and will neither be complacent nor be unduly sensitive or suspicious in determining whether or not there is a real possibility of bias."

49. The Court of appeal in Philip K. Tunoi & another vs Judicial Service Commission & another (supra) adopted the decision in Porter v Magill (2002) (supra) that no fair minded and informed observer having considered the facts, would conclude that there is a possibility that the Presiding Judge or this Court will not be impartial or fair or will be biased.

50. In the case of Kalpana H. Rawal & 2 others v Judicial Service Commission & 3 others [2016] KESC 4 (KLR), the Supreme Court stated that;

> "A claim of apprehended bias requires a finding that a fair minded, and reasonably well-informed observer might conclude that the decision-maker did not approach the issue with an open mind."

51. Similarly, in the case of Aly Khan Satchu vs Capital Markets Authority [2019] eKLR the Court held as follows;

> "The Respondent constituted an ad hoc committee under section 14 of the Act. The Committee comprised of four members of the CMA among them its Chairperson. CMA is on record stating that acting on reasonable suspicion that the applicant was involved in Insider Trading it commenced investigations. It is common ground that CMA issued the NTSC. For all purposes, CMA was the investigator, the prosecutor, the jury and the executioner. It is a correct statement of the law to state that a tribunal is only competent to adjudicate on a matter only if: -
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> a. it is properly constituted as regards number and qualification of the members of the Bench and no member is disqualified for one reason or the other;
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> b. the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and
>
> c. the case came before the court initiated by due process of law and upon fulfilment of any conditions precedent to the exercise of jurisdiction.
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> I have serious doubts on paragraphs (a) above. A serious challenge on the impartiality of the four CMA members could have easily lead to their disqualification. This is because a reasonable observer in the circumstances of this case would be persuaded that the said Members could not be perceived to have approached the dispute with an open mind. Similarly, paragraph (c) above raises serious doubts as to whether the dispute was initiated after observing due process of law and upon fulfilment conditions precedent to the exercise of jurisdiction. I say so because CMA was the investigator, it issued the NTSC, it was for all purposes the prosecutor and finally, its members sat in the ad hoc Committee that heard and determined the dispute. This scenario raises a fundamental issue of procedural impropriety and a reasonable apprehension of likelihood of bias."

52. In my considered view, although regulatory overlap may be tolerated, it cannot extend to circumstances where members of the enforcement panel were previously investigators or where external members had direct interests in entities affected by the enforcement. Therefore, applying the test set in Porter v Magill, a fair-minded observer would indeed apprehend bias in *the constitution* of the Ad hoc Committee.

53. Be that as it may, it is not in dispute that Dr. McFie one of the Ad hoc committee member is a director of SBM Bank which acquired Chase Bank Kenya Limited assets upon insolvency. It cannot be gainsaid that Dr. Mc Fie will be impartial with such substantial interest in the matter. The rule nemo judex in causa sua denotes that no man can be a judge in his own cause and decision by a tribunal or court should not be tainted with by bias or apprehension of bias by complying with the principles of impartiality and independence as enshrined under article 50(1) and 47 of *the Constitution*.

54. This position is supported by the provision of Section 35A (15) of the *Capital Markets Act* which provides that a member of the Tribunal who has an interest in any matter which is the subject of the proceedings of the Tribunal shall not take part in those proceedings.

55. From my above analysis, this court concludes that the Ad Hoc Committee was improperly constituted, and the Tribunal erred in upholding its decision.

56. On the issue of whether the appellant was denied the right to a fair hearing, particularly cross-examination of witnesses. The appellant expressly sought to cross-examine the authors of the financial statements and the Deloitte forensic report which request she request was not granted. *The Constitution* of Kenya under Article 50(2)(k) provides for the right to adduce and challenge evidence. The right is reinforced by Article 25(c), which dictates that despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited;

    a. ....

    b. ....

    c. the right to a fair trial.

57. Section 12 of the *Capital Markets Act* cap 485A provides that;

> "The provisions of the Civil Procedure Rules made under the *Civil Procedure Act* (Cap. 21) dealing with the summoning and attendance of witnesses shall apply with respect to the hearing of an appeal as though those provisions formed part of these Rules."

58. Further, Section 35A (5) of the *Capital Markets Act* cap 485A provides that;

> "For the purposes of hearing an appeal, the Tribunal shall have all the powers of the High Court to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents."

59. Order 19 Rule 2 of the Civil Procedure Rules, 2010;

    a. Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.

    b. Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.

60. Rule 15 (f) of the Capital Markets Tribunal Rules provides that a witness called and examined by either party to the appeal may be cross-examined by the other party to the appeal and if so cross-examined may be re-examined;

61. In the case of Christopher Ndaru Kagina vs Esther Mbandi Kagina & another [2016] KEHC 3192 (KLR) the court held that;

> "Expert testimony must be subjected to vigorous cross-examination and ought to be weighed along with all other evidence."

62. The importance of cross-examination has been underscored in the case of Anyona vs Wells Oil Ltd [2023] eKLR, where the Court of Appeal held that cross examination is important, first and foremost is that it is a sure way of guaranteeing a party the right to a fair hearing and in criminal cases, the right to a fair trial. Cross-examination allows the accused in criminal cases or the defendant in civil

cases to thoroughly analyse and challenge the evidence brought forward by opposing witnesses. cross-examination is central to testing veracity and ensuring fairness. Cross examination also establishes inaccuracies in a case. Determining inaccuracies in a witness' statement can damage the overall case brought forward by the opposing party. Cross examination also tests the credibility of the witness. The credibility of a witness relates to their sincerity and whether they are speaking the truth as they believe it to be.

63. The Tribunal erred in shifting the burden onto the appellant, reasoning that she did not raise the matter adequately. The duty to ensure fairness lay with the Respondent, as held in Judicial Service Commission vs Mbalu Mutava [2015] eKLR, where the Court of Appeal affirmed that the right to fair administrative action imposes an affirmative obligation on decision-makers.

64. The tribunal erred in denying the appellant the opportunity to cross examine the authors of the financial reports presented before the tribunal. This did not only render the proceedings a nullity but procedurally unfair and unconstitutional.

65. As regards the issue of whether the Ad Hoc Committee's decision was invalid for want of a majority vote, the appellant argued that no vote was conducted regarding the decision of the Committee. Clause 9 of the Committee's Terms of Reference required that all decisions of the Committee be reached by a majority of members with no casting vote from the Chair. Rule 15 (j) of the Capital Markets Tribunal Rules provides that the decision of the Tribunal shall be on the basis of a majority vote and shall be in writing, dated and signed by the Chairman and the members of the Tribunal who participated in the decision.

66. The Tribunal failed to address itself on this issue substantively. The rules are very clear that the decision of the Tribunal shall be on the basis of a majority vote. Failure to comply with the rules and in the absence of proof of a majority vote renders the decision of the Ad Hoc committee void ab initio.

67. Lastly, on the issue of hearsay and unsigned financial statements, it has been submitted that the Tribunal relied on unsigned restated financial statements and the Deloitte forensic report. The authors of the reports were not called for examination by the appellant. It is trite law that administrative tribunals are not bound by the strict rules of evidence but reliance on unsigned and untested documents compromises fairness. It has been held severally that administrative bodies must comply with minimum standards of fairness. The Tribunal therefore erred in law by treating such financial statements as probative evidence without calling the authors as required by law.

68. Regarding the orders this Court can grant. This Court is guided by the provisions of Section 35A (24) of the *Capital Markets Act* which states that;

    Upon the hearing of an appeal under this section, the High Court may—

    i. confirm, set aside or vary the decision or order in question;

    ii. remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;

    iii. exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or

    iv. make such other order as it may deem just, including an order as to costs of the appeal of earlier proceedings in the matter before the Tribunal.

69. It is clear that the proceedings before the Ad Hoc Committee were tainted by bias and denial of the right to fair trial. The Tribunal compounded these errors by failing to address critical grounds of appeal

and by misapplying the law. For the reasons stated above, this Court makes a finding that the appeal dated 23rd August, 2024 is successful and this court proceeds to grant the following orders;

a. The appeal is hereby allowed.

b. The judgment of the Capital Markets Tribunal dated 26th July 2024 in Tribunal Appeal No. 8B of 2022 is hereby set aside in its entirety.

c. The Notification of Enforcement Action dated 2nd August 2022 is hereby quashed.

d. The appellant is awarded the costs of this appeal

JUDGEMENT DELIVERED, DATED AND SIGNED VIRTUALLY THIS 7TH DAY OF OCTOBER, 2025.

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HON JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the presence of:

Siele/Susan (Court Assistants)

No Appearance for the Applicant

No Appearance for the Respondent