Capital Markets Authority v Ogundo & 2 others (Civil Appeal 131 & 132 of 2018 (Consolidated)) [2023] KECA 1175 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1175 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 131 & 132 OF 2018 (CONSOLIDATED)

MSA MAKHANDIA, J MOHAMMED & HA OMONDI, JJA

OCTOBER 6, 2023

BETWEEN

CAPITAL MARKETS AUTHORITY .... APPELLANT

AND

JOYCE OGUNDO .... RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL 132 OF 2018

BETWEEN

CAPITAL MARKETS AUTHORITY .... APPELLANT

AND

JAMES R MURIGU .... 1ST RESPONDENT

BARTH RAGALO .... 2ND RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (G. V. Odunga, J.) dated 16th January, 2018 in JR Misc Civil Application No.606 of 2016 and JR Misc Civil Application No.607 of 2016)

JUDGMENT

Background

1. The two consolidated Appeals stem from two Judicial Review Miscellaneous Applications that had been filed in the High Court in Nairobi dated November 29, 2016 by Joyce Ogundo, James R Murigu

and Barth Ragalo (the respondents) seeking orders of *certiorari* and prohibition as against the Capital Markets Authority (the appellant). A brief background will help place the appeal in perspective.

2. The appellant is an authority established under the provisions of section 5 of the *Capital Markets Act* (the Act). It is charged with the responsibility of, *inter alia*, promoting, regulating and facilitating the development of orderly, fair and efficient capital markets in Kenya.

3. Joyce Ogundo, (Joyce), the respondent in Civil Appeal No 131 of 2018 and James R Murigu (James) and Barth Ragalo, (Barth) (the respondents in Civil Appeal No 132 of 2018) were all directors of Uchumi Supermarkets Limited (In receivership), hereinafter referred to as USL.

4. The genesis of the matters culminating into this appeal are two applications, to wit, Judicial review Misc. application No 606 of 2016 and Judicial Review Misc. Application No 607 of 2016 filed by the respondents respectively in the High Court in Nairobi on December 9, 2016.

5. The reliefs sought in the application by Joyce were, inter alia:

> " 1. That the Honourable court be pleased to issue an order of *certiorari* to remove into this honourable court for the purposes of quashing the Notice to Show Cause dated August 31, 2016.
>
> 2. That the Honourable court be pleased to issue an order of Prohibition restraining the Respondent by themselves, their agents or employees from proceeding with the Notice to Show Cause dated August 31, 2016 or purporting to undertake any other disciplinary procedure against the applicant contrary to the provisions of the law.
>
> 3. That any other order that the honourable court deems fit and appropriate to grant.
>
> 4. The costs of this Application be provided for."

6. The reliefs sought in the application by James and Barth were, *inter alia*:

> " 1. That the Honourable court be pleased to issue an order of *certiorari* to remove into this honourable court for the purposes of quashing the Respondent's decisions dated November 17, 2016 and November 18, 2016.
>
> 2. That the Honourable court be pleased to issue an order of prohibition restraining the Respondents by themselves, their agents or employees from enforcing the decisions dated November 17, 2016 and November 18, 2016.
>
> 3. That any other order that the honourable court deems fit and appropriate to grant.
>
> 4. The costs of this Application be provided for."

7. According to the application by Joyce, she was at one time a director of USL but ceased to be a director more than one year prior to the time of filing the application in the High Court. She stated that on 31st August 2016, the appellant herein brought allegations against her that, by reason only of having sat in USL board meetings, she had violated certain provisions of the Act, the *Capital Markets (Securities) (Public Offers Listing and Disclosures) Regulations* (the Regulations) and the Capital Market Guidelines on Corporate Governance by Public Listed Companies (the Guidelines). Accordingly, the appellant issued a Notice to Show Cause (NTSC) calling upon her to appear before

it and show cause why sanctions should not be issued against her in accordance with sections 25A and 11(3)(cc) of the Act.

8. According to James and Bartha they were at one time directors of USL but ceased to be directors more than one year prior to the time of filing the application in the High Court. On August 31, 2016, the appellant brought allegations against them that, by reason only of having sat in USL board meetings, they had violated certain provisions of the Act, the Regulations and the Guidelines. Accordingly, the appellant issued a NTSC calling upon them to appear before it and show cause why sanctions should not be invoked against them in accordance with sections 25A and 11(3)(cc) of the Act.

9. It was averred that the NTSC alleged that the respondents sat as members of the Board of Directors of USL when certain decisions were allegedly taken which according to the appellant violated certain provisions of the Act as well as some Regulations and Guidelines made thereunder.

10. The trial court (GV Odunga, J - as he then was) delivered the judgments in respect of both applications on January 16, 2018 and allowed both as prayed.

11. The appellants were aggrieved by the aforesaid judgments thus provoking the appeals *vide* memoranda of appeal dated April 25, 2018 and 17th April, 2018 respectively. The memorandum of appeal in respect of the appeal against Joyce raised the following six (6) grounds of appeal that the learned Judge erred in law and in fact in: finding that the respondent was charged with actions which were not contemplated by sections 30(D)(1)(a) and 34(b) of the Act; in classifying the administrative NTSC proceedings proposed to be undertaken by the Board against the respondent as 'quasi-criminal' proceedings; in construing the allegations made against the respondent in the administrative Show Cause proceedings using a test applied in criminal or quasi-criminal judicial proceedings; in failing to appreciate the administrative nature of the Show Cause proceedings; in finding that the appellant acted irrationally, unfairly and in abuse of power in framing the allegations against the respondent; and in quashing the administrative Show Cause letter dated August 31, 2016.

12. The memorandum of appeal in respect of the appeal against James and Barth raised the following eight (8) grounds of appeal: that the learned Judge erred in law and in fact in finding that the respondents were charged with and found culpable of actions which were not contemplated by sections 30(D)(1)(a) and 34(b) of the Act; in classifying the administrative NTSC proceedings proposed to be undertaken by the Board against the respondents as 'quasi-criminal' proceedings; in construing the allegations made against the respondent in the administrative Show Cause proceedings using a strict test applied in criminal or quasi-criminal judicial proceedings; in failing to appreciate the administrative nature of the Show Cause proceedings; in finding that the appellants acted irrationally, unfairly and in abuse of power in framing the allegations against the respondents; in finding that the enforcement action taken against the respondents could not stand; in quashing the respondents' decisions dated 17th and November 18, 2016; and in prohibiting the respondents from enforcing the decisions dated 17th and November 18, 2016.

The 2 appeals were consolidated at the hearing before this Court.

Submissions By Counsel

13. The appeal was argued by way of written submissions with oral highlights. Learned counsel, Mr Mogere appeared for the appellant while learned counsel Mr Munyua held brief for Dr Arwa, learned counsel for the respondents.

14. With regard to the appeal, learned counsel for the appellant submitted that the appellant is created under article 10 of the [Constitution] which sets out the national values and principles of governance.

Counsel submitted that the respondents were an alternate director and directors respectively of USL, a listed company in the Nairobi Securities Exchange (NSE). Counsel further submitted that the appellant received a complaint from USL's new management in late 2015 arising from USL's dealings/ transactions. Counsel asserted that the appellant conducted investigations into the allegations and formed a preliminary opinion that certain parties including the respondents may have had a role to play in the financial challenges experienced by USL. Counsel urged that following its statutory mandate the appellant issued a NTSC to the respondents to answer to various allegations.

15. It was counsel's further contention that Joyce opted not to respond to the factual allegations in the NTSC and instead raised various preliminary objections which were considered by the appellant's board and dismissed, but she did not appeal against the same. Instead, she filed judicial review proceedings impugning the NTSC proceedings raising the same arguments contained in the dismissed preliminary objections. On the other hand, James and Barth appeared before the appellant's board for oral hearing of the NTSC letters accompanied by their legal counsel. Through the counsel they made detailed submissions in their responses to the allegations leveled against them and were asked questions by the appellant's board to which they gave substantive responses.

16. It was submitted that James and Barth also raised a preliminary objection which their legal counsel substantiated on in further written submissions to the appellant's board and which preliminary objection upon consideration by the appellant's board was dismissed. Further, that the said decision was not appealed against but instead James and Barth opted to file Judicial review proceedings against the appellant's board.

17. Counsel asserted that the substantive questions to be determined in this appeal are whether the administrative NTSC proceedings undertaken by the appellant's Board against the respondents are quasi-criminal proceedings. With regard to this ground, it was argued that the learned Judge erred in law in classifying the NTSC proceedings undertaken by the appellant as "quasi-criminal" proceedings. It was further submitted that the judgment is further replete with terminology that is typically used in criminal and quasi criminal proceedings such as, charge sheet, charges, sentences and conviction and that the use of the terminologies by the learned Judge is a clear indication that the learned Judge was of the view that the NTSC proceedings were either criminal or quasi-criminal proceedings.

18. It was further submitted that the NTSC issued to the respondents made specific reference to the provisions of section 26(8) of the Act. It was submitted that the provision enjoins the appellant in cases where it intends to take action against a person for breaches of provisions of the Act to give the person affected by such action an opportunity to be heard. That the opportunity to be heard does not turn the proceedings so taken to be quasi-criminal proceedings. Counsel emphasized that the show cause proceedings undertaken by the appellant against the respondents are administrative proceedings and neither criminal nor quasi-criminal proceedings. Reliance was placed on the case of *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR.

19. Counsel further contended that the administrative proceedings taken by the appellant against the respondents were intended to instil discipline amongst directors of listed companies in the conduct of the listed company's affairs intended to protect investors. It was submitted that the show cause proceedings were administrative in nature and at worst can be classified as "civil" proceedings and they do not involve any prospect of imprisonment but instead involve the right to earn a livelihood balanced against the demands of public safety or policy.

20. It was counsel's further submission that the appellant's general power to sanction those under its mandate for breaches of provisions of the Act, regulations or directions issued to the respondents is provided for under section 11(3)(c) of the Act. Counsel submitted that section 4 of the *Fair*

Administrative Actions Act as read with article 47(1) of the *Constitution* are relevant in construing the legality of appellant's actions.

21. On the question whether the learned Judge erred in law in construing the allegations contained in the show cause proceedings using a strict test applied in criminal or quasi criminal proceedings, it was submitted that in construing the provisions of section 30D(1)(a) and section 34(b) of the Act, the learned Judge made reference to the decision in *Tanganyika Mine Workers Union v the Registrar of Trade Unions* [1961] EA 629 for the proposition that:

   > " where the provision of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought to take care that no one is brought within it who is not brought within it in express language."

   Counsel submitted that it was an error on the part of the learned Judge to classify the show cause proceedings as criminal or quasi criminal proceedings which consequence led to the next misdirection that the Judge applied the strict construction of penal statutes in criminal or quasi-judicial criminal proceedings to an administrative show case process.

22. With regard to whether the respondents were charged with and found culpable of actions not contemplated by section 30(D)(1)(a) and 34(b) of the Act, it was counsel's contention that the allegations leveled against the respondents included that they "facilitated and/or omitted to prevent the provision of misleading and deceptive information in the IM contrary to the provisions of 30(D)(1)(a) of the *Capital Markets Act*". It was submitted that the mischief rule ought to have been applied in the context of the administrative proceedings in order to meet the objectives of the Act. That this is especially so given that the proceedings before the appellant's board were neither criminal nor quasi criminal in nature as the appellant had no power to mete out penal sanctions. Reliance was placed on *Rotich Samuel Kimutai v Ezekiel Lenyongopeta & 2 others* [2005] eKLR.

23. On the question whether the learned Judge erred in fact and in law in failing to appreciate the administrative nature of the show cause proceedings, it was submitted that the right to fair administrative action under article 47 of the *Constitution* is a distinct right from the right to a fair hearing under article 50(1) of the *Constitution*. Counsel contended that fair hearing applies in proceedings before a court of law or independent and impartial tribunals or bodies. It was submitted that in *Judicial Service Commission v Mbalu Mutava & anor* [2015] eKLR this Court noted that the right to a fair trial does not apply to a decision made in an administrative decision.

24. Counsel contended that the question which remains is whether the respondents were afforded a fair administrative action? It was contended that it is not disputed that the respondents were given NTSC letters on why action should not be taken against them for breaches of the provisions of the Act and regulations made thereunder. Counsel asserted that the actions by the appellant met the threshold set under section 4 of the *Fair Administrative Actions Act* and article 47 of the *Constitution*.

25. As to whether the learned Judge erred in quashing the administrative show cause letter dated August 31, 2016, it was counsel's assertion that there was no basis for striking out the show cause letter and especially since the learned Judge had dismissed all other objections by the respondents.

26. In opposition to the appeals on whether the appellant has jurisdiction to deal with violation of criminal provisions, Mr Munyua submitted that the appellant derives its jurisdiction from section 11 (3) (cc) of the Act and from a reading of the same, the appellant can only issue sanctions where a provision or regulation under the Act has been breached. Further, that section 25A of the Act defines the scope of the powers donated under section 11(3)(cc) that the appellant may impose specified sanctions or

levy financial penalties for the breach of any provisions of the Act, the regulations, rules, guidelines, notices or directions it may issue.

27. Counsel asserted that the Act separates civil wrongs and criminal wrongs/liabilities. Reliance was placed on *Aly Khan Satchu v Capital Markets Authority* [2019] eKLR. It was argued that the offences the respondents were allegedly charged with expressly criminal *'res ipso loquitor'*. Reliance was placed on *Hudson v US* 522 US 93 (1997) and *Solomon Muyeka Alubala vs Capital Markets Authority; National Bank of Kenya Ltd (Interested Party)* [2019] eKLR .

28. Counsel further submitted that in light of the said authorities, the board lacked the requisite jurisdiction to handle the matter due to the criminal nature of the offences which is a sole preserve of this Court.

29. As to whether there was any breach disclosed in the NTSC, counsel submitted that it is a cardinal principle that no breach of statute or legislative instrument is possible where the legislative provisions alleged to have been breached do not exist. Further, that the legislative provisions alleged to have been breached do not impose any duty whatsoever capable of being breached on the person alleged to have breached it. Counsel submitted that the NTSC charged the respondent with alleged breach of provisions of law which do not exist, and/or which do not impose any duty capable of being breached on the person alleged to have committed. Reliance was placed on *Keroche Industries Limited vs Kenya Revenue Authority & 5 others* [2007] 2 KLR 240.

30. It was further contended that the provisions of the Act as well as the provisions of the Guidelines for listed Companies in Kenya, 2002 which the respondents were accused of breaching actually do not exist. It was contended that the NTSC alleged that the respondents had breached section 30D (1) (a) and 34(b) of the Act and the particulars of charges levelled against the respondents in the NTSC itself indicated that the respondents were accused of breaching totally different laws which actually do not exist, whether in the Act itself or elsewhere in the Laws of Kenya, a fact that the trial court affirmed.

31. On the question whether the appellant acted legally by purporting to issue the respondents with NTSC in respect to breach of criminal offences, counsel submitted that a NTSC is issued to a person to show cause why a punishment should not be meted upon them. Counsel asserted that in civil/ administrative proceedings that is the proper method to take but where a person has been charged with a criminal offence, greater care needs to be put to ensure that the principle of fair hearing is adhered to and that the accused persons are not prejudiced.

32. It was counsel's further submission that the respondents maintain that the NTSC served upon them as well as sanctions and penalties imposed upon them are all tainted with illegality as they were denied a right to a fair hearing. Reliance was placed on the case of *Okiya Omtatah Okoiti v Attorney General & Anor* [2020] eKLR and *Alnashir Popat & 7 others v Capital Markets Authority* [2020] eKLR.

Determination

33. We have considered the grounds of appeal, the submissions by counsel, the authorities cited and the law. We are required as a first appellate court by rule 31 of the *Court of Appeal Rules*, to re-appraise the evidence and to draw inferences before coming to our own independent conclusion.

    See *Selle & Another vs Associated Motor Boat Co. Ltd & others* (1968) EA 123.

34. From the pleadings on record, we discern that the consolidated appeals can be narrowed down into one main issue: whether the trial court erred in holding that the Notices to show Cause amounted to criminal or quasi- judicial criminal proceedings?

35. It is not in dispute that on August 31, 2016 the appellant served the respondents with NTSC pursuant to its statutory mandate seeking from them detailed submissions relating to various issues regarding to the operations of USL during their tenure of office. The issues cited in the NTSC are the rights issue, financial statements, USL Branch network expansion program, Asset Sale and Lease Back. The NTSC read in part: "the authority having undertaken a review of various allegations made against you with respect to the operations of USL, has inquired into your compliance with the Capital Markets regulatory framework obligations attaching to your position as chief financial officer at USL for the period up to June 15, 2015."

36. Following the notices to show cause dated August 13, 2016, Joyce raised a preliminary objection to the appellant's board, which was upon consideration dismissed by the board and she was invited to appear before the board on November 30, 2016, but she instead opted to file judicial review proceedings before the High Court.

37. James and Barth appeared before CMA's Board of Directors (the Board) and the appellant's external legal counsel for hearing accompanied by their advocates and were later fined Kshs 660,000/= and Kshs 855,000/= respectively as well as banned from holding office as a director and/or key officer of a public listed Company and/or issuer, licensee or any approved institution of the appellant.

38. With the foregoing in mind and with regard to the issue, we first address the appellant's statutory mandate. The appellant asserted that the case against the respondents was in line with its mandate as spelt out under the Act as promoting, regulating and facilitating the development of an orderly, fair and efficient capital market in Kenya and for connected purposes. Section 11(1) of the Act provides for its objectives while Section 11(3) sets out its mandate.

39. Section 13B empowers the appellant to conduct investigations. The said section 13B was amended under section 4 of the *Capital Markets Authority (Amendment) Act, 2018* to read as follows:-

   Section 13B of the Act was amended —

   > "(a)in subsection (1), by deleting paragraph (b) and substituting therefor the following new paragraph (b)a director, manager or employee of a licensee, approved person or an issuer or any other person, may have engaged in embezzlement, fraud, misfeasance or other misconduct in an issuer, licensee or approved person in connection with its regulated activity.(b)by adding the following new subsection immediately after subsection (3)-(4)The Authority may, where satisfied that the capital markets or an investor shall suffer irreparable damage as a result of an' activity under subsection (1), impose an interim measure for not more than three months to prevent further damage pending completion of an of inquiry."

40. Under section 11(3) of the Act, the appellant is also granted wide powers that enable it to instil discipline upon any errant player, with a view to regulating and facilitating the development of an orderly, fair and efficient capital market in Kenya, in line with the preamble to the Act. The Authority may, among other things, suspend or cancel the listing of any securities; inquire, either on its own motion or at the request of any person, into the affairs of any person which it has approved or to which it has granted a licence and any public company the securities of which are publicly offered or traded on an approved securities exchange; conduct inspection of the activities, books and records of any persons approved or licensed by the Authority.

41. The Canadian Supreme Court in the case of *Brosseau vs Alberta Securities Commission*, [1989] 1 S.C.R. 301, stated that:

> " Administrative tribunals are created for a variety of reasons and to respond to a variety of needs."

In the case of securities commission, that Court added:

> " By their nature, such commissions [read tribunals] undertake several different functions. They are involved in overseeing the filing of prospectuses, regulating the trade in securities, registering persons and companies who trade in securities, carrying out investigations and enforcing the provisions of the Act."

42. Such bodies will therefore have repeated dealings, in both administrative or adjudicative capacities, with the same parties. It is for this reason and to achieve the efficiency required in the operations of the securities markets, that the legislatures more often than not, allow for an overlap of functions which in normal judicial proceedings would be kept separate.

43. We agree wholly with this view. It is clear that administrative tribunals are not supposed to operate like courts of law. This is why they are allowed to be masters of their own procedure although they must act fairly. (See Lord Denning's *dictum* in *Selvara Jan v Race Relations Board* [1976] 1 ALL ER 12). It was the appellant's contention that for purposes of efficiency and in the carrying out of the objective of the Act, especially in the expeditious disposal of disputes that arise in the operations of the capital markets, the functions set out in section 11(3) cannot be performed by separate bodies. We agree. We are guided by the decision of the Supreme Court of Kenya in *Alnashir Popat & 7 others vs Capital Markets Authority* [2020] eKLR where the learned Judges of the Supreme Court pronounced themselves as follows:

> " To fragment the discharge of those functions will, in our view, lead to disputes dragging for years on end and thus defeating one of the crucial objectives of the *CMA Act*: efficiency. As such, these functions have, as of necessity, to be discharged by one body hence the overlap in the mandate granted to *CMA*."

44. The requirement for fair administrative action is now a constitutional right pursuant to article 47(1) of the *Constitution*. Article 47(1) provides that "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." The purpose of article 47(1) is to subject administrative actions by administrative bodies to constitutional test of speed, efficiency, lawfulness, reasonableness and procedural fairness in order avoid administrative bodies applying caprice or surprise when taking administrative action against those under them. In that regard, this Court stated in the case of *Judicial Service Commission v Mbalu Mutava & another* [2014] eKLR that:

> " Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of

constitutionality rather than to the doctrine of *ultra vires* from which administrative law under the common law was developed."

45. This Court reiterated the duty to give reasons by an administrative body in the case of *Judicial Service Commission v Mbalu Mutava & another* (*supra*) as a way of enforcing the right to fair administrative action when it stated:

> " [40] The duty to give reasons and the nature and extent of the reasons envisaged by article 47(2) is dependent on the character and limits of the administrative discretion conferred on the administrator by the *Constitution* or law and its application to the facts of the case. So, when article 47(2) is considered together with the role of JSC under article 165(4), it is clear that JSC is not required to keep a detailed official record of the proceedings nor does it have a legal duty to provide its internal working documentation to the 1st respondent. It follows that the request for the full report, recommendations and reasons for the decision, was misconceived in the circumstances of this case. Furthermore, the right to be given written reasons under article 47(2) arises, if the right has been or is likely to be adversely affected by the administrative action. In other words, the administrative action must have adversely affected the right or is likely to adversely affect the right."

46. We have considered the submissions made on behalf of both the appellant and respondents. The NTSC issued to the respondents inviting them to show cause on the various allegations and for a hearing before actions contemplated in sections 26(8) of the Act. According to Joyce she opted to move to court after she was issued with the NTSC but she squandered a chance to be heard by filing the judicial review application prematurely while James and Barth were accorded a right to be heard and were heard but opted to also file judicial review proceedings in the High Court after sanctions were invoked against them.

47. The respondents did not deny that they received the NTSC letters inviting them to appear before the committee to show cause. It is also evident that James and Barth eventually appeared before the committee and were thus given a hearing by the committee before making its recommendations to them. Taking all this into account, the element of speed as contemplated by article 47(1) of the *Constitution* cannot be faulted. From those facts, it is clear that the respondents were given a fair chance to be heard.

48. The respondents laid more emphasis in questioning the procedural fairness of the appellant's action contending that the action was procedurally unfair. The test for procedural fairness of an administrative action was stated in the case of *Pastoli vs Kabale District Local Government Council and others* [2008] 2 EA 300 thus:

> " ..Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or failure to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

49. In the case of *Selvarajan v Race Relations Board* [1976] 1 ALL ER 12, Lord Denning put the position thus:

> "… The investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it. The investigating body is however the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only."

50. In impugning procedural fairness, the respondents were decrying that the NTSC contained charges that were more likely criminal charges or quasi criminal that would likely have adverse consequences against them; that the committee would also make recommendations to the appellant; and that the recommendations may include penalties which were criminal or quasi-criminal in nature as the committee would have engaged in criminal or quasi-criminal proceedings.

51. As we have observed elsewhere in this judgment, the respondents had received the NTSC together with the allegations facing them and therefore they knew the contents therein and must have known the likely consequences. The letters of August 31, 2016 gave the respondents an opportunity to be heard pursuant to sections 26(8) of the Act. This implies that having received the letters, the respondents were aware of the allegations made against them, and any further information was in addition to what they already knew. Furthermore, James and Barth made Written Submissions before the committee made its recommendation.

52. It is clear from the record that it was after James and Barth received certain administrative actions including fines and sanctions by the committee that they resolved to file the matter in court.

53. In order to decide whether the learned Judge erred in the circumstances, it is worth recalling that the true province of judicial review is to deal with and correct procedural improprieties but not the merits of the decision itself. See *Chief Constable vs Evans* [1982] 3 ALL ER 141 where Lord Brightman sounded the caution that unless the restriction to process as opposed to merits is observed, "the court will, …under the guise of preventing abuse of power, be itself guilty of usurping power". He went on make clear that "judicial review is not an appeal from a decision, but a review of the manner in which the decision was made." The main basis for the learned Judge to grant of the judicial review prayers was that the Board conducted the proceedings before it in a quasi- criminal manner in respect of an act which did not in law constitute an offence under the legal provisions that the respondents were charged. The learned Judge put it this way at paragraph 127 of his judgment:

> "It is clearly irrational, unfair and an abuse of power to subject a person to criminal or quasi criminal proceedings in respect of an act which does not in law constitute an offence or an offence under the legal provisions he is charged. Where public authorities abuse their powers, act unfairly or irrationally the Court is empowered to intervene and bring to an end such action."

54. It seems obvious that the learned Judge was convinced of the sufficiency of the evidence of charges as contained in the NTSC. Words such as the said charge, offence, conviction, can only mean that

the learned Judge was embarking on an exercise of making value judgments regarding the evidence, weighing it and minutely examining or interrogating it to determine whether it reached a certain threshold of acceptance. With respect, that approach is far removed from process, the purpose and province of judicial review, and is a delving into the merits of the decision as one would do were he is dealing with an appeal.

55. With respect, in so doing, the learned Judge fell into error. Our holding on this point is consistent with a long line of decisions of this Court including, in *OJSC Power Machines Limited, Transcentrury Limited & Civicon Limited (Consortium) vs Public Procurement Administrative Review Board & 2 others* [2017] eKLR where it was stated that:

> " Save for a limited scope, which we shall return to later, the court, considering a judicial review application, must never consider its role as appellate court and must avoid any temptation to go into the substance of the impugned decision itself or to ask questions, whether there was or there was no sufficient evidence to support the decision of the public body concerned. It is not for the court or individual judges to substitute their opinion for that of the public body constituted by law to decide the matter in question. See *Republic vs Kenya Revenue Authority ex parte Yaya Towers Limited* (2008) Misc. Civil Appl. No 374 of 2006. In judicial review proceedings, the mere fact that the public body's decision was based on insufficient evidence, or on misapplication of evidence, cannot be a ground granting judicial review remedies. Whether that decision was right or not, the affected party ought to challenge it on appeal. In reaching its determination, it must, however, be recognized that a tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts. Whereas a decision may properly be overturned on an appeal, it does not necessarily qualify as a candidate for juridical review. See *East African Railways Corp. vs Anthony Sefu Far-Es-Salaam* (1973) EA 327."

56. In our view, tribunals, in their primary category, are specialized bodies charged with programming and regulatory tasks of the socio-economic, administrative and operational domains. Membership in such tribunals generally reflects the essential skills required for the specific tasks in view. The appellant's Board falls within this category. It is endowed with requisite experience from its membership, and has access to relevant information and expertise, to enable it to dispose of matters related to the issues raised in NTSC.

57. In principle, matters on the agenda of an administrative tribunal will merit determination on the basis of the claims of each case, and will depend on the special factual dynamics. The relevant factors of materiality, and of urgency, will require individualized response in many cases: and in these circumstances, a strict application of standard rules of procedure or evidence may negate the fundamental policy-object. On this account, the specialized tribunal should have the capacity to identify relevant factors of merit; be able to apply pertinent skills; and have the liberty to prescribe solutions, depending on the facts of each case. Such a tribunal should fully take into account any factors of change, in relation to different cases occurring at different times: without being bound by some particular determination of the past. Matters before an administrative tribunal should be determined on a case-to-case basis, depending on the facts in place.

58. We are of the considered view that the trial court erred in its finding that the Board proceeded in a criminal or quasi-criminal manner in handling the NTSC. It should not have gone to the merits of the Board's decision as if it was an appeal, nor granted any of the orders as it did.

59. In conclusion, from our evaluation of the facts of this case, the evidence and the law and considering precedents, we are satisfied that the appellant acted in accordance with the provisions of the Act in issuing the NTSC and proceeding with the same would not have amounted to criminal or quasi-judicial criminal proceedings as held by the trial court. We are also satisfied that the respondents were accorded an opportunity to be heard and indeed James and Barth appeared before the committee which gave them a hearing and even filed written submissions in so far as can be seen from depositions in their affidavits. Joyce opted to move to court and squandered the chance to be heard. In doing so we take the view expressed by this Court in the case of *Commissioner General, Kenya Revenue Authority v Silvanous Onema Owaki t/a Marenga Filling Station* (Kisumu Civil Appeal No 45 of 2000 that; the right to be heard must be determined according to the statutory scheme which sets out the duties of the statutory corporation and the rights of the subject. We are satisfied that in the circumstances, the NTSC issued by the appellant were well founded.

Disposition

60. We have established that the appellant, in issuing the NTSC to the respondents, was acting within its statutory mandate; and the finding by the learned trial judge that it was "clearly irrational, unfair and an abuse of power to subject a person to criminal or quasi-criminal proceedings in respect of an act which does not in law constitute an offence or an offence under the legal provisions he is charged. Where public authorities abuse their powers, act unfairly or irrationally the Court is empowered to intervene and bring to an end such action." had no basis and was erroneous.

61. To that extent, we allow the consolidated appeals (Civil Appeal Nos. 131 & 132 of 2018) and set aside the respective judgments of the High Court. We also set aside the orders of *certiorari* to remove into the Court and quash the NTSC letters issued by the appellant to the respondents. For the avoidance of doubt, the appellant shall be at liberty to continue with the administrative proceedings that it had commenced against the respondents.

62. The appellant is awarded the costs of the applications before the High Court as well as the costs of this appeal.

63. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

ASIKE-MAKHANDIA

……………………………

JUDGE OF APPEAL

JAMILA MOHAMMED

……………………………

JUDGE OF APPEAL

HELEN OMONDI

……………………………

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR