Capital Markets Authority v Okumu (Civil Appeal 302 of 2018)
[2023] KECA 1212 (KLR) (6 October 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 302 OF 2018

MSA MAKHANDIA, J MOHAMMED & HA OMONDI, JJA

OCTOBER 6, 2023

BETWEEN

CAPITAL MARKETS AUTHORITY ..... APPELLANT

AND

CHADWICK OKUMU ..... RESPONDENT

(An appeal from the judgment of the High Court at Nairobi, (Mativo, J.) delivered on 2nd May, 2018 in Constitutional Petition No. 510 of 2016)

JUDGMENT

Introduction

1. The appeal stems from a Constitutional Petition that had been filed in the High Court in Nairobi dated November 30, 2016 by The Capital Markets Authority (the appellant), seeking seven (7) declarations/ orders as against Chadwick Okumu (the respondent).

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 an orderly, fair and efficient capital market in Kenya.

3. The respondent was employed as the Chief Finance Officer of Uchumi Supermarkets Limited (USL) (In Receivership), from January 17, 2007 to June 15, 2015.

Background

4. A brief background will help place the appeal in perspective. The brief facts in this appeal are that: the appellant served the respondent with a notice to show cause (NTSC) dated August 31, 2016 seeking from him detailed submissions relating to various issues relating to the operations of USL during his

tenure of office. The issues cited in the NTSC were 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."

5. The respondent averred that the notice did not identify to him the makers and or origin of the "various allegations". He nevertheless averred that he presented to the appellant detailed written submissions dated September 13, 2016. Further, he stated that vide a letter dated October 4, 2016, the appellant invited him to personally make oral submissions and to provide any additional information regarding the said allegations. He responded to the summons on October 5, 2016 and on October 11, 2016 in conformity with the provisions of Section 4 (3) (g) of the *Fair Administrative Action Act*, he requested the appellant prior to the hearing date set for October 25, 2016, that he be provided with the names and positions of the persons who made the various allegations against him, copies of the written allegations, against him and copies of the documents incriminating him. He stated that the responses availed did not address his rights.

6. The respondent stated further that he appeared before the appellant's Board of Directors (the Board) and the appellant's External Legal Counsel on October 25, 2016 accompanied by his advocate where he responded to all the questions put to him by the appellant's Chief Executive. He also asked that he be provided with typed proceedings to enable him to prepare his final submissions. On November 1, 2016 he was supplied with incomplete proceedings pending correction of errors, which was not adequate for purposes of preparing his final submissions.

7. He stated that notwithstanding the Boards' failure to supply him with the proceedings, on November 18, 2016, he received a letter from the appellant informing him of certain breaches of the Act and Regulations that he was alleged to have committed as a consequence of which the appellant imposed administrative sanctions against him, namely:- (a) Disqualify him from holding office as a Chief Finance Officer, Director and/or key officer of a public listed company and or issuer, licensee or any approved institution of the appellant for a period of two years from the date of the notification, (b) Lodge a request for the commencement of disciplinary proceedings by the Institute of Certified Public Accountants of Kenya in respect of his professional conduct as a Certified Public Accountant of Kenya-CPAK.

8. Dissatisfied with the appellant's findings contained in the letter dated November 18, 2016, the respondent filed a Constitutional Petition on December 2, 2016. The Petition was heard by the High Court (Mativo, J. - as he then was) who in a judgment delivered on May 2, 2018, granted some of the reliefs sought in the Petition holding *inter alia:*

> 74. I find and hold that the entire process was undertaken in total violation of the principles of natural justice. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "an essential inbuilt component" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

75. In view of my analysis and determinations of the above issues, the conclusion becomes irresistible that the impugned decision was tainted by bias. The manner in which the entire process was conducted violates the sanctity of the rules of natural justice. No person can be a judge in his own cause. It was wrong for the Respondent to act as the investigator, prosecutor, judge and executioner. Such a decision cannot pass the constitutional muster. It cannot survive court scrutiny. The correct legal path, in my humble view, is what I prescribed in the case of Ernst Young. A reading of section 11A clearly shows that the law allows the Respondent wide discretion to delegate its functions to avoid perceived or real apprehension of bias. I find and hold that this Petition succeeds. Consequently, I allow the Petition and order as follows:-

    i. A Declaration be and is hereby issued that the investigations, proceedings and/or hearing instituted by the Capital Markets Authority against the Petitioner herein Mr. Chadwick Okumu on October 25, 2016 were conducted in a manner that violated the principle of natural justice and consequently, the said proceedings and the consequential decision arising there from dated November 18, 2016 is null and void for all purposes.

    ii. An order of certiorari be and is hereby issued quashing the investigations, proceedings and/or hearing conducted by the Capital Markets Authority against the Petitioner herein Mr. Chadwick Okumu on October 25, 2016 and the subsequent determination dated November 18, 2016 and all consequential orders arising from the said decision.

    iii. No orders as to costs"

9. The appellant was aggrieved by the aforesaid judgment thus provoking this appeal vide a memorandum of appeal dated August 24, 2018, raising 12 grounds of appeal. The grounds are that the learned Judge erred in fact and law:

    i. in conflating the provisions of Article 47(1) and Article 50(1) of *the Constitution* as being concurrently applicable to the show cause proceedings undertaken by the appellant when discharging its administrative functions under Section 11(3), 13B, 25A and 26 of the Act.

    ii. failing to find and hold that the appellant is not the 'independent and impartial tribunal or body' envisaged under Article 50(1) of the *Constitution* when discharging its administrative functions under Section 11(3), 13B, 25A and 26 of the Act;

    iii. in applying the provisions of Article 50 (1) of the *Constitution* to the administrative decisions of the appellant instead of Article 47(1) of the *Constitution*;

    iv. in applying a reasonable apprehension of bias test to the administrative decision and administrative decision-making processes of the Act without regard to the legislative intent captured by the provisions of Section 11(3), 13B, 25A and 26 of the Act;

    v. in failing to appreciate the workings of the Act in arriving at the impugned administrative decision; that the investigations conducted by a different arm and the show cause hearing conducted by the Board of Directors;

vi. in finding and holing that the appellant acted contrary to the rules of natural justice in the factual and legal context of the show cause proceedings against the respondent;

vii. in finding that the appellant acted in breach of the rules of natural justice when the respondent's own counsel informed the Board that the Board had been very fair to the respondent during the show cause proceedings;

viii. in interfering with the appellant's exercise of discretion granted to it by statute, in finding that the case before him 'was a proper' case for the appellant to invoke Section 11A of the Act and delegate the functions as an independent body without establishing the grounds for such interference;

ix. in finding that the respondent had established a reasonable apprehension of bias contrary to the provisions of Section 7(2) of the *Fair Administrative Action Act* when the respondent had never raised the issue when appearing before the appellant during the show cause hearings;

x. in finding and holding that the entire process was undertaken in violation of the principles of natural justice;

xi. in allowing the Petition and making the final orders that he did; and

xii. that the learned Judge's findings are not supported by the evidence adduced at trial and not supported by the law.

10. The appellant sought for an order that the entire judgment of the High Court be set aside and the Petition filed by the respondent be dismissed with costs; and that the costs of this appeal be awarded to the appellant.

Submissions by Counsel

11. The appeal was heard by way of written submissions with oral highlights by counsel for the parties. Learned counsel, Mr. Mogere together with Ms. Aremo appeared for the appellant while learned counsel, Dr. John Khaminwa appeared for the respondent.

12. Counsel for the appellant sought to condense the grounds of appeal into two thematic areas namely; whether the learned Judge erred in fact and in law in finding that the provisions of Article 50(1) of the *Constitution* are applicable to the show cause proceedings undertaken by the appellant pursuant to Sections 11(3), 13B, 25A and 26 of the Act and; and whether the learned Judge erred in fact and in law in applying a reasonable apprehension of bias test to the administrative decision and the administrative decision-making processes of the appellant without regard to the legislative intent captured by the provision of Section 11(3),13B, 25A and 26 of the Act.

13. With regard to the first thematic issue on the place of Article 50(1) of the *Constitution*, counsel submitted that the learned Judge erred in holding that Article 50(1) of the *Constitution* applied to the show cause proceedings undertaken by the appellant pursuant to Sections 11(3), 13B, 25A and 26 of the Act. It was submitted that the appellant is not a court or an independent and impartial tribunal or body as contemplated at Article 50(1) of the *Constitution*. Further, that as an administrative body, the appellant, in the exercise of its functions is not bound by the requirements of Article 50(1) of the *Constitution* on fair hearing.

14. Counsel submitted that in exercise of its functions under Section 11(3), 13B, 25A and 26 of the Act is an administrative body discharging a regulatory mandate and therefore subject to the provisions of Article 47 of the *Constitution*. Counsel asserted that proceedings before the appellant are not comparable to judicial proceedings before a court of law, or an independent tribunal and impartial tribunal and as such are administrative rather that judicial or quasi-judicial proceedings. Reliance was placed on the case of *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR.

15. Counsel further submitted that the appellant does not make definitive findings of guilt in the sense reserved for a criminal court at the conclusion of a criminal trial. Further, that the fact that sanctions may result from an administrative process does not make that process a criminal or quasi- criminal trial. Reliance was placed on the decision of Dr. Anil Mussani v College of Physicians and Surgeons of Ontario [2003] 64 O.R (3d) 641 by the Court of Appeal in Ontario as cited with approval in *Judicial Service Commission v Gladys Boss Shollei & another* [supra] for the proposition that professional disciplinary hearings are not criminal or quasi-criminal in nature.

16. With regard to the second thematic area, it was submitted that the requirements of Article 50(1) of the *Constitution* do not apply to the appellant in the course of its exercise of its administrative and statutory functions. That Article 50(1) does not apply to administrative and regulatory bodies while they discharge their administrative and regulatory functions. Reliance was placed on the decision of this Court in Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR. Counsel further submitted that the learned Judge erred in distinguishing the circumstances of the impugned judgment from the general principle that this court authoritatively elucidated in the case of Judicial Service Commission v Mbalu Mutava & Another (supra). Counsel further submitted that the circumstances of the impugned judgment were such that as far as the *Constitution* is concerned, they fell under Article 47(1) of the *Constitution* and that there was no scope for the application of Article 50(1) of the *Constitution*.

17. On the question whether the rules of natural justice were violated, it was submitted that the learned Judge erred by failing to appreciate that the right to a fair administrative action is not absolute and that the right has other dimensions beyond procedural fairness. Counsel further submitted that the learned Judge failed to take note of the statutory regime within which the appellant functions.

18. Counsel further submitted that Article 47(1) of the *Constitution* which establishes the constitutional basis for the right to a fair administrative process is not absolute and can be limited in terms of the provision of Article 24 of the *Constitution*. Counsel asserted that the latitude for the limitation of the right to a fair administrative action has been expressed by our courts, that the general aim being to provide accommodation to the operational exigencies of the concerned administrative bodies. Reliance was placed in Judicial Service Commission v Mbalu Mutava & another (supra) which affirmed Lord Denning's holding in *Selvarajan v Race Relation Board* [1976] 1 All ER 12.

19. Further, it was submitted that the provisions of Sections 11(3),13B,25A and 26 of the Act constitute a limitation to the right to a fair administrative action under Article 47(1) of the *Constitution*. Counsel asserted that the rationale for the limitation is justifiable as this Court has held in the case of Capital Markets Authority v Jeremiah Gitau Kiereini & another [2014] eKLR .

20. On the question whether the procedure adopted by the appellant in proceedings against the respondent met the threshold of fairness and natural justice in the context of the appellant's mandate, it was submitted that it did. Counsel asserted that the appellant started by engaging the respondent through interview and requests for information. It was further submitted that upon conclusion of the inquiry, the appellant sent a NTSC to the respondent on 31st August, 2016 inviting him to respond to allegations in respect of the alleged breaches of the Act. It was submitted that the appellant's board

having reviewed the respondent's submissions invited him to appear before the Board on 25th October, 2016 with a view to making his oral submissions and providing additional information for the Board's consideration in making a just decision.

21. Further, it was asserted that the respondent and his advocate appeared before the Board on 25th October, 2016 during which appearance they were asked various questions by the chairperson, Chief Executive Officer and other members of the appellant's board. Counsel further submitted that at the close of the hearing, the Chairperson of the Board invited the respondent to make any comments arising from the questions put to him. That the respondent had no other comments except to request for the final copy of the transcript which was availed. Counsel contended that the Board afforded the respondent an opportunity to be heard and was made aware of the allegations levelled against him. Further, that questions were put to him for his response, and he was also accompanied by his advocate during the hearing before the Board. Counsel asserted that in the circumstances of this case, the rules of natural justice were followed to the letter.

22. With regard to the learned Judge's finding that the Board performed the tripartite duties of investigator and prosecutor, jury and Judge in the matter against the respondent, counsel submitted that that finding did not take into consideration the statutory context within which the Board operates. That this was the basis upon which the learned Judge found that the rules of natural justice were violated after applying the reasonable apprehension of bias test. Counsel asserted that the appellant's actions were lawful and that the rules of natural justice were adhered to. Further, that the Act contemplates that the appellant would have overlapping functions and that the investigations against the respondent were conducted by a different body within the appellant, the Capital Markets Fraud Investigation (CMFIU), while the NTSC proceedings were conducted by another body, the Board. Counsel emphasized that in the circumstances, there was sufficient separation of functions, there being a unit with the delegated authority within the appellant that conducts investigations.

23. Counsel asserted that this was not a case for which Section 11A of the Act could have been invoked to delegate a function to a committee of the Board or to an authorized person, or to a self-regulatory organization. It was unfairness during the conduct of the show cause proceedings. That, in fact, at the conclusion of the respondent's appearance before the Board, the respondent's advocate took his liberty to commend the the Board for having been fair stating "may I say with respect, you have been fair".

24. In final submissions, counsel submitted that this Court has established an authoritative line of jurisprudence that first, Article 50(1) of the Constitution does not apply to administrative proceedings. It was contended that the provision applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. Further, that the discharge of such overlapping functions, this Court has held, does not constitute an abrogation of the rules of natural justice.

25. In opposition to the appeal on the issue of Article 50(1) of the *Constitution*, counsel for the respondent submitted that the said article grants the respondent certain safe guards and even though the appellant in its submissions hold the view that its duties were administrative in nature, and thus it should not be held accountable to the same threshold as laid out in Article 50 of the *Constitution* is not correct. It was further submitted that the appellant relies on this Court's holding in Judicial Service Commission v Gladys Boss Shollei & another [supra]. Counsel further asserted that the respondent's situation is totally different in that the respondent was made to take an oath. In the circumstances, the administrative and the nature of the proceedings changed. Counsel asserted that the taking of the oath opened a different level of what could be termed as dangers to the respondent and makes him liable to penalties in the event that his testimony is proved to be untrue by virtue of his taking an oath.

26. Counsel further submitted that by taking an oath, the proceedings became quasi-judicial in nature, and thus the conditions set in Article 50(1) of the *Constitution* have to be upheld. Counsel asserted that since the respondent was made to take an oath, the proceedings became quasi- judicial in nature and the same were akin to proceedings before a court where the respondent was represented by legal counsel, the respondent was asked questions with regard to his employment with USL.

27. Counsel further contended that counsel for the appellant proceeded to not only sit as a judge in the proceedings but also was prosecutor with the prosecution being led by the appellants' Chief Executive Officer. Further, that the proceedings as conducted by the appellant were in breach of his fundamental rights and freedoms of a fair trial before an impartial tribunal as provided for under the provisions of Article 50(1) of the *Constitution*. The respondent asserted that the action by the appellant to be the investigator, prosecutor and judge is prejudicial to the respondent's interests. That the respondent has a right to claim that the whole exercise was biased as there was no independent and impartial output in the

28. Counsel further submitted that bias can take the form of actual bias or apparent bias, and while actual bias is very difficult to prove in practice, apparent bias once shown will result in a decision being void without the need for any investigation into the likelihood of bias. Counsel asserted that one does not need to show that there was any actual bias by the appellant and all that the respondent was required to show is that there was reasonable apprehension of bias. Counsel submitted that the appellant made a promise to provide him with proper transcripts to allow him a reasonable opportunity to review the same and the opportunity to make further comments. Counsel submitted that the respondent had the right to rely on the principle of legitimate expectation and the appellant breached the respondent's right to legitimate expectation.

Determination.

29. 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 v Associated Motor Boat Co. Ltd & Others* (1968) EA 123.

30. From the pleadings on record, we discern that the appellant's appeal can be narrowed down into 3 main issues. They are:

    1. Whether there was a breach of the respondent's rights to a fair administrative action;

    2. Whether there was a breach of the respondent's right to a fair hearing; and

    3. Whether the overlapping roles that the *Capital Markets Act* vests in the Capital Markets Authority constitutes a violation of Articles 47(1) and 50(1) (as read with Article 25(c) of the *Constitution* and if Section 11(3),13B,25A, and 26 of the *Capital Markets Act* which authorizes the overlapping is unconstitutional".

31. It is not in dispute that on 31st August, 2016 the appellant served the respondent with a NTSC seeking from him detailed submissions relating to various issues concerning to the operations of USL during his tenure of office. The issues cited in the notice are the Rights issue, Financial Statements, USL Branch network expansion program, Asset Sale and Lease Back.

32. Following the NTSC dated 31st August, 2016, the respondent appeared before the Board and the appellant's external Legal Counsel on October 25, 2016 accompanied by his advocate where he responded to all the questions put to him by the appellant's Chief Executive office.

The respondent asked to be provided with typed proceedings to enable him prepare his final submissions and on November 1, 2016 he was supplied with what he deemed as incomplete proceedings pending correction of errors, and which he stated was not adequate for purposes of preparing his final submissions.

33. With the foregoing in mind and with regard to the first issue, we first address the statutory mandate of the appellant & its power to delegate.

The appellant is established under section 5(1) of the Act. Its mandate is spelt out under section 11(1) of the Act as follows:

> " 11.
>
> (1) The principal objectives of the Authority shall be –
>
> a. the development of all aspects of the capital markets with particular 28 Amended by Act No. 48 of 2013 Amended by Act No. 38 of 2016 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 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 licenced 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."

34. 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 appellant 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 licenced by the appellant.

35. The appellant is also empowered to act as an appellate body in respect of appeals against any self-regulatory organization, securities or exchange- traded derivatives contracts exchange, and do all such other acts as may be incidental or conclusive to the attainment of its objectives under the Act. Section 11A (1) states as follows:

> (1) The Authority may delegate any of its functions under this Act to-
>
> a. a committee of the Board
>
> b. a recognized self-regulatory organization; or
>
> c. an authorized person."

36. Such delegation cannot however prevent the appellant from performing the delegated function. See section 11A (3). It is therefore clear that the appellant has power and responsibility to investigate any breaches and enforce all the statutory provisions and regulations. The learned Judge appreciated that dual role. With respect, having done so, the learned Judge went on to find that there was possibility of bias and/or reasonable apprehension of bias on the part of the appellant in conducting the show cause hearing upon the respondent.

37. The learned Judge observed that:

> " This is a case where the appellant performed the three roles contrary to the rules of natural justice. To me, it was ill advised for the appellant to investigate, prosecute, sit as the jury and convict. This was a proper case for the appellant to invoke Section 11A cited above and delegate its functions to an independent body. the appellant ought to have delegated some of the functions which is clearly permitted under the law as earlier discussed."
>
> The learned Judge further stated: violation of legitimate expectation or abuse of power."
>
> > I find that the Petitioner has established reasonable apprehension of bias which is a violation of Section 7(2) of the *Fair Administrative Action Act* which provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness,

38. With respect, we do not think the trial court's finding on apprehension of bias was well founded. The test of bias or apprehension of bias is now well settled. It is whether a fair-minded observer, having considered all the relevant facts of a matter would conclude that there was a real possibility of bias. See this Court's decision in *Kalpana H. Rawal V. Judicial Service Commission & 2 others* [2016] eKLR. In that matter the seven- judge bench, in adopting the aforesaid test, cited with approval the decision by the *East Africa Court of Justice in Attorney General of Kenya v. Prof. Anyang' Nyong'o & 10 others*, EACJ Application No. 5 of 2007 where the court held that:

> " We think that the objective test of 'reasonable apprehension of bias' is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of the reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially?"

39. In applying that test to the circumstances of this matter, a reasonable and right-minded person must bear in mind the appellant's statutory role. As the statutory regulator of capital markets in Kenya, the appellant approves all securities, and in so doing it considers, among other things, the information and disclosures submitted to it by various applicants, including officials serving in the institutions that make the application.

    However, even after granting its approval, the appellant is empowered to investigate and take enforcement actions against directors of an entity that has been granted approval who may have performed their official duties unsatisfactorily or who may have deliberately or negligently provided incorrect information that was relied upon in granting approval by court.

40. The dual mandate of the appellant was reiterated by this *Court in Capital Markets Authority vs. Jeremiah Gitau Kiereini & Another* [2014] eKLR. We therefore agree with counsel for the appellant that in the exercise of its statutory mandate, the appellant is able, and is expected to make unprejudiced judgment on matters that it has investigated, notwithstanding the duality of its mandate.

41. From the preamble to the Act, it is clear that the objective of the Act is 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." This is the objective we are required to keep in mind while interpreting the Act vis-a- vis the provisions of Articles 47 and 50(1) of the *Constitution*. One of the canons of statutory interpretation, as was stated by this *Court in Commissioner of Income Tax v. Menon* [1985] eKLR, is the appreciation of the social and historical background of a legislation. The historical background to this case is that, prior to the enactment of the the Act, the capital market in Kenya faced multiple challenges running from illicit intermediaries to lack of proper legislative guide hence the need for a firm regulatory regime. To achieve the objective of the Act therefore, the appellant which is established under Section 5 of the Act, is, under Section 11(1) thereof charged with the responsibility of, inter alia, developing "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" to facilitate "wider participation of the general public in the securities commodities market and derivatives market"; and "the protection of investor interests."

42. To achieve this objective, Section 11(3) of the Act grants the appellant wide powers to enable it 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.

43. Counsel for the appellant submitted that there is no overlap of the appellant's functions as held in the impugned judgment. In other words, does the overlap foul the nemo judex in causa sua esse "(no one should be a judge in their own cause)" principle as argued by the respondent? We do not think that the overlap per se denies parties the right to a fair hearing. The rights to fair administrative action and fair hearing are universal. The natural justice of *nemo judex in causa sua* esse principle is one of the fundamental principles in many common law jurisdictions.

    Lord Hewart, CJ's famous maxim in the case of *R v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, [1923] All ER Rep 233 that justice should not only be done but also be seen to be done is worth reminding ourselves. Our view is that this principle is blurred when one presides in the adjudication of one's cause or in a process one has an interest in. See the US Supreme Court in the case of *Re Murchiso*n, 349 U.S. 133, 136 (1955), where the court stated that no person should be allowed to be a judge in his own cause or in a cause he has an interest in its outcome.

    Interest here includes a situation where one desires or is keen on obtaining a given result. A prosecutor, for example, has an interest in the conviction of a suspect he hauls to court.

44. Having so stated, we agree with counsel for the appellant's submissions that there are exceptions to most principles. An important exception to the nemo judex in causa sua esse principle raised in this case is where the overlap of functions is a creature of statute and as long as the constitutionality of the statute is not in issue. This exception has been captured in the Canadian case of *Re W. D. Latimer Co. and Attorney- General for Ontario* (1973), 2 O.R. (2d) 391, affirmed Re W. D. Latimer Co. and Bray (1974), 6 O.R. (2d) 129, where Dubin, JA stated:

> Where by statute the tribunal is authorized to perform tripartite functions, disqualification [on the ground of bias] must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task."

45. The Canadian Supreme Court later stated in the case of *Georges R. Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, "Administrative tribunals are created for a variety of reasons and to respond to a variety of needs."

In the case of Georges R. Brosseau v Alberta Securities Commission (supra), the Canadian Supreme 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."

46. 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 legislature more often than not, allow for an overlap of functions which in normal judicial proceedings would be kept separate.

47. In the case of Georges R. Brosseau v The Alberta Securites Commission (supra), Brosseau was a solicitor who prepared the prospectus of a company that later went into bankruptcy. The Alberta Securities Commission launched an investigation into the affairs of the company and in that regard summoned Brosseau to show cause why a cease trading order and/or possible deprivation of certain statutory exemptions would not be made against him. Brosseau raised a preliminary objection that the Commission had no jurisdiction to entertain any such proceedings against him. Upon the Commission overruling that objection, he unsuccessfully appealed to the Alberta Court of Appeal. The major issue in his further appeal to the Canadian Supreme Court was whether there was a reasonable apprehension of bias given that the Commission's Chairperson was involved in investigative stages.

48. In its decision in that case, the Canadian Supreme Court held that in assessing allegations of bias, courts must be sensitive to the fact that, in their "protective role", securities commissions have a special character. As such, it is not enough to merely claim bias because a commission, in undertaking its preliminary internal review, did not act like a court. If it is clear from the empowering legislation that certain activities which might otherwise be considered "biased" form an integral part of its operations and the Commission has not acted outside its statutory authority, the doctrine of "reasonable apprehension of bias" per se cannot be sustained. The Commission's structure and responsibilities as well as the manner of the discharge of its mandate must, inter alia, be considered.

49. 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). This is also why we agree with the appellant 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. See the Supreme Court of Kenya decision in *Alnashir Popat & 7 others v 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 the appellant Act: efficiency. As such, these functions have, as of necessity, to be discharged by one body hence the overlap in the mandate granted to the appellant."

50. In the circumstances, we persuaded that the overlapping mandate of the appellant under Section 11(3) of the the appellant Act does not per se render the proceedings before the appellant unfair and hence denying parties such as the respondent a right to a fair administrative action. Is that the case in this matter? Did the appellant, in its attempt to adjudicate over the issues raised in this matter act or was likely to act with total disregard to Article 47(1) of the *Constitution*? These questions invite us to view the critical qualifications given in both the Brosseau and Latimer Cases that the exception to the nemo judex in causa sua esse principle is on the assumption that "the constitutionality" of the statute is not in issue and in the discharge of its overlapping mandate, a tribunal does not go "beyond the performance of the duties imposed upon it by the empowering legislation."

51. That being the case, from the architecture of the Act, it cannot be reasonably stated that the Authority cannot be impartial. The finding on apprehension of bias by the High Court must therefore be set aside, which we hereby do. We are not satisfied that the appellant's actions were in violation of its obligations under Article 47(1) of the *Constitution* and the relevant provisions of the *Fair Administrative Action Act*. The respondent was notified of the allegations levelled against him and was afforded an opportunity to be heard at which hearing he was accompanied by an Advocate; he was notified of his right to produce any necessary documents which he did in his written submissions dated 13th September, 2016; he was at liberty to scrutinize the appellant's documents and was advised to liaise with USL for access of the Forensic Audit report prepared by KPMG; he was furnished with all the necessary materials, including the evidence that was to be relied on at the hearing; and he was also notified of his right to legal representation which he took up by bringing his Advocate to the hearing on October 25, 2016.

52. Section 4 (3) of the *Fair Administrative Action Act* provides:

> "4(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—
>
> a. prior and adequate notice of the nature and reasons for the proposed administrative action;
>
> b. an opportunity to be heard and to make representations in that regard;
>
> c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
>
> d. a statement of reasons pursuant to section 6;

e. notice of the right to legal representation, where applicable,

f. notice of the right to cross-examine or where applicable;

g. information, materials and evidence to be relied upon in making the decision or taking the administrative action."

53. The respondent's contestation as appears in his submissions is that he was not issued with proper transcripts before a decision was made by the Board and he had the legitimate expectation that the same would be done.

The appellant raised a question whether the respondent had a legitimate expectation that he would have a full second hearing before the Board and if so, whether he was given an opportunity to be heard as the *Constitution* and rules of natural justice demand. On our own evaluation of the evidence on record, we answer the first limb in the negative. We say so because it is plain beyond argument that the respondent was given the opportunity to appear and be heard before the committee on the specific allegations that were made against him and was also accompanied by an advocate.

54. In the circumstances of this case, the respondent cannot therefore be heard to say that the procedure was not fair for the reason that the appellant promised to avail to him the proper transcripts for him to make further comments before reaching a decision and had the legitimate expectation to be heard. With respect, we find this complaint cannot stand as the respondent was heard and hence the legitimate expectation to be heard on the same issues cannot arise.

55. From the circumstances of this case, can the respondent claim that his rights to a fair administrative action were breached when the appellant fully complied with the provisions of Section 4 (3) of the Fair Administrative Action Act? With regard to the ground of appeal whether there was a breach of the appellant's right to a fair hearing pursuant to the provisions of Article 50 (1) of the *Constitution* of Kenya, that Article provides as follows:

Fair hearing:

1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

56. In our view, the proceedings carried out by the appellant were above board and the respondent was accorded an opportunity to be heard vide the NTSC dated August 31, 2016.

Disposition

57. We have established that the appellant, in issuing the NTSC dated August 31, 2016 to the respondent, was acting within its statutory mandate.

With respect, we find that the learned trial Judge erred when he found that there existed a possibility of bias when the appellant conducted the hearing as we find that there was no basis for so finding.

58. To that extent, we allow the appeal and set aside the High Court's finding in issuing a declaration that the investigations, proceedings and/or hearing instituted by the appellant against the respondent on October 25, 2016 were conducted in a manner that violated the principles of natural justice and consequently, that the said proceedings and the consequential decision arising there from dated 18th November, 2016 is null and void for all purposes. We also set aside the order of certiorari quashing the investigations, proceedings and/or hearing conducted by the appellant against the respondent on

October 25, 2016 and the subsequent determination dated November 18, 2016 and all consequential orders arising from the said decision. For avoidance of doubt, the appellant shall be at liberty to continue with the administrative proceedings that it had commenced against the respondent.

59. The appellant is awarded the costs of this appeal.

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

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR