



**Ernst & Young LLP v Capital Markets Authority & another (Civil Appeal  
92 of 2017) [2022] KECA 36 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 36 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 92 OF 2017  
HM OKWENGU, F SICHALE & KI LAIBUTA, JJA  
FEBRUARY 4, 2022**

**BETWEEN**

**ERNST & YOUNG LLP ..... APPELLANT**

**AND**

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

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

*(An appeal against the Judgment of the High Court of Kenya at Nairobi (Mativo, J) dated 7th March 2017 in H.C. Constitutional Petition No. 385 of 2016)*

**Issuance of a Notice to Show Cause by CMA is not a breach of a regulated entity's right to fair administrative action**

*Ernst & Young LLP appealed against the dismissal of its petition challenging a notice to show cause issued by the Capital Markets Authority (CMA) over its audit of Uchumi Supermarkets Limited. The appellant claimed violation of rights to fair administrative action and a fair hearing under articles 47 and 50 of the Constitution. The Court of Appeal held that CMA was lawfully exercising its regulatory mandate through an inquiry and the notice, which contained detailed allegations and afforded the appellant an opportunity for response and representation. The process was substantively and procedurally fair, and no rights were infringed. The appeal was dismissed with costs.*

Reported by John Ribia

**Constitutional law** – fundamental rights and freedoms – right to fair administrative action – mandate of Capital Markets Authority – issuance of a notice to show cause to a regulated entity after an inquiry - whether an inquiry and notice to show cause issued by the Capital Markets Authority to a regulated entity amounted to a breach of the right to fair administrative action – Constitution of Kenya article 47; Capital Market Authorities Act (cap 485A) section 26(8); Fair Administrative Action (cap 7L) section 4(3)(g).



## **Brief facts**

Ernst & Young LLP, auditors of Uchumi Supermarkets Limited (USL), were invited by the Capital Markets Authority (CMA) in May 2016 to a meeting concerning the 2014 and 2015 audits, following a forensic review by KPMG. Although the appellant requested the full KPMG report, only extracts were provided. After the meeting, no further engagement occurred until September 2016, when CMA issued a notice to show cause alleging audit failures by Ernst & Young in relation to USL's rights issue. Contending that its rights to fair administrative action and a fair hearing under articles 47 and 50 of the Constitution were infringed, Ernst & Young petitioned the High Court. The petition was dismissed, with the court holding that CMA's steps were lawful and the petition was premature. Aggrieved, the appellant lodged an appeal challenging the High Court's refusal to grant declaratory reliefs.

## **Issues**

Whether an inquiry and notice to show cause issued by the Capital Markets Authority to a regulated entity amounted to a breach of the right to fair administrative action.

## **Held**

1. The appellant had demonstrated that there was a breach of any of its rights to a fair administrative action. The appellant admitted that on May 19, 2016, it was called for a meeting by the 1<sup>st</sup> respondent to discuss the 2014 and 2015 USL audits whereupon it accepted the invitation and that, further vide a letter dated May 20, 2016, it was sent an email by the 1<sup>st</sup> respondent setting out the issues to be discussed at the meeting of May 26, 2016. The appellant having attended the meeting of May 26, 2016 and having been given an outline of the issues to be discussed in the said meeting, could not turn around and say that the process was not administratively fair.
2. The 1<sup>st</sup> respondent was only making an inquiry and there was no indictment on the part of the appellant. The notice to show cause (NTSC) contained detailed and comprehensive allegations that were levelled against the appellant. The appellant was further given 14 to give a detailed explanation to highlight any contradictory information in mitigation to the allegations. The appellant was assured of a scheduled hearing with an opportunity for oral submissions and legal representation.
3. The appellant's rights to a fair administrative action were not breached when the 1<sup>st</sup> respondent fully complied with the provisions of section 4(3) of the Fair Administrative Act.
4. The NTSC clearly laid bare the specific allegations that had been levelled against the appellant which the appellant did not respond to instead opting to rush to court to file the impugned petition. The court would not go into the realm of directing the 1<sup>st</sup> respondent as to how it should conduct enquiries/investigations pursuant to the parent statute, provided that the same was substantively and procedurally fair in the circumstances.
5. It had not been demonstrated to the satisfaction of the court that the High Court exercised his discretion improperly. The appellant had not demonstrated that its rights to a fair hearing were breached or violated for reasons. The allegations of bias were unfounded and baseless.

*Appeal dismissed with costs.*

## **Citations**

### **Cases**

1. Judicial Service Commission v Mbalu Mutava & another (Civil Appeal 52 of 2014; [2015] KECA 741 (KLR)) — Explained
2. Selle & another v Associated Motor Boat Co Ltd & Others ([1968] EA 123) — Explained
3. Selvaian v Race ([1976] 1 ALL ER 12) — Explained

### **Statutes**

1. Capital Market Authorities Act (cap 485A) — section 26(8) — Interpreted
2. Constitution of Kenya — article 46(1)(b); 47; 50(1) — Interpreted



3. Court of Appeal Rules, 2010 (cap 9 Sub-Leg) — rule 29 — Interpreted
4. Fair Administrative Action (cap 7L) — section 4(3)(g) — Interpreted

#### **Advocates**

None mentioned

### **JUDGMENT**

1. Ernst & Young LLP (the appellant herein) has filed this appeal against the judgment of Mativo, J dated March 7, 2017.
2. The appeal stems from a Constitutional Petition that had been filed at the High Court in Nairobi on September 15, 2016 by the appellant, seeking 14 declarations/orders as against the 1<sup>st</sup> respondent.
3. The petition was heard by Mativo, J who in a judgment delivered on March 7, 2017, declined to grant any of the reliefs sought in the petition holding inter alia:

“As stated above, I find that the petitioner moved to court rather too early acting on apprehension, but as at that point in time, I find that the steps already taken by the 1<sup>st</sup> respondent are in conformity with the law and no breach of a fundamental right or threat had taken place or has been sufficiently proved. However, for avoidance of doubt, I declare that the first petitioner in the performance of its functions under the provisions of the Act is required to observe and accord persons under investigations and or any person likely to be adversely affected by their decision a fair process and in particular it is required to adhere to the principles of natural justice and comply with the provisions of articles 50(1) and 47 of the Constitution including providing the person under investigation in advance with any adverse evidence that may be used against him/her. In conclusion, I decline to grant any of the reliefs sought in the petition. Each party shall bear its costs for this petition.”

4. The appellant was aggrieved by the aforesaid ruling thus provoking this appeal vide Memorandum of Appeal dated April 7, 2017, raising a whopping 21 grounds of appeal which we have considered.
5. The brief facts in this appeal are as follows: on May 19, 2016, one Hebert Wasike from the appellant’s firm received a call from one Lawrence Mumina an officer of the 1<sup>st</sup> respondent who requested for a meeting with the appellant’s audit team to discuss 2014 and 2015 Uchumi Supermarkets Limited (hereinafter USL) audits, following an alleged audit report by KPMG and for clarification of certain issues. Mr Wasike accepted the invitation and planned for the appellant’s team to meet Mr Mumina on May 26, 2016 and further confirmed that the appellant’s audit team would attend the meeting led by one Michael Kamoni who was the audit partner. On May 19, 2016, the appellant, through Mr Kamoni wrote to the 1<sup>st</sup> respondent requesting for a final copy of the forensic audit report prepared by KPMG to enable the appellant prepare for the meeting.
6. It was the appellant’s contention that the 1<sup>st</sup> respondent vide a letter dated May 20, 2016, responded by sending Mr Kamoni an e-mail setting out the issues to be discussed at the meeting of May 26, 2016, as well as an extract of the KPMG report, indicating that the full report was voluminous and could not therefore be sent to him. The 1<sup>st</sup> respondent further informed the appellant that it was reviewing the KPMG forensic report on USL for a discussion with the appellant on May 26, 2016, and there was no indication of an inquiry or investigation against the appellant by the 1<sup>st</sup> respondent.



7. That, after receipt of the extract of the KPMG audit report, Mr. Kamoni on May 23, 2016, wrote an email to the 1<sup>st</sup> respondent requesting for a full and final copy of the report and to date the 1<sup>st</sup> respondent was yet to respond to this request. The appellant further contended that on May 26, 2016, Mr Kamoni and Mr Nicholas Kathiari attended the meeting at the 1<sup>st</sup> respondent's offices as scheduled and upon conclusion of the meeting, the 1<sup>st</sup> respondent promised to share with the appellant the minutes of the meeting and to arrange for subsequent meeting for further deliberations between the parties on what was not discussed at the meeting.
8. It was the appellant's contention that there was no further communication from the 1<sup>st</sup> respondent until September 2, 2016, when by a letter dated August 31, 2016, the 1<sup>st</sup> respondent issued a notice to show cause to the appellant which expressed that that the 1<sup>st</sup> respondent had conducted an inquiry on the financial statements of USL and the role of the appellant as the reporting accountants for the USL rights issue thus provoking the petition that was filed at the High Court.
9. The appeal was argued by way of written submissions with oral highlights by the parties on October 18, 2021. Mr Owiti holding brief for Mr Kiragu Kimani SC, appeared for the appellant whereas Mr. Imende appeared for the 1<sup>st</sup> respondent. There was no appearance for the 2<sup>nd</sup> respondent.
10. The appellant sought to condense the grounds of appeal into two thematic areas namely; that there was breach of article 47 of the *Constitution* and section 4(3)(g) of the *Fair Administration Act* and that there was a breach of the appellant's right to a fair hearing.
11. With regard to grounds 3, 4, 5, 8, 9, 11, 12, 19 and 20 of appeal, it was submitted that the Learned Judge erred in declining to issue a declaration that the 1<sup>st</sup> respondent's actions were in breach of the appellant's rights to fair administrative action and fair hearing, and that all the process and procedures undertaken by the 1<sup>st</sup> respondent up to the issuance of the notice to show cause dated August 31, 2016, clearly illustrate that the 1<sup>st</sup> respondent breached the appellant's rights. It was thus submitted that the 1<sup>st</sup> respondent ought to have framed and informed the allegations facing the appellant, given the appellant an opportunity to respond to the allegations and thus, the 1<sup>st</sup> respondent failed to comply with this procedure and it mattered not that the stage of the proceedings were preliminary.
12. The Learned Judge was also faulted for declining to issue a declaration that the 1<sup>st</sup> respondent took into account irrelevant considerations by relying on a draft, privileged, incomplete and/or inconclusive report by KPMG as a basis for taking out enforcement action against the appellant, and that the extract of the draft KPMG audit report as received by it in May, 2017, clearly indicates that the same was inconclusive and ought not to have been relied upon by the 1<sup>st</sup> respondent in any of its process or procedures, in exercise of its mandate and it ought not to have formed the basis of the inquiry and charges against the appellant. Further, that to date the 1<sup>st</sup> respondent had not provided the appellant with a full copy of the KPMG report which was the alleged basis of the allegations against it by the 1<sup>st</sup> respondent despite several requests by the appellant.
13. It was further submitted that the Learned Judge erred in fact in declining to issue a declaration that the 1<sup>st</sup> respondent had breached the appellant's legitimate expectation by refusing to avail it with the draft KPMG report and the report of the meeting of May 26, 2016 and that further after the meeting of May 26, 2016, the appellant had a legitimate expectation that the 1<sup>st</sup> respondent would avail it with report of the meeting with the conclusions and findings.
14. Finally, it was submitted that the Learned Judge erred by declining to issue the orders prayed for in the petition despite holding that the 1<sup>st</sup> respondent was bound by the provisions of articles 47 and 50 of the Constitution, and that this was wrongful exercise of judicial discretion by the Judge. It was further



submitted that after making the determination that the 1<sup>st</sup> respondent was in breach of the appellant's right to fair administrative action and fair hearing, the only logical conclusion for the Judge was to grant prayers sought for in the petition and further by declaring that the petition was filed prematurely, instead of issuing an order of Certiorari to quash the decision of the 1<sup>st</sup> respondent as contained in the notice to show cause dated August 31, 2016, the Learned Judge departed from his wise decision and wrongfully exercised his discretion.

15. On the other hand, it was submitted for the 1<sup>st</sup> respondent that the main legal question in this appeal concerned the manner and extent to which constitutional imperatives concerning the right to fair administrative action and the right to fair hearing would apply to an administrative and regulatory body in the discharge of its statutorily prescribed mandate, following a statutorily prescribed procedure. The 1<sup>st</sup> respondent further addressed the appellant's grounds of appeal under two distinct heads namely, the right to fair administrative action and the right to a fair hearing.
16. With regard to the right to fair administrative action (grounds 3, 4, 5, 7, 8, 10, 13, 16, 17 and 18) of appeal, it was submitted that the *Capital Market Authorities Act* establishes a framework that mirrors the requirements of the right to fair administrative action under the Constitution, and that Section 11 of the Act identifies the objectives of the 1<sup>st</sup> respondent, one of them being to protect investor interests, and that to realize these objectives, the Act bestows upon the 1<sup>st</sup> respondent certain powers which inter alia include, to inquire, whether on its own motion or at the request of any other person into the affairs of any person whom the 1<sup>st</sup> respondent has granted a license, and any public company the securities of which are publicly offered, and that it was under the rubric of these powers that the 1<sup>st</sup> respondent commenced an inquiry into USL leading to the involvement of the appellant.
17. It was submitted that the processes and the procedures that the 1<sup>st</sup> respondent undertook into the inquiry were lawful and that the appellant was involved in the preliminary inquiry having been invited to attend a meeting with the 1<sup>st</sup> respondent on May 26, 2016, and having received an email from the 1<sup>st</sup> respondent detailing the issues to be addressed at the said meeting and that administrative bodies such as the 1<sup>st</sup> respondent, enjoy procedural discretion as to the manner in which to conduct inquiries or investigations, provided that the same were substantively and procedurally fair in light of the body's operational context. It was thus submitted that in view of the foregoing, the processes and procedures leading to the issuance of the notice to show cause were constitutional and lawful and did not violate the appellant's right to a fair administrative action.
18. Finally, with regard to the right to a fair hearing, it was submitted that the right to a fair hearing under article 50(1) of the Constitution was not applicable in the circumstances of this case since the preliminary inquiry conducted by the 1<sup>st</sup> respondent in relation to the appellant or the potential administrative consequences under section 26(8) of the *Capital Market Authorities Act*, did not fall within the purview of Article 50 (1) of the Constitution as they were neither a hearing in court nor a proceeding before or by "other independent and impartial tribunal or body exercising judicial or quasi-judicial authority."
19. On the other hand, it was submitted for the 2<sup>nd</sup> respondent that that the steps taken by the 1<sup>st</sup> respondent were in conformity with the law, and that there was no breach of fundamental rights or threat that took place and that the 1<sup>st</sup> respondent acted within the confines of the law as it is statutorily bound to undertake such steps it took to safeguard the interests of the public, particularly in compliance with article 46(1)(b) of the Constitution, and that further the allegation by the appellant that there was violation of its right to a fair hearing was baseless as the appellant was not only informed of the investigations against it, but was also given sufficient time to attend the same and also attended the meeting.



20. We have considered the grounds of appeal, the rival submissions by the parties, the responses thereto, the cited authorities and the law. We are required as a first appellate court by rule 29 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.
21. From the pleadings on record, it is our considered opinion that the appellant's appeal can be narrowed down into 2 main issues:
1. Whether there was a breach of the appellant's rights to a fair administrative action.
  2. Whether there was a breach of the appellant's right to a fair hearing".
22. It is not in dispute that on May 19, 2016, the appellant received a call from the 1<sup>st</sup> respondent requesting for a meeting with the appellant's audit team to discuss the 2014 and 2015 USL audits following an alleged audit report from KPMG and for clarification of certain issues whereupon the appellant accepted the invitation. It is also not in dispute that vide a letter dated May 20, 2016, the 1<sup>st</sup> respondent sent an email to the appellant outlining the issues to be discussed at the scheduled meeting of May 26, 2016, which meeting the appellant duly attended. It is also not in dispute that vide a letter dated August 31, 2016, the 1<sup>st</sup> respondent issued a notice to show cause to the appellant thus culminating in the filing of a petition before the High Court by the appellant against the respondents seeking various declarations/ orders, which petition was dismissed by Mativo, J on March 7, 2017. Mativo, J while considering the petition rendered himself inter alia thus:

applying the constitutional principles reiterated above, I find no difficulty in holding that a body performing investigative duties as in the present case is bound to adhere to the constitutional prescriptions of according the person affected, a process that is procedurally fair and just as clearly provided in our transformative constitution.

Section 13B grants the first respondent the authority to investigate.

Section 26 (8) of the Act provides that:

8. The Authority shall, in all cases where the Authority takes action under sections 25 and 26, give the person affected by such action an opportunity to be heard.

The above section, that is section 26 (8) which guarantees the opportunity to be heard was clearly quoted in the notice to show cause dated 31<sup>st</sup> August 2016. In fact, the petitioner was clearly required to respond in writing within 14 days from the date of the letter. The letter contained specific allegations which the petitioner was required to respond to. The petitioner was given up to 14<sup>th</sup> September 2016 to respond but instead of responding on 15<sup>th</sup> September 2016 he filed this petition. I find that the petitioner moved to the court "too early" to stop the process and at the time of filing this petition, there was nothing to show that the steps hitherto taken by the respondent were contrary to the statutory mandate of the first petitioner nor has the petitioner proved infringement of any fundamental rights or threat to the infringement to warrant this courts intervention."(Emphasis supplied.)

23. We have perused the record and, from the circumstances of this case, we are not satisfied that the appellant has demonstrated that there was a breach of any of its rights to a fair administrative action.



The appellant indeed admitted that on May 19, 2016, it was called for a meeting by the 1<sup>st</sup> respondent to discuss the 2014 and 2015 USL audits whereupon it accepted the invitation and that, further vide a letter dated May 20, 2016, it was sent an email by the 1<sup>st</sup> respondent setting out the issues to be discussed at the meeting of May 26, 2016. The appellant in this case having attended the meeting of May 26, 2016 and having been given an outline of the issues to be discussed in the said meeting, how then could it turn around and say that the process was not administratively fair? It is evident that, from the circumstances of this case, the 1<sup>st</sup> respondent was only making an inquiry and there was no indictment on the part of the appellant. Suffice to state, we have looked at the notice to show cause dated August 31, 2016 that was issued to the appellant by the 1<sup>st</sup> respondent. The same, in our view, contained detailed and comprehensive allegations that were levelled against the appellant which we need not reproduce here. The appellant was further given 14 days and in any case not later than September 14, 2016, to give a detailed explanation to highlight any contradictory information in mitigation to the allegations. He was further informed “that upon consideration of the detailed written submissions, the 1<sup>st</sup> respondent would schedule a hearing on a date to be communicated, provide the appellant with an opportunity to be heard by way of oral statement for purposes of highlighting and elaborating on the written submissions made and the appellant was at liberty to be accompanied by a legal representative”. (Emphasis ours.)

24. Section 4(3) of the [Fair Administrative Action Act No 4 of 2015](#) provides:
4. Administrative action to be taken expeditiously, efficiently, lawfully etc
  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-examination or where applicable, or
    - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.
25. From the circumstances of this case, how then could the appellant contend that its rights to a fair administrative action were breached when the 1<sup>st</sup> respondent fully complied with the provisions of section 4(3) of the Fair Administrative Act? (*supra*).
26. In addition, we also note that vide a letter dated 13 September, 2016, by the 1<sup>st</sup> respondent to the appellant’s advocates then on record, the 1<sup>st</sup> respondent *inter alia* wrote:

We note that the notice to show cause issued on 31<sup>st</sup> August 2016 provided adequate time for your client to respond to the allegations set out therein through written submissions



by September 14, 2016. However, in view of the clarifications sought in your letter dated September 13, 2016, the authority has extended the period for submission of your client's written submissions by 10 days until 24 September 2016." (Emphasis supplied).

27. Surely from the circumstances of this case how then could the appellant contend that its right to a fair administrative action was breached? We will say no more regarding this point.
28. The appellant further faulted the learned Judge in declining to issue a declaration that the 1<sup>st</sup> respondent took into account irrelevant considerations by relying on a draft privileged incomplete report by KPMG as a basis for taking enforcement action against it.
29. We have examined the email dated May 20, 2016, addressed to the appellant by the 1<sup>st</sup> respondent. Part of the email reads:

the report is quite voluminous hence I will send you portions that the Authority will want to discuss with yourselves. This is even better having reviewed the issues as highlighted in the report to prepare a submission which may guide our discussion on Thursday." (Emphasis supplied.)

30. We have looked at the notice to show cause dated August 31, 2016 and indeed there is no reference to the said KPMG report. The notice however, and in our opinion sufficiently so, clearly lays bare the specific allegations that had been levelled against the appellant which the appellant did not respond to instead opting to rush to court to file the impugned petition. Indeed, this court would not go into the realm of directing the 1<sup>st</sup> respondent as to how it should conduct enquiries/investigations pursuant to the parent statute, provided that the same was substantively and procedurally fair in the circumstances. As was stated by this court (differently constituted), in *Judicial Service Commission v Mbalu Mutava & another* (2015) eKLR while affirming Lord Denning's decision in *Selvajan v Race* [1976] 1 ALL ER 12, that:

"The investigating body is however, the master of its own procedure. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice if the broad grounds are given. It need not name its informants. It can give the substance only".

31. In our view, and even though the learned Judge did not specifically address the issue of the alleged KPMG report, it has not been demonstrated to the satisfaction of this court that the learned Judge exercised his discretion improperly. Consequently, nothing turns on this ground of appeal and the same must fail.
32. With regard to the other ground of appeal namely; 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:

50. 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."

33. In our view, the appellant has not demonstrated that its rights to a fair hearing were breached or violated for reasons we have afforested in the course of this judgment.



- 34. On the contrary, the proceedings carried out by the 1<sup>st</sup> respondent were above board and the appellant was accorded an opportunity to be heard vide the notice to show cause dated August 31, 2016, which it squandered by filing the instant petition prematurely as was rightly held by the High Court.
- 35. Similarly, the allegations of bias were unfounded and baseless, and no evidence was adduced to show that the 1<sup>st</sup> respondent was biased or would have been biased had the appellant responded to the allegations levelled against it in the notice to show cause. Consequently, nothing turns on this point.
- 36. We think we have said enough to demonstrate that this appeal is devoid of merit. Accordingly, it is hereby dismissed in its entirety with costs to the respondents.
- 37. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

