



**Capital Markets Authority.. v Popat & 8 others (Civil Appeal  
35 of 2017) [2019] KECA 592 (KLR) (28 June 2019) (Judgment)**

*Capital Markets Authority v Alnashir Popat & 8 others [2019] eKLR*

Neutral citation: [2019] KECA 592 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 35 OF 2017  
EM GITHINJI, DK MUSINGA & JO ODEK, JJA  
JUNE 28, 2019**

**BETWEEN**

**THE CAPITAL MARKETS AUTHORITY ..... APPELLANT**

**AND**

**ALNASHIR POPAT ..... 1<sup>ST</sup> RESPONDENT**  
**OMUREMBE IYADI ..... 2<sup>ND</sup> RESPONDENT**  
**JINIT M. SHAH ..... 3<sup>RD</sup> RESPONDENT**  
**ANWAR A. HAJEE ..... 4<sup>TH</sup> RESPONDENT**  
**HANIF SOMJI ..... 5<sup>TH</sup> RESPONDENT**  
**VISHNU DHUTIA ..... 6<sup>TH</sup> RESPONDENT**  
**ERIC G. BENGI ..... 7<sup>TH</sup> RESPONDENT**  
**CHRISTOPHER DIAZ ..... 8<sup>TH</sup> RESPONDENT**  
**MUKESH K. M. PATEL ..... 9<sup>TH</sup> RESPONDENT**

*(An Appeal from the judgment of the High Court at Nairobi  
(Onguto, J.) dated 19th December, 2016 in Petition No. 230 of 2013)*

**JUDGMENT**

1. The appellant, The Capital Markets Authority, (CMA), is an authority established under the provisions of Section 5 of the [Capital Markets Act](#) (CM 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.



2. The respondents were directors of Imperial Bank Limited (In Receivership), hereinafter referred to as the “the Bank”. The Bank was established in 1992 and had a Board of Directors made up of one executive Managing Director, six non-executive directors and three independent non-executive directors.
3. On 30<sup>th</sup> March, 2015, the Board approved the Bank’s issuance to the general public of a Corporate Board of Kshs 2 billion. The Bank’s Managing Director, Mr. Abdulmalek Janmohamed, and the Bank’s Chief Finance Officer, Mr. James Kaburu, were the only insiders who were involved on behalf of the Bank in the issue. The two officers together with the various external transaction advisors handled all the correspondence regarding the bond issues.
4. In April, 2015, the Bank submitted an application for approval of the bond issue to the appellant. Upon consideration of the information and statutory disclosure submitted by the Bank, the appellant gave its approval on 12<sup>th</sup> August, 2015.
5. On 15<sup>th</sup> September, 2015, Mr. Janmohamed, the Bank’s Group Managing Director, passed away. M. Naeem Shah, formerly the Bank’s Head of Credit, was appointed Acting Managing Director and Mr. James Kaburu was appointed the Deputy Managing Director.
6. On 21<sup>st</sup> September, 2015, the new Managing Director and his deputy informed Mr. Alnashir Popat, the 1<sup>st</sup> respondent, who was the non-executive Chairman of the Board, that the former Group Managing Director had for many years authorized irregular disbursements of vast amounts of money, which had been concealed from the Board.
7. When that information came to the Board, on 7<sup>th</sup> October, 2015 the Board appointed a consultant to carry out a forensic audit with a view of ascertaining the Bank’s accurate financial situation. The Board also passed a resolution not to utilize the proceeds of the bond issued pending the outcome of the investigations by the consultant.
8. On 12<sup>th</sup> October, 2015, the Board received a preliminary report from the consultant which revealed, among other things, that the former Group Managing Director had been running a scheme of fraudulent and illegal disbursements within and outside the Bank. The scheme was unknown to the Board. The Board then decided to make a report to the Central Bank of Kenya (CBK).
9. On 13<sup>th</sup> October, 2015, CBK appointed the Kenya Deposit Insurance Corporation (the Receiver) as the receiver of the Bank for a period of twelve (12) months, pursuant to sections 43(1) and (2) and 53(1) of the *Kenya Deposit Insurance Act*. The appointment also included declaration of a moratorium on the Bank. On the same day, CMA instructed the Nairobi Stock Exchange (NSE) not to proceed with the listing of Bank’s bond on the fixed securities market segment until further notice.<sup>3</sup>
10. On 24<sup>th</sup> December, 2015, the appellant invited the respondents for a meeting on 13<sup>th</sup> January, 2016 to deliberate on the circumstances prevailing at the Bank from the period between when the approval was sought and the closure of the bond offer period. The meeting was held as scheduled. The appellant informed the respondents that the conduct of all parties in the issuance of the bond would be inquired into fully.
11. On 6<sup>th</sup> May, 2016, the appellant issued a Notice to Show Cause (NTSC) letters to each of the respondents in respect of seven allegations regarding their oversight role as Board Members of the Bank. The allegations were based on information derived from affidavits filed by shareholders and the Receiver in various court proceedings.



12. On 13<sup>th</sup> May, 2016, the respondents' advocate responded to the NTSC and stated, inter alia; that the seven days period given to prepare written responses was wholly inadequate; that the respondents had no access to the records, minutes, systems and documentation that they would require to respond as the same were under the control of the Receiver; that there were pending legal proceedings in Judicial Review Application No 43 of 2016 in which the respondents were seeking, inter alia, access to critical information about the Bank under article 35 of the *Constitution*.
13. In response, the appellant insisted that the respondents had to respond to the issues raised in the NTSC as the information the respondents sought to rely on was allegedly in the public domain.
14. Following the respondents' insistence that they were not able to respond within the given period of time, the appellant moved the hearing from 24<sup>th</sup> May, 2016 to 31<sup>st</sup> May, 2016. Come that day, the advocates holding brief for the respective counsel for the respondents appeared before the appellant and applied for adjournment of the hearing. The appellant adjourned the hearing to 16<sup>th</sup> June, 2016.
15. On 13<sup>th</sup> June, 2016 the respondents moved to the High Court and filed a petition against the appellant (the respondent in the petition) seeking the following the orders:
  - “ 1. Pending the hearing and determination of this Petition, Conservatory Orders be issued as prayed in terms of the Notice of Motion filed herewith.
  2. An order do issue compelling the Respondent to avail and deliver up to the Petitioners and each of them all such documents in its possession as related to the Bond issued in 2015 by Imperial Bank Limited (In Receivership) to the general public for an amount of Kshs 2 billion.
  3. An Order do issue compelling the Respondent to invoke and enforce those powers vested in it under the law and to call for and obtain all such documents as may be in the possession and/or control of third parties related to the Bond Issued in 2015 by Imperial Bank Limited (In Receivership) to the general public for an amount of Kshs 2 billion.
  4. An order compelling the Respondent to avail and deliver up to the Petitioners and each of them the documents obtained by the Respondent from third parties pursuant to Order No. 3 above.
  5. A declaration that in its purported enforcement proceedings against the Petitioners:-
    - a. The respondent has breached the requirements of articles 10, 20 and 232 (1) (a), (c) and (f) of the *Constitution*.
    - b. The Respondent has violated the fundamental rights and freedoms of the Petitioners and each of them as regards the right to equality and freedom from discrimination under article 27 of the *Constitution*, the right to access information under article 35, the right to fair administrative process under article 47 and under the *Fair Administrative Action Act*, 2015 and the right to a fair hearing under article 50 of the *Constitution*.
  6. An order of compensation directed at the Respondent compelling it to compensate the Petitioners for the damage caused to them by its actions and



the quantum of such compensation to be determined by this Honourable Court.

7. Such further Orders as this Honourable Court deems mete and just.
  8. The costs of this Petition be awarded to the Petitioners.”
16. In their application by way of a Notice of Motion, the respondents sought, inter alia, a conservatory order to restrain the appellant from proceeding with the process of inquiry that was scheduled to commence on 16<sup>th</sup> June, 2016.
  17. In response, CMA filed a replying affidavit that was sworn by Mr. Paul Muthaura, its Chief Executive Officer (CEO). The appellant’s CEO set out the mandate, statutory duties and functions of CMA. He stated, inter alia, CMA’s sole focus in the impugned process was to inquire into the matters relating to the Bank’s corporate bond issue and determine whether there were contraventions of its regulatory requirements by the respondents.
  18. CMA gave a breakdown of the statutory obligations of the respondents as directors of an issuer of securities and set out the alleged contraventions of the statutory obligations by the respondents. It further stated that it had acted fairly and lawfully in the conduct of proceedings against the respondents in that it had severally accommodated the respondents by granting them various adjournments. CMA argued that the respondents should have appeared before the Board of the Authority (CMA) and demonstrate their inability to proceed with the hearing by tabling the very issues presented in support of their application and petition that they had presented before the trial court.
  19. CMA further stated that the respondents had been subjected to a fair process within the meaning of article 47 of the Constitution and the Fair Administrative Action Act, 2015.
  20. CMA further argued that each of its decision is subject to an appeal to the Capital Markets Tribunal established under section 35A of the Capital Markets Act and section 7(1) (b) of the Fair Administrative Action Act. Accordingly, the respondents ought to have raised their objections before the Board of CMA, allow the Board to make a determination and if dissatisfied lodge an appeal to the Capital Markets Tribunal. Consequently, the respondents had invoked the jurisdiction of the High Court prematurely, CMA contended.
  21. The appellant denied that it was prosecuting the respondents secretly; and that it had denied the respondents access to documents that they required for purposes of preparing their defence.
  22. Lastly, CMA stated that there was immense public interest in the bond issue; and members of the public who invested in the same were entitled to an early determination as to who was culpable. It was therefore in the best interest of the public that as a regulatory body charged with supervising, licencing and monitoring stock exchange and control depository system to be allowed to promptly enquire into the circumstances leading to the subject bond issue.
  23. Having considered the petition, the affidavits on record and submissions by counsel, the learned judge framed three main issues for determination as follows:
    - (i) Whether the petition was properly before the court;
    - (ii) Whether the inquisitorial and enforcement proceedings the respondents were being subjected to by the appellant was in violation of the respondents’ fundamental rights and freedoms;
    - (iii) The remedy available to the respondents.



24. On the first issue, the trial court held that the appellant had power to undertake the investigations that it had commenced; however, although the Capital Markets Tribunal had jurisdiction to handle the dispute, since the respondents' position was that the process they were being subjected to amounted to violation of their fundamental rights and freedom, only the High Court has jurisdiction to determine that dispute.
25. On the second issue, the trial court found that the respondents had not demonstrated that they were discriminated against by the appellant; however, the respondents had shown that there was a possibility of bias against them by the appellant since it was the appellant who had considered the Bank's proposal for issuance of the bond and given its approval, having carried out due diligence. In the circumstances, the High Court had to intervene; and that the appellant could not be an independent and impartial arbiter.
26. As regards the respondents' complaint that they were required to defend themselves without the benefit of relevant information and documents, thus denying them the right of access to information as guaranteed under article 35 of the Constitution, the trial court found that the respondents had been provided with all the essential documents necessary to enable them attend the show cause hearing.
27. In conclusion, the trial court granted the following orders:
- (i) "There shall issue a declaration that the Petitioners' rights under article 47(1) of the Constitution are under a threat of violation when the Respondent seeks to undertake and proceed with the administrative and enforcement action against the Petitioners yet the Respondent who seeks to execute its statutory mandate is apparently conflicted in the circumstances of this case.
  - (ii) There shall issue an order of certiorari to remove into this court and quash the Notice to Show Cause letters issued by the Respondent to the Petitioners on 6 May 2016."
28. Being aggrieved by the said judgment, the appellant preferred an appeal to this court which raises 12 grounds. The same, according to the appellant's written submissions, may be summarized as hereunder:

The learned judge erred in law and fact in:-

- (i) Holding and making a declaration that the petitioners' rights under article 47(1) of the Constitution were under a threat of violation due to CMA's intended administrative and enforcement action against them;
- (ii) failing to consider the statutory mandate of the Appellant under the Capital Markets Act which vests in CMA the power and responsibility to both investigate and enforce against breaches within its jurisdiction and in exercise of its mandate;
- (iii) holding that there exists a perceived/a possibility of and/or a reasonable apprehension of bias on the part of the CMA and consequently, it should not execute its statutory mandate as it had commenced to do against the Petitioners;
- (iv) dealing and subsequently determining issues that were not specifically pleaded and failed to correctly apply the law and properly direct his mind;



- (v) holding that the Petition was properly before the High Court for hearing and determination;
- (vi) holding that the Capital Markets Tribunal has no mandate to determine allegations of breach of fundamental rights and freedoms as alleged and or raised by the petitioners;
- (vii) holding that the CMA was conflicted and could only exercise its regulatory mandate against the Petitioners by way of delegation as per section 11A of the [Capital Markets Act](#) (cap 485A Laws of Kenya);
- (viii) interpreting the meaning and import of section 11A of the [Capital Markets Act](#) (cap 485A Laws of Kenya) on the delegation of CMA functions;
- (ix) in his interpretation of the delegation of CMA functions, a finding which prima facie contradicts the binding authority of the Court of Appeal in Civil appeal No. 9 of 2014 ([Capital Markets Authority – Vs- Jeremiah Gitau Kiereini & Another](#));
- (x) making an order of Certiorari to quash the Notice to Show Cause Letters issued by the CMA to the Petitioners on 6 May 2016;
- (xi) ignoring the greater public interest which Parliament sought to protect by the enactment of the [Capital Markets Act](#) (cap 485A Laws of Kenya) and
- (xii) partially allowing the petition which currently sets a bad precedent which has the effect of paralyzing the operations of the CMA and indeed other statutory regulators in the Republic of Kenya.”

29. In support of the appeal, the appellant condensed the grounds of appeal under three broad issues:

- “(a) The statutory mandate of the CMA is deliberately designed to empower it to investigate and take enforcement action against errant players in the capital markets; [Grounds 1, 2, 3, & 7 of Appeal].
- (b) The learned judge erred in his interpretation of delegation of the CMA’s roles under the Act, [Grounds 7, 8, 9 of Appeal].
- (c) The learned judge erred in holding that the petition was properly before the High Court and proceeding to quash the Notice to Show Cause Letters issued by the CMA. [Grounds 5, 10, 11 & 12 of Appeal].”

30. On the other hand, the respondents also filed a notice of cross appeal under rule 93 of this [Court’s Rules](#). They argued that parts of the said judgment ought to be varied or reversed on the grounds that the learned judge erred: by failing to find that an inconvenient hearing date had been imposed by the appellant upon them and finding that they ought to have set up a challenge in that regard by way of an appeal to the Capital Markets Tribunal; by finding that the respondents were not discriminated against by the appellant; in finding that there was no violation of Article 47 of the [Constitution](#) in so far as expedition, lawfulness and reasonableness are concerned as integral ingredients of a fair administrative process; in finding that the provisions of article 50(1) and (2) of the [Constitution](#) were not applicable; and in finding that the respondents were provided with all the essential documents necessary to enable them attend the impugned show cause hearing.



31. Mr Waweru Gatonye and Mr Njoroge Regeu, learned counsel for the appellant and respondents respectively, chose to canvass the appeal by way of written submissions.

32. We shall begin by considering whether the statutory mandate of the CMA is deliberately designed to empower it to impartially investigate and take enforcement action against errant players in the Capital Markets. The appellant took issue with the learned judge's holding at paragraph 115 of his judgment that:

“In my view, a well informed and fair minded observer given all facts would conclude that there exists a possibility of bias in the circumstances of the instant case. If the particulars outlined in the notices to show cause were to be aligned to the statutory provisions as well as the process that the regulator goes through prior to granting its approval to the bond issue and handed over to the well informed fair minded observer, I do not believe the fair minded observer would conclude that the Respondent in the case would approach the decision making process with the impartiality appropriate to the decision. I conclude that the circumstances denote a reasonable apprehension of bias.”

33. The appellant's counsel submitted that the finding on impartiality or apprehension of bias was erroneous in the circumstances of this case on two main reasons. First, no proper factual basis was laid out by the learned judge to enable him arrive at that conclusion. Secondly, the statutory role of CMA includes both investigative and enforcement powers.

34. The appellant's counsel further submitted that CMA is able to make unprejudiced judgment on matters it was investigating, notwithstanding the duality of its mandate. He cited the case of *FTC v Cement Institute* 333 US 683 [1948], where the court held that there is no violation of procedural process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. Counsel further cited this court's decision in *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR, where the court cited with approval the decision of the Supreme Court of Canada in *George R Brosseau v Alberta Securities Commission* [1989] 1 SCR 301 that:

“...as a general principle, a person is entitled to an independent, impartial decision-maker, the nemo iudex in causa sua esse principle. In general, it is not permitted for members of an adjudicatory panel to also be involved in the investigatory stages of a proceeding, as this would give rise to a reasonable apprehension of bias.

However, statutory authorization for overlapping functions are an exception to this rule, subject to the statute being constitutional. Administrative bodies are created for a variety of reasons and to respond to a variety of needs. In some cases, the legislature may decide that in order to achieve the ends of the statute, it is necessary to allow for an overlap in functions that would, in normal judicial proceedings, have to be kept separate. If a certain degree of overlapping of functions is authorized, by statutes then to the extent that it is authorized, it will not generally be subject to any reasonable apprehension of bias test. [Underlining added]

35. On the second cluster of grounds of appeal, the appellant's learned counsel submitted that the learned judge erred in his interpretation of delegation of CMA's roles under the Act. He faulted the judge's view that the Authority ought to disqualify itself and delegate its functions of the Capital Markets Tribunal, which issue was neither pleaded nor addressed by any of the parties. In support of that submission, counsel cited this Court's decision in *George W Omondi v Guilders International Bank*



Limited [2015] eKLR where the court held that as a general rule, it is not open to a court to base its decision on unpleaded issues.

36. That notwithstanding, the appellant's counsel added, section 11A (3) of the CM Act confers a concurrent jurisdiction on the appellant and expressly states that a delegation made under this section shall not prevent the Authority from performing the delegated function.

37. Lastly, it was submitted that the learned judge erred in holding that the petition was properly before the High Court and proceeding to quash the Notice to Show Cause Letters issued by the CMA.

It was argued that CMA observed the respondents' right to fair administrative action; the respondents had already responded substantively to the allegations contained in the Notice to Show Cause Letters; and that CMA had furnished the respondents with documents to be relied upon at the hearing, among other things.

38. The appellant's counsel faulted the trial court for assuming jurisdiction and determining the constitutional questions raised. In his view, the case before the High Court was well calculated to stop a statutory inquiry process from going on; the respondents ought to have attended the hearing before CMA and if aggrieved then prefer an appeal to the Capital Market Tribunal.

39. On those grounds, this Court was urged to allow the appeal and dismiss the cross appeal.

40. Opposing the appeal, regarding the argument that the statutory mandate of CMA is deliberately designed to empower it to investigate and take enforcement action against errant players in the capital markets; the respondents' counsel submitted that CMA is not exempt from the law, it is regulated by both the Constitution and statutory laws and its decisions are amenable to judicial review by the High Court; that even the so called errant players in the capital markets have explicit rights and protection under the Constitution.

41. Counsel submitted that the learned judge was absolutely right in finding that there existed a possibility of bias against the respondents if they were to appear before the appellant for the Notice to Show Cause proceedings as required.

42. Regarding the appellant's argument that the learned judge erred in his interpretation of delegation of the CMA's roles under the Act, the respondents submitted that the trial court's finding on delegation of the powers of CMA were obiter dictum and not the ratio decidendi and were therefore not binding. Counsel cited the Supreme Court decision in Jasbir Singh Rai & 3 others V Tarlochan Singh Rai Estate & 4 others [2013] eKLR where the court stated:

“A statement obiter dictum is one made on an issue that did not strictly and ordinarily call for a decision; and so it was not vital to the outcome set out in the final case.”

43. The above submission notwithstanding, the respondents' counsel argued, the learned judge actually erred in his obiter statement that the matter could be referred to the Capital Markets Tribunal because by virtue of section 35(1) of the CMA, the jurisdiction of the said tribunal is limited to only those matters specified in the section; the issues raised in the petition are not amongst those that the tribunal has jurisdiction to deal with.

44. Responding to the appellant's argument that the learned judge erred in holding that the petition was properly before the High Court and proceeding to quash the Notice to Show Cause Letters, the respondents' counsel submitted that the Capital Markets Tribunal had no jurisdiction to entertain, hear or determine any of the issues which triggered the petition. The issues were constitutional in nature and only the High Court could determine them, counsel stated.



45. Turning to the Cross Appeal, the respondents submitted that the learned Judge erred in failing to find that the appellant's actions were in violation of its obligations under article 47(1) of the Constitution which provides that "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." It was contended that the appellant had arrogated unto itself the role of selecting the narrow, limited and contentious evidence that was to be used in the inquisitorial proceedings. The appellant had by its letter dated 6<sup>th</sup> May, 2016 specified the respondents' documents that it would rely on.
46. The respondents said that was unreasonable and violated the provisions of article 50(2)(k) of the Constitution which provides that
- "every accused person has the right to a fair trial, which includes the right to adduce and challenge evidence." Among the documents that the appellant had said it would rely on were the supporting affidavits of Peter Gatere and Ghabib Hajee and the replying affidavit of Naeem Shah in HCCC No 523 of 2015. The respondents had objected to the reliance on those affidavits because they were not parties to HCCC No 523 of 2015 and therefore had not had an opportunity to challenge them.
47. The respondents' counsel further faulted the learned judge for finding that the respondents were provided with all the necessary documents required for their defence in the inquisitorial proceedings and cited the various documents that they considered necessary but were not availed to them.
48. The learned judge was further faulted by the respondents for failing to find that an inconvenient hearing date had been imposed upon them by the appellant, saying that they ought to have been accorded sufficient time to prepare themselves and to have the hearing on dates that were convenient to their advocates. Counsel cited the correspondence between the appellant and the respondents and the various appearances before the appellant's Board by the respondents' advocates to seek adjournment of the hearing.

## **Analysis Of The Submissions And Determination**

### **(i) Statutory Mandate of CMA & Power to Delegate**

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

" 11.

- (1) The principle 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.”

50. Under section 11(3) of the Act, CMA 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 licenced by the Authority.

51. CMA 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.

52. 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.”

However, such delegation cannot prevent the CMA from performing the delegated function. See section 11A (3).

53. It is therefore clear that CMA has power and responsibility to investigate any breaches and enforce all the statutory provisions and regulations. The learned judge appreciated that dual role when at paragraph 112 of the judgment he stated:

“ 112. The context herein is that the Respondent is a statutory regulator. It has various chores in the capital, securities and financial market. It is intended to facilitate an orderly fair and efficient capital market. It grants licences to



the capital market players and may suspend or revoke such licenses. It also disciplines its licensees. It approves securities. It protects the public. It has a wide oversight role. It has investigative and enforcement powers. It may impose sanctions and penalties. Such penalties or sanctions include the levying of financial penalties and the disqualification of any director of a listed company from appointment as a director of a listed company. The sanctions may be dire and severe and may include an order for restitution to any aggrieved person(s).”

54. But having so held, the learned judge went on to find that there was possibility of bias and/or reasonable apprehension of bias on the part of the authority in conducting the show cause hearing. The learned judge observed that the Authority, having exercised due diligence before it granted approval of the bond issue, could not be impartial in its interrogation of the entire process. He stated:

“The respondent (CMA) was expected to, and I believe did, move through the motions of due diligence on the Bank before granting its approval and thus when the Respondent serves a notice to show cause upon the petitioners and lodges accusations touching on non or fraudulent disclosure, a question may reasonably be posed as to what the respondent and its officers did in the process.”

55. With respect, we do not think the trial court’s finding on impartiality or 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:

“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?”

56. In applying that test in the circumstances of this matter, a reasonable and right-minded person must bear in mind the statutory role of the Authority. As the statutory regulator of capital markets in Kenya, the CMA 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 are making the application. But even after granting its approval, the Authority 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.

57. That dual mandate was reiterated by this court in *Capital Markets Authority v Jeremiah Gitau Kiereni & another* [2014] eKLR.

We therefore agree with the appellant that in the exercise of its statutory mandate, the CMA is able, and is expected to make unprejudiced judgment on matters that it has investigated, notwithstanding the duality of its mandate. The statute expressly authorizes the overlapping functions. That being the case, it cannot be reasonably stated by anyone who is familiar with the architecture of the Act that the Authority is unable to be impartial. The finding on apprehension of bias by the High Court must therefore be set aside, which we hereby do.



58. Turning to the issue of delegation of the Authority's roles, having found that there was perceived bias on the part of the Authority, the learned judge ordered that the Authority should not execute its mandate. The learned judge went on to state:

“138. I have looked at the scheme and structure of the Capital Markets Act. Unlike judges who do not choose their cases and litigants who do not choose their judges, the Respondent has the option of choosing whether or not to execute the mandate and over which entity. Under the Capital Markets Act, the Respondent may delegate its functions to other persons, including a recognized self-regulatory organization bodies: see Section 11A. Likewise, the Respondent may file a reference to the Capital Markets Tribunal on any matter relating to the Capital Markets Act. See section 35A(4) of the Capital Markets Act.”

59. The appellant's objections to that holding is that the issue as to whether it should have delegated its powers pursuant to the said section was neither pleaded nor submitted on.

60. While we agree with the appellant that the issue had not been raised or argued, this statement was made obiter dictum and therefore nothing much turns on it. That notwithstanding, we wish to make two observations about the finding. One, a delegation made under section 11A cannot prevent the Authority from performing the delegated functions; see section 11A(3). Two, under section 35A(4) which the learned judge cited, the Authority cannot file a reference to the Capital Markets Tribunal. Only an aggrieved party can appeal to the Tribunal following a determination by the Authority.

**(ii) Was the petition properly before the High Court?**

61. To the extent that the respondents were alleging that CMA had violated their fundamental rights and freedoms under the Constitution and sought a declaration to that effect, the High Court was properly seized of the matter. The High Court held that its exclusive jurisdiction under article 165(3) of the Constitution could not be shared with the Authority or the Tribunal.

62. This Court has pronounced itself on that jurisdictional issue in a similar matter. In *Capital Markets Authority V. Jeremiah Gitau Kiereini & Another* (supra), one of the issues that the Court had to determine was whether the High Court had jurisdiction to determine constitutional issues in disputes arising out of decisions by CMA in light of section 35A that established the Capital Markets Tribunal. The High Court had held that since it had been called upon to intervene on a claim of alleged breach of the petitioner's fundamental rights and freedoms under the Constitution, the matter was within its jurisdiction by virtue of article 165(3) of the Constitution. The Tribunal did not have such jurisdiction, the High Court held. That holding was upheld by this court.

The court affirmed that no other adjudicative body had such a mandate.

The court held:

“The existence of an alternative remedy, in this case the Tribunal, would not be efficacious because the High Court does not share with it the powers under article 165 of the Constitution. We are satisfied that the issue laid before the High Court under article 47 was constitutional in form and substance and consequently the right forum for its adjudication was the High Court.”



63. We must therefore reject the appellants' submission that the High Court had no jurisdiction in the matter. But this finding is limited to the High Court's mandate to determine violation of Constitutional rights and freedoms.

It does not in any way limit the mandate of CMA or the Tribunal to perform their statutory duties and functions; as long as in the course of executing that mandate they do not trample upon constitutional rights and freedoms of parties before them.

### **The Cross Appeal**

64. Turning briefly to the respondents' cross appeal, 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*, 2015. The respondents were notified of the allegations leveled against them; they were afforded an opportunity to be heard; they were notified of their right to call witnesses and produce any necessary documents; they were at liberty to scrutinize the appellant's documents; they were furnished with all the necessary materials, including the evidence that was to be relied upon at the hearing; and they were also notified of their right to legal representation.
65. The respondents cannot be heard to say that an inconvenient date was imposed upon them by the appellant. The matter under investigation was of great public importance and required to be disposed of expeditiously. That notwithstanding, the appellant adjourned the hearing severally to accommodate the respondents' advocates. In fixing hearing dates, a Court or adjudicative body cannot always do so in accordance with the demands or convenience of a party.
66. Where it appears that a party's actions or demands are calculated to delay or bound to unilaterally fix a hearing date and notify parties accordingly. In this instance, it is now evident that the respondents, in buying time to prepare their papers for filing before the High Court, which they eventually did.
67. The respondents' assertion that there was discrimination against or selective prosecution is without any legal basis. Various other parties that were involved in the bond issue, including the transaction advisers, had also been summoned by the appellant.
68. Having taken a panoramic view of the grounds contained in the notice of cross appeal, we find no merit in them and dismiss the cross appeal in its entirety.

### **Conclusion**

69. We have established that the appellant, in issuing the NTSC to the respondent, was acting within its statutory mandate; and the finding by the learned trial judge that there existed a possibility of bias if the appellant were to conduct the hearing had no basis and was erroneous.

To that extent, we allow the appeal and set aside the High Court's finding that the respondents' rights under article 47(1) of the *Constitution* are under a threat of violation by the appellant.

We also set aside the order of certiorari to remove into the Court and quash the NTSC letters issued by the appellant to the respondents on 6<sup>th</sup> May, 2016. For avoidance of doubt, the appellant shall be at liberty to continue with the administrative proceedings that it had commenced against the respondents.

70. The appellant is awarded the costs of the petition before the High Court as well as the costs of this appeal.

**DATED AND DELIVERED AT NAIROBI, THIS 28<sup>TH</sup> DAY OF JUNE, 2019.**



**E. M. GITHINJI**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

