IN THE COURT OF APPEAL

AT NAIROBI

CORAM: WAKI, KARANJA & KIAGE, JJ.A

CIVIL APPEAL NO. 92 OF 2014

BETWEEN

VANIA INVESTMENTS POOL LIMITED….....APPELLANT

AND

CAPITAL MARKETS AUTHORITY…….……..…..…..1ST RESPONDENT

REA TRADING LIMITED……...……..2ND RESPONDENT

CENTUM INVESTMENTS LIMITED…….……..3RD RESPONDENT

TAUSI ASSURANCE CO. LIMITED…….……..4TH RESPONDENT

G. A. INSURANCE LIMITED……...……5TH RESPONDENT

SAVCO STORES LIMITED……..……...6TH RESPONDENT

KENYALOGY COM LIMITED……..…….7TH RESPONDENT

REA VIPINGO PLANTATIONS LIMITED……..……8TH RESPONDENT

KILIFI COUNTY GOVERNMENT…….9TH RESPONDENT

(An Appeal from the Ruling of the High Court of Kenya at Nairobi (Majanja, J.) dated 17th April 2014

in

H. C. MISC. CIVIL APPL. NO. 139 OF 2014)

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JUDGMENT OF THE COURT

Capital Markets Authority (1st respondent) is a body corporate established under **Section 5** of **Capital Markets Act (CAP 485A of the laws of Kenya).** One of its objectives which is germane to this appeal as provided for in **Section 11** of the said Act is;

> ***"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."***

Another of its core functions as stipulated in **Section 11(d)** is "***the protection of investor interests***".

It was in the performance of some of the functions stipulated above that the 1 st respondent made the decision that was challenged before the High Court by way of Judicial Review. The aggrieved party in those proceedings was **Vania Investment Pool Limited (appellant)** who moved the High Court by way of a chamber summons dated 8th April, 2014.

The chamber summons, taken out under **Order 53 Rules 1, 2** and **4** of the **Civil Procedure Rules** was for the requisite Leave to apply for the following orders:-

> (a) ***An order of prohibition stopping the respondent from taking any further step or implementing any timetable it has set for completing the takeover of REA Vipingo Plantations Limited based on the direction that offers made could not be varied after 28th of February, 2014.***
>
> (b) ***An order of certiorari removing to this Honourable Court for the purpose of the same being quashed, the respondent's directions contained in the notice published on the 5th of February 2014 in the Daily Nation setting the deadline for new offers and variation of offers already made on the takeover of REA Vipingo Plantations Limited.***
>
> (c) ***An order of mandamus to compel the respondent to approve such variation of offer as the applicant will make to the offer it has already made for takeover of REA Vipingo Plantations Limited.***
>
> (d) ***An order of mandamus to compel the respondent to allow the applicant to submit the takeover document as provided in Regulations 13(2) of the Regulations and make such changes as are allowed by the Regulations.***

The 2nd to 8th respondents herein were named as Interested Parties in that chamber summons, which was heard and subsequently dismissed by Majanja, J. with costs to the 1st, 2nd and 3rd respondents herein. Being aggrieved by that decision, the appellant moved to this Court on appeal vide the memorandum of appeal filed on its behalf by Walker Kontos Advocates dated 24th April 2014. It is worth noting that the 4th, 5th, 6th and 7th respondents supported the appellant in this appeal. The appeal is predicated on seven substantive grounds which can be summarized as follows:

> *That the learned Judge erred and misdirected himself in:-*
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> · *finding that the appellant should have pursued its claim before the CMA tribunal, a statutory tribunal mandated to hear appeals from decisions of the 1st respondent and not by way of Judicial Review;*

· *finding that the 1st respondent had not violated its own Regulations;*

· *finding that the appellant had delayed before moving the Court for Judicial Review;*

· *finding that the appellant had not satisfied the threshold required for leave to be granted;*

· *finding that it was in the public interest not to grant the leave sought by the appellant.*

The appellant therefore entreats this Court to set aside the impugned decision so that leave can be granted for it to seek the Judicial Review orders outlined in the said Notice of Motion. We shall revert to these grounds later. The appeal was canvassed by way of written submissions filed by all counsel herein. Learned counsel for the appellant also filed a reply to the respondent's submissions.

We have read and carefully considered these submissions together with the list of authorities filed by counsel.

We now look at the transaction and/or process that gave rise to the 1st respondent's decision that was challenged before the High Court before we can determine whether the impugned decision was properly arrived at or not.

The 8th respondent, **Rea Vipingo Plantations Limited ("RVPL")** is a public company listed at the Nairobi Securities Exchange **(NSE).** R.E.A. Trading Limited **("REAT")** on the other hand is a shareholder of RVPL. On 13th November 2013, "REAT" issued a notice under **Regulation 4(1)** of the **Capital Markets (Take-overs and Mergers)** Regulations, 2002 (the Regulations) to the effect that it intended to make an offer to acquire all the issued ordinary shares of RVPL which had not yet been owned and registered in RVPL's name.

This notice came to the attention of other companies who had an interest in investing in RVPL. The 3rd to 7th respondents were among companies which expressed their interest on diverse dates. The 3rd respondent **Centum Investments Company Limited (Centum)** published its notice of such intention on 2nd December, 2013. On 21st December 2013 **Www. Bid Investment Company Limited** ("WBICL") published its notice of intention, while the appellant published its notice of intention on 30th January 2014.

These notices were published pursuant to Regulation 4(1) of the Regulations which provided:-

> ***"A company or person who intends to acquire effective control in a listed company shall not later than twenty four hours from the resolution of its Board to take effective control in the company or not later than twenty four hours prior to making a decision to acquire effective control in the company in the case of any other person announce the proposed offer by press notice and serve a notice of intention, in writing of the takeover scheme … to the***
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> (a) ***Proposed offeree at its registered office;***
>
> (b) ***Securities exchange at which the offeree's voting shares are listed;***
>
> (c) ***Authority (in this case the Capital Markets Authority 1st respondent) and the commissioner of monopolies and prices."***

After the said notices are served then **Regulation 4(4)** comes into play. The same requires the offeror to serve on the offeree its statement of the takeover scheme within 10 days from the date of the notice of intention referred to above. Such statement shall be approved by the (CMA).

The said notice and statement can nonetheless be amended if need be but with the permission of CMA. This can however, only be done before the takeover document is served on the offeree. Such amendments and/or substitution of the notice must be on terms approved by CMA.

Under **Regulation 7(1)**, the offeror is required within 14 days of service of the offeror statement to submit to CMA for approval the takeover document which CMA is required to approve within 30 days or such time as CMA may determine. This therefore, means that CMA has discretion to approve the statement any time before expiry of the 30 days. Once the statement is approved by CMA, the same is served on the offeree within five days of such approval. Where there are competing take-over offers, given that they may have been made at different times, these procedures shall apply *mutatis mutandis* except the notice period to the competing offer. (See **Section 13(1)** of the **Regulations**).

Under **Regulation 13(2)**, the competing offeror shall serve a competing take- over offer at least 10 days prior to the closure of the offer period and this period shall also apply to the revisions that may be made to the competing offer.

Regulation 14 is also germane to this appeal and the same provides;

> ***14 "An offeror must keep a take-over offer open for acceptances for a period of 30 days from the date the takeover document is first served in accordance with Regulation 7(4) or such period as may be determined by the Authority.*** *(Underlining supplied)*
>
> ***16 (1) An offeror may vary the terms and conditions a takeover offer including increasing the consideration in relation to the whole or part thereof provided such variation shall be made at least five days prior to the closure of the offer period.***
>
> ***(2) The varied take-over offer document shall set out in an appropriate form particulars of such modification of the offeror's statements and information required under the second schedule as necessary having regard to the variations.***
>
> ***(3) The offeror shall serve the varied take-over offer document on the offeree, the Authority and the securities exchange within twenty four hours of making the decision to vary the take-over offer, and simultaneously make a public announcement by press notice in at least two English language dailies of national circulation disclosing material variations to the offer."***

We find it necessary to cite these regulations, almost verbatim in some instances, because according to the appellant, CMA breached these regulations and that forms part of the challenge on the decision of the High Court (see ground 3 in the memorandum of appeal).

It comes out explicitly from the cited regulations that the takeover or merger transactions are strictly controlled by the CMA on very determinate timelines. These timelines, as is indeed stipulated by all parties herein, are meant to ensure an efficacious, expeditious and predictable process which is meant to boost investor confidence in the securities market.

Breach or violation of statutory rules and regulations by a Judicial or quasi- judicial body is one ground for Judicial Review. If there was breach of these regulations by CMA as claimed by the appellant, then it's contention that leave to proceed by way of Judicial review should have been granted would be very compelling indeed. We shall therefore analyse and scrutinize the conduct of CMA vis-a- vis these regulations and make our findings on whether such breach or violation has been demonstrated to warrant the grant of leave.

We shall now retrace the transaction giving rise to this appeal to see what exactly happened and how the appellant's grievance arose. Thereafter, we shall consider whether CMA's decision was amenable to Judicial Review. We shall then examine the learned Judge's decision and determine whether he fell into any error when he dismissed the chamber summons dated 8th April, 2013.

After the several offers had been made, the 1st respondent on 5th February 2014 published in the *Daily Nation Newspaper* the notice setting a deadline of 28th February 2014 for the following:-

> (a) *Anyone who intended to make a new offer for the takeover of (RVPL) to issue the necessary notice of intention to RVPL;*
>
> *and*
>
> (b) *If there were any variations of the existing offers, the notice was required to be served by that date.*

The 1st respondent then proceeded to issue its timetable for the takeover scheme with the anticipation that all the offers, variations etc would be closed by end of the notice deadline.

We need not go into the details of the offers and counter-offers that were made before the set deadline. The problem arose when on the date of the deadline , the appellant wrote two letters to the 1st respondent expressing reservations on the proposed take over time table.

Several letters were exchanged between the appellant and the 1 st respondent on the subject but ultimately the 1st respondent refused to budge and remained steadfast on the fixed deadline. On its part, the appellant insisted that under **Regulation 16(1) (2)(3)**, it could still amend or vary its offer post 28th February 2014. The 1st respondent stood its ground and claimed the right to set the timetable and the deadlines pursuant to **Section 11(3) (w)** of the **Capital Markets Act**. It consequently rejected the appellant's bid. This strict adherence to the timetable and the subsequent refusal to accept the varied offer was, according to the appellant, also contrary to **Regulation 13(2)** of the **Regulations**. It was also tantamount to denying the shareholders of RVPL the opportunity to benefit from the highest bid. These grievances are what propelled the appellant to move to the High Court by way of Judicial Review seeking the orders we have enumerated earlier in this ruling. The said orders were declined and hence this appeal.

In his ruling which is the subject of this appeal, the learned Judge declined to make any definitive finding as to whether the 1st respondent was in breach of any of the regulations under the Act that are meant to regulate its procedure, more particularly Regulation 13(1) of the said Regulations.

The argument by the 1st respondent was that it did not breach any of the regulations and furthermore, **Section 11(w)** of the Act under which the notice was issued gave the 1st respondent wide powers in the execution of its duty to ensure an orderly, fair and transparent process. It is the 1st respondent's stand that the Regulations do not prescribe a detailed timetable but leave the discretion to it to modify the Regulations appropriately and hence the use of the words *mutatis mutandis* in **Regulation 13(1).**

Even without going into great detail on the issue of these regulations and whether the alleged breach of the same existed, we can safely say that the said regulations are not cast in stone. We say so because the primary mandate of the Capital Markets Authority (1st respondent) as succinctly set out in the preamble to the Capital Markets Act (Cap 485A) is *inter alia* to promote, regulate, facilitate and develop an orderly, fair and efficient Capital Market in Kenya.

Section 11(w) of the said Act mandates the 1st respondent:-

> ***"To do all such acts as may be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under this Act."***

Therefore, even with the plethora of regulations made under the Act, the 1 st respondent still has wide latitude under **Section 11(w)** to do that which fosters and promotes a fair and expedient process of takeovers or mergers. This section which is akin to **Section 3A** and **3B** of the **Appellate Jurisdiction Act** or our so called '*oxygen rule'* is invoked in situations where the justice of the case is likely to be hampered by strict adherence of procedural strictures which in this case would include the prescribed timelines.

In this case, the 1st respondent was alive to the need to complete the transactio in question quickly in order to ensure that the RVPL shares were not excluded from the NSE for longer than was necessary.

The timelines set by the 1st respondent applied to all the respondents and not just the appellant. We observe that the process was indeed open and all the players were accorded sufficient time to make their offers. None of them could therefore justifiably claim to have been discriminated against. The long and short of this is that there was no such flagrant or blatant breach of the regulations that would solely have impelled the learned Judge to grant the said leave to file the motion for Judicial Review. Ground 3 of the appellants appeal must therefore fail.

The other issue we wish to address is whether the learned Judge was wrong in his finding to the effect that the appellant should have sought the alternative available recourse before moving the High Court by way of Judicial Review. This is indeed the first ground in the appellant's memorandum of appeal. In his ruling, the learned Judge observed that one of the reasons that may cause a court to reject an application for Judicial Review is the availability of an alternative remedy for the aggrieved party. Indeed he gave that as one of the reasons for rejecting the applicant's application. In this finding, he called in aid previous decisions of this Court in **Speaker of National Assembly vs Njenga Karume (1990 – 1994) EA 546, and Republic vs National Environment Management Authority ex-parte Sound Equipment Limited CA**

> **Civil Appeal No. 84 of 2010 (2011) eKLR** in which this Court observed that:- ***"Where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it."***

In other words, although ideally Judicial Review should be sought as a remedy of last resort, there can be exceptions. This Court pronouncing itself on this issue in **Republic vs National Environmental Management Authority (2011) eKLR**

stated:-

"… in determining whether an exception should be made, and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it."

In this case, the appellant pleads that it did not move to the CMA Appeals Tribunal because the same was not quorate. The lack of quorum of the Tribunal is acknowledged by the respondents. According to the 1st respondent however, the appellant should have either moved to the High Court for the Judicial Review orders within the statutory timelines set out in the Capital Market Act, or filed the appeal in the Tribunal and thereafter filed an application seeking orders of mandamus compelling the relevant minister to appoint members of the Tribunal. The appellant did neither of the above. Instead, it sought the Judicial Review orders long after the expiry of the 15 days provided for in the Act within which an aggrieved party must challenge an order issued by the 1st respondent. This delay, according to the 1st respondent, cannot be countenanced.

> The learned Judge was of the same view and hence his observation that ***"A take-over transaction relating to a publicly listed company is not a trifling matter. It is a time bound process as illustrated by Regulations which impose 24 hours, 5 day, 10 day, 14 day and a maximum or 30 day limits for doing certain acts. A period exceeding 30 days in the context of matters dealing with takeover is inordinate…."***

The learned Judge cited "undue and unreasonable delay" as one of the reasons for dismissing the appellant's chamber summons application.

As to whether the appellant should have moved to the Tribunal though well aware of its challenge as far as the quorum was concerned, we note that indeed the 3 rd respondent did move to the Tribunal, and thereafter to the High Court for orders of mandamus. That demonstrates a plausible option for the appellant as well. Would it have been efficacious? We think so, as the appellant would have demonstrated that he had gone for Judicial Review as a last resort and this could have worked in his favour. As observed by the learned Judge, we also observe that indeed the appellant moved to the court after the deadline set out in the regulations allowing it to move the Tribunal, and that was actually the delay the learned judge was referring to in his ruling. We agree with the learned Judge that the appellant failed to demonstrate that the circumstances of its case qualified as exceptional to warrant a hearing by way of Judicial Review before the statutory procedure had been exhausted. Grounds one and two must therefore fail.

As to whether the learned Judge erred by delving into the merits of the matter at leave stage, it is trite law and practice that an application for leave to seek orders of Judicial Review is not granted as a matter of course. There is a certain threshold which has to be met.

The House of Lords in **Inland Revenue Commissioner vs National Federation of Self-Employed** and **Small Business Ltd (ALL ER 1981 Vol 2 page**

94) aptly addressed this issue in the following terms:

> ***"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.The discretion that the court is exercising at this stage is not the same as that which it is called on to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."***

Closer home, this Court echoing the above findings of the House of Lords in

Kariuki vs Attorney General (1990 – 1994) E.A. held:-

> ***"In an application for leave to apply for orders of certiorari and mandamus, the applicant only needs to demonstrate a prima facie case without going to the merits of the case."***

See also **Njuguna vs Minister for Agriculture (2000) 1 EA 184.**

The learned Judge appreciated this test and applied it in his ruling as can be deciphered from the following statement:-

> ***"The court can only come to the conclusion that the case is frivolous, or that leave is underserved by examining the facts…"***

In this case, we note that the application for leave was actually heard inter- partes. That was a procedure available to the court and an invitation to examine the facts. The learned Judge had the opportunity to hear all the parties involved and considered the material they placed before him. This was therefore, different from many other situations where applications for leave proceed ex-parte. The learned Judge was therefore in order to consider the submissions made by the parties before him and make his finding while still restraining himself from making any findings on the merits of the matter before him. That explains why he opines in his ruling

> ***"As this is an application for leave, I am not prepared to say that the applicant has raised a frivolous argument, it is not one that may succeed at the end of the day but it is one that is not entirely hopeless."***

It is our finding that the learned Judge did not depart from the accepted threshold of "*prima facie case*". He had to do justice giving due consideration to the submissions of all counsel, which led him to the conclusion that leave was not deserved in the circumstances of the case. He did not in our view delve deeper into the merits of the case than was sufficient for him to conclude that a prima facie case had not been made out to warrant the order for leave. Ground six also falls by the wayside.

On the question as to whether it was in the public interest not to grant the leave sought, the learned Judge found that granting leave would cause hardship to third parties and would not be in the public interest as it would also diminish investor and public confidence in Capital Markets. It is the appellant's submission however, that the converse is actually the truth. The appellant's contention is that what was not in public interest is the court's countenancing the disregard of operational rules by a public body like the CMA. In the appellant's view, that would be an affront to investor confidence.

In that regard, learned counsel for the appellant cited the case of **Republic vs Permanent Secretary/Secretary to the Cabinet and Head of Public Service Office of the President and Two Others – Ex-parte Stanley Kamanga Nganga [2006] eklr,** where the court held that the purpose of Judicial Review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large.

We have however found that the 1st respondent was not in breach of its regulations and that renders this submission and the attendant authority irrelevant in the present circumstances.

Our view is that what would have impacted negatively on the public interest is any derogation that would create the impression that the Securities Market was unpredictable and its rules manipulable in favour of some bidders as opposed to others in a playing ground that was not even. Indeed, as stated earlier on in this ruling, the role of the 1st respondent is to ensure the right opposite. The Rules and Regulations are meant to inspire public confidence in the securities market and to ensure a fair, transparent, and efficacious trading atmosphere that would not allow one party to steal a march on the others by having the timelines extended beyond the deadline.

It is also noted that the delay that would have been occasioned by an open- ended schedule and the failure to stick to set timelines would have affected the other shareholders as their shares were suspended from trading during the take-over process.

In conclusion, we wish to add that Judicial Review orders are discretionary.There are firm principles that guide the appellate court which must be observed before such a court can interfere with a trial Judge's discretion. We fall back on the *locus classicus* case of **Mbogo vs Shah (1968) EA 93,** in which the predecessor of this Court succinctly pronounced itself thus:

> ***"A Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice."***

In this case we find no misdirection on the part of the learned Judge. He applied the law correctly after considering the law and the material placed before him by learned counsel.

We find no basis whatsoever for interfering with the said ruling. In the result, we must decline the appellant's plea and dismiss this appeal which we hereby do with costs to the 1st, 2nd, 3rd and 8th respondents.

Dated and delivered at Nairobi this 11th day of July, 2014.

P. N. WAKI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR