

KIVUNIRA V CAPITAL MARKETS AUTHORITY

Key Point

The High Court has continued a line of decisions by the Courts aimed at protecting individuals who find themselves in a regulator's cross-hairs. The case concerned an executive who was the subject of investigations by the Capital Markets Authority following a whistleblower complaint.

The Authority has dual investigatory and enforcement mandates. It acts both as an investigator and enforcer of capital markets violations. The High Court has held that the Authority has a duty to apply the rules of natural justice when exercising both aspects of its dual mandate.

Background Facts

The Appellant was employed as the Chief Financial Officer of National Bank of Kenya. His employment was terminated in 2016 amid allegations of breach of fiduciary duties. Thereafter, the Authority investigated his conduct and issued a notice to show cause against him.

The Appellant requested to be provided with documents which formed the basis for the allegations but his request was denied.

After a hearing, the Authority found the allegations against the Appellant proven. He was found to have acted in contravention of the Capital Market Guidelines for failing to prepare interim accounts and failing to supply the board with relevant, accurate and

timely information. Consequently, he was fined KES 1,000,000.00

The Appellant unsuccessfully appealed to the Capital Markets Tribunal.

Decision in the High Court

The Appellant appealed the dismissal by the Capital Markets Tribunal to the High Court.

The Court considered that the sole issue for determination was whether the Authority granted the Appellant a fair hearing. It held that the Authority is required to grant all parties before it a fair hearing in exercising its administrative functions. The provision of information, materials, and evidence to be relied on making a decision is a component of fair administrative action. Further, the right to be supplied with all documents necessary to defend oneself is a constitutional tenet.

The Court referred to the Authority's dual role and stated:

"In the two processes, the [Authority]t was bound to exercise and apply the rules of natural justice and accord the appellant and any other person involved their constitutional rights to fair administrative action and hearing."

The Court made further comments as to how the Authority should exercise its role:

- a) As an investigator, the Authority should carry out its duties without a pre-determined target. Its investigations should not cover a particular individual, but the entity as a whole, including the board of directors;
- b) The Authority should only make a decision on the culpability of any party after hearing exhaustive representation by all affected parties;
- c) The Authority is bound in law to treat evidence received from either side objectively;
- d) It is not for the Authority to decide whether documents requested by the Appellant were relevant or not.

The Court concluded that the investigations and hearing before the Authority were tainted with unfairness and a violation of the Appellant's right to fair administrative action, and in breach of the rules of natural justice. It therefore set aside the sanctions.

Comment

In exercise of its dual mandate, the Authority has the tendency to be judge, jury, & executioner. It both passes the sentence and wields the axe. This decision builds on earlier jurisprudence by the Courts designed to ensure that individuals who find themselves within the Authority's cross hairs are treated fairly.

In particular, the Supreme Court in *Popat & 7 others v Capital Markets Authority* (Petition 29 of 2019) [2020] KESC 3 (KLR) was emphatic:

*"In this case therefore, in the discharge of its dual mandate, laudable as it obviously is, **the respondent cannot be allowed to ride roughshod** over the non-derogable constitutional rights of investors. That will obviously be counterproductive and instead of engendering the confidence required in the capital markets, it will scare away the very prospective investors it is seeking to entice. So, if broader and greater public interest cannot override the right to fair hearing, it follows therefore, that narrow interests such as fostering investor confidence in the securities market cannot be used as an excuse to deprive the petitioners of their constitutional right to a fair hearing of the allegations against them."*

This decision is welcome as it expands the Court's supervision into the investigatory arm of the Authority's dual mandate.

If you have any questions arising from this article, you can contact [Peter Gachuhi](#), [Esther Kinyenje](#) and [Victor Njenga](#) who regularly represent clients before the Capital Markets Authority and the Capital Markets Tribunal



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