IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KARANJA & MWERA, JJ.A)

CIVIL APPEAL NO. 9 OF 2014

BETWEEN

CAPITAL MARKETS AUTHORITY .....APPELLANT

AND

JEREMIAH GITAU KIEREINI ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

(An appeal from part of the decision of the High Court of Kenya at Nairobi (Majanja, J.) dated 22nd August, 2013

in

H.C. PETITION NO. 371 OF 2012)

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JUDGMENT OF THE COURT

Introduction

1.This is an appeal from the judgment of the High Court, Majanja, J. sitting in Nairobi and delivered on 22nd August 2013. There are about 2500 pages of documents and proceedings bound in four volumes in the matter. There are also various volumes of legal material and authorities filed. However, the crux of the appeal, which we shall distil shortly, is fairly narrow and it will determine whether the appeal stands or falls. There are also peripheral issues raised by the parties which we shall endeavor to resolve.

2.The appellant is the Capital Markets Authority **('CMA'),** a statutory body created under **Section 5** of the **Capital Markets Act** (Cap '485A' Laws of Kenya)**(the Act**) with a general mandate to promote, regulate and facilitate the development of an orderly, fair and efficient capital market in Kenya. It is represented in the appeal, as it was in the High Court, by learned counsel Mr. Waweru Gatonye instructed by M/s Waweru Gatonye & Co Advocates. The first Respondent, **is Jeremiah Gitau Kiereini ('Kiereini')** who was the petitioner before the High Court and was described as "a well known Kenyan,

once a Permanent Secretary in the Office of the President, Head of the Civil Service and Secretary to the Cabinet, chairman of many Boards of Directors in the private sector" and as relevant to this matter, the non-executive Chairman of CMC Holdings Limited **('CMCH')** until his voluntary retirement in March 2011. He is represented before us as he was in the High Court by learned counsel Mr. Njoroge Regeru, of Njoroge Regeru & company Advocates. Learned counsel, Mr. Moimbo Momanyi instructed by the Attorney General represents the 2nd Respondent **('the AG')**. By agreement of all counsel the appeal is determined on the basis of written submissions which they all filed.

Background.

3.The dispute goes back to September 2011 when there was a loud implosion and explosion of CMCH, a reputable publicly listed motor dealing and assembling company which has been in Kenya since 1948. The trigger was a series of boardroom wrangles pitting some Directors against others amidst allegations of non-compliance with corporate governance, conflict of interest and fraud. Kiereini, the non-executive chairman had voluntarily resigned his position in March 2011.

4.Ultimately, CMA had to intervene in the interests of the investing public and on16th September 2011, it suspended the company from trading its shares on the Nairobi Stock Exchange. It then began its own investigations on CMCH even as CMCH itself engaged the services of Price Waterhouse Coopers (PWC) to carry out a forensic audit relating to procurement of logistics services from Andy Forwarding Services Ltd which was associated with one of the Directors, and PWC did so between September and December 2011. The CMA investigation, through a South African Firm, **Webber Wenzel ('Webber')** was commissioned in November 2011 to cover the financial operations of CMCH and its subsidiaries, and in the process also review the report filed by PWC. They submitted their report **('the Webber report')** to CMA on 31st January 2012.

5. The Webber report was damning.As relates to Kiereini, it listed several allegations against him, among them:-

> (i) Operation of a scheme where manufacturers (Land Rover Jaguar and Nissan UD) over-invoiced CMCH Motors by 2% and 1.5% respectively contrary to fiduciary duty of a director under Article 3.1.1 of Capital Markets Guidelines on Corporate Governance Practices by Public Listed Company in Kenya;
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> (ii) Establishment of a feeder bank account namely Corival (1996) in Jersey. The account was funded by the over invoiced amount charged by the manufacturers contrary to fiduciary duty of a director under article 3.1.1 of Capital Markets Guidelines on Corporate Governance Practices by Public Listed Company in Kenya;
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> (iii) Establishment of a Fair Valley Trust which received funds from the Corival Bank account. The funds were later invested for personal benefit and the benefit of a select group of employees contrary to fiduciary duty of a

director under Article 3.1.1 of Capital Markets Guidelines on Corporate Governance Practices by Public Listed Company in Kenya;

(iv) Use of the Corival (1996) funds during the periods of 1999-2000 as a vehicle to lend money at interest at CMC Motors contrary to fiduciary duty of a director under Article 3.1.1 of Capital Markets Guidelines on Corporate Governance Practices by Public Company in Kenya;

(v) Together with the other members of the board adopting a risky business model for the Company of borrowing to lend and failed to implement an "asset/liability" with the activity of borrowing to lend contrary to Article 3.1.1 (iii) of the Capital Markets guidelines on Corporate Governance Practices by Public Listed Company in Kenya;

(vi) Together with the other members of the board he appointed a company secretary who was not qualified and provided false information to the public on the status of the company secretary contrary to regulation F.06 of the 5th schedule of the Capital Markets (Securities) (Public offers, Listing and Disclosure) Regulations 2002 and section 34(1)(b) of the Capital Market Act;

(vii) As a member of the board he failed to exercise effective oversight over the management of the company as evidenced by weak internal audit function and weak internal control on the operations of the company contrary to Article 3.1.1(ii) and (v) of the Capital Markets Guidelines on Corporate Governance Practices by Public Listed Company in Kenya;

(viii)As a member of the board he failed to disclose the extent of the company's compliance with the Corporate Governance Guidelines issued under the Capital Markets Act and further failed to explain areas of non-compliance in the annual report of the company contrary to regulation F.01 and F.08 of the Capital Markets (Securities) (Public officers, listing and Disclose) Regulations 2002;

(ix) As a member of the board he signed off the accounts which were not prepared in compliance with Internal Financial Reporting Standards in the year 2009 and 2010 contrary to article 2.4.1 of the CMA guidelines on Corporate Governance.

6. CMA then, in March 2012, proceeded to appoint an ad hoc Committee (**the committee**) of five persons and notified Kiereini about that appointment and the specific allegations made against him in the Webber report. It asked Kiereini to appear before the Committee between 4th and 5th April 2012 in respect of those allegations. Kiereini, however, through his lawyer, protested the appearance before the committee, both by letter and in submissions made before the committee on 17th April 2012. The lawyer referred to the existence of other civil suits before courts and questioned the effect of this on Kiereini; sought answers to the nature, scope and effect of the mandate, procedure and objective of the hearing; questioned CMA's involvement in other litigation before

courts; and protested Kiereini's continued harassment even when he had already appeared before other investigative bodies (PWC and Webber) to give evidence.

7. On the protest relating to the nature, scope and effect of the hearings of the Committee, Kiereini asserted that there was either total silence or lack of clarity from the notices served by CMA on the following issues:-

> (a) The mandate of the Committee and the general or special functions for which it has been appointed.
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> (b) The terms of reference of the Committee.
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> (c) The procedure to be adopted during the hearings.
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> (d) The capacity in which he would appear before the Committee, that is, whether as a party under investigation or inquiry, whether as a witness or any other capacity.
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> (e) Whether he would be entitled to present any evidence and/or call witnesses in support of his position.
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> (f) The ultimate objective intended to be achieved or pursued after the business of the Committee had been concluded.

8. In its response on those issues, the committee gave various clarifications, guidance and directions. It clarified its terms of reference as follows:-

> "1. To consider the Webber Wenzel investigation findings and determine the validity of the allegations against Directors of CMC Holdings Ltd.
>
> 2. Give a fair and reasonable opportunity for the past and current Directors whether executive or not of CMC Holdings and any other person the Committee may deem necessary to be heard and defend themselves on the allegations attributed to them.
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> 3. The Committee shall give recommendations to the Board of the Authority on actions to be taken, if any, against the past or current Directors and Management of CMC Holdings Ltd.
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> 4. The Committee may give recommendations based on the lessons learnt from the hearings of CMC Holdings on ways to improve the capital markets.
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> 5. The Committee's recommendations shall be considered by the Board of the Authority for enforcement or other appropriate action."

9. On other issues raised on behalf of Kiereini, the committee clarified thus:

> **(i) Composition and Procedure**:- Two Board members of CMA and three independent members. The procedure was in written form and was given to Kiereini
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> **(ii) Independence**:- CMA and the committee, in exercise of statutory functions can carry out investigatory as well as enforcement actions. "No

regulator is expected to be independent in the sense that it cannot investigate and "prosecute" and "take enforcement action". In other words, regulators by their very function are in slang investigator, prosecutor, judge and jury".

(iii)Concurrent court litigation and committee investigation: - There would be no effect. "Our proceedings can go on in parallel with those court cases for the reasons that we are performing our statutory function, there is no court order barring the Committee from proceeding and the subject matter of the cases in court as we understand it is the PWC report whereas these Committee's proceedings are to test the validity of the Webber report."

(iv) Capacity in which Kiereini will appear:- This is not a criminal or civil proceeding. "There is no accused person, there is no defendant, there is no prosecutor, there is no plaintiff, our proceedings do not take the form of case for the prosecution or the plaintiff, case for the defence and so on and so forth. There is no examination-in-chief, there is no cross-examination, there is no re- examination. Mr. Kiereini like other current or former Directors is invited to appear before the Committee in his capacity as such, a former Director, Chairman of the CMC to be heard on the findings of the Webber report and the allegations attributed to him in that report, pursuant to the provisions of Section 26 of the Act. The objective is to afford him his right to natural justice."

(v) Double jeopardy: None. "As he furnished information to the Webber Consultants who then compiled their report and this Committee's task is to test the validity of that report. Mr. Kiereini may very well be able to show that the report is not well founded or what he told them is not what they have indicated in their report. The ultimate objective of this Committee is to make recommendations with respect to the persons affected for consideration by the Capital Markets Authority Board. If any Director for any reason does not want to take advantage of the opportunity afforded him, the Committee will have to make its recommendations based on the material that will have been placed before it."

10. Despite those clarifications, Kiereini declined the invitation to appear before the committee, stating thus:

"[Our] client is of the view that his participation in the proceedings of the Committee would occasion grave Prejudice to him and to Court proceedings which are either pending or are likely to be instituted. We therefore have instructions to notify you, as we hereby do, that our client will not be appearing before the Committee and will henceforth not participate in its proceedings in any way."

11. The committee was not deterred by that rebuff. It served hearing notice on Kiereini to appear before it and call witnesses on 30th April 2012. When he made no appearance, the committee proceeded to admit evidence which it evaluated and submitted a report to CMA.

12. On 3rd August 2012, CMA issued its **"Report and Resolutions on the Investigations into CMC Holdings Limited"**. On the basis of the report CMA commenced enforcement action after informing Kiereini of the outcome of the investigations on the allegations made against him as follows:-

a. On the allegation that he operated offshore arrangements contrary to fiduciary duties of a director; the Authority established that he breached his fiduciary duties as a director of the Company based on the following reasons:

i. That in addition to being aware of the existence of the offshore arrangements he was also intimately involved in the operations of those offshore arrangements and that he benefited from the offshore arrangements to the detriment of the Company and its shareholders;

ii. That although the offshore trust had been established for the benefit of the past, current and future members of staff of the company, he curiously benefited there from despite having been a member of staff of the Company; and

iii. That he was a signatory to some of the correspondence touching on the operation of those offshore arrangements.

b. On the allegation that he together with the other members of the Board of the Company adopted a risky business model for the Company of borrowing to lend and failed to implement an "asset/liability management process to monitor, manage and hedge all such risks associated with the activity of borrowing to lend;

the Authority established that he breached his fiduciary duties as a director of the company based on the following reasons:

i. That the company's external auditors in the year 2006 had clearly brought to the attention of the Board of the Company the risky nature of the business of the company.

ii. That there was no evidence that the Board of the Company was monitoring the implementation of the business model through hedging of the risk associated with the model.

iii. That no evidence was provided to demonstrate that the Board had taken any action over the management for failure to implement policies that it had established despite some of the director's incessant concerns on how the Company was run; and

iv. That the Company was borrowing money from financial institutions to purchase vehicles from overseas manufacturers and thereafter use the borrowed funds to fund credit extension to drive sales volume. This was noted to have been done without the existence

of the necessary infrastructure to support the business model thereby exposing the Company to great risk and impacted negatively on the profitability the company.

c. On the allegation that a member of the Board of the Company failed to exercise effective oversight over the management of the Company as evidenced by a weak internal audit function and weak internal controls in the operations of the Company;the Authority established that he breached his fiduciary duties as a director of the Company based on the reasons that the Board of the Company established that there were grave weaknesses in the internal controls of the Company under Mr. Martin Forster's watch who had commissioned an internal audit assessment survey by Deloitte and whose recommendations were never implemented. The Board of the Company thus failed in its duty to monitor the implementation by the Management of the Company of the recommendations made.

d. On the allegation that he together with the other members of the Board of the Company appointed a Company Secretary who was not qualified and provided false information to the public on the status of the Company Secretary,

this allegation was not established since there was no proof of appointment of an unqualified Company Secretary.

e. On the allegation that as a Member of the Board he failed to disclose the extent of the Company's compliance with the guidelines on Corporate Governance Practices by Public Listed Companies in Kenya and further failed to explain areas of non-compliance in the annual report of the Company;

the Authority established that although he was not an expert, that did not exonerate him from such responsibility and that as the Chairman of the Company (by then), he should have taken responsibility to ensure compliance.

f. On the allegation that as a Member of the Board of the Company he signed off the accounts which were not prepared in compliance with IFRS in the year 2009 and 2010.

the authority found the allegation as established although it took cognizance of the fact those non executive directors, save for accountants, may not be knowledgeable in IFRS. That however did not exonerate the petitioner from such a responsibility, concluded the Report.

13. CMA further informed Kiereini about the nature of enforcement action flowing from the determinations made by the committee and accepted by the Board. The following sanctions and penalties were imposed under Sections 11(3)(cc), 25A and 34A of the Act:-

"i. disqualifies you with immediate effect from appointment as a director of any listed company or licensed or approved person, including a securities exchange in the capital markets in Kenya pursuant to Section 25A (1) (c)(i) of the Act.

ii. reprimands you for signing off the accounts for the year ended September 30, 2009 and 2010 not prepared in compliance with IFRS and for non-disclosure on the extent of the Company's compliance with the Guidelines on Corporate Governance Practices by Public Listed in Kenya.

In addition to the above the Authority shall:

i. Recover from you an amount equivalent to two times the amount of the benefit accruing to you from the offshore arrangements pursuant to Section 25A(1)(c)(ii) of the Act upon the quantum of the wrongful amounts being ascertained by the Company or such other independent investigative body; and

ii. Require you to restitute the Company the amount of the benefit accruing to you from the offshore arrangements once the quantum is ascertained by the Company or such other investigative body pursuant to Section 254 (2) and (3) of the Act."

14.CMA also proceeded to inform other relevant organs and parties of the enforcement action taken. They included the Registrar of Companies, the Nairobi Securities Exchange, the Central Depository & Settlement Corporation Limited, CMC Holdings Limited, CFC Insurance Holdings Limited and Unga Group Limited.

That is the action which precipitated the constitutional petition filed by Kiereini before the High court on 27th August 2012.

Kiereini's Petition.

15. Kiereini was aggrieved that CMA had violated several of his fundamental rights and freedoms under the Constitution. They included the violation of principles of governance under Article 10; his right to dignity under Article 28, as he would no longer associate with his peers and business associates; the right to freedom of security under Article 29(d) and (f); the right to privacy under Article 31(c); his right to access to information protected by Article 35; his right to own property enshrined in Article 40; and the right to equal protection and benefit of the law contrary to Article 27. Indeed, he asserted that the entire proceedings were carried out in breach of Article 47(1) which protects his right to fair administrative action and Article 50 which guarantees every person the right to a fair hearing.

16. In support of those claims, he attacked the PWC and the Webber reports which CMA, through the committee, relied on to make its resolutions and recommendations stating that the reports were not only incomplete and unauthenticated but were also subject of court cases. His evidence, which he gave before those investigative bodies was also ignored. As for the Committee itself, Kiereini asserted that it was not impartial as it

included Board members of CMA; that it omitted crucial evidence he had tendered before the other investigators; that it proceeded to deal with matters that were already before the court; and that it never framed any charges which he would answer before he was condemned in enforcement action.

17. In the end he prayed for the following orders:

(i). A declaration that the 1st Respondent has breached the Petitioner's Fundamental Rights as enshrined in Articles 10, 10(2) B, 10(2)(C), 28, 29 , 29 (D), 29 (F), 31, 31 (C) , 35, 35 (1) (B), 47, 47 (1), 50, 50(1), 50 (2) (A), 50 (2) (K), 50 (2) (L), 27, 27 (1) of the Constitution of the Republic of Kenya.

(ii). A declaration that the 1st Respondent's breach of the Petitioner's Fundamental Rights as above has caused the Petitioner damage to his reputation and good name.

(iii). A declaration that to the extent that the same concerns the Petitioner, the Report and Resolutions by the Board of Directors of the 1st Respondent dated 3rd August 2012 regarding the investigation into the affairs of CMC Holdings Limited is unlawful and unconstitutional.

(iv). A declaration that to the extent that the same concerns the Petitioner, the Report and Resolutions by the Board of Directors of the 1stRespondent dated 3rd August 2012 regarding the investigation into the affairs of CMC Holdings Limited was:

a. In breach of the Petitioner's legitimate expectations.

b. Disregarded material and pertinent facts relating to the affairs of CMC Holdings Limited.

c. Unfair.

d. Unprocedural.

e. Unreasonable and Irrational.

f. In Breach of the Wednesbury Principles.

(v). A Judicial Review Order of Certiorari to bring into this Honourable Court and quash the following resolutions contained in the Report and Resolutions of the 1st Respondent dated 3rd August 2012 regarding the investigation into the affairs of CMC Holdings Limited

(vi). A Judicial Review Order of Prohibition restraining the 1st Respondent acting by itself, its employees and or agents or through such person as may act on its authority from implementing any and all the determinations and/or resolutions contained in the Report and Resolutions by the Board of Directors of the 1st Respondent dated 3rd August 2012 Regarding the investigation into the affairs of CMC Holdings Limited touching on or affecting the Petitioner in any manner whatsoever.

(vii). An order of compensation directed at the 1st Respondent compelling it to compensate the Petitioner for the damage caused to him by its actions and the quantum of such compensation to be determined by this Honourable Court.

CMA's response to the Petition.

18. CMA took the position that it never violated any rights, Constitutional or otherwise, due to Kiereini. As a regulator, it had the statutory duty to ensure the integrity of the capital markets in Kenya and to maintain corporate governance standards. It therefore followed the law in carrying out investigations and taking the enforcement measures it did. The only requirement for giving Kiereini a further opportunity to be heard was in the process of ascertainment of the quantum of loss and restitution under **Section 25A(2)** and **(3)** of the Act. CMA further stated that Kiereini was given the opportunity by the committee to be heard on the specific allegations made against him in a conscious effort to comply with **Article 47** of the **Constitution**. All the committee did after the hearing was to make recommendations which CMA effected in one continuous decision-making process of the Authority.

19. For his part, the Attorney General supported CMA and further contended that the petition was an abuse of court process since there was a proper channel for appealing any decision of the Authority as set out in Capital Markets Tribunal established under the Act.

Decision of the High Court.

20. After considering the pleadings, the affidavits in support, the submissions of counsel and the relevant law, the trial court surmised that there was only one overarching issue, the decision of which would address all the other minor issues raised by Kiereini. The issue was whether CMA breached Kiereini's fundamental rights and freedoms in the discharge of its mandate. The court further narrowed down the overarching issue and restricted it to Article 47 of the **Constitution** as applied to the investigation and enforcement process, stating:-

> **"...the issue at the heart of this case is the investigation and enforcement process which led to sanctions being imposed on the petitioner. The violation of several rights and fundamental freedoms has been prayed in aid of the petition but I think that all these rights are implicated in the process of investigation and enforcement and whether or not they have been violated depends on whether or not the process of investigation and enforcement by CMA was, "expeditious, efficient, lawful, reasonable and procedurally fair." In my view, this case falls squarely within the purview of Article 47(1) of the Constitution."**

21. The trial court examined the jurisdictional issue in limine and determined that it was only the High Court which was vested with jurisdiction by **Article 165(3)** of the **Constitution** "to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened" and "the question whether

anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution". The contention by the Attorney General on the competence of the Capital Markets Tribunal was therefore misplaced.

22. The court also found and held;

- That Articles **47** and **50** of the Constitution protected separate and distinct rights which should not be conflated: while **Article 47** applies to administrative action generally, **Article 50(1)** applies to a court, impartial tribunal or a body established to resolve a dispute. The invocation of **Article 50(2)** in particular which relates to criminal cases, as well as the argument made by Kiereini that he was exposed to double jeopardy was therefore misplaced.

- The fact that there were previous investigations did not preclude CMA from appointing the Committee to test the veracity of the issues emanating from the forensic report or affording the persons mentioned in the report an opportunity to respond to the allegations.

- **The investigation by the CMA did not constitute harassment of Kiereini as it was carrying out its statutory mandate.**

- **The existence** of civil suits relating to the very subject of the investigation and affecting him did not disentitle CMA from exercising its statutory mandate.

- The conclusion to be drawn from **Section 11** of **the Act** is that CMA is established as the chief regulator of the capital markets including protecting investor interests in those markets. It is in public interest and in line with the principles of good governance that the capital markets be properly regulated.

- It is not in doubt that CMA was within its powers in carrying out the investigation and enforcement action against the petitioner.

- **Section 11A** and **14 of the Act** permit **CMA to delegate its functions to various persons including a Committee of the Board and, therefore**, CMA was within its powers in appointing an ad hoc Committee to consider investigations carried on its behalf.

- As for the right to a fair hearing by an independent and impartial tribunal, the Committee was composed of two members of CMA Board and three independent members. The Authority and the Committee were exercising statutory functions conferred by the Capital Markets Authority Act, and no regulator is expected to be independent in the sense that it cannot investigate and "prosecute" and "take enforcement action". The committee process was in line with CMA's mandate of regulating the capital markets industry.

- An appreciation of the mandate of the Committee was that its function was investigatory.

- It is clear from the mandate of the Committee that it was not entitled to take enforcement action but rather make recommendation to the Board of CMA. It is upon consideration of such recommendation that the CMA Board would then take and indeed took enforcement action.

- Kiereini was given an opportunity to be heard during the investigation but he waived this right by his advocate's letter of 27th April 2012,

- The waiver applied only to the proceedings before the Committee and not the entire process. Kiereini could not have waived his right to appear or make representations before the Board when such an opportunity had not been provided.

- Kiereini was entitled to be heard before enforcement action was taken against him by the Board.

- What the Committee was called upon to do was to, **"consider the Webber Wentzel investigation findings and determine the validity of the allegations against directors of CMC Holdings Ltd."** At no time was the Committee required to take enforcement action on behalf of the Board.

- The Board did not delegate its enforcement authority to the Committee, that power to take enforcement action against Kiereini, in the circumstances, could only be exercised by the Board.

- Although the process of investigation and imposition of sanctions was a continuous process, it is clear that the two stages were separated by the mandate imposed on the Committee and the ultimate authority of the Board to impose sanctions for infractions of the **Act.**

- The fact that the Committee and the Board were entitled to keep material reflecting opinions, and deliberations confidential and privileged under **section 13** of **the Act** did not discharge the obligation to the petitioner to inform him of the charges before taking enforcement action against him.

- Once the Committee made the recommendation for enforcement action against the petitioner, the petitioner was entitled to be informed of the formal findings against him or the charges which he was to face and given adequate opportunity to make representations on those findings before enforcement action would be preferred.

- CMA breached the petitioner's right to fair administrative action by failing to accord him a fair opportunity to respond to the findings made by the Committee before taking enforcement action and before the same were made public.

- There was no proper notice for purposes of enforcement action. The petitioner was denied an opportunity to rebut the evidence before the disciplinary measures were affected and publicised.

- It is no defence that the petitioner knew of the allegations against him or that an opportunity to be heard had been presented to the petitioner earlier on before the Committee with a mandate to carry out investigations before a determination on the sanctions was ultimately made by the Board. The mandate of Committee did not include taking enforcement action.

- Whether or not the adverse allegations against the petitioner were in fact true or fictitious is irrelevant. It is also no defence that there are no statutory provisions that expressly require an opportunity be given to an affected party to respond before adverse publications following an inquiry are made against them. All this does nothing to exonerate the CMA of its constitutional duty to accord the petitioner a procedurally fair process even before drawing the conclusions on matters subject to further investigation.

23. In summary, the trial court concluded as follows:-

> **"a. That the CMA was in terms of sections 11A and 14 of the Capital Markets Act entitled to delegate its authority to an ad hoc Committee and the Committee constituted in this case was properly constituted and had the capacity and authority to carry out its mandate.**

b. The proceedings before the Committee did not violate the principle against double jeopardy as the process was not a criminal trial and the petitioner was not the "accused" hence Article 50 of the Constitution could not apply in the circumstances.

c. Although the petitioner was afforded a fair opportunity to be heard by the ad hoc Committee and that opportunity waived by the petitioner in his advocate's letter dated 27th April 2012, the waiver did not apply to proceedings before the Board of the CMA which was entitled to take enforcement action against the petitioner.

d. The mandate of the Committee was to make recommendation to the Board which would then take enforcement action. The petitioner was not given an opportunity to rebut or respond to the findings of the Committee which formed the basis of the Board taking enforcement action against the petitioner.

e. The CMA was in breach of the petitioner's right to fair administrative action under Article 47 of the Constitution… As such, the decision reached by CMA in breach of the requirement of the rules of natural justice must be invalidated.

f. The consequence of my findings is that the decision of the CMA taking enforcement action against the petitioner must be set aside. Since this decision is limited to an examination of the process upon which the decision was reached, it is unnecessary to examine the substantive findings of the PWC Report and the Webber Report including whether in fact the petitioner was exonerated. The substantive aspect of the reports and the allegations against the petitioner are matters within the statutory mandate of the CMA to deal with.

g. For the avoidance of doubt, the Committee's findings are not set aside as the process was investigatory and the petitioner waived his right to appear before it. The Board of CMA shall be at liberty to take action against the petitioner upon giving him reasonable opportunity to be heard on the findings of the Committee and to defend himself on the basis of any charges or allegations that may lead to enforcement action being taken against him."

24. With that, a declaration was issued that the petitioner's rights under **Article 47(1)** of the Constitution were violated by the CMA when it took enforcement action against the petitioner in the letter dated 3rd August 2012. The Report and Resolutions by CMA dated 3rd August 2012 regarding the investigation into the affairs of CMC Holdings Limited in as far as they relate to Kiereini, including the enforcement action taken thereon and more particularly set out in the letter dated 3rd August 2012 issued by the CMA, were quashed.

The Appeal.

25.Kiereini did not challenge any of the findings of the trial court. CMA too did not challenge most of them. Its memorandum of appeal contains four grounds and nineteen sub-grounds which appear prolix and argumentative. That would be contrary to Rule 86(1) of the Court of Appeal Rules, 2010. Be that as it may, the appeal is essentially, as stated by CMA:

"..against that part of the above-named decision that decided, whether directly or implicitly, that the CMA was in breach of the petitioner's right to fair administrative action under **Article 47(1) of the Constitution**, by reason that:-

1.1.Mr Kiereini's waiver of the right to be heard only applied to the proceedings before the committee and not the entire process;

1.2. Once the Committee made recommendations for enforcement action against Mr. Kiereini, he was entitled to be informed of the formal findings against him, and given adequate opportunity to appear or make representations to the Board before enforcement action was taken against him by the Board;

1.3.The Petitioner could not have waived his right to appear or make representations before the Board when such an opportunity had not been furnished and therefore, the CMA breached Mr. Kiereini's right to a fair administrative action by failing to accord him a fair opportunity to respond to the findings of the Committee before the Board took enforcement action;

1.4. The CMA was in breach of the petitioner's right to fair administrative action under Article 47(1) of the Constitution, by reason that there was no proper notice for purposes of enforcement action."

26. The narrative that follows the above main ground may be summarized, as follows:-

a) The trial court's findings that Kiereini's waiver of the right to be heard was restricted to the proceedings before the committee and that CMA did not issue any notice before enforcement action were not based on the pleadings or submissions of counsel.

b) Having found that the committee was properly exercising delegated authority to hear Kiereini under **Section 26(2)** of the Act, and did in fact accord him hearing rights, the court failed to appreciate that there was no requirement for a further hearing before the CMA Board. At all events, the waiver by Kiereini was absolute for purposes of **Article 47** of the Constitution and remained so unless he requested a hearing before enforcement, which he did not.

c) Kiereini's challenge based on the right to fair administrative action under **Article 47** was not about denial of a hearing before the committee or the Board, but rather that he was being forced to self-incriminate himself and that CMA was trying to recover from him an undetermined sum of money without carrying out investigations, a futuristic situation covered under **Section 25A (3)** of the Act.

d) There was no statutory requirement for giving hearing notice before enforcement action, or the intention by CMA to impose sanctions. The only duty is to give notice of the actual decision and the reasons for it. Under **Section 35** of the Act, a dissatisfied party may then appeal thereafter.

e)The court exercised its judicial mandate erroneously or disproportionately by ignoring the following relevant factors:-

- automatically quashing Kiereini's disqualification would oust the original jurisdiction of the Appeal Tribunal;
- its own previous interpretation of the right to be heard before the CMA Board;
- the finding that the principle of double jeopardy was not violated;
- the finding that Kiereini was given a lawful opportunity for fair hearing which he declined;
- the unqualified waiver of the right to be heard was absolute;
- the findings of the committee which the court did not set aside, and which require decisive and deterrent action, like disqualification, in order to safeguard the integrity of the capital markets;
- Kiereini offered no new matter or evidence which could materially cause any change of the Board's decision to disqualify him on grounds of corporate impropriety;
- the greater constitutional and interest rights of the investing public, the integrity of capital markets players, and the statutory duties of CMA;
- A judge's modifying interpretation can only apply prospectively, not retrospectively, to affect a disqualification.

Submissions of counsel.

27. There are extensive submissions made by learned counsel on all sides and we can only but extract the salient portions thereof for purposes of this judgment. Counsel for CMA summarized and made submissions on five grounds. The first of those grounds was summarized as follows:-

> **"1. Whether the issue of Mr. Kiereini's 'Limited waiver or lack of notice were pleaded issues, and if not, whether the Court could rest its decision on issues raised suo motu without giving the CMA a meaningful and substantive opportunity to be heard on this issue".**

28. Counsel submitted that it was necessary to understand the nature of the complaint submitted by Kiereini to court as relates to Article 47. In his view, the challenge on CMA's decision and sanctions was based on 10 specific grounds enumerated in the Petition, and basically centered on the allegations that the committee was improperly constituted and could not carry out a fair hearing; the hearing was geared towards having Kiereini self-incriminate himself, thus violating his rights; and the order for recovery of undetermined sums of money from Kiereini before carrying out further investigations. The Petition was never about allegations that:

"(a) he had been denied a hearing before the ad hoc committee of the Board; or

(b) his waiver of the right to be heard only applied to the proceedings before the Committee and not the entire process, such that he had a legitimate or statutory expectation of being accorded a 2nd or further hearing before the full board of the CMA on the findings of the ad hoc committee; or

(c) his constitutional rights had been violated as there was a lack of proper notice for purposes of CMA's enforcement action."

The court, therefore, erred in considering issues which never arose in pleadings, the evidence or in submissions of counsel.

29. In addition, counsel contended, pleadings in constitutional cases must be specific so that the responding party knows what to respond to. If the court raises issues it considers relevant suo motu, it runs the danger of appearing partisan in the litigation contrary to requirements of judicial passivism. The right thing to have done, but the trial court never did, was to give sufficient opportunity to CMA to be heard on the unpleaded issue of limited waiver of the right to be heard. There was otherwise no serious contention between the parties on the absolute nature of Kiereini's waiver of the right to be heard on grounds of self- incrimination. Simply put, the court lacked jurisdiction to adjudicate on the issue or alternatively, it was an unjustifiable abuse of judicial discretion.

30. In response to those submissions, learned counsel for Kiereini submitted that the pith and substance of the petition before the High Court was the denial by CMA of Kiereini's God given right to a fair hearing before he was condemned and enforcement action taken against him. He complained that his fundamental and constitutional rights had been breached and he specified and elaborated the complaints not only in various paragraphs of the petition but also in three affidavits and two sets of submissions. The denial of those rights covered the entire period from inception to the purported order for restitution. CMA countered the complaints about fair administrative action and fair hearing by contending that it had complied with the Constitution. It submitted at length on due process and enforcement action contending that Kiereini had waived his right to make any representations before the committee, hence no denial of his rights. There was thus a joinder of issue upon which the court could, as it did, formulate the issue for determination as the mandate of the committee and its relation to CMA Board which took enforcement action.

31. Furthermore, counsel submitted, it was CMA which contrived a laborious, convoluted and circuitous process for determining the culpability of Kiereini through several investigative media including PWC, Webber and the committee, but it was not up to CMA to decide at which stages the affected party would be heard and which ones to disregard. It was a constitutional requirement that he should be heard at every stage in that complex process, and certainly at the most crucial one when he was being 'convicted' or 'sentenced'. The issue of denial of the right to a fair hearing and to fair administrative action throughout the process was clearly pleaded and canvassed before the court and the

allegation that it was raised by the court suo motu has no basis. If the appellant's counsel needed to address any issue, all he needed to do was to apply to the court for that opportunity but the appellant never did.

32. At all events, counsel concluded, on the authority of **Odd Jobs vs. Mubia [1970] EA 476**, and other cases, the court is entitled to frame the relevant issues for determination based on the evidential material before it. The complaint here was about an entire process and the court was entitled to examine it to see if the same met constitutional and legal thresholds. It would have been absurd for the court to leave out the unconstitutionality of any part of the process despite clear evidence before it. Even on the basis of the legal doctrine of res judicata, exemplified in **explanation 4** of **Section 7** of the **Civil Procedure Act**, the court is entitled to consider not just the issues directly before it but also those reasonably incidental to the matter at hand. And finally, as regards constitutional issues, especially the Bill of Rights and Fundamental rights, counsel submitted that the court cannot be seen to split hairs and rely on technicalities but is required to interpret it in a purposive, broad, dynamic, generous and liberal manner.

33. The Attorney General did not make specific submissions on the first ground of appeal

34. Grounds 2 and 3 may be taken together and were framed by counsel for CMA as follows:

> "2. For purposes of **Article 47(1)** of the Constitution: -
>
> (a) What was the nature and effect of Mr. Kiereini's waiver of the opportunity to be heard on grounds of fear of self-incrimination, on a proper appreciation of the law and evidence on record?
>
> (b) Whether there was lack of a default notice in CMA's show cause letters stating the consequences of non-attendance before the ad hoc committee, and if not, whether on a proper appreciation of the clarifying evidence given to Mr. Kiereini, the process was in fact incompatible with ***Article 47 (1)*** of the Constitution,
>
> 3. Whether there was, in fact, a right for Mr. Kiereini to be heard on the findings of the ad hoc committee prior to the final determination by the CMA Board and subsequent enforcement action, in light of the exclusive statutory appeal procedure under Sections 35 and 35A of the Act and the broad powers conferred upon the Capital Markets appeals Tribunal."

35. The submission on these grounds is centered on the waiver of the right to be heard which Kiereini gave and on the basis of which the court found Kiereini was given an opportunity to be heard and undoubtedly waived his right. That waiver, according to counsel, was absolute because Kiereini was expressly informed in letters and in a formal Ruling when he sought clarification from the committee, about the dates of the hearing, the consequence of non-attendance, the nature, scope and the effect of the hearings. The relevant statutory provisions relied on for the hearings were cited as **Sections 25A** and ***26(2)*** of the Act and the Rules of procedure to be followed were given to Kiereini before the hearings started. Kiereini was therefore aware throughout, that the

hearings were carried out in contemplation of enforcement action, if warranted. He waived his rights despite this knowledge and CMA could not compel him to appear and expose himself to cross-examination or self incrimination if he did not choose to. At no time, according to counsel, did Kiereini allude to a statutory or legitimate expectation of a second hearing before the CMA Board. He never suggested that his waiver was limited or was qualified. Other than the hearing notice contemplated under **Section 25A** of the **Act**, the waiver was absolute in nature.

36. Counsel further submitted that the trial court held that the committee was properly constituted and had the capacity to carry out its mandate. By dint of **Sections 11A** and **14** of the Act it was an extension of the CMA Board exercising delegated authority and therefore it was in fact and in law carrying out the functions of the Board in hearing the parties before enforcement action is taken. The waiver of the right to be heard before the committee would thus, logically and legally, be a waiver to be heard before the Board. It was therefore erroneous for the court to turn around, as it did, and hold that Kiereini was not aware or on notice that results of the committee hearings would lead to sanctions or that his waiver did not apply to the entire proceedings. In doing this the trial judge ignored the substance of the hearing notice and the clarifications given which satisfied the requirements of **Article 47(1)** of the **Constitution.**

37. In counsel's view, there were deliberate and conscious motives by Kiereini to manipulate the administrative process and to avoid appearance before the committee. He was indifferent to the consequences and wanted to avoid being subjected to scrutiny on whatever representations he would make before the committee of the Board. The Judge was therefore in error when he gave premium to Kiereini's game of judicial lottery with his constitutional rights -- waiving them when they are offered and crying foul to the court on grounds arising from his own waiver.

38. As for the trial court's view that Kiereini ought to have been given the opportunity to rebut the findings of the board before enforcement, counsel submitted, firstly, that the only constitutional and statutory duty imposed on CMA was to give notice of its actual decision and the reasons behind it and not notice of its intention to impose sanctions. There was no statutory provision for bifurcation of the process. Secondly, in the absence of a statutory requirement, the court should have respected the discretion given to CMA by Parliament to decide the most appropriate actions in the exercise of its regulatory mandate. It was not open to the court to substitute its choice of the manner of exercise of discretion for that of CMA. Thirdly, a bifurcation of the process would have resulted in further unjustifiable and unnecessary delay, considering that Kiereini had the opportunity to appeal to the **Capital Markets Tribunal** which under **Section 35** of the **Act** had the power to call for further evidence, and to set aside, confirm or vary the decision of the CMA Board or its committees. There was also further room for appeal to the High court on points of law.

39. The Attorney General supported those submissions by submitting, firstly, on the issue of notice, that the letters served on Kiereini by CMA after appointment of the committee cited **Sections 25A** and **26(2)** of the Act and the committee made further oral and written clarifications on the nature, scope and effect of its hearings. As such, Kiereini

was fully aware that the committee, which was an extension of the Board, was hearing the matter in contemplation of enforcement action and no further notice was necessary save on the restitution issue as required under **Section 25A** of the **Act.**

40. Secondly, on whether the expectation of a second hearing before the Board was legitimate, he submitted that it was not because, in the first place, Kiereini himself never asserted one and secondly, the only statutory requirement for notice to show cause is under Section 25A of the Act. To hold otherwise would be to encourage a multiplicity of hearings which would impede the regulatory mandate of CMA. He cited the case of **Dry Associates Limited vs. Capital Markets Authority [2012] eKLR 180** where the same Judge had stated in a different case involving CMA and "fairness" in the exercise of its functions that:

> *"fairness does not necessarily require a plurality of hearings and representations and counter representations. If there were too much elaboration of procedural safeguards nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be easily sacrificed."*

41. In response to those submissions, Kierein's counsel contended that there was admission by CMA that it did not give notice to Kiereini to be heard before enforcement action was taken against him. The only issue for determination is whether this was necessary. In counsel's view, the right to a fair hearing was one of those that the Constitution guards so jealously that under **Article 25** it may not be limited. Fair trial, in counsel's submission, entails fair hearing, fair administrative action and evidence obtained lawfully. Anything done contrary to these tenets would be struck out and cannot be saved even by public policy considerations. So too the report arrived at by CMA through the contrived process of several investigative bodies required the opportunity for Kiereini to be heard at each stage. In support of those propositions counsel cited **Article 259(1)** of the Constitution which provides for the manner of interpretation of the constitution 'to promote its purpose, values and principles, advance the rule of law and the human rights and fundamental freedoms in the Bill of Rights, permit development of the law and contribute to good governance'.

Also under **Article 20(3)**, the court shall adopt the interpretation that favors the enforcement of a right or fundamental freedom.

42. Citing the case **of Kenya Anti corruption Commission vs. Lands Limited & Others Misc Appl. 583/2006 (UR)**, counsel submitted that the right to a hearing was a key component of due process and therefore an individual must be informed of the fact that a decision which will have adverse consequences for him may be taken and to notification of possible consequences of the decision. There cannot be an implied waiver of the fundamental right to be heard. It must be express and unequivocal as it was before the committee but not before the CMA Board. If there is any ambiguity as to whether there was a waiver or not, then an implied absence of a waiver should be made.

43. Counsel emphasized that the investigatory and enforcement procedures in this case were designed to be distinct and separate stages. The committee declared that it was merely

investigating and would thereafter make recommendations to the Board. Since there cannot be a conviction on the basis of investigations without a trial, Kiereini was entitled to expect, and legitimately so, that he would be heard by the Board in the ensuing trial or enforcement stage. He would also be entitled to be heard in mitigation before sentence, even in the event of conviction.

44. The final issue was based on **Ground 4** of the memorandum of appeal and was stated and argued in the alternative, thus:

> **"Without prejudice to the above, the learned Judge, in any event, erred in fact and in law, and therefore exercised his judicial mandate erroneously and/ or disproportionately by proceeding to automatically quash the petitioner's disqualification."**

In essence it was argued that, even assuming, arguendo, that notice to Kiereini was necessary before enforcement action was taken and that he legitimately expected a second hearing before the Board, it was not justifiable for the court to quash the final report as well as all the enforcement measures already taken. That is because the enjoyment of the rights of any individual must be balanced against the rights of others. In this case, the court should have applied sound objective analysis of the evidence and legal principles to justify the protection of Kiereini's right to be heard against the collective rights of others to be protected through enforcement action.

45. According to counsel, in that balancing act, the court failed to consider that there was no statutory requirement for notice and there was substantial compliance with **Article 47** of the **Constitution**; that Kiereini did not make any request to be heard before enforcement action after waiving his right to be heard before the committee; that having upheld all affirmative defences to the petition by CMA, the court had no jurisdiction to continue with the rest of the petition as there was an exclusive appellate mechanism under the Act; that the Appeals Tribunal set up under **Section 35A** of the Act ousted the original jurisdiction of the court to quash the disqualification and gave Kiereini a second chance to re-litigate his rights if any had been infringed; that in view of the **Dry Associates case(supra)**, the threshold of a fair judicial process was not guaranteed by a multiplicity of administrative hearings; and finally that the court completely disregarded public interest considerations in the matter.

46. In conclusion, counsel submitted that the petition by Kiereini was in truth a merit appeal against the disqualification by CMA and not a constitutional issue; that the decision of CMA was Wednesbury reasonable and rational in the context of the imperative of enforcing laws and policies that promote a stable, efficient, effective and vibrant capital market for the benefit of the investing public; and that any capital markets regulator, properly directing itself on the law, evidence and facts relating to CMCH, would have taken the same enforcement action as CMA did.

47. The AG, in supporting this ground of appeal, was emphatic that the Capital Markets Tribunal had the jurisdiction to deal with Kiereini's grievances since they were based on a decision of CMA. A constitutional petition cannot be a substitute for exclusive appellate mechanisms set up by Parliament. The AG cited several previous decisions

which, in his submission, supported the view that where there was an alternative remedy, or where Parliament has set up a statutory appellate procedure, it is only in exceptional circumstances that the court would intervene before the procedure is exhausted. The cases include:

(a) **Bernard Samuel Kasinga vs. The Attorney General & 7 Others** (High Court Petition No. 402 of 2012)

(b) **Vania Investment Pool Limited vs. Capital Markets Authority & Others** (High Court Misc. CA No. 139 of 2014)

(c) **Michael Wachira Nderitu vs. Independent Electoral and Boundaries Commission & 2 Others** [2013] eKLR.

(d) **Republic vs. National Environmental Management**

Authority [2011] eKLR

(e) **Rich Productions Limited vs. Kenya Pipeline Company & Another** [2014] eKLR at page 14 thereof where the court stated that: -

> "The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects which I need not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not." (Emphasis added).

(f) **Republic v Ministry of Interior and Coordination of National Government & Another Ex-Parte ZTE Corporation & Another** [2014] EKLR.

48. Moreover, he submitted, **Article 159 (2) (c)** of the Constitution now provides that the courts shall promote alternative forms of dispute resolution. It is only by doing so that Tribunals established under various legislations like the Capital Markets Tribunal would be capable of discharging their functions as they also have persons with the relevant expertise to deal with the issues raised. Above all, this would be a progressive way of decongesting the courts.

49. On the issue of public interest, the AG submitted that there was immense public interest involved in the matter and particularly the paramount consideration of the role played by CMA in maintaining market integrity, investor confidence and protecting the interests of public investors where acts of gross corporate impropriety are established. A balance must therefore be struck between the rights and privileges of an individual to remain eligible for appointment as a Director and those of the investing public to be protected from corporate misfeasance. In this case, the most appropriate sanction was

disqualification of Kiereini especially when it was established that he was involved in the quasi-criminal activity of making Tax free payments to Directors. **See Kenya National Examinations Council vs. Republic, ex Parte Kemunto Regina Ouru [2010] eKLR and Vania Investment Pool Ltd vs. Capital Markets Authority & Others Hct Misc CA 139 of 2014.**

50. Responding to those submissions, counsel for Kiereini, vehemently defended the jurisdictional position taken by the trial court. He cited **Article 165(3) (a)** and **(b)** as well as **Articles 22** and **23(1)** of the **Constitution** which give firm jurisdictional grounding to the High Court on matters of Constitutional interpretation and implementation to any person who knocks at its doors. He also cited several decided cases which have applied those provisions of the Constitution including: **County Government of Nyeri vs. Cabinet Secretary, Ministry of Education, Science and Technology & Another [2014]eKLR; Joseph Mwenda Mbuko vs. Provincial Police Officer Central Police & 2 Others [2013]eKLR; Samura Engineering &10 Others vs Kenya Revenue Authority [2012]eKLR 220;**

51. In counsel's view, those authorities support the proposition that **Articles 165(3)(a)** and **(b)** as well as **23(1)** of the **Constitution**, irrespective of any other provision of the constitution or any other written law, confer on the High Court the jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been infringed. That jurisdiction cannot be taken away by any other law, either expressly or by implication. Counsel contended that Kiereini's cause of action lay in the fact that a violation of his rights and freedoms had occurred and this had to be remedied. The court's jurisdiction was therefore exclusive and not dependent on any other remedy which may be available to an aggrieved citizen. In sum, the establishment of the Capital Markets Tribunal under **Section 35 and 35A** of the **Act** did not take away the jurisdiction of the court under the Constitution.

52. As regards the submission that the court ignored its own decision in **the Dry Associates Ltd case (supra)** on multiplicity of hearings,counsel asserted that the case was distinguishable on the facts and pointed out that the trial court in fact made that distinction. The most important finding was that, on the facts, Dry Associates Ltd had been given sufficient opportunity to present its case and that the constitutional requirements had been met, hence the finding in law that **Article 47** had not been breached.

53. Turning to invocation of "public interest" as a relevant consideration, counsel submitted that it cannot be used to as a shield by a party who brazenly violates a citizen's constitutional rights. The relevant public policy was one that requires that all state organs obey the law. They cannot breach the law under the pretext of advancing undefined "public interest". In counsel's view, public interest and individual rights can co-exist and it would not be right to stifle or extinguish individual rights at the alter of enforcing public interest. At any rate, the right to a fair trial, and the right to a fair hearing are so fundamental that they cannot be limited even by public interest. For emphasis, the cases of **Kenafric Industries Ltd vs. The Commissioner of Domestic Taxes & 4 Others [2012] eKLR and Eric Okongo Omongeni vs. IEBC & 2 Others [2013] eKLR** were

cited for the proposition that administrative bodies have a duty to act in accordance with the dictates of **Article 47(1)** which requires fair and efficient administrative action and that they must comply with the rules of natural justice when exercising quasi-judicial functions.

The issues for determination.

54. We stated at the opening paragraph that this appeal will stand or fall on the issue at the centre of the appeal which, in our view, is whether, on the facts, the Committee merely carried out **"investigations"** and left out **"enforcement action"** for the CMA Board or in one seamless process, the committee, as an extension of the Board, covered both the investigation and enforcement. Depending of the finding on those facts, the conclusion will flow in law to determine whether the rights of Kiereini under **Article 47** of the **Constitution** were infringed. The highlighting of that issue does not detract from the primacy of the jurisdictional issue which on its own is also capable of disposing of the appeal. In the periphery are:- the issue of reliance by the trial court on unpleaded matters; the twin issues as to whether Kiereini had a legitimate expectation of a second hearing before the Board and if so, whether he was entitled to notice; and, finally, what is the place, if any, for "public interest" consideration in the matter.

Guiding Principles.

55.As this is a first appeal, we must, as always, reconsider, reassess, reappraise and re-evaluate the factual evidence on record in the manner of a retrial and to reach our own conclusions in the matter. See **Selle & Another v. Associated Motor Boat Co Ltd & Others [1968] EA 123**. Ordinarily, we would defer to the findings and conclusions of the trial court, but will readily interfere if they are based on no evidence, or on a misapprehension of it or the court demonstrably acted on wrong principles in making those findings. This Court is also not bound to accept the trial judge's findings of fact if it appears, that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence. See **Mwangi vs. Wambugu [1984] EA 453.**

56.In relation to the exercise of discretion of the trial court, interference with such discretion is circumscribed and we need only cite what this Court stated in **MBOGO & ANOTHER vs. SHAH [1968] EA 93** at page 96, thus:

> **"An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been misjustice."**

57. Assuming at this stage that the matter involves constitutional interpretation, there is not much debate on the principles governing such interpretation and therefore we shall not belabour them.

> **"...the Constitution is not an Act of Parliament and is not to be interpreted as one. It is the supreme law of the land; it is a living instrument with a soul and consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposively or teleologically to give effect to those values and principles; and that whenever the consistency of any provision (s) of an Act of Parliament with the Constitution are called into question; the court must seek to find whether those provisions meet the values and principles embodied in the Constitution."**

see **Njoya & Others vs. Attorney General & others [2004] EA 274**. See also the decision of the Court of Appeal, Tanzania, in **Ndyanabo vs. Attorney General [2001] EA 485** which stated in part:

> **"the Constitution .. is a living instrument, having a soul and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in time with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and rule of law. As was correctly stated by Mr. Justice E.O. Ayoola, a former Chief Justice of The Gambia:… "A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the constitution a stale and sterile document."**

58. In the current Constitution, which the people of Kenya 'adopted, enacted and gave to themselves and future generations' in August 2010, several Articles come to mind that serve as towering beacons of constitutional interpretation. **Article 10** enshrines the national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever anyone of them applies or interprets any law or implements public policy decisions. Such values include good governance, integrity, transparency and accountability. **Article 20(1)** provides that the Bill of rights shall apply to and bind all state organs and all persons, while **Article 20(3)** commands the court to develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favors the enforcement of a right or fundamental freedom. The court is also commanded under **Article 20(4)** to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights. **Article 22(1)** gives every person the right to institute court proceedings claiming that a right or fundamental freedom has been denied, violated or infringed or is threatened. Finally **Article 259(1)** requires that the constitution be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, and the human rights and fundamental freedoms

in the bill of rights, permits the development of the law, and contributes to good governance.

Analysis and Determination.

59. We have considered the pleadings, affidavits on record, the findings of trial court, the submissions of counsel, the authorities cited and the applicable law. We must first dispose of the jurisdictional issue since jurisdiction is everything and the court would down its tools without it.

> **"A Court's jurisdiction flows from either the constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law…. The issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings…..Where the constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within this authority to prescribe the jurisdiction of such a court or tribunal by state law."**

-see the Supreme Court decision in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR .**

60. As we understand it, the objection taken on jurisdiction before us, as it was before the trial court, is that there was nothing constitutional about the matter placed before the High Court which was no more than a merit appeal against the decision of CMA. As such Parliament has enacted in **Sections 35** and **35A** of the **Capital Markets Act**, an alternative remedy of a Tribunal to resolve the issues raised. The trial court considered this objection and found that it was being called upon to intervene in a matter where a party alleges breach of his fundamental rights and freedoms and that the issue squarely fell within the jurisdiction of the High Court by dint of **Article 165(3)(b)** and **(d)(ii)** of the **Constitution**. No other adjudicative body, including the Tribunal, had that mandate.

61. Those relevant Articles provide as follows:-

> **165. (3) Subject to clause (5), the High court shall have—**
>
> **(a) …….**
>
> **(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened;**

(c) …….

(d)(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution.

Clearly, therefore, there is express jurisdiction flowing from the supreme law itself. The argument thus turns on whether a party can ignore an existing alternative remedy, and whether indeed the matter in issue was constitutional. We have examined the petition filed before the High Court citing several provisions of the Constitution and alleging violations thereunder. Most of those complaints were swept by the wayside in the judgment of the trial court and none of the parties has complained about that, save for the one allegation of violation of fair administrative action under Article 47 of the Constitution.

62. The relevant part of that Article provides as follows:

47. (1)Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2)If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Under **sub-Article 3,** Parliament is enjoined to enact legislation to give effect to those provisions and under the **Fifth Schedule** of the Constitution it had four years from promulgation to complete that process, subject to extension. No submission was made by any of the parties to establish the existence of such legislation and we are not aware of any. In the event, we cannot fault the trial court for resorting to the Constitution itself in resolving the allegations placed before it. 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. We are also satisfied that the issue arose from the pleadings and the evidence before the court and was not raised by the court suo motu, as submitted by the appellant's counsel. The appeal relating to jurisdiction thus fails.

63. And now to the crux of the appeal. Was it **"Investigation only"** or both **"Investigation and enforcement action"**. That is the question relating to the work of the committee appointed by CMA.

64.There is no controversy regarding the vital role played by CMA in attempting to achieve the aspirations of the **Capital Markets Act** of 'promoting, regulating and facilitating the development of an orderly,fair and efficient capital market' in this country. It is only through effective corporate management and regulation that a robust capital market which safeguards the interests of both local and international investors can be assured. That is why CMA is given fairly wide powers and functions under the statute. It is the manner of exercise of those powers that is in question, and it becomes necessary

therefore to examine the relevant legislative provisions and the evidence relating to the exercise of the powers.

65. Under **Section 11(3)** of the Act, no less than 29 wide 'powers, duties and functions' of the Authority (also referred to as **"the Board")** established under **Section 5** of the Act are listed. **Section 11(3) (w)** makes such powers unlimited as the Board may "do all other 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". Very wide powers indeed and therefore the reason for caution in the manner of exercising them to avoid abuse. There may be some truth in the adage that 'power corrupts and absolute power corrupts absolutely'.

66. The Act in **Section 11A** further gives the Board the discretion to delegate its functions to, inter alia, a "Committee of the Board". Such delegation may be revoked at any time and the delegation does not prevent the Board from performing the delegated function. In other words, the Board and its own committee may carry out the same function simultaneously. There is further general discretion under **Section 14(1)** of the Act to appoint "Committees, whether of its own members or otherwise, to carry out such general or special functions as may be specified by the Authority and may delegate to any such committee such of its powers as the Authority may deem appropriate." **Sub-section (2)** however, makes it mandatory for the Authority to establish:

> (a) committee to hear and determine complaints of shareholders of any public company listed on an authorized securities exchange, relating to the professional conduct or activities of such securities exchange or such public company, or any other person under the jurisdiction of the Authority and recommend actins to be taken, in accordance with rules established by the authority for that purpose; and
>
> (b) a committee to make recommendations with respect to assessing and awarding compensation in respect of any application made in accordance with rules established by the Authority for that purpose.(emphasis added)

It is evident from the diverse provisions in those sections of the Act that the Board must make a choice of the form and nature of delegation of its powers and functions. The trial court found and held that CMA was within its powers to appoint the ad hoc committee under **Sections 11A** and **14** of the Act. With respect, that is not entirely correct. It is only so in so far as the general power exists. The Board must go further and specify which provision of the Act is invoked.

67. We have examined the appointing document ('JK 8' in the record of appeal) and confirmed that CMA invoked **Section 14(1)** of the Act. It was bound under that sub- section to state whether the committee was of 'its own members or otherwise'; whether there were 'general or special functions' to be carried out; specify the 'function', and specify which of CMA's powers were delegated. In that document, referred to as **"Terms of Reference" (TOR)**, CMA listed 13 specifications, among them, **"The Purpose and Responsibilities"** of the ad hoc committee. We have reproduced these in paragraph 8 of this judgment as clarified by the committee at the instance of Kiereini. What the committee did not tell Kiereini, but was part of the TOR, was the specification that the committee was required to:

"report and make recommendations to the Board of the Authority which shall thereafter notify adversely mentioned persons in writing of the decision of the committee".

68.From our own examination and evaluation of the specified functions of the committee, its main function was to verify, by calling further evidence, the investigation report and findings of the **Webber report**. It was to carry out further investigation. Beyond that, it would "give recommendations to the Board on actions to be taken, if any…."

We do not have the benefit of the report submitted to the Board by the committee or the recommendations made as these were confidential, and there is statutory provision for that confidentiality. What is on record is the letter dated 3rd August 2012 entitled "Enforcement Action" and which summarizes the allegations made against Kiereini before the committee, the determination on each of those allegations, and the sanctions imposed. These have been reproduced in paragraphs 12, 13 and 14 of this judgment. Was it the committee which carried out the entire process?

69. It is difficult to say; firstly because we have no record of the committee's report and recommendations; secondly, there was no specification by the Board of delegation of its function of imposition of 'sanctions' under **Section 11(3)(cc)**, 'additional sanctions' under **Section 25A,** or 'offences and penalties' under **Section 34A** of the Act. All these functions remained reposed in the Board throughout. What is clear from the record is that CMA indicated what it would do with the report once it was submitted to the Board; that is, as stated above: "the Authority... shall thereafter notify adversely mentioned persons in writing of the decision of the committee". In all probability therefore, CMA envisaged a stage after investigations by the committee, when it would notify Kiereini about the findings of the committee and record any mitigating circumstances from him before exercising its coercive power of sanctions and other penalties.

70. The above analysis leads us to the conclusion that the committee carried out investigations only and that the power of enforcement was not delegated to the committee. Such power should have been delegated expressly in line with the provisions of the Act if that was the intention. In our view, the committee was not given a carte blanche by CMA so that it would supplant the Board in the entire process of investigation and enforcement. What is the consequence of this finding?

71. Logically, it leads us to the consideration of the peripheral issue as to whether Kiereini had a legitimate expectation that he would have a full second hearing before the Board and if so, whether he was given an opportunity to be heard as the Constitution and rules of natural justice demand. On our own evaluation of the evidence on record, we answer the first limb in the negative. That is because it is plain beyond argument that Kiereini was given the opportunity to appear and be heard before the committee on the specific allegations that were made against him. He made a conscious decision not to appear before the committee. In a manner of speaking, he made his bed and he ought to sleep in it. The proceedings before the committee were therefore valid as were the findings which were unchallenged. Indeed it was one of the findings made by the trial court as follows:

"For the avoidance of doubt, the Committee's findings are not set aside as the process was investigatory and the petitioner waived his right to appear before it."

None of the parties has challenged that finding. Having so found, however, the trial court made an order quashing all the findings of the committee and requiring CMA to hear Kiereini on all the evidence that led to those findings. With respect, we think the finding and the order are contradictory and the trial court was in error in that respect. The order must be interfered with to accord with the finding. In our view, the finality of the process before the committee gave rise to an appeal, if the affected party so desired, in accordance with the Act and not to a challenge of the process before the High Court.

72. What deserved a constitutional challenge was the summary imposition of sanctions and other penalties before giving Kiereini an opportunity to be heard in mitigation. Some of the findings made by the committee bordered on criminal offences and yet penalties were imposed before hearing the affected person. The analogy by counsel for Kiereini that an opportunity is always given to a convicted person to mitigate before sentence is not entirely out of place in the circumstances of this case. After the hearing, the Board may well arrive at the same conclusion but it would have passed muster in complying with the law. There is no express provision in the Act for a hearing before imposition of sanctions and other penalties, but the right to fair administrative action which includes fair hearing is so jealously guarded by the Constitution that we would **apply Article 10** on transparency and accountability, and **Article 20(3)** to develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favors the enforcement of the right or fundamental freedom.

73. Finally, as regards considerations of public interest to override constitutional requirements of fair administrative action and fair hearing, we need only state that those rights of the individual are so fundamental that they cannot be limited even by public interest. In this regard the cases of **Kenafric Industries Ltd vs. The Commissioner of Domestic Taxes & 4 Others [2012] eKLR and Eric Okongo Omongeni vs. IEBC & 2 Others [2013] eKLR** are instructive.

Disposition.

74. We have come to the conclusion that this appeal is partly meritorious and partly not. We accordingly give the following orders:-

(a) We allow the appeal in as far as it questions the process ending with the findings made by the committee on the specific allegations placed before it for investigation, and reiterate that the findings were made procedurally, and are valid until they are set aside by a lawful order on appeal. The order of the trial court setting aside the findings of the committee, which were accepted by the Board as listed in the letter dated 3rd August 2012 is hereby set aside.

(b) We dismiss the appeal in so far as it questions the finding of the trial court that **Article 47** of the Constitution was breached since Kiereini was

not given the opportunity to be heard before sanctions and other penalties were imposed on him.

(c) The sanctions, penalties and offences imposed by the Capital Markets Authority under **Sections 11(3)(cc), 25A** and **34A** be and are hereby set aside. CMA shall be at liberty to re-impose them if they are merited only after giving the opportunity to Kiereini to be heard.

(d) This disposition relates only to **JEREMIAH GITAU KIEREINI**.

(e) As there has been partial success, and the matter is of public importance, each party shall bear its own costs of this appeal and in the High Court.

Dated and delivered at Nairobi this 7th day of November, 2014

P.N. WAKI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J.W. MWERA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR