Capital Markets Authority v Ciano & another (Civil Appeal 314 of 2018) [2023] KECA 581 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 581 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 314 OF 2018

HM OKWENGU, JM MATIVO & GWN MACHARIA, JJA

MAY 26, 2023

BETWEEN

CAPITAL MARKETS AUTHORITY ..... APPELLANT

AND

JONATHAN IRUNGU CIANO ..... 1ST RESPONDENT

UCHUMI SUPERMARKETS LIMITED ..... 2ND RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Odunga, J.) dated by (Nyamweya, J.) on the 9th April, 2018 in JR No. 62 of 2016)

JUDGMENT

1. The Capital Markets Authority (the appellant), is a statutory body established under Section 5 of the *Capital Markets* Act. Its functions are, inter alia, to promote, regulate and facilitate the development of an orderly, fair and efficient capital market in Kenya. In this appeal, the appellant seeks to overturn the judgment and decree of the High Court (Odunga, J.) delivered on 9th April, 2018 in Nairobi Judicial Review Application No. 62 of 2016. The case was filed against the appellant by Jonathan Irungu Ciano (the 1st respondent), formerly a director of Uchumi Supermarkets Limited, (the 2nd respondent), which was sued as an interested party in the said proceedings.

2. A brief synopsis of the facts, which triggered the said proceedings, is essential in order to contextualize the matters raised in this appeal. Fortunately, the facts are substantially if not wholly common ground or uncontested. In summation, on 15th June, 2015, the 2nd respondent's board terminated the 1st respondent's services citing alleged gross misconduct and negligence. Disturbed by probable fraud and misconduct in the financial operations of the 2nd respondent and its subsidiaries, the 2nd respondent's board commissioned KPMG International Limited (KPMG) in June, 2015, to conduct a forensic audit of the 2nd respondent's financial operations and those of its subsidiaries for the period between 1st June, 2013 and 31st May, 2015. It was averred that the forensic audit revealed massive malpractices.

3. The board prompted the appellant to commence an inquiry into allegations of financial mismanagement, impropriety and violation of regulations within the 2nd respondent. After preliminary inquiries, on 31st August, 2016 the appellant in exercise of its statutory powers served the 1st respondent with a notice to show cause citing six contraventions of the *Capital Markets* Act. The 1st respondent contended that the said notice was couched in a manner suggesting that a predetermination of the issues had been made because it read:

> " Your submissions should be targeted to enable the authority arrive at an objective assessment of your potential culpability for the contraventions cited above and where appropriate to determine the appropriate enforcement action to be taken against you as provided in the Capital Markets Act."

4. On 25th October, 2016, the 1st respondent appeared before the appellant's board accompanied by his advocate for the hearing. After the hearing, the board found the 1st respondent culpable of the allegations made against him. Consequently, the appellant sanctioned the 1st respondent and fined him Kshs.5,000,000/= and banned him from holding office as a director and or key officer of a pubic listed company and or issuer, licensee or any approved institution of the Capital Markets Authority. The 1st respondent was served with a notification of enforcement action letter dated 17th November, 2016. Aggrieved by the decision, the 1st respondent filed judicial review proceedings in the High Court being Judicial Review Number 62 of 2016 seeking an order of certiorari to quash the said notification and an order of prohibition to restrain the respondent from acting on the said notification. The 1st respondent also prayed for such further and other orders that the court may deem fit to meet the ends of justice.

5. After hearing the matter, the High Court distilled one issue, namely whether the 1st respondent was furnished with sufficient material in good time to adequately put forward his defence. In resolving the said issue, the learned judge reasoned as follows:

> " 29. Whereas it is true that it would have been prudent for the applicant to seek more time to adequately deal with the issues facing him if he thought that the time given to him was too short, the current state of the law places the onus on an administrative body or authority to furnish the person against whom allegations are made with the information, materials and evidence to be relied upon in making the decision or taking the administrative action. In other words, it is not upon the applicant to ask to be supplied with the same as the right to be furnished the same is imposed on the administrator by law.
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> 30. I have considered the material placed before me and I am not satisfied that the manner in which the Respondent conducted its proceedings met the threshold of a fair administrative action as contemplated under section 4(3) (a) and (g) of the Fair Administrative Action Act."

6. The learned judge allowed the judicial review application and issued an order of certiorari quashing the notification of enforcement action dated 17th November, 2016. In addition, the trial judge issued a prohibition order prohibiting the appellant from acting upon the previously mentioned notification. However, the learned judge clarified that if the appellant was still intent on carrying out its mandate, it must do so in strict adherence to the law, both procedural and substantive. Lastly, the learned judge made no orders as to costs.

7. Aggrieved by the above verdict, the appellant lodged this appeal citing 6 grounds. In his submissions, the appellant's counsel condensed the grounds into two. (a) Whether the learned judge erred in fact and in law in finding that, the appellant had not conducted the show cause proceedings against the 1st respondent in a manner that meets the threshold of a fair administrative action. (b) Whether the 1strespondent was prejudiced by the contents of the KPMG forensic audit report.

8. On the first issue, the appellant argued that- (a) It complied with the law governing fair administrative action in the subject proceedings. (b) The 1st respondent was informed of specific charges against him relating to his conduct as the Chief Executive Officer of the 2nd respondent. (c) He responded to the issues raised vide written and oral submissions. (d) He was represented by an advocate, and he was afforded an opportunity to clarify any of his answers. (e) He was informed about his right of appeal against the decision to the Capital Markets Tribunal but chose to move to the High Court instead. (f) The learned judge erred by holding that the 1st respondent was not furnished with sufficient material in good time to enable him to adequately put forward his defence despite courts having held that the appellant like comparable administrative and regulatory bodies has discretion regarding the manner it conducts its mandate as long as the same is done within the constitutional and statutory framework. The appellant cited the dictum in *Judicial Service Commission v Mbalu Mutava and Another* (2015) eKLR where this Court affirmed Lord Denning's decision in *Selvajan v Race* (1976) 1 ALL ER 12 that:

> " The investigating body is however, the master of its own procedure. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice if the broad grounds are given. It need not name its informants. It can give the substance only... There are, in my view, no words, which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth..."

9. On the failure to provide the 1st respondent with a copy of the KPMG report within sufficient time, the appellant's counsel argued that the KPMG report was not a crucial document in the impugned proceedings since the appellant conducted its own independent investigations to ascertain whether the 1st respondent contravened the law. Therefore, the appellant never relied on the KPMG report in taking the administrative action against the 1strespondent. The appellant submitted that the show cause letter contained a catalogue of evidence supporting the allegations contained therein and furthermore, the 1st respondent was informed that the evidence referred to in the said catalogue was within his possession but the same would be furnished if requested. In the end, counsel argued that the 1st respondent was not prejudiced in any way. Further, the KPMG report was sent to the 1st respondent on 21st October, 2016, a week before the proceedings. The appellant relied on *Judicial Service Commission v Mbalu Mutava and Another* (Supra).

10. In rebuttal, the 1strespondent argued that the 1st respondent received the KPMG forensic report on the eve of the appearance before the board, that the said report was crucial for the purposes of the proceedings, thus denying him adequate time to prepare himself for the proceedings. Further, the 1st respondent during the hearing indicated to the appellant that if he had received the report in good time he would have made a detailed response to the same. The 1st respondent cited Article 47 of the *Constitution*, which guarantees the right to a fair administrative action. He also cited section 4 (3) and (4) of the *Fair Administrative Action* Act, 2015 (the FAA Act) which lays down the procedure to be adopted by decision makers where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person. The 1strespondent also submitted that the appellant had the duty

under the law to supply the KPMG report and it was not upon the 1st respondent to ask for the said report.

11. To buttress his submissions, the 1st respondent's counsel relied on *OL Pejeta Ranching Limited v David Wanjau Muhoro* (2017) eKLR where this Court observed:

> " The respondent before the re-scheduled disciplinary 'hearing' requested the appellant to furnish him with a copy of the audit report so as to sufficiently prepare for his defence as is envisaged by the principles of fair hearing. Fairness in the circumstances would inform that the respondent be supplied with the allegations against him in sufficient detail to adequately prepare for a defence. The appellant's CEO testified that he attempted to furnish the respondent with the same on the hearing date but the respondent rejected it. Obviously then, the audit report would have made no impact as there was no time for the respondent to amply prepare. It was merely tendered to the respondent as a technical formality. There was no reason given as to why the respondent could not have been supplied with a copy much earlier and in good time. ...That coupled with the fact that he had no knowledge of the audit findings, he had no fair chance to advance his defence. In the circumstances, therefore it cannot be said that the termination process was fair."

12. The 2nd respondent did not participate in this appeal nor did it file submissions.

13. This is a first appeal in a matter in which the High Court determined a judicial review application premised on Articles 47 & 50 of the *Constitution*, the *Capital Markets* Act and Sections 3, 4, (1), (2), (3)(a)(b)(c)(d) & (g), (4),6,7(1)(a) & (2) of the *FAA* Act. The obligation of this Court is to appraise and evaluate the High Court's interpretation of the *Constitution*, the *FAA* Act and the *Capital Markets* Act, the findings of facts, and the conclusions arrived at by the High Court, with a view to drawing our own conclusions concerning the issues raised by the appellant.

14. Before addressing the merits or otherwise of this appeal, we find it necessary to address a pertinent point of law which the parties never addressed before us or before the High Court. Nevertheless, we would be failing in our duty if we shut our eyes to such a glaring point of law. The 1st respondent approached the High Court by way of judicial review proceedings aggrieved by what he claimed was an unfair administrative action in breach of his rights. The proceedings before the High Court were founded on the provisions of Article 47 of the *Constitution*, the *Capital Markets* Act and sections 3,4, (1), (2), (3)(a)(b)(c)(d) & (g), (4),6,7(1)(a) & (2) of the *FAA* Act.

15. The issue that arises is whether the judicial review proceedings before the High Court offended the doctrine of exhaustion of remedies. Put differently, the question is whether the High Court was divested of jurisdiction by the said doctrine. Section 9 of the *FAA* Act provides as follows:

> 9. Procedure for judicial review
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> 1. Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a Subordinate Court upon which original jurisdiction is conferred pursuant to Article 22(3) of the *Constitution*.
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> 2. The High Court or a Subordinate Court under sub- section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms

for appeal or review and all remedies available under any other written law are first exhausted.

3. The High Court or a Subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

4. Notwithstanding subsection (3), the High Court or a Subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

5. A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

16. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks judicial review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting judicial review only when all available administrative proceedings fail to produce a satisfactory resolution.

17. Section 35A of the *Capital Markets* Act establishes the Capital Markets Tribunal. Sub-section (4) provides that the tribunal shall, upon an appeal made to it in writing by an aggrieved party following a determination by the Authority on any matter relating to the Act, inquire into the matter and make an award thereon, and every award made shall be notified by the tribunal to the parties concerned and the authority as the case may be.

18. Under subsection (5) thereof, the tribunal has all the powers of the High Court to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents. In addition, subsection (17) provides that upon any appeal to the tribunal under Section 34A, the status quo of any matter or activity, which is the subject of the appeal, shall be maintained until the appeal is determined.

19. Also significant is subsection (22) which provides that any party to proceedings before the tribunal who is dissatisfied by a decision or order of the tribunal on a point of law may, within thirty days of the decision or order, appeal against such decision or order to the High Court. It is important to note that, Parliament in its wisdom restricted the right to appeal to the High Court to points of law and stipulated a time frame within which the appeal should be filed.

20. Subsection (23) confers an automatic stay articulated as follows:

> " No decision or order of the tribunal shall be enforced until the time for lodging an appeal has expired or where the appeal has been commenced until the appeal has been determined. At subsection (24), Parliament listed the remedies available from the High Court upon hearing an appeal under the Act-
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> (24) Upon the hearing of an appeal under this section, the High Court may—
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> a. confirm, set aside or vary the decision or order in question;

b. remit the proceedings to the tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;

c. exercise any of the powers which could have been exercised by the tribunal in the proceedings in connection with which the appeal is brought; or

d. make such other order as it may deem just, including an order as to costs of the appeal of earlier proceedings in the matter before the tribunal."

21. From the above provisions, it is patently clear that the *Capital Markets* Act establishes a clear dispute resolution mechanism, including an appellate process on points of law only and an aggrieved party only appeals to the High Court in accordance with the above provisions. The 1st respondent by passed the above mechanism and filed judicial review proceedings before the High Court. Unfortunately, from the material before us, none of the parties addressed the court on the above provisions nor did the trial court address its mind on the issue.

22. This doctrine of exhaustion of remedies has consistently been appreciated by our superior courts to the extent that it is correct to state that the doctrine is now of esteemed juridical lineage in Kenya. (See the High Court in *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others* (2017) eKLR). The doctrine was fittingly explained by the Court of Appeal in *Speaker of National Assembly v Karume* (1992) KLR 21, a pre-2010 decision in the following words:

> "Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

23. Many post-2010 court decisions have found the reasoning sound and have provided justification and rationale for the doctrine under the 2010 Constitution. For example, the Court of Appeal provided the constitutional justification for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* (2015) eKLR as follows:

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

24. Similarly, the High Court added its voice on the subject in the Matter of the *Mui Coal Basin Local Community* (2015) eKLR thus:-

> "The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution

> creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."

25. We have already reproduced the relevant provisions of Section 35A of the *Capital Markets* Act. The impugned decision is a determination by the authority on a matter relating to the Act, as contemplated by Section 35A of the Act. Therefore, it was an appealable decision to the tribunal established under the said section.

26. Section 9(2) of the *FAA* Act reproduced earlier provides that the High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-section (3) which provides that "the High Court or a Subordinate Court shall, if it is not satisfied that the remedies referred to in sub- section (2) have been exhausted, direct that an applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

27. Parliament in its wisdom used the word shall in the above provisions. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of the effect to be given to their directions. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory. The real question in all such cases is whether, a thing, has been ordered by the legislature to be done, and what is the consequence, if it is not done. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance. The word "shall" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory.

28. Section 9(2) & (3) of the *FAA* Act is couched in mandatory terms. The only way out is the exception provided by subsection (4), which provides that:-

> "Notwithstanding subsection (3), the High Court or a Subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Two requirements flow from the above sub-section. First, the applicant must demonstrate exceptional circumstances. Second, on an application by the applicant, the court may grant an exemption. Our reading of the law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under Section 9(4) of the *FAA* Act. The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given. Section 9(4) of the *FAA* Act postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy.

29. Perhaps we should add that the impugned decision constitutes an administrative action as defined in Section 2 of the *FAA* Act. Therefore, an internal remedy must be exhausted prior to judicial review, unless the applicant can show exceptional circumstances to exempt him from this requirement. The

foregoing being the law, we find no difficulty concluding that the judicial review proceedings before the High Court offended the doctrine of exhaustion and the trial court ought to have declined to exercise its jurisdiction even on its own motion.

30. Notwithstanding our above finding, we shall address the appeal on merits. Before the appellant on 25th October, 2016, the 1st respondent indicated that he received the KPMG report a week to the hearing. The 1st respondent's grievance was that he was given the report on the eve of the hearing depriving him ample time to reply to the allegations. The key issue here is whether the impugned decision suffers from procedural impropriety rendering it susceptible to judicial review. A decision suffers from procedural impropriety if in the process of its making, the procedures prescribed by statute are not followed, or if the rules of natural justice are not adhered to. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached.

31. The term procedural impropriety was used by Lord Diplock in the House of Lords decision in *Council of Civil Service Unions v Minister for the Civil Service* (1985) 1 A.C. 374 to explain that a public authority could be acting ultra vires if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of judicial review, the other two being illegality and irrationality.

32. Procedural impropriety generally encompasses two things: procedural ultra vires, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness. Lord Diplock noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice, is a form of procedural impropriety.

33. The converse of the term "procedural impropriety" is "procedural fairness" which means acting fairly in administrative decision- making. It relates to the fairness of the procedure by which a decision is made, and not the fairness in a substantive sense of that decision. (See Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action*, Thomson Reuters, Australia, 2013, 397).

34. Article 47 of the *Constitution* codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Section 4 of the *FAA* Act echoes Article 47 and reiterates the entitlement of every person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

35. Under section 4(3)(a) to (g) of the *FAA* Act, where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator is mandatorily required to give the person affected by the decision–

    (a) prior and adequate notice of the nature and reasons for the proposed administrative action;

    (b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

36. Section 4 (4) of the *FAA* Act provides that the administrator shall accord the person against whom administrative action is taken an opportunity to– (a) attend proceedings, in person or in the company of an expert of his choice; (b) be heard; (c) cross- examine persons who give adverse evidence against him; and (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

37. The appellant's appeal will stand or fall on the question whether it accorded the 1st respondent adequate notice as contemplated by Article 47 and Section 4 of the *FAA* Act. "Adequate notice" means that the affected person must be informed that an administrative action is being planned. The person must be given enough time to respond to the planned administrative action. The person also needs to be given enough information about the planned administrative action to be able to work out how to respond to the planned action. The person needs to know the nature of the action (what is being proposed) and the purpose (why the action is being proposed).

38. There is no fixed content to the duty to afford procedural fairness. The fairness of the procedure depends on the nature of the matters in issue, and what would be a reasonable opportunity for parties to present their cases in the relevant circumstances. As Mason J. stated in *Kioa v West* (1985)159 CLR 550 (18 December 1985), High Court (Australia), 'the expression "procedural fairness" ... conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case." Fairness is not an abstract concept. The concern of the law is to avoid practical injustice.

39. It should be underscored that the standards of fairness are not immutable. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependant on the context of the decision, and this is to be taken into account in all its aspects. (See *R v Secretary of State for the Home Department, ex parte Doody* (1994) 1 AC 531 at 560). Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met. In addition, the foregoing implies that the range of procedural protection will vary, depending on the context, with greater protections in some contexts rather than others. The Supreme Court of Canada in *Baker v Canada* (Minister of Citizenship & Immigration 2 S.C.R 817 6 held:

> " The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."

40. As Mason J. stated in *Kioa v West* (1985) 159 CLR 550, High Court of Australia the specific content of the hearing rule will vary according to statutory context. However, a fair hearing will generally require the following: (a) prior notice that a decision that may affect a person's interests will be made. This has been referred to as a 'fundamental' or 'cardinal' aspect of procedural fairness; (b) disclosure of the

critical issues to be addressed, and of information that is credible, relevant and significant to the issues; (c) a substantive hearing oral or written with a reasonable opportunity to present a case. Whether an oral hearing should be provided will depend on the circumstances. The crucial question is whether the issues can be presented and decided fairly by written submissions alone.

41. As stated earlier, the gravamen of the 1st respondent's grievance was that he was served with the KPMG report on the eve of the hearing. At paragraph 17 of his verifying affidavit dated 21st November, 2016, appearing at pages 14 to 19 of the record, the 1st respondent stated on oath that he received the KPMG report on 20th October, 2016. He acknowledged the report vide his e- mail dated the same day appearing at page 59 of the record. Even though in the email he complained that due to the size of the documents, he was receiving delivery failure reports; there is nothing to show that he never received the report. Hearing commenced on 24th October, 2016. In his evidence, the 1st respondent is recorded at page 188 of the record stating that he was given the report "last week" an admission he had already received the report. There is no request for adjournment nor is there a complaint that he was unable to prepare his defence. Instead, he proceeded to present his case as recorded at pages 175 to 236 of the record.

42. The reasonable opportunity to make representations can generally be given by ensuring that reasonable steps are taken to bring the fact of the decision-making to the attention of the person to be affected by the decision and by affording the affected person reasonable time. The test is an objective one, which enquires whether a reasonable, objective and informed person would on the correct facts reasonably conclude that the affected person has been notified of the allegations against him and that he was afforded a reasonable opportunity to respond to the allegations and to participate in the proceedings.

43. As stated above, the 1st respondent was supplied with the KPMG report on 20th October, 2016, four days prior to the hearing. The 1st respondent and his advocate as shown by the record fully participated in the proceedings on 25th October, 2016 without raising any objections. The record shows that during the hearing, the 1st respondent answered all the questions pertaining to the KPMG forensic audit report and even poked holes in the report. As mentioned above, the 1st respondent and his advocate never complained about inadequate period to prepare for the case. They instead participated in the proceedings and as expected, they put their best foot forward without citing any hindrance to the preparation or presentation of their defence. We also note that the notice to show cause was detailed and covered all the aspects of the allegations. Notably, the 1st respondent responded to the allegations. He gave a very detailed defence. The 1st respondent and his advocate had a right to seek for an adjournment if at all they needed more time to prepare but they never complained. The complaint about late service and the alleged breach of Section 4 of the *FAA*A Act and Article 47 rights was first raised in the High Court and it was the only issue upon which the judicial review proceedings was determined.

44. We find and hold that the complaint that the 1st respondent's rights under Section 4 of the *FAA* Act and Article 47 of the *Constitution* were violated on account of the alleged late service was an afterthought. This is because nothing prevented the 1st respondent or his advocate from requesting for time to respond to the report or prepare for the hearing if at all, they were not ready to present their case. Having fully participated in the proceedings and having adduced evidence touching on the report and even discredited the report, the 1st respondent cannot turn around and allege prejudice after losing the case citing late service of the report.

45. In conclusion, we find and hold that the appeal is merited. The learned judge erred by entertaining the judicial review application, yet the *Capital Markets* Act provides a clear dispute resolution mechanism with an appellate mechanism to the High Court. In short, the proceedings offended the doctrine of exhaustion of remedies as provided in Section 9 (3) and (4) of the *FAA* Act. It is also our finding that the

learned judge erred in finding that the 1st respondent was not given a fair hearing in the circumstances of this case, yet the record shows that the 1st respondent fully participated in the proceedings and neither himself nor his advocate raised any objections before the appellant. Whereas this Court hoists high the right to procedural fairness guaranteed under Section 4 of the *FAA* Act, Article 47 of the *Constitution*, the degree of fairness under the right to a fair administrative action is context sensitive, and it varies depending on the facts and circumstances of each case. As severally stated above, the 1st respondent fully participated in the proceedings. Above all, no objections were raised before the appellant. We find and hold that in the circumstances of this case, there was no breach of procedural fairness. Accordingly, we allow the appeal, set aside the judgment of the High Court dated 9th April, 2018 and substitute it with an order dismissing the judicial review application before the High Court. The 1st respondent shall bear the costs of this appeal and the costs before the trial court.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MAY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

G. W. NGENYE - MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR