



Oriental Commercial Bank Limited v Capital Markets Authority (Appeal 1 (NRB) of 2005) [2016] KECMT 17 (KLR) (6 October 2016) (Award)

Neutral citation: [2016] KECMT 17 (KLR)

**REPUBLIC OF KENYA
IN THE CAPITAL MARKETS TRIBUNAL
APPEAL 1 (NRB) OF 2005
JK KIBET, CHAIR, L MACHARIA, K. KANDIE, K. NYAMWEYA & K. KINYUA, MEMBERS
OCTOBER 6, 2016**

BETWEEN

ORIENTAL COMMERCIAL BANK LIMITED APPELLANT

AND

CAPITAL MARKETS AUTHORITY RESPONDENT

AWARD

1. This is an Award of the Tribunal on the Appellant's Appeal contained in the Memorandum of Appeal and supported by a statement of facts and Annexures dated 7th January 2005 filed on the same date.

The Appellant, oriental Commercial Bank Limited (formerly Delphis Bank Limited) is a limited liability company incorporated in the Republic of Kenya and a banking institution licensed under the *Banking Act* Chapter 488, Laws of Kenya. The Respondent, Capital Markets Authority is a Statutory body established under the *Capital Markets Act* Chapter 485A of the Laws of Kenya, for the purpose of promoting, regulating and facilitating the development of an orderly, fair and efficient capital markets in Kenya and of connected purposes.
2. The Appeal before us is expressed to be against the directions, decision or action of the Respondent contained in a letter addressed to the Appellant dated 22nd December 2004. The Appellant sets out eight (8) grounds of Appeal all of which are contained in the Memorandum of Appeal and they are as follows:
 1. The Authority erred in the making direction or action or decision not to determine or decide the application of the Appellant seeking consent to transfer certain shares in Baumann and Company Limited from Steel Brothers and Company (Overseas Investments) Limited to the Appellant.



2. The Authority erred in law and fact in refusing to make any decision and /or in deferring its decision and or in failing to consider or to have any due or proper regard to the application and the representations put forward to it by the Appellant in support of its application.
3. The Authority erred in wrongfully and unreasonably exercising its discretion and applying wrong principals and taking irrelevant factors into account omitted relevant factors thereby constituting a refusal and/or failure to perform its statutory duty to judiciously decide upon the Appellant's application.
4. The authority erred in acting contrary to the principles of natural justice and the Audi Partem Altram rule
5. The Authority erred in differing its decision on the Appellants application for exemption which is arbitrary and unreasonable in the circumstances.
6. The Authority erred in failing to judiciously exercise its discretion by taking into consideration matters which it ought not to have considered.
7. The Authority erred in the law and fact in failing to make any decision contrary to its statutory duties and principles as set out in the provisions of the Capital Markets Authority (Cap 485A, Laws of Kenya) and the objects of the Authority as set out in the preamble to the said Act.
8. The Authority caused or allowed an unreasonable delay in the delivery of its direction or action or decision in refusing to determine the Appellant's application which period amounted to a miscarriage of justice.

The Appellant prays for orders that:

- I. This Appeal be allowed;
- II. The direction or action decision, if any of the Capital Markets Authority be set aside with costs
- III. The Capital Markets Authority be ordered to approve the Appellant's application and grant its exemption in accordance with Regulation 5 of the Capital Market's (Takeovers and Mergers) Regulations, 2002;
- IV. The costs of this appeal be awarded to the Appellant.

The appeal is opposed by the Respondent and in opposition thereto the Respondent has filed a Statement of facts dated and filed on the same date.

A. Facts

3. It is undisputed that in or about the year 1994 the Appellant (then known as the Delphis Bank Limited) granted banking facilities to Aebha Properties Limited being overdraft facilities to the limit of Kshs 223,000,100/-. One of the securities offered to the Bank was an equitable charge over 1,343,673 ordinary shares owned by Steel Brothers and Company (Overseas Investments) Limited in A. Baumann and Company Limited. A Baumann and Company Limited was then a company listed on the alternative investment market segment which therefore meant that it was regulated by the Respondent.

Steel Brothers and Company (Overseas Investments) Limited executed all the necessary security documents including a memorandum of deposit of documents of title to the securities, a guarantee board resolution etc. In November 2001 Aebha Properties Limited is said to have defaulted in the



payment of the then demanded sum of Kshs. 236,107,596.62 following which the then Statutory Manager of the of the Appellant issued notices calling for the payment of the said outstanding sum. At the same time the Statutory Manager notified the Company Secretary of A. Baumann & Company Limited of the default and requested the Company Secretary to record the Appellant's lien over the shares. The Company Secretary responded by a letter dated 8th January 2002 and confirmed that a lien over the shares had been recorded.

4. In April 2004 the advocates acting for the Appellant, Messrs. Kapila Anjarwalla and Khanna advocates began engaging the Respondent essentially seeking exemption from the regulations contained in the The Capital Markets (Take-Overs and Mergers) Regulations 2002. Correspondence ensued between the said advocates and the Respondent, the result of which the Respondent wrote a letter dated 17th August 2004 in which it stated that it was not in a position to determine the application for exemption for the reason that the Respondent had noted that the securities being the 1,343,683 ordinary shares in A Baumann and Company Limited were subject to two high court cases being HCCC 1051 of 2002 and 1074 of 2002. There was another letter dated 22nd December 2004 reiterating the contents of the letter of August 2004.

The existence of the two high court cases had been brought to the attention of the Respondent by a letter dated 20th July 2004 written by one Mr. Odhiambo M. T. Adala Advocate. In his letter, which is annexed to the Respondent's statements of facts, Mr. Adala stated that he was acting for Mr. Charles Kariuki Githungo and the court appointed receiver to Frairswood Limited and Steel Brothers and Company (Overseas Investment) Limited. The letter of Mr. Adala to the Respondent came over two months after the application by the Appellant's Advocates for an exemption.

5. We have stated that facts undisputed as these are the facts set out at paragraphs 1-17 of the Appellant's Statement of facts and are admitted at paragraph 1 of the Respondent's Statement of facts.

It is also undisputed that when both High Court Civil Cases Nos.1051 and 1074 of 2002 were filed, neither the Appellant nor the Respondent were parties. It is pleaded in the documents that the Appellant at some point made applications to be enjoined in the suits.

B. Parties Submission

6. At the hearing of the Appeal Appellant was represented by Mr. Akelo and the Respondent was represented by Ms. Janmohamed. The Appellant also filed written submissions dated 4th February 2016.

The submissions of Mr. Akelo were basically a restatement of facts set out in the statement of facts. The gist of submissions in summary were that;

The Respondent failed to grant the exemption sought by the Appellant on the ground that there were suits filed in the High Court which touched on the shares which had been pledged to the Appellant;

7. The Appellant was not a party to the suits and referred the Tribunal to the extracted court orders annexed to the Appellant's statement of facts and that the orders could not affect the rights of the Appellant and the respondent could not rely on them to make any direction or order as the court orders had not been directed to the Appellant and as shown in annexure OCBL26 the orders had been vacated.

The liability remains unpaid to date and that at the time the exemption was sought the value of shares was Kshs 52 and that the Tribunal should take judicial notice of the risks faced by banks these days and the possible effect of large unpaid liabilities. He further submitted that the Appellant had been unable to realize its securities and interest continues to accrue on the outstanding liabilities.



8. The Appellant is faced with slim chances of ever recovering the liability in full because of the steady and gross decline in the shares pledged over the years. Counsel further submitted that the Appellant's interest in the shares took priority to any other matters. A lien having been recorded over the shares was a confirmation that the Appellant's interest duly existed and the shares were in any event not available for transfer by Steel Brothers.

In response, Ms. Janmohamed for the Respondent took up an objection in respect to limitation under section 35 of the *Capital Markets Act*. She submitted that an Appeal ought to have been filed within 15 days of the date of the decision appealed against. She submitted that in any event reading from the letters annexed as OCBL 21, OCBL23 the Appellant was simply stating that there were suits pending and therefore there was not decision made and that if the contents of the letters amounted to a decision, [particularly the letter of 17th August 2004 then the Appeal should have been filed within 15 days of the said 17th August 2004. In her view the letter dated 22nd December 2004 was simply reiterating the contents of the letter dated 17th August 2004. She also submitted that the Appellant was applying for exemption in the year 2004 and yet it was said that the security crystallized in the year 2001. She reiterated that in view of an existence of a court order the Respondent could not have been expected to go against the court order and consequently breach it even if the court order had been a nullity. She submitted that in view of the then court cases the Appellant's application was immature.

9. In respect to the provisions under which the appeal has been brought, she submitted that the appeal cannot lie under the provisions of section 35 (1) and presumably it has been under sub-section 35A as follows:

(4) The tribunal shall, upon an appeal made to it in writing by any party or a reference made to it by the Authority or by any committee or officer of the Authority, on any matter relating to this Act, inquire into the matter and make an award thereon, and every award made shall be notified by the Tribunal to the parties concerned, the Authority or any committee or officer thereof, as the case may be.

10. She submitted that the Tribunal is being asked to substitute a decision and make an order to approve the transfer, a power which does not fall within the jurisdiction of the Tribunal. She summed up her submissions by stating that there was no decision made by the Respondent and the best that the Tribunal can do is to direct the Appellant to go and make another application. She drew the attention of the Tribunal to the fact that the Appellant was aware of the Court order and reiterated that in view of that the Respondent could not be expected to breach the order even if the order was a nullity. The Respondent had no option but to comply with the orders having been brought to its attention. She relied on the famous Omega case and asked the Tribunal to dismiss the Appeal.

In brief response to the submissions of the Respondent, Mr. Akelo submitted that section 35 of the Capital Markets Authority does not define what an award is and it was indeed the Respondent who had asked the Appellant to make an application for exemption. In respect to limitation, he submitted that the decision being appealed against is contained in letter dated 22nd December 2004 and the appeal was therefore filed timeously. He submitted that the overriding interest in respect to dispute is that substantive justice has to be administered in accordance with the requirements of *the constitution* of Kenya 2010. He urged the Tribunal to allow the appeal and that the Omega Case could not apply in the circumstances because the Court order did not affect the Appellant and therefore the Respondent could not have been in breach in any way.

C. Issues for determination

11. From the forgoing, we find the following to be issues of determination:



- a. Whether the appeal was filed out of times;
- b. Whether there was a decision by the Respondent capable of being appealed against.
- c. If there was a decision, whether the Respondent erred in law and fact in failing to consider the Appellant's application for exemption from the Capital Markets (Takeovers and Mergers) Regulations, 2022.

The first issue; Whether the appeal was filed out of time

12. Counsel for the Respondent raised a preliminary objection that the appeal was brought out of the time prescribed by Section 35 of the Capital Markets Act Cap 484A Section 35 states that:

Any person aggrieved by any directions given by the Authority may appeal to the Capital Markets Tribunal against such directions, refusal, limitation or restrictions, cancellations, suspension or removal as the case may be within fifteen days from the date on which the decision was communicated to such person.

13. Counsel for the Respondent argued that the decision that the Authority was not in a position to determine the application for the exemption was communicated by a letter dated 17th August 2004 and the Appellant filed their memorandum of appeal on the 7th of January 2005.

Counsel for the Appellant argued that the decision on subject matter of the appeal is the one contained in the letter dated 2nd December 2004 and that the Appeal was logged on the 7th of January, 2005 therefore it was within the statutory limit.

We have stated earlier that correspondence between the Appellant's Advocates and the Respondent commenced sometime in March 2004. The letter annexure OCBL15 refers to earlier email correspondence is however not annexed. By its letter dated 17th of August 2004 the Respondent advised the Appellant that it was not in a position to determine the Appellant's application until the suits mentioned in the letter were determined.

14. In response to the said letter dated 17th August 2004, the Appellant's Advocates wrote, rather belatedly, on the 23rd November 2004 advising that they had been trying unsuccessfully to trace the court files relating to the two cases mentioned in the Respondent's letter of 17 August 2004.

In our view, it is not possible to separate the letters exchanged between the parties. It is clear to us that the final position taken by the Respondent was the letter dated 22nd December 2004 having reviewed the contents and arguments of the Appellant's Advocates contained in the letter dated 23rd November 2004, it is our finding therefore that the Appeal is properly based on the final letter dated 22nd December 2004 and was therefore filed on time.

The second issue is whether there was a decision by the Respondent capable of being appealed against.

15. According to Counsel for the Respondent. Ms. Janmohamed the letters of 17th August, 2004 and 22nd December 2004 were simply stating that there were suits pending and therefore that could not have amounted to a decision by the Appellant.

We think it is important to set out the full contents of the letters in question;

Our Ref: CMA/MRT/8/218

August 17, 2004

Anjarwalla & Khanna Advocates



6th Floor, Transnational Plaza

City Hall Way

P. O. Box 61278

00200 NAIROBI

Attn: AMYM MUSSA

Dear Sirs

Application for exemption from the Capital Markets (Takeovers and Mergers) Regulations, 2002 proposed transfer of 52 Percent Steel Brothers Holding in A. Baumann Limited to Delphis Bank Limited

The above matter refers

16. Kindly note that we are still awaiting response to our letter of July 27, 2004.

We have reviewed your application dated April 2, 2004 for exemption from the Capital Markets (Takeovers and Mergers) Regulations, 2002 for transfer of 52 per cent shares of A. Baumann Limited held by Steel Brothers Limiter to Delphis Bank Limited. We not that:

- i. Securities that are the subject matter of this application are the subject matter in Civil Case no 1051 of 2002 and Civil Case No 1074 of 2002 which are still pending in court and
- ii. Delphis Bank has been enjoined as an interested party in these suits

Consequently, the Authority is not in a position to determine your application until these suits are determine (emphasis ours)

Yours faithfully,

Edward H Ntalami

CHIEF EXECUTIVE

cc: Delphis Bank Limited

The letter dated 22nd December, 2004 read as follows:

Our Ref: CMA/MRT/8/218

December 22, 2004

Anjarwalla & Khana Advocates

6th floor Transnational Plaza

City Hall Way

P. O. Box 61278

00200 NAIROBI

Attn: AMYM MUSSA

Dear Sirs

Application for exemption from the Capital Markets (Takeovers and Mergers) Regulations, 2002 proposed transfer of 52 Percent Steel Brothers Holding in A. Baumann Limited to Delphis Bank Limited

Your letter of November 23, 2004 on the above matters refers.



We have reviewed contents of your letter and note that;

- iii. Securities that are the subject matter of this application are the subjects matter in Civil Case No 1051 of 2002 and Civil Case No 1074 of 2002 which are still pending in court and
- iv. Delphis Bank has been enjoined as an interested party in these suits.

Consequently, we reiterate our position by letter dated August 17, 2004 that the Authority is not in a position to determine your application until these suits are finalized. (emphasis ours)

Yours faithfully,

K.C. Mweti

Manager Legal Affairs and Enforcement

For: CHIEF EXECUTIVE

17. The question for determination is whether the two letters amounted to a decision or direction by the Respondent. The Black's Law Dictionary, 7th edition at page 414 defines a decision as:

A judicial determination after consideration of the facts and the law; esp. a ruling, order or judgment pronounced by a court when considering or disposing of a case

Judicial Dictionary, 12th edition K.J. Aiyar's at page 381 states:

Whenever a question is determined or a judgment is rendered, or a conclusion is arrived at, after weighing the reasons for and against the proposition, it is a decision.

18. In the Indian Case of Devarakonda Edl. Society vs All India Council Technical AIR 1997 AP 389,1997 ALT 117 while determining the question of what amount to a decision noted that;

'Normally speaking, 'decision means waking up one's mind, may be even personal decisions leading to real and true conclusions. Actually it is a judgment based on conclusions (Page 309 of Oxford Advanced Learner's Dictionary supra) As a verb, 'decide' means "to give a judgement in a case" and as a noun "decision" means "judgment in c Civil court making up one's mind to do something, act of coming to a decision, is a decision making process" (Page 67 of Dictionary of Law by P.H. Coll in supra). In the legal sense of the meaning a 'decision' is a determination arrived after consideration of facts in the legal context of law, a popular rather than technical or legal work, a comprehensive: term having, no fixed, legal meaning. It may be employed as referring to – ministerial acts as well as to those that are judicial or of a judicial character" (Page 407 of Black's Law Dictionary supra)

The court in the above cases this defined a decision as 'not merely a view but an objective determination based upon facts and circumstances of each case after examining the materials on record and if possible after bearing the persons who are going to be aggrieved by that, Therefore, it cannot be a mere conclusion or a finding based on insufficient or immature factum or the legal implications'

19. In the letter dated 17th August 2016 the Respondent's Chief Executive commences paragraph 3 thereof by the words "we have received your application dated April 2, 2004". The same work "reviewed" is used in the letter of 22nd December 2004. The word "review" connotes the formal examination of something or facts or the act of process of carefully considering or going over a subject again. In Court's "review" basically means the judicial examination as by a higher Court of the decision of proceedings in the case. Our view is therefore that both the letter of 17th August and 22nd December 2004 indicate



that the Respondent had looked at the documents availed to it including the documents forwarded by Mr. Odhiambo Adala and formed an opinion on the matter. Having done so, the Respondent made a decision that it would not determine the application before it pending the determination of the Court matters.

There are two other arguments on this point the finding of which will be the same. Section 35(1) of the Capital Markets Act reads as follows:

Any person aggrieved by any direction given by the Authority or by the Investor Compensation Fund...”

20. The word used in the section is “direction” and not decision.

Section 35A (4) reproduced elsewhere in this Award and referred to by learned Counsel Ms. Janmohamed allows an appeal or a reference on any matter relating to this Act.

Our reading of both the above sections leads to the conclusion that the matter appealed against need not be a decision. It could be a direction or a matter.

We therefore find that the Respondent had made a decision or a direction through the letters, having made objective determination based on the fact that there were on-going cases. There is therefore a decision or direction or matter upon which the Appellant can mount an appeal.

The Third issue is whether the Respondent erred in law and fact in failing to consider the Appellant’s application for exemption from the Capital Markets (Takeovers and Mergers) Regulations, 2002

21. In the instant case, the Respondent submitted that it was presented with an application for exemption in which the material subject matter was also a subject matter of two High Court Cases being HCCC No 1074 of 2002 and HCCC No 1051 of 2002. There were orders issued in the said cases and which orders touched directly on the shares upon which it was being requested to make a decision. The Respondent’s case is that it would have been in breach of the Court “Orders had it made a decision to grant the exemption.

Counsel for the Appellant Mr. Akelo submitted that the Respondent failed to judiciously exercise its authority in the circumstances because the Appellant was not a party to the said suits.

We have perused the pleadings the documents in regard to HCCC No 1074 of 2002 as well as 1051 of 2002. We have stated earlier that at the inception of the suits and at the time the orders were issued neither the Appellant nor the Respondent were parties to the suits. It is however correct as submitted by the Appellant that the Court cases dealt with the shares which had been pledged to the Appellant as security. In High Court Civil Case No 1074 of 2002 we have note from the record that an Order was issued on 26th June 2002 in which one Charles Kariuki Githongo was appointed Receiver of Steel Brothers (Overseas Investments) Limited consented to the transfer of all 52% shares it held at A. Baumann and Company Limited.

22. In determining this third issue, we have agonized as to whether the parties to this appeal could have been affected at all by the proceedings in court and the orders issued. In regard to Steel Brothers (Overseas Investments) Limited, the orders issued against it are set out in the extracted Order Annexure ‘A’ to the Respondent’s statement of facts. Order No 4 restrained the said Steel Brothers from disposing off its shares in A. Baumann.

The question of whether one can be bound by a decision on which they were not party to has settled by courts from an early period. In the Indian Case of, Gita Ram Kalsi vs S. Prithivi Singh and Ors AIR



1956 PH 129, justice Bhandari Consulted certain American works on judgements and particularly that of Freeman who on the issue of '[Nominal and Real Proper and Necessary parties' stated that:

Parties to a judgment in the strict sense include only those persons who are named as such in the record and over whom the Court has acquired jurisdiction. As to such persons the judgment is of conclusive, unless they have been previously non-suited or dismissed or are joined merely as formal parties and have no control over the proceedings as in case of an action by the grantee in the name of his grantor and as to whom no relief is sought or granted The fact that they are merely 'proper' and not 'necessary' parties does not relieve them from conclusive effect of the adjudication”.

23. In the Ugandan case of *Carolyn Turyatamba & 4 Ors Vs Attorney General & anor* ((Const Petition No 15 OF 2006)) [2011] UGCA 6 (8 August 2011) where the second issue for determination by the court was whether or not, the petition was incompetent by reason of the fact that the reliefs sought by the petitioners also affected the third parties who are not parties to the petition, the court held that;

‘However, there are also reliefs prayed for in the petition whereby this court is asked to make orders cancelling the leases and certificates that already have individual third parties as registered proprietors of the respective suit lands. The registered proprietors are not parties to this petition. In other words, the petitioners are seeking from us orders to disentitle these third parties of their respective interest in the suit lands when such parties have not been heard. We are unable to do so, would be to condemn such third parties, without having availed to them a fair hearing which act would be contrary to article 28 of *the Constitution*’ (emphasis)

24. In the case of *Daniel Ng’ang’a Kamande & 2 others V Ngucanirio Farmers Company LTD* [2012] Eklr: Justice Odunga agreed with the Respondents argument that since the applicants were not parties to the suit they were not affected by the judgment. He further went to state that, “The law it is that non-parties to legal proceedings are not bound by orders made therein’. The honorable judge placed reliance on the case of

Since Hashid was not a party to the decision in which the Court ordered that they lorry be released to the objector, and since he had obtained title to the lorry at a lawful auction before the said decision was made, property had passed and that decision did not bind him since he was not made a party. (emphasis)

25. In the case of *Jeanne W Gacheche & 5 others Judges and Magistrates Vetting Board and 2 others* [2015] eKLR Justices Odunga, Lenaola, Mumbi Ngugi, Nyamweya and Musyoka held that;

Ordinarily persons who are not parties to legal proceedings are never bound by decisions arising therefrom; that position, in our view however only applies to judgements which can properly be described as being in personam. In *Conflict of Laws*. R H Graveson, (7th Edu. 1974) at page 98, it is stated:

“An action is said to be in personam when it’s object it is to determine the rights and interest of the parties in the subject-matter of the action, however, the action may arise and the effect of a judgement in such an action is merely to bind the parties to it. A normal action brought by one person against another for breach of contract is a common example of an action in personam.”



26. The recent decision on this issue by justice Odunga delivered 12th July, 2016, Sky Africa holdings Ltd vs Registrar of Titles & Attorney General Ex parte Sky Africa Holdings Ltd [2016] eKLR, the judge held that;

In my view, the success or otherwise of this application may well depend on the nature of the orders made in the said petition. The general rule is that orders which are personal in nature or orders in personam in legal parlance, do not affect third parties to the cause. See Ernest Orwa Mwai vs Abdul S Hashid & Another Civil Appeal No 39 of 1995 Kotis Sandis vs Ignacio Jose Macario Pedro DE Silva Civil Appeal No 38 of 1950 [1950] 1 EACA 95, The Town Council of Ol'Kalou vs Ng'ang'a General Store Civil Appeal No 269 of 1997 and Sakina Sote Kaitany and Anor vs Mary Wamaitha civil Appeal No. 108 of 1995.

27. The judge proceeded to note that, 'However, there are other orders or judgements which bind the whole world as they determine the state of affairs rather than the rights of the parties before the Court. He relied on the case of Kamunyu and others vs Attorney General and Others [2007] 1 EA 116 with respect to a decision in rem which held;

In a suit seeking judgement in rem, that is a judgement applicable to the whole world, and individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in present case, the Appellants when successful in the suit obtain judgment which is effective against the whole world but does not confer benefits upon the whole world."

28. The learned judge further relied on the following case: Japheth Nzila Muangi vs. Kenya Safari Lodges and Hotels Ltd [2008] eKLR it was held:

It is trite law that ordinarily a judgment binds only the parties to it. This is known as Judgement in personam. A judgment may also be conclusive not only against the parties to it but also all the world. This is known as a judgment *in rem*. This is a judgment which declares, defines, or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally.

29. Pattni vs Ali Anor (Isle of Mann (Staff of Government Division) [2006] UKPC 51 in which reliance was sought from Jowitt's Dictionary of English Law (2nd Edn) p 1025-6 to the effect that:

A judgement in rem is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is also declared by the adjudication .so a declaration of legitimacy is in effect a judgment *in rem*.

30. Having carefully examined the documents and considered the matter, we are of the view that although the subject matter in the proceedings before the High Court involved the shares pledged to the Appellant as security that the Orders obtained in court by a separate party did not affect the Respondent. The Respondent's decision to postpone the determination of the application to grant a waiver runs contrary to its mandate, inter alia, "the protection of investor interests" and the wider public given that as a commercial bank holds deposits made by public. The decision or direction to postpone determination is likely to have the result of rendering the use of listed companied shares as collateral for loan facilities unacceptable if lenders face challenges if and when they wish to enforce their rights as lenders.



31. For the above reasons, we allow the Appeal and direct that, for whatever worth, the Respondent determine the Appellant's application of reception lodged in 2004 within 30 days of the date hereof.

The costs of the Appeal shall be borne by the Respondent.

DATED AT NAIROBI THIS 6TH DAY OF OCTOBER 2016

Jinaro K. Kibet Chairman

Mrs. Laila Macharia Member

Mrs. Karen Kandie Member

Mr. Kennedy Nyamwaya Member

Mr. Karumba Kinyua Member

