REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga, CJ. & P; Ibrahim; Wanjala; Njoki; & Lenaola, SCJJ)

PETITION NO. 29 OF 2019

BETWEEN

ALNASHIR POPAT.....1ST PETITIONER

OMUREMBE IYADI.....2ND PETITIONER

JINIT M. SHAH.....3RD PETITIONER

ANWAR A. HAJEE .....4TH PETITIONER

HANIF SOMJI.....5TH PETITIONER

VISHNU DHUTIA.....6TH PETITIONER

ERIC G. BENGI .....7TH PETITIONER

MUKESH K.M. PATEL.....8TH PETITIONER

AND

THE CAPITAL MARKETS AUTHORITY.....RESPONDENT

(Appeal from Judgment and Order of the Court of Appeal at Nairobi dated 28th June, 2019

in Civil Appeal No. 35 of 2017 delivered by the ***Hon. Messrs. Justices E.M. Githinji,***

D.K. Musinga and J. Otieno-Odek, JJA*).*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This is an appeal brought as of right under **Article 163(4)(a)** of the Constitution against the judgment of the Court of Appeal (*Githinji, Musinga and Odek, JJA*) which overturned the decision of the High Court in ***Capital Markets Authority v. Alnashir Popat & 8 Others,*** Constitutional Petition No. 245 of 2016. In that judgment, delivered on 28th June 2019, the Court of Appeal held that the respondent is not in breach of Article 47 of the Constitution; the provisions of the Fair Administrative Action Act, 2015; or the rules of natural justice; and as such it was not a judge in its own cause as the Capital Markets Authority Act expressly authorizes it to perform dual and overlapping, inquisitorial and enforcement functions.

B. BACKGROUND

[2] The petitioners were non-executive directors of Imperial Bank Limited (now in receivership) (the Bank). The respondent is a statutory regulatory authority established under **Section 5** of the **Capital Markets Act** (the CMA Act) and charged with the responsibility of, *inter alia*, promoting, regulating and facilitating the development of orderly, fair and efficient capital markets in Kenya.

[3] On 12th August 2015, the respondent approved the Bank's application to issue to the general public a corporate bond of **Kes. 2 billion** (the bond issue). The record shows that it was only the then Bank's Managing Director, Mr. Abdulmalek Janmohamed, and the Bank's Chief Finance Officer, Mr. James Kaburu, who were privy to that application and who, together with various external transaction advisors, handled all the correspondence regarding the bond issue.

[4] On 15th September 2015, the Bank's said Group Managing Director, Mr. Janmohamed, collapsed and died. Immediately thereafter, one M. Naeem Shah, formerly the Bank's Head of Credit, and the said James Kaburu were appointed Acting Managing Director and Deputy Managing Director respectively.

[5] On 21st September 2015, the said Acting Managing Director and his deputy informed Mr. Alnashir Popat, the 1st petitioner, who was the non-executive Chairman of the Bank's Board of Directors (the Board), that the former Group Managing Director had for many years authorized illegal disbursements of vast amounts of the Bank's monies in transactions concealed from the respondent, the Central Bank of Kenya (CBK) and the Bank's Board. Alarmed by that disclosure and having failed to verify the said allegations internally, on 7th October 2015, Popat moved the Board to appoint a consultant, the FTI Consulting Group of London, to carry out a forensic audit of the Bank's financial affairs and report on its accurate financial position. The Board also resolved not to utilize the approved bond issue pending the outcome of the investigations by that consultant.

[6] Upon receipt of the consultant's preliminary report on 12th October 2015 revealing that the former Group Managing Director had indeed been running a scheme of fraudulent disbursements resulting in losses running into billions of shillings, the Board reported the matter to CBK. On the basis of the damning revelation in that interim report, pursuant to **Sections 43(1)** & **(2)** and **53(1)** of the **Kenya Deposit Insurance Act,** on 13th October 2015, CBK placed the Bank under receivership and appointed the Kenya Deposit Insurance Corporation its Receiver/Manager for a period of twelve (12) months. That appointment also included a declaration of a moratorium on the Bank. On the same day, the respondent, on its part, instructed the Nairobi Stock Exchange (NSE) not to proceed with the listing of the Bank's bond issue on the Fixed Income Securities Market Segment until further notice.

[7] Pursuant to its regulatory authority, the respondent decided to inquire into the circumstances prevailing in the Bank during the bond application and approval period to determine whether the petitioners, as directors of the Bank had, by their actions or omissions, contravened banking regulatory requirements. Consequently, on 6th May 2016, the respondent served the petitioners with notices to show cause and required them to respond, within 14 days, to seven allegations of negligence in the discharge of their mandate as directors of the Bank. In that regard, the appellants were summoned to appear before the respondent's Board on 24th May 2016 to answer those allegations. No hearing took place on that day. The appellants claim, however, that an inquisitorial hearing, which was presided by the CMA's Chairman of the Board, Mr. James Ndegwa, CMA's Chief Executive Officer, Mr. Paul Muthaura and CMA's Assistant Manager of the Licensing and Approvals Department, was held on 13th January 2016 and that is what triggered the present dispute.

C. PETITION BEFORE THE HIGH COURT

[8] In response to those notices, the appellants filed a constitutional petition in the High Court in which they challenged the propriety of the respondent's conduct of the enquiry. They claimed that, having approved the bond issue, and its officers, namely, the said Chairman of the Board, Mr. James Ndegwa, the Chief Executive Officer, Mr. Paul Muthaura and the Assistant Manager of the Licensing and Approvals Department, having conducted the preliminary enquiry into the matter and had now constituted themselves as adjudicators in the enforcement proceedings, the respondent was conflicted and could not be impartial in the enforcement proceedings. The petitioners also alleged contravention of a host of their constitutional rights including contravention of their right of access to information under Article 35(1)(b) of the Constitution; the right to fair administrative action under Article 47 of the Constitution; as well as the right to a fair hearing under Article 50(1) of the Constitution and sought a conservatory order to restrain the respondent from proceeding with the enquiry until the respondent had caused the receiver/manager to furnish them with certain documents from the Bank. The petitioners also sought an order of certiorari to quash the notices to show cause as well as compensation for alleged damages they suffered by that attempted enquiry. The respondent opposed that petition terming it not only frivolous but also premature.

[9] After hearing that petition, the High Court found that given the respondent's dual inquisitorial and enforcement mandate and the fact that it had admittedly considered and approved the bond issue as merited, a well informed and fair minded observer, given all facts would conclude that there existed a possibility of bias on the part of the respondent against the appellants. Finding, further, that the respondent's regulatory mandate would not be hampered as it could, under Section 11A of the CMA Act, delegate its functions to an independent body, the High Court accordingly quashed the notices to show cause issued to the appellants.

D. APPEAL BEFORE THE COURT OF APPEAL

[10] On the respondent's appeal and the appellants' cross-appeal against that decision, the Court of Appeal held that since the CMA Act expressly authorized the overlapping inquisitorial and enforcement functions, the respondent is expected to make unprejudiced judgment on matters it has investigated. It consequently allowed the appeal and dismissed the cross-appeal clarifying that the respondent was at liberty to continue with the administrative proceedings it had commenced against the appellants. The Court of Appeal also awarded costs of the petition in the High Court and on appeal to the respondent. That decision provoked the present appeal before this Court.

E. APPEAL BEFORE THE SUPREME COURT

[11] Upon consideration of the 14 grounds of appeal, it is clear to us that the substratum of this appeal is the propriety of the dual statutory mandate granted to the respondent as the investigator and enforcer of capital markets infractions in Kenya. The appeal thus raises three major issues: *whether the overlapping roles that the Capital Markets Act vests in the Capital Markets Authority constitute a violation of Articles 47(1) and 50(1) (as read with Article 25(c)) of the Constitution; whether Section 11(3) (cc) and (h) of the Capital Markets Act which authorizes the overlapping is and should be declared unconstitutional; and whether the respondent's attempted enforcement proceedings were or were likely to be biased against the petitioners*.

F. PETITIONERS' SUBMISSIONS

[12] On the first issue, the petitioners argue that both Articles 50(1) and 47(1) of the Constitution espouse the twin tenets of natural justice: *nemo judex in causa sua* (no man should be a judge in his own cause) and *audi alteram partem* (no man should be condemned unheard). These twin principles are so jealously guarded that they comprise one of the only two constitutional rights that, pursuant to Article 25(c) of the Constitution, cannot be limited.

[13] The petitioners argue that by vesting both inquisitorial/investigative and enforcement functions in the respondent, Section

11(3)(cc) & (h) of the CMA Act is unconstitutional for being inconsistent with Articles 47(1) and 50(1) of the Constitution. They contend that for the officers of the respondent who had been involved in the inquisitorial/investigatory hearings, on the basis of which the respondent formulated the seven allegations (equivalent to charges) against the petitioners, to constitute themselves the adjudication panel in the subsequent enforcement proceedings is tantamount to being the accuser, investigator, prosecutor and judge at the same time. Such act will not only offend the rules of natural justice, but such officers are likely to be biased against the petitioners, thus clearly flouting the petitioners' rights under Articles 47(1) and 50(1) of the Constitution.

[14] The petitioners further argue that by requiring them to respond to the seven accusations leveled against them within 14 days and proceeding with the hearing of the inquiry on dates the petitioners' counsel was unavailable, the respondent denied them the right to legal representation by counsel of their choice and an opportunity to prepare their defence. To make matters worse, the petitioners argue, the respondent ignored their request to invoke Section 33D of the CMA Act and Article 35(1)(b) of the Constitution and obtain for them the documents they required from the Central Bank of Kenya's appointed receiver/manager to enable them prepare their defence. As such, notwithstanding the express authorization by the CMA Act of these duality of inquisitorial and enforcement functions, these acts also flout their rights under Articles 47(1) and 50(1) of the Constitution. They cite ***Imaran Limited & 6 others v Central Bank of Kenya & 5 others*** [2016] eKLR in support of that submission.

[15] In further support of their case, the petitioners cite several authorities from comparative jurisdictions. The first one is the decision of the Supreme Court of Canada in **Québec Inc. v. Quebec** *(Régie des permis d'alcool), [1996] 3 SCR 919, 1996 CanLII 153 (SCC)* where it was held that statutory provisions that authorize overlapping of functions are liable to be declared invalid where the exercise of such overlapping functions by an administrative agency would cause an informed person to have a reasonable apprehension of bias. They also cite the decision of the Supreme Court of the United States in **Williams v. Pennsylvania,** *136 S. Ct. 1899, 1910 (2016)* where it was held that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. The petitioners further rely on the American Supreme Court decision in **Lyness v. Commonwealth** *State Bd. of Medicine, 529 Pa. 535, 548 (Pa. 1992)* and argue that any appearance of non-objectivity on the part of an administrative agency renders the agency's proceedings unconstitutional whether or not actual bias exists as a result of the agency acting as both prosecutor and judge.

[16] In the circumstances, also relying on this Court's decisions in ***Communication Commission of Kenya & 5 Others v. Royal Media Services & 5 Others***, [2014 eKLR; ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others***, [2014] eKLR; and ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others*** [2012] eKLR, the petitioners urge us to hold that Section 11(3)(cc) & (h) of the CMA Act, which grants the respondent authority to adjudicate contested issues arising from matters it had investigated, fouls Articles 47(1) and 50(1) of the Constitution.

[17] Consequent upon finding that Section 11(3)(cc) & (h) of the CMA Act is inconsistent with Articles 47(1) and 50(1) of the Constitution, the petitioners urge us to declare it unconstitutional. They in addition dismissed the respondent's contention that a prayer for such declaration was not pleaded and the issue of the unconstitutionality of Section 11(3)(cc) & (h) of the CMA Act did not feature in the two Superior courts' proceedings. They argue that this Court can make that declaration *suo moto* as it did in ***Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others*** [2012] eKLR. Further, since the petitioners have raised it, the issue of the unconstitutionality of Section 11(3)(cc) and (h) of the CMA Act is squarely before this Honourable Court by virtue of Article 163(4)(a) of the Constitution as well as Sections 3(b), (c) (d) and 21(3) of the Supreme Court Act, 2011 and Rule 3(5) of the Supreme Court Rules. As such, this Court has not only the jurisdiction and the mandate but is also obliged to interpret and apply the Constitution vis-à-vis the offending Section 11(3)(cc) and (h) of the CMA Act and make appropriate declarations, so as to give a high yielding interpretive guidance on the Constitution as was stated in ***In the Matter of the Speaker of the Senate & Another,*** Sup. Ct. Advisory Opinion No. 2 of 2013; [2013] eKLR.

[18] The petitioners further submit that by declaring Section 11(3)(cc) & (h) of the CMA Act unconstitutional, this Court will simply be enforcing Article 2(4) of the Constitution which provides that "*any law … that is inconsistent with this Constitution is void to the extent of the inconsistency …*" and applying Section 7(1) of the Sixth Schedule to the Constitution which requires "*all law in force immediately before*" the promulgation of the Constitution, 2010 to "*be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution*." And on the authority of ***Mary Wambui Munene v Peter Gichuki King'ara & 2 Others*** [2014] eKLR, they contend that that declaration should apply retrospectively to the date of promulgation of the Constitution, the said provisions having predated the promulgation of the Constitution.

[19] The petitioners furthermore faulted the Court of Appeal for relying on the Canadian Court of Appeal decision in the case of ***Brosseau v. Alberta Securities Commission,*** *[1989] 1 S.C.R. 301* which had been overturned by the Canadian Supreme Court in ***Quebec Inc. v. Quebec***, (supra) and is, at any rate, inconsistent with those of our High Court in ***Solomon Muyeka Alubala v. Capital Markets Authority and Another***, [2019] eKLR, as well as ***Aly-Khan Satchu v. Capital Markets Authority*** [2019] eKLR.

[20] The petitioners also dismissed the respondent's argument that an order to foul the alleged overlapping will thwart the objective of the CMA Act. They thus argue that Section 11A of the CMA Act, which is a codification of international best practices, read together with Section 14(1) thereof which authorizes delegation of some of the respondent's functions as well as Section 34A (4) which authorizes the respondent to refer some matters to the Capital Markets Tribunal, were meant to take care of unique situations like the one of conflict and possible complicity obtaining in this case.

[21] On those submissions, the petitioners pray that this appeal be allowed, the judgment of the High Court be restored and the respondent be ordered to pay, to the appellants, compensation in the sum this Court may deem fit to award for the damage they suffered as a result of the respondent's attempted enquiry. They also seek costs as well as interest thereon.

G. RESPONDENT'S SUBMISSIONS

[22] In response to the petitioners' above submissions, on the first issue, the respondent admits that under the *nemo judex in causa sua esse* principle, which applies to administrative proceedings before statutory bodies, members of adjudicatory panels should not be involved in the investigatory stages of a proceeding as that would give rise to a reasonable apprehension of bias. However, statutory authorization for overlapping functions are an exception to this rule and is meant to achieve the objectives of a statute. The respondent cites the cases of ***Judicial Service Commission –vs- Gladys Boss Shollei & Another*** [2014] eKLR, and ***Ernst & Young LLP v Capital Markets Authority & Another*** [2017] eKLR in support of that submission.

[23] Citing Jacob K. Gakeri's Article**,** *Regulating Kenya's Securities Markets: An Assessment of the Capital Markets Authority's Enforcement Jurisprudence*, the respondent further argues that an effective enforcement regime is the bedrock of investor protection and the confidence required in capital markets. To achieve that objective, the respondent submits that Section 11(3) of the CMA Act grants wide powers to the CMA to enable it instill discipline upon any errant player with a view to regulating and facilitating development of an orderly, fair and efficient capital market in Kenya. The respondent contends that if the petitioners' prayer is granted and Section 11(3) (cc) & (h) is declared unconstitutional, the efficaciousness of CMA's regulation will be lost spelling doom to the Kenyan capital market. Such an interpretation would also ruin the alternative dispute resolution mechanism under **Article 159(2) (c)** of the Constitution and also hamper the operations of all other regulatory bodies such as the Central Bank of Kenya and the Competition Authority of Kenya tasked with investigating and sanctioning errant market players which would be absurd. Errant financial market players would ride roughshod in Kenya and such interpretation would spell the beginning of a dark period for investors.

[24] The respondent furthermore argues that the CMA Act is deliberately designed to empower the CMA to perform overlapping roles in the capital market oversight and that does not constitute a violation of Article 50(1) as read with Article 25(c) and/or Article 47 of the Constitution. As such, the petitioners' accusation that the respondent, having approved the bond issue,

turned around and investigated, with a view to taking enforcement action against the appellants (if found culpable), is tantamount to being the accuser, investigator, prosecutor and judge at the same time, has no basis. As stated, the CMA Act expressly authorizes those actions, so submits the respondent.

[25] The respondent further argues that in considering the provisions of Article 50(1) as read with Article 25(c) and Article 47 of the Constitution, as Mativo J. stated *in* ***Aly Khan Satchu v Capital Markets Authority*** [2019] eKLR**,** the respondent's proceedings under the CMA Act should not be equated to a criminal trial. Instead, as was stated in ***Dry Associates Limited v. Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd*** [2012] eKLR**,** they should be fairly informal, expeditious, efficient, lawful and reasonable.

[26] The respondent in addition argues that though the ***Quebec Inc. case*** is distinguishable from the ***George Brosseau case*** in that the latter dealt with the liquor licensing permit, the ***Quebec Inc.*** case actually upheld the ratio in the ***George Brosseau case*** on the exemption that flexibility must be shown towards administrative tribunals in the application of the *nemo judex in causa sua esse* principle and that plurality of functions is not necessarily problematic.

[27] In the circumstances, the respondent urges that the overlapping mandate granted by the CMA Act to the respondent does not constitute a violation of the appellants' constitutional rights under Articles 47(1) and 50(1) (as read with Article 25(c)) of the Constitution.

[28] On the second issue, the respondent argues that the unconstitutionality of Section 11(3) of the CMA Act was not pleaded in the High Court petition and did not feature in the two Superior Courts' proceedings. This Court cannot therefore entertain such a prayer. It is an afterthought and there is therefore no basis for declaring Section 11(3) (cc) & (h) of the CMA Act unconstitutional, it submits.

[29] On bias, the respondent denies that any inquisitorial hearing, which was presided over by the CMA's Chairman of the Board, Mr. James Ndegwa, CMA's Chief Executive Officer, Mr. Paul Muthaura and CMA's Assistant Manager of the Licensing and Approvals Department or at all, was held on 13th January 2016. What happened, according to the respondent, is that on 24th December 2015, the respondent invited the appellants to a meeting on 13th January 2016 to discuss and provide information on the circumstances prevailing in the Bank from the application to the approval of the bond issue. The appellants with their counsel attended that meeting at which the respondent informed them that the conduct of all the parties in the issuance of the bond would be fully inquired into.

[30] Based on the information gathered from the petitioners and that derived from affidavits filed by stakeholders and the CBK's said receiver/manager in various court proceedings, on 6th May 2016, the respondent served the petitioners with a notice to show cause and required them to respond in writing within 14 days and to appear before the respondent on 24th May 2016 to make their submissions on the alleged breaches. However, at the instance of the petitioners and their advocates, the hearing was adjourned twice. And before the hearing that was scheduled for 16th June 2016, the appellants filed Constitutional Petition No. 245 of 2016, which gave rise to this appeal.

[31] The respondent also contends that the allegation that the Chairman of the Board, Mr. James Ndegwa, CMA's Chief Executive Officer, Mr. Paul Muthaura and CMA's Assistant Manager of the Licensing and Approvals Department are conflicted has no basis. Other than submitting globally that Article 47(1) of the Constitution would be violated, the petitioners did not make out a case, either before the High Court or before the Court of Appeal, for a reasonable apprehension of bias.

[32] The respondent submits that under Section 6(3) of the CMA Act, the Chairman of CMA is mandated to preside over all meetings of the Board of CMA. Section 8 gives the CEO administrative functions. Ms. Mary Njuguna, the Assistant Manager in charge of Licensing and Approvals was the most suited person to gather information on the bond issue. However, when the appellants were summoned for hearing on 31st May 2016, as the minutes of that meeting show, Ms. Njuguna did not appear. At any rate, the appellants did not raise any objection or conflict on the composition of the hearing panel.

[33] The respondent further contends that this case is distinguishable from the **Solomon Alubala** case relied upon by the petitioners in that there was a hearing in that case. In this one, the hearing was nipped in the bud. The respondent cited the case of the ***Judicial Service Commission v. Gladys Shollei & Another*** [2014] eKLR and Lord Denning's statement in English Court of Appeal decision in ***Regina v Race Relations Board, Ex parte Selvarajan*** [1975] 1 WLR 1686, [1976] 1 All ER 12 for the proposition that administrative bodies are the masters of procedure in their proceedings and unless one can prove that there was acute procedural impropriety, the courts should not intervene.

[34] On those submissions, the respondent urges us to dismiss this appeal with costs.

H. ANALYSIS

[35] As stated, the substratum of this appeal is the propriety of the dual statutory mandate granted to the respondent as the investigator and enforcer of capital markets violations in Kenya. The petitioners contend that Section 11(3)(cc) & (h) that vests the respondent with that dual statutory mandate is unconstitutional. They also accuse the respondent of bias for the reason that fair play would frown upon the respondent's investigatory and enforcement mandate in this case.

[36] While conceding that under the ***nemo judex in causa sua esse*** principle the overlapping mandate should ordinarily not be allowed, the respondent on the other hand posits that in the case of bodies regulating securities, the overlap is an exception if authorized by statute and the discharge of that dual mandate is not unconstitutional.

[37] As stated, three main issues are raised in this appeal. They are: whether the overlapping roles that the Capital Markets Act vests in the Capital Markets Authority constitutes a violation of Articles 47(1) and 50(1) (as read with Article 25(c)) of the Constitution; whether Section 11(3) (cc) and (h) of the Capital Markets Act which authorizes the overlapping is and should be declared unconstitutional; and whether the respondent's attempted enforcement proceedings were or were likely to be biased against the petitioners.

[38] Having considered the parties' written and oral submissions on the three issues, we would like to observe that the importance of capital markets cannot be over-emphasized. The capitals markets are *"a fundamental component of the financial sector in achieving a robust and sustaining economic development."*

They assist governments to close resource gaps by providing *"alternative sources of long-term finance for long-term productive investments";* they assist raise *"equity and infrastructure development capital via long dated bonds and asset backed securities";* they provide *"avenues for investment opportunities that encourage a thrift culture critical in increasing domestic savings and investment ratios that are essential for rapid industrialization";* and they encourage *"broader ownership of productive assets by retail investors" [including pensioners], a critical aspect of poverty reduction.1* Securities also *"support corporate initiatives finance the exploitation of new ideas and facilitate the management of financial risk."2*

[39] Due to these fundamental roles that the Capital Markets Authority plays in a country's economy, sound and effective regulation to foster public and investor confidence in the integrity, growth and development of securities markets is imperative.3 Effective regulation also serves the purposes of *"protecting investors, reducing systemic risk and ensuring that markets are fair, efficient and transparent."4* It is for these reasons that capital markets world over are highly regulated.

[40] Apart from an effective regulatory framework, an enforcement regime is also critical. "*Enforcement determines the efficaciousness of regulation.*" As Dr. Gakeri further observes, "*an effective enforcement regime is the bedrock of investor protection and [the] confidence required in capital markets.*" And the "*effectiveness of the regulatory scheme rests upon the nature and scope of enforcement tools*"5 granted to the regulatory body.

[41] In most common law jurisdictions, for instance Australia; Uganda; Tanzania, Nigeria; and Ghana, the regulatory and enforcement frameworks are statutory with the relevant statutes also creating the regulatory authorities and spelling out their functions. Though there is no uniform regulatory and enforcement scheme, to achieve the objective of their statutes, most jurisdictions, [including Kenya], expressly authorise an overlap of functions which in normal judicial proceedings would be kept separate.

[42] In Kenya, as is clear from its preamble, the objective of the Capital Markets Act is to "*establish a Capital Markets Authority for the purpose of promoting, regulating and facilitating the development of an orderly, fair and efficient capital market in Kenya and for connected purposes*." This is the objective we are required to keep in view while interpreting the CMA Act vis-a-vis the provisions of Articles 47 and 50(1) of the Constitution.

[43] One of the canons of statutory interpretation, as was stated in the case of ***Commissioner of Income Tax v. Menon*** [1985] eKLR, is the appreciation of the social and historical background of a legislation. The historical background to this case is that, prior to the enactment of the CMA Act, the capital market in Kenya faced multiple challenges running from illicit intermediaries to lack of proper legislative guide hence the need for a firm regulatory regime. To achieve the objective of the CMA Act therefore, the Capital Markets Authority (CMA), established under Section 5 of the CMA Act, is, under Section 11(1) thereof charged with the responsibility of, *inter alia*, developing "*all aspects of the capital markets with particular emphasis on the removal of impediments to, and the creation of incentives for longer term investments in, productive enterprises*" to facilitate "*wider participation of the general public in the securities commodities market and derivatives market*"; and "*the protection of investor interests*."

[44] To achieve this objective, Section 11(3) of the CMA Act grants the Capital Markets Authority (CMA) wide powers to enable it instill discipline upon any errant player, with a view to regulating and facilitating the development of an orderly, fair and efficient capital market in Kenya, in line with the preamble to the Act.

[45] The provisions of the impugned Section 11(3)(cc) & (h) authorize the Authority to:

"(cc) impose sanctions for breach of the provisions of this Act or the regulations made thereunder, or for non-compliance with the Authority's requirements or directions, and such sanctions may include— levying of financial penalties …; ordering a person to remedy or mitigate the effect of the breach, make restitution or pay compensation to any person aggrieved by the breach; publishing findings of malfeasance by any person; suspending or cancelling the listing of any securities … for the protection of investors"; and to

"(h) inquire, either on its own motion or at the request of any other person, into the affairs of any person which the Authority has approved or to which it has granted a licence and any public company the securities of which are publicly offered or traded on an approved securities exchange or on an over the counter market."

[46] Is this overlap unconstitutional" In other words, does the overlap foul the ***nemo judex in causa sua esse*** principle and is thus unconstitutional as the petitioners argue"

[47] We do not think that the overlap *per se* is unconstitutional. The rights to fair administrative action and fair hearing are universal. The natural justice ***nemo judex in causa sua esse*** principle is one of the fundamental principles in literally all common law jurisdictions. It is an exemplification of Lord Hewart, CJ's famous maxim in the case of **R v. Sussex Justices*, ex parte* McCarthy** [1924] 1 KB 256, [1923] All ER Rep 233 that justice should not only be done but also be seen to be done.

[48] This principle is obviously blurred when one presides in the adjudication of one's cause or in a process one has an interest in. As the US Supreme Court stated in the case of **Re Murchison**, 349 U.S. 133, 136 (1955), cited to us by counsel for the petitioners, no person should be allowed to be a judge in his own cause or in a cause he has an interest in its outcome. Interest here includes a situation where one desires or is keen on obtaining a given result. A prosecutor, for example, has an interest in the conviction of a suspect he hauls into court.

[49] Having so stated, we would also agree with counsel for the respondent that there are exceptions to most principles. An important exception to the *nemo judex in causa sua esse* principle raised in this case is where the overlap of functions is a creature of statute and as long as the constitutionality of the statute is not in issue. Enunciating this exception in the Canadian case of **Re W. D. Latimer Co. and Attorney-General for Ontario** (1973), 2 O.R. (2d) 391**,**affirmed sub nom**. Re W. D. Latimer Co. and Bray** (1974), 6 O.R. (2d) 129, Dubin, JA stated:

"Where by statute the tribunal is authorized to perform tripartite functions, disqualification [on the ground of bias] must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task."

[50] As the Canadian Supreme Court later stated in the case of ***Brosseau v. Alberta Securities Commission,*** [1989] 1 S.C.R. 301, "*Administrative tribunals are created for a variety of reasons and to respond to a variety of needs*." In the case of securities commissions, that courts added,

"By their nature, such commissions [read tribunals] undertake several different functions. They are involved in overseeing the filing of prospectuses, regulating the trade in securities, registering persons and companies who trade in securities, carrying out investigations and enforcing the provisions of the Act."

[51] Such bodies will therefore have repeated dealings, in both administrative or adjudicative capacities, with the same parties. It is for this reason and to achieve the efficiency required in the operations of the securities markets, that the legislatures more often than not, allow for an overlap of functions which in normal judicial proceedings would be kept separate.

[52] In the said case of ***Georges R. Brosseau v The Alberta Securites Commission,*** Brosseau was a solicitor who prepared the prospectus of a company that later went into bankruptcy. The Alberta Securities Commission launched an investigation into the affairs of the company and in that regard summoned Brosseau to show cause why a cease trading order and/or possible deprivation of certain statutory exemptions would not be made against him. Brosseau raised a preliminary objection that the Commission had no jurisdiction to entertain any such proceedings against him. Upon the Commission overruling that objection, he unsuccessfully appealed to the Alberta Court of Appeal. The major issue in his further appeal to the Canadian Supreme Court was whether there was a reasonable apprehension of bias given that the Commission's Chairperson was involved in investigative stages.

[53] In its decision in that case, the Canadian Supreme Court held that in assessing allegations of bias, courts must be sensitive to the fact that, in their "protective role", securities commissions have a special character. As such, it is not enough to merely claim bias because a commission, in undertaking its preliminary internal review, did not act like a court. If it is clear from its empowering legislation that certain activities which might otherwise be considered "biased" form an integral part of its operations and the Commission has not acted outside its statutory authority, the doctrine of "reasonable apprehension of bias" *per se* cannot be

sustained. The Commission's structure and responsibilities as well as the manner of the discharge of its mandate must, *inter alia*, be considered.

[54] We endorse this view. Administrative tribunals are not supposed to operate like courts of law. That is why they are allowed to be masters of their own procedure although they must act fairly. (See Lord Denning's dictum in ***Selvara Jan v. Race Relations Board*** [1976] 1 ALL ER 12). And that is also why we agree with the respondent that for purposes of efficiency and in the carrying out of the objective of the CMA Act, especially in the expeditious disposal of disputes that arise in the operations of the capital markets, the functions set out in Section 11(3)(cc)(h) cannot be performed by separate bodies. To fragment the discharge of those functions will, in our view, lead to disputes dragging for years on end and thus defeating one of the crucial objectives of the CMA Act: efficiency. As such, these functions have, as of necessity, to be discharged by one body hence the overlap in the mandate granted to CMA.

[55] In the circumstances, we find and hold that Section 11(3) (cc) & (h) of the CMA Act is not unconstitutional. The overlapping mandate does not *per se* render the Section unconstitutional. What might turn out to be unconstitutional is the discharge of that dual mandate.

[56] Is that the case in this matter" Did the respondent, in its attempt to adjudicate over the issues raised in this matter act or was likely to act unconstitutionally"

[57] These questions thrust to view the critical qualifications given in both the ***Brosseau*** and ***Latimer Cases*** that the exception to the *nemo judex in causa sua esse* principle is on the assumption that "*the constitutionality"* of the statute is not in issue and in the discharge of its overlapping mandate, a tribunal does not go "*beyond the performance of the duties imposed upon it by the empowering legislation*."

[58] Besides the universal application of the *nemo judex in causa sua esse* principle, in our system, the principle is also entrenched in our 2010 Constitution. The rights to fair administrative action and fair hearing are constitutionally underpinned under Articles 47(1) and 50(1) of the 2010 Constitution. Consequently, even though we have held that Section 11(3) (cc) &

(h) of the CMA Act is not unconstitutional, we need to determine if the respondent's discharge of its dual mandate in this matter was itself likely to be unconstitutional. This calls for a critical balancing act in the interpretation of Articles 47(1) and 50(1) of the 2010 Constitution as against the dual investigative and enforcement mandate that Section 11(3) (cc) & (h) of the CMA Act grants to the respondent when allegations of bias are made in court.

[59] In such case, as already observed, one of the canons of statutory interpretation is that the historical background of a legislation must be taken into consideration—***Commissioner of Income Tax v. Menon*** [1985] eKLR. As was stated in the case of ***Judges & Magistrates Vetting Board & 2 Others v. Centre for Human Rights & Democracy & 11 Others***, [2014] eKLR, the court must be guided by the letter and spirit of the provisions of Articles 50(1) and 47(1) as read with Article 25(c) of the Constitution and give life to Parliament's intention in the enactment of section 11(3) (cc) & (h) of the Capital Markets Act by ensuring that its interpretation of these provisions does not hamper the operations of the CMA and/or those of other regulatory bodies such as the Central Bank of Kenya and the Competition Authority of Kenya. As such, in the words of the Canadian Supreme Court in ***Brosseau*** Case, quoting Wright J's observation in the ***Latimer*** *Case*, the court must ensure that a party:

"… is not unfairly dealt with or put in a position of potential unjustified peril at the hands of some person or body exercising jurisdiction. It must on the other hand [ensure that] … bodies seeking to perform their public duty are not unduly hampered in their work and that the purpose of the Legislature, if it be the source of their jurisdiction, is respected and realized as it has been expressed."

[60] On these established legal principles, we agree with the petitioners that in the promotion of public policy and efficient administration of the securities market in Kenya, the right to a fair administrative action cannot be sacrificed at the altar of efficiency or public interest. In this regard, we agree with the High Court decision in ***Republic v County Government of Mombasa Ex-parte Outdoor Advertising Association of Kenya*** [2014] eKLR that "*there can never be public interest in breach of the law … because public interest must accord to the Constitution and the law as the rule of law is one of the national values under Article 10 of the Constitution*." And as the Court of Appeal added in ***Capital Markets Authority v Jeremiah Kiereini & Another*** [2014] eKLR, individual rights "*are so fundamental that they cannot be limited even by public interest*."

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

[62] As such, while we accept the duality of the respondent's mandate under Section 11(3)(cc)(h) of the CMA Act, in any matter that can be classified as judicial or quasi-judicial, or one where, in the view of a reasonable man conversant with the matter, there is likely to be bias or a reasonable apprehension of bias, the respondent must observe the *nemo judex in causa sua esse* rule.

[63] In the circumstances, and in the words of the High Court in ***Ernst & Young LLP v Capital Markets Authority & Another*** [2017] eKLR, the respondent "*is required to observe and accord persons under investigations and or any person likely to be adversely affected by their decision a fair process and in particular it is required to adhere to the principles of natural justice and comply with the provisions of Articles 50 (1) and 47 of the constitution*." In other words, the reasonable apprehension of bias test is the key test.

[64] Furthermore, reasonable apprehension of bias is a legal standard for disqualifying judges and administrative decision-makers for bias. As such, the simple question which we require to answer in this case is whether there was or is a real possibility that a reasonable person, properly informed and viewing the circumstances realistically and practically, could conclude that the respondent might well be prone to bias. If the answer is in the affirmative, that will be a constitutional violation that cannot be overlooked in the name of public interest.

[65] We also agree with the petitioners that enforcement proceedings are not necessarily administrative merely because the enforcement body is an administrative one. In the words of the Constitutional Court of South Africa in ***President of the Republic of South Africa and others v South African Rugby Football Union and Others*** (CCT16/98) [1999] ZACC 11*: "The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising."* In ***Cojuangco vs. PCGG,*** 190 SCRA, the Supreme Court of Philippines, whilst prohibiting a law enforcer from investigating his own complaint, held that a preliminary investigation, though not a trial, amounted to a judicial proceeding on account of the nature of the function. In that characterization, it said "*An act becomes judicial when there is opportunity to be heard and for, the production and weighing of evidence, and a decision is rendered*."

[66] So, upon the characterization of the functions of the agency that are in question as judicial or quasi-judicial, the agency becomes a "tribunal" and must, in exercising those functions, comply with the requirements of impartiality and independence.

[67] In this case, we find and hold that in the discharge of its mandate under the CMA Act, the respondent must always first

determine whether or not its act or decision is judicial or quasi-judicial and whether or not it is likely to adversely affect the rights the persons or bodies under investigation. If it is either of the two or both, it must comply with the requirements of impartiality and independence under Articles 50 (1) and 47 of the Constitution. And it has no difficulty in doing so as Sections 11A(1) and 14(1) of the CMA Act empowers the respondent to delegate its functions and powers to other bodies or persons. As such, the objectives of the CMA Act will still be realized.

[68] So, by the respondent merely referring to the enforcement proceeding in this matter, euphemistically, as "administrative" does not change its intrinsic character. We are in no doubt that the nature of the enforcement proceedings sought to be undertaken by the respondent against the petitioners in this matter bespeaks a quasi-judicial process because, based on the material evidence placed before it, the respondent would have had to determine the culpability or otherwise of the petitioners. If found culpable, pursuant to Section 11(3)(cc) of the CMA Act, the respondent would impose sanctions, including financial penalties against the petitioners.

[69] As the trial Judge found, there was also a possibility of bias in this case. This is because the respondent had approved the Kshs. 2 billion bond issue. Upon information that the management of Imperial Bank Limited had been running a scheme of fraudulent disbursements resulting in losses running into billions of shillings, a factor the respondent should perhaps have discovered in the appraisal of the bond, Central Bank placed the Bank under receivership. An investigation into the propriety of the bond issue, to establish, as stated in the Notices to Show Cause, the petitioners' "*culpability for the contravention of the provisions of the Capital Markets Authority Act and determination of the appropriate enforcement action to be taken against*" the petitioners, would, no doubt, have cast aspersions upon the respondent's diligence. To shield itself against that eventuality, the respondent was likely not going to approach the decision-making process in the enforcement proceedings with the impartiality appropriate for that decision.

[70] Furthermore, from the evidence provided of the processes leading to the issuing of the Notices to Show Cause, the respondent's Board that appraised and approved Imperial Bank's Bond Issue application, is the same Board that initiated and conducted preliminary investigations into the petitioners' conduct in relation to the Bond Issue application and upon satisfying itself that the petitioners may have violated the relevant provisions of the Act and the Regulations made thereunder, made a decision to charge the petitioners and went ahead to formulate the requisite charges. It is this same Board that purported to preside over the hearing of the petitioners' cases. This would obviously lead to an inescapable appearance of partiality on the respondent's part.

I. DETERMINATION

[71] For the foregoing reasons, we allow this appeal in part and direct that each party should bear its own costs. The respondent may proceed with its enforcement proceeding subject to what we have stated above.

J. FINAL ORDERS

(a) The petitioners' appeal is allowed to the extent that the respondent may proceed with its enforcement proceedings against the petitioners through its delegated authority under Section 11A(1) and or Section 14(1) of the CMA Act;

(b) Each party to bear its own costs.

DATED and **DELIVERED** at **NAIROBI** this **11th** Day of **December 2020.**

.....	**.....**
D. K. MARAGA	**M. K. IBRAHIM**

CHIEF JUSTICE & PRESIDENT **JUSTICE OF THE SUPREME COURT**

OF THE SUPREME COURT

..... **.....**
S. C. WANJALA **NJOKI NDUNGU**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy

of the original

REGISTRAR

SUPREME COURT OF KENYA