Case Number:	Miscellaneous Civil Application 62 of 2016
Date Delivered:	09 Apr 2018
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	George Vincent Odunga
Citation:	Republic v Capital Markets Authority & another Ex-Parte Jonathan Irungu Ciano [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	no order
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 62 OF 2016.

IN THE MATTER OF: ARTICLES 47 & 50 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CAPITAL MARKETS ACT

SECTIONS 3,4,(1), (2), (3)(a)(b)(c)(d) & (g), (4),6,7(1)(a) & (2) OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: AN APPLICATIONORDERS OF CERTIORARI AND PROHIBITION

REPUBLIC.....APPLICANT

-VERSUS-

CAPITAL MARKETS AUTHORITY.....RESPONDENT

UCHUMI SUPERMARKETS LIMITED.....INTERESTED PARTY

EX-PARTE: JONATHAN IRUNGU CIANO

JUDGEMENT

Introduction

1. 1. In this Motion on Notice, the *ex parte* applicant herein, **Jonathan Irungu Ciano**, seeks the following orders:

1. THAT this Honorable Court be pleased to issue an Order of Certiorari removing to this Honorable Court for the purposes of being quashed the decision of the Respondent in respect of the Notification of enforcement action Uchumi supermarkets made on 17th November 2016.

2. THAT this Honorable Court be pleased to grant to the Applicant to apply for an order of Prohibition to prohibit and restrain the Respondent from acting upon the Notification of enforcement action Uchumi supermarkets limited against the Applicant made on 17th November 2016.

3. THAT the Court be at liberty to make such further and other orders that as it deems fit to meet the ends of Justice.

4. THAT the costs of this Application be provided for.

***Ex Parte* Applicants' Case**

2. According to the applicant, on the 15th June 2015 the Board of Uchumi Supermarkets terminated his services due to alleged Gross Misconduct and Gross Negligence. In the same month, of June 2015, the Board of the Interested Party were concerned of potential fraud and misconduct in the financial operations of **Uchumi Supermarkets Limited** and its subsidiaries commissioned KPMG being an independent audit firm to conduct a forensic audit of financial operations of **Uchumi Supermarkets Limited** and its subsidiaries for the period between 1st June 2013 and 31st May 2015. It was averred that the said forensic audit is alleged to have revealed massive malpractices that took place in **Uchumi Supermarkets Limited** during the period between 1st June 2013 and 31st May 2015.

3. Based on the said allegations of the malpractices and material non-disclosure of financial matters the interested party lodged a Complaint with the 1st Respondent pursuant to which the ex parte applicant was on the 31st August 2016 in exercise of its statutory powers issued with a Notice to Show cause in respect of six contraventions of the ***Capital Markets Act***. According to the ex parte applicant, the said notice was couched in a manner to suggest that a predetermination of the issues had been made as it read as follows:

'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. It was averred that though the 1st & 2nd Respondent made reference and relied on KPMG report for purposes of inquiry pursuant to section 113(h) of the ***Capital Markets Act*** and completed investigations and identified a number of potential contraventions of the Capital Markets legal authority and regulatory framework by various persons, the ex parte applicant has to date never seen the said results of the ultimate Investigatory findings allegedly carried out by the Respondent. Strangely enough the 1st & 2nd Respondent though having admitted references were made from the KPMG report its contents did not form the findings of the authority which culminated in Notice to Show Cause being issued to the ex parte applicant as per the letter from the Respondent dated 26th September 2016.

5. According to the applicant, in the aforesaid letter the Respondents sought from the 1st Interested Party that the KPMG forensic report be shared to allow the subject individuals to respond to the Notices to show cause yet the former had not relied on it.

6. Nevertheless, the applicant contended that as a law abiding citizen he submitted his submissions to the Respondents on the 14th September 2016 under the assumption that it was an avenue to clear his reputation which had been maligned.

7. The applicant disclosed that to the best of his knowledge the report by KPMG alleged that he had refused to co-operate yet he answered all the question they posed in writing to prevent inclusion of any incorrect information. He disclosed that on the 24th September 2016 he responded further in line with a request contained in a catalogue dated 14th September 2016 from the Respondent.

8. It was averred that on the 4th October 2016 the Respondent invited the applicant to make submissions for consideration in relation to allegations in accordance with section 26(8) of the ***Capital Markets Ac***t scheduled for the 25th October 2016 and on the eve of the hearing of the Respondent the Interested Party had to be prompted to send a copy of the KPMG report which was only received on the 20th October 2016 which was still in draft form. The applicant lamented that without being afforded a copy of its ultimate investigatory findings he faced the Respondents on the 25th October 2016 in the company of his Counsel when it dawned on him that the Respondent was the Investigator, prosecutor and Judge and the doctrine of presumption of innocence had no place in the proceedings.

9. Though he was heard, the applicant complained that the tenets of a fair hearing were abridged and while waiting for a determination on notice from the 1st Respondent court fillings they made in respect of another case in the High Court with Ernest & Young stated that the Regulator had unearthed a case of cooked books with his assistance.

10. The applicant averred that he was aware through reading the press and information from his counsel that EY had moved to Court to challenge the Notice To show Cause by the Respondent based on their reliance of the KPMG report as it had been prepared without their input and in the applicant's case misrepresentation that he had refused to give information. The applicant reiterated that the said impugned report has never been finalized and is still a draft as at 26th September 2016 based on information he received from ICPAK which has held the interested party's complaint against him in abeyance.

11. According to the applicant, to cover up for their misgivings and reliance on a report that is impugned and without any proper notice he learned from the Press that a determination had been made against him on the evening of 17th November 2016 without prior notice being given to his Counsel on record that a determination would be made.

12. Having read the determination and based on legal advice, the ex parte applicant believed that the process culminating in the determination made on the 17th November 2016 was unreasonable, that it contravenes the Rules of natural justice, that it is *ultra vires* and that it ought to be quashed by an order of Certiorari and Prohibition. While conceding that the Respondent has statutory powers to regulate the sector by undertaking investigations, enforcement in the industry, the applicant averred that in making decisions it is expected to remain objective and impartial, attributes which it failed to observe occasioning a miscarriage of justice. The applicant opined, based on legal advice that the following rights under Article 47 (1), 47(2) and 50 (1) of the Constitution which the Respondent is enjoined to afford me were violated:

a) He was presumed guilty before the determination hearing.

b) He was not informed of the ultimate investigatory findings referred to in the letter of 26th September 2016.

c) The process of determination took close to 10 months from the time of lodgement of complaint with the 1st Respondent.

d) He was availed forensic report on the eve of the hearing and the time the report was availed cannot meet the test for reasonable access to evidence.

e) He could not adduce and challenge evidence as the other proceedings involving directors were conducted separately and he could not challenge his accusers nor could he confirm what evidence they had adduced yet that evidence was used to arrive at the Determination of the enforcement notice.

13. Based on legal advice the applicant believed that Article 47(2) of the Constitution and section 4 of the ***Fair Administrative Action Act*** enjoin the Respondent to furnish affected parties with written reasons for their action where their administrative actions affect or threaten to affect their rights or fundamental freedoms and that the Respondent can only carry out its mandate within the confines of the law.

14. The applicant insisted that the Respondent has violated his right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as decreed and protected under Article 47 of the Constitution of Kenya and the provisions of sections 3, 4(l), (2), (3)(a)(b)(d) & (g), (4), 6, 7(l)(a) & (2) of the ***Fair Administrative Action Act, 2015***.

Respondent's Case

15. The application was however opposed by the Respondent.

16. According to the Respondent, it commenced its investigations on the request of the Board of the Interested Party into the ex parte applicant's possible involvement in financial mismanagement, financial impropriety and regulatory infractions within the Interested Party which request contained a complaint of the same. During the preliminary inquiry, the ex parte applicant engaged with the Respondent in exchanging information to assist in the preparation of his case to challenge the allegations against him.

17. It was averred that after the conclusion of the preliminary inquiry, the ex parte applicant was issued with a Notice to Show Cause letter specifying the allegations against him to which he responded vide submissions. It was the Respondent's case that the applicant was supplied with all the relevant information and materials, without any difficulty or impediments and that he confirmed

receipt of the same.

18. According to the Respondent, the applicant appeared with his advocate before the Board of the Respondent for the hearing on 25th October, 2016 to make his oral submissions, highlight the same and to supply additional information to the Board.

19. According to the Respondent, after considering all the evidence before it, the Board arrived at the decision to make administrative action against the ex parte applicant vide a Notification of Enforcement Action Letter dated 17th November, 2016 and it is this decision that the ex parte applicant challenges before this Court.

Determinations

20. I have considered the application, the verifying affidavit, the replying affidavit, the submissions and the authorities cited.

21. In my view the only serious ground upon which the application was based is that the ex parte applicant was not furnished with sufficient material in good time to enable him put forward his defence adequately.

22. Section 4(3)(a) and (g) of the ***Fair Administrative Action Act*** provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action and information, materials and evidence to be relied upon in making the decision or taking the administrative action.

23. *In my view the notice* contemplated *under Article 47 of the Constitution as read with* section 4(3) of the ***Fair Administrative Action Act*** must not only be *prior to the decision but must also be adequate and must disclose the nature and reasons for the proposed administrative action*. This was the position in **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR** where it was held that:

"20. Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including *"(c) responsive, prompt, effective, impartial and equitable provision of services"* and *"(f) transparency and provision to the public of timely, accurate information."*

....

28. *As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response*. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board* [2005] 4 IR 217). Hilary Delany in his book, *Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272,* notes that, *"Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision."*

30. In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, *information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be*. (*See Charkaoui v Canada* [2007] SCC 9, *Alberta Workers' Compensation Board v Alberta Appeals Commission (*2005) 258 DLR (4th), 29, 55 and *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750)." *[Emphasis provided].*

24. *Similarly* in **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** the Court held:

"I would at this stage adopt the observations made in the *Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77* where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; "1.if a statute prescribes, or statutory rules and

regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3.In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best…; 4.*The person accused must know the nature of the accusation made*; 5.*A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward*; 6.The tribunal should see to it that matter which has come into existence for the purpose of the *quasi–lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it." [Emphasis added].

25. It is my view that fair hearing must be meaningful for it to meet the constitutional threshold. The Applicants in this application contend that their rights to be heard was violated as they were not given appropriate notice in order to enable them adequately prepare their case. ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 539 at para 639 states:

"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in the light of the right under the Convention for the Protection of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination of civil rights or obligations or any criminal charge."

26. On this aspect, ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 545 at para 640 states:

"The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice…*Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter.*" [Underlining mine]

27. In my view, for a notice to be worthy of its purpose, it must not be vague and must not leave room for speculation. If possible the notice should draw the addressee's attention to the legal provision, if any, under which it is being issued and even spell out the consequences that would follow non-compliance. It is these particulars that will distinguish a notification of intent from the decision itself. Where therefore the decision is expressed in a manner suggesting that a decision has already been made, such a notice would fail to meet the purpose for which the notice is prescribed. Similarly a notice that vaguely refers to the complaint without particularising the same and which does not expressly call upon the person to be adversely affected to respondent thereto cannot in my view amount to an adequate notice.

28. In this case it is clear that one of the documents which was crucial in the conduct of the impugned proceedings was the KPMG Forensic Report. It is this report that the ex parte applicant contended it received on the eve of his appearance before the Bard. The Respondent however averred that the ex parte applicant had confirmed to the it that he had received the same report a week preceding his appearance before the Board and that the applicant did not apply for more time to prepare for his submission.

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.

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.***

Order

31. In the result there is merit in this application and I issue the following orders:

1. An Order of Certiorari removing to this Honorable Court for the purposes of being quashed the decision of the Respondent in respect of the Notification of enforcement action Uchumi supermarkets made on 17th November 2016, which decision is hereby quashed.

2. An order of prohibition, prohibiting and restraining the Respondent from acting upon the Notification of Enforcement Action Uchumi Supermarkets Limited against the Applicant made on 17th November 2016.

3. For avoidance of doubt, if the Respondent is still intent on carrying out its mandate, it must do so in strict adherence to the law, both procedural and substantive.

4. As these proceedings could have been avoided by the ex parte applicant seeking for adjournment and to be supplied with the relevant documents, there will be no order as to costs.

32. It is so ordered.

G V ODUNGA

JUDGE

Delivered at Nairobi this 9th day of April, 2018

P NYAMWEYA

JUDGE

In the presence of: