



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 328 OF 2011**

BETWEEN

**DRY ASSOCIATES LIMITED ..... PETITIONER**

AND

**CAPITAL MARKETS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 2<sup>ND</sup> RESPONDENT**

AND

**CROWN BERGER (K) LTD ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The petitioner, Dry Associates Limited (hereinafter ‘DAL’) is a limited liability company licenced to conduct the business of fund manager by the 1<sup>st</sup> respondent, the Capital Markets Authority (hereinafter ‘CMA’) under the provisions of the *Capital Markets Authority Act (Cap 485A of the Laws of Kenya)* (hereinafter the ‘Act’).

2. The substance of this case concerns the issue of commercial paper by Crown Berger (K) Limited (hereinafter ‘CROWN’), the interested party, to raise the sum of Kshs. 300,000,000.00 from the open market. Under the Commercial Paper Programme, CMA licenced CROWN to raise money by issuing unsecured promissory notes of different

denominations with a maturity period to be purchased by investors. At the date of maturity CROWN would redeem the notes and pay the investor with interest.

3. The petitioner's grievance with CMA concerns the CROWN commercial paper programme licenced by CMA. Under that programme DAL was the arranger, placement agent and registrar. Its role was to source investors who would purchase the commercial notes and advise them on the investment opportunity. CROWN did not have direct contact with the investors.

4. In addition, DAL would advise the investor to transfer the funds into the CROWN account and in the case of cheques received from the investor, deposit them in CROWN's account. DAL would inform CROWN of monies credited into its account and provide details of the investor(s). As registrar, DAL was duty bound to keep custody of the commercial notes, prepare appropriate commercial notes in relation to investments made and to forward the same to CROWN for execution by authorised signatories. It was obliged to keep a proper register of investors and provide the same to Crown Berger.

5. The petitioner avers that it has been in the commercial paper business for the last 15 years.

### **The facts**

6. The petitioner avers that in April 2011 it discovered that one of its employees Timothy Karungu Karanja (hereinafter 'Karanja') was involved in fraud and theft of investors' funds. The employee was summarily dismissed and CMA duly informed.

7. The employee was charged with various counts of theft in two cases; *Criminal Case No. 847 of 2005, R v Timothy Karungu Karanja* and *Criminal Case No. 1394 of 2011, R v. Timothy Karungu Karanja*. Both cases are still ongoing and the DAL managing director is a prosecution witness.

8. The petitioner also avers that it did, on several occasions implore CMA to exercise its powers to trace and freeze Karanja's assets but as no action was forthcoming the petitioner, and other investors instituted civil proceedings in the High Court Nairobi, Commercial Division being *HCCC No. 536 of 2011, Dry Associates Limited & 3 Others v Timothy Karungu Karanja & 7 Others*.

9. The High Court granted orders freezing various assets of the defendants on 28<sup>th</sup> November 2011 and the CMA was duly notified. The petitioner avers that it has been frustrated by the inaction by the CMA in tracing and freezing of assets belonging to Karanja.

### **The CMA letter dated 15<sup>th</sup> December 2011**

10. In December 2011, DAL received a letter dated 15<sup>th</sup> December 2011 from CMA which raised several concerns about the CROWN commercial paper programme. The said letter found that DAL was bound to comply with the provisions of **Regulation 43** of the *Capital Markets (Licensing Requirement) (General) Regulations 2002* which requires the firm to develop and maintain proper risk management systems and proper internal controls to protect investors' funds in accordance with the said regulations.

11. In the same letter, CMA concluded that DAL as the employer and principle of Karanja, was responsible for the actions of its former employee. After setting out its findings, CMA stated that DAL “concluded the commercial paper program herein contrary to the basic licence requirements for maintaining proper risk management systems and internal controls to protect investors’ funds, leading to the loss of various investors’ funds in Crown Berger Commercial Paper Program.”

12. The CMA also noted that DAL, “contravened the provisions of **section 34(1)(b)** of the **Capital Markets Act** by furnishing incorrect and misleading information to Crown Berger Limited leading to diversion of investors funds,”

13. In light of its findings, CMA imposed certain sanctions and directions on DAL as follows;

(i) A financial penalty of Kshs. 800,000.00 pursuant to **section 25A(1)(a)(vii)** as read with **section 34A** of the Act for 8 complaints which had been established in respect of the Crown Berger Program.

(ii) A financial penalty of Kshs. 256,033.40 pursuant to **section 25A(1)(a)(v)** of the Act in respect of fees and commission earned in respect of affected investors transactions.

The above sums were to be paid to the CMA Investor Compensation Fund within fourteen days from the date of that letter or not later than 2<sup>nd</sup> January 2012.

14. In addition to the financial penalties, CMA issued the following directions pursuant to **section 11(3)(1)** of the Act as follows;

(a) That DAL submits its risk control procedures in respect of provisions of services relating to commercial paper programmes which should include checks and balances to ensure that such infractions do not occur in the future.

(b) That DAL to ensure settlement of complaints received by the authority in respect of the 8 complaints and further to ensure that such complaints are fully settled and resolved to the satisfaction of the CMA.

Both directives were to be complied with within fourteen calendar days from the date of the letter and in any case not later than the close of business of 2<sup>nd</sup> January 2011.

15. In addition, the letter added as follows, “Please further note that failure by Dry & Associates to comply with Paragraphs (1), (2) and (3) above shall be deemed to be *seriatim* contraventions of **Section 11(3) (i)** of the **Capital Markets Act** and the Authority shall proceed to consider regulatory action against Dry & Associates pursuant to **Sections 25A and 34** of the **Capital Markets Act**, without further recourse to the company, **AND SPECIFICALLY**, the restriction of the use of the Fund Manager’s licence issued to Dry and Associates by the Authority for the calendar year 2011 pursuant to **Section 25A(1) (a) (iv)** of the **Capital Markets Act**.”

### **Petitioner’s Case**

16. It is the findings contained in the letter dated 15<sup>th</sup> December 2011 that DAL contends is in breach of the rules of natural justice and a contravention of its right to fair administrative  
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action protected by **Article 47** of the Constitution. The petitioner sets out the particulars of breach as follows;

*(a) The CMA was malicious in purporting to blame the petitioner and relying on matters as at 15<sup>th</sup> August 2011 and deliberately concealing or neglecting to refer to matters arising after the petitioner's response of 15<sup>th</sup> August 2011.*

*(b) The CMA purported to exercise a judicial function by condemning the petitioner unheard and failing to give it an opportunity to present its evidence and answer questions surrounding the matter through testimonial evidence and evaluation of any evidence.*

*(c) The CMA acted in bad faith by failing to take in consideration the issues raised in **HCCC No. 536 of 2011 Dry Associates & 3 Others v Timothy Karungu Karanja & 7 Others** where the petitioner has specifically raised the issue that it is not liable for acts of fraud and theft carried out by its former employee who had acted totally outside the course and scope of his employment.*

*(d) The CMA was malicious in purporting to rely on the petitioner's response of 15<sup>th</sup> August 2011 to the exclusion of all information availed by the petitioner between August and December 2011.*

*(e) The petitioner was never directly confronted with the allegations leading to the adverse and prejudicial findings contained in the letter of 15<sup>th</sup> December 2011.*

*(f) The CMA absolutely ignored all the information and documents availed by the petitioner giving a concise account of how the fraud took place.*

*(g) The CMA opted to selectively and prejudicially condemn the petitioner unheard without presenting the petitioner with any incriminating evidence.*

*(h) The CMA cannot approbate and reprobate by using the petitioner's evidence in the criminal trial where it has instituted complaints leading to the arrest of the accused and later condemning the petitioner unheard.*

*(i) The CMA has prejudged matters that are pending in court.*

*(j) The CMA has failed to provide its evidence to the petitioner to enable it defend itself.*

*(k) The CMA has resorted to witch-hunting rather than conducting a thorough and professional investigation.*

*(l) The CMA has unilaterally shifted the constitutional burden of presumption of innocence by finding the petitioner guilty of crimes committed by the petitioner's former employee without giving the petitioner the opportunity to defend itself.*

17. The petitioner also impugnes the letter dated 15<sup>th</sup> December 2011 on the ground that it contains unfounded allegations and that the investigations were not comprehensive and inconclusive in the following grounds;

*(a) The CMA did not provide in its report how the collusion took place between accused and employees of Crown Berger Limited in the release of investors' funds to different entities contrary to express mandates issued by the investors. No mention was made of how the funds*

were released without the express authority of the original investors who were listed in the registers. No mention was made that the collusion was secretive and outside the scope of the accused's employment.

(b) The CMA absolutely failed to take cognizance of the fact that Crown Berger Limited was culpable in the release of innocent investors' funds by failing to alert the petitioner or the investors of early redemption from the programme.

(c) The CMA acted with malice when accusing the petitioner of failing to share its register with Crown Berger Limited when in fact the petitioner had shared its register and informed the CMA of its analysis of the registers of letters dated 15<sup>th</sup> August, 2<sup>nd</sup> November and 29<sup>th</sup> November 2011. The CMA took no action to verify these findings.

18. In addition, the petitioner avers that its right to protection of property guaranteed under **Article 40** of the Constitution has been infringed by the arbitrary action of the CMA.

19. The petitioner seeks the following reliefs in its petition:-

A. A declaration that the petitioner's fundamental rights and freedoms to fair administration action, presumption of innocence, fair hearing and right to earn a living have been infringed by the actions of the 1<sup>st</sup> respondent as contained in its letter of 15<sup>th</sup> November 2011 and previous letters condemning the petitioner without a fair hearing.

B. A declaration that **Section 11** of the **Capital Markets Authority Act** is invalid to the extent that it denies, violates and infringes the petitioner's fundamental rights to the presumption of innocence and right to fair hearing based on the rules of natural justice.

C. An order directing the 1<sup>st</sup> respondent to produce copies of all documents submitted to it by Crown Berger Limited and all third parties together with any comprehensive investigation report and all supporting documents regarding the investigation relating to the Crown Berger Limited Commercial Paper Programme within 7 days of the order of the court.

D. A permanent injunction restraining the 1<sup>st</sup> respondent from acting on the letter of 15<sup>th</sup> December 2011 or making any publication in its annual report or any public newspaper or journal arising from the said letter or any other letters and that the said letters be expunged or deleted from any public record or files kept by the 1<sup>st</sup> respondent in accordance with **Article 35(2)** of the Constitution.

E. An Order of Mandamus be directed to the 1<sup>st</sup> respondent to forthwith issue the petitioner with its licence for 2012 in accordance with its application and allow the petition to lawfully continue to carry out its business of operating its Commercial Paper Programmes.

F. An order of prohibition directing the 1<sup>st</sup> respondent not to use the letter of 15<sup>th</sup> December 2011 or any other letter to deny the petitioner's right to renew its annual license or carry out its Commercial Paper programmes.

G. An order of Mandamus to issue directing the 2<sup>nd</sup> respondent to take over the prosecution of **Criminal Case No. 847 of 2011 R v Timothy Karungu Karanja** and **Criminal Case No. 1394 of 2011 R V Timothy Karungu Karanja** and appoint a State counsel to conduct the hearings.

*H. Exemplary damages, an inquiry and account of the losses suffered by the petitioner and payment thereafter, together with costs of the petition in the event that the 1<sup>st</sup> respondent delays or refuses to renew the petitioner's license.*

20. To support its case the petitioner filed two affidavits sworn by Mr James Dry; the affidavit in support of the petition sworn on 21<sup>st</sup> December 2012 and a further affidavit filed on 30<sup>th</sup> January 2012. Mr Kahonge, counsel for the petitioner adopted the written submissions dated 12<sup>th</sup> January 2012 and the further submissions dated 9<sup>th</sup> February 2012.

21. Mr. Kahonge, who represented the petitioner in these proceedings, reiterated the facts set out in the petition and affidavits and which I summarised above. He emphasised several important aspects of his client's case. It was the petitioner's case that it implored CMA as the regulator to invoke its powers under **section 11(3)(t) and (u)** of the **Act** to trace any assets of any person suspected of being involved in fraud and place caveats on such property or prohibit dealing. As a result of the failure of the CMA to act, the petitioner in conjunction with three investors who had lost funds, instituted civil proceedings and obtained orders to freeze assets of the persons suspected to have been involved. The petitioner contended that this development was at all material times known to the CMA but despite this the CMA in purported exercise of its regulatory powers requested DAL through a notice to show cause letter dated 5<sup>th</sup> August 2011 to explain its role in the disappearance of investors' funds.

22. Counsel for the petitioner maintained that though Karanja was its employee, the fraud was outside the scope of its employment and this was an matter for determination in the High Court case as such CMA could not impute Karanja's criminal conduct to DAL. Counsel referred to the cases of *Kooragang Investments Property Limited v Richardson and Wrench Limited* [1981] 3 All ER 65 and *Mwona Ndoor t/a Ngomeni Bus Services v Kakuzi Limited Nairobi Civil Appeal No. 50 of 1983 (Unreported)* and urged the court to find that Karanja was doing what was wholly outside what he was authorised to do.

23. Furthermore this fraud was known to CROWN but not to DAL as there were incidences where money was paid directly to some of the investors. While these matters are still pending in court CMA found DAL culpable of acts of its former employee and DAL was condemned unheard and in contravention of the subjudice principle. The petitioner contends that the letter of 15<sup>th</sup> December 2011 where DAL was fined was against the sub judice principle and while it makes reference to incidences prior to 5<sup>th</sup> August 2011 nothing is stated about what happened thereafter. The subsequent facts were not taken into consideration.

24. Mr Kahonge stated that his client was aggrieved by the fact that while the investigation process was ongoing, correspondence was being exchanged between CROWN and CMA where matters adverse to DAL were being canvassed. This correspondence was not being copied to DAL. In all fairness, counsel contended, the parties had a right to get the adverse evidence and an opportunity to comment on or respond to these allegations. The cases of *Juma & Others v Attorney General* [2003] 2 EALR 452, *R v Subordinate Court exp. Youginder Pall Sennik & Another* [2006] 1 EALR 330, *Attorney General v Ryan* [1980] AC 718, *Mureithi & Another v Republic* [2006] 1 EALR 238 and *Kanda v Government of Federation of Malaya* [1968] 2 All ER 633 were cited to support this proposition. It was counsel's contention that such violations are fundamental and DAL was not afforded an

opportunity to present its case or challenge the evidence against it therefore CMA's actions must be declared invalid.

25. Mr Kahonge further submitted that the rules of natural justice which are part of the protection afforded by **Article 47** have been infringed as such the whole decision by CMA is tainted with impropriety. Furthermore the decision contained in the letter dated 15<sup>th</sup> December 2011, imposed a fine, undisclosed penalties and threatened to cancel the petitioner's licence without following due process. As a result the right to conduct its business is threatened and therefore the petitioner's right to protection of property guaranteed under **Article 40** is infringed.

26. The petitioner's complaint regarding the prosecution of Karanja is that the petitioner's managing director noted that the Police Prosecutor prosecuting the case not well versed in complex and highly technical matters as those presented by the fraud for which the accused was charged. Mr Kahonge submitted that, while the Director of Public Prosecutions ('the DPP') under **Article 157** of the Constitution has the mandate to assign subordinate offices to perform the task of prosecution, he must exercise a greater calling under **Article 157**. Thus, counsel asserted, here must be regard to public interest otherwise an injustice may be occasioned by failure to properly prosecute.

27. Counsel contended that the DPP had a duty to avoid abuse of the court process by ensuring that competent prosecutors were engaged. Counsel drew attention to the fact that though a replying affidavit has been filed on the DPP's behalf, no competence was demonstrated in the said deposition. Counsel referred to the case of *ABN Amro N. V v Le Monde Foods Limited Nairobi Civil Application No. NAI 15 of 2002 (Unreported)* for the proposition that the burden of proof shifted to the 2<sup>nd</sup> respondent to show the prosecutors qualifications once the petitioner had established the primary facts constituting the allegation.

28. Mr Kahonge submitted that the petitioner's relies on **Article 35** as a basis for prayer C of its petition. The petitioner alleges that CMA did not provide information from CROWN to CMA hence DAL seeks an order that directing CMA to produce copies of all documents submitted to it by CROWN and third parties together with comprehensive investigative report and all supporting documents relating to the commercial paper programme.

29. Finally counsel for the petitioner urged the court to award damages at large for violation of the petitioner's rights. The court should express disapproval of CMA's action as CMA does not have unfettered power.

### **1<sup>st</sup> Respondent's case**

30. The 1<sup>st</sup> respondent, the CMA, opposed the petition. It relied on the affidavits sworn by Michael Wanyika, Assistant Manager in charge of Investigation and enforcement sworn on 5<sup>th</sup> January 2012. Counsel for the first respondent, Mr. Gatonye, adopted the skeleton arguments dated 17<sup>th</sup> January 2012 and also those filed on 13<sup>th</sup> February 2012.

31. Mr. Gatonye submitted that the petition lacks merit, mischievous and the solely intended to enable the petitioner to assume a position where it will not be regulated by the CMA. Mr Gatonye stated that the CMA has a clear statutory mandate to protect investors. In this case slightly over Kshs. 35 million has been lost through the activities of the petitioner's employee.

The money was lost as a result of failure to provide a secure environment within a duly licenced Fund Manager organisation.

32. Mr Gatonye referred to the deposition by Michael Wanyika which shows that CMA received in excess of six complaints from investors who had invested in commercial paper managed by DAL. In respect of the CROWN Commercial Paper a sum slightly in excess of Kshs. 35 million had been lost. As a result of this, one of the requirements imposed by 15<sup>th</sup> December 2011 letter was to direct DAL to institute security measures in order to comply with CMA regulations. These are the measures being resisted by the DAL through this petition.

33. As regards the conduct of Karanja, it is the 1<sup>st</sup> respondent's contention that there has been no contest that Karanja was the person designated by DAL to manage the CROWN commercial paper. All the petitioner argues is that what Karanja did was criminal hence there is no liability. This argument, Mr Gatonye maintained, lacks merit as the employer is liable in such circumstances.

34. Counsel for the 1<sup>st</sup> respondent submitted that the petitioner was given ample opportunity to be heard on allegations that formed the basis of sanctions set out in the CMA letter dated 15<sup>th</sup> December 2012. Firstly, the petitioner position is that once the fraud by Karanja was reported to the CMA, it engaged the petitioner through meetings. Secondly, DAL was given documents that came into the possession of the CMA. Thirdly, officers of the CMA visited DAL to understand its operations. The documentation annexed to the affidavit of Michael Wanyika is very clear that the allegations were answered orally and in memoranda given to the CMA. This was not one hearing but a hearing conducted over a period of time. In fact, DAL answered correspondence in great detail.

35. Mr Gatonye submitted that neither **Article 47** nor **50** state the form a hearing must take. He urged the Court must look at the circumstances and take a broad view of the Constitution by asking whether the person has been given an opportunity to know the allegations against him to answer, clarify to contradict those allegations and whether those explanations, clarifications have been taken into account in dealing or making the decision. He stated that it must be remembered that a regulatory authority such as the CMA is not a tribunal nor a court of law as such the right to a fair hearing must not be determined in abstract but must be determined in circumstances. At no one time did the petitioner request for an oral hearing which was denied. Counsel referred the court to the case of *Commissioner General, Kenya Revenue Authority v Vano Onema Omwaki t/a Marenga Filling Station Kisumu Civil Appeal No. 45 of 2000 (Unreported)*, wherethe Court of Appeal stated whether there is a fair hearing is a matter to be looked into in light of the particular statute and circumstances.

36. Counsel contended that the court should determine is whether there has been a fair process and what the Constitution requires is procedural fairness. Looking broadly at actions taken by the regulator they were fully justified as it was in consonance with its statutory mandate particularly the responsibility to protect public investors thus the CMA letter dated 15<sup>th</sup> December 2011 setting out the sanctions is fully justified.

37. Mr Gatonye emphasised that the basis of the action by the CMA was on a very narrow ground. It was as to whether there was there a lack of basic and appropriate levels of



professional management, risk management and internal control systems that led to the lost by investors? After looking at the matter, there was overwhelming evidence from the pattern of complaints that CMA had to take action and did indeed take action by issuing the letter of 15<sup>th</sup> December 2012 to DAL.

38. The 1<sup>st</sup> respondent requested the court to consider public interest which was fundamental in a matter like this. Investors had lost a lot of money and it was necessary to take quick action as there had been other complaints against DAL in six other commercial paper programmes. In addition, counsel for the 1<sup>st</sup> respondent, submitted that the decision to regulate in a particular manner is a matter within the statutory purview of the statutory body and the court is ill equipped to deal with the matters technical.

39. Mr Gatonye also submitted that the right to property is subject to the law and other people's rights. That right has not been infringed and it has not been demonstrated how this is infringed. The petitioner's right to carry on its business is subject to the statutory regime prescribed by the CMA. DAL had profited from the Commercial Paper Programme despite its weak internal controls and in this respect the CMA may impose a penalty.

40. It is the 1<sup>st</sup> respondent's case that the subjudice rule does not apply to the circumstances of this case as the case in court is between the petitioner and its employee. CMA and CROWN are not parties and have not been joined to those proceedings as such no orders in that case can bind CMA or CROWN they are not parties. Further, the result of the civil case cannot affect the regulatory power of the CMA. For all intents and purposes, counsel submitted, Karanja was in the employ of DAL and DAL must take full responsibility. Mr Gatonye was of the view that the suits filed in the High Court were self serving.

41. The 1<sup>st</sup> respondent avers that there was never a request to CMA to assist DAL trace or attach Karanja's assets. Even if it were made, such request would be within the discretion of the CMA. The CMA was entitled to take action to protect investors and but the ultimate responsibility lay with DAL, who had responsibility to institute internal control measures. The sanctions effected by the 15<sup>th</sup> December 2011 letter took into account all the circumstances disclosed and material in its possession.

42. Mr Gatonye urged the court to dismiss the petition with costs.

### **2<sup>nd</sup> Respondent's case**

43. The 2<sup>nd</sup> respondent relied on the affidavit of Victor Mule, a State Counsel in the Directorate of Public Prosecutions sworn on 2<sup>nd</sup> February 2012. Counsel for the 2<sup>nd</sup> respondent relied on the written submissions dated 16<sup>th</sup> January 2012. Counsel also supported the submissions made on behalf of the 1<sup>st</sup> respondent.

44. Mr. Obiri, counsel for the 2<sup>nd</sup> respondent, submitted that no order of mandamus can issue against the 2<sup>nd</sup> respondent as prayed in the petition. The prosecutors in the criminal cases are exercising delegated authority. **Article 157** of the Constitution set out the DPP's mandate and **Article 157(9)** and **(10)** are clear that the DPP is not required to be directed by any person or authority and the petitioner cannot ask the court to compel the 2<sup>nd</sup> respondent to take up proceedings. This is a matter within the DPP's discretion as such an order of mandamus cannot issue. Counsel referred to the case of *Kenya National Examination* Petition 328 of 2011 | Kenya Law Reports 2015 Page 9 of 23.

***Council v Republic exp. Geoffrey Njoroge & Others Nairobi Civil Appeal No. 266 of 1996 (Unreported)*** where the court outlined the principles for the grant of an order of mandamus.

45. Mr Obiri was clear that the petitioner had not been condemned unheard as the correspondence between CMA and DAL before the court is very clear on this. Similarly, counsel contended that the sub judice rule as contained in **section 6** of the ***Civil Procedure Act*** was not breached. CMA is not a party to the cases filed in the High Court.

46. Counsel further submitted that CMA is an administrative body and the court must take into account the public interests as it is the duty of CMA to safeguard investors' funds. As regard the provisions of **Article 40**, counsel submitted that the petitioner has not demonstrated how its rights are violated. The fine imposed does not violate the petitioner's rights as the deprivation is not be arbitrary. It is subject to the law and the CMA has the authority to impose fines.

47. Counsel asserted that the petition lacks merit and should be dismissed. In his view, this court is not a licensing authority and the prayers sought in the petition are untenable.

#### **Interested Party's case**

48. The interested party, CROWN, was issuer of the commercial paper that is the subject of the investigation by the CMA. It was joined to these proceedings on the petitioner's application. It has filed a replying affidavit sworn by David Muriithi, its Chief Accountant, on 25<sup>th</sup> January 2012.

49. Mr. Kiingati, counsel representing CROWN, submitted that the petitioner's case is based on half truths, misinformation and distorted facts. In his view, the undisputed fact is the investors lost money through the act of Karanja who was an employee of DAL and the fraud was at the doorstep of the petitioner and the loss occasioned by the petitioner. As to whether DAL can escape liability, counsel referred to ***Joseph Suri Nyateng & Another v H. P. Mashru Limited Kisii HCCC No. 380 and 243 of 1998 (Unreported)*** where the Court held that a master is liable for acts of the employee and in this case the petitioner cannot escape liability as a company cannot operate in the absence of human beings.

50. Counsel submitted that no evidence has been provided to show that CROWN was party to the fraud and there was nothing better to demonstrate this than the fact that the criminal charges were preferred against Karanja and not CROWN or its agents. Equally demonstrative of this fact is that the High Court suits were filed against Karanja and not CROWN.

51. Mr Kiingati urged the court to consider that a commercial paper cannot be run in the absence of a placing agent licenced by the CMA. The petitioner was licensed by the CMA and the petitioner under the doctrine of vicarious liability is responsible for the said employee and that employee defrauded investors and CROWN. The petitioner has earned commission and cannot now escape liability.

52. The interested party prays for costs whatever the outcome as no orders have been prayed against it, it was jointed belatedly and it gave full facts which were in the petitioner's hands and which ought to have been disclosed by the petitioner.

#### **Issues for determination**

53. The purpose of the procedure enacted in **Article 22** of the Constitution is to enforce fundamental rights and freedoms of the individual guaranteed under the Bill of Rights set out in **Part 2 of Chapter 4** of the Constitution.

54. This jurisdiction is a special jurisdiction that is to be used for the specific purpose provided and it is not, in my view, intended for determination of general questions of fact or law which are not germane or incidental to the enforcement of those rights and fundamental freedoms.

55. Since enforcement of the Bill of Rights is a special jurisdiction, it follows that a party who invokes this special **Article 22** jurisdiction to enforce the bill of rights has a duty to set out clearly the sections or provisions it is claimed have been infringed or violated and show how these sections are infringed in relation to him. This principle has been established in a long line of cases since *Anarita K Njeru v Republic (No. 1)* [1979] KLR 261 (See also *Meme v R* [2004] 1 KLR 637) and more recently in respect of the Constitution, *Joseph Kimani Mwai v Town Clerk Kangema Nairobi Petition No. 1039 of 2007 (Unreported)*.

56. In this matter, I am alive to the various contested facts involving several parties to who are not party to these proceedings. There are two criminal cases pending against Karanja and others. I have warned myself against stating anything that may be seen as interference with the fair conduct of the criminal trial. Secondly, there are civil proceedings between the petitioner and other parties who are not party to these proceedings.

57. Anything I may state or any finding of fact on my part may be taken a binding on those courts and may be prejudicial to third parties. In this judgment, I shall therefore limit myself to what is strictly necessary to finding whether the petitioner's fundamental rights and freedoms have been infringed.

58. Having heard the parties and read the submissions, I think these allegations in respect of infringement of fundamental rights are as follows;

- (a) **Article 50(1)** – the right to a fair trial.
- (b) **Article 27** – right to equality and freedom from discrimination.
- (c) **Article 35** – access to information.
- (d) **Article 47** – the right to fair administrative action.
- (e) **Article 40** – the right to protection of property
- (f) **Article 48** – access to justice.

59. It is important to note that reference to the preliminary matters or general provisions relating to the Bill of Rights set out in **Part 1 of Chapter 4** apply to the interpretation fo the Bill of Rights. Similarly the values set of in **Article 10(2)** are by virtue of **Article 10(1)** applicable to the court in handling the task of applying and interpreting the Constitution. The Court is also required to apply the provisions of **Article 259** of the Constitution. I am alive to these principles and cases that enunciate them (See *Centre for Rights and Awareness & Others v Attorney General Nairobi Petition No. 16 of 2011 (Unreported)* and *Harun Mwau v The Attorney General & Others Nairobi Petition No. 146 of 2011 (Unreported)*).

60. It is with this in mind that I now consider the petitioner's grievances.

### **Right to a fair hearing and right to fair administrative action**

61. The petitioner have invoked the provisions of **Article 47(1)** and **(2)** and **50(1)** of the Constitution. **Article 50(1)** states as follows:-

*50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*

**Article 47** states as follows:-

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

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

62. **Article 47** and **50(1)** protect separate and distinct rights which should not be conflated. Although the two rights embody and give effect to the general rules of natural justice they apply to different circumstances. **Article 50(1)** applies to a court, impartial tribunal or a body established to resolve a dispute while **Article 47** applies administrative action generally. **Article 50(1)** deals with matters of a civil nature while the rest of the Article deals with criminal trials. **Article 47** is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the *Law Reform Act (Cap 26 of the Laws of Kenya)* but is to be measured against the standards established by the Constitution.

63. What is clear to me though, is that **Article 50** is not applicable to the circumstances of this case. The petitioner did not contend that it was entitled to a public hearing as required by **Article 50(1)** nor did I hear it state that it was an accused facing a criminal trial for **Article 50(2)** to apply. It is in the context of a fair trial that some of the cases that were cited by Mr Kahonge must be seen. I will therefore consider this matter as one brought to enforce the provisions of **Article 47**.

64. It is important to note that there is an implicit flexibility in **Article 47**. The primary consideration is whether the procedure adopted is fair. In this regard I adopt the sentiments of Lord Pearson in the case of *Pearlberg v Varty (Inspector of Taxes) [1972] 1 WLR 534* at page 547 where he stated, "*Fairness, however does not necessarily require a plurality of hearings or representations and counter representations. If there were too much elaboration of procedural safeguards nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too easily sacrificed.*" This is the reason why **Article 47** not only has the element of procedural fairness but also provides that administrative action must be "*expeditious, efficient, lawful and reasonable .....*" All these elements are relevant and ought to be considered to give effect to the provisions of the Article.

65. This approach to natural justice and fairness is not new within our jurisdiction. In *Kenya National Examination Council v Republic exp. Geoffrey Njoroge & Others (Supra)*, where the cancellation of examination of results by the court was in issue, the Court of Appeal expressed the view that if it was forced to decide whether before cancelling examination results a student ought to be heard; it would be inclined to hold that this would place an unnecessary heavy burden on the Examination Council given its statutory mandate and the need to maintain the integrity and public confidence in the national examination system.

66. The opportunity to decide the question finally came in the case of *Kenya National Examinations Council v R exparte Kemunto Regina Ouru Nairobi Civil Appeal No. 127 of 2009 (Unreported)* where the Court of Appeal set aside the holding of the court *a quo* which had held that investigations into cancelled examination results entailed giving each student notice to show cause why their results should not be cancelled. No such notice was issued in the case and the trial judge concluded that before the obviously harsh, drastic and draconian decision of cancellation of results was made the student had to be notified. The Court of Appeal set aside the order on the basis that the circumstances of the case and public interest required that examinations be handled in a manner that promotes public confidence and in accordance with the statutory rules that allowed an investigation into irregularities. Those rules did not require that each student be notified and be given a full hearing.

67. In the case of *Commissioner General, Kenya Revenue Authority v. Silvanous Onema Owaki t/a Marenga Filling Station (Supra)* the Court of Appeal held that the right to be heard must be determined according to the statutory scheme which sets out the duties of the statutory corporation and the rights of the subject.

68. In order to determine whether the petitioner rights protected under **Article 47** have been breached, I think it is important to understand the role of the CMA. Capital markets in country any play an important role in mobilising money for investment. Ordinary citizens, local and international corporations alike, invest in capital markets on the understanding that their money will be safe. The important role of capital markets in Kenya is recognised in the objectives of the CMA set out in Act.

69. The CMA is a statutory corporation endowed with regulatory authority under the CMA Act to regulate the capital markets in Kenya. Its objectives as set out in **section 11(1)** of the Act are as follows;

*(a) the development of 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;*

*(b) to facilitate the existence of a nationwide system of stock market and brokerage services so as to enable wider participation of the general public in the stock market;*

*(c) the creation, maintenance and regulation, of a market in which securities can be issued and traded in an orderly, fair, and efficient manner, through the implementation of a system in which the market participants are self regulatory to the maximum practicable extent;*

*(d) the protection of investor interests;*

*(e) the operation of a compensation fund to protect investors from financial loss arising from the failure of a licenced broker or dealer to meet his contractual obligations; and*

*(f) the development of a framework to facilitate the use of electronic commerce for the development of capital markets in Kenya.*

70. In order to carry out its functions the CMA is granted a wide range of functions, powers and duties which are set out in **section 11(3)** of the Act as follows;

*(i) to frame rules and guidelines on all matters within the jurisdiction of the Authority under this Act as such rules and guidelines may prescribe-*

*· the financial penalties or sanctions for breach of the Authority's rules or non-compliance with the Authority's requirements;*

*· the fees payable annually by a securities exchange or a central depository or for securities transactions, licences and approvals required by this Act to be issued or granted on an application to the Authority.*

*· the disclosure requirements and other terms and conditions on which securities may be listed on or delisted from a securities exchange or offered for sale to the public or a section thereof;*

*(ii) to grant a licence to any person to operate as a stockbroker, dealer or investment adviser, fund manager, investment bank or authorized securities dealer, and ensure the proper conduct of that business.*

*(iii) to grant approval to any person to operate as a securities exchange, central depository, credit rating agency, registered venture capital fund or to operate in any other capacity which directly contributes to the attainment of the objectives of this Act and to ensure the proper conduct of that business.*

*(iv) register, approve and regulate collective investment schemes;*

*(v) 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 traded on an approved securities exchange;*

*(vi) give directions to any person which the Authority has approved or to which it has granted a licence and any public company the securities of which are traded on an approved securities exchange;*

*(vii) conduct inspection of the activities, books and records of any persons approved or licenced by the Authority;*

*(viii) publish findings of malfeasance by any persons approved or licenced by the Authority, or any public company the securities of which are traded on a securities exchange;*

*(ix) suspend or cancel the listing of any securities or the trading of any securities for the protection of investors;*

*(x) appoint an auditor to carry out a specific audit of the financial operations of any collective investment scheme or public company the securities of which are traded on an approved securities exchange, if such action is deemed to be in the interest of the investors, at the expense of such collective investment scheme or company;*

*(xi) grant compensation to any investor who suffers pecuniary loss resulting from the failure of a licence d broker or dealer to meet his contractual obligations;*

*(xii) have recourse against any person whose act or omission has resulted in a payment from the Compensation Fund;*

*(xiii) act as an appellate body in respect of appeals against any securities exchange or central depository in actions by parties aggrieved thereby;*

*(xiv) co-operate or enter into agreements for mutual co-operation with other regulatory authorities for the development and regulation of crossborder activities in capital markets;*

*(xv) regulate and oversee the issue and subsequent trading, both in primary and secondary markets, of capital market instruments;*

*(xvi) regulate the use of electronic commerce for dealing in securities or offer services ordinarily carried out by a licensed person;*

*(xvii) trace any assets, including bank accounts, of any person who, upon investigation by the Authority, is found to have engaged in any fraudulent dealings in securities or insider trading;*

*(xviii) in writing, order caveats to be placed against the title to such assets or prohibit any such person from operating any such bank account as may be directed by the Authority, pending determination of any charges instituted against that person;*

*(xix) prescribe rules or guidelines on corporate governance of a company whose securities have been issued to the public or a section of the public;*

*(xx) do all such other acts as may be incidental or conducive to the attainment of the objectives of the Authority or the exercise of its powers under this Act.*

71.CMA promotes the creation, maintenance and regulation of a market in which securities can be issued and traded in an orderly, fair, and efficient manner. This is achieved through the implementation of a system in which the market participants are self regulatory to the maximum practicable extent, and as such the risk management and internal controls are largely left to the individual firms who must conduct their business efficiently, honestly and fairly, with the integrity and professional skills appropriate to the nature and scale of activities in accordance with **Regulations 22(b)** as read with **regulation 43** of the **Capital Markets Licensing Requirements)(General) Regulations 2002**. In considering whether the fund manager is conducting its business as required, **regulation 22(2)** provides that CMA give due regard to the management and organizational structure, reporting principles and procedures, internal audit procedures, procedures for compliance with the securities laws and risk management policies which the fund manager has adopted or proposes to adopt for its business.

72.I have set out the provisions of **section 11** to show CMA has powers to regulate capital markets as it deals with huge amounts of money as evidenced by the Kshs. 300,000,000.00 CROWN commercial paper programme. This, coupled with the sophistication of technology and the fact that capital markets are weaved into international commerce means that the CMA must have the flexibility within its regulations to deal with matters that may dent or diminish investor and public the confidence in the capital markets.

73.It is in exercise of these wide ranging powers that an investigation was launched into the CROWN commercial paper after complaints were lodged by investors. This investigation was concluded by CMA issuing of the letter of 15<sup>th</sup> December 2011 whose contents I have set out at paragraphs 10 to 15 above.

74.I have considered the material before me, the depositions and the submissions and I take the following view of the matter. First it is not in dispute that Timothy Karanja, was involved in some form of fraud regarding the commercial paper issued by Crown Berger. He has now been charged and the nature and extent of the fraud is a matter within the competence of the criminal court.

75.The petitioner's argument is that it cannot be implicated by Karanja's criminal conduct. I have been referred to certain authorities for and against the imposition of vicarious liability in the event of criminal conduct by an employee. I think this is the wrong approach; I take the view that liability must be determined from a reading statute governing the conduct impugned.

76.I agree with the 1<sup>st</sup> respondent that the Act and regulations made thereunder particularly **regulation 22 of the Capital Markets Licensing Requirements)(General) Regulations 2002** imposes an obligation on the Fund Manager to ensure its systems risk management and internal controls were upto the standard required by the regulations. As a licensee of CMA, DAL is fully responsible for the conduct of its employee under the statute. What the petitioner is attempting to do is to shift its burden to a third party. To allow this would diminish the efficacy of the regulatory system to the detriment of the investors and the public.

77.The petitioner has also raised the issue that the investigation and decision by the CMA are subjudice in so far as there are civil proceedings pending in the High Court. CMA is not party to those proceedings hence the sub judice argument is devoid of merit. To uphold it would mean that the regulatory authority of CMA would be stultified by a party implicated in wrongdoing filing suits in which CMA was not party and impleading those suits as a defence to regulatory investigation. The mere existence of High Court civil suits cannot prevent CMA from carrying out its statutory duties.

78.I have examined the charge sheets which form the basis of the criminal charges against Karanja. The charges were not initiated by the CMA as complainant but specific investors who claimed that Karanja has stolen their money. The criminal charges are being pursued by the State which does so in public interest. In this case, I do not think that the charging Karanja affects the statutory authority of CMA. CMA has wide discretion in the manner it uses the various tools in its arsenal. I do not find any basis for the complaint that the CMA refused to pursue Karanja as requested by DAL.



79. Apart from the report by DAL relating to its employer, CMA also received six complaints in respect of the commercial paper. According to the Internal Memorandum dated 13<sup>th</sup> July 2011, CMA conducted an inquiry through interviews with the managing director and general manager of DAL, the financial manager of CROWN apart from reviewing or analysing documentation in relation to the commercial paper programme.

80. The internal investigations culminated in a letter dated 5<sup>th</sup> August 2011 signed by the Chief Executive of the CMA addressed to DAL. That letter set out certain irregularities which in the view of CMA, entitled it to take regulatory action. After setting out these irregularities, the letter concluded that, *“the above irregularities were contrary to **Regulation 22(b) and (d) of the Capital Markets (Licensing Requirements) (General) Regulations 2002, which requires that all licensees should maintain risk management systems and proper internal controls to protect investors funds; your firm did not establish and maintain proper risk management systems and internal controls.***

*Kindly respond in writing within 7 working days of this letter and show cause why regulatory action should not be taken against you pursuant to Sections 25A and 34A of the Capital Markets Act of the above noted breach.”*

81. A similar letter was addressed to CROWN setting out the irregularities its commercial paper programmes and asking it to show cause on the following terms, *“At the meeting of 5 August 2011, both Crown Berger Limited and Dry Associates Limited informed the Authority that they had put in place systems and procedures to ensure that such irregularities do not occur in future. However in order to reinstate the investors for the losses suffered due to the aforementioned irregularities, the Authority directed both Crown Berger Kenya Limited and Dry Associates Limited to provide the Authority with details on the arrangements put in place to reinstate the above investors by Monday, 8<sup>th</sup> August 2011. Further to the above pursuant to **section 25(4)(c)(i) of the Capital Markets Authority Act, you are hereby required to show cause within the next seven(7) days from the date hereof why the approval dated July 29, 2011 for the Kshs.300 million Commercial Paper should not be revoked.**”*

82. It is instructive to note that the letter dated 5<sup>th</sup> August 2011, was written after a meeting between the CMA, CROWN and DAL and the letter to CROWN was copied to DAL. The letters I have referred to asked CROWN and DAL to show cause why certain regulatory action should be taken against them after setting out the particulars of irregularities. In other words both CROWN and DAL were informed of the allegations against them and given the opportunity to respond.

83. By the letter dated 15<sup>th</sup> August 2011, DAL duly responded to the CMA letter of 5<sup>th</sup> August 2011 where it substantially denied liability and blamed Karanja as acting outside his scope of his employment.

84. It appears that there was a further meeting confirmed by the letter dated 1<sup>st</sup> September 2011 by CMA to CROWN held on 16<sup>th</sup> August 2011 between DAL, CROWN and CMA where a plan of action to resolve outstanding issues was agreed upon. In that letter CROWN was required to furnish CMA with a plan of action to resolve certain issues concerning the investors. This letter was copied to DAL.

85. DAL complains that CMA exchanged correspondence with CROWN without copying the same to DAL. There are two letters annexed to the replying of Michael Wanyika. The first letter is dated 21<sup>st</sup> September 2011 from CMA to CROWN. The tenor and effect of the letter was to inform CROWN that CMA was concerned about the failure of CROWN and DAL to comply with know your client (KYC) requirements. The second letter is dated 4<sup>th</sup> October 2011 from CMA to CROWN expressing CMA's concern about the failure of CROWN to provide certain information and failure to put in place set timelines for the speedy resolution of the matter.

86. The two letters did not, in my view, make adverse comments against DAL. It must be remembered that CMA was investigating both CROWN and DAL and was entitled to communicate to either party independently. For purposes of a fair administrative process, it is not necessary to copy all correspondence to all the parties to the investigation. Whether to do so is a matter of discretion. To insist that CMA copy each and every correspondence to a third party to the party being investigated would be unduly burdensome. What is important is that at the appropriate stage DAL was given notice of the facts and circumstances that constituted the charge against it to enable it defend itself. Apart from the meetings between CMA, DAL and CROWN I have referred to, this notification of the facts and charges was outlined in the letter by CMA dated 5<sup>th</sup> August 2011 (see paragraph 80 above) and the letter dated 15<sup>th</sup> December 2011. I hold that these letters were sufficient to fulfil the fairness requirement.

87. I have also seen a letter dated 2<sup>nd</sup> November 2011 from DAL to CMA. It alludes to a meeting held on 26<sup>th</sup> October 2011 between officers of DAL and CMA officers from its legal and compliance department. My view therefore is that there were discussions, meetings and correspondence between 15<sup>th</sup> August 2011 and the time the CMA letter dated 15<sup>th</sup> December 2011 was written.

88. I have reviewed the internal memoranda dated 13<sup>th</sup> July 2011, 2<sup>nd</sup> November 2011 and 7<sup>th</sup> November 2011 written by CMA officers investigating the matters. They show that CMA was keen to follow the letter of the law. In my view and taking into account the nature of investigations, I conclude that the investigation, which by law CMA was entitled to carry out, was done so in a fair and professional manner.

89. Accordingly I do not find any evidence of concealment or neglect to consider the petitioner's evidence or that the petitioner was denied an opportunity to present its case or that it ignored or selectively used information. I also do not find any evidence of a witch hunt, malice, bad faith, unreasonableness or bias in the manner the investigation was conducted.

90. The affidavits filed on behalf of the petitioner and interested party deal with specific allegations relating to the theft. As I have stated, a substantial part of this evidence is the subject of a criminal trial and I have exercised great circumspection in dealing with it. Besides, the letter dated 15<sup>th</sup> December 2011 requires DAL to show cause why regulatory action should not be taken. In the circumstances, if I delve into resolving the factual matters on which liability of DAL for regulatory infractions are based I would be assuming the authority of CMA. The inquiry to be conducted in determining whether there has been a

breach of **Article 47** is not intended to give the court jurisdiction to assume the role of a regulator.

91. Even when considering the whether the action taken was reasonable, the court must give due deference to the statutory authority having regard to the fact that the authority is equipped with the technical expertise and has a statutory mandate to discharge. This is not to say that the court cannot intervene in an appropriate case but I find that on the basis of the material before me and for the reasons that I have stated, this is not a case where a case for such intervention has been made out. On the whole I find that the CMA conducted itself in a manner consistent with the dictates of **Article 47** of the Constitution.

92. Coming to this conclusion, I must emphasise that fairness in light of **Article 47** must be taken in the context of the case which include a determination of the nature of the proceedings and the statutory regime or architecture. I reject any suggestion that the petitioner would be entitled to a full oral hearing with all the accoutrements that go with it; witnesses, statements, evidence in chief, cross examination of witnesses and oral submissions.

93. I have found that the process culminating in the letter dated 15<sup>th</sup> December 2011 did not violate the petitioner's fundamental rights hence the exercise of the powers by the CMA under **section 11** do not infringe the Constitution. Furthermore, **section 11** of the Act, part of which I have set out in paragraphs 69 and 70 above contains the objectives of the Act and wide range of powers donated by the legislature to CMA to fulfil its important role. In addition, there are rules and regulations which have been promulgated subject to the Act. Unless a specific provision, rule or regulation is shown to infringe a specific right or fundamental freedom protected by the Constitution, I must reject prayer B sought in the petition.

94. Prayers D, E and F cannot be granted as this court cannot assume the role of the CMA. The prayers seek to immunise the petitioner from regulatory authority. As I have found that there has been no breach of fundamental rights and freedoms, then I must reject those prayers.

95. In conclusion, I find and hold that the petitioner's rights under **Article 47** of the Constitution have not been infringed.

### **Right to protection of property**

96. The petitioner's contention in respect of breach of **Article 40** is that the decision by the CMA to impose penalties without giving audience to the petitioner to seek a meeting since September 2011 for purposes of a proper audit and reconciliation of accounts was unconstitutional.

97. **Article 40(2)** provides that, *'Parliament shall not enact a law that permits the State or any person – (a) to arbitrarily deprive of property of any description or of any interest in, or right over, any property of any description ....'*

98. I have already held that there has been no breach of **Article 47** thus the the action to impose sanction which is authorised by **section 11(3)** of the Act is not arbitrary in its application nor is the CMA authorised to impose sanctions and penalties that would run afoul of **Article 40(2)**.

99. Needless to say, the allegation that there was no meeting since September 2011 to reconcile accounts is not borne out by the evidence as the letter dated 2<sup>nd</sup> November 2011 from DAL to CMA which I have referred to paragraph 83 alludes to a meeting on 26<sup>th</sup> October 2011. Furthermore, it is not necessary to for purposes of **Article 47** or **Article 40(2)** to have meeting after meeting as this would defeat not only the objects of the statute itself but also the obligation to provide an efficient administrative system.

### **Right to Equality and freedom from discrimination**

100. Right to Equality and freedom from discrimination is set out in **Article 27** of the Constitution which provides, in part, as follows;

*27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.*

*(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.*

*(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.*

*(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.*

*(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*

101. The petitioner's argument to support this ground is that CMA assigned primary responsibility for the loss of funds but proceeded to discriminate and place all the blame on DAL who never had control and custody of funds held by CROWN. In my view the case against DAL was for failing to have proper risk management systems and internal controls that led to loss of investors funds. The obligation to maintain a safe investment environment for investor is a statutory obligation imposed on DAL by **Regulation 43** of the *Capital Markets (Licensing Requirement) (General) Regulations 2002* and enforcement of these regulations in the circumstances of this case is not discriminatory as alleged or indeed at all.

102. **Article 27** as a whole has different elements. I have read the pleadings and petitioner's depositions. It has not been demonstrated by evidence or argument how the respondents have breached this right. As a result I do not find any infringement of **Article 27**.

### **Access to information**

103. The right of access to information is to be found at **Article 35** of the Constitution which provides;

*35. (1) Every citizen has the right of access to—*

*(a) information held by the State; and*

*(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.*

*(2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.*

*(3) The State shall publish and publicise any important information affecting the nation.*

104. In the case of *Kenya Society for the Mentally Handicapped v Attorney General & Others Nairobi Petition No. 155A of 2011 (Unreported)*, the court in regard to the approach to be adopted in considering **Article 35(1)** stated, “[43] *I am not inclined to grant prayers 8 and 9 of the application as the Petitioner has not requested the information from the state or state agency concerned and that request rejected. Coercive orders of the court should only be used to enforce Article 35 where a request has been made to the state or its agency and such request denied. Where the request is denied, the court will interrogate the reasons and evaluate whether the reasons accord with the Constitution. Where the request has been neglected, then the state organ or agency must be given an opportunity to respond and a peremptory order made should the circumstances justify such an order. I find that the petitioner did not make the request for information to the respondents hence I dismiss this request.*’ I adopt this reasoning for this case.

105. Once again I have read the pleadings and depositions and I do not find any allegation that the petitioner has been denied any information which it requested from the state or CMA to enable it enforce its fundamental rights and freedoms in relation to this matter. If anything, CMA has been candid in these proceedings and provided substantial information including internal memorandum that would in certain instances, attract privilege. I find that the right to access to information has not been breached.

106. The petitioner has invoked **Article 35(2)** in prayer D of the petition which seeks, ‘*A permanent injunction restraining the 1<sup>st</sup> respondent from acting on the letter of 15<sup>th</sup> December 2011 or making any publication in its annual report or any public newspaper or journal arising from the said letter or any other letters and that the said letters be expunged or deleted from any public record or files kept by the 1<sup>st</sup> respondent in accordance with Article 35(2) of the Constitution*’

107. Quite apart from holding that the granting of this prayer would be impeding the work of a statutory body by restraining it from conducting its statutory mandate, I hold that the **Article 35(2)** is not intended to interfere with normal regulatory and adjudicatory processes. The right to correction or deletion of untrue or misleading statements is also achieved through the normal forensic processes established by law. As I have found that the investigation leading to the issuing of the letter dated 15<sup>th</sup> December 2011 was not in breach of the DAL’s fundamental rights and freedoms, it follows that I cannot grant prayer D.

108. The letter dated 15<sup>th</sup> December 2011 was issued in exercise of statutory authority. It is not conclusive of the specific findings in the sense that the petitioner has been asked to show cause why regulatory action should not be taken against it. There is still a process of determination that is awaited. It is the CMA that is charged with the responsibility of determining whether information is true or misleading. Furthermore, the Act provides a right of appeal against any such decision that may be made. To grant this prayer would be disable the work of the CMA in a matter where no basis has been laid for such an order.

### **Right of access to justice**

109. The right of access to justice is to be found at **Article 48** of the Constitution which provides;

***48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.***

Apart from quoting this Article, I do not think that any case has been made to substantiate breach of **Article 48**.

110. Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.

111. The petitioner apart from having the opportunity to move this court to protect its fundamental rights and freedoms, is entitled to other remedies under the CMA Act. Those remedies have not been denied or impeded by the respondents. I find that the petitioner's right of access to justice has not been infringed.

### **Whether an order of mandamus can issue against the DPP**

112. Earlier in this judgment I stated that the procedure in **Article 22** are intended for the enforcement of fundamental rights and freedoms under the Constitution. The petitioner has not demonstrated how the actions of the DPP in the criminal trial of Karanja have infringed its rights.

113. It is true that the office of the DPP is an independent office under the Constitution and in accordance with **Article 157**, the office is entitled to act either directly or through delegated authority. In this respect the authority to prosecute has been delegated and such delegation is a matter of discretion for the DPP. The court may intervene in appropriate circumstances but this is not one of them.

114. Finally, I do not read the case of *ABN Amro Bank NV v Le Monde Foods Limited (Supra)* as discharging the petitioner's burden of satisfying the court that for purposes of **Article 22** proceedings that its rights and fundamental freedoms have been violated by the acts of the DPP notwithstanding the fact that specific allegations have not been traversed. As I have held, the petitioner has failed in that regard.

### **Disposition**

115. It is now abundantly clear that the petition lacks merit, it must be dismissed and it is hereby dismissed. In view of the fact this is a matter of enforcement of fundamental rights and freedoms, I shall not award costs to the respondents but I shall award costs to the interested party who was brought into these proceedings by the petitioner.

116. I thank the advocates who have appeared in this matter for the depth of submissions.

**DELIVERED** and **DATED** at **NAIROBI** this 2<sup>nd</sup> day of March 2012.

**D.S. MAJANJA**

**JUDGE**

Mr P. Kahonge instructed by Macharia Kahonge & Company Advocates for the Petitioner

Mr W. Gatonye instructed by Waweru Gatonye & Company Advocates for the 1<sup>st</sup> Respondent

Mr G. Obiri instructed by the Directorate of Public Prosecutions for the 2<sup>nd</sup> Respondent

Mr Kiingati instructed by Mbuthia Kiingati & Company Advocates for the Interested Party



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