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Kampala City Council Football Club Ltd V Capital Markets Authority-HCT-00-CC-MC-0008-2007 [2007] UGCommC 31 (16 April 2007)

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL COURT DIVISION)**

**HCT-00-CC-MC-0008-2007**

Kampala City Council Football Club Ltd Plaintiff
Versus
Capital Markets Authority Defendant

**16 April 2007**

**BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE**

**R U L I N G:**

This exparte chamber application was brought under Sections 36 and 37 of the Judicature Act, Cap. 13, 0.46 A r. 2, 7 CPR and under Rules 2, 3 and 4 of the Civil Procedure (Amendment) Judicial Review Rules, 23. It seeks leave to apply for orders of certiorari and prohibition against the respondent.

The application is accompanied by a statement of facts setting out the particulars of the applicant, the reliefs sought and the grounds on which those reliefs are sought. The statements of fact are verified by an affidavit of one Omongole Richard, Secretary of Kampala City Council Football Club, and a share holder in Kampala City Council Football Club Limited, herein after called the company. From the records, the company was incorporated as a private company on December 13, 2006 with a share capital of Shs.2,000,000- divided into 100 ordinary shares of Shs.20,000= each with power to increase and reduce the said capital. A few days later, to be precise on December 16, 2006, in a special company resolution, the shareholders decided to increase the share capital to Shs.5,000,000,000= (five billion) by creation of Shs.5,000,000= ordinary shares of Shs.1000= each. 40% of the said Shs.5,000,000 shares were to be offered to the members of Kampala City Football Club but was not implemented. On March 15, 2007, by yet another special company resolution, the company again resolved to increase its share capital to Shs.50,000,000,000= (fifty billion) by creation of Shs.50,000,000= (fifty million) shares of Shs.1000 each. 40% of the said 50,000,000 shares were to be offered for sale to members and fans of Kampala City Council Football Club.

From the records also, on March 22, 2007, the company lawyers wrote to the Registrar of Companies notifying him of the offer of shares by the company to its members and asking the Registrar to differ registration of prospectus as the company establishes membership. The company lawyers also, though not required to do so according to the deponent, Mr. Omongole, wrote to Capital Markets Authority (CMA), notifying them of what the Club was doing. The letter to CMA is also on record and it is dated March 22, 2007. They received it on March 23, 2007. On March 27, when the share offer process had started, CMA wrote back to them as follows:

> "Re: Notice of Offer of Shares To KCC Members and Supporters

We acknowledge receipt of your letter of Ref: KO/P/07/010 dated March 22, 2001 regarding the above subject matter and your subsequent telephone conversation with the undersigned on 27 March 2007.

Your letter indicates that your client, KCC FC Ltd, wishes to raise capital by selling 40% of its shares to the fans, members and supporters of the club. While you have not provided us sufficient information regarding the transaction, we presume that the fans, members and supporters your client is offering shares to exceed 50 in number.

A transaction of this nature necessitates the conversion of KCC FC from a private to a public company and the preparation of a prospectus for the approval of Capital Markets Authority (CMA) and Registration by the Registrar of Companies prior to an offer being made. This is to inform you that the proposed sale of shares by your client does not meet the requirements of the Companies Act and does not have the requisite approval from CMA. It should therefore not be undertaken unless and until approval is given.

Yours sincerely,

Allan Rwakakooko
Legal and Compliance Manager"

The company contends herein that the respondent has no legal authority or jurisdiction to halt the process; and that the applicants were not given a hearing, contrary to the rules of natural justice. Hence this application for leave to be granted to them to file an application for declaration that their (CMA) actions are illegal. They will seek the quashing of their (CMA) decision to prevent further damage to the applicant share offer to its fans and supporters.

It is a principle, fairly notorious in my view, that the prerogative order of certiorari is designed to prevent the excess of, or the out right abuse of, power or jurisdiction by public authorities. The legal authorities show that the primary object of the prerogative orders of certiorari and prohibition is to make the machinery of government operate properly and in the public interest rather than to protect private rights. See: ***Rvs Paddington Valuation Officer ex-parte Peachey Corporation Ltd [1966] 1 QB 380*** and also ***Mwesigye Enock V Electoral Commission HCMA 62/98*** reproduced in ***[1998] 11 KARL 107.***

The power extends to the acts and orders of a competent statutory public authority, which has power to impose a liability or to give a decision, which determines the rights or property of the affected parties. I should hasten to add that certiorari is a discretionary order and a Court would only exercise its discretion to grant it only in fitting circumstances. Accordingly, the discretion to grant it must be exercised judicially and not as a matter of course.

From decided cases, applications for review may be made on grounds such as:
(i) Want or excess of jurisdiction (as when an inferior Court, tribunal or public authority exceeds its jurisdiction); or
(ii) Where there is an error of law on the face of the record; or
(iii) Failure to comply with rules of natural justice.

The Applicant’s intended action is premised on (i) and (iii) above.

I have addressed my mind to the application, the accompanying affidavit of Richard Omongole in support of the application, and the address of counsel to Court at the hearing.

The Capital Markets Authority, the CMA, is a body corporate. Under S.5 (1) (b) of the Act creating it (Cap 84), the Authority is mandated, inter alia, with the creation, maintenance and regulation, through implementation of a system in which the market participants are self – regulatory to the maximum practicable extent, of a market in which securities can be issued and traded in an orderly, fair and efficient manner. Securities under the law include shares. It is also charged with protection of investor interests. From the act, I get the impression that the Authority is legally empowered to approve the establishment of stock exchanges and licensed securities dealers and other intermediaries. The law also provides for a number of offences in relation to certain prohibited and manipulative activities in the market, for example, insider trading and market manipulation. In view of these statutory functions, it would appear to me that the applicant's letter to the Authority dated March 22, 2007 was not merely out of courtesy. It was in recognition of their statutory function in matters of securities. I now turn to the application itself.
The law, as I understand it, is that it is only public companies in this country which can raise funds from the public through the sale of their shares. See: Company Law in Uganda by D.J. Bakibinga at p. 87. The law may be archaic in that regard but that is what it is. The applicant has not pointed out any law in its favour, which one would be inclined to say that the intended respondent is in blatant breach thereof. It instead relies on practices in other jurisdictions. I get this from paragraph 25 of Mr. Omongole's affidavit, where he avers that the law in Uganda is silent on private offerings but widely practiced in common law and other American jurisdictions. In my view, whether or not the Memorandum of Association of the applicant makes it possible for the company to invite subscribers for shares does not make it an exception to the rule. By definition and expression in its Memorandum of Association, the applicant is a private company. I have already indicated that the Act allows CMA to regulate issuance of and trading in securities. It is mandated to do so in an orderly, fair and efficient manner. I'm not sure that the applicant's apparent defiant mood towards the Authority is backed by any law. If any such law exists, it has not been drawn to the attention of Court.

Court is mindful that the decision whether or not to buy the shares is for the public, including the football fans. The Authority does not buy shares. Its duty is to ensure that the offer of shares to the public is done in an orderly, fair and efficient manner. In my view, irrespective of who, between the applicant and the intended respondent, has the right to set in motion the process of floating those shares to the public, which I am not being asked to determine herein, the instant action is unwarranted. It can still be sorted out inter parties without any order of certiorari and /or prohibition. In other words, the stand off can be resolved through dialogue rather than confrontation because in the end what matters is the fans' confidence in the system to purchase the shares, and CMA's ability to protect their interests. I have considered the applicant's complaint that CMA has not given them a hearing. A remedy for Judicial Review is basically concerned not so much with the decision of which review is sought but with the decision making process itself.

From the pleadings, when CMA got to know what was happening, it wrote to the applicant advising them to halt the proposed sale of shares until approval for the sale has been given by the CMA; issue a press statement notifying the public of the withdrawal of the offer; and withdraw all adverts inviting people to buy shares. They ended the letter thus:

> "We invite you to attend an urgent meeting at our offices on Friday 30th March, 2007 at 10:00 a.m to resolve this matter."

It would appear that the meeting did not take place. Instead, the applicant came to Court for

prerogative orders. Courts in the interests of fairness impose certain obligations upon those with power to take decisions affecting other people. These obligations arise from the rules of natural justice. By virtue of these rules, such bodies must afford each party the opportunity to adequately state their case. In the instant case, the applicant itself, by its own pleadings, threw away that opportunity when it disregarded the CMA's invitation for a meeting. It cannot be heard to complain now that it has not been heard. The applicant's apparent reluctance/refusal to go for the meeting precludes it from raising such complaint, and this is irrespective of whether the respondent is right or wrong in directing as it did. No decision worth quashing has been demonstrated to Court. Accordingly, I have not found this a proper case in which Court should exercise its discretion in favour of granting leave to the applicant to file an application for prerogative orders. I would disallow the application, without prejudice to the applicant's right to file an ordinary suit, if it so desires. I do so.

The applicant shall bear its own costs herein.