FRAUD AND BOARD FAILURES IN KENYA: THE TRIBULATIONS OF CORPORATE GOVERNANCE WITHOUT ENFORCEMENT

NANCY MURINGO KANYIRI

G62/8224/2017

A research project submitted to the University of Nairobi Law School in partial fulfilment of the requirements for the Master of Laws (LLM) Degree program.

NOVEMBER 2019

DECLARATION

I, NANCY MURINGO KANYIRI do hereby declare that this is my original work and that it has not been submitted for the award of a degree or any other academic credit at any other University.

NANCY MURINGO KANYIRI

G62/8224/2017

Signed…………………………………………… Date………………………………..

This project has been submitted for examination with my approval as a University supervisor

Signed: ………………………………………. Date: …………………………..

DR. NKATHA KABIRA

DEDICATION

To all women and men who abide by Abraham Lincoln’s quote;

“I am not bound to win, but I am bound to be true. I am not bound to succeed, but I am bound to live by the light that I have. I must stand with anybody that stands right, and stand with him while he is right, and part with him when he goes wrong.”

LIST OF STATUTES AND REGULATION

Domestic Legislation

Code of Corporate Governance Practices for Issuers of Securities to the Public 2015) enacted by the Capital Markets Authority on 4 March 2016

Guidelines on Principles of Corporate Governance for Public Listed Companies (2002)

Prevention of Fraud (Investment) Act (2012)

The Banking Act Cap. 488

The Capital Markets (Corporate Governance) (Market Intermediaries) Regulations, 2011

The Capital Markets Act Cap. 485A (Amended in 2018)

The Capital Markets Management, Supervision, and Internal Control Standards for entities licensed by the CMA, Guidelines (May 2012)

The Central Depositories Act No 4 of 2000 (Amended in 2013)

The Companies Act (Revised Edition 2012)

The Companies Act Cap. 486 (Revised Edition 2015)

The Companies (Amendment) Bill, 2017

The Constitution of Kenya (2010)

The East Africa Community Directives, (Legal Notice No. EAC/142/2017)

The Financial Markets Conduct Bill (2018)

The Financial Services Authority Bill (2016)

The Insurance Act Cap. 487

The Kenya Penal Code Chapter 63, Revised Edition 2014

The Kenya Revenue Authority Act, Revised Edition 2018

The Public Finance Management Act, Legal Notice No. 34 2015

Foreign Legislation

The United States of America, Sarbanes-Oxley Act of 2002 [Public Law 107–204, Approved July 30, 2002, 116 Stat. 745] [As Amended Through P.L. 112–106, Enacted April 05, 2012]

The United States of America, Securities Exchange Act of 1934 [As Amended Through P.L. 115-141, Enacted March 23, 2018]

South Africa, Financial Markets Act, 2012

South Africa, The Financial Sector Regulation Act 9 of 2017

The Australian Securities and Investments Commission Act 2001 (Revised 2018)

The Australian Corporations Act 2001 (Corporations Act) (Revised 2017)

The United Kingdom Financial Services and Markets Act 2000

The United Kingdom Financial Services and Markets Act 2000 (Prospectus) Regulations 2019

LIST OF CASES

Kenya Law Cases

Alnashir Popat & 8 others v Capital Markets Authority [2016] eKLR

Capital Markets Authority v Alnashir Popat & 8 others [2019] eKLR

Capital Markets Authority v Jeremiah Gitau Kiereini & another [2014] eKLR

Capital Markets Authority v Jeremiah Gitau Kiereini, Kingsway Nominees Limited & Kingsway Family Holdings Limited [2015] eKLR

Chadwick Okumu v Capital Markets Authority [2018] eKLR

Ernst and Young LLP v Capital Markets Authority Nairobi Petition No. 385 of 2016

Jeremiah Gitau Kiereini v Capital Markets Authority & The Attorney General, Constitutional Petition No. 371 of 2012

Law Society of Kenya v Betty Sungura Nyabutto & 2Others (2012) eKLR

Munir Sheikh Ahmed v Capital Markets Authority [2018] eKLR

Republic v Capital Markets Authority Ex parte: James R.Murigu and Barth Ragalo [2018] eKLR

Republic v Capital Markets Authority & another Ex-Parte Jonathan Irungu Ciano [2018] eKLR

International Case Law

Credit Lyonnais Bank Nederland v Pathe Communications Corp. (1991)

Decana Inc. v Contogouris 0604247/2002 (N.Y. Misc. 2007)

Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919)

Sears v. Hotchkiss, 25 Conn. 171 (1856)

LIST OF FIGURES

LIST OF ABBREVIATIONS

ACFE	Association of Certified Fraud Examiners
CBK	Central Bank of Kenya
CMA	The Capital Markets Authority
CEO	Chief Executive Officer
EFSA	Egyptian Financial Supervisory Authority
IM	Information Memorandum
IOSCO	International Organisation of Securities Commission
OECD	The Organisation for Economic Cooperation and Development

TABLE OF CONTENTS

ABSTRACT

This study makes a case for effective enforcement mechanisms against fraudulent directors and boards that fail to conduct their governance duties. Although the CMA has in the past instituted legal reforms to enhance good corporate governance practices in Public Listed Companies, nevertheless, there are challenges faced in administering effective enforcement actions. The study focuses on assessing the enforcement actions by the Capital Markets Authority for the period 2015 to 2019. Fraud orchestrated or condoned by directors bedevilled listed companies in Kenya within this study's period. Areas of concern that arose from this were why the regulator did not detect timely the malfeasances and why for some cases no enforcement action was administered against directors. This project advances three central arguments: the first argument is that the Capital Markets Authority and tribunal institutional reporting arrangement as envisioned by the Capital Markets Act has impeded effective enforcement actions against fraudulent directors. Secondly, collateral attack cases instituted by aggrieved directors resulted in unfavourable decisions such as quashing CMA's enforcement actions on procedural matters. Thirdly, there are implementation challenges faced by the CMA resulting in delays in instituting actions or inaction. This is due to pending court cases, claims of undue influence, capacity and resource constraints. Through doctrinal research methodology, this study examines the challenges faced by the CMA in administering enforcement actions against fraudulent directors. A key finding of this study is that the achievement of an effective enforcement framework in Kenya requires a sound legal framework and an implementation program that evolves from early detection to investigations and ultimately to administrative, criminal or civil proceedings. This study reveals that there is room for further revision of the CMA legal framework to address gaps in sanctions/penalties provisions, devolve the Authority CEO's power to invoke investigations and to promote CMA's independence by devolving/limiting the Executive's powers as outlined in the Capital Markets Act.

CHAPTER ONE

INTRODUCTION

1.1 Background

This study examines Kenya's CMA Corporate Governance enforcement mechanisms, analyses the challenges faced in imposing enforcement actions against fraudulent directors and boards that fail to conduct their governance duties. It makes a case for effective enforcement actions against such directors. On 22 February 2012, The CMA as a matter of public interest sought to provide responses to issues raised in the Standard Newspaper relating to fraud scandals[1]. Regarding losses to investors arising from fraudulent activities or collapsed companies, they provided the following response[2]. In their view, the downfall of market operators was witnessed within the period of March 2007 and February 2010. CMA had since taken various steps to improve this including, reinforcing its legal framework; change of its oversight approach and introducing regulations. CMA further explained that they had taken steps towards strengthening its supervision capacity and with the assistance of the Treasury and the Commissioner of Police had set up Capital Markets Fraud Investigation Unit (CMFIU) to combat fraud[3]. They claimed that data from the CMFIU for 2009 to the year ending 2011 showed a 77% decline in the number of capital markets fraud cases received or reported to the CMFIU[4]. To their own defence, they argued that there was no doubt that investors in the market had noted the gains of the above measures. According to them, it was, therefore, not accurate to state that the trends were, in fact getting worse. Regarding their regulatory and enforcement capacity, CMA explained that they had continued to improve its capacity in terms of human

---

[1] Rose Lumumba Director Corporation Secretary & Communications at Capital Markets Authority, 'CMA has and continues to execute its mandate', Standard Digital (22 February 2012), https://www.standardmedia.co.ke/article/2000052605/capital-markets-authority-has-and-continues-to-execute-its-mandate last accessed 9 February 2019
[2] Ibid
[3] Ibid
[4] Ibid

capital, systems, and enabling legal framework[5]. The Judiciary was handling criminal cases brought forward by the Authority against shareholders, directors, and employees[6].

Fast forward to the period 2015 - 2019 Kenya witnessed some of the biggest corporate fraud scandals ever. In 2016 and 2017 alone, Kenyan investors lost an estimated 270 billion in eight companies due to mismanagement and fraud[7]. The companies included Chase bank, Imperial bank, CMC, Uchumi, Mumias, Kenya Airways, National Bank and Trans Century[8]. The malfeasances encompassed poor strategies by the companies' management, misstatements in published prospectuses, lengthy tenures for Board of Directors in office, and poor oversight by board members over management activities. Regulators instituted investigations and fraud-related charges only because of public & shareholders outcry, reported losses in financial statements and listed companies suffering cash flow problems. The main questions that arose from these cases were why despite the presence of regulators and regulations in place, the CMA did not impose enforcement actions swiftly. Further, due to court rulings regarding non-adherence to natural justice laws during proceedings, some of CMA's enforcement orders were set aside.

A global view of fraud and fraud-related scandals was also important for this study, in order to gain an understanding as to whether other regulators encounter the challenges faced by CMA and how they mitigate this. Investors have incurred massive losses across the globe due to corporate fraud. According to the KPMG Global Profiles of the fraudster[9], within 2013 to 2015 executive and non-executive directors perpetrated 34% of frauds[10]. Research studies across the

[5] Ibid
[6] Ibid
[7] Cytonn Investments, 'Cytonn Corporate Governance Index Report-2017', 25 June 2017
[8] The Standard Media, ' Poor governance cost investors Kshs 246 billion, Available at https://www.standardmedia.co.ke/business/article/2000201218/report-poor-governance-costs-investors-sh264b last accessed 6 March 2019
[9] KPMG, *Global Profiles of the Fraudster*, May 2016, Available at <https://assets.kpmg/content/dam/kpmg/pdf/2016/05/profiles-of-the-fraudster.pdf> accessed 3 February 2019
[10] Ibid

world have revealed various commonalities in these frauds[11]. "Greed or sense of making magic; over-ambitious corporate expansions that have led to complex structures and pressure to achieve market expectations"[12]. In addition, corporate governance failures because of incompetent or ineffective boards and board committees. Sense of entitlement by senior management, financial records manipulation and fraudulent financial reporting to disguise the true nature of underlying problems[13]. Weak controls fuel and technology also enables fraud[14]. There is a growing focus on Corporate Governance across the world due to the financial crisis experienced in Europe in 2016. This has led to a shift in attention globally from the role played by substantive law regarding Corporate Governance to enforcement mechanisms and strategies. John Armour in his book argues that the effectiveness of a regulatory regime is dependent on substantive rules coupled with enforcement mechanisms[15]. He explains that the central problem of Corporate Governance for UK firms is getting managers to be accountable to shareholders[16].Sam Mensah observes that Across Africa, governments have initiated reasonable regulations to achieve the key objectives of corporate governance, particularly in the areas of board composition and disclosures[17]. However, in his view, "the effectiveness of these rules is dependent on the ability of the regulatory agencies to enforce, that is, executing a process that provides restitution when the rules are broken"[18]. Evidence indicates that enforcement is a challenge due to weak judiciary systems making it difficult to obtain convictions for rules violations[19]. Securities regulators, therefore, could work hard to

[11] KPMG Publication, 'Corporate Failures', Available at <https://assets.kpmg/content/dam/kpmg/pdf/2016/05/Corporate-Failures.pdf> accessed 6 March 2019
[12] Ibid
[13] Ibid
[14] Ibid
[15] John Armour, 'Enforcement Strategies in UK Corporate Governance - A roadmap and Empirical Assessment', (University of Oxford Law Working Paper NO.106/2008)
[16] Ibid
[17] Sam Mensah Executive Director, 'Corporate Governance In Africa: The Role Of Capital Market Regulation By African Capital Markets Forum CEO, SEM Financial Group Limited Ghana', (Presented at the 2nd Pan African Consultative Forum on Corporate Governance, Nairobi, Kenya), [2003]
[18] Ibid
[19] Ibid

administer the law, identify violators but the normal process of enforcement may not be equipped to apply the new laws[20]. The Association of Certified Fraud Examiners (ACFE) recognizes that effective governance processes are the foundation of fraud risk management[21]. Lack of effective corporate governance seriously undermines fraud risk management[22].

More Kenyans have embraced global trends and the financial benefits of investing in publicly listed companies. These include increased transparency and accountability requirements for the company directors, increased company exposure and growth. However, the increase in shareholding brings with it a greater demand for listed companies' directors to govern and manage companies properly. The Kenyan Capital Markets Act provides the objectives of the Capital Markets Authority, which include protection of investors' interests[23]. The Authority may also exercise powers such as imposing sanctions for breach of the Act or for non-compliance. The Capital Markets Fraud Investigation Unit (CMFIU) deals with fraud offences but CMA handles administratively governance breaches. The Authority is in essence empowered to investigate and undertake enforcement/regulatory action. The CMA introduced the revised Code of Corporate Governance Practices in 2016 in a bid to set out principles and recommendations companies were to adopt in making good corporate governance an important part of their business dealings[24]. On 18 July 2018, the Chief Executive of the CMA promised that as part of their 2018-2023 strategic plan they would reduce the resolution of governance issues to a period of six months. In line with the above, this study examines the CMA's enforcement actions for the period 2015 -2019, the Authority's challenges in effective

---

[20] Ibid

[21] The Institute of Internal Auditors, American Institute of Certified Public Accountants, and Association of Certified Fraud Examiners, *Managing the Business Risk of Fraud: A Practical Guide,* (2008).

[22] Ibid

[23] The Capital Markets Act, Cap 485A (Amended in 2018)

[24] Code of Corporate Governance Practices for Issuers of Securities to the Public 2015) enacted by the Capital Markets Authority on 4 March 2016

detection, investigation, prosecution, and conclusion of fraud-related cases. It also provides best practises from other jurisdictions that CMA can borrow.

1.2 Statement of the Problem

Although the CMA has in the past instituted legal reforms to enhance good corporate governance practices in Public Listed Companies, nevertheless, the Authority still faces challenges in administering effective enforcement actions against fraudulent directors.

This study prepones that there is room for further revision of the Capital Markets Act to address gaps in sanctions/penalties provisions. In the converse, this study argues that other Acts such as the Companies Act and Penal Code contain corporate governance provisions that the CMA could rely on in enforcement. While acknowledging Kenya's public practise where economic regulators report to the National Treasury, the study advocates for decentralisation/limits to the Executive's power to prevent undue influence as aided by the Act. This study also examines various court rulings on collateral attacks instituted by aggrieved directors and discusses the need for revision of inquiry, investigation & prosecutorial procedures to avert future litigation against CMA's enforcement actions.

The study will also seek to propose best practices that can enhance corporate governance enforcement mechanisms.

1.3 Justification of the study

This study is justified because though there are CMA laws and regulations in place to regulate Corporate Governance; enforcement against fraudulent directors and boards that fail to conduct their duties diligently remains a challenge in Kenya.

This study adds to the body of knowledge, as existing literature does not contain an assessment of CMA's enforcement actions against fraudulent directors. This project makes a case for effective enforcement actions against such directors. Further, this study is justified, as past research, studies were limited due to lack of a comprehensively documented enforcement jurisprudence for analysis until 2018 when the CMA published the Digest of Decisions on Capital Markets.

1.4 Objectives of the study

This study makes a case for effective enforcement mechanisms against fraudulent directors and boards that fail to conduct their governance duties. This study seeks to:

1. To understand the position of regulators, the challenges they face in administering enforcement action against fraudulent directors and boards that fail to conduct their governance duties.
2. Examine the history of CMA's corporate governance enforcement framework and its evolvement.
3. Examine the position of law in Corporate Governance enforcement in Kenya and the institutional framework in which CMA operates.
4. To utilize selected case studies to undertake an analysis of the challenges faced by the CMA in administering enforcement actions against fraudulent directors and boards that fail to conduct their governance duties in Kenya.
5. To seek for lessons and best corporate governance enforcement practises from other jurisdictions.
6. Propose recommendations to aid in the improvement of CMA's enforcement framework and identify areas for further research.

1.5 Research Questions

This study seeks to answer the following research questions:

1. What is the position of corporate governance regulators, what challenges do they face in administering enforcement action against fraudulent directors, and boards that fail to conduct their governance duties?
2. What is the history of CMA's corporate governance enforcement framework and how has it evolved?

3. What is the position of law in the enforcement of corporate governance mechanisms in Kenya and the institutional framework in which CMA operates?
4. What challenges does the CMA face in administering enforcement actions against fraudulent directors and boards that fail to conduct their governance duties in Kenya?
5. What lessons can Kenya can learn from other jurisdictions whose regulators have successfully administered enforcement actions against fraudulent directors?
6. What recommendations and practices can be formulated to aid the improvement of CMA's enforcement framework?

1.6 Hypothesis

The study makes the following hypothesis.

1. The CMA encounters challenges in administering effective enforcement actions against fraudulent directors and boards that fail to conduct their governance duties.
2. Australia, the USA, the UK and South Africa offer lessons which Kenya can emulate for the purpose of improving CMA's enforcement framework.

1.7 Theoretical framework

An analysis of the theoretical framework for Corporate Governance was important in carrying out this study. It is only when we understand the roles and obligations of executives in companies that we can justify that the relevant institutions should have proper enforcement mechanisms and autonomy to punish violators who are involved in fraud dealings. The study will utilise two theories whose theorists have debated for centuries as to the primacy of shareholders in a company versus other stakeholders. It is important to review whether CMA and company directors' actions in the past have been influenced by other actors (Stakeholder theory) or by directors self- interest due to the autonomy in decision making bestowed on them (Agency theory). An in-depth understanding by the regulator CMA on what motivates or drives directors' actions is crucial in formulating laws and administering enforcement actions. The Agency theory also is essential in this study, as it relates to one of CMA's key objectives the protection of investor interests. The CMA in this study being the regulator is the Agent acting as the gatekeeper to protect investor interests (principal). The smart regulation theory is also key as it advocates for the use of multiple regulatory tools and cohesion amongst regulators and industry actors in order to ensure effective enforcement and good compliance results. Another theory that will be considered is the responsive regulation theory that will be useful in seeking lessons Kenya can borrow from other jurisdictions. Countries that utilize responsive regulatory models achieve betters results in terms of enforcement. Their securities regulators study the environment and adapt to the actions of companies or people they regulate[25]. The people's conduct ideally determines whether to use a more or less interventionist approach. John Rawls's theory of justice is also essential to this study especially in assessing one of the key challenges faced by the CMA which is litigation. In various court cases, judges have ruled the Capital Markets Acted contrary to rules of natural justice.

1.7.1 Smart regulation theory

Smart regulation theory advocates for the use of a mix of regulatory tools and promotion of communication among various stakeholders including regulators[26]. They argue that this allows the implementation of complementary combinations to achieve more effective compliance results. The theory also advocates for the use of law reform to develop existing legal tools or legal structure. The underlying rationale of this theory is that using multiple instead of a single policy instrument, and a larger range of actors would produce better regulation[27]. The theorists argue that informal mechanisms of social control may yield better results than formal ones. They propose that focus should be put on understanding regulatory influences and interactions with companies, trading partners, financial markets, peer pressure and self-regulation through

---

[25] Jonathan Kolieb, 'When to punish when to persuade and when to reward : strengthening responsive regulation with the regulatory diamond', https://www.austlii.edu.au/au/journals/MonashULawRw/2015/6.pdf, Accessed 7 April 2019

[26] N Gunningham and P Grabosky, Smart Regulation: Designing Environmental Policy (1998) p 4.

[27] Ibid

industry associations, culture and even civil society[28]. This approach also encourages actors to engage within the regulatory process, fostering a sense of responsibility and "ownership" of the process[29]. Compliance is therefore encouraged and the development of shared goals and objectives facilitated.

The CMA commendably in the past has instituted various legal reforms in order to effectively monitor and administer enforcement actions. However, there has been criticism that for instance the Corporate Governance code enacted in 2002 was borrowed heavily from more developed countries, with less emphasis on conditions of the market in which the code was to be enforced. This was because of a lack of involvement of market players, companies' directors in the drafting of the Code. The CMA improved this by consulting stakeholders to some extent prior to the release of the Amended 2015 Corporate Governance Code. Therefore, market actors have been more receptive to the code's principles. The CMA further signed a Memorandum of Understanding in 2009 with the Retirement Benefits Authority, Central Bank of Kenya and Insurance Regulatory Authority. However, a decade later, there is no evidence as to how this has aided the Authority's enforcement capacity. Smart regulation theorists are also of the view that beyond roles of the state in enforcement as traditionally known, other third parties who act as regulators have a role to play in enforcement[30]. They argue for a three-sided enforcement pyramid, "the third face being actions by commercial or non-commercial third parties, the second face being self-regulation and the first face being government action"[31]. Peter Drahos provides an illustration of the enforcement pyramid as shown below:

[28] Peter Drahos, *Regulatory Theory: Foundations and applications* (published 2017 by ANU Press, The Australian National University, and Canberra, Australia).
[29] Level Crossing Law Commission, *Government's Code of Practice on Consultation*, (The Law Commission Consultation Paper No 194 and The Scottish Law Commission Discussion Paper No 143 of 2010)
[30] Ibid pg 135
[31] Ibid pg 135

Figure 1: Enforcement pyramid

Source: Peter Drahos, Regulatory Theory: Foundations and applications

The above pyramid depicts the importance of using a mix of tools. Notably in Kenya, the imposition of criminal penalties has been low. The CMA's enforcement jurisprudence up to October 2019 had registered a low number if any of successfully prosecuted cases.

1.7.2 Responsive regulation theory

The responsive regulation theory seeks to review traditional methods of enforcement such as imposing sanctions[32]. It advocates for a hierarchy of enforcing authorities, with decisions made at progressively higher levels[33]. Various authors argue that rule compliance is an "impoverished" view of regulation[34]. They argue that regulation should not just be tantamount to compliance mechanisms or enforcement of rules only[35]. Regulations according to them

[32] Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, (Oxford Socio-Legal Studies), (OUP, 1992) pp 4, 6
[33] Ibid
[34] Ibid
[35] Ibid

should also encompass methods and mechanisms that go beyond compliance with legal rules to satisfy regulatory goals[36]. Responsive regulation theorists argue that in some cases in order for regulation and regulators to be effective they should adapt to actions of companies or people they regulate[37]. The people's conduct ideally should determine whether to use a more or less interventionist approach[38]. They argue that a regulator must be willing and should be responsive to how citizens or companies are regulating themselves before they escalate intervention[39]. They should be ready to shift approaches from soft words to hard deeds and be willing to de-escalate once appropriate behaviour from regulated entities is displayed. A look at the past enforcement regime by the CMA shows a clear depiction that the Authority is not driven by adaptation to companies' actions. The Authority has shifted to taking hard stances mainly due to public outcry once corruption scandals are reported rather than this being detected by their own internal investigations. At times the number of enforcement actions differed/could be correlated to who was the Authority’s CEO.

1.7.3 Agency and stakeholder theories

According to Clarke, the separation of control and ownership continues to remain a subject of interest and occasionally sparks controversy[40]. Meckling and Jensen defined an agency relationship as “a contract under which one or more persons (the principal engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent”[41]. This theory correlates to one of CMA’s key objectives, the protection of investor interests. CMA being the regulator and gatekeeper plays the role of an ‘agent’ acting on behalf of its ‘principal’ investors. Worldwide cases that showed

[36] Ibid
[37] Ibid
[38] Ibid
[39] Ibid
[40] Clarke Thomas, *Theories of Corporate Governance, The foundations of Corporate Governance*, (2004)
[41] Michael C. Jensen and William H. Meckling , *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, (Harvard Business School MJensen@hbs.edu and Meckling University of Rochester), Page 309

how catastrophic the agency problem can be include the collapse of the giant energy company Enron in 2001[42.] The company's officers and board of directors, including the Chairman, CEO, and CFO, disposed their stock at higher prices due to falsified accounting reports that made the stock appear more valued than actual prices[43]. Once the scandal was discovered, numerous stockholders lost millions of dollars as Enron share values plunged. Another scandal that shook the Capital Markets abroad was The Boeing Buyback[44]. From 1998 to 2001, the Aerospace leader Boeing had more than 100,000 shareholders consisting mostly of employees who had purchased stock through their retirement plans[45]. Concurrently, Boeing was planning on buying back most of its stock, driving down its share price. The executives' actions damaged the value of their employees' retirement accounts[46].

Agency theory is crucial to any inquiry into the behaviour of corporate actors as these theorists argue that applying basic principles of agency theory to the issue of criminal sanctions yields two insights[47]. First, "corporate officers and directors have a natural inclination to refrain from taking risks. Engaging in criminal activity is a form of risk-taking. Excessive enforcement can lead to a tendency of excessive risk avoidance, in turn leading to a general decline in social wealth"[48]. The second critical insight provided by agency theory is that "corporate actors do not engage in criminal activity to benefit the firms for which they work but for self-interest. In some, but not for all cases, these activities will benefit the firms for which the corporate actors work"[49]. The real aim of criminal behaviour by organizations is to advance the careers and lining of pockets of the responsible corporate actors. Therefore these actors should bear the

[42] Gerald Hanks, 'Examples of Agency Problems in Financial Markets'; https://smallbusiness.chron.com/examples-agency-problems-financial-markets-70962.html, Accessed 05 March 2019
[43] Ibid
[44] Ibid
[45] Ibid
[46] Ibid
[47] Jonathan R. Macey, 'Agency Theory and the Criminal Liability of Corporations', Yale Law School (1991)
[48] Ibid
[49] Ibid

blame and criminal sanction should be levied against them[50]. Agency theory suggests rewarding executives financially in order to motivate them to maximize shareholders' and owners' profits. It is argued that a board developed from an agency theory perspective tends to exercise strict control and supervision to protect shareholders' interests. The board is as a result keenly involved in most of the managerial decision-making processes and is accountable to the shareholders. However, for past judicial decisions courts have stated that directors are not agents of shareholders but are fiduciaries of the Corporation[51]. This would, therefore, provide directors with a defence especially where they make decisions once a company is faced with cash flow problems or is to be put under receivership. In *Credit Lyonnais Bank Nederland vs. Pathe Communications Corp. (1991)*[52] the Delaware Court of Chancery held that "when a corporation became insolvent or near insolvent, shareholders were not in a position to deal with assets as they saw fit hence directors owed them a fiduciary duty to protect the assets for the benefit of the company including the creditors"[53].

The shortfall of viewing directors as fiduciaries would be that in certain instances they would be viewed as to have acted to the detriment of shareholders. It may be argued that for instance in the Uchumi case where directors opted to utilize the funds raised from the rights issue to pay creditors, they acted against the shareholders' will. Amidst the allegations of conflict of interest levelled against its former CEO, it would be difficult to convince Uchumi's shareholders that utilizing the funds to settle payments owed to creditors was for the shareholder's benefit or even to keep the company afloat. On the other hand, Stakeholder theorists argue that clients, customers, and suppliers have a stake in a company[54]. They are affected by the failure or success of a company. Stakeholder theories promote corporate social responsibility, even if it

---

[50] Ibid
[51] Sears vs. Hotchkiss (1853), Decana Inc vs. Contogouris (2007)
[52] Credit Lyonnais Bank Nederland vs. Pathe Communications Corp. (1991)
[53] Ibid
[54] Jones, T.M., Wicks, A.C. and Freeman, R.E., *Stakeholder Theory: The State of the Art.* In: Bowie, N.E., Ed., The Blackwell Guide to Business Ethics, Blackwell, Oxford. (2002)

translates to a reduction of long-term profit for a company[55]. Freeman defines stakeholders as "those groups who are vital to the survival and success of the corporation"[56].

Stakeholders and especially shareholders primacy was emphasized in the judicial decision delivered in *Dodge Vs Ford Motor Company (1919)*[57]. The case formulated the principle that "management must conduct its corporate affairs for the benefit of shareholders"[58]. The Supreme Court of Michigan rejected Ford Motor's rationale for deciding not to pay a special amount in dividends to shareholders[59]. Henry Ford explained that he intended to use the money to "employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes"[60]. The judge, J. Ostrander, lashed out at him for trying to run the firm like a "semi eleemosynary institution and not as a business institution" [61]. However, over time, case law has evolved and there is a recognition that other stakeholders also matter and should be considered by company directors. A critical analysis of the *Enron case* jury comments made after the trial indicates that the jury was influenced by the magnitude of the Enron collapse and the impact it had especially on employees. Another scandal, the *Volkswagen scandal* uncovered in September 2015 also outlined the dire consequences that stakeholders can have to a company[62]. Volkswagen recalled nearly 500,000 diesel cars in the U.S. Within a few days, VW saw a massive sell-off of its stock, wiping out $16.9 billion of the market value of the company[63]. After the scandal broke out, VW's economic status was damaged from worldwide recalls, loss of sales, and decreased

[55] Ibid
[56] Ibid
[57] Dodge vs. Ford Motor Co., 1919. 170 N.W. 668.
[58] Ibid
[59] Ibid
[60] Luh Han and Loizos Heracleus, 'Rethinking the Agency theory: The view from the Law', [Academy of Management Review 2010, Vol. 35, No. 2, 294–314].
[61] Ibid
[62] Epoch Pi, 'Volkswagen: the Loss of Trust in Stakeholder Theory', <https://www.epochpi.com/blog/2015/09/30/volkswagen-the-loss-of-trust-in-stakeholder-theory>, Accessed on 3 April 2019
[63] Jung, Jae & Bin "Alison" Park, Su, 'Case Study, Volkswagen's Diesel Emissions Scandal) Thunderbird International Business Review. 10.1002/tie.21876

stock market price[64]. VW appeared to have lied to customers and regulators, unfairly lowered costs by staff, defrauding suppliers. They also ignored the environment lights a slow-burning fire that eventually became a huge problem[65]. VW suffered a loss in terms of brand damage, lawsuits, and regulatory penalties[66]. Back home, there has been a spate of scandals that have engulfed listed companies. For instance Mumias scandal, directors ignored calls by the auditor to seal gaping corruption loopholes leading to losses that brought the company to its knees[67]. The regulator CMA also did not protect stakeholders as it did not timely detect, investigate nor punish perpetrators of the fraud. Many employees lost their jobs and farmers who depend on the proceeds of the sale of sugarcane to Mumias factory lost their livelihoods. Going by the spirit of this theory, one of the principal objectives of the CMA is to facilitate the existence of a nationwide securities system to enable wider participation of the public[68]. The authority also has the mandate to investigate where on its own motion or based on a complaint has reason to suspect the manner in which a listed company is operating is not in the interest of their client or the public[69].

The political philosopher Charles Blattberg, however, criticized the stakeholder theory due to their assumption that stakeholders' interests can be balanced against each other[70]. Blattberg argues that it was "a product of its emphasis on negotiation as the chief mode of dialogue for dealing with conflicts between stakeholder interests, he recommends conversation instead"[71]. Jensen explains that while the agency theory places primary emphasis on shareholders' interests, stakeholder theory accentuates taking care of all stakeholders' interests, and not just

---

[64] Ibid
[65] Ibid
[66] Ibid, 63
[67] Salton Njau, 'How Mumias bosses brought firm to its knees', (DAILY NATION, 17 February 2015)
[68] Ibid 23
[69] Ibid
[70] Essays, UK. 'The Stakeholder Theories Today Economics Essay', (November 2018), https://www.ukessays.com/essays/economics/the-stakeholder-theories-today-economics-essay.php?vref=1), Accessed on 3 February 2019
[71] Ibid

the shareholders[72]. In line with this, he suggests enlightened value maximization, "which utilizes much of the enlightened stakeholder theory but accepts maximization of the long-run value of the firm as the criterion for making the requisite tradeoffs among its stakeholders and therefore solves the problems that arise from multiple objectives that accompany traditional stakeholder theory". Regulators such as the CMA, therefore, have a duty to protect all stakeholders concerned.

1.7.4 John Rawls Theory of Justice

John Rawls's theory of justice principles expresses his view of justice through principles. His first Principle of Equal Liberty: Each person has an equal right to the most extensive basic liberties compatible with similar liberties for all[73]. Judges in Kenya have sought to emphasize that individuals rights must be respected by courts, regulators and all individuals. In the case of *Law Society of Kenya v Betty Sungura Nyabutto & 2 Others (2012)*[74] the court observed as follows;

> "*...there is nothing in the Constitution that draws this distinction or limits the application of the Bill of Rights in such a manner. The Bill of Rights applies to all, persons and binds everybody. However, the nature and extent of a particular right may be limited in scope to apply to the state and not a private individual…*[75] ".

John Rawls theory of justice is essential to this study especially in assessing one of the key challenges faced by the CMA which is litigation. In various court cases, judges have ruled the Capital Markets acted contrary to rules of natural justice. Rawls's principle accords with widespread convictions about the importance of equal basic rights and liberties. Critics to this theory have argued that Rawls deals for the most part with a perfectly just society in which

[72] Jensen, M. C. 'Value Maximisation, Stakeholder Theory and the Corporate Objective Function', (European Financial Management), Vol 7 No (3), 297-317.(2001).
[73] John Rawls, *A theory of Justice* [1971] Harvard University Press, 328.
[74] Law Society of Kenya v Betty Sungura Nyabutto & 2 Others (2012) eKLR
[75] Ibid

"[e]veryone is presumed to act justly and to do his part in upholding just institutions[76]."' They argue that it is not clear how this “perfectly just society” would work in practice[77]. This reflects the Kenyan situation whereby as much as there is a laid out Bill of Rights in the constitution, this does not mean that regulators will automatically adhere to the rules in all circumstances. However, in essence, Rawls theory of justice is key in proposing reforms for what would be termed as an “ideal society”. If the CMA was to adhere to the rules of natural justice, this does not mean there would be no collateral attacks, however, this would reduce litigation cases instituted challenging their enforcement actions. Further, John Rawl’s Theory of justice will prove essential in analysing the challenges faced by the CMA as every entity/institution has stakeholders: individuals and groups to whom they owe consideration in governance decisions. According to Rawls the relative weight of stakeholder interests can be established with fairness without the confounding influence of arguments based on self-interest[78]. This will be essential in assessing if the CMA’s challenges are due to leadership and accused people’s self-interest and if it is plagued with undue political interference into its operations.

The theories outlined above were, therefore, crucial in conducting this study. The “smart regulation” and “responsive regulation” theories aided in assessing the role of a regulator, the effectiveness of CMA in conducting governance enforcement and identifying areas of improvement. The agency and stakeholder theories were useful in understanding the roles and obligations of executives in companies. Further, these theories correlate to one of CMA’s key objective which is the protection of investor interests. Investors are key stakeholders in a company and CMA being the regulator and gatekeeper plays the role of an agent. It is only

[76] Ibid, 73
[77] Ibid
[78] Ibid, 73

when this is understood that this study could justify that the CMA should have proper enforcement mechanisms and autonomy to punish violators who are involved in fraud dealings.

1.8 Literature Review

Research done in the past has shown that there is a correlation between a proper legal system and Corporate Governance. A working legal system plays a significant role in ensuring compliance with corporate governance laws and regulations. There is a growing body of literature regarding corporate governance and even a focus on enforcement across continents such as Asia, North America, and Europe. However, in Africa, very few writers have focused on challenges faced in the enforcement of Corporate Governance especially by regulators. Further, drafters of Corporate Governance laws such as in Kenya have continued to borrow heavily from more developed countries' laws, without paying attention to the fact that our legal traditions are different, regulatory infrastructure and economy position also is not similar to that of modern countries.

1.8.1 Concept of Corporate Governance with a focus on enforcement

According to Berglof & Claessens, a key issue of good corporate governance practice is the enforcement of laws and regulations[79]. A good enforcement framework ideally encompasses a program that evolves from intelligence analysis to investigations and ultimately to administrative, criminal or civil proceedings[80]. The OECD emphasizes that regulation is a key tool for achieving the social, economic and environmental policy objectives of a government, which it cannot effectively address through voluntary arrangements and other means[81]. Regulators are also important in ensuring transparency within the overall regulatory system[82].

---

[79] Erik Berglöf and Stijn Claessens, 'Corporate Governance and Enforcement', La Porta et al., 2008

[80] J. William Hicks, 'Securities Regulation, Challenges in the decades ahead', (1993, Indiana Law Journal), Available at: http://www.repository.law.indiana.edu/ilj/vol68/iss3/12, Accessed 8 April 2019

[81] OECD, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy,(2014)

[82] Ibid

Fishman notes that "enforcement determines the efficacy of regulation"[83]. "The effectiveness of the regulatory scheme rests upon the nature and scope of enforcement tools because they give the framework effect, enhance confidence and protect investors. Effective enforcement is the bedrock of investor protection"[84]. Worldwide, corporate governance gained eminence in the 1980s and 1990s due to stock market crashes and corporate failures[85]. Several scandals that led to the collapse of companies such as Enron, Parmalat, Bank of Credit and Commerce International, and WorldCom, led to more focus on enforcement of Corporate Governance rules and regulators[86]. Rita Ruparelia and Moses Njuguna in their article provide an example of the Enron case, a milestone regulation in the United States that deregulated the electrical power market drove its growth[87]. This legislation paved the way for Enron to engage in electricity trading and gathering of substantial margins from the differences in wholesale and retail prices between States[88]. By 1994, Enron had apparently grown into one of the largest companies in the world. Unfortunately, the company engaged in fraudulent accounting practices[89]. The company further entered into several partnership agreements with companies it had formed in order to hide massive debts and hefty losses on its trading businesses[90]. The collapse of Enron led to people losing their jobs and investors lost billions. These collapses necessitated the need for corporate governance reform[91]. Findings from investigations show

---

[83] Fishman; Norman. Poser, 'Why SEC Failed: Regulators Against Regulation', 3 BROOK J. CORP FIN. & COM L. 289 (2009);

[84] Ibid

[85] Dagli, H, Eyuboglu, K., Ayaydin, H., 'Performance Evaluation of Corporate Governance Index in Turkey',(Vol. 12, Iss. 2, pp. 163 - 172 2012)

[86] La Porta, R., Florencio, L., Shleifer. A. & Vishny, R., 'The quality of government. Journal of Law', Economics & Organisations, (OUP 1999)

[87] Rita Ruparelia, Amos Njuguna, 'The Evolution of Corporate Governance and Consequent Domestication in Kenya', (International Journal of Business and Social Science Vol. 7, No. 5; May 2016), Available at https://ijbssnet.com/journals/Vol_7_No_5_May_2016/14.pdf, Accessed 3 May 2019

[88] Ibid

[89] Ibid

[90] Ibid

[91] Aebi, V., Sabato, G., & Schmid, M., 'Risk Management, Corporate Governance, and Bank Performance in the Financial Crisis,(10th GUBERNA European Corporate Governance conference in Brussels (2010) and the University of St. Gallen, January 2011)

that the companies collapsed due to corporate governance failures, financial fraud, and abuse of power. They have also led to the opportunity for law reforms and practices governing corporate governance[92].

Most developing countries however still face the challenge of relatively weak systems of laws and regulations[93]. In turn, this leads to poor protection of the interests of different stakeholders. Even for those countries with good laws and regulations, they still face enforcement challenges. This is due to bureaucracy in governments and corrupt practices[94]. The Corruption Perception Index released by Transparency International in 2017[95] reported that despite Sub-Saharan Africa being the worst performing continent as a whole, commendably Africa since had several countries that consistently fight against corruption, and with noteworthy progress[96]. For instance, Namibia, Botswana, Seychelles, Cape Verde, and Rwanda scored better on the index compared to some OECD countries like Italy, Greece and Hungary. The key ingredient that the top-performing African countries had in common was political leadership that was consistently committed to anti-corruption and going an extra step to ensure implementation of existing anti-corruption mechanisms[97].

1.8.2 The position of law and role played by securities regulators in enforcement

There are three essential elements of securities regulation. The legal framework, the supervision program, and the enforcement program[98]. Supervision and enforcement are tools of implementation, a means of fostering compliance with the legal framework[99]. Adherence to

92 Iskander, Magdi & Chamlou, N., Corporate Governance: A Framework for Implementation,(World Bank, 2000)
93 Kaufmann, D., Kraay, A. & Mastruzzi, M.,' Governance matters VIII: Aggregate and individual governance indicators', (1996-2008 World Bank Policy Research Working Paper No. 4978 Washington, USA)
94 Ibid
95 Transparency International, The Corruption Perception Index, (2017) <https://www.transparency.org/news/feature/a_redefining_moment_for_africa> Accessed 7 May 2019
96 Ibid
97Ibid
98 Ana Carvajal and Jennifer Elliott, 'The Challenge of Enforcement in Securities Markets: Mission Impossible?, IMF Working Paper ', (2009)
99 Ibid

laws, regulations, and rules defines compliance. Supervision seeks to detect non-compliance with rules while enforcement seeks to detect and punish non-compliance. It is difficult to separate supervision and enforcement as both are aimed at promoting the implementation of the rules[100]. Both involve the exercise of authority and require resembling skills, and the success of each is tied to the other[101]. There is still a tug of war between regulators and securities markets, whereas regulators do envision intense regulatory measures in order to protect investors, the securities markets would prefer less regulation or even complete deregulation. In his speech during the Georgia Law Review Annual Symposium, Commissioner Luis A. Aguilar sought to reflect back on the financial crisis that had hit the U.S. Securities and Exchange Commission while he was a SEC commissioner[102]. He explained how he witnessed "first-hand how fragile a capital market can be and the need to have a robust and effective SEC to protect them"[103]. He provided an example of the Lehman Brothers case (2008) whose demise led to a financial system on the verge of collapsing. Within a few weeks of Lehman Brothers filing for bankruptcy, its share price plunged to almost being worthless. In his view, the subsequent turmoil shook the global economy to its core and exposed the faults of many regulatory regimes[104]. It became apparent that years of slapdash attitudes, deregulation, and complacency about the benefits of strong regulation contributed considerably to the financial crisis[105]. The above case depicts the important role an effective regulator and regulations play in protecting securities markets.

In Kenya, the Position of Law on enforcement and challenges faced by the CMA was critically analysed by Dr Jacob Gakeri in 2012, in his journal article's abstract he explains that to have a

[100] Ibid
[101] Ibid
[102] Commissioner Luis A. Aguilar, *Preparing for the Regulatory Challenges of the 21st Century Georgia Law Review Annual Symposium Financial Regulation: Refections and Projections,* (University of Georgia, Athens, Georgia March 20 2015)
[103] Ibid
[104] Ibid
[105] Ibid

vibrant securities market it is important to have an effective regulatory and enforcement philosophy[106]. Further, he sought to analyse if the securities market regulatory framework at the time was self-regulatory, government or a combination of both[107]. He notes that a hybrid of the two is considered as the most favourable option due to its flexibility. He criticizes self-regulation, as self-regulatory bodies may not have the mandate to impose criminal sanctions[108]. From his analysis, the regulatory paradigm in Kenya was largely government-driven with nominal self-regulation. He, however, states that “the CMA enjoys the full complement of powers, which a typical regulator should have in order to discharge its mandate effectively”[109]. He also sought to demonstrate that the CMA is empowered to discharge a wide range of enforcement actions, which dishearteningly they rarely evoked[110].

The Organisation of Economic Cooperation Development (OECD) published a book on Corporate Governance in Emerging markets in 2007[111]. In their view Asian countries just as in the rest of the world, scandals had heightened the awareness of governance issues, and public outcry had forced governments to protect public interests and restore confidence in financial markets[112]. According to the OECD publication, the enforcement of good governance relied on factors such as a “strong judicial infrastructure”. The book states that the reality in Asia was that the countries' judiciaries were under-funded and were vulnerable to influence by powerful interests[113]. Asian countries had realized that they needed to pay attention to improving the law

[106] Dr Jacob K. Gakeri, ‘Regulating Kenya’s Securities Markets: An Assessment of the Capital Markets Authority’s Enforcement Jurisprudence’, (International Journal of Humanities and Social Science Vol. 2 No. 20) [Special Issue – October 2012], Available at <http://www.ijhssnet.com/journals/Vol_2_No_20_Special_Issue_October_2012/25.pdf>, Accessed 5 October 2019

[107] Ibid
[108] Ibid
[109] Ibid
[110] Ibid
[111] OECD *Corporate Governance in Emerging markets Enforcement of Corporate Governance in Asia, The unfinished Agenda* (2007)
[112] Ibid
[113] Ibid

regarding areas such as sanctions, civil penalties, better disclosures and class actions[114]. These countries amended laws in response to the scandals. Another aspect that had contributed to corporate governance achievements in Asia included cooperation between various regulatory institutions to achieve maximum regulatory efficiency. OECD, however, admitted to the fact that co-operation was difficult to achieve even with the best of intentions[115]. Dan A. Bavly in his book, Corporate Governance and Accountability outlines some of the challenges faced in enforcement[116]. He gives an example of a government of bureaucracy and the cost this has to governance, for instance, President Bill Clinton in his state of the union 1996 speech had announced that the end of a "big government" had arrived[117]. However months later it was apparent that this was a declaration more easily made than implemented. The problem according to Paul Light was that where you have numerous positions occupied in government, this creates layers in management hence communication distance between the president and front lines of government becomes difficult making it hard to track who is in fact accountable. Bavly argued that also the competing requirements by different regulators for companies/ banks to provide disclosures lead to information overload that added up to a waste of time and delays in making important decisions[118].

On the regional front, the African Development report published in 2011 outlined the major challenges facing Corporate Governance in Africa[119]. This included a weak legal and regulatory framework for Corporate Governance, a lack of strong supervisory institutions with enforcement power and a lack of strong capacity for self-monitoring of compliance[120]. The

[114] Ibid
[115] Ibid
[116] Dan Bavly, *Corporate Governance and Accountability: What Role for the Regulator, Director and Auditor?,* (2000), (EDPACS, 28:5, 1, DOI: 10.1201/1079/43262.28.5.20001101/30364.4)
[117] Ibid
[118] Ibid
[119] African Development Bank, *Africa Development Report, Private Sector Development as an Engine of Africa's Economic Development* (2011)
[120] Ibid

report recommended for streamlining and simplification of national codes and standards to take into account limited capacity Small Medium Enterprises[121]. In the 2010 OECD report on the assessment of corporate governance in Egypt[122], the report laid out observations that Egypt had introduced institutional reforms to its regulatory authorities[123]. Some of these reforms included, creation of a single non-bank financial regulator, support and supervision of the country's Institute of Directors, and creation of an Egyptian Financial Supervisory Authority (EFSA) with increased oversight and enforcement authority[124]. Egypt also introduced the Egyptian Code of Corporate Governance for Listed companies and Code[125]. Their Corporate Governance framework was also improved by the revision of their Company law, Capital Markets Law and tightening of listing rules. However, Egypt also has faced a considerable number of challenges in its enforcement of corporate governance laws[126]. The Global Competitive Index showed a deterioration of Egypt's overall ranking as in 2016[127]. Relatively low scores of terrorism, macroeconomic efficiency, and crime undermined the strength of their regulatory institutions.

Africa Corporate Governance Network report 2016 also analysed achievements and challenges Kenya was facing in the enforcement of Corporate Governance[128]. It outlined that Kenya was among the top five improvers in overall governance as ranked by the 2015 Ibrahim Index of African Governance[129]. The World Bank's "ease of doing business survey 2016" also ranked Kenya as among the top 10 economies that showed improvement in performance[130]. However,

---

[121] Ibid

[122] OECD, Survey on Corporate Governance Frameworks in the Middle East and North Africa,(2010) <Available at http://www.ecd.org/corporate/ca/corporategovernanceprinciples/49012924.pdf>, Accessed 7 June 2019

[123] Ibid

[124] Africa Corporate Governance Network (ACGN), *State of Corporate Governance in Africa: An Overview of 13 countries*,(February 2016)

[125] Ibid

[126] Ibid

[127] Ibid

[128] Ibid

[129] Ibid

[130] Doing Business 2016, Measuring Regulatory Quality and Efficiency, (2016 International Bank for Reconstruction and Development / The World Bank, 13th Edition)

on a disappointing note, Kenya performed poorly in the rule of law assessment, with corruption stated as a serious problem as well as a weak judiciary[131]. The 2016 “Doing Business Survey” highlighted areas of weakness in Kenya’s regulatory framework, especially on shareholder protection[132]. It ranked Kenya position 115th among 189 countries and 17 among 47 sub-Saharan African countries on the protection of minority investors in relation to shareholder governance and conflict of interest regulation[133]. Commendably Kenya’s index has since improved, in 2019 it was ranked position 56 among 190 countries, and position 1 among sub-Saharan African countries on the protection of minority investors[134].

The Capital Market Authority Blueprint's objective was to strengthen the laws, regulations, and institutions that would influence corporate governance in Kenya[135]. It included action plans for implementation in the short term and revision of the CMA Guidelines on Corporate Governance practices by Publicly Listed Companies in Kenya[136]. Commendably the CMA revised the Guidelines in 2016. The revised guidelines contain requirements of the development of a code of ethics by companies and communication of the same within the companies. In addition, the CMA was required to provide input regarding corporate governance to be included in the draft Companies Bill[137]. Kenya revised the Companies Act. The CMA was also to address supervision, enforcement, and clarification of its self-regulatory role[138].

---

[131] Ibid
[132] Ibid
[133] Ibid
[134] The World Bank, 'Database 2019 Ease of Doing Business Score data for Kenya', Available at http://www.doingbusiness.org/en/data/exploreeconomies/kenya, Accessed 28 October 2019
[135] Capital Markets Authority, *Capital Markets Strategic Plan 2018-2022*, Available at <http://www.cmarcp.or.ke/images/Docs/2018/CapitalMarkets.pdf>, Accessed 4 April 2019

[136] Ibid
[137] Ibid
[138] Ibid

1.8.2.1 Review of Kenya Corporate Governance enforcement laws

In Kenya, an addition to Corporate Governance laws was the revised Code of Corporate Governance enacted by the CMA on 4 March 2016. The CMA introduced it to identify "principles and recommendations on structures and processes that companies should set up"[139]. In the past Kenyan authors have criticized the Corporate Governance code enacted in 2016 claiming that it heavily borrows from more developed countries, with less thought placed into Kenyan market conditions[140]. Various writers have also analysed corporate governance provisions included in the Companies Act. Kali a Kenyan blogger in 2013 published an article in which he analysed the weaknesses in the provisions of duties of directors as outlined in the then Companies Act (Revised Edition 2009)[141]. In his view section, 45(1) of the Companies Act (set out the civil liability of the director for misstatements in the prospectus however, Section 45 (2) provided them with defences. These include where the prospectus was issued after he/she withdrew his consent, it was issued without his knowledge or consent, or on becoming aware of an untrue statement that was inserted after he issued his consent, and he withdraws his consent. The writer argued that gave directors leeway, as courts could not hold them liable unless the plaintiff proved that they were aware of the misstatement or consented to its insertion in the prospectus[142]. The writer goes ahead to state that even sections 46 and 188 of the Companies Act contained provisions, which directors could use as defences to exonerate themselves from liability[143]. Notably, in 2015, the revised edition of the Companies Act was gazetted[144]. Further, there was an introduction of a draft of the Companies Amendment bill in 2017. Notably, Part III of the repealed Act continued to apply in relation to the

---

[139] The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 enacted by the Capital Markets Authority on 4 March 2016

[140] Kali *Critical Analysis of Corporate Governance Laws in Kenya (*Posted 18 January 2013) Refer to website link: http://lawconsultingcentre.blogspot.co.ke/2013/01/critical-analysis-of-corporate.html, Accessed 6 June 2019

[141] Companies Act Chapter 486 (Revised Edition 2009)

[142] Ibid 140

[143] Ibid

[144] The Companies Act Cap. 486 (Revised Edition 2015)

misstatement of a prospectus[145]. Section 188 of the earlier Act was revised. Section 223 of the Companies Act Revised Edition 2015[146] stipulates that an undischarged bankrupt can only participate in the formation or management of a company with the leave of the court. Notably, the penalty for acting contrary to the provision now attracts a fine of five hundred thousand shillings a higher amount than the initial fine of ten thousand shillings[147]. He further analysed section 189 of the Companies Act (2009) which provided that the court could only restrain fraudulent persons from managing companies for only a period of 5 years[148]. This meant that after the 5 years, companies could still appoint them as directors. Section 189 could only be invoked in the course of winding up a company and thus could not ensure that fraudulent persons are not appointed as directors. The writer provided examples that as of 2013 people accused of mismanagement of companies such as the Kenya National reinsurance Co-operations, Kenya Posts, and Telecommunications Corporation were later appointed to other directorship positions elsewhere[149]. Also as in 2013, despite public outcry and identification of perpetrators of fraud such as in the Goldenberg scandal, Anglo leasing scandal, Kenya Cooperative Creameries, Kenya Bus services, and Kenya National Assurance scandals no prosecutions had been carried out[150]. According to Kali, the Corporate Governance laws and regulations in place were to blame for lack of enforcement measures or actions taken against directors. Commendably under the Revised Companies Act, the period of disqualification can go up to fifteen years, also the Act introduced an additional clause 224, which holds a person liable for the debts of a company if they take instructions from a company's manager when they are subject to a disqualification order. The Revised Act contains provisions relating to disqualification orders. A person who contravenes the order is liable for a fine of one million

[145] The Companies Act (Revised Edition 2009)
[146] Ibid, 144, Section 223
[147] Ibid, 144
[148] Ibid, 145
[149] Ibid, 141
[150] Ibid, 141

shillings, five years imprisonment or both. However, the Act still allows a disqualified person to seek the court's permission to act in a way that would otherwise be a breach of disqualification. The Act commendably also introduced provisions relating to the declaration of conflict of interest by directors. One must seek authorization from fellow directors on matters relating to conflict of interest[151]. In Kali's view, before foreign laws on corporate governance are adopted in Kenya, a review needs to be done to ensure that we only borrow rules of corporate governance that have proved successful in other jurisdictions that have similar market conditions [152].

There are also concerns that some of the tests courts and advocates are to use in proving the guilt of a director may pave their way to freedom where they are suspected to have carried out fraudulent acts. For instance, section 145 of the Companies Act regarding the duty of a director to exercise reasonable care, skill and diligence[153]. The provision contains a two-test approach, both a subjective test and an objective test. Advocates may argue that the subjective test of evaluating a director based on knowledge skill and experience he has may provide a defence to a nonprofessional or less qualified director. Corporate Governance laws are also fragmented and outlined in numerous Acts. There are still no clear provisions on responsible statutory institutions' mandate for different offences. The Companies Act has been revised in order to enhance Corporate Governance enforcement mechanisms. The revised Act sought to seal some of the gaps in the earlier version by introducing new offences in line with recent scandals that had contributed to the collapse of publicly listed companies and increase penalties for Corporate Governance offenders.

Other Acts contain provisions on Corporate Governance such as The Capital Markets Act Chapter 485 A that was the key legislation examined in this study. The Public officer Ethics

---

[151] Ibid, 144
[152] Ibid, 141
[153] Ibid, 144

Act Chapter 183; The Insurance Act Chapter 487; The Banking Act Chapter 488; Prevention of Fraud (Investment) Act (2012), Anti - Corruption and Economic Crimes Act No.3 of 2004 and the Penal Code Chapter 63. However, the various Acts still contain different sanctions and penalties for similar offences. Provisions in some of the Acts contain provisions borrowable to improve other Acts. Further, some of the defences or exclusion of liability clauses in the Acts gives leeway to Company Directors to exonerate themselves when accused of committing fraud. For instance, two different Acts and the Penal Code contain provisions regarding the offence of misstatements in prospectus. Under the Companies Act[154], it is a civil and criminal liability offence whereas under the Capital Markets Act it is a criminal liability offence. According to the Capital Markets Act under criminal liability, one is liable to pay a fine not exceeding ten million shillings whereas under the Companies Act an individual is liable to a fine not exceeding ten thousand shillings. There is no clear-cut answer as to when regulators prosecutors should charge accused persons under either of the Acts. Part III of the Companies Act contains provisions regarding civil and criminal liability for misstatement of a prospectus[155]. Section 46 of the Act contains the criminal liability offence; one is liable to imprisonment for a term not beyond two years, or to a fine not exceeding ten thousand shillings, or to both fine and imprisonment. Defences available to a person is where they prove either that the statement was immaterial or that they had reasonable ground to believe and did, up to the time of the issue of the prospectus, believe that the statement was true. Section 30 D of The Capital Markets Act contains provisions regarding criminal liability for a defective prospectus[156]. An individual is liable to a fine not exceeding Kshs ten million or to imprisonment for a term not exceeding seven years. The Act allows an individual to defend themselves where the statement was immaterial or had reason to believe the statement was

[154] Ibid, 144
[155] Ibid, 144
[156] Ibid, 23

untrue. Directors are also liable to provide compensation to any person who acquires securities in reliance on the prospectus. Notably, the Act does not define compensation amount limits. However, directors are not considered liable if they did not authorize the offer, and a prospectus was published without his/her consent. The Penal Code section 329 contains a provision regarding false statements by officials of companies[157]. Directors are liable where they concur in making, publishing or circulating a statement that is untrue and is to their knowledge false for purpose of inducing someone to become a member or to enter into any security with the company. One is liable for imprisonment for seven years.

1.8.3 Challenges faced by regulators in administering enforcement action against fraudulent directors

Challenges faced by regulators in enforcement will become more complex as the world evolves. As at 2019 challenges faced by regulators across the world include an annual increase in the volume of domestic and international securities transactions, increase in the number of registered companies, brokers -dealers, investment advisers and most important incidents of fraud and trade abuses[158]. Other challenges include exclusive prosecution authority bestowed on Departments of Justice in various countries, absence of coordinated regulation, lack of adequate resources within regulators institutions, insider trading, non-disclosures and different layers of regulation[159]. Another challenge has been the successful exploitation of soft spots in statutory restraints by the financial services industry in order to broaden their product lines[160]. Other issues of concern worldwide include issues regarding the gathering of evidence abroad, freezing of assets and enforcing judgments against foreign parties[161]. Another cited factor is the changes in the regulatory environment that emanate from ordinary day changes. This is influenced by shifts of attitude towards government, politics and the economy. In addition,

[157] The Kenya Penal Code Chapter 63 Revised Edition 2014
[158] Ibid, 80
[159] Ibid
[160] Ibid
[161] Ibid

when new attractive investment products are introduced in a market, this is followed by a surge of activity by investors and speculators coupled with temptation to conduct fraudulent sales and manipulation of market prices[162]. In the writer Hicks's view, these contribute to deceptive practices and threaten the integrity of market places. Other prominent challenges faced by securities markets regulators during enforcement include:

1.8.3.1 Evolvement of white-collar crime

Bennet explains that the conceptualization of white-collar crime evolved with the growth of corporates[163]. In his view, the enforcement of criminal laws has proceeded in three phases; "In the first phase, wrongs committed by a corporation were largely regarded as a regulatory issue. This transitioned into a second enforcement phase in which prosecutors began to target corporations. Prosecutors began holding corporates vicariously liable even for the acts of a single employee"[164]. However, this came with challenges as employers and employees developed a united front to win cases or enter into settlement agreements. In the third phase, prosecutors began weighing a corporation's level of cooperation to determine whether to bring charges. The above shows that regulators must make strategic choices during investigations in order to determine a corporation's fate or to hold a person responsible for the corporation liable.

1.8.3.2 Political Interference

FisherMan attacks the UK securities regulatory framework by stating "the inability of British authorities to successfully uncover and prosecute commercial and securities fraud has long been notorious"[165]. In his view, the government has reformed the prosecutorial structure and reorganized it under the investor protection framework with little result. In the past committees such as Roskill, Fraud Trials Committees were formed to interrogate the snags in prosecuting

[162] Ibid
[163] Robert S. Bennett, Hilary Holt LoCicero, and Brooks M. Hanner, 'From Regulation to Prosecution to Cooperation: Trends in Corporate White Collar Crime Enforcement and the Evolving Role of the White Collar Criminal Defense Attorney'
[164] Ibid
[165] James J. Fishman, 'Enforcement of Securities Laws Violations in the United Kingdom', (9 Int'l Tax & Bus. Law. 131 (1991))

commercial fraud and to provide recommendations for reform. The Committees concluded, “The public no longer believed that the legal system was capable of successfully prosecuting serious frauds and added that the public perception was correct[166]”. The Committee's report stated that “at every stage, during an investigation, preparation, commitment, pre-trial review, and trial, the arrangements offered an open invitation to abuse and delay, and that the largest and most cleverly executed crimes escaped unpunished”. It recommended a change in the law, in prosecutorial procedures and shift in attitudes towards commercial crimes[167]. In FisherMan’s views, many reasons exist for these enforcement problems, i.e. “the nature of the schemes that are usually sophisticated, complex, often discovered only after the fact, when the money-and occasionally the perpetrators have long disappeared. Investigation of fraud is also labour-intensive, time-consuming, and burdensome on the understaffed and underfunded investigatory bodies. A number of overlapping, competing organizations, lacking coordination or shared purpose, further plagues English law enforcement. In addition, there is neither an enforcement tradition nor the widespread expertise necessary to prosecute commercial fraud”[168]. Another reason, is attitude, he quotes Professor Michael Levi, a commercial fraud researcher, "There is no political mileage in being a high-profile fraud buster in this country, the tradition of discretion and caution is too deeply engrained[169].”' Kenya also faces the above problems.

In Kenya, one of the key challenges faced by CMA during enforcement as noted by Dr Gakeri as at 2012 was “the treasury’s immense influence over the CMA, which affected its capacity to discharge its statutory mandate”[170]. Notably, even under the Revised Act of 2018, the position remains the same; the Cabinet Secretary appoints the Authority’s Chairman and six other members. Further, the Minister still relishes powers of “appointment of members, fixing

[166] Ibid
[167] Ibid
[168] Ibid
[169] Ibid
[170] Ibid

remuneration of the Authority and the Capital Markets Tribunal, lawmaking, and even prescription of penalties for breach of provisions of the Act and accountability”[171]. In the past, it was observed by scholars that the manner, in which the CMA conducted the exercise of licensing brokers, was due to influence by powerful interested parties who had the executive’s support[172].

1.8.3.3 Delayed justice due to traditional prosecution methods

Rick Sarre argues, “There is a belief that traditional prosecutions led to too many relatively minor matters clogging the criminal law courts, causing delays and denying justice”[173]. The traditional approach costs were becoming a huge burden to the public taxpayers. Agreeably even in Kenya, the prosecution process involves a series of steps through investigation, pre-trial decision-making and then the trial itself. It is a slow and cumbersome process occasioned by delays and adjournments. Sarre advocates for proactive regulatory strategies, which in his view are “sensitive to commercial priorities, hence foster a compliance culture and harnesses the power of aggrieved citizens making them more effective in the fight against fraud than a traditional strategy based upon findings of legal culpability”[174]. In his view, prosecutions for corporate fraud can be long, tedious and expensive. He provides an example of the Grimwade’s Case where the Supreme Court of Victoria quashed the convictions of the defendants Sir Andrew Grimwade and Jon Wilson done in 1992[175]. They declared that the jury could not have reached a fitting verdict given the over 400 sitting days and the intricate nature of the financial and other commercial evidence[176]. According to Sarre, a lot of money and time was spent, yet little was achieved. The Victorian Full Court, in their ruling, blamed the legal counsel, referring to the 'fractured presentation' of the evidence and the 'prolonged and disconnected'

---

[171] Ibid, 23
[172] Ibid
[173] Rick Sarre, ‘ Keeping an eye on fraud: proactive and reactive options for statutory watchdogs’, https://www.austlii.edu.au/au/journals/AdelLawRw/1995/8.pdf, Accessed 7 July 2019
[174] Ibid
[175] Ibid
[176] Ibid

cross-examinations. In Sarre's view, more is required of the legal system in addressing apprehensions raised by complex fraud trials. In his view, the requirement to prove a case against an accused beyond reasonable doubt ironically sometimes works against the public interest. Cases that drag on for many months at a cost of millions of shillings are luxuries that we, as taxpayers, may no longer be able to afford[177].

1.8.3.4 Administrative remedies: Debated issues

Ideally, the objective of administrative remedies is to interrogate and discipline the offender by Adhoc procedures rather than via the formal prosecution process[178]. "It is superlatively hoped that by removing offenders from the processes of the criminal justice system, and the attendant ' labelling' process, offenders will be less likely to become embittered by the experience and more likely to move quickly to re-integrate themselves into mainstream society"[179]. However, theorists are involved in a debate about a couple of challenges and issues regarding this method. First, there could be inconsistencies and anomalies as to how various governments and regulators rely on and administer these remedies compared to traditional prosecution methods[180]. Another challenge as discovered by Grabosky and Braithwaite in their study of the powers used by regulatory agencies to police unlawful conduct, "regulators are likely to opt for administrative remedies where there is a chance that the target would resist investigation and threats of prosecution"[181]. The authors found, that "in the mid-1980s, no major business regulatory agency in Australia was aggressively prosecutorial"[182]. In their view, using the "gentle" approach was a whimsical and ineffective method as it led to the perpetration of more fraud by repeat offenders[183]. There is also a concern that whereas the administrative option

[177] Ibid
[178] Ibid
[179] Ibid
[180] Ibid
[181] Grabosky & Braithwaite, O*f Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies*,(Oxford University Press, Melbourne 1986)
[182] Ibid
[183] Ibid

gains in flexibility and expediency, it loses in fairness and “due process”[184]. “Without the safeguards placed by common law requiring i.e. proof beyond reasonable doubt, the presumption of innocence and the rules against hearing evidence unfairly, illegally or improperly obtained, there is always the risk that 'kangaroo' justice will prevail”[185]. There is also the worry that as administrative decisions are not likely to be publicized and debated, this would work against the public interest. However, one must acknowledge that it might be difficult to make public “private” justice[186]. Another school of thought reasons that there may be a lack of deterrence force “without the full force of the law behind the sanctioning process leading to a rise in criminality”. This was the view of the Commonwealth DPP when he wrote, in his 1991-92 Annual Report[187]; *“The important point that must be made is that civil action cannot, in cases of fraud or dishonesty, be an adequate and effective deterrent…. The frustrations that are felt resulting from such long lead times must not lead to the conclusion that the criminal process is inappropriate ... the only real and effective deterrent for the criminal is the perceived likelihood of detection followed by the certainty of punishment. To advocate otherwise is to simply encourage corporate wrongdoers to factor into the cost of doing business the cost of having to pay back ill-gotten gains”*[188].

1.8.3.5 Lack of complete, accurate data and information

A regulator should be well informed in order to effectively oversee the capital market. However, this is a challenge faced by most SECs around the world especially with rapid evolvement of technology, markets continuing to become more complex and fragmented. An example is the US SEC whose lack of access to critical data had dire consequences during the Flash Crash case[189]. It, unfortunately, took SEC staff months to collect the data and analyse the

---

[184] Ibid, 173
[185] Ibid,173
[186] Ibid,173
[187] Australia Director of Public Prosecutions, *Annual Report*, (1991-1992 p5.)
[188] Ibid
[189] Ibid, 102

events of the fateful 20 minutes in which the prices of many U.S. equities experienced unusually rapid and extreme fluctuations[190]. Further, the financial crisis and its aftershock made it clear that the SEC needed more information to effectively supervise important market sectors. It also made it clear that the commission received information that was too "stale" to be of regulatory use. "Once a prominent money market fund "broke the buck," and other funds came under pressure, they did not have the data at hand to determine what other funds could break the buck[191]".There exists literature regarding corporate governance; nevertheless, there is a gap that this study seeks to address. Especially in Kenya, researchers have not placed much focus on understanding the challenges faced by the CMA in successfully administering enforcement actions against fraudulent directors. Further, in the past, there was a lack of comprehensively documented enforcement jurisprudence for analysis until 2018 when the CMA published the Digest of Decisions on Capital Markets[192]. This study seeks to fill this gap by evaluating the success or otherwise of the legislation, policies, and mechanisms aimed at increasing effectiveness of enforcement actions against fraudulent directors by the CMA.

1.9 Research Methodology

This study was conducted using the following research methods, approaches, and tools.

1.9.1 Mixed research methodology

This study mainly utilized a mixed research methodology in order to ensure that as much as it seeks to interrogate Corporate Governance enforcement legal principles and rules, it also gives prominence to the relationship of these laws with the political environment, social values and social institutions.

[190] Ibid, 102
[191] Ibid, 102
[192] The Capital Markets Authority, *The Digest of Decisions on Capital Markets*, published by National Council for Law Reporting

1.9.1.1 Doctrinal research methodology

Doctrinal legal research refers to the collection and analysis of case law and relevant legislation[193]. Researchers utilize this methodology to conduct studies based on a historical perspective; it also includes secondary sources for example journal articles or other written commentaries on case law and legislation. This study utilizes the doctrinal research methodology to conduct an analysis of case law pertaining to CMA's enforcement decisions. This aided in examining CMA's Corporate Governance enforcement framework and interrogating the challenges faced in imposing effective enforcement action against fraudulent directors. The method was also utilized to identify secondary sources that were useful to this study. This includes research reports, CMA's annual reports, and historical records useful for this study's analysis. The methodology was also important in conducting an in-depth desk review of case studies for past public companies fraud scandals.

1.9.1.2 Qualitative research methodology

Qualitative research is also an interdisciplinary field as it crosscuts the humanities and the social and physical sciences[194]. The qualitative research methodology was utilized in analysing corporate Governance enforcement institutional arrangement in the past, CMA enforcement action approach to enforcement in the past. This method was also important for this study because as much as some of the challenges faced by the CMA in enforcement may be of a legal nature, for a regulator to investigate and prosecute successfully the political and social environment plays a big role. The historical perspective of enforcement in Kenya shows that there are instances where political interference has influenced the outcome of court cases. Qualitative research was also important in examining the positions of corporate governance enforcement mechanisms in other jurisdictions. The study, however, took into account the other countries' differences in structure and dynamics to that of Kenya in order to present the best-

---

[193] 'Research Methods for Law', Edited by Mike McConvilleand Wing Hong Chui

[194] C.R Kothari, *Research Methodology (Methods and Techniques*), (Second Revised Edition 2004)

suited practices that Kenya's Capital Markets Authority can borrow to improve its enforcement laws and mechanisms.

1.9.2 Research methods

The researcher used the following data collection methods:

1.9.2.1 Case study method

This method is a form of qualitative analysis whereby researchers conduct an observation of a situation or an institution[195]. Efforts are put into studying every aspect of the concerning unit in detail and then inferences are drawn[196]. However, a limitation faced in using this method is that case situations are seldom comparable therefore the information gathered in case studies is often not comparable. As this study revolves around one specific regulator institution, it places focus on its enforcement mechanisms, statistics, and enforcement unit, in order to draw inferences and conclusions.

1.9.2.2 Library research method

This study utilised the library research method to identify secondary sources. This includes research reports, CMA's annual reports, and historical records useful for this study's analysis. The researcher analysed information from published textbooks by authors who have written on Corporate Governance and enforcement. The information was available in existing libraries and the internet. National and international statutes and journals relating to Corporate Governance enforcement were reviewed.

1.9.2.3 Observation method

Under the observation method, the researcher seeks information through the investigator's direct observation without inquiring from the respondent. The researcher being a forensic investigator, sought to include insights from past assignments carried out in relation to the topic.

[195] Ibid
[196] Ibid

1.9.3 Tools of analysis

1.9.3.1 Computer/Internet research

This study collated enforcement statistics provided by CMA in their publicized reports, cases included in their released Digest Decisions on Capital Markets and media reports regarding cases handled by the CMA. These were useful in analysing the number of complaints the Authority has received every year, the number of cases investigated and closed.

1.9.3.2 Case Law

This study also examined case laws that have been determined in a court of law and/or before the CMA relating to the topic of research. This will be useful in gauging the success rate of the Authority's enforcement framework and identification of challenges they have faced in the past.

1.10 Limitations

The mandate of enforcing corporate governance laws mainly lies with the statutory bodies entrusted with the responsibility. This project, therefore, does not represent the views of the statutory bodies nor CMA representatives but relies on information within the public domain, previous research conducted and observations by other corporate governance stakeholders.

1.11 Chapter breakdown

Chapter One introduces the study and contains an overview of the background to the study, its objectives and answers it seeks to uncover.

Chapter Two examines the concept of corporate governance, history of enforcement by the CMA in Kenya. It also examines the role played by regulators, and the challenges that arise in detection, investigation and prosecution of fraudulent directors and management.

Chapter Three examines the position of law in the enforcement of corporate governance mechanisms in Kenya and the institutional framework in which CMA operates.

Chapter Four outlines the challenges faced in the implementation and enforcement of corporate governance regulations by CMA. The chapter also focuses on the need for CMA to be independent in order to avoid influences from politicians and other arms of government.

Chapter Five presents the best practices from other jurisdictions that CMA can emulate to improve its enforcement mechanisms.

Chapter Six draws conclusions on the research questions and proposes recommendations.

CHAPTER TWO

HISTORY OF CORPORATE GOVERNANCE ENFORCEMENT BY THE CMA IN KENYA

2.1 Introduction

This chapter examines the history of Corporate Governance enforcement by the CMA in Kenya and its evolvement since the Authority's inception. This chapter argues that for one to analyse challenges faced by the Authority in administering enforcement actions against fraudulent directors, it is necessary to discuss how the Authority was set up, as it is a precursor to its current operations. The Chapter will also illustrate enforcement statistics, events and challenges faced within the different periods. The study will further seek to demonstrate the challenges faced in reviewing the CMA enforcement operations in the past due to lack of enforcement jurisprudence until 2018.

2.2 History of Corporate Governance enforcement by the CMA in Kenya

In Kenya during the period 1920 to 1950s, the dealing of shares commenced with trading taking place via "gentleman's agreement" with no physical trading floor[197]. In 1923, the London Stock Exchange (LSE) officials recognised the setting up of the Nairobi Stock Exchange as an overseas stock exchange[198]. The National Securities Exchange was then registered under the Societies Act in 1954. The first privatization through the NSE happened in 1988 when a successful sale occurred of a 20% Government stake in Kenya Commercial Bank. During the period, 1920 to 1950 there was no Act nor Authority set up to handle Corporate Governance matters. However, the Kenya Penal code of Criminal Law which had been first enacted in 1930 listed offences i.e. theft by servant. Overtime the Penal Code was revised in order to include provisions and penalties for corporate governance-related offences. These include provisions on offences such as false statements by officials of companies and false accounting[199]. For the

[197] National Securities Exchange website , https://www.nse.co.ke/nse/history-of-nse.html, Accessed 2 June 2019
[198] Ibid
[199] Ibid, 157

period 1963 to 1990, companies were regulated via provisions in the Companies Act that was first gazetted in 1963. At the time, it did not embody Corporate Governance provisions but currently includes Corporate Governance practices[200]. The Companies Act has been amended over time in order to introduce new requirements that relate to corporate governance such as conflict of interest, financial misstatement provisions, duties of company directors and their civil and criminal liability for various offences.

Before Kenya‘s economy was liberalized in the 1990s leading to privatization of parastatals, accountability within the public sector was to a great extent "anathematic"[201]. There were widespread corruption and nepotism within the public sector. This was also replicated in the private sector. Family owned and managed stockbrokers controlled the Nairobi Securities Exchange (NSE), their key driving force was "business not regulation". This consequently led to the NSE having an amicable relationship with listed companies and they therefore rarely invoked regulatory sanctions for non-compliance[202]. Privatization of public entities presented fresh dynamics as once parastatals floated securities to the public; they were listed on the NSE. This, therefore, led to the establishment of the Capital Markets Authority.

The Capital Markets Authority was constituted in 1989 through the Capital Markets Act (Cap 495A) and inaugurated in March 1990. The main aim of setting up the CMA was to have a body that specifically regulated "the development of organized, fair and effective capital markets in Kenya, with a view of promoting market integrity and investor confidence". The Capital Markets Authority defines fraud as, "willful misrepresentation of the truth with the intent to deceive by one party resulting in actual or potential loss to another party or illegitimate gain to the fraudster. This includes the fraudulent sale of client shares, insider trading, market

[200] Ibid, 144
[201] Ibid, 40
[202] Ibid, 40

manipulation, stealing of client funds, and manipulation of client records among other offences[203]." The CMA has instituted numerous regulatory and institutional forms since its set up that have been largely due to evolvement of economics and crime, corruption scandals, public outcry and changes in the legal landscape in Kenya. In 2002, the CMA introduced the Guidelines on Principles of Corporate Governance for Public Listed Companies[204]. There were concerns raised that the guidelines were a carbon copy of other Codes such as the United Kingdom's combined code.

In March 2009, there was an attempt to boost CMA's information gathering capacity for purposes of enforcement. The CMA, CBK, RBA and the IRA signed an information-sharing memorandum of understanding[205]. This was to enable investigation of cross sector-regulated companies. The Capital Markets Act's provisions were amended to allow the Authority to share information with other agencies[206]. Securities enforcement in Kenya in his opinion can be viewed as "prevention, monitoring, and information gathering and, power of intervention, sanctions, penalties, and judicial proceedings" [207]. The research journal shows that before 2004, the CMA did not indicate in their annual report the number of on-site inspections it had undertaken in the prior year[208]. Statistics show that the number of investors' complaints grew between the period 2006 to 2008; attributable to the heavy oversubscription for IPOs in privatized parastatals. For the period, 2007 and 2009 three prominent stock brokerage firms collapsed leading to massive losses of investors hence the growth of complaints. However, the CMA failed to disclose the nature of fraud reported through complaints and whether these

---

[203] The Capital Markets Authority website , https://www.cma.or.ke/index.php?option=com_content&view=article&id=258:capital-markets-fraud-investigations-unit&catid=2&Itemid=219, Accessed 5 June 2019
[204] Capital Markets Authority, Guidelines on Principles of Corporate Governance for Public Listed Companies (2002)
[205] Steve Mbogo, 'Financial sector regulators in bid to work jointly', BUSINESS DAILY, May 13, 2009.
[206] Ibid
[207] Ibid, 106
[208] Ibid, 106

related to listed companies or intermediaries[209]. Also notably the CMA has been carrying forward the number of complaints received and does not provide details in subsequent annual reports as to how they were addressed or why they were not resolved. In 2008, after the downfall of Francis Thuo & Partners Ltd, the CMA was empowered regarding the mandate to impose sanctions[210]. The CMA introduced amendments to its governing Act and Finance Act to provide the Authority and the Minister "statutory power to prescribe and impose sanctions and financial penalties on licensed persons, the securities exchange, approved persons, listed companies, directors and employees of licensed persons". In May 2009, the CMA formed The Capital Market Fraud Investigations Unit (CMFIU) through collaboration with Kenya Police in a bid to amalgamate the investigations of all securities-related fraud cases under one roof[211]. However, unfortunately as of 2012, the CMA had not generated any enforcement actions. Their practice at the time was to aggregate complaints and breaches into complaints received and resolved without any further explanation[212]. As of 2012, Dr Gakeri's opinion was that it was difficult to assess CMA's enforcement jurisprudence, as "there was neither an enforcement pyramid nor an elaborate reporting system"[213]. In the below section, this study illustrates the number of enforcement actions by the CMA during various past periods.

2.2.1 Period 1990 to 2008

For the years between 1990 to 1994, there were no recorded enforcement statistics recorded due to the fact that the CMA was in its formative stages. They also did not have enough resources to conduct investigations or institute enforcement actions. There was also widespread corruption, ethnicity, and nepotism within this period[214].

---

[209] Ibid, 106
[210] Ibid
[211] The Capital Markets Authority, *Annual Report* , 2010
[212] Ibid, 106
[213] Ibid, 106
[214] Ibid 106

The 1995 to 2002 period was one of the more lively periods; the CMA embraced their role as a regulator. Listed companies were more affected as there were more delistings than listings. Between the years 2003 to 2007, this was a slow period. There NSE took a lead role in self-regulation. There were a lot of commentaries and editorials faulting the CMA for inaction[215].

2.2.4 Period 2009 to June 2012

At the commencement of this period, the push for change by the public and media was unrelentingly leading to the CMA becoming more active. The number of enforcement actions significantly increased from one in 2007 to 27 by 2009[216]. Between 2010 and 2011, the CMA's CEO was keen on implementing 'the UK's Financial Service Authority (FSA) risk-based management system for market intermediaries in Kenya'. Fund managers, stockbrokers, and investment banks were, therefore, subject to tough reporting, ownership and assurance requirements[217].

The Kenya Police together with the CMA established the CMFIU in 2009 and was staffed by officers from the Criminal Investigation Department specializing in economic and cybercrime. This remarkably contributed to the improvement in enforcement statistics[218]. Within the first year, the unit received 390 cases for the period July 1, 2009, to June 30, 2010. Investigations into a total of 66 cases had been finalized by the end of the financial year The Authority began publishing statistics of enforcement actions against companies and more so individuals in their Annual report[219]. The Authority indicated its cases position in the period as below:

Figure 2: CMFIU Case log for the period 2009 to 2012

Position of cases	2009/2010	2010/11	2011/12
Pending before court	36	30	16

[215] Washington Akumu, 'Chief Executive Officer CMA: We are doing our best', DAILY NATION, Mar. 27, 2007 at 13; Editorial 'CMA must put its act in together or close shop', THE STANDARD, Apr. 17, 2007 at 12; The Public Watchdog, 'Capital Markets in need of competent Regulator', THE STANDARD, Nov.27, 2007 at 13, DAILY NATION, May 24, 2007; Robert Bunyi, 'Regulator must act to protect market's integrity', BUSINESS DAILY, Apr. 22, 2007;
[216] Ibid, 106
[217] Ibid, 106
[218] Ibid, 211
[219] The Capital Markets Authority, *Annual Report*, (2014)

Position of cases	2009/2010	2010/11	2011/12
The pending arrest of the known accused person	2	19	1
Withdrawal	12	40	2
For enforcement	13	17	5
Forwarded to Director of Public Prosecutions	3	7	1
Pending under investigations	324	47	41
Reported cases	**390**	**159**	**66**

Source - The CMA annual report 2010/11

2.2.5 Period 2012 to 2014

During this period, the CMA put in place measures to proactively aid in tracking and arresting suspects[220]. This contributed to the significant increase in enforcement actions. For example, they introduced a system that aided in the tracking and arrest of suspects who had since moved from their previous employment postings. This reduced the number of cases that had hindered the arrest of known suspects due to delays[221]. Position of cases for the period 2012 to 2014 were as below:

Figure 3: CMFIU Case log for the period 2012 to 2014

	2012	2013	2014
Pending before Court	12	5	5
Pending Arrest of Known Accused	3	3	3
Pending Under Investigation	19	15	10
Recommendation for Enforcement Actions	2	2	1
Forwarded to Director CID for further action	-	-	-
Withdrawal by the complainant after settlement	4	5	3
TOTAL	40	30	22

Source - The CMA annual report 2013/14

Various regulations were also enacted in the course of the financial year 2012 – 2013. These were; “Capital Markets (Amendment) Act, No. 37 of 2012; Capital Markets (Corporate Governance) (Market Intermediaries) (Amendment) Regulations, 2013 (Legal Notice No. 115

[220] Ibid
[221] Ibid

of 2013) (gazetted on 18th June 2013), Capital Markets (Licensing Requirements) (General) (Amendment) Regulations, 2013 (Legal Notice No. 112 of 2013) (gazetted on 18th June 2013), The Capital Markets (Amendment) Bill, 2013" amongst others[222]. Remarkably, in 2012 and 2013, this was the first time the Authority took enforcement actions and measures against directors[223]. This was pursuant to section 11(3) (cc) and section 25A and 34A of the Capital Markets Act as part of its mandate to sustain market integrity and confidence[224]. For the CMC case, they disqualified the seven directors from being directors of any listed company[225]. They also recommended the recovery from its directors Mr Jeremiah Kiereini and Mr Martin Forster to two times the amount of the benefit accruing to them from the offshore arrangements pursuant to Section 25A(1)(c)(ii) of the Capital Markets Act[226]. The Board of the Authority further resolved to disqualify Mr Joseph Mumo Kivai with respect to his directorship in CMCH only. The also reprimanded the seven directors for signing off accounts that were not prepared in compliance with IFRS and for non-disclosure on the extent of CMCH's compliance with the Guidelines on Corporate Governance[227]. The Capital Markets Authority also took action against six directors of companies who had been involved in bond fraud with respect to the fraudulent creation of fixed income securities at CBK and subsequent sale at the NSE. They were disqualified with immediate effect from being appointed as directors of listed companies[228].

2.2.6 Period 2014 to 2018

The table below illustrates the number of cases reported and dealt with by the Capital Markets Fraud investigation unit:

---

[222] The Capital Markets Authority, *Annual Report*, (2013)
[223] The Capital Markets Authority, *Annual Report*, (2012)
[224] Ibid
[225] Ibid, 222
[226] Ibid
[227] Ibid
[228] Ibid

Figure 4: CMFIU Case log for the period 2014 to 2018

Year	PBC	PUI	PAKA	Enforcement	Finalized	Total
2014	5	20	3	2	3	22
2015	6	22	4	-	4	36
2016	6	10	2	1	5	25
2017	4	13	2	2	0	21
2018	7	14	5	1	14	40

Source – The CMA Annual report 2018

KEY

PBC - Pending before the court

PUI - Pending under investigations

PAKA - Pending arrest of known accused

The CMA's revised Code of Corporate Governance Practices was gazetted on March 4, 2016[229]. CMA sought 'to align local standards to global best practice in order to promote institutional strengthening for listed companies'. The code adopted an "Apply or Explain" approach whereby boards are required to "fully disclose any non-compliance with the code to relevant stakeholders, including the CMA, with a firm commitment to move towards full compliance." In July 2016, the CMA launched an anonymous reporting portal to facilitate whistleblowers to report malpractices in the Capital Markets. This aided in the increase in the number of complaints received by the Authority. Within the year 2017 to 2018 alone, the Authority reported that they had imposed Kshs. 113,481,196.07 in financial penalties for contravention of the capital market's legal and regulatory framework[230]. The Authority executed no-contest settlements of Kshs. 49,012,007 with individuals who had contravened the capital market's legal and regulatory framework. The Authority also received an additional settlement of Kshs. 56,972,625/= in the CMC administrative action matter. The enforcement

[229] Ibid, 139

[230] The Capital Markets Authority, *Annual Report*, (2018)

actions are analysed in chapter 4 of this study. In 2017, the Authority reported to have meted enforcement action against fraudulent directors only in one case the Uchumi case, and in 2018 only in the National Bank of Kenya fraud saga.

As much as CMA has been in existence for almost 30 years, it has faced its own set of challenges that include political interference. Dr Gakeri in his article views it as an iron triangle between the Executive, stockbrokers and the CMA[231]. He quotes the Global Corruption Index of 2009 where Transparency International stated that "The fundamental problem that mostly causes poor governance in Kenya is singular: excessive power within the presidency. If power were devolved from the presidency, oversight institutions such as the CMA would be effective in ensuring good corporate governance without undue influence from an overbearing executive. The executive powers greatly compromise the effectiveness of the oversight institutions."

Despite the changes instituted by the Authority, there was no documented enforcement jurisprudence regarding the various legal proceedings instituted across the various periods until 2018. In 2018, they commendably published the Digest of Decisions on Capital Markets[232]. The Digest ideally draws together decisions from the Courts in Kenya that "provide guidance on the interpretation of capital markets laws and procedures as well as inform the range and exercise of administrative powers vested in the Capital Markets Authority (CMA) under the Capital Markets Act, Chapter 485A". Most of the matters aggrieved parties have filed in court were to challenge the administrative process utilized by the Authority during enforcement[233].

2.2.7 Summary - historical timeline

The table below illustrates the evolution of corporate governance enforcement by the CMA:

[231] Ibid
[232] Ibid, 192
[233] Ibid, 230

Figure 5: Summary of the history of Corporate Governance globally

Period	**Event**
Pre-1900	Origin of Corporate Governance in the UK. The beginning of the modern corporation that separates control from ownership (Berle & Means, 1967)
1980s	Due to scandals , stock market crashes across the world and inability of corporate governance frameworks to prevent corporate failures, Corporate governance gains prominence in the 1980s (Francis, 2000)
1999	Global Corporate Governance Forum was developed by the World Bank Group and OECD.

Figure 6: Summary of the history of enforcement by the CMA in Kenya

Period	**Event**
1920-1950	The dealing of shares commenced with trading taking place via gentleman's agreement with no physical trading floor.
1988	The first privatisation through the NSE.
1989	The Capital Markets Authority was constituted in 1989 through the Capital Markets Act (Cap 495A) and inaugurated in March 1990.
1990s	– Privatisation of government corporations. – CMA limited capacity and resources to conduct investigation or institute enforcement actions. – Country experienced widespread corruption, ethnicity and nepotism. – Listing of numerous companies.
2000 - 2002	– The CMA introduced the Guidelines on Principles of Corporate Governance for Public Listed Companies. – CMA's role as a regulator was more pronounced and recognised by the public.
2003 - 2005	– CMA took a back seat and allowed the NSE to regulate the securities markets. – There were a lot of commentaries and editorials faulting the CMA for inaction.
2006-2008	– Number of investors' complaints grew, attributed to the heavy over subscription for IPOs in privatised parastatals. – Amendments to the Capital Markets Act and Finance Act, CMA was empowered regarding mandate to impose sanctions. –
2009 - 2012	– The CMA, CBK, RBA and the IRA signed a memorandum of understanding on information sharing for purposes of Enforcement. – The Capital Market Fraud Investigations Unit (CMFIU) was formed through collaboration by the Kenya Police and CMA with a view of consolidating the investigations of all securities related fraud cases under one roof – Push for change by the public and media prompting CMA to become more active. – The number of enforcement actions increased from one in 2007 to 27 by 2009. – Amendment to the Capital Markets Act in 2012.
2013 - 2015	– Measures were put in place to proactively aid in tracking and arresting suspects. This contributed to the significant increase in enforcement actions.
2016-2018	– In 2016 revised Code of Corporate Governance practices for Issuers of securities to the public was gazetted. – The CMA launched an anonymous reporting portal to enable whistle blowers to report malpractices in the capital markets. – Increase in number of complaints received by the Authority. – High profile scandals and company collapses have led to massive losses and spelt doom for shareholders in Kenya. – 2017-2018 alone, CMA reported that they had imposed Kshs. 113,481,196.07 in financial penalties. Of this, no contest settlements of Kshs. 49,012,007 were executed. – Documentation of CMA's enforcement jurisprudence, the Digest of Decisions on Capital Markets was published.

2.3 Conclusion

Appreciably CMA's enforcement framework has evolved over time since its inception in 1990. CMA's enforcement capacity was marred by political interference as the country struggled with widespread corruption and nepotism in the 1980s and 1990s. This Chapter illustrated that despite the numerous amendments to Corporate Governance regulations in Kenya, CMA has continued to face challenges in enforcement. CMA's enforcement statistics have fluctuated over time. Dishearteningly in the past, there has been a correlation of who held the reigns at the Authority within a period and the enforcement statistics reported and actions taken. This Chapter displayed that the constant widespread corruption and nepotism within the public sector, has hindered the effectiveness of CMA's enforcement capacity over the years. The Chapter also demonstrated the challenges faced in reviewing the CMA enforcement operations in the past due to a lack of enforcement jurisprudence until 2018.

CHAPTER THREE

LEGISLATIVE AND INSTITUTIONAL FRAMEWORK

3.1 Introduction

Chapter One explicated that research done in the past has shown that there is a correlation between a proper legal system and Corporate Governance. A working legal system plays a major role in guaranteeing compliance with corporate governance regulations and laws. CMA is the designated regulator for the enforcement of Corporate Governance regulations in Kenya. The CMA was established under the Capital Markets Act 1990. Overtime the CMA has sought to amend the Act to reflect current economic and social changes. The Capital Markets Act, The Central Depositories Act, Regulations and the Guidelines are what the Authority uses to supervise and regulate market intermediaries and listed companies. This Chapter outlines the legal and institutional framework within which CMA conducts enforcement actions. It also discusses the various signed Memorandum of Understanding that guides its collaboration with other regulators. This Chapter also seeks to illustrate where there are gaps in the existing legal and institutional framework.

3.2 The Constitution of Kenya 2010

The Constitution is key in evaluating corporate governance enforcement measures, as regulators and courts have to adhere to its provisions during administrative and criminal proceedings. Chapter 12 of the Constitution outlines the principles and framework of Public Finance. Article 201 (d) outlines that “Public money should be used in a prudent and responsible way, (e) financial management should be responsible, and fiscal reporting shall be clear”[234]. This provision empowers regulators such as the CMA body that also regulates listed state corporates to ensure that public money is applied in a prudent way. Chapter 4 outlines provisions on the Bill of rights. Article 22(1) stipulates the right for persons to institute court

[234] The Constitution of Kenya (2010)

proceedings claiming, “a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened”. This article has been invoked a number of times by company directors who have instituted court proceedings challenging CMA’s actions and decisions against them. Article 47 contains a provision on the right to Fair Administrative Action. It outlines, “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”[235]. Kenyan courts have invoked this Article to quash decisions by the CMA. For instance in *Republic v Capital Markets Authority & another ex parte Jonathan Irungu Ciano*[236]. In this matter, the court held that it was not satisfied that the manner in which CMA conducted its proceedings met the threshold of a fair administrative action as contemplated under Article 47(1) of the constitution and section 4(3) (a) and (g) of the Fair Administrative Action Act. It, therefore, quashed the decision made by the CMA[237]. In addition, Judge John Mativo in delivering his ruling in *Chadwick Okumu v Capital Markets Authority*[238] explained that the provisions of Article 47(1) of the Constitution meant the following. That “the law allowed every citizen to have a right to fair and reasonable administrative action, and to be given reasons for administrative action that affected him or her in a negative way”. Fair procedures according to him meant that decisions could not be taken that had a negative effect on people without consulting them first. In addition, administrators had to make decisions impartially.

3.2.1 CMA oversight by the National Treasury

The Capital Markets Authority as it is a state corporation lies within the ambit of the National Treasury. The Treasury’s influence over the CMA and the Capital Markets Tribunal has in the

[235] Ibid
[236] Republic v Capital Markets Authority & another Ex-Parte Jonathan Irungu Ciano [2018] eKLR
[237] Ibid, 192
[238] Chadwick Okumu v Capital Markets Authority [2018] eKLR

past been critiqued as this may affect its capacity to discharge its statutory mandate. The Act as at 2019 had mandated the Cabinet Secretary to have a hand in "the appointment, and fixing remuneration of members of the Authority and the Capital Markets Tribunal, lawmaking, sources of finance and fees payable to the Authority, prescription of penalties for breach of provisions of the Act and accountability"[239]. The Capital Markets Authority is established under section 5 of the Act. The Authority is comprised of "a chair appointed by the President on the recommendation of the Cabinet Secretary, six members appointed by the Cabinet Secretary. In addition a Principal Secretary to the Treasury or a person deputed by him in writing, the Governor of the Central Bank of Kenya or a person deputed by him in writing, and the Attorney-General or a person deputed by him in writing"[240]. The Minister in consultation with the Board appoints the Chief Executive[241]. He/she holds office for a period of four years and is eligible to serve for another one term[242].

3.3 Legal and Institutional Framework under the Capital Markets Act and Central Depositories Act

The institutional regulatory framework of the Capital Markets Authority comprises of the following:

The two main Acts:

1. The Capital Markets Act, Amended 2018[243];
2. The Central Depositories Act, 2000, Rev. 2013[244].

Integral regulations and rules have also been formulated over time, which include:

1. The Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002
2. The Capital Markets Tribunal Rules, 2002
3. The Capital Markets(Corporate Governance) (Market Intermediaries) Regulations, 2011

[239] Ibid, 106
[240] Ibid, 23
[241] Ibid, 23
[242] Ibid, 23
[243] Ibid, 23
[244] The Central Depositories Act No 4 of 2000 - Amended 2013

The above Acts, regulations together with the below Guidelines are employed by the Authority to supervise and regulate the capital markets.

1. Code of Corporate Governance Requirements for Issuers of Securities to the Public, 2015[245]
2. Guidelines on the Approval and Registration of Credit Rating Agencies

The Capital Markets Act Cap.485A Laws of Kenya contains the substantive law governing the operations of the capital markets in Kenya[246]. The main objective of the Act is "to serve the purpose of promoting, regulating and facilitating the development of an orderly, fair and efficient Capital Markets in Kenya and for connected purposes". The initial version of the Act was assented to in 1989, overtime numerous amendments have been done to the Act to keep it abreast of economic, social and political changes. The Act has been amended 16 times and counting with the most recent amendments in the Capital Markets Act revised edition 2018. The Central Depositories Act 2000 deals with "facilitation of the establishment, operation, and regulation of central depositories, to provide for the immobilization and eventual dematerialization of, and dealings in, securities deposited in Kenya"[247]. The Capital Markets Act in its preamble indicates, "a director has the meaning assigned to it in the Companies Act". According to the Companies Act, "director, in relation to a body corporate, includes any person occupying the position of a director of the body; and any person in accordance with whose directions or instructions (not being advice given in a professional capacity) the directors of the body are accustomed to act"[248].

3.3.1 The Capital Markets Authority

Section 11 of the Capital Markets Act lists the principal objectives of the Authority, which include "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

[245] Ibid, 139
[246] Ibid, 23
[247] Ibid, 244
[248] Ibid, 144

which the market participants are self-regulatory to the maximum practicable extent. The protection of investor interests and the facilitation of a compensation fund to protect investors from financial loss arising from the failure of a licensed broker or dealer to meet his contractual obligations[249]". For purposes of carrying out its objectives, the Act empowers the Authority to exercise, perform or discharge the following powers, duties, and functions[250]. This includes employment of officers as may be necessary for the proper discharge of the functions of the Authority. Secondly, having recourse against any person whose act or omission has resulted in a payment from the Compensation Fund, co-operating or entering into agreements for mutual co-operation with other regulatory authorities for regulation of cross-border activities in capital markets[251]. The Act also provides the Authority with the power to do all other acts necessary for the attainment of the objectives of the Authority or the exercise of its powers under the Act[252]. The Act, even so, contains a clause that may be considered contentious. Section 37 states that where there is a conflict between the provisions of the Act and the provisions of any other written law with regard to the powers or functions of the Authority, the provisions of the Act prevail. Where its power or functions or may be considered to be ultra vires to the constitution's articles and bill of rights then, in reality, the constitution's provision supersedes the Act. CMA's enforcement mandate as per the Act is dividable in three facets as follows:

3.3.3.1 Prevention

The Capital Markets Act, Central Depositories Act and constituent regulations outline requirements for registration, licensing, approval and authorizations[253]. For instance some of the objectives and functions of the Authority relating to prevention as set out by the Act are[254] "granting licence to any person to operate as a stockbroker, derivatives broker, dealer or

[249] Ibid, 23
[250] Ibid, 106
[251] Ibid, 106
[252] Ibid, 106
[253] Ibid, 106
[254] Ibid, 23

investment adviser, fund manager, investment bank, central depository or authorized securities dealer, and ensuring the proper conduct of such business". Another function of the authority is to implement policies and programs of the Government with respect to the capital markets[255]. They also are mandated to prescribe notices or guidelines on corporate governance of a company whose securities have been issued to the public[256]. The licensing framework, in essence, is important to the Authority as they are able to assess the risks pertaining to an entity and how this affects the market, investors, and customers. The Authority's issuance of guidelines in accordance with Section 12A of the Act is important, as they are able to manage risks effectively, control malfeasances and facilitate an environment for transparent operations[257]. There is also the requirement for the CMA to set standards that must be met by regulated persons. Before approving a securities exchange, the Authority also confirms the applicant has made and adopted rules in compliance with the Act. The Authority licenses intermediaries on an annual basis in order to ensure companies implement continual improvements. The Authority nonetheless has the discretion to decline a renewal request. Additionally, it can grant an extension of a license for a period of up to three months to provide ample time for the applicant to comply with licensing requirements.

The CMA has also issued guidelines to assist listed and unlisted companies to create and implement governance structures in order to prevent fraud, malpractice and ensure conformance. In May 2012, the CMA issued a circular of *guidelines on Management and Supervision Internal Controls*[258]. The Internal Control Standards were developed by CMA in accordance with section 11(3) (e), (f) and (w) of the Capital Markets Act to safeguard the proper conduct of a licensed or an approved business. In 2015, the CMA issued the *Code of*

[255] Ibid, 23
[256] Ibid, 23
[257] Ibid, 23
[258] The Capital Markets Authority, Management Supervision Internal Control Guidelines (May 2012)

Corporate Governance Practices for Issuers of Securities to the Public, for application by both listed and unlisted public companies in Kenya[259]. The Code encourages self-regulation as it shifted from the "Comply or Explain" approach to "Apply or Explain". This approach is "principle-based rather than rule-based, and recognizes that a satisfactory explanation for any non-compliance will be acceptable in certain circumstances". The Code introduced a self-reporting template for issuers while at the same time creating assessment criteria for the Authority to independently review and analyse governance reports submitted by issuers. The Code still contains mandatory provisions, which are the minimum standards that issuers must implement. It contains provisions encouraging directors to be appointed in a transparent manner to promote accountability. It advocates for Boards to establish clear roles and responsibilities. In discharging its fiduciary and leadership functions, directors should be seen to have acted in the best interest of the company at all times. It advises Boards to put in place measures to avoid and mitigate conflict of interest instances. It advocates for Board independent assessment annually. The CMA also recommends that companies should conduct annual governance and Legal Compliance audits. It outlines the rights of shareholders and the role of institutional investors and other stakeholders. It also encourages the setting of standards to promote ethical leadership; an ethical risk profile is to be compiled by companies to that effect. The Code further outlines that Boards have a responsibility to ensure there are sufficient systems and processes of accountability, risk management, and internal controls.

In 2018, the CMA released a report on "the state of corporate governance of issuers of securities". According to Paul Muthaura, CMA's CEO the 2017/2018 findings suggested a fair status of 55.00% weighted overall score in the application of the Code[260]. In his view, this was a good starting point owing to the fact that this was the first time that CMA was assessing

[259] Ibid, 139

[260] The Capital Markets Authority, 'The Report on the State of Corporate Governance of Issuers of Securities to the Public in Kenya', 2017/2018, 2018/2019

issuers on their application of corporate governance practices as espoused in the Code. The basis of the report was information received from 56 issuers of securities to the public in Kenya. The scorecard methodology and system of assessing companies is commendable albeit it took the CMA almost 3 years to commence assessment of the Code's implementation. The 2018/2019 finding suggested a commendable improved status of 61% weighted overall score in the application of the Code.

3.3.3.2 Monitoring and Investigation

Monitoring and investigation are important mechanisms to a regulator as they aid in the detection of malpractice, act as a deterrent to wrongdoing and are essential in gathering evidence. The purpose of an investigation is to verify whether malpractice took place and if so who was involved and what was the modus operandi used. The Act guides the CMA to exercise these powers by conducting on and off-site inspections, demanding information from market participants and investigations. Some of its objectives as per the Act are[261]: "Inquiring, 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 license and any public company the securities of which are publicly offered. The Act authorizes the CMA to conduct an inspection of the activities, books, and records of any persons approved or licensed by the Authority"[262]. The Act allows the Authority to "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"[263]. Section 13B as per the amended act allows the appointed investigator to request documents required, to summon individuals to provide further details/ information and to cooperate with them[264]. In addition, the Act authorizes the Authority to "trace any assets,

[261] Ibid, 23
[262] Ibid, 23
[263] Ibid, 23
[264] Ibid, 23

including bank accounts, of any person who, upon investigation by the Authority, is found to have engaged in any fraudulent dealings in an issuer and its securities or insider trading”[265]. Section 13(A) of the Act provides a mandate to CMA’s Chief Executive Officer to authorize an officer to inquire into the affairs of a person or company covered under the Act. Unfortunately, up to October 2019, only the CEO had the mandate to invoke the powers. Following the introduction of the Finance Act 2008, an additional clause was added. It provides that “if a senior officer or manager authorized by the CEO of the Authority to inquire into the affairs of a person is satisfied that an offence has been committed, he may apply to a Magistrates Court for a warrant to search the premises of the person”. 13(B) empowers the Authority to investigate where it has cause to believe by its own motion or a complaint that an offence has been committed. “Where it believes the manner in which a company or person is acting is not in the best interest of its stakeholders/public interest and a director, manager or employee of a licensee, approved person or an issuer or any other person, may have engaged in embezzlement, fraud, malfeasance or other misconduct in connection with its regulated activity”[266].

The Central Depositories Act contains a more reasonable provision as CMA staff other than the CEO can invoke the power to investigate[267]. Section 56 empowers the CMA to “enter and search any premises if it does have reasonable ground to suspect that the committal of an offence under the Act”. The Authority in its efforts to bolster enforcement established the Fraud Investigation Unit in May 2009. The CMFIU handles fraud offences but CMA administratively deals with governance breaches[268]. The unit has the mandate to “investigate suspected violations and fraud, including theft, conversion of funds and employee pilferage, identify

---

265 Ibid, 23
266 Ibid, 23
267 Ibid, 244
268 The Capital Markets Authority website, <https://www.cma.or.ke/index.php?option=com_content&view=article&id=258&Itemid=219>

perpetrators and gather evidence for their prosecution". It was envisioned that it would manage fraud risks through prevention, detection, and deterrence[269]. Upon finalizing investigations, the CMFIU pursues prosecution of identified suspects[270]. According to CMFIU, "The standard of proof for sustaining successful prosecution of persons suspected of criminal offences is generally submission of proof beyond reasonable doubt by the prosecution. Penalties range from fines of up to Ksh15, 000,000.00 or a jail term of up to 7 years"[271].

3.3.3.3 Power of intervention, sanction, penalties, and judicial proceedings

To detect and punish offenders, the CMA does have a number of enforcement powers and mechanisms at its disposal. Amongst its objectives are "Imposing sanctions for breach of the provisions of the Act or regulations, or for non-compliance with the Authority's requirements or directions and sanctions[272]. The Authority has the power to levy financial penalties, proportional to the gravity or severity of the breach. The CMA may order a person to remedy or mitigate the effect of the breach, make restitution or pay compensation to any person aggrieved by the breach[273]. Another objective is to publish findings of malfeasance by any person. The Authority is expected to grant compensation to any investor who suffers a pecuniary loss resulting from the failure of a licensed broker or dealer to meet his contractual obligations. Concerning recovery of assets the Act Authorises the Authority to 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 the determination of any charges instituted against that person"[274]. The CMA also enjoys prosecutorial power. Section 38 stipulates that "Attorney-General on the request of the Authority may appoint an officer of the Authority or advocate of the High Court to be a public prosecutor for the purposes of

[269] Ibid, 106
[270] Ibid, 268
[271] Ibid,268
[272] Ibid, 23
[273] Ibid, 23
[274] Ibid, 23

offences under the Act". According to section 33 (A) of the Act, the Powers of the Authority to intervene in the management of a licensee include "the power to appoint a competent person or statutory manager to assume the management, control, and conduct of the affairs and business of a licensed person[275]. They also have the power to remove any officer or employee of the licensed person who, in the opinion of the Authority, has caused or contributed to any contravention of the Capital Markets Act or its regulations leading to deterioration in the financial stability of the licensed person or has been guilty of conduct detrimental to the interests of investors"[276]. The Authority is empowered " to appoint a competent person who is familiar with the business of a licensee to its board of directors to serve as its director"[277]. The Authority is further empowered to "revoke or cancel any existing power of attorney, mandate or appointment or other authority by a licensee in favour of any officer, employee or any other person"[278].

Offences and penalties under the Act that affect company Directors/Managers involved in fraudulent activities include the following. Offence relating to offering of securities- Section 30 (D) Criminal liability of issuers for defective prospectus, in the case of an individual, a fine not exceeding ten million shillings or to imprisonment for a term not exceeding seven years or to both; and in the case of a company, a fine not exceeding thirty million shillings. The CMA sought to invoke the above provision when handling the Uchumi directors' cases. However, the case was marred by administrative irregularities on CMA's part leading to the court issuing Certiorari and Prohibition orders as fair hearing provisions as per the constitution had not been adhered to by the Authority. Further, the provision relates to the making of a deceptive statement and therefore does not apply to directors accused of facilitating or omitting to prevent

[275] Ibid, 23
[276] Ibid, 23
[277] Ibid, 23
[278] Ibid, 106

the making of a deceptive statement[279]. The Authority can invoke section 30E to ensure that issuers of securities who distribute defective prospectus are liable to pay compensation to any person who acquires any of the securities, in reliance upon the prospectus[280]. The Act nonetheless does not prescribe compensation limits. Section 30(F) imposes on companies' disclosure obligations regarding corporate governance information to assist in appraising a company's financial position and failure to do so constitutes an offence[281]. Section 32(B) lists the offence for insider trading. "The insider knowing or having reasonable cause to believe that the trading would take place; or discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person". Section 32(E) lists penalties for this offence, which includes fines of Kshs 2,500,000 or imprisonment term of two years and payment of an amount of gain made or loss avoided[282]. Other offences listed in the Act include Market manipulation, falsely inducing trading in securities, use of manipulative devices, false or misleading statements inducing securities transactions, front running, false trading and market rigging[283]. Section 32KA lists the offence of obtaining gain by fraud. It defines this as "any person who on his own action or conspires with another by deceit, intentional concealment, omission or any fraudulent means to obtain financial or personal gain from the public, an issuer or a regulated person"[284]. One is liable to pay a fine of up to Kshs 5,000,000 or imprisonment term of two years and payment of twice the amount of gain made or loss avoided.

Contentiously, the Authority has the power to handle "criminal offences and impose fines on suspects without prosecution"[285]. Section 62 of the Central Depositories Act provides that

[279] Ibid, 23
[280] Ibid, 23
[281] Ibid, 23
[282] Ibid, 23
[283] Ibid, 23
[284] Ibid, 23
[285] Ibid, 23

“where the Authority is satisfied that a person has committed an offence, it may order the person to pay a sum not exceeding fifty per cent of the amount of the minimum fine to which the person would have been liable if he had been prosecuted and convicted. If the person does not pay the fine within fourteen days of the order, the Authority may cause criminal proceedings to be instituted against the person”[286]. This provision is however silent about how the Authority should satisfy itself that the court would have convicted the person, the procedural provisions and how to determine the amount of fine[287]. These powers implicate the CMA’s capacity and commitment to due process. Assessing amounts payable as fines and penalties is a challenging task even for courts; it is, therefore, a daunting issue as to how the Authority assesses amounts to be paid.

3.3.2 The Capital Markets Tribunal

The Capital Markets Tribunal was established in accordance with Section 35 of the Capital Markets Act. An officer or employee of a licensed person/company if aggrieved by CMA’s decisions may appeal to the Tribunal[288]. The tribunal has the power to reverse or modify the decision and make any other order in the circumstances as it deems just. The Act provides a fifteen days window appeal period from the date on which they received communication on the decision. The tribunal also exercises watchdog powers over the Authority. It may “require the Authority or the Investor Compensation Fund Board to show cause for its action or decision. It then may affirm or, after providing the Authority or the Board an opportunity to be heard, set aside such action or decision”. The 2018 amended Act contains a provision that in hearing an appeal, the Tribunal has all the powers of the High Court to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents. The person in whose favour the costs have been awarded is required to file the

[286] Ibid, 244
[287] Ibid, 106
[288] Ibid, 23

certificates issued by the tribunal in the High Court and upon being so filed, the certificates are deemed a decree of the High Court and may be executed as so. Procedurally the Act has a commendable provision that authorizes the Chief Justice to make rules governing the making of appeals and providing for the fees payable, the scale of costs of any such appeal. The tribunal is comprised of seven members appointed by the Cabinet Secretary; these appointments are announced in a gazetted notice. This may be seen to affect the ability of the Tribunal to act as an independent body in decision-making and determination of appeals. Interestingly also according to the Act, the Cabinet Secretary has the power to remove a member for failure to attend three consecutive meetings or is unable to discharge the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour. Misbehaviour and any other cause are not defined therefore may be misused to unwarrantedly remove a tribunal member. Unfortunately, the Act is silent regarding the right to appeal the decisions of the tribunal to the Court of Appeal.

3.4 The Financial Services Authority Bill 2016

This bill sought to provide for "the establishment of uniform norms and standards relating to the conduct of providers of financial products and services"[289]. As of 2019, it proposed to establish the Financial Services Authority (FSA), the Financial Sector Ombudsman and the Financial Sector Tribunal. The FSA will replace the following bodies; the CMA, the IRA established by the Insurance Act; the Retirement Benefits Authority established by the Retirement Benefits Act; and the Sacco Societies Regulatory Authority (SASRA) established by the Sacco Act. The aim of having the combined regulatory body is to "minimize the duplication of effort and expense, including by using, where appropriate, common or shared databases and other facilities". Commendably the Authority will authorize Self-Regulatory Organisations to exercise specified powers and functions. However, members of the FSA

[289] The Financial Services Authority Bill 2016

board will be appointees of the president and Cabinet Secretary, with the exception of the Central Bank Governor. The Board in consultation with the Cabinet Secretary will appoint the Chief Executive Officer[290]. Part XIII contains provisions regarding the review of decisions. Commendably the Judicial Service Commission will be responsible for the appointment of tribunal members. The JSC will also be responsible for the removal of members, clear grounds of removal have been stipulated in the Bill. The Chief Justice will determine remuneration and allowances to be paid to the tribunal. The Bill also proposes the formation of an Executive Committee that will be selected by the Board comprising the senior staff of the Authority, to advise the Chief Executive Officer. Section 13 of the Bill proposes that The FSA and the Central Bank of Kenya shall collaborate and co-ordinate, actions they take, including licensing; inspections and investigations; actions to enforce laws and information sharing. However, as the FSA Bill is yet to be finalized, it is not clear as to how the replacement of the different regulatory Authorities will work. This is likely to be met with a lot of resistance, as some staff may be declared redundant. Further, there will be political bickering, as it would be more difficult to influence the decisions of one united Authority compared to individual stand-alone Authority bodies.

3.5 Other Legal and Institutional Frameworks

3.5.1 Collaboration with other regulatory institutions

Section 3.3 of the CMA's Capital Market Master Plan 2014 -2023 speaks to the establishment and development of internal linkages. Its subsequent task is putting in place regulatory Memorandum of Understanding (MOU) to allow for an exchange of confidential information.

[290] Ibid

The Authority has signed a number of MOU's with local and international regulators, standard-setting bodies and associations[291]. Relevant MOU's to this study include:

1. “Directorate of Criminal Investigations (DCI) (2015) – MOU set to identify the roles and responsibilities of each party as they relate to the implementation of Capital Markets Fraud and Investigations Unit housed within CMA[292]”;
2. Financial Reporting Centre (FRC) (2013) - The MOU sets forth the Authorities' statement of intent to “establish a framework for the supervision of financial institutions, mutual assistance, co-operation and the exchange of information in the fulfilment of their respective supervisory responsibilities and combating Money Laundering and Financing of Terrorism”[293];
3. CMA, CBK, IRA, RBA and SASRA (2013) - Collaboration on the supervision of financial institutions and on other matters of mutual interest. This was intended to facilitate investigation of cross-sector regulated entities and challenges[294].
4. East Africa Securities Regulatory Authority: EASRA (2011) - The MOU provides a “framework for cooperation and consultation to achieve their common objectives, including to foster mutual assistance, including the execution of requests and the sharing of information[295]”;
5. IOSCO MMOU (2009) – “Mutual cooperation and consultation among IOSCO Members to ensure compliance with, and enforcement of, their securities and derivatives laws and regulations[296]”;

[291] The Capital Markets Authority website, <https://www.cma.or.ke/index.php?option=com_phocadownload&view=category&id=40&Itemid=200>, accessed on 6 August 2019
[292] Ibid
[293] Ibid
[294] Ibid
[295] Ibid
[296] Ibid

6. CMA and Australian Securities and Investment Commission (ASIC) (2016) – "The agreement sets up a framework for co-operation between the CMA and ASIC in the expanding space of innovation in financial services[297]";
7. Unclaimed Financial Assets Authority (UFAA) (2015) – "Collaboration on the supervision of unclaimed financial assets and on other matters of mutual interest[298]";
8. Financial Services Board South Africa (2012) - The MOU provides "a framework for Co-operation, Consultation and Exchange of Information"[299].

However, the CMA has not availed in its reports information as to how the above MOUs have assisted the Authority in conducting its enforcement mandate. Further, CMA may have in some instances collaborated with other prosecutorial bodies such as the DPP's offices to pursue criminal action.

3.5.2 The East Africa Community Directives

The EAC Directive applies to "all investor education activities by the Competent Authorities and licensed market intermediaries and their agents in respect of the securities markets within the Community"[300]. Principles for amending and harmonizing national laws include enforcement and sanctions directives. Principle 20(2) stipulates that "the Competent Authority upon being satisfied that a market intermediary has failed to comply with the provisions of the Directive, may impose the listed administrative sanctions. These include compliance within a specified period, reprimand, restriction or suspension of certain business activities; revocation or suspension of a business licence; or issue an order to the market intermediary to suspend or remove from office any member of the staff who fails to comply". An important principle the CMA should consider adhering to, states that "before imposing administrative sanctions, the Competent Authority should give the market intermediary a notice in writing indicating: nature

[297] Ibid
[298] Ibid
[299] Ibid
[300] The East Africa Community Directives Legal Notice No. EAC/142/2017.

of non-compliance; intention to impose administrative sanction; and amount or particulars of the intended administrative sanctions[301]". The market intermediary should then be allowed sufficient time to provide reasons why the sanctions should not be imposed. The principles also outline the relevant circumstances the Authority should take into account when determining the type and amount of administrative sanctions. These include: "the gravity and the duration of the non-compliance; the degree of responsibility; profits gained or losses avoided; losses for third parties caused by the non-compliance; the level of cooperation by the responsible natural or legal person with the Competent Authority; and previous non-compliance by the responsible natural or legal person"[302].

3.6 Conclusion

This Chapter has focused on outlining the current laws and regulations that guide the CMA in Corporate Governance enforcement. Appreciably the CMA in line with IOSCO principles for regulators has clearly stated its objectives, functions and enforcement powers and mechanisms. This Chapter has demonstrated that the CMA enjoys sufficient powers to conduct its enforcement mandate. The study also has displayed evidence that overtime the CMA has signed Memorandum of Understanding with different regulators such as the IOSCO MMOU, IRA, RBA, SASRA, EASRA, DCI and FRC to promote cooperation in information sharing and aid enforcement. However, CMA up to October 2019 did not include information in their reports as to how the MOUs had been of assistance to the Authority in enforcement. This Chapter has provided evidence that the Capital Markets Acts as a silo to the extent in the past it has sought to enforce sanctions for non-existent provisions in the Act rather than rely on other Laws. The Chapter has outlined that whereas the CMA has the mandate to impose sanctions, for example, the Central Depositories Act disputably, empowers the Authority to handle criminal offences and impose fines on suspects without prosecution. The Capital

[301] Ibid
[302] Ibid,

Markets Act further contains a clause that is contentious. Section 37 states that where there is a conflict between the provisions of the Act and the provisions of any other written law with regard to the powers or functions of the Authority, the provisions of the Act prevail. Where its power or functions or may be considered to be ultra vires to the constitution's articles and bill of rights then, in essence, the constitution's provision supersedes the Act. Of concern is the fact that some of the Capital Markets Act's provisions allow hefty involvement of the Government in CMA's appointments, running of affairs and accountability. The next Chapter will seek to demonstrate how this has impeded the Authority's enforcement capabilities. Chapter 4 will also provide in-depth analysis of Court rulings against the CMA for acting ultra vires to the existing laws especially the Constitution.

CHAPTER FOUR

CHALLENGES FACED IN IMPOSING ENFORCEMENT ACTIONS: A CASE STUDY OF VARIOUS LISTED COMPANIES

4.1 Introduction

Chapter 1 outlined the challenges faced by enforcement securities regulators worldwide. The preceding chapter 2 outlined the historical framework of enforcement by the CMA and provided statistics showing the number of cases the Authority has published as having dealt with. Chapter 3 outlined the current legal and institutional framework within which CMA conducts its enforcement operations. The Chapter illustrated the gaps in the existing legal and institutional framework. It also provided illustrations where Court decisions have ruled that CMA acted ultra vires to the existing laws especially the Constitution. The main argument in this chapter correlates to this study's hypothesis that a review of CMA's institutional framework and case studies will demonstrate the legal and implementation challenges faced by the Authority in enforcement. This chapter explores the challenges the CMA encounters in imposing enforcement actions against company directors accused of malfeasances. The study analyses past company fraud cases reported in the media and by the CMA to gauge the success rate of its enforcement framework. This Chapter also provides an in-depth review of court cases where courts ruled that the CMA had acted ultra vires to the Law. This study was timely as the CMA in July 2018 announced its plan to bolster its investigative unit to help it conduct investigations within six months. The CMA has overtime admitted that it has faced challenges in conducting investigations and enforcement in general. Furthermore, in 2018 the Treasury Cabinet Secretary challenged the Authority to implement existing laws to the letter to curb corporate greed, even as he pledged reforms to address emerging trends such as digital products[303].

4.2 Research design

The project adopted the case study approach in order to conduct a detailed analysis of the institution and its operations under query. As this study revolves around one regulator CMA, the focus was placed on its enforcement mechanisms, statistics and enforcement unit, in order to draw inferences and conclusions. The study also utilised case laws that have been determined in Kenyan courts and/or before the CMA relating to this study's topic. This proved useful in gauging the success rate of the Authority's enforcement framework and identification of challenges they have faced in the past. Further qualitative research was utilised in seeking enforcement lessons from other jurisdictions. The study conversely took into account the other countries differences in structure and dynamics to that of Kenya in order to present the best-suited practises that the CMA can emulate.

4.3 Data collection

This study utilised data and information available in published CMA reports, Kenya Law reports and media reports. Data utilised to make inferences included enforcement statistics provided by CMA in their publicised annual reports. This project also utilised data from court cases reported in their released Digest Decisions on Capital Markets.

4.4 Data analysis

The data collected in this study proved useful in analysing the number of cases CMA has investigated and closed. Further, the statistics were useful in determining fraud cases that have been unresolved and dismissed in court. During the process of data collection, this study

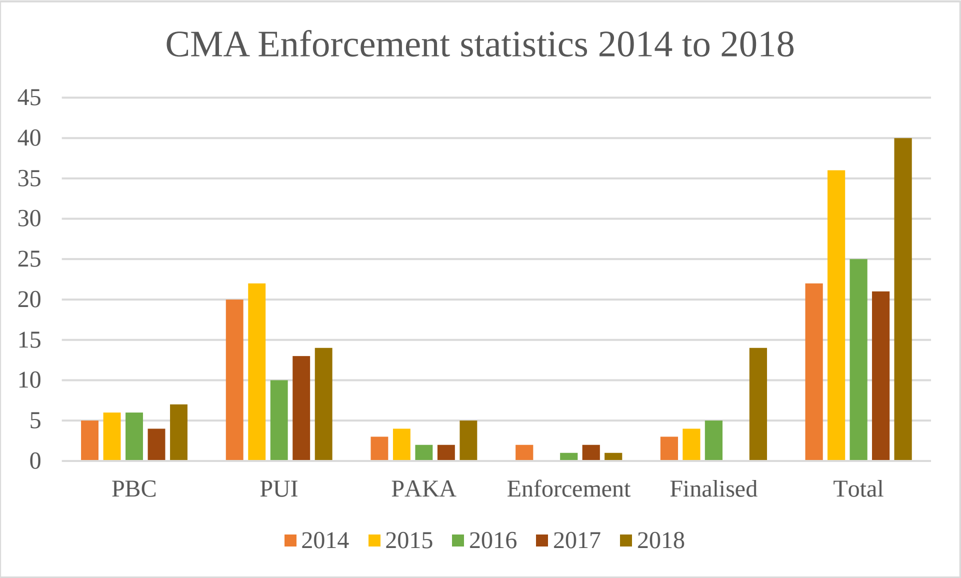
[303] Patrick Alushula, "CMA eyes six-month deadline for resolving listed companies probe", Business Daily July 18 2018, <https://www.businessdailyafrica.com/markets/capital/CMA-eyes-six-month-deadline/4259442-4670208-10rgj3l/index.html>, Accessed 6 July 2019

identified the following areas as having contributed to the low number of successful enforcement actions by the CMA.

4.4.1 Sub-optimal number of enforcement actions against directors

Overall, the number of enforcement actions by the CMA has fluctuated. However, there was a commendable rise in the number of cases handled in 2018. The chart below depicts the Authority's enforcement actions from 2014 – 2018. As at 2019 the CMA did not publicise the company/ director or employee names included in these statistics:

Figure 7: Enforcement statistics by the CMA for the period 2014 -2018



Source: The CMA annual report 2018

KEY

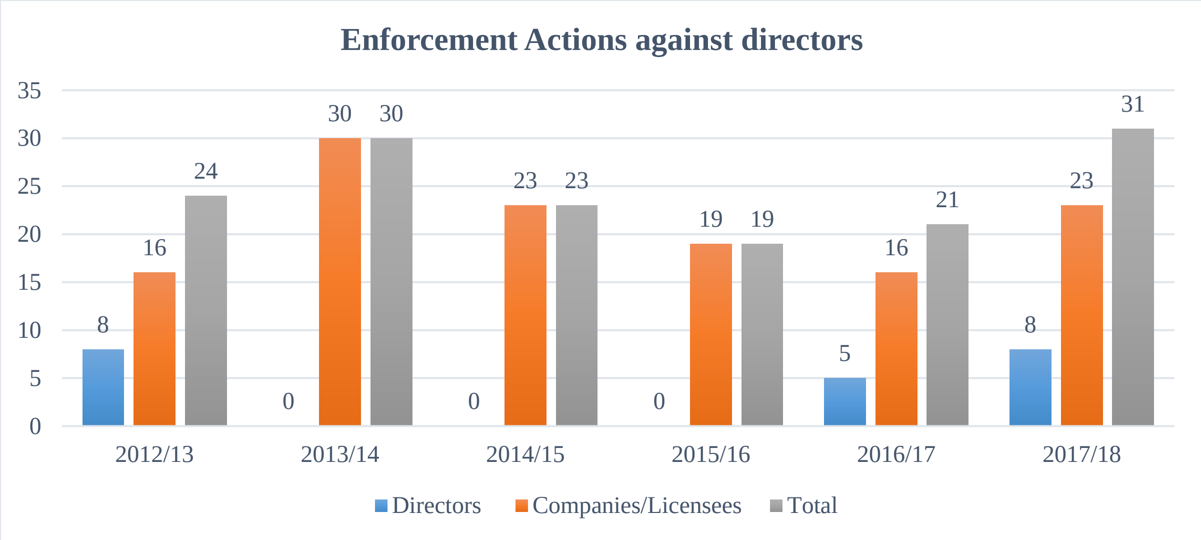
PBC - Pending before the court

PUI - Pending under investigations

PAKA - Pending arrest of known accused

The following chart is a depiction of the number of enforcement actions meted against companies/licensees in comparison to directors.

Figure 8: CMA Enforcement actions against licensees and directors



Source- The CMA Annual reports 2014 -2018

Gaps identified in some of the investigations conducted by the Authority have led to the low number of actions against directors. This had led to instances where CMA has not subjected to investigations culpable directors and in turn only held employees/companies liable for offences. In 2017, the Authority reported to have meted enforcement action against fraudulent directors only in one case the Uchumi case, and in 2018 only in the National Bank of Kenya fraud saga. In the following two cases, there was no publicly availed evidence that the CMA conducted investigations into the reported malfeasances.

4.4.1.1 Britam case

Britam's asset management unit instituted claims against its former executives who had transferred fraudulently Kshs 3.9 billion that investors had entrusted to the company. The High Court declined to stop the prosecution of the four former Britam employees. High Court judge John Mativo stated that the former employees who had started their own company and were now Cytonn Limited directors did not convince the court that charges instituted by Britam against them were out of malice[304]. He observed that the Director of Public Prosecution had

[304] Kamau Muthoni, "Court declines to stop Sh1billion fraud case against Cytonn directors", Standard Digital 11 September 2018, https://www.standardmedia.co.ke/article/2001295309/court-declines-to-stop-sh1bilion-fraud-case-against-cytonn-directors, Accessed 7 July 2019

"independently weighed the complaint by their former employer Britam Limited and pressed the charges based on the evidence in his possession" [305]. Conspicuously nonetheless, four years earlier in 2014, the media reported that the CMA had declined to reveal whether it was taking any action to protect investors following allegations of fraud at Britam, which is a listed company that has numerous shareholders[306]. Up to 2019, there was no publicly available evidence of CMA instituting any action regarding this matter.

4.4.1.2 Kenya Airways Case

The media highlighted Kenya Airways' (KQ) financial problems after the release of its 2014 audited accounts. Its woes were blamed on a build-up of liabilities overtime against poor performance owing to a failed strategy[307]. The CMA's CEO Paul Muthaura when queried in 2016 as to what action the Authority had undertaken, he responded that KQ had been engaging the government for further financial support and the discussions remained inconclusive. He indicated that KQ continued to update the CMA on new developments. However, he did not clarify whether the Authority had initiated any inquiries or investigations in order to establish the facts surrounding KQ's financial problems. Kenya Airways in 2016 hired an independent audit firm Deloitte to conduct a forensic investigation. Its report whose contents were not availed online reportedly disclosed procurement malpractices and other non-compliance matters conducted by various employees[308]. This led to a blame game by its Board and Management as to who was responsible for the firm's rapid decline into loss-making. It also

---

[305] Kamau Muthoni, "Court declines to stop Sh1billion fraud case against Cytonn directors", Standard Digital 11 September 2018, https://www.standardmedia.co.ke/article/2001295309/court-declines-to-stop-sh1bilion-fraud-case-against-cytonn-directors, Accessed 7 July 2019

[306] Editorial, 'CMA tight-lipped on Britam, Mumias fraud cases', Business Daily, 3 December 2014, https://www.businessdailyafrica.com/corporate/CMA-tight-lipped-on-Britam--Mumias-fraud-cases-/539550-2543788-lt1tq5z/index.html, Accessed 7 July 2019

[307] Paul Muthaura 'How CMA is tackling KQ, Mumias woes', Business Daily 6 March 2016, https://www.businessdailyafrica.com/analysis/How-CMA-is-tackling-KQ--Mumias-woes/539548-3105606-5gachpz/index.html, Accessed 9 July 2019

[308] Editorial, 'KQ must act on Deloitte forensic audit report', Business Daily, 26 September 2017, https://www.businessdailyafrica.com/analysis/KQ-must-act-on-Deloitte-forensic-audit-report/539548-4113274-15bqm0f/index.html, Accessed 10 July 2019

helped shed light on the issues the management had been unable or unwilling to make public for many years. As at October 2019, there was no evidence confirming CMA had taken action against senior management and directors for the malfeasances. KQ fired only the involved employees.

On the other hand, a Senate Select Committee was constituted in May 2018 to probe into the activities of the Kenya airways. Their findings included "poor investment decisions by management of buying and leasing aircraft, and fuel hedging, under arrangements, which were, not profitable to the company had led to skyrocketing debts. Other issues included non-competitive practises such as expensive ticketing, routing arrangement and partnerships that accounted for massive losses of revenue"[309]. The above issues are attributable to decisions made by KQ's management and the Board. The CMA, therefore, should have considered conducting an investigation or appointing an investigator to conduct a forensic review and based on the findings considered whether to administer action against the company's management and directors[310].

4.4.2 Delays in instituting enforcement proceedings and action against directors

Numerous media reports have displayed the public's outcry and stakeholder fatigue due to the slow pace at which the CMA conducts enforcement proceedings[311]. The CMA, on the other hand, has mostly blamed the Kenyan court litigation processes. The Chief executive officer Paul Muthaura in unveiling the Authority's 2018-2023 strategic plan announced its plan to boost a number of resources and their capacity in order to ensure quick resolution of governance issues[312]. Nevertheless, this came at a time when market confidence had waned

[309] Kenyans.CO.ke, 'Report Reveals 5 Major Problems Facing Kenya Airways', 21 August 2018, https://www.kenyans.co.ke/news/report-reveals-5-major-problems-facing-kenya-airways, Accessed 11 July 2019
[310] James Anyanzwa, 'Kenya's CMA urged to punish more errant top bosses', 30 November 2016, https://www.theeastafrican.co.ke/business/Kenya-CMA-urged-to-punish-more-errant-top-bosses-/2560-3470214-format-sitemap-rtopp2z/index.html, Accessed 12 July 2019
[311] Gathu Kaara, 'Penalties for KenolKobil share fraud a big joke', 22 July 2019
[312] Ibid 307

due to unresolved issues such as Chase and Imperial banks bond and Mumias Sugar mismanagement. The public and the media have raised queries why directors have gone unpunished[313]. The below cases will seek to demonstrate instances where there were delays in detecting malfeasances in Listed Companies and delays in instituting enforcement proceedings.

4.4.2.1 Uchumi case

The Uchumi case came into the limelight through media reports in 2015. The media reported that the Board of Directors were forced to fire the CEO Jonathan Ciano after accusations of negligence, gross misconduct and poor management of the company[314]. It was also reported that Mr Ciano's decisions and leadership had led to the company's financial constraints that led to delayed suppliers payments. CMA published a statement on November 2016 that they had taken enforcement action against the former Uchumi Chief Executive, Finance Manager, former Uchumi directors and the rights issues transaction advisor for regulatory breaches[315]. This was after their inquiry in line with its mandate of investor protection. These enforcement actions were to be effective from November 17, 2016. The CMA went ahead to state that the regulatory breaches of the former Uchumi directors were identified in respect of a prior period of 2012 – 2015. Questions arose as to why the regulator CMA, did not detect the malpractices by Uchumi directors until the public outcry. Some of the Authority's omissions were glaring for instance in January 2015 Uchumi reported publicly that it was to finance the opening of new branches through funds raised via the Rights Issue[316]. However, Uchumi's management crafted the Information Memorandum shared with potential investors in a conniving manner as it read; *"The purpose of the Rights Issue is to enable Uchumi to meet working capital requirements necessitated by the planned opening of new branches in the region"*. This meant

[313]Ibid, 310
[314] Mwendo, 'KOT's Reactions after Uchumi's CEO Jonathan Ciano Got Fired' Nairobi Wire, 16 June 2015
[315] Patrick Alushula, 'Former Uchumi Supermarket directors barred from office, ordered back to class' , (Standard Digital 19 November 2016)
[316] Simon Ciuri, 'Uchumi set to open new branch after rights issue', Daily NATION January 2015

that Uchumi's directors could pay off past suppliers debts using the Rights Issue funds in a bid to place more orders for goods/assets needed in the new branches. The CMA though did not flag this.

The CMA had approved the proposed Rights Issue in 2014 stating that it had satisfied itself that the requirements of "Regulation 11 of the Capital Markets (securities) (public offers, listing and disclosures) regulations", 2002 had been complied with and the IM contained information that would enable the investors to make an informed decision. Interestingly within this same year, there had been numerous media reports about Uchumi's financial woes. For instance, in 2014, Uchumi reported in its annual report that the Uganda subsidiary recorded its consecutive loss for a third year while the Tanzanian operations continued its loss-making streak since Uchumi set up shop in Dar es Salaam in 2011[317]. The performance destined Uchumi to rely on its Kenyan operations. The media further reported that the delay of the Rights issue approved by its shareholders in 2012 had contributed to the retailers' struggle with supplier debts and stock-outs, pushing the retailer to incur further debts to shore up its working capital[318]. These and more were clear telltale signs that the Rights Issue's purpose was to raise funds to offset the retailors' overdue debts to creditors, however, the Authority did not timely conduct an inquiry regarding this. The CMA, therefore, had not achieved one of its key objectives of promoting investors interests.

4.4.2.2 Mumias case

In 2015, reports in the media emerged regarding allegations of fraud and malfeasances conducted by the Sugar Company's executive management. The allegations revolved around procurement malpractices, fraud in the importation of sugar & irregular issuance of discounts to distributors and unfair commercial dealings. Mumias Board of Directors took action and

[317] Uchumi Supermarkets limited, *Annual Report* , (2014)
[318] David Herbling, Uchumi Uganda, 'Tanzania units sink into deeper losses', BUSINESS DAILY, 24 August 2014

suspended the then CEO and CFO. Mumias Sugar Company then appointed KPMG an audit firm to investigate the malfeasances. It emerged that the former Managing Director and his successor at Mumias Sugar reportedly ignored repeated calls by auditors and the company's board of directors to seal corruption loopholes at the company[319]. Former Mumias CEO who later was voted in as the Nairobi Governor was listed in the article as having been aware of some of the procurement malpractices[320]. He approved the award of tenders to bidders who had not been selected through a fair and competitive process. He further approved the sale of disposed assets to the company's competitors[321]. Others implicated in the report included the immediate former CEO. The CEO and the acting commercial director was accused of failing to provide pertinent information to the board regarding the importation of sugar.

Fast forward to May 2016, the media reported that the CMA had terminated the services of a multinational consultancy, BDO LLP after it failed to give evidence and clear analysis linking any Mumias Sugar director or manager to corporate governance malpractice[322]. Two months later in July CMA's CEO, Paul Muthaura issued notices informing the public that between 2009 and 2012 Mumias former Business Development Manager and former Commercial Director together with other senior managers had provided excessive discounts through credit notes to select customers amounting to Kshs 3.1 billion[323]. Surprisingly even as late as October 2019, 4 years from the commissioning of the first Forensic Audit, there was no publicly available evidence of enforcement action taken by the CMA against Mumias Directors and management. The CMA claimed via media reports that conservatory orders obtained by three former Mumias Sugar Company senior managers from the court had impeded investigations in

[319] Ibid, 67
[320] Ibid
[321] Ibid
[322] Lola Okulo, "Mumias forensic probe ends with no evidence" Dauly Nation May 2016
[323] The Capital Markets Authority, 'Notice to the public', 2012

56 out of 85 bank accounts under inquiry[324]. CMA explained that until the Court heard and determined the petitions questioning the legality of the warrants they could not conclude their forensic audit. Notably, also unlike in the CMC and Uchumi sagas, no complaint was filed with the Institute of Public Certified Accountants of Kenya (ICPAK) concerning the conduct of the external auditors of Mumias who ought to have pointed out the above irregularities[325]. CMA also stated that it was following up with various banks in order to receive bank statements of 29 accounts that were not subject to any court order[326]. Markedly this was 4 years since the Mumias scandal was conveyed by the media to the public. The CMA approved reallocation of one of its budget line items in 2017 to facilitate the forensic audit conducted through their own appointed firm M/S J. Miles Limited[327]. Evidently, the complete fall and closure of the Mumias factory precipitating insolvency are what sprung the regulator into action in 2018[328].

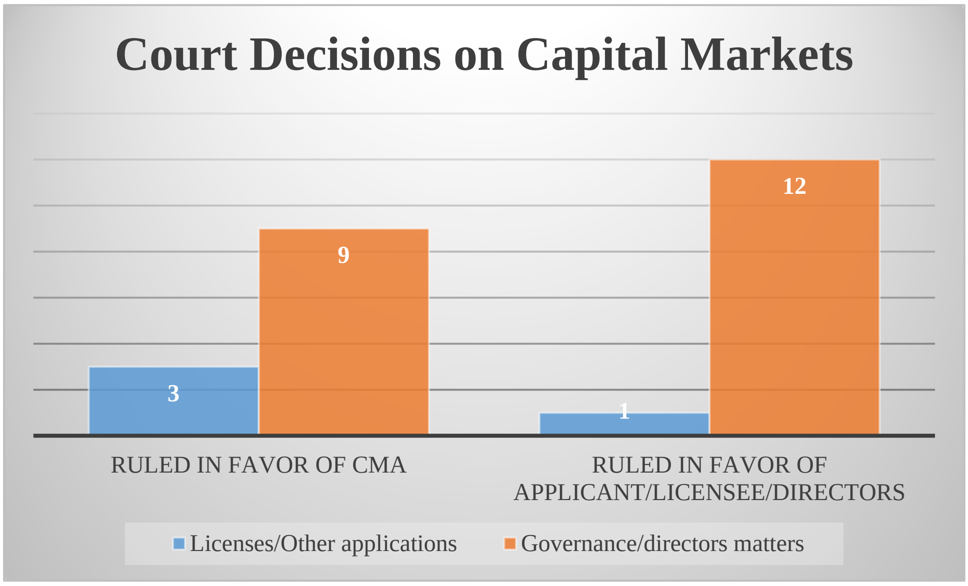
4.4.3 CMA enforcement jurisprudence - Digest of decisions

Media reports have shown that the CMA faces a threat to its autonomy from piling litigation cases filed by various people affected by its previous enforcement actions. In 2018, the CMA for the first time published a Digest of Decisions on Capital Markets. Kenya Law and the CMA developed the digest focusing on capital markets, as they saw the need to track jurisprudence in this area[329]. It highlighted judicial decisions based on applications presented in court mostly to provide guidance on the interpretation of capital markets laws, procedures and the resolution of disputes arising from decisions made by the CMA and its Tribunal[330]. Most of the matters aggrieved parties have filed in court were applications to challenge the administrative process utilized by the Authority during enforcement. Also, only nine of the 27 court applications

[324] Nelly K, 'CMA says court orders are delaying Mumias Sugar Company fraud probe', Daily NATION 13 July 2018
[325] Ibid, 305
[326] Otieto Guguyu, 'Regulator goes for looters of Mumias Sugar in new audit', Daily NATION 3 April 2018
[327] Capital Markets Authority, *Annual Report* 2017
[328] Ibid, 306
[329] Ibid, 192
[330] Ibid, 192

included in the Digest relate to criminal charges or criminal sanctions levelled against accused persons. The Digest also lists cases instituted from 2008 as much as the CMA was set up in 1990. Below is a chart that summarises the number of cases, it indicates whether the judgment was in favour of CMA or other applicants:

Figure 9: Court decisions on Capital Markets



Source - The Capital Markets Authority, The Kenya Law, Digest of Decisions on Capital Markets

The CMA acknowledged in their 2018 annual report that they were facing the risk of litigation and a series of unfavourable decisions[331]. They indicated that they were mitigating this risk by lodging appeals where judges delivered adverse judgements and building capacity of internal counsel to enable proper representation.

There is room for improvement concerning the courts shaping of CMA's enforcement jurisprudence over and above procedural matters. In 2019, the Court of Appeal had heard and determined only one appeal regarding securities laws, (the Imperial case – procedural matter).

[331] Ibid, 230

4.4.4 Decision quashed due to issuance of sanctions in reliance to non-existent provisions in Capital Markets Act

The following case illustrates an instance where the court ruled that the CMA had relied on non-existent provisions and advised that they should consider relying on other existing laws.

4.4.4.1 Uchumi Case

Once Uchumi's woes were in the limelight, it contracted an independent audit firm KPMG at the advice of CMA to conduct a forensic investigation. The CMA then conducted its own independent investigation to corroborate the findings listed in KPMG's Forensics report. In 2017, the CMA published in its annual report that it had taken action against Uchumi directors. This included its Former CEO, former CFO, and three Board Members. However, the enforcement actions by the CMA were challenged in court, the decisions were then included in its Digest published in 2018[332]. This paper examined why the rulings were in favour of the applicants in these applications. In *Republic v Capital Markets Authority Ex parte: James R.Murigu and Barth Ragalo [2018]* the prosecution presented in court that the applicants' former Uchumi directors had previously sat at Uchumi board meetings[333]. CMA had issued a Notice to Show Cause (NTSC) on 31 August 2016 calling upon the directors to appear before it and show cause why sanctions could not be issued against them in accordance with sections 25A and 11(3) (cc) of the Capital Markets Act. Despite objections from the Applicants, CMA proceeded with the NTSC and proceeded to sanction the applicants fining them Kshs 660,000 and Kshs 855,000 respectively as well as banning them from holding office as directors key officers of a Public Listed Company or any approved institutions of the CMA. The Applicants contested the decision in court by stating that they were being sanctioned for contravening repealed laws which action was not only illegal but was also ultra vires[334]. For example one of the breaches

[332] Ibid, 192
[333] Ibid, 192
[334] Republic v Capital Markets Authority Ex parte: James R.Murigu And Barth Ragalo [2018] eKLR

listed was “failure to make adequate disclosure to investors of all the relevant information on the likely application and impact of the funds being raised by the Rights Issue in contravention of the provisions of Regulation 12 of the Capital Markets (Securities) (Public Offer, Listing and Disclosure) Regulations,2002[335]”.

The CMA rebutted by stating that the 2002 Guidelines were in force at the time when the applicants committed the regulatory breaches and were hence the applicable Guidelines to the allegations facing the ex parte Applicants. The court then took issue with the fact that while the NTSC alleged that the Applicants (or USL Board) had breached sections 30D (1) (a) and 34(b) of the Capital Markets Act, the particulars of charges levelled against the Applicants in the NTSC indicated otherwise. They were instead accused of breaching very different laws that actually did not exist, whether in the Capital Markets Act itself or elsewhere in the Laws of Kenya. Whereas Section 30D (1)(a) of the Act provided that a person who made a “false, misleading or deceptive” statement in a prospectus committed an offence, the offence with which the Applicants (or USL Board) were charged within the NTSC was that of facilitating or omitting to prevent the provision of misleading or deceptive statement in the information memorandum. According to the applicants, the Act or any other provision did not outlaw this. Section 34(b) criminalized furnishing or publishing information known to be untrue, incorrect or misleading because of material omission. However, the crime with which the Applicants were charged and of which they had been convicted was that of facilitating and/or omitting to prevent the furnishing or publishing of information known to be untrue, incorrect or misleading, an offence not outlawed by the said section. Judge C.A Ooko in delivering his judgment stated that; “ *It is clearly irrational, unfair and an abuse of power to subject a person to criminal or quasi-criminal proceedings in respect of an act which does not in law constitute an offence or an offence under the legal provisions he is charged. Where public authorities*

[335] Ibid

abuse their powers, act unfairly or irrationally the Court is empowered to intervene and bring to an end such action[336]." He, therefore, gave an order of Certiorari for the purposes of quashing CMA's decisions and an order of prohibition restraining CMA, their agents or employees from enforcing the decisions. This study finds that CMA could have relied on Section 30E regarding compensation for a false or misleading prospectus. The section outlines that directors are liable to provide compensation to any person who acquires securities in reliance to the prospectus. The Act does not define compensation amount limits. However, directors are not liable if they did not authorise the offer; and a prospectus was published without their consent. Alternatively, they could have relied on section 45 of the Companies Act regarding directors' civil liability for misstatements in prospectus. Directors are liable to pay compensation to all persons who sustained loss/damage due to purchasing shares in reliance on an untrue statement. Directors are liable if they authorised the prospectus[337]. Only defences availed to directors is if they withdrew their consent before issuance of the prospectus, relied on an expert's opinion that the statements were true or did not have knowledge of the untrue statement. Also under the Companies Act, any person who authorised the issuance of the prospectus is liable for imprisonment for a period of not exceeding two years or a fine not exceeding two thousand shillings.

4.4.5 CMA's mandate and adherence to rules of natural justice during enforcement proceedings

Chapter 4 of the Kenyan constitution contains provisions relating to the Bill of Rights. The rights apply to all laws and bind state organs and everyone[338]. The CMA as a regulator is therefore also expected to adhere and respect individuals' rights. However, evidence in the below cases shows that there have been instances where courts have ruled that the Capital

[336] Ibid
[337] The Companies Act Revised Edition 2012
[338] Ibid, 234

Markets Acted contrary to rules of natural justice. This was during inquiries, proceedings and issuance of sanctions/penalties to directors accused of corporate malfeasances.

4.4.5.1 Uchumi Case

CMA on being issued by Uchumi the forensic report prepared by Uchumi's appointed auditor KPMG reviewed it and saw it fit to summon some of Uchumi's former directors to provide explanations. CMA, therefore, wrote to the directors seeking clarifications/details. The directors, in turn, replied and provided some explanations. CMA deemed it fit to invite them to offer some explanations orally. The directors appeared with their lawyers and the CMA undertook the proceedings in what the directors described as 'an inquisitorial manner'[339]. CMA then rendered their decisions and sanctions. Uchumi's Former Directors, CFO and CEO sought to challenge CMA's administrative actions against them in court. They raised the issue that CMA's decision was tainted with bias; and/or violated Article 47 of the Constitution and the Fair Administrative Act. In *Republic v Capital Markets Authority & another Ex-Parte Jonathan Irungu Ciano [2018] eKLR* The former CEO's advocates argued that he was presumed guilty before the determination of the hearing and the process of determination took an unnecessarily long time. The forensic report done by KPMG was availed to him in the eve of the hearing hence could not pass the test of reasonable evidence. Judge Odunga, in turn, ruled that the applicant had not been furnished with the evidence in good time against section 4 (3) of the Fair Administrative Action Act and Article 47 of the constitution. Orders of Certiorari and Prohibition were therefore issued. CMA was informed that if it was still keen on carrying out its mandate, in needed to adhere to the law both procedurally and substantively.

Judge John Mativo in delivering his ruling in *Chadwick Okumu v Capital Markets Authority [2018] eKLR* [340] explained that the provisions of Article 47(1) of the Constitution meant the

[339] Ibid, 192
[340] Chadwick Okumu v Capital Markets Authority [2018] eKLR

following. “That every citizen had a right to fair and reasonable administrative action that was allowed by the law, and to be given reasons for administrative action that affected him or her in a negative way. Lawful in his view meant that administrators had to obey the law and the law had to authorise the decisions. Reasonable meant that the decision taken had to be justifiable-there had to be a good reason for the decision. Fair procedures meant that decisions could not be taken that had a negative effect on people without consulting them first. In addition, administrators had to make decisions impartially”. The CMA in their submissions in court argued that the allegation that the CMA had acted as the accuser, prosecutor and judge was misinformed as the Authority has administrative powers donated by law to investigate any complaints of breach of its regulations and to impose administrative enforcement action as appropriate. Judge John Mativo in delivering his ruling referred to his ruling in *Ernst & Young LLP vs Capital Markets Authority & Another*[341] where he stated that the relevant statute authorized CMA’s functions and that it authorized overlapping functions. In his view in some cases, the legislature may decide that in order to achieve the ends of the statute, it is necessary to allow overlap in functions that would have to be kept separate in normal judicial proceedings. If a statute authorized a certain degree of overlapping, then, to the extent that it is authorized, it would not generally be subject to any reasonable apprehension of bias test, unless the applicant sufficiently demonstrates the reasonable possibility of bias. He added that to prevent bias the CMA had the option of exercising its discretion and delegate the process to another body. For the Ernst & Young case, he termed the application as premature and authorised the CMA to carry on with its investigation. For the suit application by the Former CFO, he stated that the CMA had a jurisdictive mandate to perform the functions in question. However, in delivering his judgment he added that… “*This is a case where CMA performed the three roles contrary to the rules of natural justice. To me, it was ill-advised for CMA to investigate,*

[341] Ernst and Young LLP vs. Capital Markets Authority Nairobi Petition No. 385 of 2016

prosecute, sit as the jury and convict. This was a proper case for CMA to invoke Section 11A cited above and delegate its functions to an independent body. I find that the Petitioner has established reasonable apprehension of bias which is a violation of Section 7 (2) of the Fair Administrative Action Act[61] …"

The judge explained that CMA was bound by the principle of legality enshrined in the constitution. Public bodies are only allowed to do what the law has empowered them to do. The CMA therefore in enforcing laws and making decisions should conform to provisions of law governing its operation. The judge found that the CMA had undertaken the enforcement process against Uchumi directors in violation of the principles of natural justice. Bias tainted CMA's decisions. The court, therefore, quashed all the administrative decisions and sanctions that CMA had issued against Uchumi's directors.

4.4.5.2 CMC Holdings Limited case

The CMC case came into the limelight during the reign of the former CMA chair Kungu Gatabaki[342]. He led the offensive in suspending CMC shares trading at the NSE and appointment of South African firm Webber Wentzel to conduct a forensic audit that uncovered a syndicate where directors at the company ran a secret offshore slush fund for its senior managers and board members[343]. There was an allegation that Kiereini together with other board members adopted a risky business model for the Company of borrowing to lend and failed to implement an "asset/liability management process to monitor, manage and hedge all such risks associated with the activity of borrowing to lend". Shareholders were left contending with shares of a company that was spinning out of control. The malpractices at CMC forced the CMA to launch independent investigations into the rot at the company. Prior to intervention by the CMA, CMCH appointed PricewaterhouseCoopers (PwC) to conduct a forensic

[342] Winfred Kagwe, 'CMA directs CMC to release audit report', (The Star, 26 March 2012)
[343] Ibid

investigation[344]. The CMA separately commissioned Webber Wentzel, a South African firm, to conduct a forensic investigation into defined aspects of the financial operations of CMCH and its trading subsidiaries. CMA also asked Webber Wentzel to review the PwC Report and comment on the methodology applied and the conclusions drawn by PwC.

Reportedly, almost none, from the CEO, the board and several executive managers, was found unblemished after the investigations unearthed several frauds at the firm[345]. CMA found that a number of CMC directors were beneficiaries of "the healthy trade" and did not question the then CEO's management decisions including overseeing and querying his actions. The CMA sent Mr Kiereini a copy of the Webber Report via a letter and notified him through the same that the Board of the Authority had resolved to appoint an ad hoc Committee as per section 14 of the Capital Markets Act[346]. The CMA requested him to appear before the Committee. Conversely, through his advocate, he wrote a letter to the Committee stating that he would not appear before it as participating in its proceedings would occasion prejudice to him and to Court proceedings on the same subject matter, which were either pending or were likely to be instituted. The Committee conducted its investigations and upon conclusion submitted its recommendations to the CMA Board. The CMA then issued a press statement announcing that it had taken enforcement action against the executive and non-executive directors allegedly found to have flouted the capital markets' legal and regulatory requirements in relation to CMC's affairs[347]. Following deliberations with the CMA, Mr Muthoka and Mr Kivai withdrew two judicial review matters. The CMA was also able to recover its legal costs[348]. Mr Kiereini and seven other former directors of CMC Holdings Limited were then banned from holding directorships at NSE firms. In 2013, media reports indicated that Kiereini had won a precedent-

[344] Ibid
[345] Ibid
[346] Ibid
[347] Bizextras, 'CMA bans Njonjo, Muthoka, Kireini, Kemoli from listed firms*, CMA takes stern action on CMC Holdings ltd past and current directors*', (3 august 2012
[348] The Capital Markets, *Annual Report*, 2013

setting case against the CMA, permitting him to re-join the boards of publicly listed companies from which the regulator had ejected him[349]. The High Court overturned CMA's decision to ban Mr Kiereini from the boards of firms listed on NSE, stating it was a breach of his rights to "fair regulatory actions".

Justice David Majanja quashed the CMA's enforcement actions. In delivering the ruling in *Capital Markets Authority v Jeremiah Gitau Kiereini & another [2014] eKLR* the judge stated that CMA had rightfully provided Kiereini with an opportunity to be heard as it was on his own volition that he opted not to attend the proceedings. However, they constitutionally challenged the summary imposition of sanctions and other penalties before giving Kiereini an opportunity to be heard in mitigation. In his view findings made by the committee bordered on criminal offences and yet penalties were imposed before granting him an opportunity to be heard or proper notice[350]. He set aside the sanctions, penalties and offences imposed by the CMA. He, on the other hand, noted that the CMA was at liberty to re-impose them if they were merited only after giving the opportunity to Kiereini to be heard. This meant that Kiereini was free to rejoin boards of public companies, including CFC Insurance Holdings and Unga Group where CMA had disqualified him as a director in the previous year. However, in the following year 2014, the CMA filed a civil suit against Mr Kiereini and two other defendants in **CMA v** *Jeremiah Gitau Kiereini, Kingsway Nominees Limited & Kingsway Family Holdings Limited [2015] eKLR*[351]. Kiereini and the other defendants sought dismissal of the suit claiming that the suit was scandalous, frivolous, and vexatious and an abuse of the process of the court. The applicants contended that the proceedings constituted an Enforcement action and were therefore in violation of the judgement of Majanja J. in the earlier case[352] of where he had

[349] Victor Juma, "Court quashes CMA's ban on Kiereini's directorship" The Daily NATION 22 August 2013
[350] Capital Markets Authority v Jeremiah Gitau Kiereini & another [2014] eKLR
[351] Capital Markets Authority v Jeremiah Gitau Kiereini, Kingsway Nominees Limited & Kingsway Family Holdings Limited [2015] eKLR
[352] Jeremiah Gitau Kiereini Vs Capital Markets Authority & The Attorney General, Constitutional Petition No. 371 Of 2012

expressly stated that before any Enforcement Action could be undertaken, it was imperative that Kiereni, be provided with a reasonable opportunity to be heard. That finding was premised upon the fact that the purported Notice of the allegations against Kiereini also included findings, which the Committee had made on some of the allegations. In addition, the court ruled that the notice had already laid out the sanctions, which the committee had imposed against Kiereini.

The Capital Markets Authority in their defence stated that the court proceedings were instituted to obtain court orders to restrain Kiereini and the other defendants from disposing of or encumbering or in any other manner, dealing with any shares that they own in the NSE and the CDSC. These orders were to restrain the defendants pending the judgement, outcome of the earlier case and/or completion of applicable due process hearings on any enforcement action CMA was to take in accordance with the report, and recommendations of the ad hoc committee. To this, Judge Fred Ochieng stated that it had been overtaken by events. Nobody could continue waiting for that which court had already delivered. In his view, the reliefs sought by the CMA indicated that the CMA was undertaking enforcement action, as it was seeking to recover money from the applicant, on the basis that the said money was already found to be due and payable[353]. In his view, the CMA had already determined Kiereini's liability or culpability.

The judge also stated that the Court of Appeal had already upheld the findings that Kiereini had had sanctions and penalties imposed upon him before he was heard in mitigation, therefore the CMA had failed to heed the directions given by both the High Court and the COA. He, however, stated that as much as he supported the Court of Appeal on the need to jealously safeguard the right to a fair trial, he recognized the possibility that even after giving him right to a fair hearing, the CMA could still arrive at findings similar to those that were arrived at earlier. Therefore, the CMA could eventually get around to prosecuting the Enforcement

[353] Ibid, 351

Action. He ruled that the right balance of the rights of the parties would be struck by staying the proceedings until the CMA had given to the applicant a fair opportunity to be heard. Unfortunately, he passed on without evidence of the CMA instituting a fresh inquiry.

4.4.5.3 Imperial bank case

In 2016, the media was rife with reports of an investigation by an American forensic audit firm, FTI Consulting that exposed insider trading, fraud perpetrated through collusion by senior executives of Imperial Bank. Also, falsified financial reporting systems led to the loss of more than Kshs 20 billion of depositor funds at the collapsed Bank[354]. The firm further revealed that there lacked satisfactory internal and external audits at Imperial Bank in the duration of the fraud. The public raised questions following the fraud as it had been perpetrated for more than 10 years without the bank's internal, external auditors or the CBK detecting red flags[355]. Surprisingly also the financial report by the firm revealed that as early as 2012, a whistleblower had raised red flags about possible money-laundering and tax evasion via an email to the Kenya Anti-Corruption Commission (KACC), The Treasury and the CBK among other government agencies. It was also not clear how the CBK utilised the information received from Imperial Bank on the suspicious accounts in 2012 prior to it being placed under receivership in 2015. The directors of the bank, in turn, moved to court and filed a petition *Alnashir Popat & 8 others v Capital Markets Authority* challenging the administrative proceedings that had been instituted by the CMA in respect to the Bank's receivership[356]. These were in relation to a Kshs 2 billion corporate bond that the bank issued a month before it was placed in receivership. The applicants claimed that in carrying out its investigation, the CMA had violated or was likely to violate the directors' fundamental rights and freedoms. In particular "the right to equality and freedom from discrimination under Article 27, the right to access information under Article 35, the right

[354] Patrick Mayoyo, 'Imperial fraud: How Sh20 billion was fried', 2017 https://www.sde.co.ke/thenairobian/article/2001231542/imperial-fraud-how-sh20-billion-was-fried
[355] Ibid
[356] Alnashir Popat & 8 others v Captial Markets Authority [2016] eKLR

to fair administrative process under Article 47 and the right to a fair trial under Article 50” of the Constitution. The CMA in its response explained that in their view the petition was premature and that they had the statutory mandate to investigate the matter. It contended that the Court ought to allow it to exercise its mandate without usurping the Authority.

In delivering his judgment, Judge Onguto affirmed that the CMA had a broad statutory mandate and the Act endowed it with wide powers to conduct inquiries, investigations and imposing sanctions as mandated under section 11(3) of the Act. The judge also confirmed that the Capital Markets Tribunal had original and appellate jurisdiction. The Imperial directors, however, failed to prove how they were discriminated against by the CMA by being given a hasty date to appear before the tribunal. The Court was unable to find any violation of article 47 of the Constitution as far as expedition lawfulness and reasonableness were concerned. He also ruled that the CMA had provided them adequate access to information. The applicants also sought orders claiming bias on the basis that the industry regulator approved the bond issue by approving the information contained in the final information memorandum. It had then sought to investigate the circumstances that led to the approval of the bond issue. The CMA, in turn, issued a notice to show cause, which stated that; “the authority had accordingly noted that there were various shortcomings with respect to the conduct of the oversight and governance role of the Board in relation to the issue of the bond”. Judge Ondungo stated that “procedural fairness required that an impartial decision-maker make decisions free from a reasonable apprehension of bias”. The judge took issue with the fact the CMA as a regulator was involved in the bond transaction. “It was the body that approved the issuance of the bond. It was then conducting enforcement proceedings against the Petitioners”. He noted that the Capital Markets Act vested the CMA with both investigation and enforcement powers in relation to the same mandate it exercises. He stated that *“…well informed and fair-minded observer given all facts would conclude that there existed a possibility of bias in the circumstances of the instant case. …”*

He further expounded by stating that the CMA could have opted to delegate its functions to other persons including recognized self-regulatory organization bodies in accordance with Capital Markets Act Section 11A. Likewise, it could file a reference to the Capital Markets Tribunal on any matter in accordance with section 35A (4) of the Capital Markets Act). Judge Ondungo therefore partly allowed the application and issued partly orders unfavourable to the CMA[357]. He issued a declaration that the Petitioners' rights under Article 47(1) of the Constitution were under a threat of violation because the CMA by seeking to execute its statutory mandate was apparently conflicted in the circumstances of the case. He also gave an order of certiorari to remove into the court and quash the Notice to Show Cause letters issued by the CMA to the Petitioners.

Appreciably and in a precedent-setting ruling delivered in 2019, the Court of Appeal quashed the High Court's Orders. In delivering the ruling the Court of Appeal judges Erastus Githinji, Daniel Musinga and Otieno Odek stated, *"With respect, we do not think the trial court's findings on the impartiality of the apprehension of bias was well-founded*[358]". The judges consequently ruled that the claim of bias had no basis and was erroneous. They also stated that the CMA was at liberty to continue with the administrative proceedings that it had commenced against the respondents. Following the High Court ruling, the public will keenly watch for evidence of proceedings undertaken by either the Capital Markets Tribunal or another regulatory body regarding this case.

4.4.6 Unsuccessful recommendation of criminal prosecution

CMA has in the past-recommended criminal prosecution of some fraudulent directors. However, there is no jurisprudence on successful convictions as of 2019.

[357] Ibid
[358] Otiato Guguyu, 'CMA gets nod to punish former Imperial directors', (Standard Digital 2 July 2019)

4.4.6.1 National Bank of Kenya case

In 2018, the CMA imposed sanctions and meted penalties against NBK's former CEO and CFO for misrepresenting financial statements and failure to supply the NBK Board with pertinent management information[359]. It was also reported in the media that the former CEO had led the board and other senior managers to overstate profits of NBK for second and third quarters of 2015 in addition to siphoning about Kshs1 billion from the bank's coffers. Media houses reported that he supervised the grading of a Kshs 2.5 billion non-performing loan as performing in 2015, leading to Kshs 680 million being declared as earnings from these loans without approval of the board[360]. Further, the article indicated that he was accused of conflict of interest dealings having awarded lucrative contracts to his brother and sister without the knowledge of the lender's board. Interestingly the CMA only fined him Kshs 5 million. The CMA fined the Former Head of Treasury Kshs 104,800,000 for causing contracted deposit mobilization agents of NBK to raise invoices for payment by NBK irrespective of whether they had mobilized deposits of such amounts. He also deposited or directed deposits amounting to Kshs.52 million to his Advocates' client account in a deposit mobilization embezzlement scheme to siphon funds out of NBK contrary to the protection of investors' interests as per Section 11(1) (d) of the Act. The CMA also issued a regulatory caution to the Board members for failing to effectively execute their duties both individually and collectively as a board. The Former CEO and Head of Treasury moved to court seeking for Judicial Review orders to stay proceedings for the sanctions already imposed by the CMA.

Judge Pauline Nyamweya in delivering the ruling in *Munir Sheikh Ahmed v Capital Markets Authority*[361] allowed the former CEO's application and granted leave to commence judicial review proceedings to operate as a stay of the payment and/or recovery of the financial penalty

[359] Ibid, 192
[360] Business DAILY, "Ex-NBK boss gave contract, loan to kin", 3 July 2018
[361] Munir Sheikh Ahmed v Capital Markets Authority [2018] eKLR

of Kshs 5,000,000 imposed upon him by the CMA. However, she disallowed the application to challenge CMA's imposed disqualification from holding officer order meted on the former CEO. Her basis was that this was a decision that was self-executing and on which the CMA needed to take no further positive steps. The CMA had therefore fully implemented it. She further explained that, *"...Even if that Court had jurisdiction and the discretion to suspend the sanction. The discretion should be exercised sparingly where a decision had been fully implemented, and as there was a public interest element involved, only where an applicant had made out a strong case…"* This ruling delivered in August 2018 provided great strides to the CMA as the court considered public interest matters in arriving at the decision.

The media reported that the CMA had further recommended for the criminal prosecution of NBK's former Head of Treasury and former CFO[362]. Dishearteningly in November 2018, it was reported that the Director of Public Prosecution had cleared the former NBK CEO over the alleged loss of Kshs 1 billion from the bank's coffers[363]. Allegedly correspondents filed in court by the former CEO to support his claim for compensation for his dismissal in April 2016 from the bank, revealed that the prosecution instead was considering taking him on as a witness. "The director of prosecutions then cleared the former NBK CEO of all the charges and allegations levelled against him," read a letter signed by Ngatia Iregi, Director Banking Fraud Investigations Department. Unfortunately, if the CMA delays the matter and both NBK former directors and managers go unpunished, the regulators involved including the CMA will continue facing the challenge of loss of public trust.

[362] Citizen Digital, 'CMA takes action on National Bank fraud architects', 4 April 2018.
[363] Business DAILY, "DPP clears ex-NBK boss in Sh1 billion fraud case", 6 November 2018

4.4.7 Gaps in investigations and levelling breaches against accused persons

An in-depth analysis on some of the breaches listed by the CMA in their annual reports shows there were instances where companies were held liable for breaches whereby the directors should have also been held liable.

The following cases represent the above assertions:

4.4.7.1 Uchumi case

Breaches levelled against Uchumi officials included "failure to make adequate disclosure to investors regarding the Rights Issue; Failure to ensure that accounts were complete and all necessary disclosures on encumbrances on investment properties were done. Also failure to ensure that an appropriate risk management framework was applied by the Board to inform the process of reviewing branch opening and expansion proposals in violation of the fiduciary duty of care", among others[364]. Sanctions imposed in accordance to Section 25A of the Capital Markets Act; included "disqualification from holding office as Director and/or key officer of a public listed company or any approved institution of the CMA for a period of two (2) years, disgorgement of Board allowances of Kshs1.77 million net of taxes". Interestingly the CMA only accused the Company's Former CEO and CFO of breach of preparation of inaccurate and incomplete financial statements. The Board ideally reviews and approves the publishing of financial statements. There was no evidence provided showing that the CMA satisfied itself that the Board was not aware of the inaccuracies or misstatements. Further, the Capital Markets Act nor its regulations did not cover most of the breaches that the CMA levelled against Uchumi's directors. For instance, it accused the Former CEO Ciano of failure to make necessary disclosure of conflict of interest to the USL board, concerning companies that used to trade with Uchumi. Interestingly the Act nor its regulations did not contain a provision on conflict of interest until December 2015. However, up to October 2019, the Corporate

[364] Ibid, 327

Governance Code nor the Act did not outline penalties/fines for failure to declare conflict of interest instances.

The Capital Markets Act at the time did not contain any provisions/offences relating to the misrepresentation of financial statements. The only provision relating to Board's responsibility concerning financial statements was included in CMA's Guidelines on Corporate Governance Practises. Chapter 6 stipulates that "the Board should put in place adequate structures to enable the generation of true and fair financial statements"[365]. The Code, however, does not prescribe an offence for failure to do this, as the code is more of a guideline rather than law. In the absence of a provision relating to misstatement within CMA's Act, the Authority should have considered invoking the provisions of the Companies Act or liaise with relevant Authorities. Section 635(1) of the Companies Act imposes the duty on companies' directors to prepare the financial statement of the company. Section 636 "Directors of a company are expected to approve financial statements only if they are satisfied that the statement gives a true and fair view of the assets, liabilities and profit or loss. If they act in contravention, they are liable to a fine not exceeding Kshs 500,000"[366]. This study notes that the CMA has since revised the Act and the Amendment Act of 2018 now includes a provision on financial misstatement. Section 30 G (A) (2) now stipulates that "…(2) An issuer of securities, a licensed or an approved person shall not falsify its books or record of accounts or financial statements or report financial statements, not in line with the International Financial Reporting Standards"[367]. "(3) An officer or director of a company or any other person acting under their direction, shall not take any action to mislead an auditor engaged in the performance of an audit or review of the financial statements that such action would render the issuer's financial statements materially misleading

[365] Ibid, 139
[366] Ibid, 144
[367] Ibid, 23

as to their completeness and correctness"[368]. The Act though does not describe penalties/ sanctions for this offence.

4.4.7.2 The National Bank of Kenya Case

An analysis of the enforcement actions taken by the CMA against NBK also depicts gaps in investigations, interventions, sanctions/penalties meted out by the Authority. For the NBK case, the CMA only held the Former Acting Financial CFO and the Former CEO liable for the misrepresentation of financial statements. Further, the Authority held the board only liable for failing to ensure NBK had in place and maintained an adequate system of internal controls to safeguard shareholders' investments and assets during the year 2014-2015. The Board had contravened Article 3.1.1(v) of the 2002 Corporate Governance Guidelines. Interestingly CMA held NBK's board in breach as a full board rather than individual liability for directors. It also only issued a regulatory Caution to the board members pursuant to Section 11(3) (cc) of the Capital Markets Act. This paled in comparison to the penalty imposed on the former CFO and CEO, who were issued with financial penalties of Kshs. 1 Million and Kshs 5 million respectively. The CMA had also slapped the Head of Treasury with a financial penalty of over Kshs 104 million. A question arose as to whether the Board was not liable, as they were responsible for approving financial statements. How did the CMA ascertain that the Board had satisfied itself that the financial statements presented a true and fair position of its financial operations? The Former NBK CEO was also quoted in documents filed in court as having denied the allegations of overstating NBK profits and siphoning about Sh1 billion from the bank's coffers. He argued that CMA's sanctions were part of a scheme to make him the sacrificial lamb in order to protect other members of the board. As discussed in the analysis of the Uchumi case above the Capital Markets Act at the time did not contain provisions/offences relating to the misrepresentation of financial statements. The CMA further failed to invoke the

[368] Ibid, 23

provisions of its Guidelines to impose liability also on NBK's Board of Directors for financial misstatement. In the absence of a provision relating to misstatement within CMA's Act, the Authority should have considered invoking the provisions of the Companies Act or liaise with relevant Authorities. It was not surprising that NBK's Former CFO and Former CEO challenged the Authority's Enforcement actions at the High Court.

Notably, also media reports showed that the CMA in its responding affidavits filed in court for the application filed by the Former CEO challenging its decisions had included other offences conducted by the former CEO that the CMA had not acted on[369]. The CMA disclosed that Sheikh and Company Advocates, a law firm owned by the former CEO's sister, provided legal services to the bank and NBK management gave it preferential treatment without the board's knowledge. The regulator also revealed that another firm known as Fozi Investments, owned by the former CEO's brother, was granted a loan under preferential treatment. "There was non-disclosure of conflict of interest by the applicant to the board with respect to companies related to the applicant's sister and brother who were doing business with the bank with preferential treatment," said the CMA in its response. The Capital Markets Act as of 2019 did not contain provisions relating to conflict of interest and declaration of such instances. However, the Code of Corporate Governance practises contains guidelines advising the Board to put in place a policy to manage conflict of interest[370]. Further "directors are not to take part in any discussions or decision making regarding any matter or transactions in which they have a conflict of interest[371]". The CMA could have invoked the provisions of the Code or opted to invoke the provisions of the Companies Act. Division 4 of the Companies Act contains provisions on the declaration of interest in existing transactions and arrangements. It imposes on directors a duty

[369] Ibid, 362
[370] Ibid, 139
[371] Ibid, 139

to declare interest in proposed or existing transaction or arrangement[372]. Directors who contravene the section commit an offence and are liable on conviction to a fine up to Kshs one million and disqualification for a period of up to 5 years.

4.4.8 Political patronage

The Capital Markets Act has bestowed upon the Cabinet Secretary Powers to appoint CMA officials and fix the Authority and tribunal's remuneration. The Cabinet Secretary also appoints the Capital Markets Tribunal members. Further, the CMA is accountable to the Cabinet Secretary; he/she has the power to call for returns, accounts and other information relating to CMA's activities[373]. This has led to undue influence by the Executive into CMA's operations. An illustration of executive's influence was displayed in 2009 when the then Finance Minister Uhuru Kenyatta threatened to disband CMA, NSE and the Central Depository and Settlement Corporation (CDSC's) Board of Directors[374]. The minister issued a notice to reconstitute the board. The minister went ahead and appointed two new directors but could not take any against the boards of the NSE and CDSC as they are private companies[375]. Appointment to their boards of directors is regulated by their instituting documents. Analysis of some of the case laws and documented evidence is as below:

4.4.8.1 Mumias case

A blogger published an article in 2017 alleging that the delays by the CMA to take action against former Mumias directors was as a result of the CMA's CEO being handed Kshs. 300 Million bribe in order not to publish the forensic report[376]. He further alleged that a former Governor named in the report was influencing the CEO and that the president was being complicit, as he had not demanded the release of the forensic report. The blogger claimed that

---

[372] Ibid, 144
[373] Ibid, 23
[374] Joseph Bonyo, 'Cheserem is new CMA Chair', THE STANDARD, Feb. 21, 2009 at 23
[375] Wachira Kang'aru, 'How Treasury forced NSE to do its bidding', DAILY NATION, May 2, 2009
[376] Cyprian Is Nyakundi, "Muthaura's Son Bribed With Kshs. 300 Million To Withhold Mumias Forensic Report By Kidero" 2017

the CEO cited on several occasions "instructions from above" as the reason why he could not release the forensic audit report[377]. As much as the above statements may be viewed as the bloggers' opinion, they could represent sentiments and questions raised by many Kenyans as to why the CMA took no enforcement action against Mumias directors up to October 2019. The CMA may be considered to have failed in its objective to protect investors as mandated by the Capital Markets Act, considering the company had been declared insolvent.

4.4.8.2 Britam case

The CMA remained tight-lipped as to whether it would seek to be enjoined in Britam's suit against its former employees as an interested party mandated to protect investors. A Business Daily editor published an article that in their view the inaction by the CMA was because Britam's chair, the former head of civil service was the father to CMA's CEO[378].

4.4.8.3 Barclays Bank of Kenya 2004 Corporate Bond

In 2004, the relevant regulatory authorities approved the issuance of Kshs 3 billion bond. Treasury at the time however delayed approving the issuance; a media article reported that this was due to pressure from influential stockbrokers who feared this would impede their business[379]. Treasury then approved the bond 3 years later[380].

4.4.9 Transparency/publication of enforcement actions

Section 25(A) of the Capital Markets Act requires "the Authority to publish in its annual report, the names of persons against whom action has been taken by the Authority"[381]. This is in line with one of the Authority's objectives of publishing findings of malfeasances by any person. However, the provision does not refer to the enforcement proceedings or action itself. Dr Gakeri critics this in his journal article as according to him this creates uncertainty as to whether

[377] Ibid
[378] Ibid, 306
[379] Washington Akumu, 'Barclays ready for first quarter launch of Kshs. 3 Billion bond', DAILY NATION, Jan. 6, 2004
[380] Jaindi Kisero, 'Why Barclays is yet to list Corporate Bond', DAILY NATION, Jan. 10, 2004 at 19.
[381] Ibid, 23

the Authority takes the correct and appropriate measures. In his view, “it *is unclear whether the Authority engages in collaboration, problem-solving, or employs lower-level sanctions such as reprimanding or warning letters before drastic regulatory action is taken*[382].” Dr Unfortunately also neither the Act nor its regulations mandate the Authority to maintain a register of disqualified persons. Publishing findings of malfeasance and maintaining a register of disqualified persons is indisputably a severe penalty because of its wide repercussions on the person’s reputation. The CMA could emulate the Australian Securities & Investments Commission (ASIC) which regularly publishes on their website enforcement outcomes within their jurisdiction. The reports include briefs of specific cases they have handled. In addition, the Authority could borrow from South Africa’s Financial Services Conduct Authority (FSCA), which publicizes on its website enforcement actions taken with the relating orders attached.

4.4.10 Accessing information and data

The CMA while conducting investigations, especially where there are allegations of manipulation of financial statements, insider trading and conflict of interest suspicions require access to suspects documents, electronic equipment, company registry documents and perhaps bank statements[383]. Transparency International advocates for “publicly accessible registries of beneficial ownership information in order to break the vicious cycle of impunity that hidden ownership allows”[384]. In a review of instances of grand corruption over the last 30 years, the World Bank found that for more than 70% of the cases, the ownership of the stolen funds had been disguised through the misuse of corporate entities, half of which were anonymous shell companies[385]. Kenyans have faced a number of challenges since the introduction of digitised

[382] Ibid, 106
[383] Transparency International, The Corruption Perception Index, (2017) https://www.transparency.org/news/feature/a_redefining_moment_for_africa , Accessed 8 August 2019
[384] Ibid
[385] Ibid

company registry records. Citizens experienced difficulties in accessing CR12 forms and some did not contain all the information that is available on the manual records i.e. registered charges/debentures, previous directors. There were also difficulties in linking companies to individuals' e citizen records. Directors who had formed shell companies and included proxies as directors orchestrated most of the frauds. The lack of access to such ownership details frustrates CMA's assets recovery efforts. As at 2019, data collected by financial institutions was also not availed to competent authorities such as the CMA and crosschecked by other economic regulators and the media, against the information available in public registers, in order to highlight discrepancies and improve accuracy"[386].

Remarkably however was the enlisting of East Africa Data handlers by the CMA to assist in an insider-trading probe at Kenol Kobil[387]. The Authority contracted the data firm to assist them to retrieve information that was key in the investigation. This included retrieving information from various gadgets including mobile phones and laptops of key individuals linked to the scandal[388]. Hopefully, the CMA will adhere to Kenya's Evidence Act rules and ensure proper chain of custody to avoid the accused persons challenging the administrative process in court. In 2017 while delivering a speech at a global conference, CMA's CEO Muthaura, acknowledged that the Authority has a key role in promoting an environment within which timely and reliable information is availed to inform investor decision making[389]. In addition, one of the major risks identified in CMA's Enterprise Risk Framework in 2017 was cybersecurity threats[390]. The authority, however, indicated it was continuously mitigating the risks to its ICT Infrastructure, Information Systems and data by preventive maintenance

---

[386] Ibid
[387] Capital Business, 'CMA enlists East Africa Data handlers in insider trading probe', 31 January 2019
[388] Ibid
[389] Paul Muthaura, Chief Executive, CMA Kenya 'Perspectives from the Capital Markets Authority Kenya' IFC PRACTICE GROUP MEETING ON CODES, STANDRADS, TRANSPARENCY AND DISCLOSURE 'A Governance Framework for Sustainability in Emerging Markets' Vienna, Austria, June 20 – 21, 2017
[390] Ibid

actions, implementing appropriate security measures, restricting access to its data centre and cybersecurity awareness workshops to its staff.

4.4.11 CMA's capacity/lack of resources

The CMA overtime has reported that they face challenges in carrying out their enforcement mandate due to limited resources.

4.4.11.1 Policy pronouncements

The CMA published in their 2018 Annual report that the following policy pronouncements in their view would hinder/limit their operations[391]. In 2018, the Kenya Revenue Authority Act was amended, section 15 mandated that all revenues collected by, or due and payable to, the Authority would be paid into the Consolidated Fund[392]. Further amendments were made to the Public Finance Management Regulations to allow KRA to collect the surplus from regulatory authorities and remit to the Consolidated Fund[393]. According to section 219 (2) of the regulations ", the regulator is required to remit ninety per centum of its surplus funds reported in the audited financial statements after the end of each financial year". In the Authority's view the below were potentially adverse implications due to the above policy requirements[394]:

- With reduced activity in the market, this would affect the revenue for the Authority that is highly dependent on trading activity at the NSE.
- Long term organizational planning would be frustrated in the absence of surplus funds being available to cushion against revenue volatility;
- Institutional capacity to attract and retain talent would be undermined in the event of the constraints on incentive and benefit schemes backed by surplus funds.

However, a relook at the Act shows that the Authority is only required to remit its surplus funds. The definition of surplus funds shows that these are "funds that remain after all

---

[391] Ibid
[392] The Kenya Revenue Authority Act, Revised Edition 2018
[393] The Public Finance Management Act, Legal Notice No. 34 2015
[394] Ibid, 230

liabilities, including taxes, insurance, and operating expenses, are paid. Having surplus funds means that a company has made a profit or perhaps that it has completed a project under budget"[395]. Therefore, with proper planning, the Authority would note their resourcing requirements at the onset of its financial year, include this in its budget and this would mitigate the adverse implications they foresee because of this policy pronouncement.

4.4.11.2 Staff capacity

In their 2018 report, the Authority admitted that they were facing the risk of suboptimal staff capacity[396]. They have also cited the challenge of attracting and retaining talent/qualified people as the Authority's salary and benefits packages are not at par with the private sector. The Auditor-General in his CMA audit report for the financial year 2016/2017 reported that the CMA's employees costs absorb 44% of the total income earned by the Authority[397]. These costs had increased from 22% in the previous year, further, the costs increased by 9% in the financial year 2017/18. Ideally then, there should be a rise in the number of cases handled and concluded by the Authority as a result of the recruitment of additional employees.

The Authority's revenue consists mostly of a collection of capitalisation, rights and new issue fees. In 2016/17 the Authority raised approximately Kshs 759 million and in 2017/18 Kshs 825 million from the above revenue streams[398]. There could be a consideration for the Authority to be allowed to deduct its enforcement costs prior to remitting penalties and fines to the investor compensation fund. The CMA in its annual report indicates all financial penalties and no contest settlements received by the Authority are payable to the investor compensation fund in accordance with Section 18(2) of the Capital Markets Act[399].

---

[395] The free dictionary by Farlex, https://financial-dictionary.thefreedictionary.com/surplus+funds, Accessed on 3 October 2019
[396] Ibid, 230
[397] The Auditor General – CMA report , Financial year 2016/17
[398] Ibid
[399] Ibid, 230

4.4.12 Lack of sufficient evidence of collaboration with other regulators

CMA over the years has been criticised on how it relates or works with other enforcement agencies. Notably, the CMA up to October 2019 had signed various Memorandums of Understanding with different regulators across the region including the DCI, FRC, CBK, IRA, RBA and SASRA. However, the CMA has not availed in its reports information as to how the above MOUs have assisted the Authority in conducting its enforcement mandate. Only in the 2018 report, is there a mention of CMA forwarding two former NBK officials cases to the DPP's office to conduct criminal investigations[400]. Also in 2015, they included in the enforcement actions table that they had forwarded one case to the DCI for further investigation; however, they did not disclose details of the matter[401]. Regarding the financial sector, CMA in their annual report published in 2016 admitted that the financial year 2015/16 was a "reality check" for the financial services sector, with the supervision function and the regulator's role for listed banks being put to test[402]. The Authority quoted three banks, namely Dubai Bank Kenya Limited, Imperial Bank Limited and Chase Bank Limited that had been placed under receivership following claims of maladministration and under-reporting of bad debts/loans from borrowers[403]. They admitted that this sparked hefty discussions on the apparent inefficiencies in market supervision amongst industry regulators. The Authority advocated for a more coordinated approach in the supervision of financial service players to ensure the public was not exposed to the risk of losing their hard-earned investments and incomes. This was for earnings made outside the banking system but adversely affected by the closure of commercial banks due to non-segregation from bank deposits[404].

[400] Ibid, 23
[401] The Capital Markets Authority, *Annual Report* 2015
[402] The Capital Markets Authority, *Annual report* 2016
[403] Ibid
[404] Ibid

In February 2019, the CMA announced that it was investigating several banks and bond dealers for engaging in illegal transactions[405]. The Authority, however, did not disclose whether they were working together with the CBK on this[406]. They cautioned that insider trading was bad news for the growth of the debt market that was still going through a crisis of confidence after Chase and Imperial banks collapsed with bondholders' funds. Legal practitioners said the CMA probe was an acid test in the regulator's bid to enhance accountability and safeguard the integrity of Kenya's vibrant securities market.

One of the practitioners Shitul Shah, a partner at Daly and Inamdar Advocates. expressed his concern that [407]"*insider trading is difficult to prove as the prosecution must prove beyond reasonable doubt that it took place and despite Kenya having robust laws against the practice, I am not aware of any successful prosecutions or convictions secured to-date in Kenya,"*. Kenya's first trials for insider trading involved former Uchumi general manager Bernard Mwangi Kibaru and former KCB chief executive Terry Davidson in 2010. The two individuals were acquitted[408]. Up to October 2019, therefore, there was no conclusive evidence as to how the CMA had collaborated with the CBK to protect investors and the public.

4.5 Conclusion

This Chapter has examined enforcement actions undertaken by the CMA in the past and analysed the CMA's enforcement statistics. This Chapter has also shed light that some of the challenges faced by the CMA are due to gaps in the Capital Markets Act's provisions. This study noted gaps in the provisions for offences and sanctions. Most of the reported fraud cases within this period involved insider trading, financial misstatements and conflict of interest. Unfortunately, up to 2018 Capital Markets Act did not contain provisions on misrepresentation of the financial statements. As at October 2019, conflict of interest provisions had not been

---

[405] Brian Ngugi, 'CMA probes banks over insider trading', Business DAILY 12 February 2019
[406] Ibid
[407] Ibid
[408] James Anyanzwa, 'Flaws in law expose East Africa's bourses to insider trading', the East African

included. As suggested by judges in court, the CMA could opt to rely on provisions in the Companies Act. The findings in this Chapter also illuminated that the Capital Markets Act has bestowed upon the Cabinet Secretary immense oversight powers. This Chapter has cited three case studies where Executive's overarching power has either led to delay in approvals, the institution of action or no action taken against directors involved in malfeasances. The proposed Financial Services Authority bill as of 2019 to some extent sought to amend this. With regards to collateral attacks instituted by directors aggrieved by CMA's decisions, this Chapter has demonstrated that judges have in some high profile cases quashed the Authority's decisions due to non-adherence to natural justice laws during proceedings. The cases, however, raise a concern regarding the CMA's powers, and overlapping functions, Other challenges faced by the CMA include a sub, optimal staff capacity and lack of resources

The Chapter also outlined that there is room for improvement regarding CMA's transparency as to the number of complaints they receive in a year and how these are handled. It could also publish enforcement action or publicize notices during enforcement proceedings. Further, the CMA has not availed in its reports information as to how MOUs with different regulators and prosecutorial bodies have aided the Authority in conducting its enforcement mandate. This Chapter also demonstrated cases where queries were raised on why the Authority did not detect fraud timely. Delays in instituting investigations have also been because of court rulings. An example is the Mumias case where CMA could not conclude their forensic audit until the Court heard and determined the petitions questioning the legality of the warrants.

This Chapter has also demonstrated the challenges faced by the CMA during inquiries and investigations due to the lack of ease of accessing data and information as Kenya's company registry is yet to be fully digitised. Most of the frauds were orchestrated by directors who formed shell companies and included proxies as directors. The lack of access to such ownership details has frustrated CMA's assets recovery efforts. The CMA also encounters the challenge faced by most regulators across the world, investigating and proving the offence of insider trading and market manipulation.

CHAPTER FIVE

SECURITIES REGULATOR ENFORCEMENT MECHANISMS IN AUSTRALIA, THE UK, THE USA AND SOUTH AFRICA: LESSONS FOR KENYA

The preceding Chapters outline the challenges faced during enforcement by the CMA in the past and currently. By drawing on evidence, this study has displayed that the challenges faced have been occasioned by ineffective provisions in the current CMA Act that provide the Executive with overarching powers, delays and inaction by the CMA and CMA's challenges in conducting proceedings and investigations.

This Chapter presents best practise corporate governance enforcement mechanisms that have worked in the UK, Australia, USA and South Africa. These countries albeit face similar challenges to Kenya due to the evolvement of fraud and financial crime mechanisms, but have more developed regulatory systems than Kenya does. Appreciably securities regulations reforms in the USA, UK and South Africa similar to Kenya were motivated largely by public companies scandals. Further, the USA, UK and South Africa have faced the challenge of negative public perception in the past due to unsuccessfully prosecuting serious fraud cases. Over time they have conducted law reforms, revised prosecutorial procedures and advocated for change in attitude towards commercial crimes. The practical lessons drawn from this section shall inform the conclusions and recommendations in the final chapter.

5.1 Australia

Australia is an unusual jurisdiction as the Australian Securities and Investments Commission (ASIC) is both a corporate and securities market regulator[409]. This is similar to Kenya's CMA structure as the Authority also play both roles. Selection of Australia in conducting this study is also justified by the fact that they are one of the leading countries in undertaking criminal

[409] Corporate Governance, 'An IOSCO perspective OECD-ADBI 8th Round Table Capital Market Reform in Asia ADB Institute', (Tokyo 11 & 12 October 2006)

actions and handing over custodial sentences to securities regulation offenders[410]. The Australian Government is committed to enhancing the securities regulator ASIC's power in enforcement. Corporate Governance in Australia involves both a mix of mandatory and voluntary requirements. Australia's Over the Counter (OTC) trade reporting framework enhanced its capability to conduct market surveillance and enforcement mechanisms[411]. This ensures that for companies that are not listed their securities trade is done electronically over-the-counter. In Australia, the ASIC is tasked with regulating and supervising listed entities and participants' compliance to the law while the Australian Securities Exchange (ASX) is responsible for the supervision of its market, ensuring compliance with its rules and forwarding suspected breaches of the law to relevant authorities[412]. The standard of proof in Australia is similar to Kenya's, for criminal proceedings, it is proof beyond reasonable doubt and civil proceedings is on a balance of probabilities. Australia's Corporations Act contains provisions on the duties of directors[413]. A director who fails to execute their duties may be guilty of a criminal offence with a penalty of A$ 200,000 or imprisonment for up to 5 years, or both. Where persons conceal books during investigations by ASIC they are liable to 200 penalty units or imprisonment for 5 years, or both. Section 997 and 998 of The Australia Corporation Law, also contains prohibitions that relate to Australia's securities markets manipulation[414][415]. Particularly, Australia's Corporation Act refers to the Criminal Code concerning offences. The CMA could borrow lessons from Australia by not only referencing the Capital Markets Act but

---

[410] Lev Bromberg, George Gilligan, Ian Ramsay, Enforcement of Financial Market Manipulation Laws: An International Comparison of Sanctions, (2016, University of Oxford)

[411] Council of Financial Regulators, 'Over the counter derivatives', <https://www.cfr.gov.au/financial-market-infrastructure/regulatory-framework/over-the-counter-derivatives.html>, accessed 10 May 2019

[412] South Africa Treasury, Reviewing the regulation of financial markets in South Africa policy document explaining the Financial Markets Bill, 2011, <http://www.treasury.gov.za/public%20comments/FMB/FMB%20policy%20document.pdf>, Accessed 15 August 2019

[413] Luke Hastings and Andrew EastWood, 'The Securities Litigation review', (Edition 4 Australia, July 2018)

[414] Investigating and prosecuting market manipulation; 'Technical Committee of the International Organization of Securities Commissions May 2000', Addendum to this IOSCO report was published in (April 2013)

[415] Ibid pg 31

also other Acts such as the Companies Act and Penal code. This would complement the Act, especially where it does not contain offences/penalties for conflict of interest and financial misstatements.

Commendably ASIC publicises information sheets on their website regarding enforcement undertakings, mechanisms, procedures and their obligations. ASIC has meted a number of high-profile civil penalty actions against directors and individual auditors for alleged breaches of duty in connection with corporate disclosures. Directors and auditors in the past have also been ordered to contribute to compensation for affected investors because of class actions or ASIC proceedings[416]. ASIC considers a set of factors when determining whether to investigate dependent on the circumstances of the case. This includes the extent of harm or loss, whether enforcement is cost-effective, availability of evidence and if admissible in court. In most cases, ASIC makes a decision as to whether it is more effective to deal with their concerns using other regulatory tools, such as engagement with stakeholders, surveillance, education, and policy advice, instead of enforcement action. In some instances, they may opt that they should take no further action. Where they believe that they have gathered ample evidence to support the assessment that a criminal offence has been committed, they refer the matter to the Commonwealth Director of Public Prosecutions (CDPP). However, ASIC is authorised to prosecute some minor regulatory offences on their own behalf. Another lesson Kenya can borrow is on the gravity of offences Vis a Vis sanctions/penalties administered against accused persons. In Australia, the criminal penalties for securities laws contraventions imposed by courts are severe, reflecting the gravity with which the courts look at such offences[417]. "For individuals, conviction of certain serious securities market offences carry a sentence of up to 10 years' imprisonment or a fine that is the greater of A$945,000 (4,500 penalty units); or three

[416] Ibid, 413
[417] Corporations Act 2001 (Cth) Schedule 3 item 310.

times the total value of the benefits obtained that are reasonably attributable to the commission of the offence, or both imprisonment and a fine[418]. Corporations that commit such offences can be fined the greater of A$9.45 million (45,000 penalty units); three times the total value of the benefits obtained that are reasonably attributable to the commission of the offence. Also if the court cannot determine the total value of the benefits for (b) above, 10 per cent of the corporation's annual turnover during the year preceding the offence commission". The ASIC commendably regularly publishes on their website enforcement outcomes within their jurisdiction.

Impressively, the number of enforcement outcomes are quite high under each category especially criminal custodial actions and the CMA could emulate the mechanism of imposing compensation and community benefit fund payments[419]. ASIC also publishes periodic six-monthly reports outlining their enforcement outcomes. The reports include briefs of specific cases they have handled. For instance, in their January to June 2018, they included the Malouf Group Enterprises and Jordan Malouf case[420]. "The Federal Court ordered credit repair business, Malouf Group Enterprises Pty Ltd (Malouf Group), to pay a pecuniary penalty of $400,000 and its sole director, Jordan Francis Malouf, to pay a penalty of $100,000[421]. The court found that Mr Malouf and the Malouf Group had breached the Australian Consumer Law by making false and misleading representations, they had made false representations on websites operated by the Group as to its standing as a credit repair company[422]". "In determining the penalties, the court took into account a court-enforceable undertaking in which the respondents would refund a total of USD 1.1 million to consumers who did not have any

[418] Ibid, 413
[419] ASIC enforcement outcomes, (January to June 2018 Report 585 August 2018)
[420] Ibid
[421] Ibid
[422] Ibid

negative listings on their credit files when they entered into contracts with Malouf Group during 2014–15. The respondents were also ordered to pay $100,000 towards ASIC's costs[423]".

5.2 The United Kingdom

Securities regulations reforms in the UK just like in Kenya were driven mainly by scandals, which later culminated, to the establishment of the Financial Conduct Authority. The United Kingdom's securities regulatory reform came with its own set of challenges. According to James J. Fisher Man, the regulatory framework reflects "political compromises in its attempt to serve conflicting purposes: the encouragement of domestic competition through deregulation of the financial services industry, the promotion of a vigorous financial services sector able to compete in a global trading environment, and the attainment of public policy objectives of safety, soundness, stability, and integrity[424]." FisherMan acknowledges that commercial fraud prosecution is difficult and necessitates huge resources[425]. In his view prior to 1991, "The UK's enforcement regime had been ineffective because of the lack of prosecutorial experience, political interference, attitude, the absence of full investigatory powers by certain enforcement agencies, overlapping and conflicting lines of authority and a shortage of trained personnel"[426]. This clearly reflects some of the challenges faced by CMA in Kenya. Fisherman also quoted Professor Levi, a commercial fraud researcher, "There is no political mileage in being a high-profile fraud buster in this country, the tradition of discretion and caution is too deeply engrained[427]". Commendably the UK continues to take drastic steps to address these challenges. The FCA uses a wide range of enforcement powers, criminal, civil, regulatory to protect consumers and to take action against firms and individuals that do not meet their

[423] Ibid
[424] Ibid, 165
[425] Ibid
[426] Ibid
[427] Ibid

standards[428]. the FCA is the key regulator set up in accordance with the Financial Services and Markets Act (FSMA) 2000[429]. The FCA has primary responsibility for "regulating the conduct of the UK's financial services industry and markets. It has the power to take disciplinary action against firms it has authorised to operate in that industry and individuals it has approved to perform certain licensed functions, specified by FSMA. The FCA can bring civil and, in some cases, criminal enforcement action against those whose conduct has breached its rules or statutory requirements. The FCA is expected to make and maintain effective arrangements for consulting various panels i.e. the practitioners' panel and consumers' panel on the extent to which its general policies and practices are consistent with its general duties"[430]. Another body, the Prudential Regulation Authority (PRA) is tasked with regulation and supervision of banks, building societies, credit unions, insurers and designated investment firms. UK's Serious Fraud Office (SFO) is a law enforcement agency that has powers to both investigate and prosecute cases of top-end financial crime[431]. It has powers of compulsion, for suspects to answers questions and/or produce documents. It shares information with regulatory, law enforcement and intelligence communities in the UK and abroad.

A lesson Kenya can emulate from the UK is on sanctions. For example in 2018, the CMA fined a businessperson Kshs 50,000 for committing the offence of market manipulation[432]. A study carried out for a ten-year period up to December 2015 regarding market manipulation shows that a typical offender in the UK received a punitive pecuniary sanction, and in some cases also a ban[433]. In the UK, the size of sanctions tended to be considerably higher than in the other

---

[428] Financial Conduct Authority Australia website, https://www.fca.org.uk/about/enforcement Accessed 9 August 2019

[429] The Financial Services and Markets Act 2000

[430] Ibid

[431] J Miles & Co. ,'Regulatory Compliance: Emerging Fraud Risks & Enforcement in Capital Markets', 2016

[432] Ibid, 230

[433] Enforcement of Financial Market Manipulation Laws: An International Comparison of Sanctions | Oxford Law Faculty https://www.law.ox.ac.uk/business-law-blog/blog/2016/11/enforcement-financial-market-manipulation-laws-international[05/01/2019 10:50:21]

jurisdictions both in absolute terms and when compared to the size of the illegal profit (the median punitive pecuniary sanction was more than three times the size of the illegal profit). Interestingly, David Harris in an article noted that in the past UK regulatory enforcement actions paled by comparison to US cases[434]. “The UK Financial Services Authority’s record fine at the time was £5.6 million, imposed on the Royal Bank of Scotland Group in 2010, whereas the high watermark in the US was OFAC’s $9.8 billion settlement with BNP Paribas in 2014[435]. Harris attributed this to the difference in the powers of the regulators when it came to the enforcement of sanctions. Under the UK regime, the Treasury had no power to enter into settlements with UK companies identified as having breached UK sanctions legislation. By contrast, OFAC could impose civil penalties, as well as negotiate out-of-court settlements in relation to sanctions breaches[436]”. This displays the importance of broadening the focus of enforcement to also negotiating out of court settlements. The SFO and FCA have since made efforts to improve their sanctions regime. In 2018, two former directors of a collapsed oil company Afren were sentenced to up to six years in prison after the court convicted them of fraud and money laundering over a $300 million business deal[437]. The directors created shell companies and agreed to a side deal with one of the companies Nigerian oil partners from which they would benefit, without the knowledge of Afren’s board. Lisa Osofsky, the director of the SFO, said in her statement, "The significant sentences reflect the seriousness of this fraud. Shahenshah and Ullah violated their duties and their employees, the board of directors and shareholders paid the price"[438]. In August 2015 a jury convicted Tom Hayes a former

[434] David Harris, 'A tougher stance on sanctions enforcement in the UK?', (Norton Rose Fulbright, Published December 2015)
[435] Ibid
[436] Ibid
[437] Noor Zainab Hussain , ‘SFO says ex-Afren executives sentenced for fraud, money-laundering’, (Reuters) 29 October 2018
[438] Ibid

derivatives trader at UBS and Citigroup on eight counts of conspiracy to defraud and sentenced him to a total of 14 years in prison[439].

The FSMA contains provisions for various offences i.e. making misleading statements and practises; provision of false or misleading information regarding fair-trading, body corporates liability for offences committed by their officers among others[440]. A practise worth borrowing by Kenya's CMA is on transparency and publicly availed information. The FCA operates in a very transparent manner; information about how they operate is available in their publicised "Decision procedure and penalties manual (DEPP) and Enforcement guide, including information on their approach to decision-making and use of their regulatory, civil and criminal powers"[441]. Their guide gives an overview of their enforcement powers, their typical procedure for disciplinary cases, information on mediation and settlement[442]. They further publish enforcement notices as per their publication scheme under the Freedom of Information Act 2000 to inform the public, maximise the deterrent effect of enforcement action and ensure their decisions are transparent[443]. The FCA once they issue a statutory notice, publish certain information about the enforcement action. This range from "warning notices issued when they propose to take action, decision notices issued when they decide to take action, final notices issued when they take action, supervisory notices, requirement notices, cancellation notices and other publications"[444]. The FCA and PRA also published rules on whistleblowing and appointed a dedicated team to handle whistleblowing disclosures. In 2014/2015, the FCA processed over 1,000 intelligence cases containing sanitised information from whistleblowers[445]. In over 160 cases, information was shared with external stakeholders

439 Ibid
440 The Financial Services and Markets Act 2000, http://www.legislation.gov.uk/ukpga/2000/8/section/1
441 The Financial Conduct Authority website, https://www.fca.org.uk/about/enforcement, Accessed 23 August 2019
442 Ibid
443 Ibid
444 Ibid
445 Ibid

including National Crime Agency, police forces, Solicitors Regulatory Authority, other UK and overseas regulators. The number of cases has more than trebled over the last five years.

During investigations, information and documents obtained from persons under investigation are uploaded on to regulators' internal evidence management systems[446]. To make this quicker and more efficient, the UK FCA has "developed a standard template and standard data formats, which they use in requesting documents and information; the UK FCA also liaises closely with entities under investigation to ensure that they provide data in the right format and to agree to workarounds where this is not possible". SFO and FCA have also demonstrated that cooperation with entities under investigation is key by issuing deferred prosecution agreements where the entities reported themselves, appointed external advisors to conduct assessments and remediated the wrongs[447]. Similar to Kenya, under the Financial Services Act 2012, the FCA is obligated to pay "the Exchequer all financial penalties received, other than certain enforcement costs incurred in generating these penalties in the same year[448]". They publish yearly all fines received on their website, in the year 2018 alone they collected a total of £60,467,212 from firms and individuals and as at August 2019 fines amount was £350,630,287[449] . The FCA lists the firms and individuals names and their corresponding fine amounts on their website. This helps in keeping the FCA accountable to the public; it is a good deterrence mechanism and is a government revenue-generating initiative.

In September 2017, in a speech delivered at a Compliance and Legal Conference, the Director of Enforcement and Market Oversight at the FCA, Mr Mark Steward provided key highlights regarding enforcement in the UK[450]. He stated that there was an approximate 75% increase in

---

[446] OICU IOSCO, *Credible deterrence in the enforcement of Securities regulation,* June 2015
[447] Ibid
[448] Ibid
[449] The Financial Conduct Authority website, https://www.fca.org.uk/news/news-stories/2019-fines, Accessed 23 August 2019
[450] Speech by Mark Steward, Director of Enforcement and Market Oversight at the FCA, *A better view*, (delivered at the AFME European Compliance and Legal Conference 2017)

the number of FCA investigations in 2017 because of three factors. “More investigations into capital market disclosure issues, the extension in scope of the reporting regime for firms brought about by Market Abuse Regime (MAR) giving the FCA a richer and more varied market picture, leading to more cases being selected for investigation and the FCA’s change in approach when deciding whether to open an investigation”. In his view the starting point of investigations was where FCA suspect serious misconduct may have occurred, the operative word to him here is serious i.e. “not trivial, technical or officious which implies also a rational and objective basis to investigate, where the circumstances give rise to real harm or risk of real harm caused by suspected misconduct[451].” He also added that in his opinion, the increase in the number of investigations did not necessarily translate to the requirement for the FCA to recruit additional staff. To him, it was a challenge to the FCA for them to become more efficient, strategic, focused, especially in conducting investigations more quickly and expediently. This is a key lesson that CMA can also learn in improving their approach to investigations. Mr Mark further pointed out that to improve their data collection capabilities for the capture of transaction reporting data, they had developed FCA’s capacity to collect and aggregate order book data from all venues using a cloud-based platform. This then would enable them to make assessments, virtually in real-time; understand the markets they supervise with much greater precision; reduce false positives and data requests to firms. It would also enable them to detect serious misconduct early enough, especially suspected manipulation which in his view was far more challenging to detect than insider dealing.

5.3 The United States of America

The selection of the USA in this study is justified, as it was the first jurisdiction to adopt an Act strictly for protecting investors. This was aimed at improving the accuracy and reliability

[451] Ibid

of corporate disclosures made pursuant to the securities laws[452]. USA corporate governance legal reforms have also largely been motivated by fraud scandals. In response to this, a number of bodies were formed to handle fraud matters, The Securities Exchange Commission has oversight over the Public Company Accounting Oversight Board that mostly handles corporate and audit financial reporting and disclosure matters. The selection of the USA is also justified as it is one of the leading countries in undertaking criminal actions and handing over custodial sentences to securities regulation offenders. The US Department of Justice has a fraud section, which handles economic crime matters. Within it are subsections that handle different fraud offence matters i.e. Securities & Financial Fraud Unit, Health Care fraud unit and Foreign Corrupt Practises Act unit[453]. This study acknowledges that the USA has a more advanced economy and Kenya may not have ample resources to implement or form multiple administrative or Justice Departments. However, there are key lessons that can be borrowed to improve our existing Capital Markets Act, Accountants Act and enforcement against fraudulent directors within listed companies, their auditors and their advocates.

The United States of America's congress in 2002 ratified the Sarbanes-Oxley Act (SOX), named after its sponsors Senator Paul Sarbanes and Representative Michael G. Oxley[454]. The Act is referred to as the "Public Company Accounting Reform and Investor Protection Act" (in the senate) and "Corporate and Auditing Accountability, Responsibility, and Transparency Act" (in the house)[455]. The Act established a strict protocol for internal controls that affect financial reporting and securities within publicly traded companies'[456].Introduction of the Act was motivated by fraud scandals within corporate giants such as Enron, World Com, Adelphia

[452] Sarbanes-Oxley Act of 2002 [Public Law 107–204, Approved July 30, 2002, 116 Stat. 745] [As Amended Through P.L. 112–106, Enacted April 05, 2012]
[453] The United States Department of Justice, Available at https://www.justice.gov/criminal-fraud, Accessed on 1 November 2019
[454] What is SOX Compliance, 28 May 2019, Available at https://www.dnsstuff.com/what-is-sox-compliance ,Accessed on 1 November 2019
[455] Ibid
[456] Ibid

and Tyco International. For instance, the crimes that Enron's officers committed were far-reaching and had been ongoing[457]. Misrepresentations led to overwhelming losses to shareholders and theft of corporate funds by its directors[458]. Section 3 of the Act mandates the Securities Exchange Commission (SEC) to create rules and regulations as necessary in the public interest or for the protection of investor interests[459]. With regards to enforcement, a violation of the Act is to be treated as a violation of the Securities Exchange Commission Act and persons are subject to the same penalties[460].

The Act established the Public Company Accounting Oversight Board, (PCAOB) which oversees "the audit of companies that are subject to the securities laws, and related matters, in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports[461]". Duties of the board include "registering public accounting firms, adoption of auditing, quality controls, ethics and independence standards, conducting inspections, investigations into public accounting firms and imposing sanctions"[462]. This is a lesson worth borrowing in Kenya as the only Insititute of Certified Professional Accountants Kenya (ICPAK) a self- regulatory professional body has the mandate to promote the public interest by monitoring firms registered under it and regulating the accountancy profession. The Sarbanes Oxley Act also mandates audit firms to prepare and maintain working papers for a period of not less than 7 years. Also quality assurance requirements, providing a second partner concurring review and approval of audit reports[463]. The audit company is also expected to "monitor professional ethics and

---

[457] Rosemary Peavler, 'The Enron Scandal That Prompted the Sarbanes-Oxley Act, Business FINANCE Accounting basics, https://www.thebalancesmb.com/sarbanes-oxley-act-and-the-enron-scandal-393497, Accessed on 1 November 2019
[458] Ibid
[459] Ibid 452
[460] Ibid 452
[461] Ibid 452
[462] Ibid 452
[463] Ibid 452

independence from issuers, brokers, and dealers on behalf of which the firm issues audit reports[464]". Section 104 authorises the board to conduct ongoing programs of inspections to "assess the degree of compliance of each registered public accounting firm, in connection with its performance of audits and issuance of audit reports"[465]. The Board also inspects audit reports for brokers and dealers. Section 105 provides the Board with the mandate to conduct investigations and disciplinary proceedings for accounting firms. Where an audit firm does not cooperate with investigations, it may bar such persons or suspend them from the firm[466]. For confidential cases are not heard publicly. The board is authorised to sanction audit firms wherein its act or practise it has acted in violation of the law relating to the preparation, issuance of audit reports and the obligations and liabilities of accountants[467]. The penalties and sanctions range from temporary or permanent suspension, limitation on activities of the firm, civil penalties of up to 15 million dollars, and required additional professional training. The Board also may impose sanctions to supervisory persons of an audit firm where it determines that they failed to supervise their teams during audits[468].

Section 106 of the Act holds foreign audit firms auditing US registered firms to the same standards. stipulates that "a foreign accounting firm which prepares or furnishes an audit report with respect to any issuer, broker, or dealer, subject to the Act and the rules of the Board and the Commission, is also liable to the same extent as a public accounting firm that operates under the laws of the United States or any State"[469]. The SEC has oversight of the Public Accounting Company Oversight Board. The Board is required to file a notice of any final sanction on a registered public accounting firm with the commission[470]. The Securities

[464] Ibid 452
[465] Ibid 452
[466] Ibid 452
[467] Ibid 452
[468] Ibid 452
[469] Ibid 452
[470] Ibid 452

Exchange Act section 4 E provides a deadline of 180 days for completing enforcement investigations, compliance examinations and inspections[471]. SEC staff are expected after issuing a written notification to any person, to either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action[472].

The Board's sources of funds include recoverable budget expenses and funds generated from the collection of monetary penalties[473]. Title II speaks to auditor independence, the Board may from time to time exempt auditors and allow them to conduct services outside the scope as long as it's in line with the protection of investors and public interest[474]. The Act also mentions about auditors mandatory rotation. Title III advocates for corporate responsibility as it pertains to the "failure of corporate officers to certify financial reports". False information reported accidentally is punishable by a fine up to US dollars 1 million or a prison sentence up to 10 years in length. When misinformation is reported "willfully," officers face up to 20 years in prison and a fine up to US dollars 5 million[475]. Principal Executive officers of companies are expected to certify that quarterly and annual reports have been reviewed and that they "do not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading". The signing officers are responsible for establishing and maintaining controls[476]. The signing officers are expected to disclose to the auditor and board audit committee significant deficiencies in internal controls and any fraud. This is where it is material and involves management or other employees who have a significant role in the issuer's

[471] Securities Exchange Act of 1934 [As Amended Through P.L. 115-141, Enacted March 23, 2018]
[472] Ibid 452
[473] Ibid 452
[474] Ibid 452
[475] Ibid 452
[476] Ibid 452

internal controls[477]. Interestingly section 304 contains fines/penalties for financial restatements. The CEO and CFO of the issuer are required to reimburse the issuer for any bonus, incentive or equity-based compensation he/she received from the company for the preceding 12 months. “This is for cases where an issuer is asked to prepare an accounting restatement due to material noncompliance, as a result of misconduct, with any financial reporting requirement under the securities laws”[478]. In addition, any profits realized from the sale of securities of the issuer during that 12-month period. The Act also prohibits insider trading during pension fund blackout periods. If a director or executive officer acts in violation, such profits are recoverable.

Title V Conflicts of Interest - consists of measures designed to help restore investor confidence in the reporting of securities analysts[479]. It defines the codes of conduct for analysts and requires disclosure of knowable conflicts of interest[480]. Section 307 lays out rules of responsibility for professional attorneys. Attorneys are expected to “report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof)”. Any funds collected from civil penalties for violation of the SOX laws is for the relief of victims and is to be remitted to the disgorgement fund. Title IX refers to white-collar crime penalty enhancements. The US Sentencing Commission is expected to ensure that “the sentencing guidelines and policy statements reflect the serious nature of the offences and the penalties set forth in the Act[481]” Title XI on corporate fraud accountability is commonly referred to as the Corporate Fraud Accountability Act of 2002[482].

---

[477] Ibid 452
[478] Ibid 452
[479] Sarbanes Oxley Act, Available at https://en.wikipedia.org/wiki/Sarbanes%E2%80%93Oxley_Act, accessed on 1 November 2019
[480] Ibid 452
[481] Ibid 452
[482] Ibid 452

It contains harsh penalties for fraud, one is liable for a conviction for a period of up to 20 years and a maximum fine of USD 25 million dollars[483].

The PCAOB publishes the number of enforcement actions on its website. As of 30 September 2019, 14 firms had been sanctioned, 16 individuals sanctioned, seven orders involving the six largest global accounting firms and four firms' registrations were revoked[484]. They also publish notes of proceedings and enforcement actions undertaken. In April 2019, PCAOB took enforcement against a 'big 4' audit firm. The Board imposed a "civil money penalty in the amount of US $250,000, requiring the firm to undertake and certify the completion of their system of quality control. In addition, it imposed a civil money penalty in the amount of US $10,000 upon the audit partner, and limited his role in the firm's system of quality control for a period of two (2) years from the date of the Order"[485]. A key lesson to Kenya's judiciary system is on criminal prosecution and convictions for securities fraud-related offences. It is important to have severe penalties for securities offences for instance in the US Enron case in 2006 Skilling the CEO of the company was jailed for 24 years in a maximum-security prison for insider trading and securities fraud. The US government also confiscated assets worth 40 million dollars from the CEO. For the Madoff Ponzi scheme where clients lost over USD 65 billion, *U.S. v. Madoff, 08-MAG-02735*, the chairman pleaded guilty to 11 federal securities fraud-related charges in 2008 and was sentenced to 150 years in prison and was ordered to pay US dollars 170 billion in restitution. SEC was however criticised for not detecting the fraud early enough despite there being red flags since 1999. The United States criminal justice fraud section also plays an essential role in the Department's fight against sophisticated economic

483 Corporate Accountability: Sarbanes-Oxley Act of 2002: (P.L. 107-204) August 27, 2002
484 Public Company Accounting Oversight Board website, https://pcaobus.org/enforcement/Pages/default.aspx Accessed on 1 November 2019
485 ORDER MAKING FINDINGS AND IMPOSING SANCTIONS In the Matter of KPMG Audit Limited and Damion J. Henderson, CA, Respondents, 9 April 2019, https://pcaobus.org/Enforcement/Decisions/Documents/105-2019-008-KPMG-Bermuda.pdf Accessed on 1 November 2019

crime. Its securities and financial fraud unit consist of roughly 45 prosecutors who prosecute complex securities, commodities, and other financial fraud cases[486]. In 2018, alone the fraud unit had registered the following statistics; it had over 60 individuals charged, about 30 individuals pleaded guilty, 12 individuals convicted at trial, 3 corporate criminal enforcement actions resulting in over USD 300 million. Criminal fines, penalties, forfeiture, and restitution and total enforcement action amount payable of over USD 800 million and one company agreed to disgorge illegal profits totalling more than USD 12 million[487]. The CMA and the judiciary could emulate the unit's practise of publishing the enforcement statistics and actions on its website. In 2018, for instance, it convicted the former CFO of a bank, Bankrate Inc in a complex accounting and securities fraud scheme that led to shareholders losing more than US dollars 25 million[488]. He also pleaded guilty to having overseen a scheme to manipulate earnings through supposed "cookie jar" or "cushion" accounting, "millions of dollars in unsupported expense accruals were purposefully left on the banks' books and then selectively reversed in later quarters to boost earnings. He also admitted that he made materially false statements to the bank's independent auditors to conceal the improper accounting entries, and he caused the banks' financial statements filed with the SEC to be materially misstated"[489]. He was sentenced to 10 years in prison and was ordered to pay approximately US dollars 21 million in restitution[490].

5.4 South Africa

The World Economic Forum Global Competitiveness report of 2011, ranked South Africa first out of 142 countries for its regulation of securities exchanges[491]. This was the second successive

[486] The United States Department of Justice, Fraud section year in review 2018, http://www.justice.gov/criminal-fraud, Accessed on 1 November 2019
[487] Ibid
[488] The United States Department of Justice, http://www.justice.gov/criminal-fraud/securities-and-financial-fraud-unit, Accessed on 1 November 2019
[489] Ibid
[490] Ibid
[491] World Economic Forum, *Global Competitiveness Report* (2011-2012)

year that South Africa had achieved this ranking. They, unfortunately, dropped to position 84 out of 190 as at 2019[492]. The report ranked Kenya as position 68 in 2011 and had since improved to position 56 as at 2019. However, South Africa remains one of the most competitive countries in sub-Saharan Africa, despite their current economic setbacks, political uncertainties and rise of unemployment. Selection of South Africa in conducting this study is justified as it grapples with the same set of challenges as Kenya and the two countries are within Africa. The revised and recently introduced the FSCA Act in South Africa resembles the proposed Kenya FSA bill provisions. Kenya could use this to its advantage in observing the successes and challenges that South Africa will face during implementation in order to remedy/revise Kenya's Bill provisions. The Johannesburg Stock Exchange (JSE) regulates Securities Markets in South Africa[493]. The JSE as of 2019 was ranked the 19th largest stock exchange in the world by market capitalisation and the largest exchange in the African continent. In South Africa, the Financial Services Board (FSB) was the financial regulatory agency responsible for the non-banking financial services industry from 1990 to 2018[494]. It was "an independent body, which had a mandate to supervise and regulate the non-bank financial services industry in the public interest. This included the regulation of the JSE. The Financial Sector Regulation Act split the FSB into prudential and market conduct regulators as of 1 April 2018"[495].

On 21 August 2017, the Financial Sector Regulation Act (FSR Act) was signed into law[496]. Similar to Kenya's proposed FSA bill, the Act creates a system of financial regulation by establishing the Prudential Authority (PA) and the Financial Sector Conduct Authority (FSCA) and confers powers on these entities. It also established the Financial Stability Oversight Committee, to regulate and supervise financial product providers and financial services

[492] World Economic Forum, *Global Competitiveness Report* (2017-2018)
[493] Johannesburg Stock Exchange, https://www.jse.co.za/about/history-company-overview Retrieved 6 April 2019.
[494] FANews. 'FSB has changed to the FSCA', fanews.co.za. 2018-04-05. Retrieved 6 April 2019
[495] Ibid
[496] The Financial Sector Regulation Act 9 of 2017 South Africa

providers[497]. It also provided for coordination and collaboration among the "Reserve Bank, the PA, the FSCA, the National Credit Regulator, the Financial Intelligence Centre and other organs of state in relation to financial stability and the functions of these entities"[498]. Further, it established the Financial System Council of Regulators and the Financial Sector Inter-Ministerial Council for making regulatory instruments[499]. It also established the Financial Services Tribunal as an independent tribunal and confers on it powers to reconsider decisions by financial sector regulators[500]. The Prudential Authority similar to the proposed Kenya Financial Market Authority is responsible for "regulating banks, insurers, cooperative financial institutions, financial conglomerates and certain market infrastructures"[501]. FSCA has the mandate of market conduct regulator of financial institutions that provide financial products, financial services, and financial institutions that are licensed in terms of financial sector law[502]. In 2018, the PA assumed the FSB's responsibilities for non-bank financial institution prudential supervision and the FSCA assumed FSB's responsibilities for market conduct. The FSCA is responsible for investigating potential market abuse and instituting enforcement action where appropriate[503]. The Minister of Finance appoints the FSCA's Executive Committee and it is accountable to him for the effective implementation and enforcement of Securities Regulation[504]. The FSCA's Executive Committee delegates supervision to the Commissioner, who then delegates certain aspects of this authority to the (Self-Regulatory Authorities (SROs) namely the Johannesburg South Africa Exchange (JSE) and Strate[505]. Strate is South Africa's

---

[497] Ibid
[498] Ibid
[499] Ibid
[500] Ibid
[501] *Cohen, Tim (5 April 2019). "Public Protector tears into Financial Services Board and former boss Dube Tshidi, vindicating EFF's Julius Malema". msn.com. Daily Maverick. Retrieved 6 April 2019*
[502] Ibid
[503] Johannesburg Securities Exchange website, https://www.jse.co.za/services/market-regulation, Accessed 6 April 2019
[504] Ibid
[505] Ibid, 412

Central Securities Depository[506]. Offences under the South Africa Financial Market's Act include Insider trading; prohibited trade practises; false, misleading or deceptive statements, promises and forecasts.[507] Sanctions that can be imposed include administrative sanctions, attachment of assets or evidence to prevent their concealment, removal, dissipation or destruction[508].

Interestingly, South Africa has an enforcement committee established in accordance with section 298 of the Financial Sector Regulation Act[509]. The Committee is responsible for enforcing compliance with laws regulating financial institutions[510]. The committee is involved in quantifying damages payable to claimants especially in relation to insider information offences[511]. Kenya's CMA could borrow lessons on transparency and availing enforcement information to the public. The FSCA regularly publishes information on the status of the market abuse investigations that it is conducting, inclusive of matters referred by the JSE Market Regulation division. In 2018, the JSE referred a number of potential market abuse matters to the FSCA, 12 Insider trading cases and 13 market manipulation cases. The FSCA further publicizes on its website enforcement actions taken with the relating orders attached[512]. As at May 2019, it had published 222 enforcement actions undertaken for the period 2006 to May 2019.

However, South Africa has also faced its set of challenges in the past. During the 2008 joint World Bank-IMF FSAP mission, as much as they found that the country's securities services regulatory framework was modern and generally effective, they identified a need to strengthen supervision of conglomerates. This was in order to focus on risks that span more than one sector

[506] South Africa Strate website, https://www.strate.co.za/about/our-company, Accessed 7 April 2019
[507] South Africa, The Financial Markets Act, 2012
[508] Ibid
[509] South Africa, The Financial Services Regulation Act 9 of 2017
[510] Ibid
[511] Ibid
[512] Financial Services Conduct Authority website, https://www.fsca.co.za/Enforcement-Matters/Pages/Enforcement-Actions.aspx, Accessed 7 April 2019

and to further promote cooperation, consistency, and effectiveness among regulators[513]. Other challenges JSE face include; issues of enforcement of securities rules, conflict of interest, and adequacy of resources[514]. South Africa's securities regulator similar to CMA has grappled with political interference due to the minister's overarching powers to appoint members of the committee and accountability to him. In a public report, Public Protector Busisiwe Mkhwebane criticised the administration of the Financial Services Board, finding the conduct of executives of the crucial body 'improper' and that they had misled the finance minister, potentially opening a new front in the more widespread allegations of government maladministration of critical institutions[515]. Some of the governing principles, that have guided the financial sector regulatory reform in South Africa relate to the independence of regulators and cohesion by multiple sets of regulators[516]. As a result, South Africa's Financial Markets Act reinforces the FSB's (formerly the FSCA) regulatory independence and powers for example by allowing for its adopting of "subordinate operationally focussed regulation" without Minister Approval[517]. A Council of Financial Regulators was also set up to "improve coordination between financial sector regulators on issues such as enforcement, market conduct and general regulation" [518]. Kenya in addition to the introduction of the FSA bill could opt to emulate South Africa and create a council of financial regulators with clear principles on how it would operate.

Remarkably, the South African FSCA has begun making great strides as evidenced in the much publicised Steinhoff International fraud saga[519]. "In December 2017, Steinhoff's shares

---

[513] Reviewing the regulation of financial markets in South Africa policy document explaining the Financial Markets Bill, 2011
[514] Ibid
[515] Tim Cohen, 'Public Protector tears into Financial Services Board and former boss Dube Tshidi, vindicating EFF's Julius Malema', https://www.msn.com/en-za/news/national/public-protector-tears-into-financial-services-board-and-former-boss-dube-tshidi-vindicating-effs-julius-malema/ar-BBVAM0n?ocid=spartanntp Accessed 7 April 2019
[516] Ibid, 494
[517] Ibid, 494
[518] Ibid, 513
[519] Cameron Dunstan-Smith and Adam Schnider, 'South Africa: FSCA Levies Record R1.5 Billion Fine Against Steinhoff International Holdings N.V. For False, Misleading And Deceptive Statements To The Market', modaq, Last updated 25 September 2019, Accessed 3 October 2019

plunged following the sudden resignation of its CEO, Markus Jooste, and allegations of accounting irregularities[520]. “Following an internal investigation conducted by an independent expert, it was discovered that a range of "fictitious and/or irregular" transactions "substantially" inflated the profits and assets of the group by over €6.5 billion between 2009 and 2017. These "fictitious and/or irregular transactions were entered into with parties made to appear to be, third party entities independent of the Steinhoff group and its executives" but which the investigation found appeared instead to be "closely related to" those executives who were issuing the instructions to perform these transactions[521]. On 12 September 2019, the FSCA announced the conclusion of its investigations[522]. The FSCA found that Steinhoff provided false, misleading statements to the market and accordingly breached the provisions of the Financial Markets Act[523]. As a consequence of this breach, the FSCA fined Steinhoff R1.5 billion but deducted a portion of the fine due to the precarious financial position of the Steinhoff group, resulting in Steinhoff paying a penalty of R53 million. This was the largest fine ever to be levied by the FSCA[524].

5.4 The views of a former securities regulatory commissioner

The researcher collected the following lessons and recommendations from a former ASIC Regulatory Commissioner who has also interacted with the FCA in the UK and the CMA Kenya in his capacity as a Financial Crime and Forensic Investigation director within KPMG. This study classifies his observations and recommendations within the following themes:

5.4.1 Prioritisation

The respondent identified this as a major challenge faced by regulators across the varied jurisdictions. According to him, no corporate regulator has sufficient resources to investigate

520 Ibid
521 Ibid
522 Ibid
523 Ibid
524 Ibid

all complaints and allegations that warrant investigation. This is a question of funding. Therefore, corporate regulators including the CMA need to have a clear and transparent policy on how they will prioritise matters they will investigate. The former regulator explained that in his view the public understands that there are limited resources to investigate corporate wrongdoings, but want to be sure that the regulator investigates the most egregious cases. This is where a proper complaints assessment process is vital. This assessment will take into account a range of factors, including the age of the matter, the likelihood of proving an offence (including the availability of evidence), amounts involved and public impact.

5.4.2 Focused inquiries/investigations

The respondent stated that what he has observed in the past is a tendency by regulators to initiate too many investigations rather than maintain a focus on the most important investigations. He cautions that by initiating too many investigations, enforcement agencies run the risk of lengthy delays in completing investigations (because of resource constraints) or never actually completing an investigation.

5.4.3 Prompt enforcement action

The former regulator remarked that delays in instituting enforcement proceedings can arise from spreading resources too thinly as described above or poor project management could occasion these. He recommends proper planning and a focus on deadlines, as this will encourage enforcement agencies to complete investigations in a timely manner. According to him, lessons that the CMA can borrow include some agencies set benchmarks (for example, investigations must be completed within six months). In setting targets, the regulators acknowledge that there will be some instances where it is necessary for an investigation to take more than six months (for example due to complexity).

5.4.4 Collateral attacks

One of the challenges faced by enforcement agencies in the former regulatory commissioner's view is how to respond to collateral attacks against the investigation process and/or use of coercive powers. His assertion is that administrative law challenges against the investigation process are a part of life. His view is that over time (and presuming that the CMA is able to properly defend these collateral attacks) there will be a drop off in these attacks. He, however, notes that individuals will not stop instituting an action to frustrate investigations. He recommends that sufficient resources should be set aside to respond to collateral attacks. Otherwise, there is a risk that investigation resources will be diverted from completing investigations. He provides caution that investigators need to be careful in exercising coercive powers and be conscious of the requirements of natural justice (including procedural fairness).

5.4.5 Skillset

The respondent advises that corporate enforcement agencies need a blend of skill sets. He decries that in the past, there has been a tendency to rely on police officers. He observes that indeed there is a need for police officers (example for executing coercive powers and conducting interviews). However, in addition to this, he states that what is also required is a blend, lawyers (so those investigations can be focused on obtaining admissible evidence and avoiding/responding to collateral attacks) and forensic accountants who are able to understand and investigate complex financial transactions.

5.5 Conclusion

As outlined in this chapter, the provisions in the UK FCA Act, USA SEC Act, Sarbanes Oxley Act, Australia's ASIC Act and South Africa's FCSA Act reflect OECD's Corporate Governance best practises. Notably the revised and recently introduced FSCA Act in South Africa resembles the proposed Kenya FSA bill provisions. Kenya should, therefore, utilise this to its advantage in observing the successes and challenges that South Africa will face during implementation in order to remedy/revise our Bill's provisions. The UK, USA and Australia

Corporate Governance framework involve a mix of voluntary and mandatory requirements. This, in essence, creates a sense of ownership amongst licensees and the public. This can be replicated in Kenya to ensure that not only is the public provided a window period to provide comments to new regulations but also that their comments are considered and companies are provided ample time to implement mandatory requirements. The CMA could also borrow lessons from Australia by not only referencing the Capital Markets Act but also other Acts such as the Companies Act and Penal code. This would complement the Act, especially where it does not contain offences/penalties for conflict of interest and financial misstatements.

The Sarbanes Oxley Act is stellar, as it not only seeks to take enforcement action against listed companies but also against a company's auditors for false or misleading financial statements. Attorneys/advocates are also held responsible where they fail to report a violation of securities laws. This would go a long way in remedying the modus operandi such as in the NBK case where funds had been channelled to an advocate firm under the disguise of advocate- client privilege. Concerning transparency and public access to information. Kenya should emulate the three jurisdictions. ASIC publicises information sheets on their website regarding enforcement undertakings, mechanisms, procedures and their obligations. The FCA's information on how they operate is availed including information on their approach to decision-making and use of their regulatory, civil and criminal powers. They also publish certain information about enforcement actions. The PCAOB in the USA publishes the number of enforcement actions on its website. The US Department of Justice – Securities Fraud unit also publishes on its website the number of prosecuted cases and successful convictions. The FSCA in South Africa further publicizes on its website enforcement actions taken with the relating orders attached. Another important lesson for Kenya is the need for the public to perceive the regulator as being capable and committed to taking action against corporate governance offenders in spite of rank or affiliations. ASIC in Australia for instance succinctly communicates that it will take enforcement action against gatekeepers fail to discharge their duties carefully where this has permitted wrongdoing to occur. This section has illustrated that this practice has borne fruit based on evidence of the number of cases successfully closed and action taken by ASIC for high-profile cases. Based on recommendations from the former ASIC regulator and research on ASIC and FCA's practises this section demonstrates the importance of prioritisation and focused inquiries/investigations. The ASIC does consider a varied range of factors when deciding whether to investigate depending on the circumstances of the case. This section also seeks to address the concern on lack of sufficient dedicated CMA officials with the requisite skills. Scholars and the former regulator challenge regulators to become more efficient, strategic and focused, especially in conducting investigations more quickly and expediently. They also advise that corporate enforcement agencies should have a blend of skill sets. CMA could also opt to benchmark with other agencies such as the US SEC. The Securities Exchange Act contains a provision, which gives a deadline of 180 days for completing enforcement investigations.

Concerning sanctions and penalties a key lesson Kenya can borrow from the USA, UK and Australia is the importance of broadening the focus of enforcement to also negotiating out of court settlements. Another lesson is the importance of restorative orders, reformative measures that involve the offender acknowledging their conduct and its impact. In addition, the imposition of compensation and community benefit fund payments. There is also an importance of having severe penalties for securities offences for instance in the US Enron case in 2006 Skilling the CEO of the company was jailed for 24 years in a maximum-security prison for insider trading and securities fraud. The US government also confiscated assets worth 40 million dollars from the CEO. For the Madoff Ponzi scheme, the chairman was sentenced to 150 years in prison and was ordered to pay US dollars 170 billion in restitution. In the USA one can be convicted for a period of up to 20 years for committing securities fraud offences.

The USA justice department has a dedicated fraud unit and corporate fraud prosecutors. Also in Australia, the criminal penalties for securities laws contraventions imposed by courts are severe, reflecting the seriousness with which the courts regard these offences. One can be liable to conviction of up to 10 years' imprisonment. In order to prevent undue influence by the Executive and promote CMA's independence, Kenya could emulate transparency practises discussed above. Also through consultation, as evidenced by The UK FCA enforcement framework where their Authority consults various panels i.e. the practitioners' panel and consumers' panel on the extent to which its general policies and practices are consistent with its general duties. South Africa Financial Markets Act further reinforces its regulator's independence and powers by allowing for its adopting of "subordinate operationally focussed regulation" without executive's approval. To promote cohesion amongst regulators Kenya could emulate South Africa who has set up a Council of Financial Regulators to improve coordination between financial sector regulators on issues such as enforcement, market conduct and general regulation. Overall, even as Kenya considers the enactment of the FSA bill into law, it should emulate SA approach of implementation, where they have opted for gradual changes over the course of a year, as sections of the Financial Services Regulatory Authority come into operation in a phased manner. There is also an importance of the Government committing to fighting corruption and promoting the independence of regulators. For instance, the Australian Government is committed to enhancing the securities regulator ASIC's clout in enforcement.

This section demonstrates that as much as the four countries indeed do also face challenges in securities regulation. However of importance is the continual law reforms, and revision of corporate governance enforcement practises to succeed in administering effective enforcement actions against fraudulent directors.

CHAPTER SIX

FINDINGS AND RECOMMENDATIONS

6.1 Summary of findings

This study makes a case for effective Capital Markets enforcement framework in order to improve the success rate of actions levelled by the CMA against fraudulent directors and boards that fail to conduct their governance duties. The three key elements of the framework are supervision/prevention, investigation and sanctioning. The study focused on assessing the enforcement actions for the period 2015 to 2019. In investigating this study's problem, this study hypothesised the fact that the current Corporate Governance regulatory and institutional frameworks are not conducive enough to facilitate CMA's effective administration of enforcement actions against fraudulent directors. A number of theoretical approaches guided this study in order to respond to the research questions. The Agency theory aided in the inquiry into the behaviour of corporate actors as they engage in criminal activity to benefit themselves not for the companies they represent. Therefore justifiably it is against such directors that the primary criminal sanction should be levied. This theory also proved essential in this study, as it speaks to one of CMA's key objectives the protection of investor interests. The CMA in this study being the regulator is the Agent acting as the gatekeeper to protect investor interests (principal). Findings from this study indicate that the public's confidence in CMA's capabilities has waned due to numerous unresolved fraud cases. The Stakeholders theorists advocate for the consideration of not only investors/shareholders but also clients, customers, suppliers and the public at large. They are affected by the success or failure of a company. This study has demonstrated that the CMA indeed relishes the complete powers a typical regulator should have in order to discharge its mandate. The Capital Markets Act provides the Authority with the mandate to investigate cases where they receive a complaint that a company is engaging in regulated activities that are not in the public interest. The CMA could also publish enforcement actions or publicize notices during enforcement proceedings in adherence to the spirit of the stakeholders' theory. As illustrated by findings of this study, the challenges that have bedevilled the Kenyan Corporate governance enforcement framework can be attributed to the non-consideration of all company stakeholders and more so the agents who are the investors. John Rawls theory of justice also proved essential in this study as findings show that one of the key challenges faced by the CMA is litigation whereby in various court cases the court ruled the Capital Markets Acted contrary to rules of natural justice. Rawls's principle accords the importance of equal basic rights and liberties. Further, the theory was also important in analysing the challenges faced by the CMA as every entity/institution has stakeholders: individuals and groups to whom they owe consideration in governance decisions. The relative weight of stakeholder interests can be established with fairness without the confounding influence of arguments based on self-interest. This would mitigate the risk of corruption, political interference/ into the operations and decisions of the CMA. The Executive, the CMA and company directors would place the interests of the public and investors first.

This project has advanced three central arguments: the first argument is that the Capital Market's Authority and tribunal institutional reporting arrangement as envisioned by the Capital Markets Act has impeded effective enforcement actions against fraudulent directors. Secondly, there have been a high number of litigation cases instituted by aggrieved directors challenging CMA's actions resulting in unfavourable decisions such as dismissal on procedural matters. Thirdly, there are implementation challenges faced resulting in delays in instituting actions or inaction. This is due to pending court cases, claims of undue influence, capacity and resource constraints. In investigating the research problem, this study sought to address six key questions under the various chapters.

Chapter one sought to answer the question regarding the position of Corporate Governance regulators and which challenges they face in enforcing laws and regulations. The Chapter highlighted the importance of enforcement as it determines the efficaciousness of regulation. Active enforcement is perceived as the bedrock of investor protection. Overall, it depicted the important role an effective regulator and regulations play in protecting securities markets The Chapter also discussed three important elements of securities regulation, the legal framework, the supervision program and the enforcement program. The Chapter outlined challenges faced in the past globally and locally in detection, investigation and prosecution of fraudulent directors and management as identified by various writers. These challenges include evolvement of white-collar crime, political interference, delayed justice due to traditional prosecution methods, and lack of complete accurate data & information. More importantly, is debated issues on administrative remedies and the danger of using this “gentle” approach. It is considered an ineffective method as it leads to the perpetration of more fraud by repeat offenders. *Chapter two* sought to delve into the question on the history of CMA’s Corporate Governance enforcement and its evolvement since the Authority’s inception. The study traced the enforcement statistics by the CMA since its inception in 1990. This study revealed that in spite of the numerous amendments that have been made to governance regulations in Kenya, CMA’s enforcement statistics have fluctuated over time and scholars attribute this to the fact that there was a correlation of who held the reigns at the Authority within a period and the enforcement statistics reported and actions taken. This Chapter further shed light on the fact that due to the constant widespread corruption and nepotism within the public sector, this has hindered the effectiveness of CMA’s Corporate Governance framework over the years. The Chapter also demonstrated the challenges faced in reviewing the CMA enforcement operations in the past due to lack of enforcement jurisprudence until 2018. The Digest however only lists cases instituted from 2008 as much as the CMA was set up in 1990. *Chapter three* responded to the question regarding the position of law in the enforcement of corporate governance mechanisms in Kenya and the institutional framework in which CMA operates. This Chapter examined the various laws and regulations that guide the CMA in enforcement. The Chapter demonstrated that the CMA enjoys the full set of powers, a regulator should have to effectually discharge its mandate The study divides this in three facets, one prevention, two monitoring & investigation and three power of intervention sanction, penalties & judicial proceedings. It also outlined the various Memorandum of Understanding that the CMA has signed with different regulators to promote cooperation in information sharing and aid enforcement. However, the study noted that CMA up to 2019 did not include information in their reports as to how the MOUs have been of assistance to the Authority in enforcement. The Chapter also analysed the proposed Financial Services Authority bill and noted that it would establish the Financial Services Authority (FSA), the Financial Sector Ombudsman and the Financial Sector Tribunal. The FSA will replace various regulatory bodies including the CMA. As the FSA Bill was yet to be finalised, it is not clear as to how the replacement of the different regulatory Authorities would work. Commendably however this may promote cohesion amongst regulators. This Chapter noted that the Executive continue being responsible for the appointment and fixing remuneration of the Capital Markets Board members. Further, whereas the CMA has the mandate to impose sanctions, the Central Depositories Act’s section 62, contentiously allows the Authority to impose fines to suspects who would have been liable if prosecuted. The Act is silent on how the Authority should satisfy itself that the person would have been found guilty. The Capital Markets Act also contains a provision Section (13A) that suggests that only the CEO has the mandate to authorise the carrying out of an inquiry/investigation. This provision may lead to delays or inaction where a CEO is reluctant to invoke the power to order for an inquiry. It also outlined that the Capital Markets Act contains a clause that is contentious. Section 37 suggests that the provisions of the Act supersede any other written law with regard to the powers or functions of the Authority. Where its power or functions may be found to be ultra vires to the constitution's articles and bill of rights then the reality is that the constitution's provision supersedes the Act.

Chapter four was dedicated to answering the question regarding the challenges faced by the CMA in administering enforcement actions against fraudulent directors in Kenya. The main argument in this chapter correlated to this study's hypothesis that a review of CMA's institutional framework and case studies will demonstrate the implementation challenges faced by the Authority in enforcement. In proving this hypothesis, the study utilised case laws that have been determined in a court of law and/or before the CMA relating to this project's topic. This proved useful in gauging the success rate of the Authority's enforcement mechanisms and identification of challenges they have faced in the past. The Chapter also utilised specific listed companies fraud scandals as case studies to illustrate problems brought about by the enforcement framework within the period 2015 -2019. Concerning legal challenges, a view of the powers of the Cabinet Secretary revealed the treasury has an influence on the appointment, dismissal, remuneration of members of the Authority and the Tribunal, formulation of laws, sources of funds, penalties prescription for breach of provisions of the Act and accountability. This study cited three case studies where Executive's overarching power has either led to delay in approvals, the institution of action or no action taken against directors involved in malfeasances. the proposed Financial Services Authority bill as of 2019 to some extent sought to amend this. The Executive would continue being responsible for the appointment of board members. However rulemaking will be the prerogative of the Cabinet Secretary in consultation with the FSA. This study also noted gaps in the provisions for offences and sanctions. Most of the reported fraud cases within this period involved insider trading, financial misstatements and conflict of interest. Unfortunately, up to 2018 Capital Markets Act did not contain provisions on misrepresentation of the financial statements. As at October 2019, conflict of interest provisions had not been incorporated. As suggested by judges in court, the CMA could opt to rely on provisions in the Companies Act. The Act further does not require the Authority to maintain a register of disqualified persons, therefore companies may still appoint such fraudulent/accused directors. Publicly naming and shaming fraudulent directors act as a deterrence due to its implication on their reputation. With regards to collateral attacks instituted by directors aggrieved by CMA's decisions, this study demonstrated that judges have in some high profile cases quashed the Authority's decisions due to non-adherence to natural justice laws during proceedings. Judges have emphasised that the Authority should respect and adhere to the rules of Natural justice. This would minimise the number of court cases filed by aggrieved parties challenging the CMA's decisions. The Authority has admitted that in some cases they faced this challenge due to capacity gaps and undue influence. Court cases discussed in this study have displayed an area of concern regarding the CMA's powers. Some judges do concur that the Act endows the Authority with overlapping functions, which is necessary for it to effectively, conduct its functions. It has the power to conduct the investigation, inquiries/interrogations and impose sanctions. Others nevertheless are of the view that this is ill-advised and that the CMA's decisions may be tainted with bias as it ends up being the investigator, prosecutor, jury and the hangman. To these judges, the CMA performs the three roles contrary to the rules of natural justice. About sub, optimal staff capacity and lack of resources, the findings in the Chapter illuminate that if the Authority were to improve its enforcement actions success rate, it would promote investor confidence encouraging more companies to list therefore bolstering its revenue. The Authority would, therefore, have enough revenue to hire qualified staff including legal advisors and allocate funds to training staff.

The Chapter also outlined that there is room for improvement regarding CMA's transparency as to the number of complaints they receive in a year and how these are handled. Further, the CMA has not availed in its reports information as to how MOUs with different regulators and prosecutorial bodies have aided the Authority in conducting its enforcement mandate. The enforcement pyramid utilised by the CMA is also indistinct. This study also demonstrated cases where queries were raised on why the Authority did not detect fraud timely. Examples are the Imperial and Uchumi cases where it approved rights and bonds issuance by approving information contained in the final information memorandums. The rights and bonds issue respectively later turned out to be tainted with integrity concerns. Delays in instituting investigations have also been due to court rulings. An example is the Mumias saga where CMA could not conclude their forensic audit until the Court heard and determined the petitions questioning the legality of the warrants. The delays and lack of explanation to the public thereof in some cases have contributed to the diminishing public trust. Lack of trust compromises the willingness of the Kenyan public and companies to comply with CMA's guideline codes and regulations. Regarding judicial impartiality, the quashing of High court Orders by the Court of Appeal in the Imperial bank case where they ruled the CMA had not acted with bias was a step in the right direction. Access to ownership data and registry records also pose a challenge, as directors who had formed shell companies and included proxies as directors have orchestrated most of the frauds. The lack of access to such ownership details has exasperated CMA's assets recovery efforts. By there being evidence of CMA not detecting malfeasances early enough, delaying in conducting investigations and accused persons challenging its enforcement actions in court, there is lack of confidence that it has met its principal objective on the protection of investor interests.

Chapter five sought to examine the position of securities regulators enforcement mechanisms in Australia, United Kingdom, United States of America and South Africa. It presented the best practise corporate governance enforcement mechanisms that have worked in these jurisdictions. Appreciably securities regulations reforms in the UK and South Africa similar to Kenya were motivated largely by public companies scandals. The CMA could borrow lessons from these jurisdictions to reference other Acts such as the Companies Act and Penal code in addition to the CMA Act. This would complement the Act, especially where it does not contain offences/penalties for conflict of interest and financial misstatements. The Sarbanes Oxley Act is stellar and its provisions can be emulated, as it allows the SEC and PCOAB to take enforcement action against not only listed companies but also against a company's auditors for false or misleading financial statements, conflict of interest and other disclosure matters. Attorneys/advocates are also held responsible where they fail to report a violation of securities laws. This would go a long way in remedying the modus operandi such as in the NBK case and other State Corporation cases where funds had been channelled to an advocate firm hoping to claim advocate- client privilege in case the fraud scheme was discovered. This study also found that the revised and recently introduced FSCA Act in South Africa resembles the proposed Kenya FSA bill provisions. Kenya could, therefore, utilise this to its advantage in observing the successes and challenges that will be faced by South Africa during implementation in order to remedy/revise our Bill's provisions. Concerning transparency and public access to information, Kenya should emulate the four jurisdictions. ASIC publicises information sheets on their website regarding enforcement mechanisms, procedures and their obligations. The FCA's information about how they operate is available in their publicised "Decision procedure and penalties manual" (DEPP) and Enforcement guide, including information on their approach to decision-making and use of their regulatory, civil and criminal powers[525]. They also publish certain information about enforcement actions. The US Department of Justice – Securities Fraud unit also publishes on its website the number of prosecuted cases and successful convictions.

This study has revealed that there is room for further revision of the current CMA legal framework to address gaps in sanctions/penalties provisions and to promote CMA's independence to avert the Executive's overarching powers as aided by the current Act.

525 Ibid

Collateral attacks in the form of litigation proceedings against CMA’s inquiries and investigation procedures are a normal challenge faced by regulators. There is however a need for revision of inquiry, investigation & prosecutorial procedures to avert future litigation against CMA’s enforcement actions. In addition, the number of litigation actions lodged by aggrieved individuals displays the need to have staff with a proper skill set including investigators and lawyers to conduct inquiries and administrative proceedings. This study asserts that over time once CMA can properly defend these collateral attacks there will be a drop off in these attacks. The most effective and real deterrence mechanism for fraudsters is the perceived likelihood of detection followed by the certainty of punishment. Without effective enforcement, corporate fraudulent directors will continue factoring into the cost of doing business, the cost of having to pay back fraudulent gains. This study also points to the importance of the Government more so the Executive and the Judiciary committing to fighting corruption and promoting the independence of regulators. The two arms should zealously guard the public and investors interests. Overall, by advocating for change in attitude towards commercial crimes and punishing guilty fraudulent directors, this will contribute to the CMA’s implementation of an effective and efficient enforcement framework.

6.2 Recommendations

Based on this study's findings, the following recommendations were drawn. The recommendations are classified into short term, medium-term and long-term interventions. This study was guided by a number of theoretical approaches some of which have guided the collation of the below recommendations. Smart regulation theory as discussed in this study advocates for the use of a mix of regulatory tools and promotion of communication amongst regulators. The CMA could also be guided by this theory which advocates for the use of law reform to develop current legal tools/legal structure. The theorists also propose that regulators should focus on understanding regulatory influences and interactions including financial markets, peer pressure and self-regulation through industry associations, culture and even the public[526]. This would go a long way in fostering a sense of responsibility and ownership amongst securities stakeholders in Kenya and in turn compliance would be encouraged.

The research makes policy and regulatory recommendations from the above research.

6.2.1 Short term interventions

6.2.2.1 Amendments of the Legal framework

Commendably the CMA has continually revised its laws and regulations to reflect current economic trends and to fill gaps regarding governance provisions. However as demonstrated in this study, there are provisions in the Capital Markets Act that need to be reviewed.

a. The Capital Markets Act (Chapter 485 A, Amended in 2018)

In order to advocate for adherence to Corporate Governance principles, Section 5 (3) on the appointment of board members should include the provision that the selected members should satisfy the requirements of the relevant provisions of the Constitution and national laws in respect

[526] Ibid, 26

to National Values, Governance, Leadership, Integrity and Principles of Public Service. This study notes that the FSA bill has incorporated these requirements.

Section 5 (3) should be amended to recommend that one of the six members appointed by the Cabinet Secretary to be a representative of the Self-Regulatory Authorities i.e. the Nairobi Stock Exchange.

Section 12 (1) should be amended to add that the Cabinet Secretary in consultation with the Board should formulate rules and regulations as may be required to regulate various matters. Section 29 (1) of the FSA bill has sought to address this with a similar provision.

Section 13(A) should be amended to provide similar powers to that of the CEO to other Senior Officers such as the Director of Enforcement, for them to authorize an officer to inquire into the affairs of a person or company.

This study recommends amendment of Section 30 G A (2) to include the offence of preparation of misleading or inaccurate financial statements and prescribe fines or penalties. Alternatively, it could reference the provision in the Companies Act, Section 636 (2) on the duties of directors to prepare financial statements. "Directors of a company are expected to approve financial statements only if they are satisfied that the statement gives a true and fair view of the assets, liabilities and profit or loss. If they act in contravention, they are liable to a fine not exceeding Kshs 500,000"[527].

Further, the Act could borrow from provisions included in the USA Sarbanes Oxley Act and Kenya's Companies Act regarding auditors responsibility on the preparation of financial statements. Also include provisions on advocates disclosure requirements, the Companies Act section 811 mandates the Attorney General to request for information/disclosure from advocates where there is a reason to investigate securities ownership in a company. Alternatively, the Act

[527] Ibid, 144

could include provisions mandating the Authority to report accountants and advocates to their respective professional bodies for disciplinary action to be taken where they are involved in covering up of fraud dealings or are found to have acted negligently.

The Act should also be amended to include disclosure provisions on conflict of interest. It could reference the Companies Act Amended 2017, section 147 lists out duties of directors to avoid conflict of interest. Section 151 outlines the duty of a director to declare interest in proposed or existing transactions. A director who contravenes the section is liable to a fine of one million shillings and disqualification for a period of up to 5 years. The transactions entered into in contravention of the section are also voidable.

Section 35 A (3) should be amended to add the requirement that the removal of a tribunal member by the Cabinet Secretary may only occur after resolution of the Cabinet Secretary supported by at least two-thirds of the members of the tribunal. This study, however, acknowledges that under the FSA bill Tribunal appointment and removal shall be the prerogative of the Judicial Service Commission. The JSC shall only remove a member if he becomes a disqualified person or accepts employment elsewhere.

Section 36 (1) on directions on submission of reports should be amended to reflect the current practice. It should outline that within a period of three to four months after the end of each financial year, the Board should submit to the Auditor General or an auditor appointed by the Board the accounts of the Authority together with a statement of income and expenditure.

Section 37 of the Act should be repealed as wherever there is a conflict between the Act and the constitution’s provisions with regard to the powers or functions of the Authority, the provisions of the constitution prevail. The FSA bill has also proposed to repeal this section.

b. The Central Depositories Act

Section 62 regarding the power of the authority to compound offences should be amended to remove the provision that fine determination is dependent on whether the person would have been liable if he had been prosecuted and convicted on the offence. Alternately The Central Depositories (Regulation Of Central Depositories) Rules, 2004 could include guidelines on procedures for the Authority to satisfy itself that the person would have been convicted, and the principles applicable in determining the amount of fine.

Overall the CMA could borrow lessons from other jurisdictions regulators who consider other Acts. The CMA could reference laws/ provisions in the Companies Act and Penal code.

The government/Treasury should address concerns surrounding the introduced Financial Markets Conduct Bill, 2018 and Financial Service Authority Bill 2016 that seek to amalgamate financial regulators in Kenya. CMA has already expressed concerns that there will be overlap with existing market conduct authorities. The government should further conduct sensitization and discussions with various stakeholders to avoid regulatory uncertainty. Further, there should be a gradual change over; Kenya could borrow lessons from South Africa who are in the process of implementing change over.

6.3.1.2 Adherence to the rule of law in conducting its proceedings

The CMA should adhere to the rules of natural justice as recommended by various judges during proceedings instituted by litigants challenging the Authority's enforcement actions. The Authority should ensure it accords suspects fair hearings and it follows due legal process. it can achieve this by constituting committees consisting of qualified people from various professions i.e. seasoned forensic investigators, advocates/judges to conduct the hearings. Appreciably for the Kenol Kobil probe, the Authority constituted an Adhoc Board Committee. The committee encompassed four CMA board members and four independent persons for hearing and determination of the allegations contained in the outstanding, "Notices to Show Cause on the suspicious trades in

KenolKobil shares"[528]. The 4 independent members were drawn from various professions, Hon. Retired Chief Justice Willy Mutunga, Dr Jim McFie, an academic and forensics expert, Patricia Kiwanuka, President of the CFA Society of East Africa, and Anne Eriksson, former Country and Senior Regional Partner PWC. The CMA further kept the public abreast of the proceedings by publishing press release statements on their website[529]. The CMA confirmed that it convened the hearings in exercise of the Notice to Show Cause Action (NTSC) recipients' right to be heard in accordance with Section 26(8) of the Capital Markets Act and Section 4 of the Fair Administrative Actions Act. In addition, in the precedent-setting ruling for the Imperial bank case delivered by the Court of Appeal judges Erastus Githinji, Daniel Musinga and Otieno Odek, the judges quashed the High Court's orders, ruling that the claim of bias had no basis and was erroneous. The enforcement framework will appreciably improve if the Judiciary continues acting with impartiality and display willingness to support the CMA to avert unscrupulous rulings. Further, to mitigate the risk of collateral attacks there is a need for a consensus or review of the Authority's powers. There needs to be clarity as to whether the overlapping functions are indeed lawful and do not introduce the likelihood of bias in CMA's enforcement operations. The CMA could opt to use their discretion and refer matters to their tribunal or other regulators/prosecutorial bodies where there is a likelihood of bias.

6.2.2.3 Stakeholders' consultation and participation

Kenyan Publicly Listed Companies in the past have expressed their concerns regarding how the Corporate Code was introduced, the requirement by the CMA for them to conduct annual legal/compliance & governance audits and to fill out scorecard templates & forms. There was a

[528] CMA Press release, 'CMA recovers additional ksh19 million in connection with suspicious trades in Kenolkobil shares', https://www.cma.or.ke/index.php?option=com_content&view=article&id=559:press-release-cma-recovers-additional-ksh19-million-in-connection-with-suspicious-trades-in-kenolkobil-shares&catid=12:press-center&Itemid=207 , Accessed 15 September 2019

[529]The CMA, 'Press release: CMA takes enforcement action for insider trading on Kenol Kobil plc shares', 8 July 2019, https://www.cma.or.ke/index.php?option=com_content&view=article&id=575:press-release-cma-takes-enforcement-action-for-insider-trading-on-kenol-kobil-plc-shares&catid=12:press-center&Itemid=207 (Accessed 12 October 2019)

general feeling that proper sensitisation was not conducted. CMA in future should consider proper sensitisation of stakeholders prior to the release of such requirements, companies would, therefore, be clear on how to conduct the legal/compliance and governance audits, and how to source for accredited legal and governance auditors. Also, these requirements should not be administered on a one size fits all basis; some companies with fewer operations may not afford to conduct separate legal/compliance, governance and financial audits. The CMA should allow such companies to engage it on alternative reporting mechanisms. Commendably the CMA indicated in the 2019 report on the state of corporate governance that they would amend the code to reduce the cycle of governance audits to once every 2 years[530]. OECD indicates that transparency and consultation can help ensure that decisions build on a wide range of evidence and are perceived as reflecting the needs and the legitimate demands of industry and users[531]. However, there is a balance/caveat to be applied to this as powerful lobby groups can also hijack consultations. In these cases, transparency could undermine or curtail the regulators' independence. OECD recommends for informed participation by stakeholders, clear timelines for a consultation to avoid prolonged or untimely interference in the decision-making process. This can be done through various mechanisms i.e. issuance of consultation papers to be followed by on-line consultations and/or public hearings. The Authority can boost this by extensive use of media channels to explain the CMA's objectives and the reasoning behind its decisions.

6.3.1.4 Promoting public understanding and transparency

IOSCO Committee 4 on enforcement and exchange of information advocated for the promotion of transparency and public awareness[532]. In their view, "regulators who communicate their objectives, and enforcement outcomes, and seek and respond to feedback, engender public support for

[530] Capital Markets Authority, *Report On the State Of Corporate Governance For Issuers Of Securities To The Public In Kenya*, 2019
[531] OECD, *The Governance of Regulators Being an Independent Regulator*, 2014
[532] Ibid, 446

regulatory and enforcement programmes[533]. Publicity of enforcement actions is effective for deterrence when it clearly explains what went wrong, how the sanction was determined and why the conduct breached the regulator's rules and guidelines. By implementing this also, regulated persons would think twice before committing securities violations, as they are aware that their names and wrongdoings are disclosed on public record[534]".

The CMA may opt to emulate other jurisdictions i.e. the UK. The FCA operates in a transparent manner, as information about their operations is availed in their publicised Decision procedure and penalties manual (DEPP) and enforcement guide[535]. The FCA also publishes information about enforcement action once they issue a statutory notice. This range from warning notices issued when they propose to take action, decision notices issued when they decide to take action, final notices issued when they take action. South Africa's FSCA further publicizes on its website enforcement actions taken with the relating orders attached[536]. Laudably in the Kenol Kobil probe, CMA proactively provided the public with information regarding the ongoing query through public press releases. Further, the CMA could borrow South Africa practise of publishing on an ongoing basis enforcement actions on their website. The CMA should list on their website the firms and individuals names and their corresponding fine amounts. The FSCA list contains the most recent cases.

6.3.1.5 Timely enforcement interventions

IOSCO recommends that potential fraudsters are deterred from engaging in misconduct when they apprehend that regulators will hold offenders accountable for their actions and they will be punished[537]. "Timely enforcement interventions prevent misconduct crystallising into investor

---

[533] Ibid, 446
[534] Ibid, 446
[535]The Financial Conduct Authority website, https://www.fca.org.uk/about/enforcement, Accessed on 3 August 2019
[536] Financial Services Conduct Authority website , https://www.fsca.co.za/Enforcement-Matters/Pages/Enforcement-Actions.aspx, Accessed on 3 August 2019
[537] Ibid, 446

detriment and harm to market integrity"[538]. In order to achieve this, the CMA should prioritise the most severe fraud scandals for investigation. This would avert the risk of lengthy delays due to attempting to complete multiple investigations. In addition, in order to improve investigation turnaround time, they should improve their data and information collection procedures. The Authority could borrow a lesson from the UK FCA, which has standard templates and data formats used when requesting documents and information. CMA should conduct proper project management prior to inquiries and investigations with clear set deadlines. Commendably in July 2018, the Chief Executive of the CMA promised that as part of their 2018-2023 strategic plan they would reduce the resolution of governance issues to a period of six months. As discussed in this study the CMA could opt to benchmark with other agencies such as US SEC. The Securities Exchange Act provisions which give a deadline of 180 days for completing enforcement investigations[539]. SEC staff are expected after issuing a written notification to an individual, to either file an action against such person or provide notice to the Director of the Division of Enforcement of its intent to not file an action[540]. However, this study does acknowledge that there will be some instances where it is necessary for an investigation to take more than six months (for example due to complexity). The CMA should also opt to discuss and consider cooperating with entities in order to improve investigations turnaround time. The CMA should also seek court interventions i.e. search and seizure orders, interlocutory injunctions in order to preserve assets in accused persons possession pending case determination.

6.2.2 Medium term interventions

6.2.2.1 The National Treasury's oversight over the Capital Markets Authority and Tribunal

The securities markets in Kenya lie within the National Treasury, which ideally is answerable to parliament. However, as discussed in this study the Capital Markets Act has bestowed overarching

[538] Ibid, 446
[539] Ibid, 452
[540] Ibid

powers on the Cabinet Secretary to exercise influence over the CMA and the Capital Markets Tribunal, which may be seen to influence its capacity to discharge its statutory powers and functions. The OECD, emphasises that “the manner in which a regulator was established; its design, structure, decision making and accountability structures, are all important factors that determine how effective it will be in delivering the objectives it was intended to deliver”[541]. “The way that it interacts and communicates with its key stakeholders including the government is instrumental in the levels of trust it has from them, and this impacts how it behaves in discharging its responsibility[542]”. The OECD encourages the separation of economic regulators from the political branch in order to ensure they discharge their mandate independently. Further OECD indicates that an independent culture can start with transparent and unbiased selection and appointment processes. Further OECD recommends that “where legislation empowers the minister to direct an independent regulator, the limits of the power to direct the regulator should be clearly set out”[543]. The legislation should clearly set out “what can be directed and when. Any direction made by the minister or politicians should be documented and published. In the case of economic regulators, it is their preference that legislation should not permit powers directed by ministers”[544]. OECD further advocates that “legislation should explicitly state the criteria for appointing members of a regulator’s governing body, and the grounds and process for terminating their appointments. The process should involve the legislature or judiciary for greater transparency and accountability”[545]. In finalising the drafting of the Financial Services Authority bill, the government should consider including a requirement that the nominees of the executive should also undergo parliamentary vetting and a formal vote by a parliamentary committee. This would aid in the prevention of undue influence by the Executive. It should also consider the inclusion of a member appointed from the

[541] Ibid, 81
[542] Ibid
[543] Ibid
[544] Ibid, 531
[545] Ibid, 531

Self-Regulatory Authorities i.e. the Nairobi Stock Exchange. Alternatively, the Bill could borrow from the UK FCA set up whereby it is obligated to consults various panels, the practitioners' panel and consumers panel on the degree to which its general policies and practices are in line with its general duties[546]. These panels consist of members appointed from various self-regulatory organisations that represent consumers, authorised persons and investment exchanges.

Commendably under the bill, the Judicial Service Commission will appoint tribunal's members. The Chief Justice and not the Minister shall determine their remuneration. Overall, the CMA should be empowered to work without fear or favour and be operationally independent within the confines of an approved legislative and policy framework. This will contribute to the public perceiving the regulator as being capable and committed to taking action against corporate governance offenders in spite of rank or affiliations.

6.2.2.2 Capacity building initiatives

To avert the risk of suboptimal staff capacity, the CMA should seek to recruit staff through transparent and best practise recruitment methods. They could opt to recruit via independent agencies to ensure they get the requisite skill sets in staff. As illustrated in this study, corporate enforcement agencies need a blend of skill sets. As much as CMA has a fraud unit curved out of the police force it should continue to source for a blend of staff. Lawyers would assist in ensuring investigations are focused on obtaining admissible evidence and avoiding/responding to collateral attacks. Forensic accountants are able to understand and investigate complex financial transactions. Concerning the need to recruit additional staff, the CMA should also consider being strategic and focused, especially in conducting investigations speedily and expediently. Commendably the World Bank was financing a consultancy project whereby the selected consultant would develop an oversight framework and provide capacity building training on supervision to the CMA. CMA reported in 2018 that they had participated in a regional securities regulators conference to

[546] Ibid, 441

exchange best practises in enforcement and oversight of capital markets. Senior experts from the US Securities Exchange Commission facilitated the forum. The CMA should continue to attend and participate in domestic and international forums to enhance their capacity and effectiveness of enforcement. Deterrence of misconduct and fraud will occur when CMA has the capacity, competence, resources, resolve to detect and investigate malfeasances.

6.2.2.3 Funding/Resources

OECD advocates, "Funding levels should be adequate to enable the regulator, operate efficiently, to effectively fulfil the objectives set by the government, including obligations imposed by other legislation"[547]. OECD further advises that funding sources may include "budget funding from consolidated revenue, cost-recovery fees from regulated entities, monies from penalties & fines and interest earned on investments and trust funds. Also, a clear process by which the regulator, with the approval of its minister, can apply for funding for major unanticipated litigation[548]". This study evidenced that capitalisation, rights and new issue fees form the bulk of CMA's income. Points to the need for the Authority to be more effective in enforcement as this will promote investor confidence encouraging more companies to list therefore bolstering its revenue.

6.2.2.4 Performance evaluation

OECD advocates for "regular independent external reviews of regulators arranged by the government, legislature or the regulator itself, in addition to any internal reviews"[549]. It also recommends the development of indicators i.e. operational indicators and outcome indicators. Comparisons and peer expertise and evaluation should also be utilised. This will go a long way in inculcating a consistent commitment by the CMA to conduct its duties efficiently, improve its staff and senior management culture in acting unbiasedly as they would be aware their performance is independently evaluated and tied to rewards and incentives.

[547] Ibid, 81
[548] Ibid, 81
[549] Ibid, 81

6.2.3 Long term interventions

6.2.3.1 Collaboration with other regulators

The CMA should seek to implement or utilise the Memorandums of Understanding signed with various regulatory bodies. There will be successful criminal prosecution of fraudulent directors through the lawful gathering of evidence and through concerted efforts amongst the CMA, DPP and DCI offices. The three bodies should willingly and transparently share evidence gathered amongst themselves. The CMA and other regulatory bodies in Kenya should also put in place a centralised and effective process for the expeditious prioritisation and execution of information requests from other regulators.

6.2.3.2 Innovation and technology

One of the key challenges facing most regulators worldwide is the need to keep abreast of changes orchestrated by the rapid evolvement of technology. IOSCO committee advocated for regulators to seek to keep pace with market innovation; identify and resolve regulatory vulnerabilities; deploy effective enforcement strategies; and develop intellectual and technological capacities[550]. Commendably in 2018, with the support of the Financial Sector Deepening Kenya FSD (K), the Authority on-boarded consultants to finalize the policy framework on a regulatory sandbox to support FinTech innovations within the capital markets. The CMA could also opt to emulate other regulators i.e. France where their AMF investigators and inspectors are lawfully authorised to use a false identity on internet websites to gather information on suspicious matters[551]. CMA should also consider the use of the latest market monitoring and alerting software to detect market misconduct. Electronic tools such as digital forensic technology and e-discovery tools may aid investigations and prosecutions.

[550] Ibid, 446
[551] Ibid, 446

6.2.3.3 Evaluate and revise enforcement governance, strategy, priorities and tools.

IOSCO advises that "regulators who continually evolve their enforcement strategies, by regularly reviewing their governance arrangements, prioritising and allocating resources and ensuring that enforcement tools are fit for purpose will be organisationally agile and more responsive to emerging risks"[552]. When regulation is well designed and regulators have well-developed enforcement strategies, target, prioritise investigations and rigorously investigate, prosecute and sanction wrongdoing, then fear of repercussions for engaging in misconduct will outweigh the benefit[553]. According to OECD, the necessary elements of better regulatory outcomes include "well-designed rules and regulations that are efficient and effective; Appropriate institutional frameworks and related governance arrangements; Effective, consistent and fair operational processes and practices; and high quality and empowered institutional capacity and resources, especially in leadership"[554]. CMA should continually strive to revise their strategy, processes, strengthen Corporate Governance structures and improve their current legal and institutional enforcement framework.

6.3 Further Studies

This study has outlined the importance of having severe civil and criminal penalties for securities laws contraventions. This would send a resounding message on the gravity with which the courts regard such offences. This would also boost the CMA's efforts of creating an effective and efficient enforcement framework. Further studies should be conducted to evaluate the process followed by the CMA in the calculation of penalties and imposition of sanctions. The study would also need to query whether current civil and criminal penalties imposed by CMA against fraudulent directors are commensurate to the offences they or the corporations they represent have committed. Another study area would be the effect enhanced regulation of capital markets and enforcement has on the

---

[552] Ibid, 446
[553] Ibid, 446
[554] Ibid, 446

willingness of owners/directors to list their companies. Notably, as at 2019, only 63 companies had listed on the Nairobi Securities Exchange.

BIBLIOGRAPHY

Books

Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, (Oxford Socio-Legal Studies), (OUP, 1992) pp 4, 6

C.R Kothari, *Research Methodology (Methods and Techniques)*, (Second Revised Edition 2004)

Clarke Thomas, *Theories of Corporate Governance, The foundations of Corporate Governance*, (2004)

Dan Bavly, *Corporate Governance and Accountability: What Role for the Regulator, Director and Auditor?,* (2000), (EDPACS, 28:5, 1, DOI: 10.1201/1079/43262.28.5.20001101/30364.4)

Doing Business 2016, *Measuring Regulatory Quality and Efficiency*, (2016 International Bank for Reconstruction and Development / The World Bank, 13th Edition)

Grabosky & Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies,*(Oxford University Press, Melbourne 1986)

James J. Fishman, *Enforcement of Securities laws Violations in the United Kingdom*, (9 INT'L TAX & BUS LAW 131 (1991))

John Rawls, *A Theory of Justice* [1971] Harvard University Press, 328.

Jonathan C Borck and Cary Coglianese, *Explaining Compliance Business Responses to Regulation,*(Edited by Christine Parker, Melbourne Law School, University of Melbourne, Australia and Vibeke Lehmann Nielsen, University of Aarhus, Denmark)

Peter Drahos, *Regulatory Theory: Foundations and applications*, (published 2017 by ANU Press, The Australian National University, and Canberra, Australia).

Reports

Africa Corporate Governance Network (ACGN), *State of Corporate Governance in Africa: An Overview of 13 countries,*(February 2016)

African Development Bank, *Africa Development Report, Private Sector Development as an Engine of Africa's Economic Development* (2011)

ASIC, *Enforcement outcomes*, (January to June 2018 Report 585, Released in August 2018)

Australia Director of Public Prosecutions, *Annual Report*, (1991-1992 p5.)

Capital Markets Authority, *Capital Markets Strategic Plan 2018-2022*, http://www.cmarcp.or.ke/images/Docs/2018/CapitalMarkets.pdf

KPMG, *Global Profiles of the Fraudster*, May 2016, <https://assets.kpmg/content/dam/kpmg/pdf/2016/05/profiles-of-the-fraudster.pdf> accessed 3 February 2019

International Organization of Securities Commissions (IOSCO), *Credible Deterrence In The Enforcement Of Securities Regulation*, (June 2015)

IOSCO, *Investigating and prosecuting market manipulation*, (Technical Committee of the International Organization of Securities Commissions May 2000), (Addendum to this IOSCO report was published on April 2013)

OECD, *Survey on Corporate Governance Frameworks in the Middle East and North Africa*, (2010), Available at http://www.ecd.org/corporate/ca/corporategovernanceprinciples/49012924.pdf, Accessed 4 March 2019

OECD, *The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy*, (2014) http://dx.doi.org/10.1787/9789264209015-en, Accessed 7 March 2019

The Auditor-General, *The Capital Markets Authority report*, (Financial year 2016/17)

The Capital Markets Authority, *Annual report* (2010)

The Capital Markets Authority, *Annual report* (2011)

The Capital Markets Authority, *Annual report* (2012)

The Capital Markets Authority, *Annual report* (2013)

The Capital Markets Authority, *Annual report* (2014)

The Capital Markets Authority, *Annual report* (2015)

The Capital Markets Authority, *Annual report* (2016)

The Capital Markets Authority, *Annual report* (2017)

The Capital Markets Authority, *Annual report* (2018)

The Capital Markets Authority, *The Digest of Decisions on Capital Markets*, (published by National Council for Law Reporting 2018)

The Capital Markets Authority, *The Report on the State of Corporate Governance of Issuers of Securities to the Public in Kenya*, 2017/2018

The Capital Markets Authority, *The Report on the State of Corporate Governance of Issuers of Securities to the Public in Kenya*, 2018/2019

The World Bank, 'Database 2019 Ease of Doing Business Score data for Kenya', Available at http://www.doingbusiness.org/en/data/exploreeconomies/kenya, Accessed 28 October 2019

World Economic Forum, *Global Competitiveness Report*, (2011-2012)

World Economic Forum, *Global Competitiveness Report*, (2017-2018)

Command Papers and Law Commissions

Commissioner Luis A. Aguilar, *Preparing for the Regulatory Challenges of the 21st Century Georgia Law Review Annual Symposium Financial Regulation: Reflections and Projections*, (University of Georgia, Athens, Georgia March 20 2015)

Corporate Governance, *An IOSCO perspective OECD-ADBI 8th Round Table Capital Market Reform in Asia ADB Institute*, (Tokyo 11 & 12 October 2006)

Iskander, Magdi & Chamlou, N., *Corporate Governance: A Framework for Implementation*,(World Bank, 2000)

Level Crossing Law Commission, *Government's Code of Practice on Consultation*, (The Law Commission Consultation Paper No 194 and The Scottish Law Commission Discussion Paper No 143 of 2010)

Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, (Harvard Business School MJensen@hbs.edu and Meckling University of Rochester)

OECD, *Corporate Governance in Emerging markets, Enforcement of Corporate Governance in Asia*, The unfinished Agenda, (2007)

OICU IOSCO, *Credible deterrence in the enforcement of Securities regulation*, (June 2015)

Paul Muthaura, Chief Executive, CMA Kenya, *Perspectives from the Capital Markets Authority Kenya*, (Presented at IFC PRACTICE GROUP MEETING ON CODES, STANDARDS, TRANSPARENCY AND DISCLOSURE "A Governance Framework for Sustainability in Emerging Markets" Vienna, Austria, June 20 – 21, 2017)

Sam Mensah Executive Director, *Corporate Governance In Africa: The Role Of Capital Market Regulation By African Capital Markets Forum CEO, SEM Financial Group Limited Ghana*, (Presented at the 2nd Pan African Consultative Forum on Corporate Governance, Nairobi, Kenya), [2003]

Speech by Mark Steward, Director of Enforcement and Market Oversight at the FCA, *A better view*, (delivered at the AFME European Compliance and Legal Conference 2017)

Transparency International, *The Corruption Perception Index*, (2017) <https://www.transparency.org/news/feature/a_redefining_moment_for_africa> Accessed 7 May 2019

Transparency International, *Ending Secrecy to End Impunity*, (Policy Brief 02/2014), <http://transparency.org.my/laravel-filemanager/files/shares/Unmask-the%20Corrupt-Campaign-1/Brief-Policy-Beneficial-Ownership.pdf>, Accessed 6 April 2019

Journals and Articles

Aebi, V., Sabato, G., & Schmid, M., 'Risk Management, Corporate Governance, and Bank Performance in the Financial Crisis,(10th GUBERNA European Corporate Governance conference in Brussels (2010) and the University of St. Gallen, January 2011)

Akiko Karaki, 'Regulation and Compliance in Japanese Financial Institutions', (14 COLUM J. ASIAN L.)

Ana Carvajal and Jennifer Elliott, 'The Challenge of Enforcement in Securities Markets: Mission Impossible? IMF Working Paper', (2009)

Cohen, Tim, 'Public Protector tears into Financial Services Board and former boss Dube Tshidi, vindicating EFF's Julius Malema', https://www.msn.com/en-za/news/national/public-protector-tears-into-financial-services-board-and-former-boss-dube-tshidi-vindicating-effs-julius-malema/ar-BBVAM0n?ocid=spartanntp , Accessed 6 April 2019

Corporate Governance in Kenya and Cytonn weekly reports. Cytonn Corporate Governance Index Report-2017, & Cytonn Weekly #25-201 – Corporate Governance company rankings and statistics.

Dagli, H, Eyuboglu, K., Ayaydin, H., 'Performance Evaluation of Corporate Governance Index in Turkey',(Vol. 12, Iss. 2, pp. 163 - 172 2012)

David Harris, 'A tougher stance on sanctions enforcement in the UK?', (Norton Rose Fulbright, Published December 2015)

Dr Jacob K. Gakeri, ‘Enhancing Kenya’s Securities Markets through Corporate Governance: Challenges and Opportunities’, (International Journal of Humanities and Social Science), Vol. 3 No. 6 [Special Issue – March 2013], Available at http://www.ijhssnet.com/journals/Vol_3_No_6_Special_Issue_March_2013/11.pdf, Accessed 6 March 2019

Dr Jacob K. Gakeri, ‘Regulating Kenya’s Securities Markets: An Assessment of the Capital Markets Authority’s Enforcement Jurisprudence’, (International Journal of Humanities and Social Science Vol. 2 No. 20) [Special Issue – October 2012], Available at <http://www.ijhssnet.com/journals/Vol_2_No_20_Special_Issue_October_2012/25.pdf>, Accessed 5 October 2019

Erik Berglöf and Stijn Claessens, 'Corporate Governance and Enforcement', La Porta et al., 2008

Essays, UK. (November 2018), 'The Stakeholder Theories Today Economics Essay', <https://www.ukessays.com/essays/economics/the-stakeholder-theories-today-economics-essay.php?vref=1>, Accessed on 3 February 2019

Gerald Hanks,' Examples of Agency Problems in Financial Markets'; https://smallbusiness.chron.com/examples-agency-problems-financial-markets-70962.html, Accessed 5 March 2019

"Ioannis Kokkoris and Rodrigo Olivares-Caminal, 'Some Issues on Cross-Border Stock Exchange Mergers', (29 U. Pa. J. Int’l L. 455 2007), < https://scholarship.law.upenn.edu/jil/vol29/iss2/4>, Accessed 7 April 2019

J. William Hicks, ‘Securities Regulation, Challenges in the decades ahead’, (1993, Indiana Law Journal), Available at < http://www.repository.law.indiana.edu/ilj/vol68/iss3/12>, Accessed 8 April 2019

James J. Fishman, 'Enforcement of Securities Laws Violations in the United Kingdom', (9 Int'l Tax & Bus. Law. 131 (1991))

Jensen, M. C., 'Value Maximisation, Stakeholder Theory and the Corporate Objective Function', (European Financial Management), Vol 7 No (3), 297-317.(2001).

John Armour, 'Enforcement Strategies in UK Corporate Governance: A roadmap and Empirical Assessment', (University of Oxford Law Working Paper NO.106/2008)

Jonathan C Borck and Cary Coglianese, ‘Beyond Compliance; Christine Parker Explaining Business Participation in Voluntary Environmental Programs’ and Vib eke Lehmann Nielsen (eds), 'Explaining Compliance' and Edward Elgar, 'Business Responses to Regulation' (2011) 139

Jonathan Kolieb, 'When to punish when to persuade and when to reward: strengthening responsive regulation with the regulatory diamond', <https://www.austlii.edu.au/au/journals/MonashULawRw/2015/6.pdf>, Accessed 7 April 2019

Jonathan R. Macey, “Agency Theory and the Criminal Liability of Corporations’, Yale Law School (1991)

Jones, T.M., Wicks, A.C. and Freeman, R.E., *Stakeholder Theory: The State of the Art.* In: Bowie, N.E., Ed., The Blackwell Guide to Business Ethics, Blackwell, Oxford. (2002)

Kaufmann, D., Kraay, A. & Mastruzzi, M.,' Governance matters VIII: Aggregate and individual governance indicators', (1996-2008 World Bank Policy Research Working Paper No. 4978 Washington, USA)

KPMG Publication, 'Corporate Failures', Available at < https://assets.kpmg/content/dam/kpmg/pdf/2016/05/Corporate-Failures.pdf> accessed 6 March 2019

La Porta, R., Florencio, L., Shleifer. A. & Vishny, R., 'The quality of government. Journal of Law', Economics & Organisations, (OUP 1999)

Luh Han and Loizos Heracleus,' Rethinking the Agency theory: The view from the Law', (Academy of Management Review 2010, Vol. 35, No. 2, 294–314)

Luke Hastings and Andrew EastWood, 'The Securities Litigation review', (Edition 4 Australia, July 2018)

N Gunningham and P Grabosky, 'Smart Regulation: Designing Environmental Policy' (1998) p 4.

Neil Gunningham and Darren Sinclair, 'Smart Regulation', (2002)

"Norman S. Poser, 'Why the SEC Failed: Regulators Against Regulation', (3 Brook. J. Corp. Fin. & Com. L.)(2009), <Available at https://brooklynworks.brooklaw.edu/bjcfcl/vol3/iss2/2>, Accessed 10 April 2019

Order making findings and imposing sanctions In the Matter of KPMG Audit Limited and Damion J. Henderson, CA, Respondents, 9 April 2019, https://pcaobus.org/Enforcement/Decisions/Documents/105-2019-008-KPMG-Bermuda.pdf, Accessed 4 November 2019

Peter Lor, 'International and Comparative Librarianship', (Chapter 4 draft 2011-04-20 page 1)

Reviewing the regulation of financial markets in South Africa, Policy document explaining the Financial Markets Bill', (2011), <http://www.treasury.gov.za/public%20comments/FMB/FMB%20policy%20document.pdf>, Accessed 15 August 2019

Rick Sarre, 'Keeping an eye on fraud: proactive and reactive options for statutory watchdogs', https://www.austlii.edu.au/au/journals/AdelLawRw/1995/8.pdf, Accessed 7 July 2019

Rita Ruparelia, Amos Njuguna, 'The Evolution of Corporate Governance and Consequent Domestication in Kenya', (International Journal of Business and Social Science Vol. 7, No. 5; May 2016) Available at https://ijbssnet.com/journals/Vol_7_No_5_May_2016/14.pdf, Accessed 3 May 2019

Robert S. Bennett, Hilary Holt LoCicero, and Brooks M. Hanner, 'From Regulation to Prosecution to Cooperation: Trends in Corporate White Collar Crime Enforcement and the Evolving Role of the White Collar Criminal Defense Attorney'

The Institute of Internal Auditors, American Institute of Certified Public Accountants, and Association of Certified Fraud Examiners, 'Managing the Business Risk of Fraud: A Practical Guide', (2008), www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/managing-business-risk.pdf., Accessed 9 May 2019

Wendell Herbruck, 'Forestalling, Regrating and Engrossing, Michigan Law Review', Vol. 27, No. 4 (Feb. 1929), pp. 365-388,<https://www.jstor.org/stable/1278602>, Accessed 01 July 2019 08:35 UTC

Newspapers and Media Online sources

Bizextras, 'CMA bans Njonjo, Muthoka, Kireini, Kemoli from listed firms, CMA takes stern action on CMC Holdings ltd past and current directors', (3 august 2012), < https://bizextras.wordpress.com/2012/08/03/cma-bans-njonjo-muthoka-kireini-kemoli-from-listed-firms/>, Accessed 8 June 2019

Brian Ngugi, 'CMA probes banks over insider trading', (BUSINESS DAILY 12 February 2019), <https://www.businessdailyafrica.com/markets/capital/CMA-probes-banks-over-insider-trading/4259442-4978642-ib0dh5z/index.html> Accessed 9 June 2019

Brian Ngugi, 'CMA recovers more cash in KenolKobil trades probe', (BUSINESS DAILY, May 21 2019), https://www.cma.or.ke/index.php?option=com_content&view=article&id=559:press-release-cma-

recovers-additional-ksh19-million-in-connection-with-suspicious-trades-in-kenolkobil-shares&catid=12:press-center&Itemid=207 , Accessed 15 September 2019

Capital Business, 'CMA enlists East Africa Data handlers in insider trading probe', (31 January 2019), https://www.scoopnest.com/user/BreakingNewsKE/1090275396782673921-cma-enlists-east-african-data-handlers-to-retrieve-critical-information-in-insider-trading-probe-on> Accessed 31 January 2019

CMA must put its act in together or close shop', (THE STANDARD, Apr. 17, 2007 at 12)

CMA Press release, 'CMA recovers additional ksh19 million in connection with suspicious trades in Kenolkobil shares', (Wed 15 May 2019), https://cma.or.ke/index.php?option=com_content&view=article&id=559:press-release-cma-recovers-additional-ksh19-million-in-connection-with-suspicious-trades-in-kenolkobil-shares&catid=12:press-center&Itemid=207

Corporate Accountability: Sarbanes-Oxley Act of 2002: (P.L. 107-204) August 27, 2002

David Herbling, 'Uchumi Uganda, Tanzania units sink into deeper losses', (BUSINESS DAILY, 24 August 2014), <https://www.businessdailyafrica.com/corporate/uchumi-deeper-into-losses/539550-2493488-1btfir/index.html>, Accessed 18 August 2019

Dominic Omondi, 'Report: Poor governance costs investors in Kenya Sh264b', Standard Digital (10 May 2016) https://www.standardmedia.co.ke/business/article/2000201218/report-poor-governance-costs-investors-sh264b, Accessed 19 August 2019

Editorial, 'DPP clears ex-NBK boss in Sh1 billion fraud case', (BUSINESS DAILY,6 November 2018), <https://www.businessdailyafrica.com/corporate/companies/4003102-4838844-format-xhtml-15dl5hmz/index.html>, Accessed 20 August 2019

Editorial, 'CMA must crack the whip on errant Stockbrokers', (THE STANDARD, Feb. 27, 2007, at 12)

Editorial, 'CMA takes action on National Bank fraud architects', (Citizen Digital, 4 April 2018), https://citizentv.co.ke/business/cma-takes-action-on-national-bank-fraud-architects-195860/, Accessed 21 August 2019

Editorial, 'CMA tight-lipped on Britam, Mumias fraud cases', (BUSINESS DAILY, 3 December 2014), < https://www.businessdailyafrica.com/corporate/CMA-tight-lipped-on-Britam--Mumias-fraud-cases-/539550-2543788-lt1tq5z/index.html>, Accessed 7 July 2019

Editorial, 'Ex-NBK boss gave contract, loan to kin', (BUSINESS DAILY, 31 July 2018), <https://www.businessdailyafrica.com/corporate/companies/Ex-NBK-boss-gave-contract--loan-to-kin/4003102-4691100-760bp5/index.html>, Accessed 8 July 2019

Editorial, 'KQ must act on Deloitte forensic audit report', (BUSINESS DAILY, 26 September 2017), https://www.businessdailyafrica.com/analysis/KQ-must-act-on-Deloitte-forensic-audit-report/539548-4113274-15bqm0f/index.html, Accessed 10 July 2019

Epoch Pi, 'Volkswagen: the Loss of Trust in Stakeholder Theory',(Posted on September 30, 2015), https://www.epochpi.com/blog/2015/09/30/volkswagen-the-loss-of-trust-in-stakeholder-theory, <https://www.epochpi.com/blog/2015/09/30/volkswagen-the-loss-of-trust-in-stakeholder-theory>, Accessed 3 April 2019

FA News, 'FSB has changed to the FSCA', <fanews.co.za. FANews. 2018-04-05>, Accessed 6 April 2019

Jaindi Kisero, ‘Why Barclays is yet to list Corporate bond’ (DAILY NATION Feb. 10, 2004, at 5).

Jaindi Kisero, ‘Why Barclays is yet to list Corporate Bond’, (DAILY NATION, Jan. 10 2004 at 19)

Joseph Bonyo, ‘Cheserem is new CMA Chair’, (THE STANDARD, Feb. 21, 2009, at 23).

Jung, Jae & Bin “Alison” Park, Su, 'Case Study, Volkswagen’s Diesel Emissions Scandal) Thunderbird International Business Review. 10.1002/tie.21876, https://www.researchgate.net/publication/308021860_Volkswagen's_Diesel_Emissions_Scandal/citation/download, Accessed 8 May 2019

Kamau Muthoni, 'Court declines to stop Sh1billion fraud case against Cytonn directors', Standard Digital 11 September 2018, https://www.standardmedia.co.ke/article/2001295309/court-declines-to-stop-sh1bilion-fraud-case-against-cytonn-directors, Accessed 7 July 2019

Kenyans.CO.ke, 'Report Reveals 5 Major Problems Facing Kenya Airways', (21 August 2018), https://www.kenyans.co.ke/news/report-reveals-5-major-problems-facing-kenya-airways, Accessed 11 July 2019

Lola Okulo, 'Mumias forensic probe ends with no evidence', (DAILY NATION, May 2016), https://www.the-star.co.ke/counties/2016-05-25-mumias-forensic-probe-ends-with-no-evidence/, Accessed 9 September 2019

Luke Mulunda, ‘CMC Holdings officials shown the door’, (Business today, 3 August 2012), <https://businesstoday.co.ke/cmc-holdings-officials-shown-the-door/>, Accessed 10 September 2019

Mwendo, ‘KOT’s Reactions after Uchumi’s CEO Jonathan Ciano Got Fired’ (Nairobi Wire, 16 June 2015), http://nairobiwire.com/2015/06/kots-reactions-after-uchumis-ceo-jonathan-ciano-got-fired.html, Accessed 10 September 2019

Nelly K, 'CMA says court orders are delaying Mumias Sugar Company fraud probe', (DAILY NATION 13 July 2018), <https://kenyanwallstreet.com/cma-says-court-orders-are-delaying-mumias-sugar-company-fraud-probe/>, Accessed 11 September 2019

Odhiambo Orlale & Owino Opondo, 'Minister denies cartel controls Stock Market', (DAILY NATION, May 24, 2007, at 8)

Otiato Guguyu, ‘CMA gets nod to punish former Imperial directors’, (Standard Digital, 2 July 2019), https://www.standardmedia.co.ke/business/article/2001332179/cma-gets-nod-to-punish-former-imperial-directors, Accessed 11 September 2019

Otiato Guguyu, 'Regulator goes for looters of Mumias Sugar in new audit', (Daily NATION 3 April 2018), https://www.standardmedia.co.ke/article/2001275479/regulator-goes-for-looters-of-mumias-sugar-in-new-audit, Accessed 11 September 2019

Paul Wafula, ‘New report unearths more CMC bosses’ corrupt schemes’, (Daily NATION, 31 March 2012), https://www.nation.co.ke/news/New-report-unearths-more-CMC-bosses-corrupt-schemes-/1056-1377774-f3g30e/index.html, Accessed 12 September 2019

Patrick Alushula, 'CMA eyes six-month deadline for resolving listed companies probe', Business Daily July 18, 2018, <https://www.businessdailyafrica.com/markets/capital/CMA-eyes-six-month-deadline/4259442-4670208-10rgj3l/index.html>, Accessed 6 July 2019

Patrick Mayoyo, 'Imperial fraud: How Sh20 billion was fried', (SDE, 2017),< https://www.sde.co.ke/thenairobian/article/2001231542/imperial-fraud-how-sh20-billion-was-fried>, Accessed 7 July 2019

Paul Muthaura 'How CMA is tackling KQ, Mumias woes', (BUSINESS DAILY, 6 March 2016), https://www.businessdailyafrica.com/analysis/How-CMA-is-tackling-KQ--Mumias-woes/539548-3105606-5gachpz/index.html, Accessed 8 July 2019

Robert Bunyi, 'CMA Stance poses major risks by giving brokers freehand to run the Market', (BUSINESS DAILY, Mar. 12, 2007 at 16)

Robert Bunyi, 'Regulator must act to protect market’s integrity', (BUSINESS DAILY, Apr. 22, 2007 at 14)

Rose Lumumba Director Corporation Secretary & Communications at Capital Markets Authority, "CMA has and continues to execute its mandate, Standard Digital (22 February 2012), https://www.standardmedia.co.ke/article/2000052605/capital-markets-authority-has-and-continues-to-execute-its-mandate, last accessed 9 February 2019

Rosemary Peavler, 'The Enron Scandal That Prompted the Sarbanes-Oxley Act, Business FINANCE Accounting basics, https://www.thebalancesmb.com/sarbanes-oxley-act-and-the-enron-scandal-393497, Accessed 1 November 2019

Salton Njau, 'How Mumias bosses brought firm to its knees', (DAILY NATION, 17 February 2015), https://mobile.nation.co.ke/news/How-Mumias-bosses-brought-firm-to-its-knees/1950946-2627206-ymd0ytz/index.html, Accessed 15 September 2019

Simon Ciuri, 'Uchumi set to open new branch after rights issue', (DAILY NATION January 2015), https://www.businessdailyafrica.com/corporate/companies/Uchumi-set-to-open-new-branch-after-rights-issue/4003102-2588282-10yrhc/index.html, Accessed 9 September 2019

Steve Mbogo, 'Financial sector regulators in bid to work jointly', BUSINESS DAILY, May 13, 2009, at 12., <https://www.businessdailyafrica.com/markets/539552-597564-unkhim/index.html>, Accessed 10 September 2019

The CMA, 'Press release: CMA takes enforcement action for insider trading on Kenol Kobil plc shares', 8 July 2019 https://www.cma.or.ke/index.php?option=com_content&view=article&id=575:press-release-cma-takes-enforcement-action-for-insider-trading-on-kenol-kobil-plc-shares&catid=12:press-center&Itemid=207, Accessed 12 July 2019

The Public Watchdog, 'Capital Markets in need of competent Regulator', (THE STANDARD, Nov.27, 2007 at 13)

Victor Juma, 'Court quashes CMA's ban on Kiereini's directorship', (DAILY NATION, 22 August 2013)< https://www.businessdailyafrica.com/news/Court-quashes-CMA-ban-on-Kiereini-directorship-/539546-1964324-ltiqllz/index.html>, Accessed 19 August 2019

Washington Akumu, "Chief Executive Officer CMA: We are doing our best', (DAILY NATION, Mar. 27, 2007 at 13)

Washington Akumu, 'Barclays ready for first-quarter launch of Kshs. 3 Billion bond', (DAILY NATION, Jan. 6 2004)

Washington Gikunju, 'CMA silent as the deadline for troubled Stockbroker now expires, (STANDARD, Feb. 27, 2007, at 8)

What is SOX Compliance, 28 May 2019, Available at https://www.dnsstuff.com/what-is-sox-compliance, Accessed 4 November 2019

Winfred Kagwe, 'CMA directs CMC to release audit report', (The Star, 26 March 2012)

Websites and blogs

Australian Securities and Investments Commission, 'Information Sheet 151', https://www.asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-enforcement-outcomes/, Accessed 10 September 2019

Cyprian Is Nyakundi, 'Muthaura's Son Bribed With Kshs. 300 Million To Withhold Mumias Forensic Report By Kidero' (2017),< https://cnyakundi.com/muthauras-son-bribed-with-kshs-300-million-to-withhold-mumias-forensic-report-by-kidero/>, Accessed 10 September 2019

Johannesburg Securities Exchange, < https://www.jse.co.za/services/market-regulation>, Accessed 7 August 2019

Johannesburg Stock Exchange, https://www.jse.co.za/about/history-company-overview, Accessed 7 August 2019

Kali *Critical Analysis of Corporate Governance Laws in Kenya (*Posted 18 January 2013) Refer to website link: http://lawconsultingcentre.blogspot.co.ke/2013/01/critical-analysis-of-corporate.html, Accessed 6 June 2019

Lev Bromberg, George Gilligan, Ian Ramsay, 'Enforcement of Financial Market Manipulation Laws: An International Comparison of Sanctions', (2016, University of Oxford), <https://www.law.ox.ac.uk/business-law-blog/blog/2016/11/enforcement-financial-market-manipulation-laws-international>, Accessed 7 June 2019

National Securities Exchange website, https://www.nse.co.ke/nse/history-of-nse.html, Accessed 2 June 2019

Public Company Accounting Oversight Board website, Available at https://pcaobus.org/enforcement/Pages/default.aspx, https://pcaobus.org/enforcement/Pages/default.aspx Accessed on 1 November 2019

South Africa Financial Services Conduct Authority, https://www.fsca.co.za/Enforcement-Matters/Pages/Enforcement-Actions.aspx, Accessed 10 October 2019

The Capital Markets Authority, 'Fraud Investigation Unit webpage', https://www.cma.or.ke/index.php?option=com_content&view=article&id=258:capital-markets-fraud-investigations-unit&catid=2&Itemid=219, Accessed 18 October 2019

The World Bank, 'Database 2019 Ease of Doing Business Score data for Kenya', http://www.doingbusiness.org/en/data/exploreeconomies/kenya, Accessed 19 October 2019

The United Kingdom, The Financial Conduct Authority webpage, < https://www.fca.org.uk/about/enforcement>, Accessed 19 September 2019

The United States Department of Justice, http://www.justice.gov/criminal-fraud/securities-and-financial-fraud-unit, Accessed on 1 November 2019

The United States Department of Justice, Fraud section year in review 2018, http://www.justice.gov/criminal-fraud, Accessed on 1 November 2019

APPENDIX 1
INTERVIEW SCHEDULE

STUDY TITLE - ***FRAUD AND BOARD FAILURES IN KENYA: THE TRIBULATIONS OF CORPORATE GOVERNANCE WITHOUT ENFORCEMENT***

RESEARCHER: NANCY KANYIRI

SUPERVISOR: DR. NKATHA KABIRA

INTERVIEWEE: MR. SIMON DWYER **–** *Financial Crime Compliance Director KPMG LLP UK, Former KPMG East Africa Forensics partner, Former Australian Securities & Investment Commission (ASIC) Regulatory Commissioner*.

Thank you for giving me the opportunity to conduct this interview with you. I am pursuing a Masters in Law (LLM) at the School of Law, University of Nairobi. As part of the requirement for an award of the LLM Degree, I am expected to conduct a study in my area of choice in the legal realm.

This questionnaire is administered as part of my project on the topic aforementioned. This study aims to examine Kenya's Capital Markets Authority (CMA) Corporate Governance enforcement mechanisms, analyses the challenges faced in imposing enforcement actions against fraudulent directors and boards that fail to conduct their governance duties. The study will also seek to provide lessons/best practises Kenya's CMA could emulate from the Australian Securities & Investments Commission and The UK Financial Conduct Authority.

Do you agree to participate in the interview?

YES_____________

NO_____________

Please sign below to signify your consent

____

DATE OF INTERVIEW____

Having interacted/worked with the three regulators within the different jurisdictions kindly provide commentary/recommendations to curb the below challenges I identified during the study.

1. Sub-optimal number of enforcement actions against directors (number of cases reported in the media/limelight versus those the Authority has instituted inquiries/investigations)

   ……………………………………………………………………………………………….

   ……………………………………………………………………………………………….

   ……………………………………………………………………………………………….

2. Delays in instituting enforcement proceedings and action against directors

   ……………………………………………………………………………………………….

   ……………………………………………………………………………………………….

   ……………………………………………………………………………………………….

3. Litigation against CMA enforcement processes and unfavourable court decisions

   ……………………………………………………………………………………………….

   ……………………………………………………………………………………………….

   ……………………………………………………………………………………………….

4. Gaps in conducting investigations and levelling breaches against accused persons

   ……………………………………………………………………………………………….

   ……………………………………………………………………………………………….

   ……………………………………………………………………………………………….

5. Political interference

   ……………………………………………………………………………………………….

   ……………………………………………………………………………………………….

   ……………………………………………………………………………………………….

6. Transparency in the publication of enforcement actions/penalties imposed

   ……………………………………………………………………………………………….

   ……………………………………………………………………………………………….

   ……………………………………………………………………………………………….

7. CMA’s capacity/lack of resources

………………………………………………………………………………………….

………………………………………………………………………………………….
………………………………………………………………………………………….

My observations:

………………………………………………………………………………………….
………………………………………………………………………………………….
………………………………………………………………………………………….
………………………………………………………………………………………….
………………………………………………………………………………………….
………………………………………………………………………………………….
………………………………………………………………………………………….
………………………………………………………………………………………….