

REPUBLIC OF KENYA
IN THE CAPITAL MARKETS TRIBUNAL AT NAIROBI

APPEAL NO. 001 OF 2024

MIHR SAMIR THAKAR..... APPELLANT

-VERSUS

CAPITAL MARKETS AUTHORITY.....RESPONDENT

KENYA AIRWAYS PLC.....1ST INTERESTED PARTY

NAIROBI SECURITIES EXCHANGE PLC.....2ND INTERESTED PARTY

NOTICE OF APPEAL

TAKE NOTICE that the Appellant herein **Mihr Samir Thakar** seeks to appeal the decision of the Capital Markets Authority to extend the suspension of trading of the shares of Kenya Airways Plc announced to the public via a notice dated 2nd January 2024 and published on 4th January 2024.

The Appellant has appointed the firm of M/s **IC LAW ADVOCATES LLP** whose address of service is as follows; **Britam Tower, 24th Floor, Hospital Road, Upperhill, Nairobi whose contact details: Telephone: + 254- 709- 385 -089. Email: info@ic-llp.com** to be their advocates for the purposes of this appeal and all communication concerning this suit should henceforth be addressed as the said advocates.

Dated at Nairobi on this 16th day of January 2024



IC LAW LLP
ADVOCATES FOR THE APPELLANT

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(Francis Njoroge Wanjiku- Advocate

Practicing Certificate No: **LSK/2023/09113**

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MEMORANDUM OF APPEAL

The Appellant herein **Mihr Samir Thakar** being dissatisfied and aggrieved with the decision of the **Capital Markets Authority** made on 4th January 2024 suspending the trading of the shares of 1st Interested Party, Kenya Airways Plc at the 2nd Interested Party's market bourse, Nairobi Securities Exchange on the following grounds;

1. That the Respondent erred in law and in fact by extending a suspension whose initial cause had faded away.
2. That the Respondent erred in law and in fact by extending a suspension for a period of one year- which is unreasonably period of suspension which is disproportional and unjustified.
3. That the Respondent erred in law and in fact by not inviting the views of the general public and specifically shareholders while making such a huge decision.
4. That the Respondent erred in law and in fact by abusing a discretionary power which allows the Respondent to suspend trading of shares in listed companies to protect shareholders and the general public.
5. That the Respondent erred in law and in fact by being biased against minority investors holding shares at Kenya Airways.

6. That the Respondent erred in law by making a decision which was taken with an ulterior motive and purpose calculated to prejudice the legal rights of the Appellant and other minority investors.
7. **REASONS WHEREFORE:** the Appellant prays that;
 - a) That this appeal be allowed and the decision of the Capital Markets Authority be set aside with costs.
 - b) The costs of this Appeal be borne by the Respondent.
 - c) Such further or other orders as this Honorable Tribunal may deem just and expedient.

Signature of the Appellant.....

Dated at Nairobi on this 16th day of January 2024



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STATEMENT OF APPEAL

A. INTRODUCTION

1. The humble Appeal of **Mihr Samir Thakar** (the Appellant) is as follows: -

B. PARTIES

2. The Appellant is an adult male of sound mind. He is a shareholder of Kenya Airways Plc. The Appellant owns 71,075 shares of Kenya Airways Plc. He is also an active trader on other counters at the Nairobi Securities Exchange.
3. The Respondent is a state corporation established pursuant to section 5 of the Capital Markets Act, Chapter 485A of the Laws of Kenya (*"hereinafter referred to as the Act"*). One of its key objectives under section 11 of the Act is to protect investor interest.
4. The 1st Interested Party is a leading aviation and logistic publicly listed company whose shares trade at the Nairobi Securities Exchange. In its Integrated Financial Report of year ending 31st December 2022, the 1st Interested Party lists the following persons as the top ten largest shareholders; Cabinet Secretary to the National Treasury (48.90%), KQ Lenders Company 2017 Limited (38.09%), KLM (7.76%), KQ ESOP (2.44%), Standard Chartered Nominees (0.50%), Kamau Mike Maina (0.27%), Shah Tanna (0.06%), Galot International Limited (0.05%), Benard Peter Wainaina (0.02%) Peter Njenga (0.02%), Other Shareholders (1.89%).
5. The 2nd Interested Party describes itself as a leading African Exchange based in Kenya. The 2nd Interested Party is demutualized and is regulated by the Respondent.

C. FACTS

6. On 4th January 2024, the Respondent announced to the public the extension of suspension of trading of the shares of the 1st Interested Party on the bourse. The Notice read as follows;

“Notice is hereby given on the extension of suspension from trading of Kenya Airways Plc shares. The extension of suspension seeks to enable the company complete its operational and corporate restructure process. “The extension of suspension from trading the company’s shares will remain in force for an additional 12 months, with effect from January 5, 2023.”

7. The decision made on the 4th January 2024 follows a series of similar decisions made by the Respondent with respect to the trading of the shares of the 1st Interested party. The series of decisions are as follows;

8. The first announcement of suspension was as follows;

“Notice is hereby given on the suspension from trading of Kenya Airways shares. The company’s operational and corporate restructure and government buy-out is now imminent following the publication of the National Management Aviation Bill 2020 on 18th June 2020. Consequently, the company has applied for suspension of trading in its shares and closure of the register until the resolution of its future is determined.

The suspension was approved and issued by the Capital Markets Authority (CMA) pursuant to section 11(3) (w) of the Capital Markets Act and regulation 22 of the Capital Markets (Securities) (Public Offers, Listings and Disclosure) Regulations, 2002.

The suspension from trading the company’s shares take effect from July 3, 2020 and will remain in force for a period of three calendar months.

All shareholders, investors and the general public are asked to take note of the suspension”

9. The second announcement to extend the suspension was made on September 4th 2020;

“Notice is hereby given on the extension of suspension from trading of Kenya Airways Plc shares. The company is yet to finalize on its operational and corporate restructure for the eventual Government buy-out, following the publication of the National Management Aviation Bill, 2020 on the 18th June 2020.

The suspension was approved and issued by the Capital Markets Authority (CMA) pursuant to section 11(3) (w) of the Capital Markets Act and regulation 22 of the

Capital Markets (Securities) (Public Offers, Listings and Disclosure) Regulations, 2002.

The extension of suspension from trading the company's shares will remain in force for an additional six (6) months, with effect from October 4, 2020.

All shareholder, investors and the general public are asked to take note of the suspension." End

10. *The Third announcement to extend the suspension of trading of the Kenya Airways Plc shares was made on April 7th 2021.*

Notice is hereby given on the extension of suspension from trading of Kenya Airways Plc shares. The company is yet to finalize on its operational and corporate restructure for the eventual Government buy-out, following the publication of the National Management Aviation Bill, 2020 on 18th June 2020.

The suspension was approved and issued by the Capital Markets Authority (CMA) pursuant to section 11(3) (w) of the Capital Markets Act and regulation 22 of the Capital Markets (Securities) (Public Offers, Listings and Disclosure) Regulations, 2002.

The extension of suspension from trading the company's shares will remain in force for an additional nine (9) months, with effect from April 5th 2021.

All shareholder, investors and the general public are asked to take note of the suspension. End

10. *The Fourth announcement to extend the suspension of trading of the Kenya Airways Plc shares was made on January 4th 2022.*

Notice is hereby given on the extension of suspension from trading of Kenya Airways Plc shares. The company's operational and corporate restructure is still on going and the Government is expected to give a clear direction on its buy-out or bail-out.

The suspension was approved and issued by the Capital Markets Authority (CMA) pursuant to section 11(3) (w) of the Capital Markets Act and regulation 22 of the Capital Markets (Securities) (Public Offers, Listings and Disclosure) Regulations, 2002.

The extension of suspension from trading the company's shares will remain in force for an additional twelve (12) months, with effect from January 5th 2022.

All shareholder, investors and the general public are asked to take note of the suspension. End

11. *The Fifth announcement to extend the suspension of trading of the Kenya Airways Plc shares was made on January 4th 2023.*

Notice is hereby given on the extension of suspension from trading of Kenya Airways Plc shares. The extension of suspension seeks to enable the company complete its operational and corporate restructure process.

The suspension was approved and issued by the Capital Markets Authority (CMA) pursuant to section 11(3) (w) of the Capital Markets Act and regulation 22 of the Capital Markets (Securities) (Public Offers, Listings and Disclosure) Regulations, 2002.

The extension of suspension from trading the company's shares will remain in force for an additional twelve (12) months, with effect from January 5th 2023. All shareholder, investors and the general public are asked to take note of the suspension. End

12. *The Sixth and last announcement to extend the suspension of trading of the Kenya Airways Plc shares was made on January 4th 2024.*

Notice is hereby given on the extension of suspension from trading of Kenya Airways Plc shares. The extension of suspension seeks to enable the company complete its operational and corporate restructure process.

The suspension was approved and issued by the Capital Markets Authority (CMA) pursuant to section 11(3) (w) of the Capital Markets Act and regulation 22 of the Capital Markets (Securities) (Public Offers, Listings and Disclosure) Regulations, 2002.

The extension of suspension from trading the company's shares will remain in force for an additional twelve (12) months, with effect from January 5th 2024.

All shareholder, investors and the general public are asked to take note of the suspension. End

13. The last announcement that was made on January 4th 2024 is the subject of the appeal.

D. GROUNDS OF APPEAL

a) **The Respondent erred in law and in fact by extending a suspension for reasons that no longer exist.**

14. The first decision to suspend the trading of shares of Kenya Airways Plc was made on July 3, 2020 on grounds that the government buy-out was imminent. This imminence was inferred on the basis that the National Management Aviation Bill, 2020 was tabled in Parliament on 18th June 2020. The first suspension was only to be effective for three (3) calendar months.

15. The appellant states that the first suspension was in line with *Regulation 22 of the Capital Markets (Securities) Public Offers, Listings and Disclosures) Regulations, 2002. Regulation 22 provides as follows;*

“The authority may require a securities exchange to suspend a listed security where- There is significant restructuring involving the listed securities such as in the process of acquisition, mergers or takeovers;

16. Although the Appellant contends that the mere introduction of the National Management Aviation Bill, 2020 did not amount to any of the conditions as set out e.g. acquisitions, mergers or takeovers on the basis that previous government conduct while taking over shares did not include a pre-requisite of an act of Parliament. Only a binding or non-binding offer could be evidence of a takeover.

17. However, it is the consistent extensions of the suspensions of trading of the Kenya Airways Plc shares that have irked the Appellant.

18. First, the Respondent is aware that that the Government interest to take over the ownership of Kenya Airways did not exist apart from lackluster Bill that was introduced in Parliament in June 2020.

19. Second, without prejudice to the preceding paragraph, the Parliamentary Bill stalled in September 2020 due to numerous concerns about the process of takeover.

20. Third, the Respondent was aware that Government neither had a plan nor a strategy on take-over of Kenya Airways Plc. This can be inferred from the 2nd Interested Party notice as follows;

*“Notice is hereby given on the extension of suspension from trading of Kenya Airways Plc shares. **The company’s operational and corporate restructure is still on going and the Government is expected to give a clear direction on its buy-out or bail-out.**”*

21. It is clear that despite the Respondent having knowledge that the initial reason for suspension was now in doubt, they still proceeded to approve an extension of the suspension of trading of Kenya Airways Plc shares.

b) **The Respondent erred in law by extending a suspension of trading for a period of twelve months.**

22. The Appellant takes the position that section 22 B of the Capital Markets Act provides guidance on the maximum period for suspension of securities by the Respondent as follows;

***Where the Authority suspends trading under subsection (2)(b), the suspension shall not exceed a period of three months.** Provided that the Authority may, if it considers it necessary, extend the suspension for one further period not exceeding three months at the expiry of which the Authority shall either notify the securities exchange or the derivatives exchange in writing that the suspension has expired, or proceed to cancel the securities exchange or the derivatives exchange license, as the Authority considers appropriate.”*

23. The Appellant accedes that the Respondent only has power to suspend trading for three (3) months. An option is only given that the Authority may extend the suspension for an additional three (3) months.

24. The Appellant further yields that upon expiry of the extension period, the Respondent must inform the 2nd Interested Party either the suspension has expired or proceed to cancel the securities exchange.

25. The Appellant argues that the validity of suspension in trading of Kenya Airways shares lapsed in December 31st 2020. Despite knowledge of this Act of Parliament, the Respondent in conjunction with the 1st and 2nd Interested Party have abused the discretion conferred by an Act of Parliament and enabling laws.

c) **The Respondent erred in law by making a decision for suspension without public participation.**

26. The Appellant contends that the Respondent is subject to the provisions of the Fair Administrative Action Act, 2015. The Appellant challenges the decision made on January 4th 2023 to extend the suspension of shares of Kenya Airways Plc to be contrary to the provisions of section 5 of the Fair Administrative Action Act.
27. The Respondent failed to adhere to the mandatory provisions of section 5 of the FAA Act by failing to issue a public notice inviting public views; considering views of the public and all other relevant material facts.
28. The Appellant avers that the nature of public participation within the Capital Markets has been curtailed by the Respondent whose only interest is to rule with an iron fist contrary to the spirit and values pursuant to Article 10 of the Constitution of Kenya, 2010.

d) **The Respondent erred in law by making a decision that is, prima facie biased against the interests of minority shareholders of Kenya Airways Plc.**

29. The principle in law behind the Respondent's power to suspend shares is pursuant to section 22 A of the Capital Markets Act is to ensure that there is a fair, transparent and efficient operation of a securities market. The Respondent also has a duty to ensure that there is a proper and integral management of systematic risk in the securities market.
30. The Appellant avers that the main function of the Respondent is to protect the interest of the public as well as the protection of the interest of investors.
31. As a result, the Appellant seeks the Tribunal protection from the actions of the Respondent solely influenced by the Government of Kenya, which is the majority shareholder of the 1st Interested Party.
32. Due to this influence, the Respondent is making unlawful decisions solely on the basis to protect government investments without consideration of any other investor.

E. Jurisdiction

33. The Appellant affirms that this Tribunal has jurisdiction hear and determine the appeal herein pursuant to section 35 of the Capital Markets Authority Act.

F. Reliefs

34. **REASONS WHEREFORE** the Appellant prays that;

- a) That this appeal be allowed and the decision of the Capital Markets Authority be set aside with costs.
- b) The costs of this Appeal be borne by the Respondent.
- c) Such further or other orders as this Honorable Tribunal may deem just and expedient.

Dated at Nairobi on this 16th day of January 2024



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PARTY**

APPELLANT'S LIST OF DOCUMENTS

1. Notice dated July 3rd 2020 published by Nairobi Securities Exchange.
2. Notice dated September 24, 2020 published by Nairobi Securities Exchange.
3. Notice dated April 7, 2021 published by Nairobi Securities Exchange.
4. Notice dated January 4th 2022 published by Nairobi Securities Exchange.
5. Notice dated January 4th 2023 published by Nairobi Securities Exchange.
6. Notice dated January 2nd 2024 published by Nairobi Securities Exchange.
7. Any other document to be produced with leave of the Tribunal.

Dated at Nairobi on this 16th day of January 2024



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