REPUBLIC OF KENYA

IN THE COMPETITION TRIBUNAL

AT NAIROBI

CASE NO. CT/008/2021

THE STANDARD GROUP PLC.....APPELLANT

AND

COMPETITION AUTHORITY OF KENYA .....RESPONDENT

(Appeal from the decision of the Competition Authority of Kenya at Nairobi dated 31st day of March 2021)

JUDGMENT

A. BACKGROUND

1. On 17th August 2018, the Appellant, the Standard Group PLC, resolved to Purchase two (2) brands of regional newspaper publications namely Mount Kenya Star Newspaper and Pambazuko Swahili Newspaper.[1]

2. On 11th November 2018, the Appellant and Mt. Kenya Star Publishers Limited, the owners of the Mt. Kenya Star Newspaper executed an Assignment and Transfer Agreement,[2] for the acquisition of "any and all Intellectual Property Rights that are, or refer to, associated and connected with Mt. Kenya Star Newspapers"[3], by the Appellant, namely Trademark Number 101658[4]. The agreed Purchase price was K.Shs 13,750,000.00.[5]

3. On 23rd January 2019, the Appellant and Pambazuko Network Kenya Limited, the owners of Pambazuko Swahili Newspaper, executed an Assignment and Transfer

[1]The Board Resolution of the Standard Media Group PLC, appears at Page 52 of the Record of Appeal
[2] Page 18 to 35 of the Record of Appeal
[3] Page 19 of the Record of Appeal.
[4] Page 32 of the Record of Appeal.
[5] Page 20 of the Record of Appeal

Agreement[6] for the acquisition of "any and all Intellectual Property Rights that are, or refer to, associated, and connected with Pambazuko Newspaper[7], by the Appellant, Namely Trademark Pambazuko[8]. The Agreed Purchase price was K.Shs 3,500,000[9]

4. Between 3rd September 2018 and 26th June 2020, the Appellant paid to the Mt. Kenya Star Publishers Limited a total of K.Shs 5,000,000. [10], and between 3rd September 2018 and 29th August 2019, the Appellant paid to the Pambazuko Network Kenya Limited a total of K.Shs 3,420,540[11]

5. On 10th August 2020, the Respondent wrote to the Appellant, enquiring on the nature of the above transactions and requesting for the supporting documents.[12]

6. The Appellant complied with the request and forwarded to the Appellant copies of the Agreements and RTGS Remittance advices for payments made via letter dated 26th August 2020.[13]

7. On 23rd September 2020,[14] the Respondent wrote to the Appellant as follows:
    a. The Respondent had conducted investigations pursuant to the provisions of section 42(2) of the Act into the acquisition of interests, rights, trademark titles and goodwill and businesses of MT Kenya star and Pambazuko newspapers by Standard Group Media.
    b. The Respondent went on to define a merger under Section 2 of the Act
    c. The Respondent went on to delineate when a merger occurs under Section 41(1)(2) of the Act

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[6] Page 36 to 51 of the Record of Appeal.
[7] Page 37 of the Record of Appeal.
[8] Page 20 of the Record of Appeal.
[9] Page 38 of the Record of Appeal.
[10] Pages 53 to 60 of the Record of Appeal.
[11] Pages 61 to 63 of the Record of Appeal.
[12] Page 16 of the Record of appeal.
[13] Page 17 of the Record of Appeal.
[14] Page 209 of the Record of Appeal.

8. The Respondent went on to make the following preliminary findings:

    a. The Appellant had acquired interests, intellectual property rights, titles in and to the trademarks and goodwill in the businesses of Mt. Kenya and Pambazuko Newspapers.
    b. The transactions had already been implemented and the Appellant was now the current owner of the newspapers.
    c. Over 20% of the Purchase price had already been paid by the Appellant in respect of the two brands.
    d. The acquisition was in contravention of Section 42(2) of the Act as the prior approval of the Respondent had not been sought.
    e. The Authority invited the Appellant to be heard with respect to this preliminary finding in accordance with the Fair Administrative Action Act and Article 50 of the Constitution.
    f. The Appellant was given an opportunity to make its submissions in this regard.
    g. The Respondent also stated that if the allegations were proven, the Respondent would invoke section 42(5) of the Act, with respect to proposed remedies as follows:
        i. A fine of up to K.Shs 10 Million and or 5 years in jail
        ii. Financial penalty of up to 10% of the gross annual turnover of the preceding year of the Appellant

9. On 7th October 2020, the Appellant responded to the Respondent and their Advocate filed submissions before the Respondent dated 3rd November 2020.[15] In a nutshell:

    a. The Appellant did not acquire the businesses of the two enterprises but merely acquired assets.
    b. The two businesses were still going concerns

[15] Pages 215 to 226 of the Record of Appeal.

c. A look at the definition of a merger at Section 2 of the Act reveals that the transactions did not satisfy the definition of a merger within the Act;

   i. The Appellant implored the Respondent to adopt a purposive approach rather than a positivistic or formalistic approach that is mechanical and defeats the mischief which parliament intended to address.

   ii. Argued that the intention of Parliament was to prevent dominance and control and /or the distortion or lessening of competition.

   iii. Cited, *inter alia* the following authorities in support of a purposive approach

      1. Ochieng Wayumba v DPP [2019]eKLR
      2. Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others Supreme Court Petition 26 of 2014 [2014] eKLR

d. The Appellant had no control over the running of the two businesses as they did not acquire shares in the businesses.

   i. Further, according to the Appellant, Section 41 (1) (3) as read together with Rule 10 of the Competition (General) Rules 2019 of the Act reveals that the transaction did not meet the threshold of control as a result of merger.

   ii. The Appellant also implored upon the Respondent to look at the **control test** with a view to finding that these transactions did not meet the merger threshold, namely the capacity of one person or an undertaking to exercise decisive influence over another. The Appellant argues that the Appellant acquired an asset and not shares and therefore the Appellant does not exercise control over the targets.

   iii. In the premises there was no merger and there was no resultant control, therefore the jurisdiction of the Respondent over this matter did not arise.

e. The Appellant further submitted to the Respondent on the Statutory threshold envisaged under the Competition (General) Rules 2019, to wit:-

i. Regulation 6 deals with definition of mergers. The Appellant singles out regulation 6 (v) of the Competition (General) rules 2019

ii. A look at Regulation No 6 of the Competition (General) Rules 2019 (on definition of mergers) shows that the transaction did not meet the statutory threshold for definition of a merger. According to the Appellant, the transaction did not meet the criteria set out under Regulation No 6 (1) (c) (v).

iii. Further, the transactions did not contravene Rule 10 which provides the test to determine if a merger has been implemented without the approval of the Respondent. Accordingly, the following had not been established:-

1. Integration of infrastructure, systems, employees, corporate identity
2. Placement of employees from target to acquiring entity
3. Influence of control in target's business
4. Exchange of strategic information

f. The acquisition did not strengthen a dominant position of the Company.

g. The authority was obligated to make a determination on whether the combined assets of the Appellant, and the two publishers would impact competition in a negative way.

h. In a nutshell that these transactions did not require prior approval or notification to the Authority in accordance with the provisions of Regulation 9 and the Authority lacked jurisdiction to enquire into these transactions.

10. The Respondent in response to the Appellant's letter and its Advocates' submissions, responded via a letter dated 30th November 2020 [16]as follows:

a. The documents supplied by the Appellant indicated that there was a transfer of the core business of the target undertakings to the Appellant.

[16] Pages 411 to 413 of the Record of Appeal

b. The Appellant had acquired interests, IP Rights, trademarks, goodwill of the businesses of the Targets
c. The Respondent requested the parties to submit their audited financial statements for last three (3) years to determine whether the turnover and assets thresholds were met as set out under parts A, B and C of the First schedule of the competition general Rules 2019
d. The Respondent clarified that it did not grant exemption based on the likely harm to competition but rather it looked at the turnover and assets of the merging parties to determine whether a transaction is notifiable or eligible for exemption.
e. The Respondent noted that it considered these transactions notifiable based on its previous decision in Bic East Africa and Haco Industries where Bic was granted rights to manufacture and distribute Bic Brand Stationery and the Authority considered this a merger
f. The consideration was in the change in control and turnover/assets of the parties as provided under Part IV of the Act and the Rules.
g. The effects of the transaction on competition and public interest are treated as mitigating or aggravating factors when calculating the relevant penalty.
h. The Respondent takes note that the parties are desirous of regularizing the transaction however, this will only be achieved once the parties pay the penalty under the Act.

11. Thereafter, the Appellant and the Respondent had a meeting on 21st January 2021 and the Respondent vide a letter dated 10th February 2021 reiterated the sentiments of its previous letters dated 23rd September 2020 and 30th November 2020, and further invited the Appellant to make its submissions.

12. The Appellant's Advocates, through their submissions dated 18th November 2020 reiterated the previous submissions dated 3rd November 2020[17]. In a nutshell the Appellant alleged that:-

[17] Pages 411 to 413 of the Record of Appeal

- The transactions did not fall within the definition of a merger,
- The transactions did not pass the litmus test for control and control of an asset did not translate to control of a business
- The impact of the transaction on the market. That it did not have the effect of lessening competition in the market.

13. On receipt of the Appellant's said submissions, the Respondent made its decision via a letter dated 31st March 2021[18]. In a nutshell the Respondent established that:

    a. The transactions meet the definition of a merger within the meaning of section 2 and 41 of the Act. And in line with the Acquisition of the Consumer Healthcare Business of Pfizer by GlaxoSmithKline Consumer Healthcare Holdings Limited in South Africa Competition Commission.
    b. The production of the newspapers was now fully and solely being undertaken by the Appellant
    c. The decision goes on to reiterate the contents of previous letters to the Appellants,
        - letter dated 30th November 2020[19]
        - 23rd September 2020[20]
        - 10th February 2021[21]

14. Vide the Respondent's letter dated 31st March 2021, the Respondent invited the Appellant for a virtual meeting to deliberate on the mitigating and aggravating factors of the penalty process.

15. Aggrieved by this decision the Appellant filed an Appeal before the Tribunal on the following grounds:[22]
    a. No empirical evidence to support existence of a merger

[18] Page 14 to 15 of the Record of Appeal
[19] Page 411 of the record of appeal
[20] Page 209 of the record of appeal
[21] Page 415 of the record of appeal
[22] Pages 1 to 11 of the record of Appeal.

b. Cherry picking the law by singling out sections 2 and section 41 (2) (a)
c. Only change of control of an asset and not a business
d. Respondent lacked jurisdiction as it was not shown that the Appellant had control over the targets
e. The Respondent reached a decision without consideration / taking into account the Appellant's submissions on record dated 3rd November 2020, 21st JANUARY 2021 and 18th February 2021.
f. The Respondent failed in failing to summon the target undertakings since any administrative penalty imposed would affect them.
g. Bias on the part of the Respondent.

B. DOCUMENTS AND EVIDENCE

16. The Appellant filed the following documents before the Tribunal:-
    i. Record of Appeal containing:-
        a. The Memorandum of Appeal dated 20th April 2020
        b Supporting Affidavit sworn on 16th April 2021 by Millicent C. Ngétich and the annexures thereto.
    ii. Supplementary Affidavit sworn on 26th May 2021 by Millicent C. Ngétich.
    iii. Appellant's written Submissions dated 21st June 2021 together with the list and bundle of authorities attached thereto.

17. The Respondent filed the following documents:
    i. Replying Affidavit sworn by Wangómbe Kariuki and the annexures thereto.
    ii. Respondent's written Submissions dated 15th July 2021 together with the list and bundle authorities attached thereto.

18. Parties highlighted their Submissions virtually before the Tribunal on 17th August 2021.

C. THE APPELLANT'S CASE

19. The Appellant argues that the acquisition of an asset must meet a certain muster set out in statute and common law for it to amount to a merger, as according to the Appellant, not any acquisition of an asset amounts to a merger. The Appellant relies on Sections 2 and 41 of the Act which establishes control as an integral component for the existence of a merger and argues that the provisions of statutes must be interpreted in a purposive. The Appellant to that end relied on the Supreme Court case of **Gatirau Peter Munya vs Dickson Mwenda**[23]

20. The Appellant further contends that the target undertakings namely MT. Kenya Star Publishers Limited & Pambazuko Networks Limited are separate and going concerns without the control of the Appellant which has no voting rights or decision-making powers in the target undertakings. To buttress this position, the Appellant relied on the South African Competition Tribunal case of **Primedia Limited & Others – Vs-Competition Commission & Another**[24]**.**

21. The Appellant contends that the position taken by the Respondent does not espouse parliamentary intent and is otherwise narrow and such a trajectory will open a Pandora's box in assessment of merger transaction. According to the Appellant, the evaluation of a merger transaction on the premise of Section 2 and Section 41(2)(a) of the Act only while negating the control aspect envisaged in Section 41(3) of the Act and Rule 10 of the Rules is a misinformed interpretation of the law. The Appellant therefore maintains that the demonstration of control and dominance is a prerequisite for the existence of a merger, and that the Respondent erred in failing to take the same into account.

22. The Appellant further contends that the impugned transaction has no clearly attributable market value and in no way enhances the competitive position of the Appellant as to raise

[23] Supreme Court Petition No. 26 of 2014(2014) Eklr-Pages 239 to 302 of the Record of Appeal.
[24] (39/AM/MAY06)[2008] ZACT 30 (9 May 2008) – Pages 354 to 395 of the Record of Appeal.

Competition law concerns that the Respondent is mandated to intervene. In this regard, the Appellant relies on the South African case of **Competition Commission & Edgards Consolidated Stores Limited**[25]

23. The Appellant contends that Sections 34, 36 and 38 of Part III of the Competition Act, which the Respondent relied upon in arriving at its preliminary finding do not apply in the evaluation of a merger but rather confined to restrictive trade practices. The Appellant relies on the case of **Adrian Kamotho Njenga vs. Kenya School of Law** in supporting its contention that the Respondent cannot rely on wrong provisions of the law in making its decisions.

24. The Appellant further contends that the Respondent's failure to summon the target undertakings considering that a party cannot implement a merger alone amounted to bias. The Appellant further argues that its submissions and numerous authorities were never taken into account by the Respondent. According to the Appellant, the Respondent has failed in its mandate and has not only condemned the Appellant unheard but has also condemned the target undertakings who are affected by the decision of the Respondent,

25. The Appellant prays that its prayers in the Memorandum of Appeal dated 20th April 2021 be granted.

D. THE RESPONDENT'S CASE

26. The Respondent argues that on the issue of interpretation, the Tribunal should bear in mind the golden rule principle when interpreting statutes. On this, the Respondent relies on the case of **Adrian Kamotho Njenga vs. Kenya School of Law** and the Indian case of **Stephen's college vs. University of Dheli** [26] where the court held that the golden rule of construction requires that words be read in their ordinary, natural, and grammatical meaning.

[25] (Edcon) No. 95/FN/Dec02
[26] (1992) 1 SCC 552

27. The Respondent further argues that the Appellant's argument that the merger transactions happen when an acquirer controls the business of the target undertaking and not when they control an asset is a misapprehension of the definition envisaged under Section 2 and 41 of the Competition Act, and maintains that the definition of merger refers to acquisition of a business, or other assets that result in the change of control of a business, part of a business or an asset as was the case in the impugned transaction. The Respondent relied on the South African case of **the Acquisition of the Consumer Healthcare business of Pfizer by GlaxoSmithKline Consumer Healthcare Holdings Limited.**

28. The Respondent argues that it carried an inquiry where it established that the Appellant acquired control of the targets, the impugned transactions amounted to a merger within the meaning of Section 41 of the Act and that the Appellant had an obligation to seek the approval of the Respondent as required under Section 42 (2) of the Act. The Respondent maintains that the proposed merger therefore had to be notified under Section 43 of the Competition Act for the Respondent to conduct the analysis of the merger to consider the competition concerns raised by the transaction and make a decision as to whether to approve the transaction or not.

29. The Respondent relied on the case of **Engineers Board of Kenya Vs. Jesse Waweru Wahome & Others**[27] in buttressing the position that no provision of any legislation should be treated as stand-alone and there should be a holistic approach to statutory interpretation.

30. Contrary to the Appellant's assertions, the Respondent contends that control and dominance are not together a pre-requisite for arriving at a determination by the authority that the impugned transactions were implemented without approval. The Respondent further contends that the Appellant's acquisition of rights, trademarks,

[27] Civil Appeal No. 240 of 2013

brands and goodwill in the said undertakings gave the Appellant control over assets that form the critical part of the Newspaper businesses of the target undertakings.

31. On the applicability of Sections 34, 36, and 38 of the Competition Act to the impugned transactions, the Respondent contends that Sections 31 to 38 of the Competition Act are applicable to all investigations into prohibited practices, and that the Appellant never raised any issue on applicability of Section 38 of the Act during the proceedings before the Respondent. The Respondent relies on the case of **Aly Khan Satchu Vs Capital Markets Authority**[28] and **Dry Associates Limited Vs Capital Markets Authority & Another**[29].

32. The Respondent further contends that the Appellant was accorded a fair hearing in accordance with the requirements of the Fair Administrative Action Act, 2015 and the Constitution, 2010, and there was no bias as alleged by the Appellant. The Respondent argues that the Respondent would have summoned the target undertakings were it not that the Appellant moved the Tribunal before the Respondent had made a determination. The Respondent relied on a number of authorities in making out a case for fairness of the procedure adopted by it.

33. The Respondent maintains that in the absence of a determination, the matter is improperly before the Tribunal, and that if the investigation is allowed to proceed to the end, the parties shall be allowed to make representations in their defence before the Authority invokes sections 42(5) or 42(6) of the Act, and subsequently regularize the merger in accordance with the provisions of the Act.

[28] Nairobi HC, Misc. JR Application No. 220 of 2019 (EKLR)
[29] Nairobi HC, Constitutional Petition No. 328 of 2011, 2012(EKLR)

E. ISSUES FOR CONSIDERATION

34. From an analysis of the pleadings filed before the Tribunal, it is evident that the Appellant is challenging both the merit of the decision of the Respondent and the procedural fairness and fidelity of the Respondent in discharging its functions.

35. Having carefully examined the pleadings of the parties and their submissions, the following issues emerge:

i. *Whether the Respondent had made any determination against the Appellant capable of being challenged before this Tribunal.*
ii. *Whether the Appellant was accorded a fair hearing by the Respondent.*
iii. *Whether the acquisition of interests, rights, Trademark titles and good will and the businesses of Mt. Kenya Star and Pambazuka Newspapers by the Standard Newspaper constituted a merger that required the Authority's approval prior to implementation.*
iv. *Whether the provisions of sections 34, 36 and 38 of the Act apply in the analysis apply in the inquiry whether there is implementation of a merger without prior approval*
v. *What are the appropriate reliefs in the circumstances*
vi. *Who bears the cost of this Appeal.*

F. ANALYSIS

36. We must, *in limine,* address the issue of whether the decision contained in the Respondent's letter of 31st March 2021, is a decision capable of an appeal before this Tribunal. The determination of this issue will influence how this matter progresses.

37. The Respondent in its Replying Affidavit, written and oral submissions, before this Tribunal, maintains that it has neither made nor communicated a determination

capable of an appeal before this Tribunal. According to the Respondent, the Appeal is, therefore, misplaced, premature and should not be entertained by this Tribunal.

38. The correspondence giving rise to this Appeal, is a letter dated 31st March 2021 from the Respondent to the Appellant[30] wherein the Respondent stated as follows: -

> *"From the foregoing and as communicated in our meetings and correspondence since September 2020 the Authority's position is that the acquisition of interests, rights, Trademark titles and good will and the businesses of Mt. Kenya Star and Pambazuka Newspapers by the Standard Newspaper constituted a merger required the Authority's approval prior to implementation..."*

39. The Respondent in the said letter:

i. Indicated to the Appellant the options available under Section 42 of the Act.

ii. Invited the Appellant for a virtual meeting to deliberate on the mitigating and aggravating factors of the penalty process.

iii. Informed the Appellant that if it did not hear from the Appellant by the 9th April, 2021, the Respondent would proceed to pursue the first option, under section 42(5) of the Act.

40. What is the import of **Section 42 of the Act,** that the Respondent alludes to in its letter?

Section 42(5) & (6) of the Act provides as follows:-

> *"Any person who contravenes the provisions of this section commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding 10 million shillings or both.*

[30] Supra, note 18.

The Authority may impose a financial penalty in an amount not exceeding ten percent of the preceding year's gross annual turnover in Kenya of the undertaking in question."

41. Upon receipt of the communication contained in the letter of 31st March 2021, the Appellant filed this Appeal. The Appellant argues that the Respondent rendered an adverse decision against it, to wit, the Appellant had in its acquisition of Trademarks of the target undertakings constituted a merger without the Respondent's approval and further proposed to impose a pecuniary penalty and / or an administrative penalty under the Act.

42. The Respondent in the letter of 31st March 2021 concluded: -

"From the foregoing, the Authority invites you for a virtual meeting on 15th April, 2021 to deliberate on the mitigating and aggravating factors of the penalty process and communication of the penalty percentage, in the event you elect the second remedy above. However, if the Authority does not hear from you by 9th April 2021 it shall proceed to pursue the first option as provided."

43. The Respondent has submitted that its decision of 31st March 2021 is not only preliminary in nature, but they have also not finalized the investigation process. Further, if given an opportunity to finalize the process, the Respondent intends to give the Parties an opportunity to present their defence and possibly regularize the merger in accordance with the Act.

44. The question then, is whether, the decision contained in the Respondent's letter dated 31st March 2021, constitutes a well-reasoned and final decision capable of being challenged before this Tribunal?

45. A reasoned final decision reflects a summary of the of the facts of the case, the evidence relied upon, a summary of the issues arising therefrom, an analysis of the

rival arguments (conceding or refuting each major issue), an analysis of the law and finally a determination based on all the above.

46. We have looked at the letter of 31st March 2021, and we are of the considered view that the same does not constitute a well-reasoned final decision. This Tribunal is, therefore, not in a position to determine the myriad issues raised by the Appellant in the absence of a well-reasoned final decision of the Respondent.

47. On issue 35 (ii) above, the Appellant argues that the Respondent condemned it unheard. Further, the Respondent concluded investigations and made a determination without involving the "target" undertakings.

48. From the record, we note that the Appellant was accorded an opportunity to present its written submissions to the Respondent, which it did through its Advocates.[31] In addition, the Appellant requested for an oral hearing conference.[32] A perusal of the documents before us does not reveal whether the Respondent acceded to the request for the oral hearing.

49. According to the Appellant, its Advocates attended the Respondent's offices on 21st January 2021 under the impression that they were attending an oral hearing conference.[33] The Appellant, however, states that whilst in the process of making their oral arguments, they were cut short by the Respondent and informed that this was settlement session.

50. A perusal of the Act indicates that where a party requests for an oral hearing conference, the Authority is mandated to convene such conference, for instance under section 35 of the Act. Similarly, we do not find any reason why the Respondent would deny the Appellant this opportunity if so requested.

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[31] See pages 215 to 226 of the Record of Appeal

[32] See letter dated 27th October 2020 at page 214 and another dated 10th December 2020 at page 414 of the Record of Appeal.

[33] Page 7 of the Record of Appeal

51. A perusal of the pleadings, evidence, and record does not indicate that the Respondent convened an oral hearing conference as requested by the Appellant and mandated by the rules of natural justice, Fair Administrative Act and the Constitution of Kenya.

52. On the contrary, the Respondent proceeded to make a determination that the Appellant had implemented a merger without the Authority's approval. By its letter dated 31st March 2021, the Respondent invited the Appellant for a "virtual meeting on 15th April 2021 to deliberate on the mitigating and aggravating factors of the penalty process and communication of the penalty percentage..."

53. It is well settled legal principle that a party affected by an administrative decision must be presented with the opportunity to present their case fully and fairly. In the High Court case of ***Republic v National Police Service Commission Exparte Daniel Chacha Chacha [2016] eKLR,*** the Court extensively discussed the issue of natural justice and referred to many authorities in that regard. The Court observed as follows:-

> *"A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in* ***Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6*** *where it was held:*
>
> *"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."*

The Court further emphasized that ***procedural fairness is flexible and entirely dependent on context.*** *In order to determine the degree of procedural fairness owed in a given in case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker..... The right to be afforded an opportunity of being heard must have to be distinguished from the necessity to have an oral hearing especially in disciplinary matters. The procedure in such matters is aptly dealt with by* ***Michael Fordham*** *in* **Judicial Review Handbook**; *4th Edn. at page 1007 as follows:*

"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".

54. In ***Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009***, the Court of Appeal delivered itself as follows:

"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."

55. The sanctity of observance of the rules of natural justice was emphasized in the case of ***Oloo v Attorney General [1986-1989] EA 456***, where the Court held:

"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at... Denial of the right to be heard renders any decision made null and void ab initio."

56. From the above cases, the position held is that whatever form of proceedings adopted by the Authority, it must meet the minimum irreducible elements of fairness. In other words, the Respondent should not pronounce itself on the culpability of a party without first according that party an opportunity to be heard on the same. Parties appearing before the Authority have a legitimate expectation that they will be accorded an opportunity to present their case through a fair hearing.

57. **Black's Law Dictionary (Tenth Edition)** defines Legitimate expectation as:-

"Expectation arising from the reasonable belief that a private person or public body will adhere to a well-established practice or will keep a promise.

58. We also note that the Appellant is apprehensive that the Respondent has gone on to determine the issue without involving Mount Kenya Star Newspaper and Pambazuko Swahili Newspaper. The Respondent's decision is likely to impact the two entities and yet they were neither interviewed by the Respondent nor involved in the Respondent's investigations.

59. We, however, note that the Respondent did indicate in its submissions to the Tribunal that *"if the investigation is allowed to proceed to the end under sub section (4) the Authority establishes that there is a contravention of section 42(2)*

of the Act, the Parties shall (a) be allowed to make representations in their defence before the Authority invokes sections 42(5) or 42(6) of the Act... "[sic].[34]

G. CONCLUSION

60. In view of the Respondent's submissions above, and considering the rival submissions of the parties, we find that the decision contained in the Respondent's letter dated 31st March 2021 does not constitute a well-reasoned final decision[35] capable of being challenged before this Tribunal. Further, the Respondent in failing to convene an oral hearing conference as requested by the Appellant, contravened the rules of natural justice, provisions of the Fair Administrative Action Act and the Constitution of Kenya on the right to a fair hearing.

61. Having answered the question posed in paragraph 35 above, and in view of our findings, we will not delve into the other issues at paragraph 35 (iii) and (iv) above.

H. ORDERS

62. Arising from our findings hereinabove and having considered the various provisions of the law, the following are the Orders of this Tribunal:-

a. The decision contained in the Respondent's letter dated 31st March 2021 does not constitute a well-reasoned final decision capable of being challenged before this Tribunal.

b. The dispute be and is hereby remitted back to the Authority for the Respondent to conclude its investigations, hearing process, and render a final decision as per the law.

[34] Paragraph 87, page 16, The Respondent's Submissions.
[35] Paragraph 45, Supra.

c. The Authority in conducting the investigation and hearing process to ensure that it accords the Appellant and any other relevant party a fair hearing including but not limited to an opportunity for an oral hearing conference.

d. Considering the outcome of this matter, each party shall bear its own costs.

e. Parties are at liberty to apply.

Orders accordingly.

DATED at **NAIROBI** this ..5Th..day of..October.....2021

DELIVERED at **NAIROBI** this ..5Th..day of..October.....2021

.....
DANIEL OGOLA
CHAIRPERSON

.....
DR. DESTAINGS NYONGESA
MEMBER

.....
VALENTINE MWENDE
MEMBER

.....
REBECCA MOGIRE
MEMBER

I certify that this is a true copy of the original

.....
JOHN NDERITU MWANGI
SECRETARY/CEO
THE COMPETITION TRIBUNAL

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