



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MILIMANI, NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION 99 OF 2016**

**BETWEEN**

**MEA LIMITED..... PETITIONER**

**AND**

**COMPETITION AUTHORITY OF KENYA.....1<sup>ST</sup> RESPONDENT**

**KARIUKI WANG'OMBE, THE DIRECTOR GENERAL**

**COMPETITION AUTHORITY OF KENYA.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. The Petitioner is a limited liability company. Its undertaking includes the importation, distribution and blending of fertilizers. It has been in business since 1977.

2. The 1<sup>st</sup> Respondent is a state organ established under Section 7 of the Competition Act (Cap 504) Laws of Kenya ( herein “ **the Act** ”). Its mandate includes advising the government on matters relating to competition and consumer welfare as well as carrying out research inquiries and studies in matters relating to competition and consumers.

3. The Petitioner filed, simultaneously with its Petition, on 17 March 2016 an application for conservatory orders. The Petitioner sought the following conservatory orders:

i. ...

**ii. THAT** pending the hearing and determination of the Constitutional Petition by the Petitioner herein, this Honourable Court be pleased to grant conservatory orders staying all investigations and or further proceedings against the Petitioner arising from the allegation of having been involved in anti competitive conduct.

**iii. THAT** pending the hearing and determination of the Constitutional Petition by the Petitioner herein, this Honourable Court be pleased to grant a temporary injunction and or prohibition

*restraining the Respondents from destroying, sharing, disclosing or distributing to any other person, their servants or agents, or in any other manner whatsoever using the documents and information unlawfully obtained from the Petitioner pursuant to the execution of the search warrants obtained in Misc. Criminal Case No. 103 of 2016.*

4. The application was opposed.

5. The Petition was apparently prompted by an inquiry and or investigations being conducted on the Petitioner's business activities by the 1<sup>st</sup> Respondent.

### **Background facts**

6. The facts are largely not in dispute and may be retrieved from the affidavits of Eustace Muriuki filed in support of the Petition. The facts may be stated shortly as follows.

7. Pursuant to Section 18(5)(b)(i) of the Act, the 1<sup>st</sup> Respondent ( herein "**the CA**") sent out a notice to the Petitioner on 27<sup>th</sup> November 2014 informing it of the CA's intention to undertake a market inquiry with the assistance of a consultant. The consultant was the Centre for Competition, Regulation and Economic Development of the University of Johannesburg. In the five months following, the Petitioner and the CA were engaged in the exchange of information and material through oral as well as written memoranda, culminating in a letter of gratitude from the CA on 17 March 2015. Everything and everyone thereafter went mute.

8. Then on 7 March 2016, the CA's officers armed with a court order and in the company of armed police officers visited the Petitioner's premises in Nairobi, sealed the premises, prohibited the Petitioner's employees and officers from communicating with any person or moving and proceeded to search the premises. The search was in execution of the warrants or court order obtained a week earlier in **Competition Authority –v- Mea Ltd Chief Magistrate Criminal Misc. Application No. 103 of 2016** at Kibera Law Courts. The warrants/court order had been obtained without notice to the Petitioner.

9. The next day, 8 March 2016, a press report appeared quoting the 2<sup>nd</sup> Respondent as having confirmed a 'raid' on the Petitioner's premises and also another company. The report stated that the raids were "*in search of documents to help unravel alleged uncompetitive practices between the two firms who control about 60% of the fertilizer market*".

10. Ten days later the Petitioner moved court, initially also ex parte.

### ***The Petitioner's case***

11. The Petitioner contends that it had availed to the CA all the information it (the CA) required and that contrary to the Act, in particular Section 31(3), the CA failed to notify the Petitioner of the intended investigation or notify the Petitioner to furnish and produce any information or document the CA considered necessary. Additionally the Petitioner contends it was never notified by the Respondents that it was under investigation for any criminal offence.

12. According to the Petitioner the warrants/ court order was obtained by the CA through the "concealment of material facts, gross misrepresentation and abuse of office". In this regard, the Petitioner contends that the CA proceeded ex-parte yet it had all along been in contact and communication with the Petitioner. The bad faith, it was contended, was exhibited further when the Respondents issued a press-release about the 'raid' on the Petitioner's premises.

13. The Petitioner states that it was entitled to a notice prior to the investigations being commenced in accordance with Article 47 of the Constitution as well as Section 4 of the Fair Administrative Action Act and Section 31(3) of the Act. The Petitioner also contends that the Respondents action was and is discriminatory and contrary to Article 27 of the Constitution in so far as no other player in the fertilizer

industry (save Yara East Africa Ltd) has been raided or treated in the same way as the Petitioner has been treated.

### **The Respondents' case**

14. The Respondents' case can be recalled from the Replying Affidavit of the 2<sup>nd</sup> Respondent filed on 14<sup>th</sup> April 2016.

15. The Respondents confirm that the market inquiry conducted by the CA in 2014 pursuant to its statutory mandate revealed strong indications of anti-competitive conduct in the fertilizer industry which disadvantage farmers. The Respondents contend that the inquiry report finalized and issued on 10 September 2015 recommended further investigations to obtain crucial documents from the key players in the fertilizer industry, the Petitioner being one of them. The Respondents additionally contend that on 26 June 2015 all players had been notified by the 1<sup>st</sup> Respondent of the intention to conduct the inquiries and additionally the reserved right to investigate any player or trade associations in the agriculture and agro-processing sector but despite the request to submit to the process the Petitioner never complied and never availed the crucial documents sought.

16. The Respondents contend that the act of investigating the Petitioner was prompted by the inquiry report and further precipitated by the Petitioner's inaction.

17. The Respondents further contend that their action in investigating the Petitioner had a statutory underpinning and that the Respondents were under no obligation to notify the Petitioner of the investigations or the intended investigations. Additionally, the Respondents state that both the Act under Section 32 and the Criminal Procedure Code (Cap 75) under Section 118 do not invite any notices being given to those being investigated. The Respondents also deny concealing any material facts when they moved the court for search warrants under Section 118 of the Criminal Procedure Code.

18. The Respondents finally contend that the Petition is premature as the investigations are still on-going and that the Petitioner has not shown any violation of its rights as the Petitioner if deemed culpable will be afforded an opportunity to respond as appropriate as provided for under Sections 34 and 35 of the Competition Act.

19. For completeness, the Respondents asked the court not to interfere with the 1<sup>st</sup> Respondent's statutory mandate and functions.

### **Arguments in court**

20. Mr. Peter Gachuhi argued the Petitioner's case while Mr. Steve Ligunya urged the Respondents' case.

#### *Petitioner's Submissions*

21. While stating that there was no dispute that the CA sought information from the Petitioner following the market inquiry which the CA was conducting, Mr. Gachuhi submitted that all the information was provided to the CA but when the CA applied for the search warrants it did so *ex parte* and without disclosing that it had all the information. In proceeding *ex parte* before the magistrate for the search warrants, counsel submitted, the CA was in violation of the Petitioner's rights under Article 47 of the Constitution as well as Section 4(3) of the Fair Administrative Action Act, 2015.

22. Counsel added that Section 31(3) of the Act also enjoined the 1<sup>st</sup> Respondent to not only fully disclose relevant material to court but also notify the Petitioner before taking any action which was bound to affect the Petitioner adversely. Counsel stated that as a result of the CA's action combined with that of the 2<sup>nd</sup> Respondent in issuing a press-statement on the raid on the Petitioner's premises, the Petitioner could not expect any fair hearing.

23. Counsel further referred to the case of **Tom Ojienda t/a Tom Ojienda & Associates Advocates vs. Ethics and Anti Corruption Commission & 5 Others [2016]eKLR** for the proposition that this court has the requisite jurisdiction to judicially review the orders or search warrants issued by the subordinate court and also for the proposition that the mere suspicion of commission of a crime is not sufficient basis to seek a search warrant.

24. Additionally, Mr. Gachuhi relied on the cases of **Gordon Ngatia Muriuki vs. Director of Public Prosecutions & 2 Others [2014]eKLR** and **Manfred Walter Schmitt & Another vs. Republic & Another [2013]eKLR** for the proposition that there is a duty on the subordinate court to issue warrants for purposes of protecting the individual rights under the Constitution from arbitrary violation and that the search warrants are not to be issued as a matter of course.

25. Then referring to the case of **Moi University vs. Council of Legal Education & Another [2016]eKLR**, Mr. Gachuhi urged the court to invoke the doctrine of proportionality and allow the application for conservatory orders as the Petitioners were unlikely to obtain any fair hearing.

### *Respondents' Submissions*

26. Mr. Ligunya commenced his submissions by stating that the claim against the 2<sup>nd</sup> Respondent could not be sustained as there was no allegation of breach or default against the 2<sup>nd</sup> Respondent. Additionally, counsel stated that the 2<sup>nd</sup> Respondent was protected under Section 16 of the Act.

27. Mr. Ligunya then submitted that there was no hearing yet involving the Petitioner as the CA was simply still only investigating the matter before deciding whether there was need to summon the Petitioner to state its side of the story. In this respect, counsel referred the court to Sections 34, 35 and 36 of the Act and stated that the Petition was premature.

28. Counsel then further submitted that under Section 31 of the Act, the CA was not obligated to give any notice to the Petitioner as the same was discretionary and the same, added counsel, also applied to Section 118 of the Criminal Procedure Code. Counsel stated that the action without notice was further vindicated by Section 32 of the Act which allowed the 1<sup>st</sup> Respondent to even conduct searches without warrants.

29. Mr. Ligunya submitted that the Petitioner had not shown that its rights had been violated at all and if there was ultimately need for any hearing the Petitioner would be afforded an opportunity before any further action. Counsel also stated that the Petitioner's privacy or right to confidentiality had also not been violated as the Respondents only urged the Petitioner to collect its documents from the Respondents' lawyers who were also holding the documents in confidence.

30. On the press-statement by the 2<sup>nd</sup> Respondent, counsel submitted that there was evidently a cautious approach adopted where the 2<sup>nd</sup> Respondent is also quoted to have stated that they would not reveal all information to the media.

31. Mr Ligunya urged the court to dismiss the application for being pre-emptive.

### ***Discussion and Determination***

32. The core issue is whether the Petitioner is entitled to a conservatory order given the facts and circumstances of this case. A corollary issue is whether the Petition as against the 2<sup>nd</sup> Respondent is merited. I will first and in short dispose of the corollary issue.

33. The Petition alleges the violation as well as a threat of violation of the Petitioner's constitutionally guaranteed rights and fundamental freedoms. In particular, the Petitioner pointed to Articles 27, 47 and 50 of the Constitution. The Petitioner expressly accuses the Respondents of holding a 'trial-in-the media' and states that this would jeopardize any rights to a fair hearing or trial that the Petitioner is entitled to. In response, the Respondents state that there is no claim against the 2<sup>nd</sup> Respondent and that he is protected

as he was merely acting as the CA's chief executive.

34. There is no doubt that every person is entitled to institute court proceedings claiming that a right has been denied, violated, infringed or is threatened: see **Article 22(1)** of the Constitution. There is also no doubt that enforcement of the Bill of Rights may take a vertical or a horizontal approach or both.

35. I also have no doubt that primary and general rules of attribution which are ordinarily applicable to private corporate entities also apply to statutory corporate entities like the CA. Section 16 of the CA's establishing statute the Competition Act (Cap 504) avails the primary rule of attribution when it provides as follows:

***“16(1) No matter or thing done by a member of the Authority or by any officer, member of staff or agent of the Authority shall, if the matter or thing is done bona fide for executing the functions, powers or duties of the Authority, render the member, officer employee or agent or any person acting on his directions personally liable to any action, claim or demand whatsoever”.***

36. I may perhaps pause and state what may be the obvious at this point.

37. Not everything a corporate entity does or does not do requires resolution to bind it. This applies to a statement about what a corporate entity has done or not done. The corporate entity has to act by servant, agent or officers in certain instances and such act will still be attributed to the corporate entity unless the charter expressly excludes such acts from being attributed to the corporate entity.

38. The act complained of by the Petitioner herein revolves around a press interview given by the 2<sup>nd</sup> Respondent. The Petitioner states it was full of mala fides intended to hurt the Petitioner and its business. The Respondents state it was bona fide and so very cautiously made.

39. There are two possibilities, in my view.

40. One possibility is that if Section 16 of the Act and the facts and circumstances of this case are juxtapositioned, one may be led to the conclusion that the press-statement must be attributed to the CA. In such a case it may be easily concluded that the 2<sup>nd</sup> Respondent was wrongly impleaded. Another possibility is that a strict interpretation of Section 16 of the Act, may lead to the conclusion that it is not the function or mandate of the 2<sup>nd</sup> Respondent to give such real time interviews on the on-going operations of the 1<sup>st</sup> Respondent as to jeopardize such operations and the rights of all parties involved. In short, he had no business issuing the statement and therefore he must solely be held to blame and no attribution made to the CA. In such eventuality, it would be easily concluded that he was correctly impleaded.

41. It will need more than the documents and facts currently before the court to come to one specific conclusion.

42. For now, I must be contented and state that the Petitioner has expressly accused the 2<sup>nd</sup> Respondent of violating its rights or putting its rights to fair trial under threat. I would consequently not conclude and state that the 2<sup>nd</sup> Respondent has been improperly impleaded. Besides, I also take note of the fact that Section 16(2) and 16(3) of the Act both afford adequate safeguards and protection to the 2<sup>nd</sup> Respondent, even if the acts complained of are attributed to him but held to have been done in good faith. I am unable to hold that the 2<sup>nd</sup> Respondent was improperly impleaded as urged by Mr. Ligunya.

43. I turn now to the issue of conservatory orders.

44. It is now relatively clear that a court will act and grant conservatory orders where a Petitioner/applicant demonstrates that he has a prima facie case with a likelihood of success and that unless the order is granted the applicant is likely to put under great prejudice and his Petition ultimately

rendered nugatory. The court is also to consider not only whether the grant/denial of the conservatory order will promote constitutional values and principles but also whether it would be in the public interest to grant the conservatory order given that conservatory orders under the Constitution take a more public dimension though intended to maintain a status quo.

45. The above principles have been laid out in a series of cases: see **Kenya Small Scale Farmers Forum vs. Cabinet Secretary Ministry of Education NRB HCCP No. 399 of 2015 [2015]eKLR** and **Bia Tosha Distributors Ltd vs. Kenya Breweries Limited and 3 Others NRB HCCP No. 249 of 2016 [2016]eKLR**. The principles are relatively sound and are to be applied to the instant case.

46. The Petitioner's main contention is that its right under Article 47 has been violated and is still under threat of further violation.

47. According to the Petitioner the violation or threat of violation is evident in the fact that the CA opted to investigate the Petitioner for alleged anti-competitive acts without notifying the Petitioner. Additionally, the Petitioner also contends that its rights to fair administrative action were violated in so far as the CA obtained search warrants/ order and proceeded to seize documents from within the Petitioner's premises without any notification. The Petitioner also complains that the search warrants /order was obtained without a full disclosure of all material facts. The Respondents contend that they disclosed all material facts and that in any event they did not need to notify the Petitioner of the investigations or the application for search warrants/order.

48. The starting point, in my view, would be an obvious acknowledgment that the right to fair administrative action is not an absolute right and may be appropriately limited by law as provided for under Article 24 of the Constitution.

49. The CA has a rather burdensome role under the Act. Its general role is to promote and protect effective competition in markets and prevent unfair and misleading market conduct throughout Kenya as it seeks to enforce compliance with the Act. In the process it has and conducts an investigatory role. More specifically under Section 9 of the Act , the CA's functions include to:

**9(1).**

***a) Promote and enforce compliance with the Act.***

***b) Receive and investigate complaints from legal or natural persons and consumer bodies***

***c) ...***

***d) ...***

***e) Carry out inquiries, studies and research into matters relating to competition and the protection of the interests of consumers.***

***...***

***f) Investigate impediments to competition, including entry and exit from markets, in the economy as a whole or in particular sectors and publicize the results of such investigations.***

***g) Investigate policies, procedures and programmes of regulatory authorities so as to assess their effects on competition and consumer welfare and publicize the results of such studies.***

50. Largely, a good portion of the CA's functions is investigatory.

51. Part E of the Act is intutled "*Investigation into prohibited practice*". Section 31 of the Act, which falls under Part E of the Act, empowers the CA either on its own motion or upon receipt of a complaint or

information from any person to carry out investigations into any conduct or proposed conduct which may infringe on prohibitions relating to restrictive trade practices or to abuse of dominance. And where the CA decides to conduct an investigation, then under Section 31(3) (formerly Section 31(4) of the Act), it has the discretion to notify any person to; furnish it with information relevant to the investigation, to produce any document and to appear before the CA at any prescribed time to give evidence or give copies of records, the person has in his possession and which information, evidence, documents or records are relevant to the investigation.

52. Section 32 of the Act grants the CA powers of entry and search. The CA may enter any premises where it is believed information and documents relevant to investigation are domiciled and inspect such goods, documents and records situate thereon. The CA must however inform the person present or in charge of the premises entered of the intention to inspect the premises. Upon entry the CA may search, reproduce, seize and remove anything from the premises for examination and safe-keeping. The section also allows the CA to seek the assistance of law enforcement officers in execution of the right to enter, search and seize.

53. Section 33 of the Act grants the CA powers to take evidence in the form of a statement, document or information which may assist to effectively deal with the investigation. Upon conclusion of the investigation, under Section 34 the 1<sup>st</sup> Respondent is to make a decision on whether any prohibition(s) have been infringed and notify any person to be affected by that decision, clearly stating reasons for proposed decision and also setting out as proposed reliefs while also inviting the party to be affected to make written and, where necessary or required, oral submissions.

54. Finally, under Section 36 having convened a hearing conference and heard all affected parties, the CA may take appropriate action. Such actions include a declaration of infringement of the prohibition imposed by the Act as well as financial penalties and order for remedial action.

55. It is clear that the investigatory role of the CA is exhaustively provided for in the Act.

56. Decisions and determinations by administrative bodies as well as tribunals ordinarily commence with an investigation whether preliminary or substantive. An investigation essentially helps to determine whether a wrong has been committed. It is a critical step in any administrative, judicial or even quasi-judicial proceeding which may lead to prosecution. If the investigation is perverted then the course of justice itself as well as the administration of justice may be perverted. The process of investigation should thus not be soiled. The investigator should follow the due process but he must also not be misled and ought to access as much information and material as possible. That way the course and administration of justice stays intact.

57. It is the Petitioner's contention that in not having been notified of the investigation by the CA and in the 2<sup>nd</sup> Respondent issuing a media-statement the course of justice has been perverted. The Petitioner's right to fair administrative action under Article 47 has not only been violated but the likelihood being accorded a fair trial has completely waned, in the Petitioner's view.

58. It is apparent that Section 32 of the Act allows entry and seizure without any warrants. The Section must however be read in light of the provisions of both Article 47 and Section 4 of the Fair Administrative Action Act, 2015. Likewise, Section 118 of the Criminal Procedure Code also provides for search warrants /orders to be obtained but the same may be obtained ex parte. Section 32 of the Act, as well as Section 118 of the Criminal Procedure Code, is both lawful exceptions to the right to privacy guaranteed under Article 31.

59. Section 118 affords the protection from arbitrary searches and seizures by urging the court process but at the same time ensures that the course of justice is not defeated where there is a likelihood of the investigation being perverted. An investigator is not obligated to give any notice where circumstances dictate. However where the search and seizure is sought out of mere suspicion then notice ought to be given before the warrants are issued. It is for the court to be satisfied by way of affidavit evidence.

60. In **Tom Ojienda t/a Tom Ojienda & Associates Advocates –vs- EACC & 5 Others [2016] eKLR**, the court after reviewing the cases of **Viru Ltd –vs- The Chief Magistrates Court Criminal Application No. 475 of 2004**, **Gordon Ngatia Muriuki –vs- DPP & 2 Others** and **Manfred Walter Schmitt & another –v- Republic & Another Criminal Application No. 569 of 2012** stated as follows:

*[85] I am in agreement with the exposition of the law as above and the principle emerging from the above cases is that there must be some degree of reasonable basis upon which an investigator would seek to investigate a bank account. In that regard therefore, the Courts have been categorical that mere suspicion of commission of a crime, is not a sufficient basis to seek a search warrant and the test applicable to determine reasonable basis was set out by the Court in the case of Emmanuel Suipanu Siyanga vs Republic Criminal Appeal No.124 of 2009 where it stated that;*

*“... it follows that the factual basis which would make any suspicion which is actually formed a reasonable one must also exist at the material time; a suspicion cannot be held to be reasonable if it is founded on non-existent facts. This would be a subjective suspicion and must be based upon grounds actually existing at the time of its formation. If there are not ground which then made suspicion reasonable, it was not a reasonable suspicion. Whether grounds actually existed at the time is to be tested objectively. Consequently a suspicion may be reasonable even though subjectively it was based on unreasonable grounds, to prove reasonable suspicion, it must of necessity be recognized that a reasonable suspicion never involves certainly as to the truth. Where it does, it ceases to be suspicion and becomes fact ... there must be satisfactory account ...”*

61. The court in all the cases while appreciating that warrants of seizure may be obtained ex parte reiterated the need for a foundational basis or reasonable suspicion. I agree and hasten to add that such reasonable basis is established where there is also full disclosure of all material facts.

62. In the instant case the Respondents state that there was reasonable basis, that there was a factually sound foundation, that the CA made full disclosure and that the Petitioner had initially failed to give all the necessary information and documents to the CA.

63. I have read the application which was made before the magistrate for search warrants.

64. The application detailed the fact of a market inquiry conducted by the CA. It talked about the preliminary field investigations. It talked about the failure on the part of the Petitioner to avail minutes of meetings of the Fertilizer Association of Kenya allegedly chaired by the Petitioner between 2011 and 2015 and which minutes had not been availed by the Petitioner to the Respondents despite requests. The information was relayed to the court through an affidavit as required by Section 118 of the Criminal Procedure Code.

65. The information relayed to the court was, in my view, above mere suspicion. It was pegged on to a market inquiry in which even the Petitioner had participated in. I am not satisfied at this stage of the proceedings and on the basis of the evidence availed as well as the circumstances of the case that the Petitioner has shown that it has a prima facie case with a likelihood of success that its right to fair administrative action was violated by the want of notice prior to the investigations including the application for search warrants. The right under Article 47 is not absolute. Instances where it is limited by law include both Section 118 of the Criminal Procedure Code and Section 32 of the Act. The constitutional invalidity of these sections is not in doubt.

66. At this stage of the proceedings, I am also unable to identify the prejudice the Petitioner may suffer if the conservatory orders are not granted. Neither am I satisfied that the Petition may be rendered nugatory.

67. It was pointed that the Petitioner is unlikely to obtain a fair trial. I however tend to agree with the Respondents, at this stage, that even prior to any trial, the Petitioner will have to be subjected to an informal hearing under the provisions of Sections 34 and 35 of the Act. That may only happen if the

investigation is over and the CA sees the need to invoke such proceedings and afford the Petitioner the statutory opportunity.

68. I also hold the view that given the role the CA plays it would not be proportionate to grant the conservatory orders sought. The CA ought to be able to perform its statutory mandate with minimal interference. In the instant case, the chronology of events from the point of launching the market inquiry to the point of executing the search warrants appear to tailor the fact that the CA was always acting in the interest of the public.

69. The wider public interest in the circumstances of this case would dictate a denial of the orders sought.

70. Finally, the Petitioner claimed that the Respondents had failed to disclose material facts to the court when it applied for search warrants without any notice to the Petitioner. More specifically, the Petitioner stated that the CA did not disclose that the Petitioner had been in consistent touch and contact with the 1<sup>st</sup> Respondent. I am not satisfied that such disclosure would have changed the circumstances and the Magistrates' court's approach. In any event, the affidavit before the magistrate alluded to the fact of contact and request for information which had not garnered any fruits.

### **Conclusion**

71. I answer the two isolated issues in the negative.

72. Firstly, it is my view that the 2<sup>nd</sup> Respondent was not improperly impleaded as has been alleged by the Respondents.

73. Secondly, I am unable to hold, for all the above reasons, that the Petitioner has made out a case for the issuance of a conservatory order or that the Petitioner will be prejudiced if no order is granted.

### **Disposal**

74. The application deserves to be dismissed and it is hereby dismissed but with no order as to costs.

75. Orders accordingly.

**Dated, signed and delivered at Nairobi this 19<sup>th</sup> day August, 2016**

**J.L.ONGUTO**

**JUDGE**