

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E331 OF 2023

BETWEEN

SAFARICOM PLC.....

.....PETITIONER

VERSUS

DIRECTOR OF CRIMINAL

INVESTIGATIONS.....1ST RESPONDENT

DIRECTOR OF PUBLIC

PROSECUTIONS.....2ND RESPONDENT

ATTORNEY

GENERAL.....3RD

RESPONDENT

AND

FRANCIS MUSEBE & 18 OTHERS.....

INTERESTED PARTIES

JUDGMENT

Introduction

1. The Petition dated 11th September 2023 is supported by the Petitioner's affidavit in support of even date.
2. The Petitioner alleges that the criminal investigation against its employees (Interested Parties herein) by the 1st Respondent has been instigated at the behest of a Plaintiff in a commercial dispute so as to intimidate and compel the

Petitioner to settle the said commercial dispute involving the said Plaintiff and the Petitioner. The Petitioner avers that the 1st Respondent's actions are thus in violation of the Constitution, in particular, Articles 10(1), 10(2), 22, 25, 27(1) & (2), 35(1) & (2), 40, 47, 50(1) and (2) and 73 of the Constitution.

3. Consequently, the Petitioner seeks the following reliefs:

- i. Pending the hearing and determination of this Petition, an order be issued restraining the Respondents by themselves, their servants, or agents from investigating, summoning, or arresting the Petitioner's officials and/ or former or current employees or in any way howsoever investigating any matter in respect of the RFP issued in January 2016 for the Petitioner's 2nd Agency for ATL/BTL Creatives and Digital Services pending the hearing and determination of this Petition.***
- ii. A declaration be issued that the 1st and 2nd Respondents investigations relating to the Petitioner's award of the 2nd Agency for ATL/BTL Creatives and Digital Services have breached the Petitioner's and Interested Parties' fundamental rights under Articles 10(1), 10(2), 22, 25, 27(1) & (2), 35(1) & (2), 40, 47, 50(1) and (2) and 73 of the Constitution.***
- iii. A declaration be issued that the 1st and 2nd Respondents' breach of the Petitioner's and Interested Parties' fundamental rights singularly and cumulatively has caused damage to the Petitioner and the Interested Parties.***

- iv. A declaration that the continued investigation of the Petitioner and the Interested Parties by the Respondents in relation to commercial disputes emanating from the 2016 Petitioner's RFP for the 2nd Agency for ATL/BTL Creative and Digital services and/ or dispute between Safaricom Plc and Transcend Media Group Limited is an infringement and threat to the Petitioner's right to a fair trial as guaranteed under Article 50 of the Constitution.**
- v. The Respondents, either by themselves, their servants and agents, are restrained from investigating, summoning or arresting the Petitioner's employees or former employees' or in any way howsoever from investigating any matter in respect of the dispute between the Petitioner and Transcend Media Group Limited relating to the 2016 2nd Agency A TL/BTL Creative and Digital Services.**
- vi. Any other relief or such other orders as this Court shall deem fit and just to grant to the Petitioners.**
- vii. Costs of this Petition be awarded to the Petitioner.**

Petitioner's Case

- 4. The Petitioner, through its Senior Manager- Litigation, Legal Services and Secretarial Services, Daniel Ndaba aver that vide a letter dated 5th September 2023, the 1st Respondent notified its Chief Executive Officer that it had summoned the Interested Parties on various dates between 11th September 2023 to 15th September 2023 to record statements. He notes

that the 1st Respondent had sent a similar communication prior on 27th July 2023.

5. He depones that the summonses were in relation to investigations into the alleged offences of ***conflict of interest and theft of intellectual property rights*** in regard to the tender and award of the Petitioner's creative and digital agency tender issued on 25th January 2016. He notes that the tender was dubbed '*the request for proposal (RFP) for the 2nd Agency for Safaricom ATL/BTL Creative and Digital Services*'.
6. He contends that the 1st Respondent's investigation relates to a matter that is unknown to the Petitioner and the Interested Parties. This is because the 1st Respondent claims that the tender required a company that could develop software designed to satisfy the needs of the procuring entity yet the Petitioner's tender was for advertising.
7. He depones that the Petitioner protested the 1st Respondent's summons for the interested parties to appear 11th September 2023-13th September, 2023. Earlier on, the Petitioner had appeared through Counsel and sought response to its letter dated 28th July 2023 which sought information on:
 - a) *The comprehensive and thorough investigations ordered by the 2nd Respondent were in fact conducted as the Petitioner was never contacted in connection with any such investigations.*

- b) *If any such investigations were conducted (to the exclusion of the Petitioner), what the outcome thereof was and the resultant report.*
- c) *The 2nd Respondent, upon receipt of any resultant investigations file, issued any further directions and requested for a copy of the said directions.*
8. The Petitioner contends that its request for information, through its Counsel, has been futile as the 1st Respondent has refused and neglected to disclose the information requested. He in fact states that the Petitioner was surprised when it received the summon letter dated 5th September 2023 as the 1st Respondent had not responded to their correspondence seeking the information.
9. It is contended that it is palpable that the 1st Respondent intends to withhold crucial information that is material for purposes of addressing the issues raised and for preparing for the scheduled interviews and recording of statements. He informs that the Petitioner is apprehensive that the statements that will be recorded during these interviews will be used as evidence in Court.
10. Further to this, he postulates that the matter being investigated by the 1st Respondent is the subject matter in **High Court Commercial & Tax Division case No. HCCOMM No. E014 of 2022 between Transcend Media Group Limited verses the Petitioner & 10 Others**. He states that in the matter, the plaintiff, Transcend Media Group alleges that:

- a) *The Petitioner along with Saracen Media Kenya Limited (Saracen) and Fieldstone Helms Limited (Fieldstone) conspired with its employees to utilize the Plaintiff's intellectual property and confidential information to bolster the Saracen's bid.*
- b) *The Petitioner induced and caused the resignation of its employees thereby occasioning breach of contract in complete disregard to clauses on non-compete, confidentiality and intellectual property ownership.*
- c) *The Petitioner, through its employees and servants, conspired with Saracen and Fieldstone to deny it a fair tendering process.*
- d) *The Petitioner unlawfully and fraudulently disqualified it from the Tender and awarded the same to Saracen.*
- e) *The Petitioner conducted a tendering process devoid of probity, fairness, accountability, level playing field and in complete disregard to the rules on procurement.*
- f) *The Petitioner engaged in unfair trade practices contrary to the express provisions of the Competition Act.*

11. In view of this, the Plaintiff who is believed to be the complainant herein seeks the following orders against the Petitioner:

- a) *A declaration that the Petitioner and its named employees' actions amounted to inducement of breach of contract on part of its key employees.*
- b) *A declaration that the Defendants' actions were unlawful interference in the Plaintiffs economic interests and occasioned it loss and damage.*

- c) *A declaration that the Petitioner failed to undertake a fair and transparent tendering process for the 2014 ATL and BTL sole agency and the 2nd ATL/BTL Creative and Digital services agency.*
- d) *Injunctive orders to restrain the Petitioner, Saracen and Fieldstone from advertising, rolling out and executing the Blaze Kenya campaign through print, out of home communications including billboards, posters, radio, television and all digital platforms and mediums including Twitter, Facebook, websites or in any way whatsoever.*
- e) *Monetary claim/awards of a sum of Kshs. 300,000,000.00 being exemplary damages, Kshs.208,734,336.00 for loss of retainer fees for the Blaze contract, Kshs. 288,000,000.00 damages for loss of agency fees and commissions for the Blaze campaign; Kshs.19,560,240.00 damages being the pitching/ tendering/bidding expenses for the ATL/BTL Creative and Digital Agency, Kshs.9,882,500.00 being loss of tendering pitching costs for 2013 sole Safaricom Agency Contract, Kshs.446,400,000.00 for loss of retainer fees for the 2014 sole A TL/BTL advertising agency, and Kshs.396,000,000.00 being loss of commission and agency fees for 2014 sole ATL/ BTL advertising agency.*
- f) *General damages for loss of reputation stemming from bad publicity generated by the Petitioner for awarding the A TL/BTL Creative and Digital Agency to Saracen.*
- g) *General damages for inducement of breach of contract.*
- h) *Interests and costs.*

12. He contends that the subject matter of the commercial suit and the purported investigation herein, is the same, as

revolves around the question whether there was any conflict of interest and breach of intellectual property rights relating to the tendering and award of the Petitioner's Creative and Digital Services Agency, a fact the Petitioner has persistently informed the 1st Respondent about.

13. Considering this, he asserts that the instant investigation is being used to coerce the Petitioner to settle the commercial suit by unlawfully intimidating its current and former employees by seeking information which can be used as evidence in the prosecution of the Commercial suit. That notwithstanding, he asserts that the Petitioner will explicitly ventilate on the scope of the RFP, the details of how the evaluation of the bids was carried out and the criteria used to award Saracen the contract in the commercial suit.
14. He informs that upon receipt of the Petitioner's letter dated 16th July 2021, the 2nd Respondent wrote to the Inspector General of Police on 2nd August 2021 directing a comprehensive and thorough investigation be undertaken on the allegations raised in the Petitioner's letter and to forward the resultant investigations file for further directions. He states that the Petitioner has not received any response from either the 1st and 2nd Respondent since.
15. In view of the foregoing, he emphasizes that the 1st Respondent's unreasonable refusal to avail the requested information to enable the Interested Parties prepare to respond to the summonses undermines the rule of law and

the principles and values enshrined in the Constitution. Further, infringes on the rights guaranteed to the Petitioner under 10(1), 10(2), 22, 25, 27(1) & (2), 35(1) & (2), 40, 47, 50(1) and (2) and 73 of the Constitution of the Constitution.

16. According to him, the 1st Respondent's conduct and refusal to avail the requested information and insistence on interviewing the Interested Parties makes it manifest that it has criminalized the commercial dispute which is a blatant abuse of power and the criminal justice system.

1st and 2nd Respondents' Case

17. In opposition to the Petition, these Respondents' filed their Replying Affidavit sworn by CPL Charles Maroa on 13th October 2023.
18. He depones that vide a letter dated 25th June 2021, they were directed to investigate an issue that was raised by Awa Muhindi of O&M Law LLP acting on behalf of Thomas Omanga, Timla Tieng and Christine Muchedu. The concern was about possible violations of their clients' rights as a result of an ongoing investigation at Nairobi area Regional Criminal Investigation office under *Inquiry File No.14 of 2016*.
19. He states that the subject matter of the concern was in respect to a complaint that was lodged by one, Lai Muthoka the Executive Director of Transcend Media Group (TMG) on 25th May 2016. The complainant in that matter had lodged a complaint of intellectual property theft by the Petitioner

herein in collusion with employees of TMG led by the said Thomas Omanga.

20. He depones that the complaint letter particularized that:

- a) *TMG was invited to participate in the Petitioner's Creative and Digital Agency Tender on 25th January, 2016 during which it appointed Thomas Omanga, the company's client service director at the time as agency lead on the project.*
- b) *TMG successfully submitted their proposal via the Petitioner's S-HUB Portal on 1st February, 2016. The proposal contained the communication strategy and creative execution of the brief as presented by the Petitioner.*
- c) *On 17th February, 2016, TMG made their first presentation to the Petitioner's Evaluation Panel and left behind both a hard copy and CD of their presentation.*
- d) *They then proceeded to the second stage of the bid process which involved the Petitioner's evaluation team making a visit to the complainant's offices, and the company was invited to make a presentation to the Petitioner's Executive Committee on 2nd March, 2016 in which the following bidders were shortlisted:*
 - i. *Transcend Media Group*
 - ii. *Brainwave Communications*
 - iii. *Saracean Media in collaboration with 5ive Ltd & Bean*
- e) *Before the Petitioner communicated the outcome of the Tender, details emerged that there were some underhand moves happening. Thomas Omanga who had taken some time off was sighted at the Petitioner along with Christine Muchendu*

(both being employees of TMG) attempting to sell TMG's body of work in their private capacity.

- f) Further TMG alleged that Safaricom had reached out to Saracen and coerced them to work with TMG personnel to irregularly move their body of work to Saracen and use it as Safaricom's Communication Campaign strategy to the youth segment.*
- g) The complainant alleged that a manipulation of their copyrighted work was being illegally used in the Petitioner's advertising campaign dubbed "Blaze Kenya".*

21. He avers that the complainant made a follow up on the investigations vide letters 27th April 2021 and 10th June 2021. The complainant stressed that the alleged offences emanating from the subject tendering process are covered under the Copy right Act, Bribery Act and Anti-corruption and Economics Crimes Act. He states that these offences fall within the 1st Respondent's jurisdiction.
22. Following this, the 1st Respondent issued summons vide letters dated 29th June 2021 and 15th July 2021, to the Petitioner, to appear at the 1st Respondent's office at Nairobi Area. He states that these summonses were not responded to by the Petitioner.
23. He avers that subsequently, the Petitioner through its Counsel, MMC ASAFO wrote to the 1st Respondent on 16th July 2021 raising concerns on the subject investigations in which they sought the 2nd Respondent's intervention, arguing that the subject is purely a civil matter that should not invite police action. This correspondence triggered the 2nd

Respondent's communication dated 2nd August 2021 addressed to the Inspector General highlighting the issues raised by the Petitioner and directing comprehensive investigations to be undertaken and findings be forwarded to enable the making of a decision.

24. He depones that to ensure a fair investigation, they summoned the Interested Parties herein, who had played various roles in the tendering and evaluation processes, vide summons through the Petitioner's Chief Executive officer. He asserts that this was meant to offer the Petitioner an opportunity to address the concerns through recorded statements which would aid the 1st Respondent to complete investigations and 2nd Respondent in making a fair and objective review of the investigation file. He states that these summonses were also not honoured by the Petitioner.
25. He contends that the Petitioner's consistent failure to honour the summons has been an impediment in addressing the concerns in the investigation. He informs that on 1st December 2022 the investigation file, *Inquiry file No.14 of 2016*, was forwarded to the 2nd Respondent without the Petitioner's and Interested Parties input.
26. He depones that the 2nd Respondent vide a letter dated 11th April 2023, advised on areas to be covered by way of further investigations before the office could make a decision to charge or not to charge. He points out that among the areas highlighted was, recording of statements from the Petitioner's representatives.

27. He states that in compliance with the 2nd Respondent's directions, they prepared and served summons to the Interested Parties through the Petitioner in letters dated 24th July 2023 and 5th September 2023. He states that the summons were likewise not honoured by the Petitioner.
28. It is asserted that the 2nd Respondent is empowered in law to give directions to the Inspector General with respect to an investigation of any particular offence while the National Police Service Act mandates the police to investigate any complaint lodged against any person including the Petitioner.
29. He stresses that the summons were issued to enable the cited allegations to be investigated. He points out that whether or not the investigations will unearth material information which will be the basis of a decision to instigate prosecution of the Petitioner or any of the Interested Parties is a matter which is premature at this stage.
30. In light of this, he emphasizes that the 1st and 2nd Respondents have acted in good faith and in the interest of justice. He contends that the Petitioner's allegations of violation of fundamental freedoms is merely speculative, frivolous, misleading and a waste of the Court's time. He maintains that the prayers sought are merely geared towards causing further delay and frustrating the ongoing investigation and likely to prejudice the interests of justice.

3rd Respondents' Case

31. The 3rd Respondent's response and submissions to the Petition are not in the Court file or Court Online Platform (CTS).

Petitioner's and Interested Parties Submissions

32. Njoroge, Regeru and Company Advocates for the Petitioner filed submissions dated 19th September 2024 where Counsel identified the issues for discussion as: *whether the investigations have violated the Petitioner's and Interested Parties constitutional rights and whether the Respondents, their servants be restrained from summoning, arresting and or investigating any matter in respect of the Petitioner's 2nd Agency ATL/BTL creative and digital services.*
33. Counsel answering in the affirmative in the first issue submitted that in the circumstances of this case, this Court's intervention is imperative owing to the abuse of power and violation of fundamental rights since the investigations were made in bad faith with the aim of achieving an ulterior motive. Counsel recapped that the genesis of the matter was the complaint lodged by TMG's Executive Director Lai Muthoka against the Petitioner, in relation to the award of the Petitioner's Creative and Digital Agency tender dubbed as "request for proposal (RFP)" for the 2nd Agency for Safaricom's ATL/BTL Creative and Digital Services, to Saracen Media Kenya Limited. Counsel noted that this issue as deponed by the Petitioner is the subject of numerous commercial suits before the High Court Commercial and Tax Division.

34. Counsel contended that while the Constitution under Article 245(4) and Sections 24 and 28 of the National Police Service Act empowers the Inspector General and the 1st Respondent to investigate crime, such power is not absolute. Counsel emphasized that they are obligated to conduct their mandate with the highest standards of competence and integrity.
35. In this matter, Counsel pointed out that the 1st Respondent ought to have understood the nature of the alleged offence before instigating the investigations. Accordingly, Counsel faulted the Respondents decision-making process arguing that it did not adhere to the constitutional and statutory principles.
36. For this reason, Counsel urged that this Court should interfere and issue appropriate orders. To buttress this point reliance was placed in **Commissioner of Police & Director of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] eKLR** where it was held that:

“The Court on the other hand is required to oversee that the DPP and the inspector General undertake these functions in accordance and compliance with the law If it comes to the attention of the Court that there has been a serious abuse of power, it should, in our view, express its disapproval by stopping it, in order to secure the ends of justice and restrain above of power that may lead to harassment or persecution.”

37. Like dependence was placed in **Republic -vs- Wellington Kihato & 3 Others Ex Parle Kenyatta University & 3 Others, Miscellaneous Application 61 of 2017.**
38. Counsel further submitted that the 1st Respondent had violated the Petitioner's and Interested Parties rights under Article 35 of the Constitution for failing to provide the information sought as detailed in the Petitioner's affidavit. To support this point reliance was placed in **Mercy Nyawade vs Banking Fraud Investigations Department & 2 others [2017] eKLR** where it was held that:
- “Right to Information laws and policies create mechanisms whereby an individual can access information that may have an impact on them, in order to meaningfully exercise other rights in the Bill of Rights.”*
39. Counsel contended moreover that the Respondents had violated the Petitioner's right to a fair hearing under Article 50(1) of the Constitution by the extent of the delay in completing the investigations and making a decision on whether to charge on not, coupled up with the fact that their investigations had been marred with secrecy on account of their deliberate failure to give crucial information and documentation to enable the Petitioner and Interested Parties effectively prepare an appropriate defense on the allegations levelled against them.
40. Reliance was placed in **Robert Waweru Maina & 4 others v Director of Public Prosecutions & 4 others [2022] KEHC 15 (KLR)** where it was held that:

“It is therefore settled law that all persons who come to any court are entitled to a fair hearing whether the matter instituted is criminal or civil in nature. In this context, the drafters of the Constitution in Article 25(c) placed a bar on limitation of the right to a fair trial in civil and criminal matters.”

41. Equally, Counsel submitted that the Respondents had violated the rights under Article 10, 27, 28, 29, 40, 47 and 73 of the Constitution. Counsel proclaimed that the investigations had been marred with secrecy, a lack of transparency and accountability, in breach of the rule of law. Counsel added that the Respondents had failed to act diligently and expeditiously by allowing themselves to be dragged into a purely commercial dispute.
42. On the second issue, Counsel submitted that while the operation of Section 193A of the Penal Code is appreciated and acknowledged, it was underscored that the Respondent's investigations are highly malicious as are aimed at forcing the Petitioner's hand in the commercial dispute before the High Court Commercial and Tax Division, which is the bedrock of their investigations.
43. To buttress this point, reliance was placed in **Kuria & 3 others**(supra) where it was held that this Court is empowered to ensure that its process do not degenerate into tools for personal score-settling or vilification and on issues which would otherwise violate the fundamental principles of justice which underlie the society's sense of fair play and decency. Equally that, the machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds

and individual vendetta. Accordingly, Counsel submitted that the Respondents actions in sum are illegal, highly irrational and a blatant abuse of the rights and fundamental freedoms of the Petitioner and Interested Parties.

1st and 2nd Respondents Submissions

44. Senior Principal Prosecution Counsel, Achochi Henry Nyabuto filed submissions dated 20th November 2024.
45. On an opening note, Counsel underscored that the Petitioner and Interested Parties had not been charged for offences related to the impugned investigation neither a decision to charge by the 2nd Respondent made. Counsel stressed that these parties were acting out of the apprehension of the purported charges thus matter is premature and without any basis.
46. Counsel submitted that Section 24 of the National Police Service Act mandates the police to investigate any complaint brought to their attention in order to determine whether a criminal offence has been committed. Consequently, Counsel submitted that the outcome of the investigations can either exonerate or incriminate the Petitioner and the Interested Parties. Nonetheless, it was maintained that summoning of the Petitioner and Interested Parties was in line with the law and principles of natural justice thus their rights were not violated as alleged.
47. To buttress this point reliance was placed in **Rhodah Mutete Mutuku v Inspector General, National Police Service & 2 others [2019] eKLR** where it was held that:

“Investigations are a fundamental step in the justice chain to ensure that people are not charged unnecessarily and therefore cannot be said to be a threat to the petitioner’s right unless the investigations have been conducted unprocedurally and/or for ulterior motive.”

48. Comparable reliance was placed in **Republic vs. Commissioner of Police and Another ex-parte Michael Monari & Another (2012) eKLR.**

49. Further to this, Counsel submitted that the Petition offends the doctrine of ripeness as the suit was filed on an anticipatory basis. Counsel thus urged that this Court should refrain from entertaining the matter. To support this point reliance was placed in **Kiroti wa Nguni & 19 Others v Attorney General & 2 others [2020] eKLR** where it was noted that:

“The doctrine focuses on the time when a dispute is presented for adjudication. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies”.

50. Similar reliance was placed in **National Assembly of Kenya & another v Institute for Social Accountability & 8 others [2017] KECA 170 (KLR).**

51. The Petitioner was also accused of breaching the doctrine of exhaustion as failed to exhaust the administrative remedies available to it. Dependence was placed in **Geoffrey Muthiga Kabiru & 2 others - vs- Samuel Munga Henry & 1756 others [2015] eKLR** where it was held that:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brew.”

52. Like dependence was placed in **Anthony Miano & others v Attorney General & others [2021] eKLR** and **Douglas Maina Mwangi vs Kenya Revenue Authority and Another HC Constitutional Petition No. 528 of 2013.**

53. Furthermore, Counsel submitted that the 2nd Respondent had not executed his mandate under Article 157 (6) of the Constitution and therefore there were no violations of the Constitution and the law. Equally, Counsel reiterated that the police are legally obligated to investigate alleged offences and thus investigation of the Petitioner does not amount to a violation of fundamental rights as long as it is done within the parameters of the law. Dependence was placed in **Republic v Service & 2 others; Resilient Investments Limited & 3 others (Interested Party); Limited (Exparte) [2022] KEHC 43 (KLR)** where it was held that:

“The power to stop or quash police investigations on a suspected offender must be exercised sparingly and with circumspection and in the rarest of rare cases and the court cannot be justified in embarking upon an inquiry as to the reliability or otherwise of allegations made in the complaint, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the court do not confer an arbitrary jurisdiction on the court to act according to its whims or caprice. The power to quash investigations is immense since it amounts to exonerating a suspect before trial. Such power must be

exercised with extreme care and caution. It is a power, which the court exercises only in exceptional cases where there is clear evidence of abuse of powers, abuse of discretion or absence of factual basis to mount the prosecution”.

54. Parallel reliance was placed in **Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & another [2018] eKLR, Republic vs The Chief Magistrate, Milimani and 2 Others Ex. P Tusker Mattresses Ltd and 3 Others HC Misc. Civil Application No. 179 of 2012** and **Kuria & others versus AG [2002] 2 KLR 69.**

Analysis and Determination

55. It is my considered opinion that the issues that arise for determination are as follows:
- i. Whether the Petition is premature and offends the doctrine of ripeness.***
 - ii. Whether the Respondents decision to initiate an investigation into the Petitioner’s employees (Interested Parties) was, in the circumstance of this case motivated by malice.***
 - iii. Whether the investigation amounts to violation of the constitutional rights of the Petitioner and Interested Parties under Articles 10 (1) & (2), 22, 25, 27 (1), 35 (1) & (2), 40, 47, 50 (1) & (2) and 73 of the Constitution.***
 - iv. Whether the Petitioner and Interested Parties are entitled to the relief sought.***

Whether the Petition is premature and offends the doctrine of ripeness.

56. The 1st and the 2nd Respondent submitted that the Petitioner and Interested Parties had not been charged with any offences relating to the impugned investigation nor had the 2nd Respondent made the decision to charge hence the apprehension about the purported charges was anticipatory, premature and without any basis.
57. The Petitioner did not specifically react to this submission from the 1st and 2nd Respondents.
58. The doctrine of ripeness is a justiciable principle. Court have declined entertaining matters when it is too early to as to give rise to actual dispute. In **County Assembly Forum & 6 others v Attorney General & 2 others; Senate of the Republic of Kenya ([2021] KEHC 304 (KLR)** noted as follows:

“171. The Ripeness doctrine is one facet of the larger principle of non-justiciability. It is a jurisdictional issue that bars a Court from considering a dispute whose resolution has not crystallized enough as to warrant Court’s intervention. Its operation is informed by the idea that there exist other fora with the capacity to resolve the dispute other than Court process.

172. The operation of the doctrine was discussed by a multi-Judge Bench of the High Court in Nairobi Constitutional Petition No. 254 of 2019, Kiriro wa Ngugi & 19 Others v Attorney General & 2 others [2020] eKLR in the following manner: -

The doctrine focuses on the time when a dispute is presented for adjudication. The Black’s Law

Dictionary 10th Edition, [supra] at page 1524 defines ripeness as:

The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made

Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.”

59. The Supreme Court in **Attorney-General & 2 others v Ndi & 79 others; Prof. Rosalind Dixon & 7 others [2022] KESC 8 (KLR)** stated as follows:

“61. The doctrine of ripeness focused on when a dispute had matured into an existing substantial controversy deserving of judicial intervention. The doctrine of ripeness prevented a party from approaching a court before that party had been subject to prejudice, or the real threat of prejudice, as a result of the legislation or conduct challenged.

63. Ripeness discouraged a court from deciding an issue too early. It therefore required a litigant to wait until an action was taken against which a judicial decision could be grounded and a court was able to issue a concrete relief. That approach shielded a court from dealing with hypothetical issues that had not crystalized.”

60. The question thus becomes, has the present case been caught up by the principle of ripeness?
61. From the Petitioner perspective as can be garnered from the pleadings and the affidavit in support, the investigation

against its employees (the Interested Parties) is intended to exert pressure and coerce the Petitioner to settle a commercial dispute, which action amounts to harassment as opposed to a genuine investigation and thus the Petitioner is entitled to seek this Court's protection.

62. Article 22 (1) of the Constitution provides that 'every person has the right to institute proceedings claiming that a right or fundamental freedom in the Bill of rights has been denied, violated or infringed or **is threatened**. Article 23 (3) which confers this Court, among others with the jurisdiction to determine applications for redress of denial, violation or infringement of, or **threat to**, a right or fundamental freedom in the Bill of rights. Where therefore there is credible threat of violation, the Petitioner need not wait until the actual violation occurs. If a situation presents a real threat of violation, the Petitioner can move the Court for pre-emptive or anticipatory intervention and wait to undergo the violation. However, the threat must be manifestly demonstrable through laying of reasonable factual basis for the assessment by the Court.

63. In the instant matter, it is a fact that an investigation of the interested parties was in fact underway as this fact is evidenced by the letters and summonses issued to the Petitioner's requiring its employees (Interested Parties) to avail themselves at the Respondent. This fact is also confirmed by the 1st Respondent in the replying affidavit. On the basis of that, the matter becomes ripe and the Court can

thus inquire into it to determine if indeed there existed a reasonable basis or factual matrix for the intended police action against the Petitioners employees or if the investigation was based on witch-hunt and thus unjustifiable. This matter is thus not barred by the doctrine of ripeness as submitted by the 1st and 2nd Respondents.

Whether the Respondents decision to initiate an investigation into the Petitioner's employees (Interested Parties) was, in the circumstance of this case, motivated by malice and whether, the investigation violates the constitutional rights of the Petitioner and Interested Parties under Articles 10 (1) & (2), 22, 25, 27 (1), 35 (1) & (2), 40, 47, 50 (1) & (2) and 73 of the Constitution.

64. The 1st Respondent has both a Constitutional and statutory mandate to investigate crime.
65. The 1st Respondent is a Department of the National Police Service which under Article 239 (1) (c) of the Constitution is included as a national security organ and is specifically established under Article 243 of the Constitution. The National Police Service Act, 2011, which was enacted to give effect to this Article of the Constitution as envisaged under Article 243 (4) sets out the National Police Service's mandate of which Section 24 (e) is *the investigation of crimes*. Further Section 35 of the Act, authorizes the 1st Respondent, a Directorate of the National Police Service under the said Act to perform the following key functions among others:

- a. *collect and provide criminal intelligence;*

- b. *undertake investigations on serious crimes including homicide, narcotic crimes, human trafficking, money laundering, terrorism, **economic crimes**, piracy, organized crime, and cybercrime among others;*

66. It follows therefore that unless it can be demonstrated that the Respondents acted outside the scope of their mandate, acts done purely in execution of that mandate which the law authorizes them to do would not be deemed unconstitutional unless it shown that they acted outside their mandate or have acted maliciously or are otherwise abusing their statutory or constitutional mandate. The burden of proof is on the person alleging to demonstrate this fact.

67. In **Republic vs. Commissioner of Police & Another Ex-Parte Michael Monari & another (supra)** acknowledged as follows regards the 1st Respondent:

“It is also clear in my mind that the police have a duty to investigate on any complaint once a complaint is made. In deed the police would be failing in their constitutional mandate to detect and prevent crime...”

68. In **Pauline Adhiambo Raget v Director of Public Prosecutions & 5 others [2016] KEHC 7138 (KLR)** the Court held as follows:

“46. ...The Respondents are enjoined to investigate any allegations of criminal activity or conduct both by statute as well as by the Constitution. The investigations may take them to anyone including the Petitioner. They could investigate on their own prompting or upon being prompted by any member of the public as did the Interested Party in this case. In so doing, it is a legal mandate they would be undertaking.”

69. Nevertheless, in carrying investigations, the Respondents must remain faithful to their mandate and discharge without departing to advance any other motive other than conducting a genuine criminal investigation. The Court of Appeal in **Commissioner Of Police & The Director Of Criminal Investigation Department & another v Kenya Commercial Bank Limited & 4 others [2013] KECA 182 (KLR)** underscoring this point stated as follows:

“...an oppressive or vexatious investigation is contrary to public policy and that the police in conducting criminal investigations are bound by the law and the decision to investigate a crime (...) must not be unreasonable or made in bad faith, or intended to achieve ulterior motive or used as a tool for personal score-settling or vilification. The court has inherent power to interfere with such investigation or prosecution process.”

70. The superior Court went ahead and noted that:

“While the law (Section 193A of the Criminal Procedure Code) allows the concurrent litigation of civil and criminal proceedings arising from the same issues, and while it is the prerogative of the police to investigate crime, we reiterate that that power must be exercised responsibly, in accordance with the laws of the land and in good faith. What is it that the company was not able to do to prove its claim against the bank in the previous and present civil cases that must be done through the institution of criminal proceedings? It is not in the public interest or in the interest of the administration of justice to use criminal justice process as a pawn in civil disputes. It is unconscionable and a travesty of justice for the police to be involved in the settlement of what is purely a civil dispute being litigated in court. This is a case more suitable for

determination in the civil court where it has been since 1992, than in a criminal court. Indeed, the civil process has its own mechanisms of obtaining the information now being sought through the challenged criminal investigations. We have no doubt in our minds that the belated involvement of the police in this purely civil dispute is an abuse of their power. The police should direct their energies and resources to prevention of crime which we all know is rampant in this country and is about to get out of control.”

71. The question thus becomes, has the Petitioner demonstrated by way of cogent and credible evidence that in making the decision to investigate the Petitioner employees, 1st Respondent was actuated by malice, bad faith or acted unreasonably?

72. I say so because as was observed in Daniel Ogwoka Manduku v Director of Public Prosecutions & 2 others [2019] KEHC 12121 (KLR):

“... It is therefore not possible to stop any criminal investigations unless the foundation of such investigations is malicious or is an abuse of power.

51. Odunga J. in Isaac Tumunu Njunge v Director of Public Prosecutions & 2 others [2016] eKLR, said with regard to the power of the police to investigate:

“42. It is however my view that the police are clearly mandated to investigate the commission of criminal offences and in so doing they have powers inter alia to take statements and conduct forensic investigations. In order for the applicant to succeed he must show that not only are the investigations which were being done by the police are being carried out with ulterior

motives but that the predominant purpose of conducting the investigations is to achieve some collateral result not connected with the vindication of an alleged commission of a criminal offence. It must always be remembered that the motive of institution of the criminal proceedings is only relevant where the predominant purpose is to further some other ulterior purpose and as long as the prosecution and those charged with the responsibility of making the decisions to charge act in a reasonable manner, the High Court would be reluctant to intervene.

73. In submitting on this issue, the Petitioner's Counsel argued that the circumstances of this case depict a case of abuse of power as the investigations were made in bad faith with the aim of achieving an ulterior motive. While acknowledging the operation of Section 193A of the Criminal Procedure Code, it was submitted on behalf of the Petitioner that the Respondent's investigations are highly malicious as they are aimed at forcing the Petitioner's hand in the commercial dispute before the High Court Commercial and Tax Division, which Counsel argued was a duplication of the alleged investigations.
74. The Petitioner traced the genesis of the investigation to a complaint report by Transcend Media Executive Director Lai Muthoka against the Petitioner, in relation to the award of the Petitioner's Creative and Digital Agency tender dubbed as "request for proposal (RFP)" for the 2nd Agency for Safaricom's ATL/BTL Creative and Digital Services, to Saracen Media Kenya Limited. The Petitioner argued that particular tender is the subject of numerous commercial suits

before the High Court Commercial and Tax Division. In particular, the Petitioner annexed the *Amended Complaint dated 8th December 2022 -High Court at Nairobi- Commercial and Admiralty Tax Division Civil Case No. 486 of 2016 COMM-014 of 2022 - Transcend Media vs Safaricom Limited, Sylvia Mulinge, Flora Omuhaka Mangala, Emily Too, Flora Baiya, Janice Kemoli, Thomas Omanga, Timla Tieng, Saracen Media Kenya Limited & Fieldstone Helms Limited* in which at paragraph 20 of Daniel Ndaba's affidavit, he states thus:

- '20. That the commercial court suit, *Transcend Media Group* makes serious allegations against the applicant herein and 9 others, including some of the interested parties, some allegations are:
- a) That the Applicant along with *Saracen Media Limited ('Saracen')* and *Fieldstone Helms ('Fieldstone')* conspired with employees to utilize the Plaintiffs intellectual property and confidential information to bolster Saracen's bid
 - b) That the applicant induced and caused the resignation of its employees thereby occasioning breach of contract in complete disregard to clauses on non-compete, confidentiality and intellectual property ownership
 - c) That the Applicant, through its employees and servants, conspired with Saracen and Fieldstone to deny it fair tendering process
 - d) That the Applicant unlawfully and fraudulently disqualified it from the tender and awarded the same to Saracen

- e) *That the Applicant conducted the tendering process devoid of probity, fairness, accountability, level playing field and in complete disregard to the rules on procurement*
- f) *That the Applicant engaged in unfair trade practices contrary to the express provisions of the Competition Act, 2010.*

75. Paragraph 21 of the affidavit of Daniel Ndaba continues:

21. *That at paragraph 64 of the Amended Plaint dated 8th December, 2022, the Plaintiff in the Commercial suit provides the particulars of copyright infringement by the defendants herein to include:*

- a) *' Blaze Kenya' substantially adopts its 'NEXT NATION' concept in all aspects, to wit, the prelaunch of the campaign using teasers, invitation through use of micro site, the various campaign platforms, the approach in launching the event, use of imaging communication, the employment of graphics as peculiarly used by the Plaintiff, use of cultural icons etc*
- b) *using creative artistic and literally works to launch a youth focuses advertising campaign dubbed Blaze Kenya*
- c) *failing to pay royalties to the Plaintiff or acknowledgement of the authorship for the use and exploitation of the copyrighted works*
- d) *Substantially copying the plaintiffs work 'Next Nation' in order to deliver creative and advertising objectives of the Petitioner*

- e) *failing to identify the Plaintiff as the author or the copyright owner of the said works thereby infringing on its exclusive economic rights over the copyrights*
- f) *Using and/or exploiting for gain and profit copyrighted works without licence and/or consent and.*
- g) *Publishing and/or broadcasting and/or producing without licence its copyrighted work to the public and/or wider scale through print, electronic and social media.*

76. Counsel contended although Article 245(4) and Sections 24 and 28 of the National Police Service Act empowers the Inspector General through the 1st Respondent to investigate crime, they are however obligated to conduct their mandate with the highest standards of competence and integrity and the 1st Respondent ought to have appreciated the nature of the alleged complaint before instigating the investigations to ensure strict adherence to the constitutional and statutory principles.

77. The circumstances of the case as narrated by the 1st Respondent through the affidavit Corporal Charles Maroa sworn on 13th October, 2023 are not different. Briefly, the 1st respondent disclosed that on 25/5/2026; the Executive Director of Transcend Media Group (TMG) lodged a complaint through a letter alleging theft of intellectual property by the Petitioner in collusion with some of the employees of TMG led by one Thomas Omanga following which and Inquiry File

No. 14 of 2016 was opened at Nairobi Area Regional Criminal Investigation Office. The origin of the conspiracy is a tender dubbed 'Creative and Digital Agency Tender' where TMG appointed its employee - Thomas Omanga who was the Director- Client Service to be project leader.

78. TMG thus submitted its proposal containing the strategy and creative execution via Petitioner's S-Hub portal on 1/2/2016. On 17/2/2016, TMG made its first presentation to the Petitioner's Evaluation Panel and also left behind a hard copy of that presentation and a soft copy on CD with the Petitioner. TMG was then cleared to participate in the second stage of the bidding process which involved the Petitioner's team visiting TMG Offices. On 2/3/2026; TMG was invited to the Petitioner's Executive Committee together with other shortlisted bidders who included- Transcend Media Group (TMG), Brainwaive, Saracen Media in collaboration with 5ive Ltd & Bean.
79. However, just before the outcome of the bid could be communicated, details emerged of underhand dealing whereby Thomas Omanga (TMG's team leader) who had taken time off was seen at the Petitioners along with another employee - Muchedu trying to sell TMG bodywork in private. It was further alleged that the Petitioner reached out to Saracen and asked them to work with Wayward TMG Personnel. TMG thus complained its copyright work was manipulated and illegally used in advertising campaign dubbed 'Blaze Kenya'.

80. The complainant made follow up on this complaint via letter dated 27/4/21 and 10/6/21 insisting that the actions of the Petitioner constitute offences under the Copyright Act, Bribery Act and offences under the Anti-Corruption and Economic Crimes Act. The Respondent thus issued summons to the Petitioner's employees who had played various roles in the evaluation vide letters dated 29/6/21 and 18/7/21 so as to record statements to enable the Respondent have a fair and objective view of the matter but these summonses were not honoured.
81. On 16/7/2021- the Petitioner through an Advocate, NMC ASAFO wrote indicating that the matter was civil in nature, which letter further triggered another from the 2nd Respondent directing that comprehensive investigations be done but the Petitioner's employees did not turn up. Given the consistent failure to appear, the 1st Respondent forwarded the file Inquiry File No. 14 of 2016 to the 2nd Respondent but it was returned vide letter dated 11/4/2023 directing that gaps- (which included missing statements of the Petitioner's employees who had played a role in the evidence process be taken) to enable the 2nd Respondent make an informed decision on whether to charge or not. In compliance with the 2nd Respondent's directive, the 1st Respondent wrote two more letters- 24/7/2023 and 5/9/2023 the summons were also ignored by petitioner's employees (Interested parties).

82. The 2nd Respondent maintained that there are reasonable grounds for undertaking the investigation in line with its mandate and denied that its investigations are actuated with malice.

83. Section 193A of the Criminal Procedure Code provides:

84. **Concurrent criminal and civil proceedings;**

‘Notwithstanding the provisions of any other law, the fact that any other matter in issue in any criminal proceedings is also directly in issue in any pending civil proceedings shall not be a ground for any stay, prohibition, or delay of the criminal proceedings’

85. From the explanation given by the Respondents in this case, it is crystal clear that the 1st Respondent received information in which facts pointed to allegations of conspiracy and fraud to rig and throw out the Petitioner’s bid and ultimately, fraudulently convert the Petitioner’s work of art obtained through the information contained in the submitted bid for the benefit of another Company that was a competitor in a choreographed fraudulent and corrupt scheme involving the said Company and the complainant’s former employees and the Petitioner’s employees. This in my view formed a sufficient reasonable basis for initiating a criminal investigation, hence the 1st Respondents decision in initiating the investigation cannot be termed arbitrary. Further, I am not persuaded that given the nature of these allegations, they can only give rise to a civil dispute as submitted by the Petitioner. Even when they may give rise

to a civil claim, they also portray serious criminal dimensions that necessitates an investigation to determine if, for instance, corruption/bribery (*which by any means cannot be a mere civil or commercial dispute*) and other array of criminal offences including fraud, conspiracy to defraud (*which could also have civil elements such as breach of contract, tort of deceit or intellectual property infringement but are also inherently criminal*) were, in actual fact, ever committed during the transaction as alleged. That squarely falls within the constitutional and statutory mandate of the 1st and 2nd Respondents. Section 193A of the Criminal Procedure Code does not inhibit an investigation or even prosecution where facts disclose both commission of a criminal offence and a civil wrong, both can co-exist, hence the Respondents did not act unlawfully in initiating the investigation because the pendency of a civil dispute perse, does not oust the 1st Respondent's investigative power, unless, it can be shown that the power has been exercised irrationally, illegally or arbitrarily which evidence is lacking in the instant case.

86. The submission that the Respondents are malicious for initiating investigations into this matter because it is '*purely civil in nature*' is thus misleading and is thus rejected. To stop the Respondents from discharging their constitutional and statutory mandate without any proven malice or abuse of power will be act of judicial overreach that this Honourable Court must resist.

87. I am fortified in this regard by the judicial authority of **Francis Anyango Juma vs The Director of Public Prosecutions and another [2012] KEHC 2618 (KLR)**

where the Court observed as follows:

“Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party’s rights under the Constitution, or violation of the Constitution itself.”

88. Concerning violation of specific rights under the Bill of Rights, the constitutional threshold is that the Petitioner must not only plead the specific provisions of the Constitution that were violated the manner the violation occurred and the remedy the Petitioner seeks. That was the ratio in the celebrated case of **Anarita Karimi Njeru v R (1979) eKLR.**

89. However, the Petitioner must go past this point and substantiate the allegations of violation by evidence on a balance of probabilities. The petitioner alleged that rights that were violated included those protected under Article 35, Article 47 and 50 given the manner the 1st and 2nd Respondents exercised their mandate.

90. One of the major complaints by the Petitioners was that the Respondents refused to provide them with the information compiled from the investigation including- investigative reports give the interested parties an opportunity to adequately respond to the request for the interview including *'If any such investigations were conducted (to the exclusion of the Petitioner), what the outcome thereof was and the resultant report'* and *'The 2nd Respondent, upon receipt of any resultant investigations file, issued any further directions and requested for a copy of the said directions.'*
91. They thus argued that this was a breach of their right to access information under Article 35. With due respect to the Petitioner, I do not think such a request is tenable in respect of an ongoing investigation. Although Article 35 guarantees access to information held by the State, it is not absolute. In appropriate cases, Article 24 of the Constitution permits limitations to a right (except entrenched ones) as long as they are reasonable, justifiable and proportionate in an open and democratic society based on human dignity, equality and freedom taking into account all the relevant factors, including - *the nature of the right or fundamental freedom, the importance of the purpose of limitation, the nature and extent of the limitation, the need to ensure the enjoyment of rights and fundamental freedoms does not prejudice the rights and fundamental freedoms of others and, the relation between the limitation and the purpose whether there are less restrictive means to achieve the purpose.*

92. In this regard, there is the **Access to Information Act**, which at Section 6 outlines the manner in which Article 35 may be limited. It states:

6. Limitation of right of access to information

(1) Pursuant to Article 24 of the Constitution, the right of access to information under Article 35 of the Constitution shall be limited in respect of information whose disclosure is likely to—

(g) significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration;

93. Further, even if it were not to be excluded under 6 (1) (g), it would could under 6 (1) (a) as read with 6 (2) (g) which states:

'Information obtained or prepared by any government institution that is an investigative body in the course of lawful investigations relating to the detection, prevention or suppression of crime, enforcement of any law and activities suspected of constituting threats to national security'

94. This Court considers that insistence on premature delivery of material information relating to an ongoing information could potentially undermine and disrupt a genuine investigation. The refusal to supply the information by the 1st respondent was meant to protect the integrity of the investigation within the permissible limitations set out under the Access to Information Act and was thus not a violation of Article 35 (1) of the Constitution.

95. At an investigative stage, Article 50 (2) (j) does not apply as no formal charges have been preferred against the Petitioners employees (Interested parties). The matter is still at the investigatory stage where the Petitioners employees (Interested Parties) are only required to give information that would enable the investigators make a fair and objective determination of the complaint that was laid before them.
96. Turning alleged violation of on the right to fair administrative action under Article 47 of the Constitution, again, it does not apply in the context of a criminal investigation or criminal prosecution as these are not administrative actions within the meaning of Article 47 or the Fair Administrative Actions Act which apply to management affairs of an institution or organization rather than law enforcement. I am guided by the Supreme Court Judgment in ***Ethics and Anti-Corruption Commission & Anor v Tom Ojienda, Sc T/A Prof. Tom Ojienda and Associates Advocates and 2 Others Petition 30 & 31 of 2019 (Consolidated) [2022] KESC 59 (KLR)*** which held thus:

“57. By stipulating that the legislation so contemplated has to among other things, promote efficient administration, the Constitution leaves no doubt that an ‘administrative action’ is not just any action or omission, or any exercise of power or authority, but one that relates to the management of affairs of an institution, organization, or agency. This explains why such action is described as ‘administrative’ as opposed to any other action. The Concise Oxford Dictionary (9th Ed) defines the word

‘administrative’ as concerning or relating to the management of affairs “Black’s Law Dictionary” (11 Ed) defines “administrative action” to mean “a decision or an implementation relating to the government’s executive function or business management.” Burton’s Legal Thesaurus (4th Ed) defines the adjective “administrative” to mean among others, “directional, guiding, managerial, regulative, supervisory.

58. Does the 1st Appellant investigative powers fall within the corners of this definition? Part IV of the ACECA specifically provides for the 1st appellant’s investigative powers. The powers granted therein include powers, privileges and immunities of a police officer under Section 23 (3) to search premises under Section 29, to apply for surrender of travel documents under section 31, to arrest persons under Section 32 among others. Strictly speaking, these powers when exercised cannot be described as “administrative action” within the meaning of Article 47. For example, how can “conducting a house search” or “effecting an arrest” be considered as exercising administrative action? On the contrary, these are special powers conferred by specific legal regime, to be exercised for a special purpose...”

97. As guided by the Supreme Court in the above decision, the claim that the conduct of investigations is in violation of Article 47 of the Constitution is legally unsustainable. The procedures to govern investigations are specifically outlined in the special Statutes that regulate processes under the criminal law and cannot thus be branded as administrative actions.

98. The upshot is that this Petition lacks merit and is hereby dismissed in its entirety.

99. Costs are awarded at the discretion of the Court. I make no orders as to costs.

Dated, signed and delivered virtually at Nairobi this 26th day of February, 2026.

.....
L N MUGAMBI

JUDGE