

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
ORIGINATING MOTION APPLICATION NO. E018 OF 2026

**IN THE MATTER OF THE RIGHT TO A FAIR ADMINISTRATIVE
ACTION UNDER ARTICLE 47 OF THE CONSTITUTION**

-AND-

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT,
ACT NO.4 OF 2015**

-AND-

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION RULES,
2024**

-AND-

**IN THE MATTER AGAINST THE FAILURE BY THE COMPETITION
AUTHORITY TO ISSUE A NOTICE TO INVESTIGATE AND ITS
FAILURE TO PROVIDE ALL INFORMATION, MATERIALS AND
EVIDENCE BEFORE THE ISSUANCE OF THE NOTICE OF
PROPOSED DECISION AGAINST KOKO NETWORKS (KENYA)
LIMITED**

-AND-

**IN THE MATTER OF RIGHTS AND OBLIGATIONS UNDER THE
WHOLESALE CONCESSION AND OPERATING AGREEMENT MADE
BETWEEN VIVO ENERGY KENYA LIMITED AND KOKO
NETWORKS (KENYA) LIMITED**

-BETWEEN-

**KOKO NETWORKS (KENYA) LIMITED (UNDER
ADMINISTRATION)APPLICANT**

-VERSUS-

COMPETITION AUTHORITY OF KENYA RESPONDENT
JUDGMENT

1. This judgment determines the Originating Motion **dated 26th January 2026** and filed under Certificate of Urgency, pursuant to Sections 7, 9 of

the Fair Administrative Action Act, Rule 11 and 13(2) of the Fair Administrative Action Rules 2020 and all other enabling provisions of the law. The Applicant seeks the following ORDERS: -

(1). Spent.

(2). Pending the inter-partes hearing and determination of this Application, this Honourable Tribunal be pleased to issue a temporary order of PROHIBITION prohibiting the Respondent from issuing a final decision in relation to its alleged unilateral investigation conducted with respect to the Wholesale Concession and Operating Agreement between the Applicant and Vivo Energy Kenya Limited.

(3). Pending the inter-partes hearing and determination of this Application, this Honourable Tribunal be pleased to issue a temporary order of PROHIBITION restraining the Respondent from requiring the Applicant to submit its merits written submissions as directed in the Respondent's letter dated 2nd January 2026.

(4). This Honourable Court be pleased to exempt the Applicant from the obligation under Section 40 of the Competition Act, 2015 and Rule 9 of the Competition Tribunal (Procedure) Rules to exhaust the alternative remedy of approaching the Competition Tribunal,

as the Tribunal is not quorate and is therefore unable to hear matters.

(5). This Honourable Court be pleased to issue orders of CERTIORARI bringing to this court and quashing the Competition Authority of Kenya's Notice of Proposed Decision dated 15th April 2025 for violation of Article 47 of the Constitution and Section 4 (3) (g) of the Fair Administrative Action Act.

(6). This Honourable Court be pleased to issue an order of PROHIBITION prohibiting the Competition Authority of Kenya, its agents, servants and/or employees or such other persons, from investigating the alleged restrictive trade practices with respect to the Wholesale Concession and Operating Agreement dated 18 April 2018 between the Applicant and Vivo Energy Kenya Limited as the exemption automatically lapsed and the parties had already amended the agreement to remove the anti-competitive clauses subject of the alleged investigation.

(7). Any other relief that this Honourable Court may deem just and appropriate in the circumstances of the case.

(8). The costs of this Application be provided for.

2. The Application is premised on the grounds on the face of it and is further supported by the sworn affidavit of Mathew Schiller, the President and Chief Operating Officer of the Applicant herein on 26th January, 2026. Mr.

Schiller deposes that their business Koko Networks (Kenya) Limited operates a renewable fuel utility, retailing denatured ethanol cooking fuel (KOKO Fuel) to low-income households in urban Kenya. That on 18th April 2018, the Applicant entered into a 10-year Wholesale Concession and Operating Agreement with Vivo Energy Kenya Limited (Vivo) for KOKO Fuel supply and distribution. That the parties obtained a (5) five-year exemption from the Respondent on 28th March 2019, for potentially anti-competitive clauses, including exclusivity.

3. The deponent states that despite the exemption, the Applicant began engaging alternative suppliers from various markets as early as 2021 as evidenced by its response letter of 29th May 2025 so that it was clear that the parties ceased to operate on an exclusive basis even during the pendency of the exemption clauses. It is averred that and that VIVO informed them on 7th February 2024 through a letter that the exemption which was expected to lapse on 28th March 2024, would not be renewed. That this was communicated to the Respondent on 18th November 2024 where Vivo told the Respondent that the exemption clauses were no longer needed, that no party had exercised exclusivity and that they were in the process of amending their agreement. It is stated that the Agreement was subsequently amended to remove exclusivity clauses, with a signed copy shared with the Respondent on 4th March 2025. The deponent reiterates

that at the end of the Exemption Period, none of the parties was operating under an exclusive arrangement.

4. It is contended that on 15th April 2025, the Respondent unilaterally issued a Notice of Proposed Decision (NoPD), based on an alleged surveillance report, claiming the parties were still engaged in exclusive arrangements and price-fixing, in breach of the Competition Act. It is alleged that the Respondent conducted surveillance between 6th to 12th October 2024 in eight counties which led to certain findings of breach that informed the issuance of the NOPD. It is further contended that the Respondent has failed and refused to provide the Surveillance Report and all evidence relied upon for issuing the NOPD, despite repeated requests, an act which is an outright withholding evidence against the requirement of procedural fairness.
5. It is the Applicant's case that they were subsequently, invited for a meeting by the Respondent on 22nd September 2025, where they raised a Preliminary Objection (PO) challenging the Respondent's failure to issue a Notice of Intention to Investigate (NoITI) and denying them an opportunity to provide information before the NOPD was issued.
6. The Applicant urges that, had it been invited to participate prior to issuance of the NoPD, it would have been able to supply the Respondent with relevant information and clarifications regarding its business model and the Agreement which would have materially assisted the Respondent in

conducting a fair and informed investigation. However, it is deposed that the Respondent dismissed the Preliminary Objection on 3rd October, 2025 (the PO Decision), contending surveillance was merely a preliminary monitoring tool, not an investigation.

7. It is further deposed that the Respondent's conduct violates several constitutional and statutory provisions. In particular, Section 4 (3) (g) of the Fair Administrative Action Act, 2015 (FAAA), which obligates furnishing all relevant information; Articles 25 (c) and 50 of the Constitution, guaranteeing a fair hearing, Section 6(4) of the Fair Administrative Action Act, prohibiting administrative decisions without reasons or evidential support, Article 47 of the Constitution and Section 7 (2) (c) of the Fair Administrative Action Act, pertaining to fair administrative action.
8. It is also contended by the deponent that there was a flawed Assessment from the alleged surveillance which the Respondent conducted because the NoPD relied on unverified information from unnamed vendors and sales representatives, making factually incorrect assumptions about KOKO agents' roles and price determination, thus breaching Section 7 (2) (k) and (n) of the FAAA and violating the Applicant's legitimate expectations.
9. It is further deposed that the Applicant approached the Competition Tribunal on 15th January 2026, seeking injunctions against the Respondent's final decision but learned of the Tribunal's incapacity on 21st

January 2026, when the Acting Chairperson informed parties that the Tribunal was not lawfully constituted since the Chairperson's term expired and thus were unable to deal with the Applications. That for this reason, the Applicant asserts that, the High Court is the only forum with jurisdiction for urgent matters under the Competition Act.

10. It is contended that the Applicant faces irreparable damage, including potential insolvency and devastating impacts on its 1.3 million consumer base, if the Respondent proceeds with its final decision and imposes undisclosed financial penalties based on the withheld Surveillance Report. The Applicant seeks the High Court's intervention to enforce its right to fair administrative action and a review of the NOPD and PO Decision.

Response

11. In response to the Application, the Respondent filed a Replying Affidavit sworn by Bernard Ayieko, the Manager at the Enforcement and Compliance Department dated 16th February 2026, vehemently opposing the Application in several grounds. He deposes that on 28th March 2019, the Respondent granted the Applicant and Vivo Energy Kenya Limited (Vivo) a five-year exemption for certain anti-competitive clauses in their Wholesale Concession and Operating Agreement, which was otherwise a ten-year agreement. This exemption expired on 28th March 2024.
12. It deposed that upon the exemption's expiry and without receiving any new Application, the Authority/Respondent conducted surveillance which led

to certain findings. The Respondent observed that Vivo was the exclusive supplier to the Applicant and the Applicant carried out resale price maintenance and managed prices through its "KOKO Cloud" platform.

13. It is further deposed that on 18th November 2024, Vivo informed the Respondent that the business landscape had shifted, rendering the exempted clauses redundant, and stated that they were amending the agreement. That subsequently on 3rd March 2025 Vivo confirmed the amendment was complete and in circulation for signature. The executed Fourth Deed of Amendment was then forwarded by Vivo on 4th March 2025 in which Vivo claimed the deletions took effect from 27th March 2024 right before the expiry of the exemption period.
14. It is the Respondent's position and conclusion that there was no amendment lodged with the Authority removing the anti-competitive clauses by the exemption's lapse date of 28th March 2024 contrary to Vivo's claims. That therefore, the continued existence of these exclusivity clauses in the agreement after the exemption period constituted a preliminary breach of **Section 21 (1) of the Competition Act**.
15. It is averred that based on these findings, the Respondent issued a NoPD to the Applicant and Vivo on 15 April, 2025 and states that bundles of evidence were supplied with the NoPD, and the Applicant was given 21 days to submit written representations or request an oral hearing, to which

they responded by requesting a hearing, which was convened on 22nd September 2025.

16. The Respondent asserts that issuing a formal Notice of Investigation is discretionary under **Section 31(4) of the Act** and affirms full compliance with **Article 47 of the Constitution of Kenya** and **Section 4 of the Fair Administrative Action Act**, having provided all the evidence that they relied-upon in issuing the NoPD. They assert that the NoPD is not a final determination, as per **Section 34 of the Act**, and states that a final decision is made under **Section 36**. That for this reason, the Applicant's prayer to remove the NoPD cannot be granted.
17. With regard to its Statutory mandate, the Respondent contends that it cannot be restrained from exercising the powers granted under the law and asserts that the Application be dismissed with costs because the Applicant has failed to demonstrate any illegality, irrationality, or procedural unfairness by the Authority.

Further Affidavit

18. The Applicant filed a further Affidavit dated 23rd February 2026 sworn by GEORGE WERU, a Joint Administrator appointed for KOKO Networks (Kenya) Ltd. The Applicant decried the Competition Authority of Kenya, the Respondent's actions stating that they are tainted with procedural irregularities and substantive errors arising from the Respondent's investigation and issuance of the Notice of Proposed Decision (NoPD).

19. The deponent states that the Respondent's discretion to issue a NoITI cannot justify a decision-making process based on irrelevant considerations. Further, that the Respondent failed to engage the Applicant and Vivo Energy Kenya Limited (Vivo) for contextual understanding, leading to a flawed NOPD based on unverified reports.
20. The Applicant contends that the Respondent acted unreasonably by failing to engage them directly, by failing to issue a Notice of Intention To Investigate, and by relying on unverified statements, thereby violating Section 7 (2) (f), (k), and (n) of the Fair Administrative Action Act.
21. Additionally, that despite conducting a surveillance exercise, the Respondent failed to furnish the Applicant with the resulting Surveillance Report and its underlying evidence being in the nature of SMS, WhatsApp messages, phone calls and meeting minutes or a list of the people interviewed, thereby depriving the Applicant of a fair opportunity to respond to allegations of price-fixing and exclusive distribution. That consequently, the Respondent wrongly assumed KOKO agents own and resell fuel yet KOKO maintains title to the fuel and thus the allegation of price-fixing "against itself" was an illogical and legally untenable finding.
22. The Applicant states that it did not act on the exclusivity clause in its agreement with Vivo, sourcing bio-ethanol fuel from alternative suppliers since 2021. That in any case, the exemption for the exclusivity lapsed on

28th March 2024 and the agreement was formally amended to reflect this, with copies shared with the Respondent.

23. It is contended that the Respondent took a contradictory stance because it initially stated that surveillance observations formed the basis of its NOPD but later asserted it did not rely on them. The Applicant contends that this is inconsistent and an afterthought. Further, the Applicant asserts that the NOPD falls within the definition of an administrative decision under **Section 2 of the FAAA** and is thus subject to fair administrative action safeguards and judicial review.
24. On procedural unfairness, the Applicant contends that the Respondent's refusal to provide the Surveillance Report renders the administrative process procedurally unfair, irrational, and constitutionally deficient, breaching **Articles 47 and 50 of the Constitution** and Fair Administrative Action Act on disclosure obligations. The Applicant concludes that there was no lawful basis for the investigation given the exemption had automatically lapsed and no exclusivity arrangements were in operation at the material time. That in this regard, the Court should grant the prayers sought in the interests of justice.
25. The Originating motion was canvassed by way of written submissions with both parties complying with the court's directions on the filing of their respective submissions.

Submissions

The Applicant's Submissions

26. The Applicant's submissions are dated 23rd February 2026. Its Counsel submitted on alleged violations of **Article 47 of the Constitution** and **Sections 4(3)(g) and 7(2) of the Fair Administrative Action Act (FAAA)**. The core of the Applicant's challenge lies in the Respondent's failure to provide the Surveillance Report, which forms the basis of the NoPD's adverse findings and failure to issue a Notice of Intention to Investigate (NOITI) before conducting its investigation. Counsel isolated two issues for determination being:

a. whether the Respondent's refusal to supply the Surveillance Report violates the Applicant's right to fair administrative action

and

b. whether the Respondent's refusal to issue a NoITI before investigation violates the Applicant's right to fair administrative action.

27. Counsel for the Applicant argues that the Respondent's persistent refusal to supply the Surveillance Report, despite expressly stating that it formed the foundation for the NoPD's findings, violates the right to fair administrative action. That **Article 47** guarantees fair administrative action, including written reasons for adverse actions. **Section 4 (3) (g) of the FAAA**

mandates administrators to provide all documents, information, and evidence relied upon.

28. Counsel submitted that the Respondent's Replying Affidavit claims it did not rely on surveillance observations, directly contradicting its NoPD, which detailed findings from the surveillance. The Applicant invokes the doctrine of estoppel and cited the Court of Appeal decision in **Serah Njeri Mwobi v John Kimani Njoroge [2013] KECA 501 (KLR)**. Further, that without the report, the Applicant cannot ascertain the basis of allegations or meaningfully respond, thus violating their the non-derogable right to a fair hearing under **Articles 25 (c) and 50 of the Constitution**.
29. The applicant's Counsel cited a myriad of cases being the Supreme Court case of *Saisi & 7 others vs. Director of Public Prosecutions & 2 others [2023] KESC 6 (KLR) (the Saisi Case)* and *Republic vs. Speaker of the National Assembly & 4 others Ex-Parte Edward R.O. Ouko [2017] KEHC 9413 (KLR)*, *Republic vs. Speaker of the National Assembly & 4 others Ex-Parte Edward R.O. Ouko [2017] KEHC 9413 (KLR)*, *Geothermal Development Company Limited vs. Attorney General and 3 others [2013] eKLR*, *Kenya Human Rights Commission vs. Non-Governmental Organizations Co-ordination Board [2016] eKLR*, *Priscillah Wanjiku Kihara v Kenya National Examination Council (KNEC) [2016] eKLR*, *Tononoka Rolling Mills Limited v Competition Authority of Kenya [2025] KECT 4 (KLR)*, *Alubala v Capital Markets*

Authority; National Bank of Kenya Limited (Interested Party) [2019]

KEHC 4895 (KLR to emphasize the mandatory nature of evidence disclosure, the right to a fair hearing, the requirement of administrators to give reasons for their decisions and support invalidating decisions where crucial evidence is withheld.

30. It is also submitted that the refusal to supply the report suggests either a lack of lawful justification for the NoPD or an intentional deprivation of the Applicant's right to defend itself.
31. On the Notice of Intention to Investigate (NoITI), Counsel for the Applicant contends in his submissions that the Respondent's failure to issue a NoITI led to a fundamentally flawed NOPD based on unverified information and a misunderstanding of the Applicant's business model. Counsel submitted that the NoPD was an irrational decision because the Respondent relied on statements from 'unnamed vendors and sales representatives' who allegedly misunderstood the Applicant's operational structure. It is contended that the Applicant cannot 'fix prices against itself' as it solely determines the price of its product. That consequently, the Respondent arrived at a decision based on irrelevant considerations and disregarded relevant ones which constitutes irrationality and a violation ***Section 7 (2) (f), (k), and (n) of the FAAA.***
32. Counsel submits that while the Respondent has discretion to issue a NoITI, this discretion cannot circumvent statutory and constitutional obligations

for fair administrative action. Additionally, the Respondent breached the Applicant's legitimate expectation, reinforced by its historical practice of issuing NoITIs before substantive inquiries, which allows for engagement and clarification of business models. Reliance was placed on the Supreme Court's decision in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others [2014] eKLR* in support of the proposition that public authorities are bound to honour set practices and their representations unless an overriding reason grounded in law justifies a departure.

33. It is Counsel's submission that the Applicant concludes that its right to fair administrative action has been violated, that the NoPD was solely grounded on the Surveillance Report, which the Respondent failed to provide rendering it impossible for the Applicant to respond substantively and consequently violating its constitutional right to a fair hearing. That the Respondent's inability to rebut its failure to supply evidence leads to the inference that no surveillance was conducted, rendering the NoPD illegal, irrational, and devoid of lawful justification. Moreover, that the absence of a NoITI and the failure to produce the Surveillance Report imply no factual or evidentiary basis for the NoPD. The Applicant urged the Court to allow the Application with costs.

The Respondent's Submissions

34. The Respondent's submissions are dated 27th February 2026. Its Counsel isolated two issues for determination namely:

a. whether the Respondent's failure to supply the surveillance report violates the Applicant's right to fair administrative action and

b. whether the Respondent's failure to issue a Notice of Intention to Investigate (NoITI) violates the Applicant's right to fair administrative action.

35. On alleged violation of Article 47 of the Constitution, it was submitted that this Article guarantees procedural fairness, not a general right to pre-decision discovery or access to every internal working document and further, that the Respondent's surveillance observations were not relied upon as evidence for its preliminary finding of a breach of the Act. It is submitted that **Section 4 (3) (g) of the FAAA** only obligates disclosure of materials actually relied upon in making a decision and that surveillance activities generate leads and preliminary observations, forming part of regulatory fact-finding such as patrols, and are not evidentiary records requiring disclosure. That statutory bodies must retain confidential investigative capacity to ensure effective enforcement, protecting informants and investigative methodologies.

36. Counsel contends that the NoPD is a preliminary document, specifying alleged conduct and factual concerns, aimed at giving the Applicant an

opportunity to make representations. Accordingly, it was urged that judicial interference at such preliminary stages is deemed premature and legally misconceived. It is also argued that the Respondent accorded the Applicant a fair hearing by issuing the NoPD, supplying bundles of evidence, providing 21 days for written representations, and offering an opportunity for oral representations.

37. On the issuance of Notice of Intention to Investigate (NoITI), Counsel submits that **Section 31 of the Competition Act** empowers the Authority to initiate investigations on its own motion or upon a complaint. It is contended that **Section 31(4)** uses the permissive term "may" regarding the issuance of a NoITI, indicating that it is discretionary and context-dependent, not a mandatory prerequisite for investigation. That interpreting NoITI as mandatory would undermine enforcement, frustrate statutory purpose, and enable concealment or destruction of evidence by alerting subjects of investigation prematurely.
38. The Respondent's Counsel provides a distinction between stages and submitted that procedural fairness obligations, including the right to be heard, intensify at the decision-making or adjudicative stage, not the intelligence-gathering or investigative stage. That in line with this, the Applicant's claim of legitimate expectation lacks evidentiary substantiation of an express promise or consistent practice by the Respondent to

invariably issue NoITIs. It is argued that legitimate expectation cannot override express statutory provisions or fetter statutory discretion.

39. The Respondent submits that the Application lacks any recognizable grounds for judicial review. Counsel contends that the Respondent acted strictly within its statutory mandate, exercised granted discretion, disclosed all material relied upon, accorded the Applicant fair hearing opportunities, and has not yet made a final determination. Further, that the Application is a premature attempt to terminate an ongoing statutory process and improperly transform judicial review into an appeal on merits. That granting the relief sought would contradict settled jurisprudence and undermine regulatory autonomy. The Court is urged to dismiss the Application in its entirety with costs.

Analysis and Determination.

40. I have considered that originating motion as pleaded, the respective affidavits and the annexures together with the rival submissions, the main issues for my determination are: -

- (i) Whether this Court has jurisdiction to adjudicate upon the matter.***
- (ii) Whether the Respondent has violated the Applicant's right to fair administrative action in failing to supply it with the Surveillance Report and in issuing the Notice of Intention to Investigate.***

(iii) What orders should this Court make.

(i) Whether this Court has jurisdiction to adjudicate upon the matter.

41. This dispute emanates from the impugned Notice of Proposed Decision (NoPD) dated 15th April 2025 issued by the Respondent, upon the latter's discovery, following a surveillance exercise between 6th October 2024 and 12th October 2024.

42. On whether this court is clothed with jurisdiction to entertain the matter, especially where there exist alternative mechanisms set out by statute, it is trite that jurisdiction is everything and without it, a court of law cannot act. the *locus classicus* **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989)** defined jurisdiction as follows:

"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

43. This Court identifies with the fact that courts are hesitant to preside over a matter where either the Constitution or statute provide for alternative dispute resolution mechanisms before the court is moved. These

mechanisms may be internal dispute resolution mechanisms or adjudication by tribunals established to preside over matters relating to specific thematic issues or by way of appeal.

44. In this matter, **Section 71 of the Competition Act** establishes the Competition Tribunal as follows:

71. Establishment of the Competition Tribunal

(1). There is hereby established a Tribunal to be known as the Competition Tribunal which shall exercise the functions conferred upon it by this Act.

45. The Tribunal's jurisdiction is captured at **Section 73** as follows:

73. Persons entitled to appeal to the Tribunal

The following persons may exercise the right of appeal to the Tribunal conferred under this Act—

(a) any person who, by a determination made by the Authority under this Act—

(i) is directed to discontinue or not to repeat any trade practice;

(ii) is issued with a stop and desist order or any other interim order;

(iii) is permitted to continue or repeat a trade practice subject to conditions prescribed by the order;

(iv) is directed to take certain steps to assist existing or potential suppliers or customers adversely affected by any prohibited trade practices;

(v) is ordered to pay a pecuniary penalty or fine; or

(vi) is aggrieved by a stop and desist order or any other interim order of the Authority;

46. **Rule 9 of the Competition Tribunal (Procedure) Rules** made under the Competition Act also sets out the jurisdiction of the Tribunal as follows:

9. Jurisdiction of the Tribunal

The Tribunal shall have jurisdiction to hear and determine the following matters—

(a) matters referred to it for review of the Authority's decision under section 48 (1) of the Act;

a. to hear Appeals from the decisions of the Authority;

b. any other matter arising under the Act; and

c. any other matter referred to it by a competent court of law.

47. **Section 40** of the Act further sets out a dispute resolution mechanism between aggrieved parties and the Authority/Respondent as follows:

40. Appeals to the Tribunal

(1) A person aggrieved by a determination of the Authority made under this Part shall appeal in writing to the Tribunal within thirty days of receiving the Authority's decision.

(2) A party to an appeal under subsection (1) who is dissatisfied with the decision of the Tribunal may appeal to the High Court against that decision within thirty days after the date on which a notice of that decision has been served on him and the decision of the High Court shall be final.

48. From the material before this Court, it is safe to conclude that the subject of this dispute falls within the jurisdiction of the Tribunal. Courts have on several occasions declined to entertain matters that fall for resolution in other forums at the first instance in compliance with the doctrine of exhaustion which connotes that where there exists a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed before moving the courts. This was aptly enunciated by the High Court of Appeal in **Speaker of the National Assembly v Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992) (Ruling)** where the Superior Court stated that:

“15. In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

49. In **Republic vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex- Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR**, the Court applying the above principle established in the *Speaker of the National Assembly v Karume* (supra) opined that:

“42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

*43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is *Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR*, where the Court of Appeal stated 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 brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

50. The above doctrine of exhaustion finds support in the alternative dispute resolution mechanisms espoused in **Article 159 (2) (c) of the Constitution** which mandates courts and tribunals in their exercise of judicial authority, promote alternative forms of dispute resolution mechanisms. The doctrine mandates litigants to first exhaust any other available remedies before approaching the court. (See **William Odhiambo Ramogi & 3 others vs. Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR**).
51. However, there exist exceptions to the doctrine of exhaustion. In the above cited case **William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)**

(2020) eKLR) the High Court bench in Mombasa outlined exceptions to the said doctrine and held at **paras 59-61** as follows: -

“59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. v Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party

pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others v Aelous (K) Ltd and 9 Others.)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.

52. In the present case, the *ex-parte* Applicant pleads that it was unable to

approach the Competition Tribunal under Section 71 (4) because the Tribunal is currently not constituted after the term for the members expired and the Respondent did not dispute this fact.

I have also perused the communication by the Secretariat dated 21st January 2026 and confirmed this position. I note that the tenure of the chairperson and a member of the Tribunal lapsed and that those positions are yet to be filled. In those circumstances, the broader interests of justice dictates that this court exercises jurisdiction to adjudicate over the matter. More so, Section 9 of the Fair Administrative Action Act provides for such exemption in exceptional circumstances and in my view, the circumstances described herein above are exceptional to warrant such exemption so as not to allow parties to suffer injustice. The section provides:

9. Procedure for judicial review

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review

and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

53. In the circumstances, I find and hold that this court is clothed with jurisdiction to entertain the dispute before it.

- (ii) Whether the Respondent has violated the Applicant's right to fair administrative action in failing to supply them with the Surveillance Report and issue the Notice of Intention to Investigate.**

54. **Article 47 of the Constitution** guarantees every person the right to fair administrative action as follows:

47. Fair administrative action

(1). Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2). If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3). Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

55. The Fair Administrative Action Act is the implementing Act for Article 47 of the Constitution and at section 4 of the Act, it provides that:

4. Administrative action to be taken expeditiously, efficiently, lawfully etc.

(1). Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2). Every person has the right to be given written reasons for any administrative action that is taken against him.

(3). Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
- (b) an opportunity to be heard and to make representations in that regard;***
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***
- (d) a statement of reasons pursuant to section 6;***
- (e) notice of the right to legal representation, where applicable;***
- (f) notice of the right to cross-examine or where applicable; or***
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

(4). The administrator shall accord the person against whom administrative action is taken an opportunity to–

- (a) attend proceedings, in person or in the company of an expert of his choice;***
- (b) be heard;***
- (c) cross-examine persons who give adverse evidence against him; and***

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

56. It is the Applicant's case that the Respondent violated its right to fair administrative action because the respondent failed to issue the applicant with a Notice of Intention to Investigate (NoITI) under Section 31 of the Act and that instead, the respondent went ahead to issue the applicant with the impugned Notice of Proposed Decision dated 15th April 2025. The applicant asserts that the impugned NoPD was informed by impractical investigations/surveillance conducted by the Respondent which yielded a Surveillance Report that the Respondent withheld from the applicant.
57. It is further averred that the Applicant has not been afforded a meaningful right to defend itself against the alleged findings because it has been denied access to the Report contrary to the provisions of the Constitution and the Fair Administrative Action Act.
58. In their submissions, Counsel for the applicant argues that the Respondent breached the provisions of the Constitution and the Fair Administrative Action Act, in denying the Applicant access to the Surveillance Report rendering it impossible for the applicant to mount a proper defence and be subjected to a fair hearing.
59. On its part, the Respondent contended that the Applicant failed to forward an amended agreement at the lapse of the exemption period rendering the exclusivity clauses in the Agreement still operational, in breach of the Act.

They contend that the NoPD is a preliminary document, specifying alleged conduct and factual concerns, aimed at giving the Applicant an opportunity to make representations. Accordingly, judicial interference at such preliminary stages is deemed premature and legally misconceived.

60. It is also argued that the Respondent accorded the Applicant a fair hearing by issuing the NoPD, supplying bundles of evidence, providing 21 days for written representations, and offering an opportunity for oral representations. It is their position that the power to issue a Notice of Investigation under Section 31 of the Act is discretionary and that no legitimate expectations existed on its part to issue the said Notice to Investigate.
61. In their submissions, Counsel for the Respondent vehemently objects to the Court granting the prayer to provide the Applicant with the Surveillance Report and argues that Article 47 of the Constitution does not create a general right to pre-decision discovery, but only guarantees procedural fairness, not wholesome evidentiary discovery. It argues that the Applicant's attempt to transform a discretionary investigative tool into a mandatory procedural prerequisite is an impermissible invitation to this Court to legislate from the bench and that the statutory architecture of investigative powers under the Competition Act further confirms that issuance of a NoITI is optional and context dependent rather than obligatory.

62. It is also submitted that **Section 31** of the Act establishes the Authority's investigative jurisdiction broadly, empowering it to initiate investigations either on its own motion or upon receipt of information from any source. That the power to investigate is therefore triggered by statutory mandate itself, not by issuance of notice. Further, that the right to fair administrative action neither equates to the right to access every internal working document of a decision-maker nor does reference to investigative activity in a surveillance observation convert the underlying intelligence into evidence relied upon in making a decision.
63. the respondent urges that disclosure duties extend to materials only relied upon for the decision. It is argued that the Respondent being a statutory body with investigative capacity, must retain confidentiality to avoid making enforcement ineffective.
64. Having considered the above detailed arguments by the parties in respect of the Notice of Intention to Investigate and the impugned Notice of Proposed Decision, I observe, and it is undisputed that the Respondent did not issue any notices to the Applicant at the point when it decided to conduct a surveillance investigation on the Applicant. I have also considered the duties of the Respondent as set out in **Section 31 of the Competition Act** thus: -

31. Investigation by Authority

(1). The Authority may, on its own initiative or upon receipt of information or complaint from any person or Government agency or Ministry, carry out an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of—

(a) prohibitions relating to restrictive trade practices;

(b) prohibitions relating to abuse of dominance; or

(c) prohibitions relating to abuse of buyer power.

(2). If the Authority, having received from any person a complaint or a request to investigate an alleged infringement referred to in subsection (1), decides not to conduct an investigation, the Authority shall inform that person in writing of the reasons for its decision.

(3). Deleted by L.N. 23/2011, Sch.

(4). If the Authority decides to conduct an investigation, the Authority may, by notice in writing served on any person in the prescribed manner, require that person—

(a) to furnish to the Authority by writing signed by that person or, in the case of a body corporate, by a director or member or other competent officer, employee or agent of the body corporate, within the time and in the manner specified in the notice, any information pertaining to any matter specified in

the notice which the Authority considers relevant to the investigation;

(b) to produce to the Authority, or to a person specified in the notice to act on the Authority behalf, any document or article, specified in the notice which relates to any matter which the Authority considers relevant to the investigation;

(c) to appear before the Authority at a time and place specified in the notice to give evidence or to produce any document or article specified in the notice; and

(d) if he possesses any records considered relevant to the investigation, to give copies of those records to the Authority or alternatively to submit the record to the authority for copying within the time and in the manner specified in the notice.

65. The contentious issue here is whether the Respondent was obligated to issue the notice to commence its investigations or not. I observe that the above provisions under **sub-section (4)** employ the use of the term ‘may’. Consequently, I shall examine case law on the use of the term “may” and how it has been interpreted by the courts over time.

1. The word ‘may’ has often been used to connote a permissive or discretionary action. However, in some contexts, courts have interpreted it to imply a mandatory obligation if in considering the legislative context

and intent, the aspect of discretion would defeat the purpose of the said statute or where it is used to impose a public duty on a public authority/body requiring it to conduct such duty in a specific form for the benefit of a private citizen. (see the Supreme Court of Nigeria in **FRN vs. Nnajofofor (2024) 10 NWLR (Pt. 1947) 443 S.C.**) where the Court declared that the Courts would interpret the word “may” as mandatory wherever it is used to impose a duty upon a public functionary to be carried out in a particular form or way for the benefit of a private citizen. By this recent decision, although the word “May” when used in a statute is permissive, where such a phrase is used in a statute to impose a duty on a public functionary then it would be interpreted as mandatory and not permissive.

66. In the context of this case, the Supreme Court decision in the case of **Salat v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling)** is relevant, where in interpreting Rule 53 of the Supreme Court Rules which uses the term “may” ,the learned Judges held that it connotes a discretionary power. It was held thus:

“76. The statutory anchorage of the discretion to extend time is rule 53 of the Supreme Court Rules. It stipulates that: The court may extend the time limited by this rules or by any other decision of the court.

77. Hence, this court by virtue of rule 53 of the Supreme Court Rules has discretionary powers to extend time within which certain acts can be undertaken. This can be perceived by the use of the word “may” in crafting of the rule. This discretion is a very powerful tool which in our view should be exercised with abundant caution, care and fairness; it should be used judiciously and not whimsically to ensure that the principles enshrined in our Constitution are realised.”

[See also **Odera t/a AJ Odera & Associates v Machira t/a Machira & Co Advocates (Civil Appeal 161 of 1999) [2013] KECA 208 (KLR) (11 October 2013) (Judgment)**].

67. The import of the above judicial pronouncements is that the interpretation of the term ‘may’ must be contextualized. Counsel for the Applicant relied on the Supreme Court of India case of *State of Uttar Pradesh vs. Jogendra Singh (1964) SCR (2) 197* in support of the proposition that the term ‘may’ has been interpreted to mean a mandatory obligation based on the circumstance of a case and that in the context of **Sections 31 (1) and (4)** of the Act the term ‘may’ confers a mandatory obligation on the Respondent. It is also the applicant’s position that there can never be discretion where a person is obligated by the Constitution to act in a specified manner.
68. I have considered the provisions of **Section 31 (4) of the Act** and it is my interpretation that the use of the term ‘may’ is discretionary in this case

because, the provision posits that the Authority/Respondent may opt to take up investigations on its own or based on a lodged complaint. If it chooses not to investigate where a complaint has been lodged, it must provide the complainant with reasons in writing. If on the other hand it decides to conduct an investigation either on its own initiative or based on a plausible complaint lodged before it, it can then choose to proceed with its investigations on its own in a lawful manner or request for information or documents in the possession of the party complained against, or in another scenario to request for such a party to produce any person who may have information or knowledge relevant to the investigations.

69. My further understanding of the term “may” in this context is that it does not create a mandatory obligation. In my view, this term implies, not just a discretionary power as the Respondent argues in its submissions but also creates an impression that the Authority will opt for the best course of action upon considering the context of an investigation, that is whether or not to call for further information from the person being investigated. Thus, the Authority is expected to consider the facts of a case and decide whether it can conduct the investigations on its own or whether the investigations will require further input from the party being investigated. The possibility of the Authority opting for any of these two scenarios or both of them certainly cannot imply a mandatory obligation.

70. In other words, if in the view of the investigative authority, in this case the Respondent, the Act does not make it mandatory for the Authority to obtain any or additional information from the Applicant pertaining to the investigations that the Authority wishes to conduct. At the same time, if the legislators intended for the said Notice under sub-section (4) to be mandatory, then the Act would have expressly stated so.
71. Counsel for the Applicant submitted that while the Respondent indeed has discretion to issue a NoITI, that discretion cannot be invoked to justify a decision-making process grounded in irrelevant considerations while ignoring relevant and material ones. It is argued that the Respondent cannot rely on its discretionary power to circumvent a statutory and constitutional obligation governing fair administrative action. That a proper exercise of discretion requires the Respondent to seek clarification from the Applicant itself to provide insight into, their business model, which if this was the case, the impugned NoPD would not have been issued.
72. It is also argued by the Applicant that by failing to issue a NoITI, failing to engage with the Applicant directly, and drawing erroneous conclusions or making wrong findings from their investigations leading to the issuance of the NoPD, the Respondent acted unreasonably and took into account irrelevant considerations while disregarding those that were material. This

constitutes a clear violation of Section 7 (2) (f), (k), and (n) of the Fair Administrative Action Act.

73. In line with the above, the Applicant argues that it the Respondent's conduct against them in failing to issue the NoITI was a departure from its customary practise without plausible justification. They argue that they reasonably expected, based on the Respondent's established practice and the requirements of fair administrative action, that before making any investigative findings regarding its business model and contractual arrangements, the Respondent would first invite the Applicant and Vivo to provide clarifications, supporting documents and contextual explanations before issuing the NoPD. Further, that this expectation was reinforced by the Respondent's historical practice of issuing a NoITI prior to initiating substantive inquiries and reaching adverse findings.

74. The Applicant further introduces the concept of a legitimate expectation from this argument. Courts are replete with authorities that expound on the doctrine of legitimate expectation. In **Ngetich & 3 others vs. County Service Board Bomet & another (Civil Appeal 20 of 2018) 2022] KECA 575 (KLR) (28 April 2022) (Judgment)**, the court held thus: -

“30. The term “legitimate expectation” is a technical term of profound doctrinal basis. It is not the expression of wishful thinking or desire capable of translation into a legal right. Arvind Thapliyal

enunciates the doctrine of legitimate expectation in 2006 (8) SCJ p.721 thus:

“What is legitimate expectation? Obviously, it is not a legal right. It is an expectation of a benefit, relief or remedy that may ordinarily flow from a promise or established practice. The term 'established practice' refers to a regular, consistent predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is, reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established.”

31. We agree with the learned author that legitimate expectation is not a legal right, but “... an expectation of a benefit, relief or remedy that may ordinarily flow from a promise or established practice”.

75. The Supreme Court of India **Jitendra Kumar vs. State of Haryana & Others 2012 (78) ACC 70** explained the doctrine of legitimate expectation as follows: –

“A legitimate expectation is not the same thing as anticipation. It is distinct and different from a desire and hope. It is based on a right. It is grounded in the rule of law as requiring regularity, predictability and certainty in the Government's dealings with the public, and the doctrine of legitimate expectation operates both in procedural and substantive matters.”

76. The same Supreme Court of India in **M/S. Sethi Auto Service Station vs. Delhi Development Authority & Others AIR 2009 SC p.904** expounded on the said doctrine and held:-

“19. The protection of legitimate expectations, as pointed out in De Smith's Judicial Review (Sixth Edition) (para 12-001), is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public. The doctrine of legitimate expectation and its impact in the administrative law has been considered by this Court in a catena of decisions but for the sake of brevity we do not propose to refer to all these cases. Nevertheless, in order to appreciate the concept, we shall refer to a few decisions. At this juncture, we deem it necessary to refer to a decision by the House of Lords in Council of Civil Service Unions & Ors. Vs. Minister for the Civil Service, a locus classicus on the subject, wherein for the first time an attempt was made to give a comprehensive definition to the principle of legitimate expectation.

Enunciating the basic principles relating to legitimate expectation, Lord Diplock observed that for a legitimate expectation to arise, the decision of the administrative authority must affect such person either –

(a) by altering rights or obligations of that person which are enforceable by or against him in private law; or

(b) by depriving him of some benefit or advantage which either:

(i) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until some rational ground for withdrawing it has been communicated to him and he has been given an opportunity to comment thereon or

(ii) he has received assurance from the decisionmaker that they will not be withdrawn without first giving him an opportunity of advancing reasons for contending that they should be withdrawn.”

77. I reiterate that the power to notify a party of intended investigations is discretionary on the Authority. Examining the ingredients of what constitutes a legitimate expectation from the above-cited authorities, it cannot be said to be the norm for the Respondent in this case to issue a Notice of Intention to Investigate as alluded to by the Applicant because there was no evidence of established practice or a consistent and predictable conduct by the Respondent for the Applicant to expect the said

Notice from them. I find that there was no legitimate expectation existing on the part of the Respondent to act in the manner that the Applicant insisted that they ought to.

78. Additionally, the Notice of Investigation under **Section 31 (4)** is not a notification to investigate someone but a call for information to clarify issues emanating from already conducted investigations or arising from a discovery or intelligence exercise before a decision is rendered.
79. The Applicant decries the process undertaken in arriving at and issuing the NoPD stating that it is done in violation of its constitutional right to fair hearing and fair administrative action under **Articles 50 and 47 respectively**.
80. I have considered the provisions of these Articles in the Constitution. Article 50 guarantees the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. It further outlines the components of a fair hearing *inter alia*, the right to be informed of the charge, with sufficient detail to answer it; to have adequate time and facilities to prepare a defence; to a public trial before a court established under this Constitution; to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed; to be informed in advance of the evidence relied on, and to have reasonable access to that evidence; and to adduce and challenge evidence.

Article 47 provides for the right to fair administrative action as already set out above.

81. The Applicant contends that the continued refusal by the Respondent to furnish them with the Surveillance Report that informed the issuance of the impugned NoPD is an outright violation of their rights and impedes their ability to be subjected to a fair administrative process. It is contended that the Applicant is unable to put up a proper defence in the absence of this report. They decry the fact that the Respondent made certain findings from its surveillance which led them to draw incorrect conclusions in issuing the NoPD. The Applicant also contends that the Respondent's denial that the NoPD is not final is mischievous, disingenuous and a misguided way of circumventing due process to impose the punitive consequences contemplated under **Section 36 of the Act**. It asserts that the process undertaken in arriving at the NoPD by the Respondent, was irrational and fundamentally flawed.
82. On its part, the Respondent argues that the purpose of their investigation was established by the fact that at the point of expiry of the exemption period, the *ex-parte* Applicant and Koko were yet to submit their exemption requests which meant that the contentious clauses in their ten-year contract that required exemptions to avoid breach of Section 21 of the Act were still in operation. It asserts that its investigations led them to make a number of findings which alongside the issue of the failure to

obtain an exemption on time, led to the impugned Notice of Proposed Decision.

83. Further, it contends that the NoPD is not a final decision but a step in which they have called upon the Applicant to present their case regarding the adverse findings that the surveillance yielded. It is their position that if the Court were to compel them to produce the alleged Surveillance Report which outlines the details of their investigations, the same would set a bad precedent that undermines the role and confidentiality of investigative processes. According to them, it is sufficient that they outlined the findings of the Surveillance Report and called the Applicant to submit in response or in its defence.

84. I have considered these two rival arguments and as a preliminary, I must dispel the notion that the Notice of Proposed Decision was final and binding to the *ex-parte* Applicant to warrant punitive measures from the Respondent as it alleged. My perception stems from the fact that the investigative process conducted by the Respondent is what yielded the findings that they outlined in the NoPD which in turn led them to invite the *ex-parte* Applicant for a hearing. In my view, the Respondent did not in any way intend for the NoPD to be the final decision and had this been the case, then it would never have invited the Applicant for a hearing.

85. I take cognizance of the fact that Vivo Energy delayed in notifying the Respondent and making an Application for exemption for the second term

of their contract. That being the case, I find the allegation by the Applicant that the NoPD was only pegged on the said Surveillance Report was not factual or correct. It is clear that there were other triggers such as the fact that the Applicant and its counterpart Vivo were yet to submit their exemption requests as at the time of expiry of the exemption period.

86. Having established thus, I now turn to the big question being ***whether the Respondent ought to avail the Surveillance Report to the Applicant in upholding the tenets of a fair administrative action.***

87. The view of this court is that there is a clear distinction between investigative processes and adjudicative processes. Investigative processes entail a progression of activities or actions undertaken from gathering of evidence, collating and analysing information, formulating working theories and forming a reasonable *prima facie* case or charge against a person or a body.

88. An investigative process on the other hand, is a wide, impartial, fact-finding process and is only narrowed down where facts point to a certain direction upon extensive discovery. The preponderance of evidence is what establishes the decision to charge or call to defence the person against whom the investigation is conducted.

89. Additionally, an adjudicative process is the culmination of a fully completed investigative process. It entails a holistic consideration of the cases of both sides on the divide and a determination is made based on an

in-depth analysis of the facts and the law. It is this process which culminates into a final decision that must adhere to the principles of fair hearing, natural justice and to the dictates of **Article 47 of the Constitution** and **Section 7 of the Fair Administrative Action Act**.

90. A stark contrast between the two process is that each of them is distinct from the other and aspects of confidentiality and full disclosure vary between the two. While investigative processes may be characterized by secrecy and confidentiality of information gathered, adjudicative processes entail full disclosure of material relied upon in arriving at a decision.
91. It cannot be gainsaid that Judicial Review is centred on the lawfulness, propriety and fairness of the procedure employed in arriving at a decision. As a guardian of the rule of law and the bastion of justice, a court of law must guard against rendering itself in decisions that will likely impede the workings of other cogs in the wheels of justice. This is the case, because, the main issue in this case is that the Applicant decries the fact that they have been denied access to the Surveillance Report which they claim informed the decision in the NoPD by the Respondent, in contravention with their right to a fair hearing and due process.
92. What then would be the effect of this Court compelling the release of the said surveillance? While this Court appreciates that an (accused) person is entitled, under Article 50(2) (j) of the Constitution, to be informed in advance of the material the prosecution intends to rely on and to have

reasonable access to that evidence, to be afforded time and material to put up their defence in accordance with the tenets of natural justice and fair hearing, this right to access such information is not absolute. There has to be a clear distinction of what needs to be disclosed to ensure a fair hearing and what must remain undisclosed to protect intelligence and surveillance activities that are governed by confidentiality.

93. In considering this delicate balance of interests, I am persuaded by the High Court decision in **Bakari Rashid vs. Republic [2016] eKLR**, where the Court refused to fault the prosecution for failure to produce police informers as witnesses and held thus: -

“Police officers and crime-busters, most of the time use informers to gather information regarding crime. The informers are normally secretive as they go about their business and to open them up by calling them as witnesses in open court would certainly blow up their cover, compromise them and expose them to danger. That will defeat the very purpose for which they exist. That is why they are never called or are rarely called as witnesses.”

94. Similarly, the Court of Appeal in **Judicial Service Commission vs. Mutava & another (Civil Appeal 52 of 2014) [2015] KECA 741 (KLR) (8 May 2015) (Judgment)** cited several other decisions in explaining this aspect thus: -

“[33] In re Pergamon Press Ltd. [1971] 1 Ch 388, directors of a company under investigation by Inspectors under the provisions of the English Companies Act, 1948, refused to answer questions insisting that the investigators who were performing an investigatory function, were required by rules of natural justice to give them transcripts of the witnesses who speak adversely against them and see any documents that may be adversely used against them and to allow them to cross-examine witnesses. The English Court of Appeal while holding that the inspectors had a duty to act fairly rejected their claims.

Lord Denning MR said at page 400 paragraph B-C

“In all this the directors go too far. The investigation is ordered in public interest. It should not be impeded by measures of this kind.”

On his part Buckley LJ said at Page 407 – D-E:

“What disclosure will be necessary for this purpose must depend on the circumstances of each case. It may not, and I think often would not, in an ordinary case involve disclosing the identity of witnesses or the disclosure of transcripts. It certainly would not normally involve offering an opportunity to cross-examine any other witnesses, and, indeed, it seems that

inspectors could not compel a witness to submit to cross-examination”.

[34] All these cases including Nancy Makokha Baraza (Supra) show that an investigation is not a trial...”

(See also **Republic vs. Chief Justice of Kenya and Six Others Ex-parte, Moiyo Mataiya Ole Keiwua, High Court Miscellaneous Application No. 1298 of 2004 [2010] eKLR**).

95. The Applicant’s contention that failure to provide the Surveillance Report constituted a denial of due process and fair hearing cannot stand in light of the above authorities. This is because, the surveillance exercise was not only conducted in the course of the Respondent’s ordinary course of duties under **Section 31** but was a lawful fact-finding process that ought to be protected by the law.
96. Good administration of justice requires that courts of law do not unduly interfere with or fetter the statutory mandates of other statutory bodies unless it is demonstrated that in carrying out their functions, they have acted arbitrarily, illegally, irrationally or unreasonably. A court of law cannot ordinarily compel investigative agencies to disclose their raw investigative notes or surveillance reports because those materials are akin to intelligence-gathering products produced by bodies such as the National Police, the National Intelligence Service, the Directorate of Criminal Investigations among others. These records often contain sensitive sources,

methods, and operational strategies, that if revealed, could compromise ongoing or future investigations.

97. Therefore, while the justice system requires that a person who is likely to be affected by a decision must be given full disclosure of the complaints or charges brought against them together with the evidence intended to be relied upon so as to prepare a proper defence and ensure a fair trial, that duty does not extend to revealing every internal memorandum, lead, or technique used in the investigations process that would jeopardize ongoing or future inquiries.
98. Courts must therefore strike a balance between a party's right to a fair trial by ensuring their access to all material needed to prepare a defence on the one hand, against the legitimate public-interest protection of investigative integrity from unnecessary exposure on the other hand. This is intended to avoid endangering individuals, or frustrating law-enforcement objectives by only ordering the disclosure of material that is directly relevant and necessary for defence preparation while also permitting withholding or redaction of information whose release would compromise sources. The overarching principle is to protect investigative confidentiality without undermining a party's ability to receive a fair hearing and effective administrative action.
99. From the foregoing, and having considered the contents of the NoPD dated 15th April 2025, it sets out *inter alia* the findings made from the

surveillance exercise, the actions undertaken by and the correspondences exchanged by the parties in regard to the requests for exemption as well as the law relied upon by the Respondent in conducting its analysis of the said findings and the conclusions drawn. Paragraph 34 of the NoPD sets out the remedies available for the alleged breaches under **Section 36 of the Act** and paragraphs 35 and 36 recognize the right to a fair trial and fair administrative action such that the Respondent invites the Applicant for a hearing before the Authority.

100. A cursory glance at the contents of the NoPD reveals that there was sufficient material provided by the Respondent and detailed findings drawn from the surveillance exercise as outlined in the NoPD to enable the Applicant to have knowledge of and a clear understanding of the charges that they were facing before the Respondent.
101. Although the surveillance report was never availed, I find that the NoPD sufficiently set out with clear particularity what actions the Respondent found the Applicant to be engaged in, in breach of the Act.
102. There was therefore no need for the Applicant to demand to be issued with the Surveillance Report since the details of the charges were well set out in the NoPD. To move this Court to issue Judicial Review Orders compelling issuance of the surveillance Report would be asking this Court to set a precedent whose ripple effect would be to compromise the aspect of

confidentiality in investigations and in the end, undermine law enforcement processes.

103. Additionally, no law prevents the Respondent from investigating an allegation of misconduct or breach against the Applicant. This Court will however not delve into the issue as to whether the surveillance exercise was credible or not as alluded to by the Applicant because the outcome of the said Report had already been clearly outlined in the NoPD.

104. The Applicant laments that its right to fair administrative action was violated because of lack of wholesome evidentiary discovery characterized by the Respondent's failure to release the Surveillance Report and to issue them with a Notice of Intention to Investigate. However, from the preponderance of the material before me, I find that the applicant did not adequately establish that the process so far employed by the Respondent in conducting its investigations and issuing the NoPD failed the test of a fair administrative action which should be expeditious, efficient, lawful, reasonable and procedurally fair. Not only was the Applicant informed of the findings and the charges it faced, it was also afforded an opportunity for a hearing to make its representations on the NoPD.

105. From the totality of the material placed before this Court, I find that the Respondent has adequately afforded the Applicant an opportunity to know of the actions undertaken in the investigation exercise, the findings made

from the alleged breaches, the evidence relied on and has been afforded adequate opportunity to be heard.

106. This Court having already found that the NoPD is not the final decision and appreciating the fact that the Applicant has been afforded an opportunity to state at a hearing before the Respondent, it is my humble view that this Application is premature and unfounded. It does not merit the prayers sought and is thus disallowed.

107. In the end, I find and hold that the originating motion dated 26th January, 2026 is not merited and the same is hereby dismissed.

108. I order that each party bear their own costs of the Originating Motion.

109. This file is closed.

Dated, Signed and Delivered virtually at Nairobi this 22nd Day of April, 2026

**R.E. ABURILI
JUDGE**