Vivo Energy Kenya Limited v Competition Authority of Kenya (Originating Motion E008 of 2026) [2026] KEHC 5282 (KLR) (Judicial Review) (22 April 2026) (Judgment)

Neutral citation: [2026] KEHC 5282 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

ORIGINATING MOTION E008 OF 2026

RE ABURILI, J

APRIL 22, 2026

IN THE MATTER OF: FAILURE BY THE COMPETITION AUTHORITY OF KENYA TO EXERCISE STATUTORY POWERS AS AN ADMINISTRATOR UNDER THE COMPETITION ACT CHAPTER 504, LAWS OF KENYA AS READ TOGETHER WITH ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010 AND PART III OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015.

-AND-

IN THE MATTER OF: VIOLATIONS OF VIVO ENERGY KENYA LIMITED'S RIGHTS TO NOTIFCIATION, BEING FURNISHED WITH INFORMATION AND MATERIAL DOCUMENTS TO ENABLE EXERCISE A RIGHT TO BE HEARD BEFORE AN ADVERSE DECISION.-AND-IN THE MATTER OF: THE ILLEGAL ISSUANCE OF A NOTICE OF PROPOSED DECISION AS AGAINST VIVO ENERGY 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

VIVO ENERGY KENYA LIMITED .... EX PARTE APPLICANT

AND

COMPETITION AUTHORITY OF KENYA .... RESPONDENT

JUDGMENT

1. Vide Originating Motion dated 23rd January 2026, the ex-parte Applicant seeks the following Orders: -

1. Spent
2. Spent
3. That this Honourable Court be pleased to issue an Order exempting Vivo Energy Kenya Limited, the Applicant herein from the obligations under Section 40 of the *Competition Act*, 2015 and Rule 9 of the Competition Tribunal (Procedure) Rules requiring it to exhaust the alternative remedy of approaching the Competition Tribunal as the Tribunal is presently not quorate and is therefore unable to hear matters under the *Competition Act*, Chapter 504 Laws of Kenya.
4. That this Honourable Court be pleased to issue Orders of PROHIBITION directed at the Competition Authority of Kenya, the Respondent, its agents, servants and/or employees or such other persons restraining them from further demanding, considering and reviewing documents relating to an alleged complaint with respect to the Wholesale Concession and Operating Agreement dated 18th April 2018 and constituting a committee or officers for the purposes of sitting, reviewing, drafting and publishing a decision, final or otherwise with respect to the alleged unilateral investigations said to have been conducted with respect to the then business between the Applicant Vivo Energy Kenya Limited and KOKO Networks Limited and the implementation of the decisions and/or recommendations in the Notice of Proposed Decision dated 15th April 2025.
5. That this Honourable Court be pleased to issue Orders of CERTIORARI to remove into the High Court for purposes of quashing the Notice of Proposed Decision dated 15th April 2025.
6. That this Honourable Court be pleased to issue Orders of CERTIORARI to remove into this Honourable Court for purposes of quashing the decision by the Competition Authority of Kenya, the Respondent, NOT to issue the Applicant with the documents listed hereunder: -
    i. Notice to Investigate under Section 31 of the *Competition Act*, Chapter 504 Laws of Kenya.
    ii. Notice to furnish information and/or documents under Section 34 of the *Competition Act*, Chapter 504 Laws of Kenya.
    iii. The Surveillance Report and all material information and evidence, the subject of a Notice of Proposed Decision dated 15th April 2025.
7. That 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 practises with respect to the Wholesale Concession and Operating Agreement dated 18th April 2018 between the Applicant and Vivo Energy Kenya Limited as the exemption automatically lapsed and the parties thereto had already amended the agreement to remove the anti-competitive clauses, the subject of the alleged investigation.
8. That this Honourable Court be pleased to issue any other orders that it may deem just and appropriate in the circumstances of the case.
9. That the costs of the Application be provided for.

2. The Application is brought under the provisions of Sections 7, 8 and 9(4) of the *Fair Administrative Action Act*, No. 4 of 2015 and all other enabling provisions of the law. The Originating Motion

is supported by the affidavit of NAOMI ASSUMANI, the ex-parte Applicant's Regional Counsel and Legal Manager, Kenya, sworn on even date and is premised on several grounds inter alia- that the Applicant entered into a Wholesale Concession and Operating Agreement on 18th April 2018 (hereinafter referred to as 'the Agreement') with Koko Networks (Kenya) Limited for ten years to deliver cheaper, cleaner and safer alternative cooking fuel to the market (the Koko fuel) which was operationalized by a 5-years Exemption issued by the Respondent on 29th March 2019.

3. The ex-parte Applicant avers that once the commercial landscape evolved, they informed Koko that they would not be pursuing a renewal of the Exemption from the Respondent, rendering the exclusivity of the Agreement untenable. That as a result, Koko acted on this representation and began to engage alternative suppliers from various markets as early as 2021 before the expiry of the Exemption period.

4. The ex-parte Applicant asserts that at the end of the Exemption period, the parties jointly agreed that the exclusivity aspect of the Agreement was no longer necessary, leading to amendments of the said Agreement on 4th March 2025, to remove the exclusivity clauses.

5. The ex-parte Applicant urges that the Respondent then unilaterally issued a Notice of Proposed Decision (the NoPD) on 15th April 2025 anchored on an alleged Surveillance Report and made several findings against the ex-parte Applicant, without interrogating the parties' conduct after the lapse of the Exemption period or inviting them to confirm whether they would seek an exemption. That the effect of this decision is to compel the ex-parte Applicant to file merit-based submissions and make arguments in respect of the alleged violations without the Respondent first discharging its statutory obligations which amongst others, was to issue Notice to Investigate and furnish information and documents pertaining to the decision.

6. According to the ex-parte Applicant, it is unable to lawfully afford itself a right to be heard since the Respondent refused, neglected and failed to discharge its duties under the law with a justifiable risk and danger of an adverse decision of financial penalties thereby causing them irreparable loss and damage. That further, they have not been informed of the circumstances informing the decision to investigate the business sanctioned by the Agreement and that they should not be punished for supporting initiatives by the National Government for affordable safe and alternative cooking solutions under the Kenya National Cooking Transition Strategy 2024-2028.

7. It is averred that the ex-parte Applicant could not approach the Competition Tribunal under Section 71 (4) because it is currently not properly constituted as communicated by the Secretariat on 21st January 2026, making the Court the only forum for redress. The ex-parte Applicant also avers that the Respondent delayed with the Minutes of their engagement meeting held on 22nd September 2025 and only availed the same on 2nd January 2026.

8. The ex-parte Applicant further avers that there was no possibility of credible investigations being conducted as alleged by the Respondent and that in taking the role of a complainant, executioner and decision maker, the Respondent was acting in excess of its power and contrary to Section 7 of the *Fair Administrative Action Act*. It is contended that the ex-parte Applicant should be subjected to a lawful and open process, that no prejudice will be suffered by the Respondent and it is only in the interests of justice that the prayers in the Application be granted.

Response to the Application

9. In a response to the Application, the Respondent file a Replying Affidavit sworn by BENARD AYIEKO, the Respondent's Manager –Enforcement and Compliance Department dated 16th

February 2026. He avers that Section 31 (4) of the *Competition Act* provides discretionary powers to the Respondent to issue a Notice of Investigation and ask the affected party to provide records relevant to the investigation or appear before them to help with the investigation. That at the same time, Section 34 provides that the Respondent will only give written notice of its proposed decision to a party that is affected. He avers that the Respondent granted the ex-parte Applicant a 5-year exemption upon receiving their letter of request dated 28th March 2019, which was to end on 28th March 2024.

10. It is deposed in contention that the Authority never received a new exemption application from the ex-parte Applicant for the remaining contract period of 5 years and this informed their decision to conduct a surveillance exercise to determine if the parties were still continuing with the business that was sanctioned by the Agreement, in breach of the Act stemming from the contentious clauses.

11. It is stated that from the surveillance, they observed that the Applicant was still the exclusive supplier of bio-ethanol fuel as submitted by the vendors and corroborated by the ex-parte Applicant's sales representatives; that the prices were automatically determined and managed by the Applicant which was indicative of a resale price maintenance configured in the system and changed automatically to reflect the final price in the dispensing machines; and that the price changes were notified to the agents via SMS, physical meetings, WhatsApp messaging, phone call communication and through the ex-parte Applicant's sales representatives.

12. It is deposed that from the surveillance, the Respondent concluded that the ex-parte Applicant and Koko were engaged in practises in breach of Section 21 (1) as read with 21 (3) of the *Competition Act* on price fixing and territorial allocation after the lapse of the Exemption period.

13. The Respondent in its affidavit denies that its decision was only pegged on the preliminary findings from the surveillance and stated that it was also informed by the evidence attached to the Notice of Proposed Decision (NoPD) being the fact that the ex-parte Applicant was yet to forward an amended Agreement during the period when the exemption period had lapsed as confirmed by their e-mails dated 18th November 2024 and 3rd March 2025 where they stated that they were still in the process of making amendments with Koko. It is their position that because of this, the contentious clauses in the Agreement were still operational during the period when the ex-parte Applicant failed to lodge an amended agreement by the expiry date being 28th March 2024 and that the continued existence of these clauses beyond the exemption period was in breach of Section 21 (1) and (3) (a) and (b) of the Act.

14. The Respondent further contends that they issued a Notice of Proposed Decision dated 15th April 2025 and gave the ex-parte Applicant bundles of evidence relied upon to come up with the said decision, and then granted them 21 days to make written representations indicating whether they wanted an opportunity to be heard.

15. It is contended that the ex-parte Applicant responded to the NoPD on 29th May 2025 but did not request for a hearing conference but later through an email dated 4th September 2025, they requested to accompany Koko to their (Koko's) hearing conference which the Respondent allowed and convened a meeting on 22nd September 2025. That in doing this, they also gave the ex-parte Applicant an opportunity to file supplementary submission based on their request at the hearing conference of 22nd September 2025.

16. The Respondent maintains that it has fully complied with the provisions of Article 47 of *the Constitution* and Section 4 of the *Fair Administrative Action Act* as it provided all the evidence it relied upon in issuing the NoPD and therefore, no prima facie case has been established by the ex-parte Applicant to warrant the orders sought.

17. With respect to the Minutes of the hearing conference of 22nd September 2025, it is the Respondent's case that the draft Minutes were sent to the ex-parte Applicant on 4th November 2025 for confirmation between itself and Koko where correspondences were exchanged regarding the correctness of the said minutes until 2nd January 2026. Additionally, it is stated that credible investigations were conducted and that the Respondent has at all material times acted in accordance with its statutory mandate so that the ex-parte Applicant cannot point to any irrationality, unfairness of procedural impropriety on its part.

Rejoinder

18. The ex-parte Applicant filed a further Affidavit dated 20th February 2026 in response to the Respondent's Replying Affidavit in which it is deposed that prior to the issuance of the decision contained in the NoPD, the Respondent disclosed that their decision was based on the Surveillance Report which they alluded to in the same NoPD. It is stated that the Respondent being the investigator and the decision-maker, the ex-parte Applicant Vivo has not been afforded a meaningful right to defend itself against the alleged findings that informed the decision, when they have been denied access to the Surveillance Report in contravention of *the Constitution* and the *Fair Administrative Action Act*.

19. It is deposed that none of Vivo's officers were ever interviewed in the alleged investigations that were said to be conducted in 10 counties and that the NoPD does not disclose inter alia the specific stations visited and the identity of the officers interviewed. That as such, it is not possible to discern how a 6-days surveillance could have possibly yielded the broad findings that were set out in the NoPD.

20. Further deposition is that the Respondent has put Vivo on its defence but refused to avail all the information requested for to enable it to make its submissions and that the Respondent was called to a higher standard of procedural fairness and transparency in conducting its investigations and making a decision on liability that would likely lead to sanctions.

21. It is further contended that the investigations were conducted in an opaque manner leading to an unlawful decision and that there can never be discretion where a person is obligated by *the constitution* to act in a specific manner or in light of a statute that was enacted to operationalize a constitutional right.

22. The ex-parte Applicant 's deponent asserts that the Respondent conceded to not issuing the Notice of Investigations or granting Vivo the opportunity to be heard or supplying them with material information that led to its decision in utter disregard of Section 6 of the *Fair Administrative Action Act* 2015, *Access to Information Act* 2016 and Chapter 2 and 6 of the Mwongozo Code of Governance, being a state corporation.

23. Directions were issued on 27th February 2026 to consider out of court negotiations and file a consent and to also file written submissions in case they fail to reach an agreement. Both submissions are now duly filed and on record.

Submissions

24. The ex-parte Applicant's submissions are dated 20th February 2026. Counsel for the ex-parte Applicant submits on two issues being: whether the surveillance report is a material document which ought to have been furnished to Vivo; and whether the investigations and process culminating in the NoPD were opaque and procedurally unfair.

25. On the first issue, it is submitted that the Respondent denies that it did not rely on the surveillance observations in issuing the impugned decision in the NoPD but it is clear from their response that

they did rely on it. That it was impracticable for the Respondent to conduct investigations in the 10 listed counties that were geographically widely apart where also the ex-parte Applicant runs 95 Shell branded service stations.

26. It is submitted that even though the ex-parte Applicant recognizes that the Respondent is clothed with investigative, prosecutorial and adjudicatory powers under the Act, they are a statutory body obligated to adhere to *the Constitution* and Acts of parliament as held in Tononoka Rolling Mills Ltd v Competition Authority of Kenya, (2025) KECT 4 (KLR).

27. Counsel submits that Section 4 (3) of the *Fair Administrative Action Act* is couched in mandatory terms and requires that the Respondent furnishes a party whom administrative action is proposed with relevant information and material relied upon in making the decision, while Section 3 and 4 of the *Access to Information Act* 2016 confers upon Vivo as corporate citizen the right to access information. They referred to the Supreme Court case of Njonjo Mue & Another v Chairperson of Independent Electoral and Boundaries Commission & 3 Others (2017) eKLR and Republic v Capital Markets Authority & Another Ex-parte Jonathan Irungu Ciano (2018) eKLR.

28. Counsel submits that the continued requests for information and unjustified refusal is a breach of Section 8 of the *Access to Information Act* and the case of Kenya Human Rights Commission & Another v Attorney General & Another (2024) KEHC 15702 (KLR) is cited in support. Further, that being a state corporation, the Respondent is governed by the Mwongozo Code of Governance at chapters 2 and 6 which have gained the force of law as held in the case of Okoiti v the Board ExpoRt Processing Zones Authority & 3 Others; Otieno (2022) KEELRC 3771 (KLR). Further, that access to information by state agencies was vital for the protection of the rights of citizens as held in Katiba Institute v President's Delivery Unity & 3 Others (2017) eKLR.

29. It is submitted that the without the evidence sought, it is impossible for the Applicant to defend itself and ensure its non-derogable right to fair hearing under Articles 25 and 50 of *the Constitution* are adhered to. The cases of Republic v Ethics and Anti-Corruption Commission & 2 Others ex-parte Erastus Gatebe (2014) eKLR and Geothermal Development Company Limited v Attorney General & 3 Others (2013) eKLR are cited in support of the proposition that the principles of natural justice entail procedural fairness and ensure that a fair decision is reached by an objective administrative body.

30. On the second issue, it is submitted that the purpose of an investigation is to gather evidence to support an informed or objective decision making process as defined by Black's Law Dictionary 8th Edn. at page 2420 and the case of Mea Limited v Competition Authority and Another (2016) eKLR. That in the present case, the investigations and processes culminating into the issuance of the NoPD were opaque and procedurally unfair. It is contended that from the material before the Court, the Respondent's justification for its failure to issue a Formal Notice of Intention to Investigate and request any further documentation is premised on the term "may" under Sections 31 (1) and (4) of the Act which they claim connotes discretion.

31. It is their submission that discretion cannot arise in circumstances where an entity is under a mandatory constitutional obligation to comply with a statute enacted to enforce a constitutional right. That consequently, the Respondent cannot exercise its powers under the parent Act without affording the persons who would be affected by the said decision a right to be heard and right to information or material relied upon and that regardless of the term 'may' conferring discretionary authority, that discretion had to be exercised reasonably and proportionately in a manner consistent with constitutional and statutory obligations.

32. Counsel further submits that the term 'may' has also been interpreted to mean a mandatory obligation based on the circumstance of a case as held by the Supreme Court of India in State of Uttar Pradesh

v Jogendra Singh (1964) SCR (2) 197 and that in the present case, the term 'may' under Sections 31 (1) and (4) of the Act confers a mandatory obligation on the Respondent. That it is a standard and customary practice for an administrator such as the Respondent to issue such notices and requests for further information and involve parties in the investigations prior to the issuance of a NoPD as it did in the case of Blue Nice Wire Products Limited v Competition Authority of Kenya (2025) KECT 3 (KLR) where it issued a Notice of Investigation and Summons for Appearance to the Appellant to attend an interview under Section 31 of the Act; and therefore this conduct against the ex-parte Applicant was a departure from its customary practice without plausible justification.

33. It is their submission that the Respondent's argument that the NoPD is not a final decision rendering these proceedings unwarranted is mischievous, disingenuous and misguided because the consequences contemplated under Section 36 of the Act are extremely punitive and carry severe commercial implications for Vivo and had the Respondent complied with the requests and its statutory obligations before issuing the NoPD, it would have had a proper contextual understanding of Vivo's business model and not arrived at the unreasonable NoPD. Counsel concluded in their submissions that the investigations and the process culminating into the NoPD breached Sections 6 and 7 of the *Fair Administrative Action Act* for being procedurally unfair, unreasonable and illegal and cited the decision by Justice Moses Ado in Cytonn Investments Management PLC v Capital Markets Authority, HCCOM Pet. No. E007 of 2021.

The Respondent's Submissions

34. The Respondent's submissions are dated 27th February 2026. Counsel outlined two issues for determination being: Whether the Respondent's failure to supply the surveillance report violates the Applicant's right to fair administrative action; and Whether the Respondent's failure to issue a Notice of Intention to Investigate (NITI) violates the Applicant's right to fair administrative action.

35. On the first issue, it is submitted that the Applicant's case rests almost entirely on the alleged non-disclosure of a surveillance report which is both legally and logically fatal because the surveillance exercise conducted by the Respondent aimed to ascertain whether the parties were still continuing with the Agreement which had clauses that were in breach of the Act and that the Respondent did not rely on this as evidence of its preliminary findings of breach of the Act by the Parties.

36. It is submitted that Article 47 of *the Constitution* does not create a general right to pre-decision discovery, but guarantees procedural fairness, not wholesome evidentiary discovery. Counsel submits that it has been consistently held by courts that the right to fair administrative action does not equate to the right to access every internal working document of a decision-maker as stated by the Court of Appeal in Judicial Service Commission v Mbalu Mutava [2015] eKLR and Suchan Investment Limited v Ministry of National Heritage [2016] eKLR where the Court emphasized that Judicial review concerns legality of process not microscopic examination of evidentiary sufficiency or disclosure formats. That the Applicant's approach is intended to improperly elevate procedural fairness into a doctrine of compulsory evidentiary disclosure akin to civil discovery.

37. Counsel submits that Section 4 (3) (g) of the *Fair Administrative Action Act* obligates decision makers to provide information, materials and evidence to be relied upon in making the decision and that disclosure duties extend to materials actually relied upon for the decision. It is argued that reference to investigative activity in a surveillance observation does not convert the underlying intelligence into evidence relied upon. Counsel refers to R v Secretary of State ex-parte Doody [1194] 1 AC 531, where the House of Lords held that fairness requires disclosure only of the gist of adverse material, not every document and Republic s.v Kenya Revenue Authority Ex parte Shake Distributors Ltd [2012] eKLR, where the Court held that procedural fairness does not compel disclosure of internal investigative

reports where the substance of allegations has been communicated. That the duty therefore is to disclose the case to be made, not intelligence files from surveillance observations.

38. It is further submitted that surveillance activities are analogous to "patrols and form part of regulatory fact finding as they generate leads, impressions, and preliminary observations used to determine whether further enquiry is warranted. Counsel cites Republic v National Environmental Management Authority ex-parte Sound Equipment Limited [2011] eKLR where it was held that investigative notes used internally to guide enforcement decisions are not part of the evidentiary record requiring disclosure.

39. It is their position that Statutory bodies such as the Respondent that exercise enforcement mandates must retain confidential investigative capacity to avoid making enforcement ineffective. Counsel cites Republic v Public Procurement Administrative Review Board ex parte Kenya Power & Lighting co. Ltd [2019] KLR, in support of investigative privilege where the court affirmed that regulators are not required to disclose internal investigative material where doing so would compromise enforcement processes and Marks v Beyfus (1890) 25 QB 494 at 498. Further, that procedural fairness requires that a party understands the allegations and not that it be furnished with surveillance notes.

40. It is also submitted that the impugned instrument is a Notice of Proposed Decision, a stage where the Applicant is expected to make representations as part of a fair hearing and not a final determination. The case of Republic v Independent Electoral and Boundaries Commission ex-parte National Super Alliance [2017] eKLR, was cited on judicial interference at preliminary stages and it was submitted that the Applicant's request is procedurally premature and legally misconceived. That further, the authorities cited by the Applicant concerned situations where final sanctions had been imposed and undisclosed documents were used in arriving at a decision.

41. Counsel also submits that the Respondent issued the Applicant with a NoPD dated 15th April, 2025 accompanied by all the pieces of evidence it relied on and complied with its obligation to grant the Applicant a fair hearing in accordance with Article 47 of *the Constitution* and Section 4 of the *Fair Administrative Action Act* and the *Competition Act*. The case of Majid Al Futtaim Hypermarkets Limited v Competition Authority of Kenya & another [2021] eKLR was cited in support. Further, that Constitutional access to information is not a tool for speculative discovery and that Article 35 cannot be invoked for generalized disclosure requests as held in Trusted Society of Human Rights Alliance v Judicial Service Commission [2016] eKLR.

42. On the second issue, it is submitted that the Applicant's contention that the Respondent was legally obligated to issue a Notice of Intention to Investigate (NITI) prior to commencing investigations is fundamentally misconceived, both as a matter of statutory interpretation and administrative law principle as Section 31 of the *Competition Act* empowers the Respondent to carry out investigations either on its own initiative or upon receipt of information or complaint from any person or government agency or Ministry. Further, that Section 31(4) employs the permissive term "may" rather than the mandatory term "shall" which is a settled canon of statutory construction conferring discretion unless the statutory context compels a contrary interpretation.

43. Counsel argues that courts cannot convert discretion into a duty as held authoritatively by the Court of Appeal in Kenya National Examinations Council v Republic ex-parte Geoffrey Gathenji Njoroge [1997] KLR, and that consequently, the issuance of a NITI is optional and context dependent rather than obligatory. That the Court should reject statutory interpretations that defeat legislative intent or render regulatory enforcement impracticable.

44. It is further contended that Section 31 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 making the power to investigate a statutory mandate in itself, and not by issuance of notice. Subsection 31(4) of the Act therefore, merely provides one of several procedural mechanisms available to the Authority where it considers it necessary to compel production of information making it an enabling provision, not a condition precedent to lawful investigation.

45. It is their argument that the Applicant's interpretation would produce absurd results, because it would mean that the Authority cannot conduct any preliminary inquiry unless it first alerts the subject of investigation which would render enforcement impossible, frustrate statutory purpose and enable concealment or destruction of evidence.

46. Counsel submits that procedural fairness under Article 47 is to be assessed at the decision-making stage, not at the intelligence-gathering stage and that courts have consistently recognized that investigations are exploratory in nature and do not trigger full hearing rights until they crystallize into proposed adverse action. Counsel cites Dry Associates Ltd v Capital Markets Authority [2012] eKLR, where investigative processes and adjudicative determinations were expressly distinguished.

47. The Respondent's submissions posit that the Applicant's reliance on discretion - based arguments is equally untenable because it proceeds from the erroneous assumption that whenever a statutory body has discretion, it must exercise that discretion in a particular way, favorable to the regulated party The case of Republic v Public Service Commission & another ex-parte Kirinyaga County Government [2023] KEELRC 1066 (KLR) is cited in support.

48. Counsel also submits that the allegation that failure to issue a NITI violated legitimate expectation is legally unsustainable because legitimate expectation arises only where a public authority has made a clear representation or established a consistent past practice that is certain, regular, and devoid of relevant qualification as explained by the Supreme Court in Communications Commission of Kenya v Royal Media Services Ltd [2014] eKLR and that in this regard, the Applicant has not produced any instance demonstrating a binding representation by the Respondent that it would invariably issue a NITI before investigations.

49. That additionally, the Applicant's argument on legitimate expectation ignores a critical doctrinal limitation that legitimate expectation cannot be invoked to fetter statutory discretion as held in Republic v Kenya Revenue Authority ex-parte Shake Distributors Ltd [2012] eKLR, where the Court held that a public authority cannot be compelled to act contrary to statute on the basis of expectation. Therefore, even assuming that the Authority had previously issued NITIs in some investigations, that would not create a legal obligation to do so in all cases. To hold otherwise would transform administrative flexibility into rigid procedural formalism and undermine effective regulation, particularly in competition enforcement where investigative strategies must vary depending on circumstances, risk of evidence tampering, and market dynamics.

50. Counsel urged the Court to consider comparative administrative law principles governing regulatory investigations in which courts across common law jurisdictions recognise that regulators must retain latitude to conduct preliminary inquiries without prior notice, especially in economic regulation and competition enforcement where advance warning may compromise investigations. It is their prayer that the Court dismisses the suit for being premature, speculative, legally misconceived, and devoid of merit as it fails to meet the threshold for judicial review intervention.

Analysis and Determination

51. Having considered the pleadings before the Court, the evidence adduced in the respective affidavits and their annexures together with the rival submissions against the law, the main issues for my determination are:

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

ii. Whether the process undertaken in arriving at the NoPD was procedurally fair. In particular, whether the Surveillance Report forms the subject of the impugned Notice of Proposed Decision dated 15th April 2025 and whether the Respondent is obligated to furnish the ex-parte Applicant with it.

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

52. The dispute in this case arises from the impugned Notice of Proposed Decision (NoPD) dated 15th April 2025 issued upon the Respondent making certain findings after conducting a surveillance exercise between 6th October 2024 and 12th October 2024.

53. Since the question of jurisdiction of this court has been raised, before delving into the main issues, the Court must first determine whether it is empowered to adjudicate upon this matter where there exist alternative mechanisms set out by statute.

54. It is trite that jurisdiction is everything and without it, a court of law cannot act in presiding over a matter. In the locus classicus case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989) the court pronounced itself 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."

55. Court are hesitant to preside over matters 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 an appeal.

56. With respect to the matters in dispute in the present case, 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.

57. The Tribunal's jurisdiction is captured under 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;

58. Rule 9 of the Competition Tribunal (Procedure) Rules made under the *Competition Act* also outlines 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;

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

c. any other matter arising under the Act; and

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

59. 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.

60. From the material before this Court, it is safe to conclude that the subject of this suit is an issue that 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 in R v Independent Electoral and Boundaries Commission (I.E.B.C) Ex- Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:-

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.

61. The above doctrine stems from the alternative dispute resolution mechanisms under Article 159 of *the Constitution* and ensures that litigants must first exhaust any other available remedies before rushing to court. (See the decisions by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 and the High court at Mombasa in William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR).

62. 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.

63. In the present case, the ex-parte Applicant pleads that they were unable to approach the Competition Tribunal under Section 71 (4) because it is currently not constituted. I have read 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 has lapsed and they are yet to be replaced. Consequently, this Court having considered the circumstances of this case, the interests of the ex-parte Applicant and the broader interests of justice finds that it has jurisdiction to adjudicate over the matter.

ii. Whether the process undertaken in arriving at the NoPD was procedurally fair. In particular, whether the Surveillance Report forms the subject of the impugned Notice of Proposed Decision dated 15th April 2025 and whether the Respondent is obligated to furnish the ex-parte Applicant with it.

64. It is the ex-parte Applicant's case that the Respondent failed to issue them with a Notice to Investigate under Section 31 of the Act then went ahead to issue them with the impugned Notice of Proposed Decision dated 15th April 2025. They state that the impugned NoPD was informed by an illegal and impractical investigations/surveillance conducted by the Respondent in 10 specified counties on approximately 95 Shell service stations which yielded a surveillance report that the Respondent withheld from them. They assert that none of Vivo's officers were ever interviewed in the investigations as alleged by the Respondent.

65. It if further averred that the ex-parte Applicant has not been afforded a meaningful right to defend itself against the alleged findings that informed the decision yet it is being called upon to provide submissions and defend itself against a Report whose access it has been denied contrary to the provisions of *the Constitution* and the *Fair Administrative Action Act*. According to the ex-parte Applicant, the fact that the surveillance was also conducted in 10 counties over a period of 6 days makes it questionable on how such broad findings could have been made.

66. In their submissions, Counsel argues that the Respondents have breached the provisions of *the Constitution*, the *Fair Administrative Action Act*, the *Access to Information Act* 2016 and Mwongozo Code of Governance in denying the ex-parte Applicant the information it needed from the Surveillance Report stating that without the evidence sought, it is impossible for them to put up a proper defence.

67. On their part, the Respondent's case is that the NoPD was not solely premised on the said surveillance report but was also informed by the fact that the ex-parte Applicant failed to

forward an amended agreement at the lapse of the exemption period rendering the contentious clauses in the Agreement still operational in breach of Section 21 (1) and (3) (a) and (b) of the Act. It is also 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 their part to issue the said Notice to Investigate.

68. In their submissions, Counsel for the Respondent vehemently objects to the Court granting the prayer to provide the ex-parte 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 is their position 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. They state 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.

69. I have considered the two broad rival arguments of the parties in respect of the Notice of Intention to Investigate and the impugned Notice of Proposed Decision. It is undisputed that the Respondent did not issue any notices to the ex-parte Applicant at the point when it decided to conduct a surveillance investigation on the ex-parte Applicant.

70. The duties of the Respondent as set out in Section 31 of the *Competition Act* are:

 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.

71. The contentious issue here is whether the Respondent was obligated to issue the notice to commence its investigations or not. I note that the above provisions under sub-section (4) employ the use of the term 'may'. Consequently, I have also considered case law on the use of the term "may" and how it has been interpreted by the courts over time.

72. '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 v Nnajiofor (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, however, 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.

73. 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) 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)].

74. The import of the above judicial pronouncements is that the interpretation of the term 'may' must be contextualized. Counsel for the ex-parte Applicant cites the Supreme Court of India in State of Uttar Pradesh v 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 their position that there can never be discretion where a person is obligated by *the Constitution* to act in a specified manner.

75. 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 for two reasons.

76. Firstly, 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 from the party complained against, or documents in that party's possession or for that party to produce a person who may have information or knowledge relevant to the investigations.

77. My 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. In other words, 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.

78. Thus, if in the view of the investigative authority, in this case the Respondent, it is not necessary for it to obtain any or additional information from the ex-parte Applicant pertaining to the investigations that it wishes to conduct, then there is no mandatory statutory obligation requiring it to approach the ex-parte Applicant in this regard. Furthermore, if the legislators intended for the said Notice under sub-section (4) to be mandatory, then the Act would have expressly stated so.

79. Secondly, I find the ex-parte Applicant's arguments that the use of the term 'may', in this context confers upon the Respondent a mandatory obligation untenable because the wordings of Section 31 (4) is such that the Notice to be issued is not meant to inform the party being investigated that they are being investigated but is to merely call for relevant records, documents, information or persons needed to aid in the said investigation. In other words, if in the view of the Respondent, such information is not necessarily obtainable from the party being investigated and can be obtained by other lawful means, then the Notice under Section 31 (4) becomes immaterial, extraneous and unnecessary. In essence, this Notice only becomes activated the moment the Respondent wishes to obtain information from the party being investigated.

80. The ex-parte Applicant further argues that it is a standard and customary practise for an administrator such as the Respondent to issue such notices and requests for further information and involve parties in the investigations prior to the issuance of a NoPD. The ex-parte Applicant cites the case of Blue Nile Wire Products Limited v Competition Authority of Kenya (2025) KECT 3 (KLR) where it is said that the Respondent issued a Notice of Investigation and Summons for Appearance to the Appellant to attend an interview under Section 31 of the Act. They argue that the Respondent's conduct against the ex-parte Applicant was a departure from its customary practise without plausible justification.

81. The ex-parte Applicant 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 v 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".

82. The Supreme Court of India Jitendra Kumar v State of Haryana & Others 2012 (78) ACC 70 explained 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."

83. The same Supreme Court of India in M/S. Sethi Auto Service Station v 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. v 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."

84. With the above decisions in mind, though some are persuasive, and having perused the case of Blue Nile Wire Products Limited (supra) relied upon by the ex-parte Applicants in advancing the argument that there was a legitimate expectation on the part of the Respondent to issue a Notice of Investigation and Summons for appearance in accordance with Section 31 as it has always done in the past; and having already found that the power to notify a party of intended investigations is discretionary on the Authority; I observe that the case of the Blue Nile Wire Products Limited reveals that the Competition Authority who was the Respondent in the said

case conducted a search and seizure exercise pursuant to investigations informed by market intelligence that market players in the Steel Manufacturing and Distribution Sector in Kenya were engaged in coordinated conduct contrary to Section 21 of the Act.

85. After analysing the documentation seized, the Authority established that the Appellant amongst other companies, not subject to the search and seizure exercise, were also subjects of interest in the investigation. They opted to issue a Notice of Investigation (NOI) and summons for appearance to the Appellant based on a preliminary review of the material before it, to appear before the Authority to clarify information found in the course of the said search.

86. Without delving deeper into the crux of the above case, I note that the Respondent in the said case first conducted its own investigations then invoked Section 31 of the Act to call for further information from the ex-parte Applicants in that case in order to provide clarity on what they had found in the course of their investigations. In other words, there was no practice of issuance of Notice of Investigation issued prior to the commencement of the said investigations as asserted by the Applicant in the present case.

87. Examining the ingredients of what constitutes a legitimate expectation from the above-cited cases, it cannot be said to be the norm for the Respondent in this case to issue a Notice of Investigations as alluded to by the ex-parte Applicant because there was no 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.

88. I reiterate that 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.

89. The ex-parte Applicant decries the process undertaken in arriving and issuing the NoPD stating that it was done in violation of their constitutional right to fair hearing, access to information and fair administrative action under Articles 50, 35 and 47 respectively.

90. I have considered these Articles in *the Constitution*. Article 50 (1) 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 at Article 50(2) 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;

91. Article 35 (1) alongside Section 4 of the *Access to Information Act* guarantee the right to information of a citizen while Article 47 provides for 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.

92. The ex-parte 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 ex-parte Applicant is unable to put up a proper defence in the absence of this report which worse still they have brought into question because of a myriad of issues including the impractical possibility of the Respondent conducting the alleged surveillance in ten counties that were geographically wide apart within 6 days. They decry the fact that there were no names provided in the NoPD of the persons who were interviewed and contend that the said agents and distributors and even employees of Vivo who were allegedly interviewed may not have been in a position to have had a proper contextual understanding of their business model, hence leading the Respondent to drawing incorrect conclusions in issuing the NoPD.

93. 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, who was both the complainant, investigator executioner and decision maker was an instance of the Respondent acting in excess of its powers and with a possibility of not affording them a fair administrative action.

94. On their 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 Networks 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 is their case that their 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.

95. Further, they contend that the NoPD is not a final decision but a step in which they have called upon the Applicant to make submissions 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 the respondent, it is sufficient that they outlined the findings of the Surveillance Report and called the Applicant to submit in response or in its defence.

96. I have considered these two rival arguments and as a preliminary point, 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 alleged by it. My reasoning 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 to tender its submissions. I note that the Respondent from its initial investigations issued the NoPD dated 15th April 2025 and then invited the ex-parte Applicant to indicate whether they wanted a hearing or not. From the evidence before me, I note that the ex-parte Applicant only responded to the NoPD on 29th May 2025 and further did not request for a hearing conference. Instead, they much later requested through an email dated 4th September 2025 that they wanted to accompany Koko Networks Kenya Ltd to their hearing conference which the Respondent graciously allowed and convened a meeting on 22nd September 2025.

97. From the above chronology, it is clear to this Court that had the Respondent intended for the NoPD to be the final decision, then it would never have invited the Applicant for a hearing on its own or with its counterpart Koko Networks Kenya as it later did. This position is supported by evidence that the Respondent demonstrated its willingness to afford the ex-parte Applicant an opportunity to file supplementary submissions in defence of its case, when they made a request at the hearing conference of 22nd September 2025. This fact was never rebutted in Court and was in my view, a clear demonstration that the Respondent had an intention and carried out the said intention of affording the Applicant a fair hearing.

98. It is important to note that the ex-parte Applicant and Koko Networks Kenya Ltd delayed in notifying the Respondent and making an Application for exemption for the second term of their contract, I also note that 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 Koko Networks Kenya Ltd were yet to submit their exemption requests as at the time of expiry of the exemption period, a fact that they admitted in the emails of 18th November 2024 and 3rd March 2025.

99. The big question, with the above scenario in place, is whether the Court can compel the Authority to produce or reveal the details of the Surveillance Report. This Court holds the view that there must be a clear distinction between investigative processes and adjudicative processes.

100. 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. An investigative process 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.

101. On the other hand, 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*.

102. A stark contrast between the two processes is that each of them is distinct from the other and aspects of confidentiality and full disclosure varying 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.

103. 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 well as the constitutionality of the decision and process as articulated in Article 47 of *the Constitution* and the *Fair Administrative Action Act*. 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 mechanisms in the wheels of justice. This is so because, the main issue in this case is that the ex-parte 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 of their right to a fair hearing and the due process.

104. What then would be the effect of this Court compelling the release of the said surveillance Report? While this Court appreciates that a (accused) party must be provided with all the necessary material needed to understand a charge or complaint brought against them and be afforded time and material to put up their defence in accordance with the tenets of natural justice and fair hearing or fair trial, this right to access such information is not absolute. There has to be a clear distinction of what need to be disclosed to ensure a fair hearing and what must remain undisclosed to protect intelligence and surveillance activities that are governed by confidentiality.

105. In considering this delicate balance of interests, I am persuaded by the High Court decision in Bakari Rashid v 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."

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

> " (33) In re Pergamon Press Ltd. [1971] I 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 impended 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 v Chief Justice of Kenya and Six Others Ex-parte, Moijo Mataiya Ole Keiwua, High Court Miscellaneous Application No. 1298 of 2004 [2010] eKLR).

107. 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 duties under Section 31 of the Act but was a lawful fact-finding process that ought to be protected by the law. Good administration of justice requires that courts of law do not unduly interfere with or fetter the duties of other statutory bodies in carrying out their functions arbitrarily. A court 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, Directorate of Criminal Investigations etc. These records often contain sensitive sources, methods, and operational strategies, that if revealed, could compromise ongoing or future investigations.

108. While the justice system requires that a person who is likely to be affected by a decision must be given 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 that would jeopardize ongoing or future inquiries. Courts must 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 and effective administrative action.

109. Having considered the contents of the NoPD dated 15th April 2025. I find that it sets out inter alia, the findings made from the surveillance exercise, the actions undertaken by and the correspondences exchanged by the parties with 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.

110. Paragraph 34 of the NoPD sets out the remedies available for the alleged breaches under the 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 ex-parte Applicant to respond and indicate whether they wish to make oral representations to the Authority.

111. 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 ex-parte Applicant to have knowledge of and a clear understanding of the charges they were facing before the Respondent. Although the surveillance report was never availed, I find that the NoPD sufficiently set out with clear particularity what actions the Respondent found the ex-parte Applicant to be engaged in, in breach of the Act.

112. There was therefore no need for the ex-parte Applicant to demand to be issued with the Surveillance Report since the details of their charges were well set out in the NoPD. To move this Court to issue Judicial Review Orders in demanding issuance of this Report would be asking this Court to set a precedent whose ripple effect would be to compromise the aspect of confidentiality in investigations and undermine enforcement processes.

113. I have equally considered whether in issuing the NoPD, the Respondent being the complainant, executioner and decision maker as alluded to by the ex-parte Applicant, was acting in excess of its powers and failed to guarantee due process to the Applicant. I find that there was no evidence placed before this Court to demonstrate any iota of likely bias or excess of powers. There is no legal provision that prevents the Respondent from investigating an allegation of misconduct or breach against the ex-parte Applicant and then sitting in an adjudicative capacity to determine the truth of the charges against it.

114. The fact that the Respondent is both the investigative and adjudicative authority does not necessarily create a possibility of bias because the law empowers it to do so. It cannot be said to be acting in excess of its powers and equally, in the absence of evidence of bias while acting in those two distinct roles, this Court finds that that alone cannot not constitute a denial of due process.

115. In the U.S. Supreme Court case of Withrow v. Larkin, 421 U.S. 35 (1975) it was held thus: -

> " The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."

116. This Court will not delve into the issue as to whether the surveillance exercise was credible or not as alluded to by the ex-parte Applicant because to delve into its credibility will interfere with the investigative and adjudicative statutory mandate of the respondent. Additionally, to demand that the Court compels the release of the Surveillance Report so that the ex-parte Applicant could challenge its contents in its defence would be asking this Court to veer off into

the realm different from its jurisdiction, yet the outcome of the said Report had already been clearly outlined in the NoPD.

117. The ex-parte Applicant further laments that their 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. However, from the preponderance of the material before this Court, I find that the exparte applicant did not adequately establish that the process employed so far by the Respondent failed the test of a fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. Not only was the ex-parte Applicant afforded an opportunity to opt for a hearing to make its representations on the NoPD, when it failed to provide an indication on the same, the Respondent allowed it to participate in Koko's conference hearing much latter in September 2025, where they were again allowed to file supplementary submissions.

118. Throughout the sequence of events in this matter, I note that the Respondent has adequately afforded the ex-parte Applicant an opportunity to know of the actions being undertaken in the investigation exercise, the findings made on the breaches, the evidence relied on and has been afforded adequate opportunity to be heard. In fact, even the present suit emanates from an invitation by the Respondent to the ex-parte Applicant to appear before it and make submissions on the findings in the NoPD in its defence.

119. Having already found that the NoPD is not the final decision and appreciating the fact that the ex-parte Applicant has been afforded an opportunity to state its case through filing submissions and making representations at a hearing, it is my humble view that this Application was premature as the Respondent is yet to render a final determination.

120. In the final analysis, I find the Originating Motion dated 23rd January 2026 to be devoid of substance and the same is hereby dismissed.

121. Each party shall bear their own costs of the originating motion.

122. I however note that the parties have agreed and filed a consent dated 8th April, 2026 for adoption by the court, settling the dispute herein and this court has adopted the consent as recorded before this judgment which I had already written when the consent was filed, was pronounced this afternoon. Accordingly, the dismissal of the originating motion shall in no way affect the consent entered into by the parties hereto.

123. This file is accordingly closed.

124. I so order.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF APRIL, 2026

R.E. ABURILI

JUDGE