



PRESS RELEASE

THE HIGH COURT UPHOLDS CAK'S ABUSE OF BUYER POWER FINDING AGAINST MAJID AL FUTTAIM HYPERMARKETS LIMITED (CARREFOUR)

FOR IMMEDIATE RELEASE

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The Competition Authority of Kenya ('the Authority') is established under section 7 of the [Competition Act CAP 504 \('the Competition Act'\)](#). The Authority enforces the Competition Act with the objective of enhancing the welfare of Kenyans by, among other roles, sanctioning Abuse of Buyer Power (ABP).

Buyer power is the ability of a powerful buyer to obtain terms of supply outside the scope of normal business practices or that are **disproportionate, unfair and detrimental** to a supplier. It is the ability of a buyer to reduce a supplier's profitability below normal selling prices or obtain terms of supply more favourable than is contained in ordinary contracts.

The Competition Act provides a non-exhaustive list of practices through which ABP manifests in the marketplace including significant reduction of supply prices, threats of termination or unilateral termination of contracts without justification, delayed payments, refusal to receive or return goods without justifiable reasons, and transfer of costs or risks to suppliers.

In line with this mandate, the Authority welcomes the **High Court judgement** by Hon. Lady Justice Anne Ong'injo verdict that Carrefour abused its buyer power against one of its suppliers and the order for the supermarket chain to refund the supplier Ksh.289,482 in deducted rebates and also pay Ksh. 124,768 to the Authority as a penalty for engaging in ABP.

Carrefour contracted Orchards Limited (which has since closed shop) to supply probiotic yoghurt under the brand name Cool Fresh to its outlets between January 2015 and December 2018.

Specifically, the Court upheld the Authority's determination that Carrefour **possessed buyer power** over Orchards and **abused it** by applying and collecting rebates (including payment of listing fees to access stores), returning goods when the expiry date neared, and refusal to accept delivery of items ordered, without justifiable reasons like inferior quality.

Contrary to Carrefour's argument, the Court confirmed that the Authority had the **power to investigate ABP under the Competition Act**, at the time Orchards lodged a complaint in April 2019. The power includes issuing administrative sanctions such as penalties or ordering the refund of deducted rebates.





The retailer's argument that the Authority's decision should be nullified on account that they were not accorded a fair hearing, including the allegation that it was not furnished with various evidentiary information relied on in the decision-making process, was also thrown out.

The Court also concurred with the Authority that the Buyer Power Guidelines applied in the investigation are not Statutory Instruments and, therefore, could not be declared illegal on account of having not been subjected to public participation, as the retailer had argued.

Further, the Court did not find merit in the retailer's assertion that the Authority concealed from it the international best practices from Japan and Australia (whose competition regulators also sanction ABP) which it relied on in its decision-making process.

"Commercially oppressive contracts ultimately force suppliers, most of who are SMEs, to exit the market due to unfair business practices, thereby denying thousands of Kenyans their livelihoods and leaving consumers with a limited choice of goods and services," said Dr. Adano Wario, the Authority's Acting Director-General.

"The Authority respects the legal requirement to accord accused parties a fair hearing while ensuring that investigations strictly adhere to laid down processes and procedures. The professionalism and objectivity by our staff members during the investigations has occasioned the positive outcome in this case," he added.

Mr. Shaka Kariuki, the Authority's Board Chairman, said the outcome of this second and final appeal is an acknowledgement of the regulator's critical role in the Kenyan economy including facilitating a harmonious co-existence between buyers and suppliers in various sectors.

"Our message to businesses is that they should play by the rules, irrespective of status. By ensuring that our markets work efficiently, and within a level playing field, the country shall attract more investments and grant consumers a wider variety of goods and services at competitive prices," said Mr. Kariuki.

The **23rd May 2024** judgement is the culmination of a matter that commenced in April 2019 when Orchards' proprietor lodged a complaint with the Authority against Carrefour.

Orchards alleged that in January 2019 the company's contract was terminated unilaterally mid negotiations. The yoghurt company also claimed that Carrefour required it to pay listing fees and at least three types of rebates, in excess of agreed margins.

Further, the complainant alleged that some Carrefour's outlets declined to take full delivery of goods after placing orders, while other items were unjustifiably returned for nearing their expiry date. Orchards also accused the retailer of demanding free merchandise, which they later sold, and being required to deploy their own staff to man shelves.





Upon reviewing the allegations and the evidence presented, and considering Carrefour's oral and written counterarguments, the Authority in February 2020 made a determination that the retailer had contravened the Competition Act by abusing its superior bargaining power.

The Authority directed Carrefour to, among other orders, settle the aforementioned rebates and pay a fine. Given the fact that the retailer's supplier contracts were standardized, the Authority further ordered the retailer to amend and expunge provisions facilitating ABP in all their supplier contracts, which numbered approximately 700 at that point.

Carrefour challenged the orders of the Authority at the Competition Tribunal within the 30-day window after being issued with the determination.

The Competition Tribunal in April 2021 issued its [judgement](#) largely affirming the Authority's findings, including that Carrefour had abused its bargaining strength. In addition, the Tribunal upheld the orders to amend all supplier contracts, rebate refund and payment of a fine.

The supermarket further appealed the Tribunal's judgement to the High Court in April 2021. **Out of the seven prayers raised by the retailer, the High Court threw out six and upheld one.** Whereas it was proven that the Orchard-Carrefour contract had clauses facilitating ABP, the retailer got reprieve on the order to amend contracts with other suppliers. The Court held that the other suppliers were not party to the complaint or appeal and should have been joined as parties.

"...this Court is led to conclude that the conduct by the appellant amounted to abuse of buyer power. The Court therefore finds that the Tribunal was correct in declining to set aside the Authority's decision on the appellant's abuse of buyer power," Hon. Lady Justice A. Ong'ino said in her judgement.

Mr. Kariuki noted that the five-year legal dispute has enabled two judicial offices in the country to independently review and make pronouncements on the centrality of the Authority's functions as well its thorough investigation processes.

Access the judgement here -> [High Court Judgement - Appeal No. E033 of 2021](#)

[Ends...](#)

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