REPUBLIC OF KENYA

IN THE COMPETITION TRIBUNAL AT NAIROBI

CASE NO. 004 OF 2023

BETWEEN

TONONOKA ROLLING MILLS LIMITED.....APPELLANT

AND

COMPETITION AUTHORITY OF KENYA.....RESPONDENT

(Appeal from the decision of the Competition Authority of Kenya at Nairobi dated 17th of August 2023)

JUDGEMENT

A. BACKGROUND

1. This appeal arises from the decision of the Respondent rendered on 17th August 2023.[1] The Appellant states that it is part of the Tononoka Group of Companies. It is a producer of reinforcement steel, and its major products are TMT (Thermo Mechanically Treated) Rebars.[2] The Appellant confirms that Tononoka Steel Limited (TSL) is associated to the Appellant though distinct and separate from it. TSL is a producer of black and galvanized steel pipes, screen pipes, round square and rectangular hollow sections, open profiles, guard rails, welded mesh, BRC Binding Wire and Nails.[3]

2. The Respondent is a State Corporation established under the Competition Act No 12 (hereinafter referred to as "The Act") of Kenya. It has a wide mandate on matters competition law and policy under the Act. For purposes of this appeal, we shall focus on the Respondent's mandate to regulate market conduct in relation to restrictive trade practices of price fixing and output restriction under Section 21 of the Act.[4]

---

[1] Replying affidavit sworn by Benson Nyagol on 05/10/2023 Page 91 to 140 Exhibit BN 3 (a) and 3 (b).
[2] Page 1 of the Appellant's Statement of Facts dated 19/09/2023.
[3] Ibid.
[4] The Competition Act of Kenya.

3. Sometime in August 2020, the Respondent initiated investigations in the steel manufacturing and distribution sector in Kenya. This was precipitated by market intelligence that market players in the sector were engaged in coordinated conduct contrary to Section 21 of the Act.[5]

4. By a letter dated 29th November 2021 the Respondent notified the Appellant that it had appointed 8 officials of the Respondent to enter into the Appellant's business premises to conduct a search and seizure exercise pursuant to the provisions of section 31 and 32 of the Act and 118 and 118A of the Criminal Procedure Code (CAP 175 of the Laws of Kenya).[6]

5. The Respondent's officials appointed to carry out the investigations were Gideon Mokaya, Maurice Nzuki, Anne Mukami, Mercy Matara, Sylvester Mwazama, Arther Odima, Benard Ayiko and Evans Nyagena.[7]

6. The exercise was simultaneously conducted at the premises of Doshi Group, Devki Steel Mills Limited, Tarmal Wire Products Limited, Mabati Rolling Mills Limited, **Tononoka Rolling Mills**, Abyssinia Group Industries, Apex Steel Limited and Insteel Limited.[8] On 15th December 2021 the Respondent's identified agents, entered and searched the premises of the Appellant and seized evidentiary material from the premises including WhatsApp messages and emails and other documents.[9]

7. After analysis of the documentation seized, the Respondent, established that other eight (8) companies, not subject to the search and seizure, were also subjects of interest in the investigation.[10] These included Blue Nile Wire Products (Blue Nile), Accurate Steel Mills Limited (Accurate), Jumbo Steel Mills Limited (Jumbo), Nail and Steel Products Limited (Nail and Steel), Corrugated Sheets Limited (Corrugated) and Brollo Kenya Limited (Brollo).[11]

---

[5] Paragraph 4 of the Replying Affidavit sworn by Benson Nyagol on 05/10/2023
[6] Paragraph 5 of the Appellant's Statement of Facts dated 19/09/2023 and Paragraph 5 of the Replying Affidavit sworn by Benson Nyagol on 05/10/2023.
[7] Page 1 of the Record of Appeal dated 19/09/2023.
[8] Paragraph 5 of the Replying Affidavit sworn by Benson Nyagol on 05/10/2023.
[9] Paragraph 5 (v) of the Appellant's Statement of Facts dated 19/09/2023.
[10] Replying affidavit sworn by Benson Nyagol on 05/10/2023 paragraph 6.
[11] Ibid.

8. On 23rd March 2022 and 1st April 2022, the Respondent conducted interviews with the Appellant's representatives.[12] The following officials of the Appellant recorded statements with the Respondent:

    a. Dharmesh Savla –Tononoka Group (Chief Executive Officer)
    b. Navin Lakhamshi Savla - Tononoka Group (Chairman)
    c. Bhavin N. Savla - (Director)
    d. Rishi N. Savla – Tononoka Steels Limited (Director)
    e. Niral Savla – Tononoka Steels Limited (Finance Director)
    f. Mahesh Pathak – Tononoka Group (Vice Chairman)
    g. Victor Agina – Sales and Marketing.

9. Thereafter, the Respondent issued the Appellant with a Notice of Proposed Decision (NOPD) dated 4th May 2022.[13] Under the NOPD, the Appellant was duly informed that it had a case to answer in respect of alleged Restrictive Trade Practices in the steel sector.[14] That the Appellant had participated in price-fixing agreements, restrictive output agreements, sharing of commercially sensitive information and directly or indirectly recommending prices to be charged by the competitors.[15]

10. The Respondent also supplied the Appellant with the evidence upon which the NOPD was issued.[16] These comprised emails, printouts of WhatsApp chats, management reports, strategy documents, telephone print outs, price lists and spreadsheets.[17] The information and material had been obtained from the Appellant and other companies under investigation.[18] The

---

[12] Paragraph 7 of Replying Affidavit sworn by Benson Nyagol on 05/10/2023.
[13] Paragraph 8 of the Replying Affidavit sworn by Benson Nyagol on 05/10/2023 and Exhibit BN-1.
[14] Paragraph 5 (vii) of the Appellant's Statement of Facts dated 19/09/2023.
[15] Ibid.
[16] Paragraph 9 of the Replying Affidavit sworn by Benson Nyagol on 05/10/2023.
[17] Paragraph 5 (viii) of the Appellant's Statement of Facts dated 19/09/2023
[18] Ibid.

Appellant was granted 21days to make its written representations on the same and indicate if the Appellant required an opportunity to make oral representations.[19]

11. In response to the NOPD the Appellant thereafter submitted

- The Appellants letter dated 18th May 2022 seeking extension of time.
- Respondent's letter dated 17th June 2022 granting the extension.
- Written representations dated 17th June 2022 to the Respondent.[20]
- Procedural and Preliminary Objection dated 17th June 2022.
- Response in respect to Appellant's financials dated 26th July 2022
- Further written representations dated 3rd August 2022
- A Bundle of legal authorities dated 3rd August 2022.

12. An oral hearing conference was convened and conducted on 4th August 2022 and the Respondents produced minutes of the said meeting.[21] Thereafter, the Respondent through a letter dated 17th August 2022 requested the Appellant for the Appellant's audited financial statements for the years 2019, 2020 and 2021.[22]

13. The Appellant responded through a letter dated 26th August 2023 seeking clarification on the Respondent's request. The key query being whether the Respondent had already prejudged the Appellant by expressing its intention to impose a financial penalty?[23]

14. The Respondent repeatedly requested the statements from the Appellant for a period of up to 12 months before it rendered its decision on 17th August 2023.[24]
15. The Respondent in its decision found:

---

[19] Paragraph 9 of the Replying Affidavit sworn by Benson Nyagol on 05/10/2023.
[20] Paragraph 10 of the Replying affidavit sworn by Benson Nyagol on 05/10/2023 and Exhibit BN-2(a).
[21] Paragraph 10 of the Replying affidavit sworn by Benson Nyagol on 05/10/2023 and Exhibit BN-2(b).
[22] Paragraph 5 (xi) of the Appellant's Statement of Facts dated 19/09/2023
[23] Paragraph 5 (xii) of the Appellant's Statement of Facts dated 19/09/2023
[24] Paragraph 5 (xiii) of the Appellant's Statement of Facts dated 19/09/2023

i. That the conduct of Appellant:
   a. together with other manufacturers and distributors of steel namely, Apex, Brollo, Nail and Steel, Insteel, Jumbo, MRM, Devki, Doshi, Accurate, Abyssinia, Corrugated, Blue Nile, and Tarmal constituted an infringement of section 21(1) as read together with section 21(3)(a) of the Act, that prohibits any agreement decision or concerted practice that directly or indirectly fixes purchase or selling prices or any other trading conditions; and
   b. together with Apex, Doshi, MRM, Insteel, Devki, Jumbo, Corrugated, Abyssinia, Blue Nile, Brollo and Nail and Steel constituted an infringement of section 21(1) as read together section 21(3)(e) of the Act that prohibits an agreement, decision or concerted practice which limits or controls production market access, technical development or investment.

ii. The Respondent restrained the Appellant from engaging in conduct that violates section 21(1) of the Act as read together with section 21(3) and section 21(3)(e) of the Act.

iii. The Respondent restrained the Appellant from engaging in future violations of the Act.

iv. The Respondent directed the Appellant to develop and furnish the Authority with a competition compliance programme within 6 months from the date of the determination for the Respondent's approval.

v. The Respondent directed the Appellant to implement the approved competition compliance programme within 12 months from the date of its approval and whose implementation would be subjected to a compliance check by the Authority

vi. The Respondent imposed a financial penalty of 0.5 % of the Appellant's 2021 gross annual turnover in Kenya amounting to KES 62,715,074.03.[25]

16. The Appellant dissatisfied with the decision of the Respondent filed a Notice of Appeal to this Tribunal dated 30th August 2023 and urges its Appeal on the grounds of Appeal set out in its Memorandum of Appeal dated 19th September 2023.[26]

B. DOCUMENTS AND EVIDENCE

17. The Appellant filed the following documents before the Tribunal: -

Record of Appeal containing: -

---

[25] Page 135 to 136 of the Replying affidavit sworn by Benson Nyagol on 05/10/2023.
[26] Volume 1 Record of Appeal dated 19/09/2023.

a) The Notice of Appeal dated 30/08/2023.
b) Record of Appeal dated 19/09/2023 (Volume 1 and 2)
c) The Memorandum of Appeal dated 19/09/2023.
d) Statement of facts dated 19/09/2023
e) Verifying Affidavit sworn by Dharmesh Savla on 19/09/2023.
f) Supplementary Affidavit sworn by Dharmesh Savla on 11/11/2023
g) Application dated 15/02/2024 – Partial ruling on the Application delivered on 21/11/2024.
h) Submissions dated 03/05/2024
i) Submissions dated 25/02/2025
j) Supplementary submissions dated 15/04/2025
k) Case Digest dated 08/04/2025.

18. The Respondent filed the following documents:
    a) Replying Affidavit sworn by Benson Nyagol on 05/10/2023 and the annexures thereto.
    b) Further Affidavit sworn by Benson Nyagol on 29/01/2024.
    c) Replying Affidavit sworn by Benson Nyagol on 12/03/2024.
    d) Respondent's written submissions dated 08/07/2024.
    e) Respondent's written submissions dated 10/04/2025.
    f) Respondent's Case Digest dated 10/04/2025.

19. The matter came up for hearing on 16/04/2025 when the Parties' Advocates highlighted each Party's respective submissions.

C. APPELLANT'S CASE

20. The Appellant challenges not just the substantive decision of the Respondent but also the process leading to the decision. On the procedural aspect, the Appellant raises the following issues:
21. **First**, the Appellant asserts that the Respondent's investigations were marred by secrecy and lacked transparency and accountability. The Appellant argues that the Respondent ought to have shared with Appellant the report which led the Respondent to commence its investigations into suspected practices of restrictive trade practices in the steel industry.

22. **Second,** the Appellant states that the Respondent did not follow the procedure laid out by the Act under Section 31 to 36. Consequently, the decision-making process was procedurally unlawful.

23. **Third,** the Appellant argues that the Respondent in discharging its mandate under the Act acted with impartiality and bias. The Appellant took note of the fact that three officers of the Respondent namely, Gideon Mokaya, Maurice Nzuki and Evans Nyagena not only participated in the search and seizure exercise but were also members of the adjudication panel. The Appellant is aggrieved that these three officials were biased and could not therefore render a fair and independent decision on the matter. The Appellant accused the Respondent of being the complainant, prosecutor, judge and executioner which is against the principles of natural justice.

24. **Fourth,** the Appellant also complained of an inordinate delay by the Respondent in rendering its final decision. The oral hearings were conducted on 4th August 2022, but it took the Appellant up to 17th August 2023 to render its decision. The unexplainable delay in delivering the decision offends Article 50 (1) of the Constitution of a Party's right to fair hearing.

25. **Fifth,** the Appellant objects to the procedural timing of the Respondent's request for the Appellant's audited financial statements. The Appellant argues that under section 36 of the Act, the Respondent can only request financial statements upon conclusion of the investigations and consideration of both the oral and written submissions of a party. According to the Appellant, the investigations could not have been concluded when this request was first made on 17th August 2022. [27] This was a clear indication that the Respondent had prejudged the Appellant and was therefore guilty of bias. Further, the Respondent in its letter of 8th September 2022 indicated that the investigations were still ongoing and the Respondent had not reached its final decision.

[27] Page 21 Paragraph 6.45 of the Appellant's submissions.

26. The Appellant further argues that the Respondent was obligated to inform the Appellant at what stage the proceedings were at, and to afford the Appellant an opportunity to respond to any issues arising.

27. **Sixth,** in its application dated 15th February 2024, the Appellant sought to expunge a Certificate of Electronic Evidence annexed by the Respondent as BN.25(b) in Benson Nyagol's affidavit sworn on 05/10/2023. The Certificate was expunged by this Tribunal in its ruling dated 21st November 2024. The issue as to whether the electronic records were admissible in the absence of an Electronic Certificate was reserved for determination during the main appeal. The Appellant argues that in the absence of the Certificate of Electronic evidence as required under Sections 78A (1) and (4), 106A and 106B of the Evidence Act and Section 33 (1) of the Act, then all the electronic evidence which the Respondent relies upon is inadmissible. The Appellant draws this Tribunal's attention to the case of **Ogembo v Yongo (Civil Appeal E200 of 2023)** where Hon Lady Justice Aburilli stated:

"...It is evidently clear that electronic documents must be accompanied by a certificate in terms of section 106 B (4) of the Evidence Act for them to be deemed admissible. There is no other way out. This is a requirement in civil and criminal cases before courts, except in matters where statutes exclude the application of strict rules of evidence such as the Small Claims Court or specific tribunals...It is my view, that the mandatory Provisions of the Evidence Act are not only about form but also substance. Thus, before the Court can admit electronic records/evidence, an electronic certificate is mandatory to confirm the source, process, custody and delivery of the said electronic record before admission so as to eliminate the possibility of manipulation of the record...I reiterate that the certificate of electronic evidence is a mandatory requirement in the absence of which the WhatsApp messages cannot be admitted as evidence.

The certificate ought to have formed part of the evidence in the proceedings before the trial court. The Court of Appeal in County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others [2015] eKLR stated as follows regarding non-production of certificate of electronic evidence "Section 106B of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are

satisfied in relation to the information and computer." In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions to vouch for the authenticity and integrity of the electronic record sought to be produced..."

28. **Seventh,** on the striking out parts of the Respondent's affidavit which ground this Tribunal deferred for determination during the main appeal, the Appellant draws the Tribunal to the decision of **Cecil Miller v Jackson Njeru & Another[2017] eKLR** where the Court stated:

    "...Though the Respondent seems to have issues with the said affidavit, the same is part of the court record and as long as it has not been expunged from the record, the court cannot shut its eyes to it..."

29. With respect to the substantive arguments against the impugned Respondent's decision, the Appellant raises a number of arguments. The Appellant posits that the Respondent in finding the Appellant guilty of the two offences of price fixing under section 21 (3 (a), and output restriction under section 21 (3) (e) of the Act, did not address itself to the following.

30. **First** that the Respondent failed to identify the specific ingredients of the two offences. The Appellant is of the view that, proof of the two offences requires existence of a contract, an act which is co-operative and coordinated or a resolution between two firms after consideration. The Respondent ought to have provided the evidence of the existence of the Agreement, concerted practice or a decision with an object or effect of preventing, distorting or lessening trade.

31. **Second,** according to the Appellant, the Object or effect equates to an impact felt and/or produced by an agreement, decision or concerted practice. The Appellant argues that the Respondent did not demonstrate this aspect of the alleged offence.

32. **Third,** the Appellant argues that according to the decision of this Tribunal in East Africa Tea Trade Association Vs CAK Tribunal Case No 001 of 2017 that a pricing agreement is reached in consultation with ALL players in the industry. Accordingly, the Respondent ought to have

demonstrated that the existence of a pricing agreement and engagements between ALL key players and/or stakeholders in the steel manufacturing and distribution sector.

33. **Fourth**, the Appellant argues that the Respondent did not demonstrate how it arrived at a decision that there existed a horizontal relationship having failed to establish that ALL key players and/or stakeholders in the steel manufacturing and distribution sector were involved in the price fixing agreements or arrangements.

34. **Fifth**, the Appellant points out that the Respondent in its decision-making kept referencing to "Tononoka Steels Limited". However, the penalties have now been levied against the Appellant. The two companies are distinct and separate legal entities. As Tononoka Steels Limited is not a party to these proceedings, it is not clear which entity was under investigation and the decision of the Respondent against the Appellant cannot therefore stand.

35. **Sixth**, in response to the Respondent's claim that it was undertaking an administrative function and the Respondent was therefore not bound by the strict rules of evidence, the Appellant asserts that the Respondent was undertaking a quasi -judicial process and was still bound by the strict rules of procedure.

36. **Finally**, the Appellant buttresses its earlier point that the electronic evidence unsupported by the Electronic Certificate was inadmissible. Further, an interpretation of section 33 (1) of the Act mandated the Respondent to comply with section 106A and 106B of the Evidence Act in the circumstances.

D. RESPONDENT'S CASE.

37. With respect to the allegation that the process carried out by the Respondent was devoid of independence, the Respondent was impartial and had failed to adhere to the appropriate rules of procedure, the Respondent responded as follows:

38. **First,** the Respondent argues that it is an administrative body and a creature of statute. Therefore, the Respondent's mandate is not only governed by the Competition Act, but also by the tenets of fair administrative action under Article 47 of the Constitution and the Fair

Administrative Action Act (FAAA). The Act provides an elaborate framework on how investigations are conducted until a final determination is made. The Act at sections 31 to 36 prescribes the procedure to be followed throughout the administrative process. The Respondent submitted that it conducted the entire administrative process as prescribed by law.

39. **Second,** the Respondent insists that it afforded the Appellant a fair hearing as expected under the Constitution, the FAAA and the Act. The Appellant was provided with all the evidence that the Respondent relied on in making its decision. Further, the Appellant was granted an opportunity to make written and oral arguments before the decision was made. Further, the law did not require the Respondent to convene a hearing conference on mitigating factors before invoking section 36 of the Act. The Respondent relies on the case of **Republic v Commission on Administrative Justice Ex parte Stephen Gathuita Mwangi 2017 eKLR**..

> *"The fair hearing must be meaningful for it to meet the constitutional threshold. The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases.* ***This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice... Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case..."***

40. The Respondent urges that all the elements of natural justice were observed and adhered to during the process and the Respondent followed the correct procedure laid out by the law.

41. **Third,** on the allegation that the process was flawed because the Appellant was not granted an opportunity to question the legitimacy of the market intelligence which led to the investigations, the Respondent averred that there was no obligation on its part to share the market intelligence with the Appellant. The Respondent is only obligated to grant the Appellant an opportunity to make submissions before administrative action is taken. The Appellant was given this opportunity.

42. **Fourth,** on the allegation that the process was flawed because the Appellant was not granted an opportunity to cross-examine witnesses, the Respondent reiterates that this was not a judicial process but an administrative process.

43. **Fourth**, on the charge that the Respondent acted as the complainant, investigator, judge and executioner, the Respondent reiterates that it is a creature of statute. The Act empowers the Respondent to investigate and ultimately make a decision under section 36 of the Act. In **Kenya Revenue Authority Vs Menginya Salim Muragani, Civil Appeal No.108 of 2009**...

"decision making bodies such as the Respondent whose procedures are laid down by statute ***are masters of their own procedures****. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed.*

In **Alnasir Popat & 7 others v capital Markets Authority [2020] eKLR [petition 29 of 2019**

"...In most common law jurisdictions, for instance Australia; Uganda; Tanzania, Nigeria; and Ghana, ***the regulatory and enforcement frameworks are statutory with the relevant statutes also creating the regulatory authorities and spelling out their functions****. Though there is no uniform regulatory and enforcement scheme,* ***to achieve the objective of their statutes, most jurisdictions, [including Kenya], expressly authorize an overlap of functions*** *which in normal judicial proceedings would be kept separate..." par 41*

44. In **Alnasir Popat & 7 others v capital Markets Authority [2020]** case the court further stated that

> *"...An important exception to the nemo judex in causa sua esse principle raised in this case is* ***where the overlap of functions is a creature of statute and as long as the constitutionality of the statute is not in issue****..." par. 49*

45. Consequently, the Respondent's multiplicity of roles under the Act is necessary to achieve the objectives of the Act. The mere fact that the Respondent is empowered with all three functions is not evidence of bias and the Respondent challenged the Appellant to prove its allegation of bias.

46. With respect to the assertion by the Appellant that the Respondent failed to adhere to the strict rules of evidence, the Respondent states:

47. **First,** the Appellant alleged that because the Respondent held a hearing conference and made a decision, was evidence that the Respondent was carrying out a judicial process. The Respondent states that the Act allows the Respondent to investigate, conduct a hearing conference and make a decision and that does not alter the fact that the Respondent was carrying on an administrative function.

48. The Respondent relies on the decision of ***David Macharia & 2 others v Teachers Service Commission & another [2018] eKLR*** relied on the previous decision of ***Constantine Simati v Teachers Service Commission and another [2011] eKLR Azangalala J*** which distinguished judicial proceedings from administrative proceedings in stating that ***"an internal disciplinary tribunal is not to be held to the same standards as a court of law."***

49. **Second**, the Appellant alleged that the evidence obtained by the Respondent was marred with illegality and improper chain of custody. Further that the evidence relied upon by the Respondent was inadmissible in the absence of a Electronic Certificate as required by section

106A and B of the Evidence Act and Section 33 (1) of the Act. The Respondent is adamant that it discharged its obligation to ensure that the process, custody and delivery of the evidence was reasonable and procedurally fair and challenges the Appellant to prove otherwise.

50. **Further,** the provisions of section 33 (1) of the Act only apply when the Respondent is receiving evidence from other parties and not where it has collected the evidence itself. In this case the evidence was collected by the Respondent in the search and seizure exercise and it did not need to convince itself of the veracity and reliability of the evidence. The Respondent being an administrative body was therefore not bound by the strict rules of evidence and was not required by law to comply with the provisions of the Evidence Act except as provided under section 33(1) of the Act.

51. With respect to the allegation that the Respondent did not prove that the Appellant was guilty of price fixing, output restriction and exchanging commercially sensitive information with a competitor the Respondent responded as follows:

52. In its submissions before the Tribunal the Respondent **first** sought to define and illustrate the meaning of the key concepts. With respect to **price fixing** the Respondent refers this Tribunal to Section 21(3) (a) of the Act and Clause 30 of the Consolidated Guidelines on Restrictive Trade Practices under the Competition Act ("The Guidelines") which defines price fixing to include: fixing the price itself; or fixing an element of the price of such as a discount; setting percentage price increase; setting the permitted range between competitors; setting the price of transport charges, credit interest rates terms and an agreement to indirectly restrict price competition.[28]

53. On the conduct of the Appellant and what constitutes **concerted practice** the Respondent drew this Tribunal's attention to the provisions Section 2 of the Act that "**a co-operative or coordinated conduct between firms achieved through direct and indirect contact that replaced their independent action, but which did not amount to an agreement**".

[28] Page 16 of the Respondent's Submissions at paragraphs 53 to 56.

54. Clause 12 of the Guidelines gives the definition of concerted practice as a coordinated activity between undertakings that substitutes practical cooperation between them for the risks presented by effective competition. The object of this is to influence the conduct of these undertakings on a market or disclose the expected conduct contemplated which would not have been disclosed otherwise.[29]

55. The Respondent relies on the case of ***Commission v Anic Partecipazioni, C-49/92 P, EU:C:1999:356***

> *"Thirdly, it must be borne in mind that* ***a concerted practice****, within the meaning of Article 85(1) of the Treaty,* ***refers to a form of coordination between undertakings which, without having been taken to a stage where an agreement properly so called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them*****....."**

56. The Respondent clarified that the concerted practice complained of in the present matter was one between parties in a **horizontal relationship** as encapsulated by Section 21(2)(a) of the Act. Clause 27 of the said Guidelines provides that a horizontal agreement is an agreement between undertakings which operate at the same level of the value chain. Guideline No 27 further states that horizontal collusive agreements described are subject to "object" strict assessment with no defense and the regulator only considers the content and nature and not the effect.[30]

57. Guideline No 28 further states that concerted practice between undertakings in a horizontal relationship is considered a hardcore restriction which hinders competition and cannot be redeemed. Clause 29 of the Guidelines provides that price fixing and output restriction between undertakings in a horizontal relationship are hardcore restrictions that are by their very nature injurious to the proper functioning of competition and have no redeeming value whatsoever.[31]

---

[29] Page 17 Respondent's Submissions at paragraph 59.

[30] Page 17 paragraphs 60 of the Respondent's submissions.

[31] Page 18 paragraph 63 and 64 of the Respondent's submissions.

58. With respect to **out-put restriction** the Respondent cited the provisions of Clause 39 of the Guidelines. Output restriction is said to occur when competitors agree to prevent, restrict, and reduce supply or production with aim of creating scarcity. The effect of this is an increase in price or a halt in a price fall.[32]

59. The Respondent **next** sought to illustrate, through the evidence it had obtained, that: the Appellant's conduct amounted to price fixing and output restriction; this conduct was a concerted practice as it was a coordinated activity between the steel manufacturing and distribution companies; the conduct substituted practical cooperation between the players for the risks presented by effective competition; there was direct contact and communication between the steel manufacturing and distribution companies; and the object of which was either to influence the conduct of the companies or to disclose the course of conduct in the market; the companies were in competition and therefore in a horizontal relationship; and their conduct amounted to hardcore restrictions.

60. **With respect to Price Fixing: First,** the Respondent relies on **Evidence 1** [33] which is an email dated 15th May 2018 from Neelkamal Shah to Niral Savla of Tononoka. The subject of the email was "pricing." The email discusses the need to revise gross profit margins.

61. **Evidence 2**[34] an email dated 24th September 2018 exchanged between Nilesh Doshi of Doshi and Niral Savla of Tononoka. The email was discussing minimum thickness of coils. The Respondent argues there is a correlation between the thickness of the steel products and price. Uniform sizes facilitate uniform pricing.

62. **Evidence 23**[35] this is a WhatsApp communication discussing new prices for rebars from Monday 24th August 2020 and new prices for tubes effective 1st September 2020.

---

[32] Page 18 paragraph 66 of the Respondent's submissions.
[33] Page 142 of the Replying Affidavit sworn by Benson Nyagol on 05/10/2023.
[34] Page 145 to 146 of the Replying Affidavit sworn by Benson Nyagol on 05/10/2023.
[35] Page 86 of the Record of Appeal

63. **Evidence 36**[36] another WhatsApp communication confirming a steel sector meeting was held at Zen Gardens on 21st November 2020 where the pricing was discussed and the Appellant was in attendance.

64. **Evidence 53A, B, C, D and 8** are copies of pricelists of the Appellant and the Respondent on analyzing the evidence concluded that the steel manufacturers and distributors were sharing future prices to be charged. Further, there was coordinated release of price lists within days.

65. Evidence 19, 31, 34, 40A, 35, 41, 38, 45A, B, C, E and F all confirm that the steel manufacturers and distributors held meetings on diverse dates to discuss prices. The Appellant was adversely mentioned and even hosted some of the meetings.

66. The Respondent relies on the case of **P Dole Food Company, Inc. Dole Fresh Fruit Europe OHG, formerly Dole Germany OHG Vs European Commission**. The Commission found that banana importers Dole and Weichert participated in a cartel between 2000 and 2002 in violation of the EC Treaty's ban on cartels and restrictive practices (Article 81). During the relevant period the importers of leading brands of bananas into the eight EU Member States principally served by North European ports set and then announced every Thursday morning their reference price (their "quotation price") for the following week. On numerous occasions over the three-year period there were bilateral phone calls among the companies, usually the day before they set their price. During these calls the companies discussed or disclosed their pricing intentions: how they saw the price evolving or whether they intended to maintain, increase or decrease the quotation price. The Commission's decision was upheld by the European Court of Justice (ECJ).

[36] Page 101 of the Record of Appeal.

67. On the basis of its findings and the evidence, the Respondent concluded that the Appellant together with another 13-steel manufacturing and distributing companies had been engaged in price fixing agreements contrary to section 21 (1) and 21(3) (a) of the Act.

68. With respect to **output restriction** the Respondent avers that output restriction occurs when competitors agree to prevent, reduce or restrict supply with the aim of creating scarcity and thus affect pricing.

69. The Respondent relies on Evidence 45E an email dated 15th September 2021exchanged between Mr. Manish and Mr. Neelesh which confirms that a meeting had taken place on 14th September 2021 and the Appellant was represented. The email confirms that at the meeting the attendees discussed:

    i. *Availability of 1mm by some manufacturers mainly with Abyssinia*
    ii. *Discussion on how to prevent the < 1mm pipes and tubes coming from Uganda*
    iii. *Two shipments coming into the country in Dec 21 which had the material for various manufacturers including Brollo, Nails and Steel which would mean around 25000 to 30000 MT*
    iv. *Submissions alluding that Abyssinia had overstocked and had over 5k of 1mm*

70. **Evidence 3,** an email dated 13th November 2019 contained minutes of a meeting held on the same day at KAM Boardroom 2. The deliberations of the meeting were around restricting importation of the 0.9mm coils and plates with a view to foreclose Chinese companies who had affected the margins of the local manufactures. They agreed not to import 0.9mm coils and plates with a view to creating a shortage of less that 1mm finished plates.
71. **Evidence 31**[37] is a WhatsApp communication confirming a meeting that was going to be held at the Tononoka offices to discuss price and reduce stock with a view of ensuring price stability.

[37] Page 93 of the Record of Appeal

72. From the foregoing the Respondent asserts that the attendees of the Zen gardens meeting discussed shipments. With that knowledge, the players were collectively able to monitor the quantity of raw materials, their stock levels, and importation of those raw materials as well as restrictions on importation. The detailed discussions on capacities (which is commercially sensitive information), made it possible for the players to use this information to manage the output per player.

73. **With respect to the query by the Appellant as to whether the Appellant is the entity, which was the subject matter of the investigation, the Respondent states:**

74. The scope of the investigation covered steel products produced/dealt with by the Appellant. The Appellant deals with TMT rebars, Evidence 36 and 38, both WhatsApp messages discuss the pricing of rebars. In both chats the Appellant is implicated.

75. The CR 12 forms of both Tononoka Rolling Mills and Tononoka Steel indicate that both parties share similar shareholding and directorship. The people implicated in both Evidence 36 and 38 are common directors and shareholders of both companies. The two companies similarly share a common Chief Executive Officer and both companies form part of the Tononoka Group.

76. In light of the foregoing, the Respondent avers that there is "unity of purpose" and "economic unity" between the two companies. They are so intertwined and operate as a single unit. The Respondent relies on the case of **Viho Europe BV vs Commission ,(1996)E.C.R.** where the ECJ held ;

> *"the subsidiaries and the parent company form one economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market'*

77. The Respondent therefore submits that the Appellant was therefore rightly found culpable on account of being a producer of TMT Rebars and the participation of its shareholders and directors in the proscribed conduct.

E. ISSUES FOR DETERMINATION.

Having carefully examined the pleadings of the parties as well as their submissions, the following issues emerged;

I. Whether the Appellant was accorded the right to fair hearing.

II. Whether the Respondent was bound by the strict rules of evidence.

III. Whether the Appellant engaged in a concerted horizontal practice of price fixing and /or output restriction contrary to section 21(1) as read together with section 21(3) (a) and (e) of the Act

IV. Who bears the cost of this Appeal

F. ANALYSIS AND DETERMINATION

I. WHETHER THE APPELLANT WAS ACCORDED THE RIGHT TO FAIR HEARING.

78. The Appellant at grounds 13, 15 to 20, 22 to 25, 27 to 30 and 36 of the Memorandum of Appeal impugns the propriety and legality of the process leading up to the Respondent's decision. The Appellant contends that the Respondent did not follow the legal process laid out by respective laws; further that the Respondent's did not provide the Appellant with the evidence that the Respondent relied upon in making its decision, the Appellant was not allowed to interrogate investigators and their reports, and finally the administrative process was biased.

79. The Respondent is a creature of statute, and the procedure it should follow is laid out under Sections 31 to 36 of the Act. Section 31 of the Act authorises the Respondent to commence investigations, on its own initiative, into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of prohibitions relating to restrictive trade practices.

80. Section 32 empowers the Respondent, where it (the Respondent) deems necessary for its investigations, to enter into the premises of any person believed to be in possession of any relevant information or documents and to inspect such premises, goods, documents and records situated thereon.

81. Before entering such premises, Section 32 (2) requires the Respondent to disclose in writing to the person in charge of the premises, the identity of person(s) (authorised persons)

conducting the search. Section 32(3) authorises the authorised persons to search any data in computerized systems, reproduce records, seize output from any computer, attach and remove from the premises anything that is relevant to the investigation. Section 32 (4) allows the Respondent to enlist the assistance of the police and other law enforcement agents in execution of this mandate.

82. On concluding the investigation, and where the Respondent proposes to make a decision that there has been an infringement under the Act, section 34 of the Act requires the Respondent to issue a notice of proposed decision to each undertaking that may be affected by the Respondent's decision.

83. Section 34 (2) of the Act provides that the written notice of a proposed decision shall contain the reasons for the Respondent's proposed decision and the details of any relief that the Respondent may consider imposing. The notice should also inform the undertaking of the undertaking's right to submit written and oral representations to the Respondent on the matter.

84. Section 35 of the Act outlines the process of how a hearing conference shall be conducted. In a nutshell, the party concerned should get a written notice of the date, time and place where the conference shall be conducted. The party concerned may be accompanied by any person including an Advocate, the proceedings shall be informal, and the Respondent shall keep a record of the proceedings.

85. Section 36 provides the action that the Respondent may take upon considering the representations made by the party concerned. Section 36 provides:

36. Action following investigation

After consideration of any written representations and of any matters raised at a conference, the Authority may take the following measures—
(a) declare the conduct which is the subject matter of the Authority's investigation, to constitute an infringement of the prohibitions contained in Section A, B or C of this Part;
(b) restrain the undertaking or undertakings from engaging in that conduct;
(c) direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;
(d) impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question; or
(e) grant any other appropriate relief.

86. The evidence before us shows that the Respondent initiated investigations in August 2020, in the steel manufacturing and distribution sector in Kenya. This independent investigation is contemplated under section 31 of the Act. Section 31 (1) of the Act provides:

> **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.**

87. In the course of the investigation, the Respondent required to enter into the premises of the Appellant (amongst other undertakings). Before conducting the search, the Respondent obtained a search and seizure order from the Court. By a letter dated 29th November 2021 to the Appellant, the Respondent informed the Appellant of its intention to conduct the search and listed the names of the Respondent's officials who would be conducting the said search.

88. The search was thereafter conducted on 15th December 2021 and the Respondent's identified agents entered and searched for the premises of the Appellant and seized evidentiary material from the premises including WhatsApp messages and emails and other documents. On 23rd March 2022 and again on 1st April 2022 the Respondent invited the representatives of the Appellant for interviews and to record statements This was in line with section 31(4) of the Act. This section provides:

> **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.

89. Thereafter, the Respondent issued the Appellant with a Notice of Proposed Decision (NOPD) dated 4th May 2022 in line with section 34 of the Act. The Appellant was similarly invited to make written submissions, in line with Section 34 (2) (c) of the Act, which it did on 17th June 2022 and again on 3rd August 2022. A hearing conference in line with section 35 of the Act was thereafter conducted on 4th August 2022.

90. With a view to imposing a fine as provided under section 36 of the Act, the Respondent first by a letter dated 17th August 2022 and thereafter periodically, requested the Appellant for the Appellant's audited financial statements for the years 2019, 2020 and 2021. These were not supplied by the Appellant as the Appellant protested that the Respondent had prejudged it guilty of the offence which was now being expressed by its intention to impose a penalty. Nevertheless, the Respondent rendered its decision on 17th August 2023 as per the provisions of section 36 of the Act.

91. Section 36 of the Act provides:

After consideration of any written representations and of any matters raised at a conference, the Authority may take the following measures—

(a) declare the conduct which is the subject matter of the Authority's investigation, to constitute an infringement of the prohibitions contained in Section A, B or C of this Part;
(b) restrain the undertaking or undertakings from engaging in that conduct;
(c) direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;
(d) impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question; or
(e) grant any other appropriate relief

92. We have reviewed the concerns raised by the Appellant with respect to the process followed by the Respondent. The Appellant alleged that it was pre -judged by the Respondent and that it was not given an opportunity to cross-examine witnesses or granted a fair panel for adjudication. We believe that there is need to distinguish the steps taken by the Respondent in an administrative process and the steps that would normally occur in a judicial process. The Appellant appears to have been litigating against certain departments or officers of the Respondent with other departments or officers of the Respondents acting as the adjudicators in the dispute. This was not and should not be the case.

93. The administrative process undertaken by the Respondent is not a forum where two opposing sides present their cases for determination by a third-party arbiter. The process is outlined under section 31 to 36 of the Act. The Respondent is empowered to investigate and if satisfied that a party is culpable, to censure that party as provided by law.

94. By importing the judicial process into the administrative process, the Appellant fails to appreciate that the hearing conference as envisaged under section 35 of the Act, for instance, is not synonymous with hearing of a matter under a judicial process. In a judicial process, the hearing precedes adjudication of the offence. Under the Competition Act, the case conference is only convened where the regulator, based on available evidence, proposes to make a decision that there has been an infringement pursuant to Section 34 of the Act. The regulator thereby invites the concerned party to present any evidence or representations that such a party believes the regulator should consider before the Regulator makes its decision.

95. We have reviewed the process undertaken by the Respondent in conducting the investigation and finally rendering its decision on 17th August 2023. Every step taken by the Respondent throughout the process was well anchored in the procedural provisions outlined under section 31 to 36 of the Act. In the circumstances, we are persuaded that the Respondent was well guided and complied with the procedure as laid out by the Act.

96. The Appellant also complained that the Respondent had failed to supply it with all the relevant information that the Respondent relied upon in deciding against the Appellant. The Appellant

was particularly aggrieved by the Respondent's decision not to share with the Appellant the report on the market intelligence precipitating into the investigation.

97. In the **Republic -vs- Capital Markets Authority & Another Ex Parte Jonathan Irungu Ciano** the High Court held:

> *that the law places the onus on an administrative body to furnish the person against whom allegations are made with information, materials, and evidence to be relied upon in making the decision or taking administrative action.*

98. Failure to provide a party with materials and evidence relied upon is a serious lapse that would altogether render the final decision invalid. We have looked at the evidence before us and note that when the Respondent issued the Respondent with the NOPD dated 4th May 2022.

99. At paragraph 5 (viii) of the statement Facts, also repeated in at paragraph5 (viii) of the affidavit sworn by the Appellant's Dharmesh Savla on 19th December 2023 the Appellant admits that it was supplied with assorted materials forming part of the evidence relied upon by the Respondent.

100. We have looked at the NOPD dated 4th May 2022 and note that, that annexed to the same is an index of the evidence that the Respondent relied upon in making its decision. The index appears at pages 40 to 50 of the Record of Appeal and the evidence itself runs from pages 51 to 287 of the record of appeal. It has not been demonstrated by the Appellant that the Respondent in making its decision of 17th August 2023 relied on evidence outside of what appears at pages 51 to 287 of the record of appeal.

101. The Appellant also faults the Respondent in that the NOPD did not disclose the reliefs available to the Respondent in the event that it is established that the Appellant had committed an offence. We have looked at the NOPD and note that the reliefs are in fact addressed in **"Section E"** of the said notice on page 47 of the Record of appeal.

102. The Appellant claims that it is entitled to see and interrogate the report which triggered the investigation commenced by the Respondent in August 2020. The Appellant claims that failure by the Respondent to provide that report was a violation of the Appellant's right to information used against it. The Respondent argued that there was no legal obligation on its part to share the market intelligence as it was not used in making the decision against the Appellant.

103. We are constrained to agree with the Respondent on this issue. Once provided with the Evidence against it, the Appellant only had to prove or disprove the evidence that was shared by the Respondent. Provided that the investigation and adjudication process was carried out in accordance with the laid-out procedure and law, and provided the decision of the Respondent was not based on some undisclosed source or evidence, then we would go as far as requiring a regulator to share its intelligence with the public or a party under investigation.

104. In the premises it is our finding that the Appellant was given an opportunity to interrogate all relevant evidence. Further, the Respondent did not have a legal obligation to share market intelligence with the entity under investigation or the general public for that matter.

105. The Appellant contended that the process was flawed as it was not given an opportunity to cross-examine the investigators. The Appellant also stated that the presence of the investigators in the adjudication panel flew against the principles of natural justice. The process was manifestly biased and the Appellant did not therefore get a fair hearing in the proceedings before the Respondent.

106. In advancing its case before the Tribunal, the Appellant cited the following cases:

> **Mea Limited -vs- Competition Authority of Kenya & Another (2016) eKLR**
> *'... Decisions and determinations by administrative bodies as well as tribunals ordinarily commence with an investigation whether preliminary or substantive. An investigation essentially helps to determine whether a wrong has been committed. It is a critical step in any administrative, judicial or even quasi-judicial proceeding which may lead to prosecution. If the investigation is perverted then the course of justice itself as well as the administration of justice may be perverted. The process of investigation should thus not be soiled. The investigator should follow the due process but he must also not be misled and ought to access as much information and material as possible. That way the course and administration of justice stays intact...'*

Ernst & Young LLP v Capital Markets Authority & Kenya Reinsurance Corporation Ltd (Petition 385 of 2016) [2017] KEHC 8510 (KLR).

'For avoidance of doubt, I declare that the first petitioner in the performance of its functions under the provisions of the Act is, required to observe and accord persons under investigations and/or any person likely to be adversely affected by their decision a fair process and in particular it is required to adhere to the principles of natural justice and comply with the provisions of Articles 50 (1) and 47 of the Constitution''

Republic -vs- Ethics and Anti-Corruption Commission & 2 Others Ex Parte Erastus Gatebe (2014) eKLR.

'...the principles of natural justice majorly concern procedural fairness and ensure a fair decision is reached by an objective decision maker and/or administrative body. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidentiary material...'

Alnashir Popat & & Others vs Capital Markets Authority (Petition 29 of 2019) [2020] KESC 3 (KLR).

'...in this case, we find and hold that in the discharge of its mandate under the CMA Act, the respondent must always first determine whether or not its act or decision is judicial or quasi-judicial and whether or not it is likely to adversely affect the rights the persons or bodies under investigation. If it is either of the two or both, it must comply with the requirements of impartiality and independence under articles 50 (1) and 47 of the Constitution...'

Juma & Another v Attorney General [2003] eKLR

'...it is an elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments, conducted impartially in accordance with fundamental principles of justice and due process of law of which a party has had reasonable notice as to the time, place, and issues or charges, for which he has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a lawyer of his choice as he may afford, and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary's witnesses, a right to be apprised of the evidence against him in the matter so that he will be fully aware of the basis for the adverse view of him and for the judgment, a right to argue that a decision be made in accordance with the law and evidence.'

Judicial Service Commission vs Mbalu Mutava & another (2015) eKLR.

'...Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the bill of rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality...'

107. Generally speaking, all bodies exercising judicial, quasi-judicial and administrative action are required to comply with the provisions of Article 47 of the Constitution, and Section 3 of Fair Administrative Action Act 2015 (FAAA). One of the principal tenets of natural justice is the rule against bias, that no one should be a judge in his own case and the Judge must therefore be impartial.

108. In **Alnashir Popat & 7 others v Capital Markets Authority [2020] eKLR [Petition 29 of 2019}** where the Supreme Court held the following:

"...In most common law jurisdictions, for instance Australia; Uganda; Tanzania, Nigeria; and Ghana, ***the regulatory and enforcement frameworks are statutory with the relevant statutes***

also creating the regulatory authorities and spelling out their functions. *Though there is no uniform regulatory and enforcement scheme,* ***to achieve the objective of their statutes, most jurisdictions, [including Kenya], expressly authorize an overlap of functions*** *which in normal judicial proceedings would be kept separate..."*

109. It is our considered opinion that the Act grants the Respondent with investigative, prosecutorial and adjudication powers. At our level we cannot therefore fault the Respondent for exercising all powers that are granted to it by the Act. That said, there is nothing to stop the Appellant from challenging the conferment and exercise of these powers in the High Court either as a constitutional petition or in judicial review.

II. WHETHER THE PROCEEDINGS CONDUCTED BY THE RESPONDENT WERE OF NATURE THAT REQUIRED STRICT COMPLIANCE WITH THE RULES OF EVIDENCE.

110. The Appellant raises this issue under grounds 11, 12, 14, 21 and 26 of the Memorandum of Appeal. In these grounds the Appellant raises issue with the interpretation and application of section 33 (1) of the Competition Act as read together with sections 78A, 106A and 106B of the Evidence Act (CAP 80) with respect to the Electronic Evidence that was relied upon by the Respondent against the Appellant.

111. Section 33 (1) of the Act reads:

> **The Authority may receive in evidence any statement, document, information or matter that may in its opinion assist to deal effectively with an investigation conducted by it, but a statement, document, information or matter shall not be received in evidence unless it meets the requirements for admissibility in a Court of law.**

112. Section 78A of the Act reads:

> **(1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.**
> **(2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.**
> **(3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—**

(a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
(b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;
(c) the manner in which the originator of the electronic and digital evidence was identified; and
(d) any other relevant factor.
(4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

113. Sections 106A and 106B(1) of the Evidence Act read:

> **106A. The contents of electronic records may be proved in accordance with the provisions of section 106B.**
>
> **106B. (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.**

114. According to the Appellant, the provisions of Section 33 (1) of the Act behooved the Respondent to comply with the strict rules of evidence. By extension sections 78A(1) and (4), 106A and 106B of the Evidence Act required the Respondent to produce certificates of evidence in support of all electronic evidence relied upon during the proceedings undertaken by the Respondent. Accordingly, failure to produce the certificates of electronic evidence alongside the electronic evidence meant that such evidence was inadmissible.

115. The Appellant further argued that the evidence relied upon by the Respondent had been processed by and at the laboratories of the Ethics and Anti-Corruption Commission (EACC).

Accordingly, the Respondent had received evidence from " other persons" as contemplated by Section 33(1) of the Act. In these circumstances, it was imperative that the Respondent attach the Certificates of Evidence as mandated by sections 78A, 106A and 106B of the Evidence Act.

116. To buttress this position the Appellants relied on the case of : **Jackline Vusevwa Selenge -vs- Olivier Guiguemde [2021] eKLR** where the Court held that Section 78A of the Evidence Act must be read together with Section 106A and on the case of **Republic -vs- Barisa Wayu Matuguda [2011] eKLR** where the Court stated that an Electronic Certificate was mandatory.

117. The Appellant also relied on the case of **Ogembo v Yongo (Civil Appeal E200 of 2023) [2024] KEHC 15763 (KLR)**, where Hon. Lady Justice Aburilli stated that:

> **"...It is evidently clear that electronic documents must be accompanied by a certificate in terms of section 106 B (4) of the Evidence Act for them to be deemed admissible. There is no other way out. This is a requirement in civil and criminal cases before courts, except in matters where statutes exclude the application of strict rules of evidence such as the Small Claims Court or specific tribunals...It is my view, that the mandatory Provisions of the Evidence Act are not only about form but also substance. Thus, before the Court can admit electronic records/evidence, an electronic certificate is mandatory to confirm the source, process, custody and delivery of the said electronic record before admission so as to eliminate the possibility of manipulation of the record...I reiterate that the certificate of electronic evidence is a mandatory requirement in the absence of which the WhatsApp messages cannot be admitted as evidence. The certificate ought to have formed part of the evidence in the proceedings before the trial court. The Court of Appeal in County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others [2015] eKLR stated as follows regarding non-production of certificate of electronic evidence "Section 106B of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are satisfied in relation to the information and computer." In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions to vouch for the authenticity and integrity of the electronic record sought to be produced..."**

118. At the hearing before this Tribunal, the Respondent for the first time attached the Certificates of Electronic Evidence as part of the evidence filed before the Tribunal. The Appellant by an application dated 15th February 2024, applied to have not only the certificates expunged from the Record but also the electronic evidence and all parts of the Respondent's affidavit sworn by Benson Nyagol on 5th October 2023 relating to the evidence.

119. By this Tribunal's Ruling delivered on 21st November 2024, the Tribunal partially allowed the Appellant's application. The Tribunal expunged the Certificates of Electronic Evidence on the basis that the Respondent had neither sought for leave nor provided a basis for adducing additional evidence at the Appeal stage. The Tribunal reserved its findings on the inadmissibility of the electronic evidence and striking out of the affidavit to be made at the final judgment.

120. On the other hand, the Respondent argued that the Appellant misguided itself as to the interpretation of section 33(1) of the Act. According to the Respondent, the provisions of section 33(1) apply where the Respondent receives evidence from third parties such as whistleblowers. The Respondent argued that it did not " receive" the evidence from EACC but rather just used EACC laboratories and expertise to process evidence which the Respondent had collected itself.

121. The Respondent urged that it collected the evidence during the search and seizure exercise, and it did not therefore " receive it" from "other persons" as contemplated by section 33(1) of the Act. The Respondent further argued that by virtue of section 32(4) of the Act the Respondent was permitted by law to enlist the assistance of police officers and other law enforcement agencies in the execution of its investigation mandate under the Act.

122. In this spirit, the Respondent stated that the proceedings undertaken by the Respondent were administrative and not judicial. Consequently, the Respondent was not bound by the strict rules of evidence and procedure as would govern a judicial proceeding. The Respondent was categorical that the provisions of Sections 78A , 106A and 106B were therefor not applicable to the proceedings before the Respondent.

123. The Respondent relied on the case of ***David Macharia & 2 others v Teachers Service Commission & another [2018] eKLR*** in ***Constantine Simati v Teachers Service Commission and another [2011] eKLR Azangalala J*** which distinguished judicial proceedings from administrative proceedings in stating that "***an internal disciplinary tribunal is not to be held to the same standards as a court of law.***"

124. Also the case of ***Kenya Revenue Authority v Menginya Salim, Civil Appeal No. 108 of 2009,*** where the Court clarified that:

> ***"There is ample authority that decision-making bodies other courts and bodies whose procedures are laid by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."***

125. We have considered the rival arguments by both parties. It is clear in our minds that the Respondent is a regulator and was therefore carrying out an administrative process and not a judicial process. It could not have been the intention of Parliament to import the strict requirements of the law of evidence into an administrative process through section 33(1) of the Act. This provision, however, was introduced and was intended to be a safety measure in instances where the evidence is procured by "other persons" who are not the Respondent. The Respondent is required by law to subject that evidence to a higher test to verify its authenticity before relying on it to make a decision as the regulator.

126. Our understanding of Sections 78A, Section 106A and 106B of the Evidence Act is that a certificate is meant to satisfy the person making a decision that the evidence is authentic. Where the evidence is collected by the Respondent itself during a search and seizure exercise, then the Respondent does not need to satisfy itself as to the authenticity of evidence it collected itself. We are not persuaded that the processing of evidence through EACC laboratories amounted to receiving evidence from "other persons".

127. We are inclined to agree with the Respondent that the provisions of section 33 (1) of the Act were not applicable in the circumstances of this case. It was therefore not necessary for the electronic evidence to be accompanied by certificates of electronic evidence as envisaged

by section 78A, 106A and 106B as the strict rules of evidence were not applicable in administrative proceedings.

128. In the circumstances the prayer by the Appellant to strike out Evidence 1, 2, 3 19, 23, 28, 31, 34, 35, 36, 38, 39, 41, 45A,45B, 45C, 45E, 45F, 50, 53A, 53B, 53C and 53D is hereby declined and the said evidence is deemed to be properly on record. Similarly only those parts of the Respondent's affidavit sworn on 5th October 2023 relating to the production of the certificates of electronic certificates are struck out but those relating to the production of Evidence 1, 2, 3 19, 23, 28, 31, 34, 35, 36, 38, 39, 41, 45A, 45B, 45C, 45E, 45F, 50, 53A, 53B, 53C and 53D are hereby retained.

III. WHETHER THE APPELLANT ENGAGED IN A CONCERTED HORIZONTAL PRACTICE OF PRICE FIXING AND /OR OUTPUT RESTRICTION CONTRARY TO SECTION 21(1) AS READ TOGETHER WITH SECTION 21(3) (A) AND (E) OF THE ACT

129. The Appellant addresses this issue in grounds numbers 1, 2, 3, 4, 5, 6, 7,8, 9, 31 to 41 of the Memorandum of Appeal. In a nutshell the Applicant argues that the Respondent did not prove its case against the Appellant as the Respondent did not prove the existence of a contract whose object or effect was to prevent, distort or lessen competition as required by section 21 (1) and (3) (a) and (e) of the Act.

130. The Appellant also extensively quoted this Tribunal's decision in the case of East African Tea Trade Association v Competition Authority of Kenya. According to the Appellant, the Tribunal in that matter stated that for the offence of price fixing to be proven then the Respondent must show that ALL players in the industry had been involved.

131. The Appellant was also of the view that the Respondent's investigations were inconclusive and wrong in law as the entity the Respondent investigated is not the same entity that the decision was made against.

132. The Respondent brought this case against the Appellant on the basis that the Appellant had contravened section 21 (1) and section 21 (3) (a) and (e) of the Act.

133. Section 21 (1) provides:

> **Agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part.**

134. Section 21 (3) (a) and (e) provide:

> **Without prejudice to the generality of the provisions of subsection (1), that subsection applies in particular to any agreement, decision or concerted practice which—**
> **(a) directly or indirectly fixes purchase or selling prices or any other trading conditions;**
> **(e) limits or controls production, market outlets or access, technical development or investment;**

135. In support of its case against the Appellant, the Respondent with respect to the offence of price fixing the Respondent relied on Evidence 1, 2, 8, 23, 36, 53A-D and also Evidence 19, 31, 34, 35, 40, 41, 38 and 45.

136. This Tribunal had the opportunity to scrutinize and review the said evidence. For instance, Evidence 1[38] is an email dated 15th May 2018 between Neelkamal Shah of Nail and Steel to Mr. Niral Savla of Tononoka and copied to many other persons from Doshi, Tarmal steel, Devki steel, Accurate amongst others. The subject of the email is "Pricing". The sender states:

> **" We spoke last week. Many sizes on the Tube List Price List needs to be revised...are some of the sizes where I am seeing that the gross profit is very low and in some case it goes negative... I spoke to Mr. Raju of Doshi over the weekend for which he had the same sentiments..."[39]**

137. Evidence 2[40] is a series of emails exchanged between various parties. Of interest is that Mr. Niral of Tononoka is a sender or addressee in all of them. The subject matter of the thread of

[38] Page 52 of the Record of Appeal
[39] Ibid.
[40] Page 54 to 57 of the Record of Appeal

emails is " Proposed Thickness for Tubes & Plates". The first email dated 24th September 2018 originates from Nilesh Doshi and is addressed to Mr. Niral Savla of Tononoka. The email states

> **" We agreed during the meeting at KAM this morning that we will all send our proposals to Niral who will coordinate the responses so that we can reach a consensus on what thickness of coils will be imported by all of us so that we comply to the standard and create a level playing field in the country. I have attached my two proposals for discussion..."** [41]

138. Via an email dated 26th September 2018 on the same Subject Prakash directly addressed Mr. Niral expressing his agreement to adopt proposed thickness for plates and tubes.[42]

139. Evidence 8[43] are screenshots of WhatsApp messages involving one Rishi of Tononoka. A sample of those conversations is replicated below:

> **"Boss let's start increasing again! Macsteel offer is more than usd 600 per MT... Now you realise what I was saying... I told you 77 and 79 and said 72 you will sell at... yup we have increased from today... my average realisation last month was 76 boss... Neil has shut the factory for a week-he says the prices are too low to operate.. what is the price you adjusting to... I am now selling at 77 and 79 on 30 days. Adding 1/= for additional credit given! validity one week..."**

140. **Evidence 23**[44] is a screenshot of phone messages of Apex Steel Board Group Chairman. It states:

> **" Agenda for 9 am tomorrow... spoken with Kaushik price effective Monday... for Rebars and new price list for tubes effective 1st September..."**

141. **Evidence 36**[45] is also a screenshot of phone messages of Apex Steel Board Group Chairman. It states:

> **" Today there is a meeting at Zen Gardens which I shall be going to... the meeting for the steel sector... Tononoka and Devki saying that they will not book at these new prices of billet... They want to increase Price?... yes ...**

---

[41] Page 55 of the Record of Appeal.
[42] Page 54 of the Record of Appeal.
[43] Page 79 of the Record of Appeal.
[44] Page 86 of the Record of Appeal.
[45] Page 101 of the Record of Appeal.

142. The Respondent in support of its case also relied on certain decisions in support of its case. With respect to a concerted practice and the object v effect argument, the Respondent relied on the cases of **Commission v Anic Partecipazioni C-49/92 P EU: 1999:356** and case no C-**105/04 P Nenderlandse Federatieve Vereniging voor de Groothandel op Elektrotechnish Gebeid v Commission [2006] ECR I 872.**

143. We have reviewed the evidence before us and we have no doubt in our minds the Appellant together with other players in the industry held discussions and meetings to discuss pricing of their goods with the intent to minimize the risk of fair competition. The Appellant appears to be of the persuasion that the "agreement" as used in the Act would require a production of a written contract and we must respectfully disagree. An agreement maybe construed from conduct of the parties and discerned from the emails and messages exchanged between the players in the industry.

144. With respect to the object v effect argument, we are guided by provisions of section 21 (1) of the Act which requires a test of either or. A party will be considered to have violated the provisions of the Act if the nature of the agreement, practice or conduct has the object or the effect of lessening competition. The Respondent is not required to prove the effect and object suffices.

145. In our view, the evidence before us clearly shows that the Appellant together with other players in the industry engaged in conduct whose object was to lessen the risks of competition. In Nenderlandse Case the court stated that " there is no need to take account of the actual effects of an agreement once it appears that its object is to prevent, restrict or distort competition...[46]

146. We have also considered the extensive reliance by the Appellant on this Tribunal's decision in the EATTA Case. The Appellant urges that the import of that decision is that the Respondent should prove that all players in the industry were involved in the practice. We do not believe

[46] Page 230 paragraph 125 of the Respondent's submissions.

that that was the rationale of that decision. There is clearly a misinterpretation by the Appellant on the meaning and import of that decision and a resulting misapplication of the same.

147. With respect to the offence of output restriction, the Respondent relied on Evidences 3, 28, 31, 39, 45E, and 50.

148. Evidence 3[47] are minutes of a meeting held on 13th November 2019 at KAM Boardroom 2. A number of players in the steel industry were represented and Mr. Niral Savla of Tononoka was in attendance. The Agenda of the meeting was " **Discuss the presence of 0.9mm finished plates and tubes in the market and the commercial effect"**

149. The import of this meeting is that the players agreed not to import 0.9mm finished plates and tubes. They agreed that they were all going to alert their suppliers that they would not be importing 0.9mm plates and tubes anymore. They noted that the Chinese had flooded the market with the 0.9mm plates and tubes and they could not compete on pricing as the Chinese were getting rebates from their government. They noted that this was hurting local manufacturers.

150. Evidence 28[48] are screen shots of messages from the Chairman of Apex and in some of those messages state

> I was talking to Nilesh Doshi and he told me that the tube sector had a meeting this week... suggestions to skip the January shipment to bring sanity in the tube market in respect of discounts...did they agree to it?... they want feedback from all of the tube people...just talked to him and says that most of them have agreed... Doshi is playing games with us – they booked an extra 1500 tons on the last shipment... Also Brollo have huge stocks – because material from Japan and SA coming to gather...is it Brollo Doshi Insteel and Tononoka wants to dictate the market... Tarmal have declined and will go ahead to order..."[49]

151. Evidence 31[50] another transcription from the Chairman of Apex Group which states"

[47] Pages 59 to 60 of the Record of Appeal.
[48] Page 90 to 91 of the Record of Appeal.
[49] Page 91 of the Record of Appeal.
[50] Page 93 of the Record of Appeal

"They have another meeting at 10.00 am at Tononoka Westlands. They want to discuss price and how to reduce stock between manufacturers to ensure price stability".

152. Upon reviewing the evidence on record, we are persuaded that the Appellant together with others participated in conduct contrary to section 21 (1) and (3) (e) by engaging in output restriction with a view to control prices.

153. Finally the Appellant claims that the entity that was investigated is not the same entity against whom a decision was issued against. The Appellant in this matter is Tononoka Rolling Mills Limited. It has described itself as a producer of reinforcement steel, and its major products are TMT (Thermo Mechanically Treated) Rebars.[51] The investigations conducted by the Respondent touched on Rebars. Evidence 38[52] relates to rebars. The Appellant's CR 12 form[53] shows that Mr. Niral Savla and Mr. Rishi Savla appear shareholders of the Appellant. We are persuaded that the Respondent's decision against the Appellant was sound in law.

F. ORDERS

154. *We accordingly arrive at the inevitable conclusion that* the Appellant by its conduct was guilty of a concerted practice of price fixing contrary to section 21(1) as read together with Section 21(3) (a) of the Act and output restriction contrary to section 21(1) as read together with section 21(3)(e) of the Act. *In the present circumstances we therefore order as follows:*

a. *This appeal be and is hereby dismissed.*
b. *The Respondent's decision dated 17th August 2023 be and is hereby upheld.*
c. *The Appellant shall bear the costs of this Appeal.*

Orders accordingly.

---

[51] Page 1 of the Appellant's Statement of Facts dated 19/09/2023.
[52] Page 104 of the Record of Appeal
[53] Page 549 of the Record of Appeal.

DATED at **NAIROBI** this 9th day of July 2025

DANIEL OGOLA
CHAIRPERSON

VALENTINE MWENDE
MEMBER

KIPROP MARRIRMOI
MEMBER

RAYMOND NYAMWEYA
MEMBER

ODONGO MARK OKEYO
MEMBER

I certify that this is a true copy of the original

COMPETITION TRIBUNAL
P. O. Box 30041-00100,
NAIROBI

SECRETARY/CEO
COMPETITION TRIBUNAL