REPUBLIC OF KENYA

IN THE COMPETITION TRIBUNAL AT NAIROBI

CASE NO. CT/007 OF 2023

BETWEEN

DEVKI STEEL MILLS LIMITED .....APPELLANT

AND

COMPETITION AUTHORITY OF KENYA ..... RESPONDENT

(Appeal from a Decision of the Competition Authority of Kenya at Nairobi dated the 17 day of August, 2023 In the Matter regarding the Competition Authority of Kenya and Devki Steel Mills Limited & 13 Other Manufacturers & Distributors of Steel Products in Kenya)

JUDGEMENT

A. BACKGROUND

1. The appeal arose from the decision of the Respondent delivered against the Appellant dated the 17th August, 2023, that is in the matter regarding the Competition Authority of Kenya and Devki Steel Mills Limited & 13 Other Manufacturers & Distributors of Steel Products in Kenya.[1]
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.
3. Section 31 of the Competition Act Cap 504 Laws of Kenya (the Competition Act), empowers the Respondent through 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 relating to restrictive trade practices.
4. In August 2020, the Respondent initiated investigations into the steel manufacturing and distribution sector in Kenya. This action was prompted by intelligence suggesting that participants within the sector were engaging in collusive practices, prohibited by Section 21 of the Act.

[1] See page 044 of the Respondent's replying affidavit sworn by Benson Nyagol dated 2nd October, 2023

5. The Respondent in accordance with sections 31 and 32 of the Act as read with sections 118 and 118A of the Criminal Procedure Code Cap 75 Laws of Kenya simultaneously conducted a search and seizure exercise at the premises of Doshi Group (Doshi), Devki Steel Mills Limited (Devki), Tarmal Wire Products Limited (Tarmal), Mabati Rolling Mills Limited (MRM), Tononoka Rolling Mills (Tononoka), Abyssinia Group Industries (Abyssinia),Apex Steel Limited (Apex) on 15th December, 2021 and Insteel Limited (Insteel) on 21st December, 2021.

6. The Respondent stated that after initial analysis of the information obtained during the search, the Respondent established that other than the eight (8) companies mentioned in the paragraph above, an additional six (6) companies namely Blue Nile Wire Products Limited (Blue Nile), Accurate Steel Mills Limited (Accurate), Jumbo Steel Mills Limited (Jumbo), Nail and Steel Products Limited, Corrugated Sheets Limited (Corrugated) and Brollo Kenya Limited (Brollo) were also subjects of interest in the investigation.

7. Upon consideration of the pieces of evidence and the explanations given during the interview, the Respondent pursuant to section 34 of the Act, issued a Notice of Proposed Decision (NOPD) to the Appellant on 4th May, 2022. Additionally, the Respondent stated that it supplied the Appellant with the bundle of evidence it relied upon to come up with the NOPD and granted the Appellant 21 days to make written representations and/or indicate to the Respondent whether it required an opportunity to make oral representations.

8. The Respondent contended that based on the evidence, it made a preliminary finding that the Appellant, together with thirteen (13) steel manufacturers and distributors had engaged in price fixing contrary to sections 21(1) of the Act as read together with section 21(3)(a) of the Act and that the Appellant together with twelve (12) steel manufacturers and distributors had engaged in price fixing and output restriction contrary to sections 21(1) of the Act as read together with section 21(3)(e) of the Act.

9. The Respondent on 11th march, 2022 issued the Appellant with Notice of Investigation (NOI) and summons for appearance inviting them for an interview before the Respondent. The said interview was conducted on 25th march, 2022.[2] After the interview and based on the evidence obtained, the Respondent issued the Appellant with Notice of Proposed Decision NOPD on 4th May, 2022[3] together with the evidence relied upon. The Respondent was granted 21 days to make written and or oral representation in response to the NOPD. The Appellant made written representation and made a request for a meeting.

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[2] See Statement by Kaushik Pandit dated 25th March, 2022

[3] See page 68 of the Record of Appeal

10. Thereafter, the Respondent, in compliance with Article 47 of the Constitution, 2010, section 35 of the Act as read together with section 4 of the Fair Administrative Action Act, 2015 convened a hearing conference with the Appellant on 9th June, 2022 which was later deferred to 30th August, 2022.

11. On 17th August, 2023, pursuant to section 36 of the Act, the Respondent made its final decision as follows, that:
    i. the conduct of the Appellant together with Apex, Brollo, Tononoka, Insteel, Jumbo, MRM, Doshi, Accurate, Abyssinia, Corrugated, Nail & Steel and Tarmal constituted an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act;
    ii. together with Apex, Doshi, MRM, Insteel, Nail and Steel, Doshi, Jumbo, Corrugated, Abyssinia, Blue Nile, Brollo and Tononoka Constituted an infringement of Section 21(1) of the Act as read together with Section 21(3)(e) of the Act.
    iii. the Respondent restrained the Appellant from engaging in conduct that violates section 21(1) of the Act as read together with section 21(3)(a) of the Act.
    iv. the Respondent restrained the Appellant from engaging in future violations of the Act.
    v. the Respondent directed the Appellant to develop and furnish the Respondent with a competition compliance programme within 6 months from the date of the Determination for approval.
    vi. the Respondent directed the Appellant to implement the approved competition compliance programme within 12 months from the date of its approval whose implementation would be subjected to a compliance check by the Respondent.
    vii. the Respondent imposed a financial penalty of 0.5% of the Appellant's 2021 gross annual turnover in Kenya amounting to KES. 46,296,001.25.

B. DOCUMENTS AND EVIDENCE

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

Record of Appeal containing: -

a) The Notice of Appeal dated 1st September, 2023
b) The Memorandum of Appeal dated 15th September, 2023
c) Supporting Affidavit sworn by Kaushik Pandit dated 15th September, 2023
d) Undated Record of Appeal together with documents appearing as items 3 & 4 in the index in the said record filed on 18th September, 2023
e) Appellant's Supplementary Affidavits sworn by James Rimui, Counsel for the Appellant dated 13th October, 2023 and that of Kaushik Pandit dated 31st October, 2023.
f) Appellant's written Submissions dated 25th June, 2024.
g) Appellant's case digest and list of authorities dated 27th January, 2025

13. The Respondent filed the following documents:
    a) Replying Affidavit sworn by Benson Nyagol dated 2nd October, 2023 and the annexures thereto.
    b) Further Affidavit sworn by Benson Nyagol dated 19th December, 2023
    c) Respondent's written submissions dated 6th November, 2024 together with the list and bundle of authorities attached thereto.
    d) Respondent's Case digest and bundle of authorities dated 22nd January 2025

14. The matter came up for hearing on 22nd January, 2025 when the parties' advocates highlighted their respective submissions.

C. APPELLANT'S CASE

15. Dissatisfied with the Decision of the Respondent, the Appellant has appealed to this Tribunal against the decision on the following grounds:

    i) *The Respondent erred in law and in fact by finding that the Appellant entered into agreements with other undertakings which agreements had 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 in contravention of Section 21 of the Competition Act No. 12 of 2010.*

    ii) *The Respondent erred in law and in fact by finding that the Appellant entered into decisions with other undertakings which had 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 in contravention of Section 21 of the Competition Act No. 12 of 2010.*

    iii) *The Respondent erred in law and in fact by finding that the Appellant was involved in concerted practices with other undertakings which had 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 in contravention of Section 21 of the Competition Act No. 12 of 2010.*

    iv) *Moreover,the Respondent also erred in law and in fact by finding that the Appellant entered into an agreement, decision or concerted practice with other undertakings which directly or indirectly fixed purchase or selling prices or any other trading conditions, despite there being no evidence of the Appellant's involvement, directly or indirectly, in fixing purchase or selling prices of goods or any other trading conditions, in contravention of Section 21 (1) as read with Section 21 (3) (a) of the Competition Act No. 12 of 2010 .*

    v) *The Respondent erred in law and in fact by failing to consider the statement in response recorded by Mr. Kaushik Pandit on behalf of the Appellant dated 23 March 2022 which indicated that the Appellant was not privy to alleged discussions on revision of sizes of products with the aim of increasing gross profit and margins which was presented using Evidence 1,*

before arriving at the above decision and finding that the Appellant participated in the discussions on pricing.

vi) *Furthermore, the Respondent erred in law and in fact by finding that the Appellant participated in discussions on minimum tolerance for water pipes to be adhered by all as presented in Evidence 2 without considering the statement in response recorded by Mr. Kaushik Pandit on behalf of the Appellant dated 23 March 2022 which indicated that the Appellant did not participate and was not privy to the communications in the email, before arriving at the above decision and finding that the Appellant participated in the discussions on pricing.*

vii) *The Respondent erred in law and in fact by failing to consider the statement in response recorded by Mr. Kaushik Pandit on behalf of the Appellant dated 23 March 2022 which indicated that the meeting of 24 September 2018 presented in Evidence 2 was a meeting convened by the Kenya Association of Manufacturers in which every member of the Metal sector was represented for members to agree on measures to protect consumers of steel products from purchasing sub-standard products and give recommendations on standards of products to be adopted, before arriving at the above decision and finding that the Appellant's discussion was on minimum tolerance of water pipes to be adhered by all .*

viii) *The Respondent erred in law and in fact by failing to give the Appellant an opportunity to challenge Evidence 23 adduced against the Appellant on the allegations that the Appellant engaged in restrictive trade practices, before arriving at the above decision and finding that the Appellant participated in pricing discussions.*

ix) *The Respondent erred in law and in fact by failing to give the Appellant an opportunity to challenge Evidence 34, 35, 40A, 41, 45A, 45B, 45C, 45D, 45E, 45F, 48, 51A, 52 and 57 adduced against the Appellant on the allegations that the Appellant engaged in restrictive trade practices, before arriving at the above decision and finding that the Appellant participated in alleged meetings, discussions and suggestions on price fixing.*

x) *The Respondent erred in law and in fact by failing to consider the statement in response recorded by Mr. Kaushik Pandit on behalf of the Appellant dated 23 March 2022 which indicated that the Appellant did not attend and was not privy to the alleged meeting for the steel sector held at Zen Gardens Restaurant 21 November 2020 presented in communications appearing in Evidence 36, before finding that the Appellant attended the meeting whose alleged agenda was discussion on pricing.*

xi) *Moreover, the Respondent erred in law and in fact by failing to consider the statement in response recorded by Mr. Kaushik Pandit on behalf of the Appellant dated 23 March 2022 which indicated that the Appellant did not attend, participate and was not privy to the alleged meetings claimed through Evidence 31, 34, 35, 38 and 40 that were allegedly held in*

restaurants and office premises of competitors to discuss prices, discounts, limiting and joint skipping of importation of raw materials and products, before finding that the Appellant discussed prices, discounts, limiting and joint skipping of importation of raw materials and arriving at the above decision.

xii) *The Respondent also erred in law and in fact by failing to give the Appellant an opportunity to challenge Evidence 8, 19, 26, 28 and 41 allegedly indicating that there were meetings held in restaurants and office premises before finding that there existed a cordial relationship amongst executives of steel manufacturers and the Appellant and the mutual and constant interactions including having informal regular meetings in restaurants to discuss and agree on prices and pricing decisions, and sharing of price lists prevented, distorts and/or lessens competition among their companies, before arriving at the above decision.*

xiii) *Furthermore, the Respondent erred in law and in fact by failing to give the Appellant an opportunity to challenge Evidence 56 allegedly indicating that the Appellant entered into an Agreement with other undertakings to increase prices of products.*

xiv) *The Respondent erred in law and in fact by finding that the Appellant entered into an agreement, decision or concerted practice which limited or controlled production, market outlets or access, technical development or investment in contravention of Section 21 (1) as read with Section 21 (3) (e) of the Competition Act No. 12 of 2010.*

xv) *The Respondent erred in law and in fact by using a hypothesis to prove simultaneous timing of release of price lists and frequent change of prices of products in the industry to find that the Appellant engaged in restrictive trade practices.*

xvi) *The Respondent erred in law and in fact by using a hypothesis of alleged similar pricing of products and failing to consider the statement in response recorded by Mr. Kaushik Pandit on behalf of the Appellant dated 23 March 2022 in which the Appellant indicated that the Appellant's Sales department does review of prices of products and submits to them for price review and the Appellant does not look at prices of other competitors, before finding that the Appellant engaged in restrictive trade practices of simultaneous price revision and exactness of pricelists.*

xvii) *The Respondent erred in law and in fact by failing to consider the statement in response recorded by Mr. Kaushik Pandit on behalf of the Appellant dated 23 March 2022 in which the Appellant indicated that pricing of products is based on fluctuations of the United States Dollar and cost of raw materials among other factors considered, before finding that the Appellant engaged in restrictive trade practices of simultaneous price revision and exactness of pricelists.*

xviii) *The Respondent erred in law and in fact by failing to give the Appellant an opportunity to challenge Evidence 53A, 53B, 53C and 53D allegedly indicating that the Appellant released pricelists that were exactly the same and released at the same time with other undertakings which was an indication of simultaneous price revisions as evidenced by their effective dates that were within days of each other with other undertakings, before finding that the Appellant engaged in restrictive trade practices of simultaneous price revision and exactness of pricelists.*

xix) *The Respondent erred in law and in fact by finding that the Appellant shared a platform with other undertakings for sharing sensitive and strategic market information on capacities, market strategies and pricing information despite not presenting evidence directly or indirectly linking the Appellant as having shared the said information in these platforms with other undertakings.*

xx) *The Respondent erred in law and in fact by failing to give the Appellant an opportunity to challenge Evidence 39 allegedly indicating that the Appellant engaged in conduct which points to intention to control the price and material to stabilize the market due to excess material in the country.*

xxi) *The Respondent erred in law and in fact by failing to consider that the Appellant did not participate and was not privy to the alleged discussions on output restriction presented in communications allegedly appearing in Evidence 28, 31, 39, 44, 45E, 50, 55A, 55B and 55C before finding that the Appellant participated in the discussion on pricing and output restriction to create an artificial shortage of products.*

xxii) *The Respondent erred in law and in fact by failing to give the Appellant an opportunity to challenge Evidence 28, 31, 39, 55A, 55B, 55C, 44, 45E and 50 which allegedly indicated that the Appellant participated in discussions on output restriction and creating an artificial shortage of products.*

xxiii) *The Respondent erred in law and in fact by failing to consider the statement in response recorded by Mr. Kaushik Pandit on behalf of the Appellant dated 23 March 2022 which stated that the Appellant was not aware or privy to and did not attend, participate and was not privy to the meeting claimed in Evidence 3 in which it is alleged that the main agenda was to restrict importation of 0.9 mm coils and plates from China.*

xxiv) *The Respondent erred in law and in fact by failing to consider the association of the Appellant with other members of the Metal and Allied Sector within the Kenya Association of Manufacturers was an association driven to safeguard and protect consumers of products manufactured by the members and proposals and suggestions made within the association by members of the Kenya Association of Manufacturers were suggestions for the improvement of standard of products and prevention of sub-standard products.*

xxv) *The Respondent erred in law by failing to call the Appellant to produce evidence to challenge the Authority's allegations that the Appellant engaged in restrictive trade practices, before arriving at the above decision.*

xxvi) *The Respondent erred in law by limiting the Appellant's Freedom of Association with members of the Kenya Association of Manufacturers and manufacturers in the steel industry and finding that the association of the Appellant with other members of the Kenya Association of Manufacturers and manufacturers in the steel industry was a platform shared to engage in restrictive trade practices.*

xxvii) *The Respondent erred in law by considering the Appellant's gross annual turnover for the year 2021 and imposing a financial penalty of 0.5% of the Appellant's said gross annual turnover for the year 2021 amounting to Kshs. 46,296,001.25 in contravention of mandatory provisions of* ***Section 36 (d)*** *of the Competition Act, 2010 which provides that Competition Authority of Kenya shall use the immediately preceding year's gross annual turnover of the Appellant in Kenya.*

xxviii) *The Respondent erred in law by limiting the Appellant's Freedom of Association with members of the Kenya Association of Manufacturers and manufacturers in the steel industry in contravention of the Constitution of Kenya, 2010.*

xxix) *The Respondent erred in law and in fact by finding that the process used to obtain data which was sensitive personal data belonging to the Appellant during their investigations did not contravene the mandatory provisions of Section 44 and 72 of the Data Protection Act No. 24 of 2019 particularly on obtaining, processing and disclosing data belonging to the Appellant presented in evidence which is prohibited under the Data Protection Act No. 24 of 2019.*

xxx) *The Respondent and in fact by allowing production and reliance of electronic evidence without fulfilling the mandatory requirement of the law for production of such evidence as stipulated in Section 106 B of the Evidence Act and other provisions of the law thereby rendering the electronic evidence inadmissible before the Authority.*

16. The Appellant sought prayers that the Honourable Tribunal be pleased to grant the following orders as sought in the Memorandum of Appeal:

a. That the Respondent reconsiders the whole decision against the Appellant delivered on 17 August 2023; and

b. That the Respondent commence a fresh hearing of the Appellant's case; and

c. *That in alternative and without prejudice to the foregoing, this Appeal be allowed; and*

d. *Decision of the Competition Authority of Kenya delivered on the 17 August 2023 and all consequential proceedings, orders and decree be reversed and set aside and/or struck out with costs to the Appellant; and*

e. *Costs of this Appeal be awarded to the Appellant.*

f. *Such further or other orders be made as are just in the circumstances of this Appeal.*

17. The Appellant avers that on or about 23 August 2023, its former Advocates, H. Kago & Company Advocates (hereinafter referred to as the "**former Advocates**"), received a copy of the Decision, which is annexed to Affidavit 2 sworn by the Appellant's counsel, Mr. James Rimui, and marked as exhibit "**KP1**".

18. The Appellant noted that the Decision arose from investigations that the Respondent had initiated on its own motion into players in the steel industry, which began around August 2020. Subsequently, by a letter dated 29 November 2021, the Respondent's Director General informed the Appellant that the individuals named in the letter were authorised to enter its premises, conduct searches, and seize evidence.

19. The Appellant further stated that, vide the Respondent's letter dated 11 March 2022 the Appellant was summoned to appear before the Respondent for an interview together with two (2) other persons, that is, Mr. Geoffrey Mbithi and Mr. Devang Raval on 23 March 2022. The said Respondent's letter the purpose of the interview was to clarify on the contents found in the seized gadgets, inclusive of, but not limited to: *WhatsApp chats, email communications, documents and information relating to the steel sector.*[4]

20. The Appellant posits that it was not invited by the Respondent to present any evidence or challenge the evidence used by the Respondent to prove their allegations contained in the Notice of Proposed Decision. As such, being an interview, the Appellant's Managing Director Mr. Kaushik Pandit appeared before the Respondent on 23 March 2022 and answered to questions put to him by the officers of the Respondent.

21. Moreover, Mr. Geoffrey Mbithi who had also been summoned had resigned from the Appellant effective 5 February 2021 and the Respondent was presented with Mr. Geoffrey Mbithi's letter of resignation dated 5 January 2021 to prove his resignation. Consequently, Mr. Geoffrey Mbithi did not appear before the Respondent for the said

[4] See the Appellant's Affidavit 1 and marked as exhibit **"KP5" on** page 351 in the record of appeal

interview. The Appellant adduced the resignation letter to that effect.[5] Thereafter both Mr. Devang and Mr. Kaushik Pandit signed on each page of the Statement recorded.[6]

22. The Appellant stated that the search and seizures were conducted and consequently on or around 4 May 2022. The Appellant pleaded that the Respondent issued a *"Notice of Proposed Decision" under Section 34 of the Competition Act, No. 12 of 2010 in respect of Alleged Restrictive Trade Practices in the Steel Sector – Devki Steel Mills Limited)"* dated 4 May 2022 (hereinafter referred to as the "**Notice of Proposed Decision**") to the Appellant together with annexures labelled as Evidence and numbered as follows Evidence 1, 2, 3, 6, 8, 19, 21A & B, 23, 26, 28, 31, 34, 35, 36, 38, 39, 40A, 41A, 44, 45, 48, 50, 51A, 51B, 52, 53A, 53B, 53C, 54, 55A, 55B, 55C, 56 and 57 which the Respondent allegedly collected during the search and seizure process.[7]
23. The Appellant stated that in the NOPD, the Respondent identified that the Steel Sector in Kenya is categorised into the following sub-sectors of the Kenya Association of Manufacturers (hereinafter referred to as the "**KAM**"):[8]
    i) *Smelting, Hot Rolling - which mainly produces materials such as Rebars, Angles, Flats, Sections e.t.c.*
    ii) *Cold Rolling and Allied Products - which mainly provides roofing solutions (Mabati) which are metal or colour coated.*
    iii) *Wire products convertor – which mainly produces black and galvanized products like nails, weld mesh, binding wire e.t.c.*
    iv) *Pipes and Tubes – which mainly produces black and galvanizing pipes and hollow sections.*
    v) *Steel Fabricators – which are mainly involved in the fabrication of heavy engineering industries and manufacturing of machines.*

24. According to the Appellant, the Appellant's Managing Director, Mr. Kaushik Pandit, was the Vice-Chairman of the Metal and Allied sector of the KAM under which the sub-sectors are created. As such, all grievances and proposals channeled to KAM were copied to the Appellant's Managing Director in his official capacity as the Vice-Chairman.

25. Furthermore, the Appellant stated that the Respondent concluded that from their investigations the relevant product market for investigation is that of manufacture and distribution of steel products in Kenya. According to the Appellant's, Respondent's NOPD was based on the allegations that Appellant and other companies who were the subject of the investigations had breached **Section A** of **Part III** of the Act which prohibits Restrictive Trade Practices particularly **Section 21** of the Act which prohibits,

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[5] See Appellant's Affidavit 1 and marked as exhibit **"KP6"** on page 353 in the record of appeal
[6] *Statements dated 23 March 2022 annexed to Appellant's Affidavit 1 and marked as exhibit* ***"KP7"on page 354-361 in the record of appeal.***
[7] See annexure **"KP3"** in the Record of Appeal filed on 18th September, 2023
[8] See page 70-71 of the NOPD, dated 4th May 2022.

"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."

26. According to the Appellant, the Respondent alleges that KAM meetings are used as platform to share and discuss commercially sensitive and strategic market information on capacities of competitors and future investment plans of competitors for instance the Respondent alleges that that the price lists of various steel companies obtained and analysed had the following characteristics: *simultaneous timings in relation to releasing of pricelists; frequent changes of prices, especially for deformed bars; communication to distributors relating to price changes crafted in a similar manner and* ***Evidence 54*** *on communication on price changes and exactness of pricelists in* ***Evidence 53A, 53B, 53C*** *and* ***53D***.

27. The Appellant states that the Respondent in this regard, tendered evidence to allegedly prove:

    i. ***Alleged Pricing and Pricing Decisions*** *- evidence of discussions on pricing/pricing decisions and evidence of simultaneous price revisions and exactness of pricelists was presented;*
    ii. ***Alleged Output Restriction*** *- alleged communications whose object was to limit output within the steel sector was presented; and*
    iii. ***Alleged Coordination, Monitoring and Consequences for Deviation*** *- evidence of monitoring of importations and communications in relation to the same was presented.*

28. In response to the finding by the Respondent, the Appellant argued that it and other members of the steel sector had constitutional right of association to meet, form, join or participate in activities of an association of every kind. And further, a meeting under KAM with should not be construed to mean one whose effect or object is to lessen competition. They further argued that the aim of such meetings could also be construed to be one meant to further consumer protection in Kenya.

29. The Appellant further argued that it was presented with all the evidence collected during the search which the Respondent used to arrive at its decision. Of particular concern is evidence marked as exhibit: BN- 3B; BN 27 (a)-(h); BN 28 (a&b); BN 29 (a&b); BN 30,31; BN31 (a-g); BN 32.2 in the Respondent's replying affidavit dated 2nd October 2023 sworn by Benson Nyagol.

30. The Appellant contested the evidence adduced by the Respondent on the ground that no certificate of authenticity of electronic record was provided to allow the Appellant to verify the evidence. It relied on section 106 A and 106 B of the evidence Act Cap 80

laws of Kenya that in the absence of the certificate, the evidence was inadmissible under the Act.

31. The Appellant states that the Respondent retreated to deliver its decision upon close of the hearing pursuant to **Section 36** of the Act and despite the Appellant's pleas and rendered its decision on the matter dated 17 August 2023 as follows:

    i. *That the conduct of the Appellant together with 13 other manufacturers and distributors of steel products in Kenya constitutes an infringement of* ***Section 21 (1) of*** *the Act as read together with* ***Section 21 (3) (a)*** *of the Act.*

    ii. *That the conduct of the Appellant together with 13 other manufacturers and distributors of steel products in Kenya constitutes an infringement of Section 21 (1) of the Act as read together with* ***Section 21 (3) (e)*** *of the Act.*

    iii. *Imposed a financial penalty of 0.5% of the Appellant's 2021 gross annual turnover in Kenya amounting to Kshs. 46,296,001.25 and*

    iv. *Directed the Appellant to develop and furnish the Respondent with a competition compliance programme within 6 months from the date of the determination for approval; and*

    v. *Directed the Appellant to implement approved competition compliance programme within 12 months from the date of its approval whose compliance would be checked.*

32. The Appellant faulted the process, evidence tendered by the Respondent including the year of the gross annual turnover used by the Respondent in arriving at the penalty.

D. RESPONDENT'S CASE.

33. In response to the Appellant's appeal, the Respondent stated that, pursuant to Section 31 of the Competition Act Cap 504 Laws of Kenya (the Competition Act), the Respondent through its own initiative or upon receipt of information or complaint from any person or Government agency or Ministry, can carry out an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement relating to restrictive trade practices.[9]

[9] See Section 31 of the Act.

34. The Responded posits that in August 2020, the Respondent initiated investigations into the steel manufacturing and distribution sector in Kenya. This action was prompted by intelligence suggesting that participants within the sector were engaging in collusive practices, in violation of Section 21 of the Act.

35. That in accordance with sections 31 and 32 of the Act as read with sections 118 and 118A of the Criminal Procedure Code Cap 75 Laws of Kenya the Respondent simultaneously conducted a search and seizure exercise at the premises of Doshi Group (Doshi), Devki Steel Mills Limited (Devki), Tarmal Wire Products Limited (Tarmal), Mabati Rolling Mills Limited (MRM), Tononoka Rolling Mills (Tononoka), Abyssinia Group Industries (Abyssinia) ,Apex Steel Limited (Apex) on 15th December, 2021 and Insteel Limited (Insteel) on 21st December, 2021.

36. The Respondent further submitted that after initial analysis of the information obtained during the search, the Respondent established that other than the eight (8) companies mentioned in the paragraph above, an additional six (6) companies namely Blue Nile Wire Products Limited (Blue Nile), Accurate Steel Mills Limited (Accurate), Jumbo Steel Mills Limited (Jumbo), Nail and Steel Products Limited, Corrugated Sheets Limited (Corrugated) and Brollo Kenya Limited (Brollo) were also subjects of interest in the investigation.

37. Pursuant to section 31 of the Act and based on the preliminary review of the material obtained from the search and seizure, the Respondent sent out a Notice of Investigation and Summons for Appearance to the Appellant on 11th March, 2022.[10] The Respondent noted that Mr. Kaushik Pandit appeared on behalf of the Appellant for the interview on 23rd March, 2022 whose aim was to confirm the veracity of the information obtained during the search and was accompanied by two other persons; Mr.Geoffrey Mbithi and Mr. Devang Raval.[11]

38. The Respondent further stated that upon consideration of the pieces of evidence and the explanations given during the interview, the Respondent pursuant to section 34 of the Act, issued a Notice of Proposed Decision (NOPD) to the Appellant on 4th May, 2022. Furthermore, the Respondent stated that it supplied the Appellant with the bundle of evidence it relied upon to come up with the NOPD and granted the Appellant 21 days to make written representations and/or indicate to the Respondent whether it required an opportunity to make oral representations.[12]

39. The Respondent contended that based on the evidence, it made a preliminary finding that the Appellant, together with thirteen (13) steel manufacturers and distributors had

[10] Marked as 'BN2' in the replying affidavit of Benson Nyagol, sworn on 2nd October, 2023 on page 009.
[11] A copy of statement by Mr. Kaushik Pandit, dated 23rd March, 2022
[12] See page 3 Paragraph 9 of the Respondent's Written Submissions.

engaged in price fixing contrary to sections 21(1) of the Act as read together with section 21(3)(a) of the Act and that the Appellant together with twelve (12) steel manufacturers and distributors had engaged in output restriction contrary to sections 21(1) of the Act as read together with section 21(3)(e) of the Act.

40. Furthermore, the Respondent stated that in the course of the investigation and before the issuance of the determination, five out of the fourteen steel manufacturing and distribution firms that were under investigation with the Appellant invoked section 38 of the Act and entered into settlement negotiations with the Respondent and two firms have since initiated settlement negotiations following their Appeals.

41. The Respondent further submitted that, upon making its preliminary decision, the Appellant in response to the Respondent's NOPD submitted its written submissions dated 13th May, 2022. Subsequently, in accordance with the obligation under Article 47 of the Constitution, 2010 the Respondent pursuant to section 35 of the Act as read together with section 4 of the Fair Administrative Action Act, 2015 convened a hearing conference with the Appellant on 9th June, 2022 which was later deferred to 30th August, 2022.

42. The Appellant was represented by the former advocates who on 13th May, 2022 wrote to the Respondent responding to the NOPD denying its client's culpability, and as per their client's right to a fair hearing accorded in the Constitution and the Fair Administrative Actions Act, requested their clients to be given audience to plead its case, rebut any unrefuted claims and salvage its reputation. The counsel stated that their client was ready willing and able to comply with any investigation sought and also to be given and opportunity to make its case.

43. From the record, a meeting was convened on 30th August, 2022 between the Appellant's and the Respondent's representatives.[13] In the said meeting, the Appellant denied the allegation the Respondent accused them of, the Appellant's counsel further contended that the meetings held under KAM were to agree on the acceptable set of standards of the products and further that the meeting was for the protection of consumer rights.

44. The minutes of the said meeting was agreed to by both parties and duly signed by the Appellant and the Respondent's representatives on 30th august, 2022 and 2nd September 2022 respectively.

45. Finally, the Respondent, pursuant to section 36 of the Act, made its final decision on the 17th August, 2023[14] that:

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[13] Minutes of a meeting marked as "BN3" in the Replying Affidavit of Benson Nyagol sworn on 2nd October, 2023.

i. the conduct of the Appellant together with Apex, Brollo, Tononoka, Insteel, Jumbo, MRM, Doshi, Accurate, Abyssinia, Corrugated, Nail & Steel and Tarmal constituted an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act;
ii. together with Apex, Doshi, MRM, Insteel, Nail and Steel, Doshi, Jumbo, Corrugated, Abyssinia, Blue Nile, Brollo and Tononoka Constituted an infringement of Section 21(1) of the Act as read together with Section 21(3)(e) of the Act.
iii. the Respondent restrained the Appellant from engaging in conduct that violates section 21(1) of the Act as read together with section 21(3)(a) of the Act.
iv. the Respondent restrained the Appellant from engaging in future violations of the Act.
v. the Respondent directed the Appellant to develop and furnish the Respondent with a competition compliance programme within 6 months from the date of the Determination for approval.
vi. the Respondent directed the Appellant to implement the approved competition compliance programme within 12 months from the date of its approval whose implementation would be subjected to a compliance check by the Respondent.
vii. the Respondent imposed a financial penalty of 0.5% of the Appellant's 2021 gross annual turnover in Kenya amounting to KES. 46,296,001.25.

46. The Respondent added that it communicated its final decision giving reasons of the same to the Appellant via email on 21stAugust, 2023 and hard copies served on 23rdAugust, 2023.

47. In conclusion, the Respondent's submitted that based on the foregoing submissions, the Respondent has demonstrated that the Appellant engaged in conduct that constituted an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act (price fixing) and section 21(1) of the Act as read together 21(3)(e) of the Act (output restriction) and the Appellant was accorded a fair hearing and consequently, the Respondent prayed that the Honourable Tribunal:
    a. dismisses the Appellant's Memorandum of Appeal dated 14th September, 2023 and upholds the Respondent's decision dated 21st August, 2023 in its entirety; and

    b. Costs of the appeal be awarded to the Respondent.

[11] See page 4 Paragraph 12 of the Respondent's Written Submissions.

E. ISSUES FOR DETERMINATION.

48. Having carefully examined the pleadings by the parties, the evidence presented before the Tribunal as well as their written submissions, the tribunal has framed the following issue for determination:

    i) *Whether the Appellant was afforded the right to a fair hearing and fair administrative action; and*

    ii) *Whether the Appellant engaged in conduct that constituted an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act (price fixing) and section 21(1) of the Act as read together 21(3)(e) of the Act (output restriction); and*

    iii) *Whether the Appellant's Freedom of Association was limited by the Respondent's investigations; whether the Respondent breached the provisions of The Data Protection Act and whether the Respondent relied on inadmissible electronic evidence; and*

    iv) *Whether the Respondent's Decision and Penalty is a nullity for failing to consider the Appellant's immediately preceding year's gross annual turnover from the date of the Decision to impose a financial penalty; and*

    v) *Who bears the cost of this Appeal.*

F. ANALYSIS AND DETERMINATION

i) Whether the Appellant was afforded the right to a fair hearing and fair administrative action.

The Appellant posits that it was not invited by the Respondent to present any evidence or challenge the evidence used by the Respondent to prove their allegations contained in the Notice of Proposed Decision. As such, being an interview, the Appellant's Managing Director appeared before the Respondent on 23 March 2022 and answered to questions put to him by the officers of the Respondent who interviewed him. Evidence in dispute.BN- 3B; BN 27 (a-h); BN 28 (a&b); BN 29 (a&b) ;BN 30,31;BN31 (a-g); BN 32.2;

1. The Appellant submitted that the Appellant was not afforded an opportunity to answer to some of the evidence such as Evidence 23, 45D, 45E, 45F and 56 while other undertakings were given the opportunity to respond, and their responses noted in the Decision.

2. According to the Appellant, this contravened the Appellant's right to fair hearing protected by **Article 50** of the Constitution which includes the right to adduce and challenge evidence. It further avers that it violated its Right to Fair Administrative Action which includes the right of every person to administrative action that is lawful, reasonable and procedurally fair protected under **Article 47** of the Constitution mentioned above.

3. The Appellant submitted that the Right to Fair Hearing and the Right to Fair Administrative Action is sacrosanct to a just determination of a dispute and **Article 47** of the Constitution which protects the Right to Fair Administrative Action provides as follows:

> *"(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."*

4. The Appellant highlighted **Article 50(1)** of the Constitution which protects the Right to Fair Hearing by providing as follows:

> *"(1) Every person has 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."*

5. The Appellant urged the Honourable Tribunal to consider exhibits marked as "**KP8**" and "**KP9**" which according to the Appellant's demonstrates that the Appellant's rights were curtailed by the Respondent since the Appellant was not afforded the opportunity to make its case in accordance with the right to a fair hearing despite their request.

6. The Appellant's submitted that the dictates of Article 47 of the Constitution were intent on ensuring that there are enough controls to safeguard the rights and interests of persons. The Appellants relied on the case of **Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR**, where the court held that;

> *"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 rather than to the doctrine of ultra vires from which administrative law under the common law was developed."*

7. The Appellant further argued that the Respondent was required to follow the procedures set out in the Act and in particular **Section 34(2)(c)** of the Act and grant each undertaking an opportunity to present written representations to the Respondent which opportunity the Respondent denied the Appellant even despite several requests.

8. The Appellant stated that the powers and functions of the Respondent are subject to strict adherence and conformity to **Article 10 and 47** of the Constitution and ought to administered lawfully, reasonably and in a manner that is procedurally fair and respects the Constitution to avoid an unfair trial and miscarriage of justice was discussed.

9. To augment this position, the Appellant relied on the case of **Andrew Nthiwa Mutuku v Court of Appeal & 3 others [2021] eKLR** where the court held as follows:

> *"Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism...Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused....."*[12]

10. The Appellant argued that the issue of miscarriage of justice was discussed at length by the same Court in the case of **Zahira Habibullah Sheikh & Another vs. State of Gujarat & Others AIR 2006 SC 1367** where it opined that:-

> *"It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted...Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law: It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and pretence....."*[13]

11. The Appellant concluded by submitting that the denial of the Appellant's request to rebut and adduce evidence to challenge the Respondent's allegation occasioned miscarriage of justice and violated the Appellant's right to a fair hearing.

12. The Respondent's in response to the Appellant's submission, where the Appellant asserts that it was denied a fair hearing, claiming it was neither provided with the evidence relied upon by the Respondent nor afforded an opportunity to challenge or

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[13] *The same court The same Court in* ***Rattiram vs. State of M.P. (2012) 4 SCC 516*** *where the could arrived at the same holding*

interrogate that evidence, the Respondent submitted that, as stated in paragraph 20 of its Replying Affidavit, it fully complied with the requirements of a fair hearing. This was done in accordance with Article 47 of the Constitution, as read together with section 4 of the Fair Administrative Action Act (FAAA) and the Competition Act.

13. Furthermore, in response to the Appellant's assertion, the Respondent submitted that section 34 of the Act contemplates that upon conclusion of investigations and the Respondent proposes to make a decision of a finding of infringement of the Act, it is obligated to inform the Appellant through a NOPD containing its findings and the orders it intends to make against an undertaking. To this end, the Respondent issued the Appellant with a NOPD dated 4th May, 2022.[16]

14. Furthermore, the Respondent submitted that it supplied the Appellant with all the relevant bundles of evidence it relied upon in issuing the Notice of Proposed Decision (NOPD). These included, among others, evidentiary pieces numbered 8, 18, 23, 28, 31, 34, 35, 39, 40A, 41, 44, 45(A-F), 48, 50, 51, 52, 53(A-C), 56, and 57. On 30th August, 2022, the Appellant was also given the opportunity to present both written submissions and oral representations, thereby ensuring full compliance with the principles of fair administrative action.

15. Moreover, the Respondent's further submitted that it is required under section 34(2)(a) of the Competition Act as read together with section 4(3)(g) of the FAAA to duly supply every person whose right or fundamental freedoms are likely to be adversely affected by the administrative action, with information, material and evidence relied upon in making the decision or taking the administrative action and disclosure to the parties in the investigation.

16. The Respondent relied on the of **Majid Al Futtaim Hypermarkets Limited v Competition Authority of Kenya & another [2021] eKLR** where the Competition Tribunal held that:

> *"131. The said Notice duly notified the Appellant of the findings of the 1st Respondent and the orders it intended to make against the Appellant. The Notice called for evidence in rebuttal through written representations pursuant to section 34 (2) of the Act. The Appellant was also notified of its right to a hearing conference pursuant to section 35 of the Act.*
>
> *132. The Appellant insisted that it could not participate in the proceedings as the 1st Respondent had not provided it with all the evidence. Further, that the rules and procedure for the hearing conference had not been disclosed. The Appellant was*

[16] *Annexure BN. 2of the Respondent's Replying Affidavit - copy of the NOPD dated 4th May, 2022).*

also apprehensive that, according to the Notice of the Proposed Decision, a determination had already been reached without the Appellant's participation.

133. We have reviewed the procedure laid down at paragraph 34 and 35 of the Act, and we are of the opinion that the 1st Respondent acted according to the laid down procedure. The Appellant is only invited to bring evidence in rebuttal through written representations and conference hearing only upon issuance of a proposed decision.

143. We have, hereinabove, determined that the Appellant was supplied with all the documents that the 1st Respondent relied upon. We have also determined that the 1st Respondent followed the correct procedure as laid down in part E of the Act. We find that process does not require formal rules for it to achieve the threshold of natural justice. The Appellant was given adequate notice to rebut the evidence against it. The Appellant was also given an opportunity to be heard."

17. The Respondent further submitted that proceedings before it were administrative in nature and therefore the strict rules of evidence do not apply, as the correct and proper investigation process and administrative process to be followed is envisaged in Article 47 of the Constitution of Kenya, section 31-32 of the Competition Act as well as section 4 of the FAAA.

18. Further to the above, the Respondent submits that its obligation in sourcing the electronic evidence from the devices under investigation was to ensure that the custody, processing and delivery of the said electronic evidence was reasonable and procedurally fair to the party under investigation as captured in the Constitution, the Competition Act and FAAA and not section 106 B of the Evidence act.

19. Having considered the rival submissions we find that the Appellant was supplied with all the documents that the 1st Respondent relied upon in the NOPD. We also find that the 1st Respondent followed the correct procedure as laid down in part E of the Act. We also find that process does not require formal rules for it to achieve the threshold of natural justice. From the evidence placed before the Tribunal, the Appellant's was given adequate notice to rebut the evidence against it and also was given an opportunity to be heard."

20. We have taken note of the minutes of the meeting of 30th August, 2022 signed by the representative of both parties and in paragraph 18, the Appellant's former advocates observed that *"she finally appreciated the authority for according the appellant an opportunity for fair hearing and in the event the authority decision is aggrieved, they will make an appeal to the Tribunal and subsequently to the High Court."*

21. In the case of ***Miscellaneous Civil Application 220 of 2019*** **Aly** ***Khan Satchu v Capital Markets Authority [2019] eKLR.*** where the court held:

a. ***"that proceedings before CMA do not lie within the criminal sphere and cannot be classified as being criminal in nature. Accordingly, when CMA undertakes administrative and regulatory proceedings and imposes administrative penalties, the decision remains administrative in nature and falls within the four corners of the areas assigned to it by the legislature. It follows that the argument that CMA has no regulatory mandate over the applicant in allegations relating to Insider Trading just because they disclose a criminal offence fails."***

22. It is our considered opinion that the Appellant was furnished with all the evidence prior to the hearing of the matter. Further, the NOPD is not a final decision but a preliminary finding which the Appellant is invited to rebut. The Appellant addressed the evidence in both its written submissions and the oral case conference before the Respondent.

23. In view of the foregoing, we are satisfied that the Appellant was provided with all the evidence before the hearing and was given an opportunity to interrogate the same before a final decision was made. Consequently, this ground of appeal should fail and hereby fails.

ii) Whether the Appellant engaged in conduct that constituted an infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act (price fixing) and section 21(1) of the Act as read together 21(3)(e) of the Act (output restriction);

24. The Respondent made a finding that the Appellant's conduct constituted a violation of Section 21(1) of the Act, as read in conjunction with Sections 21(3)(a) and 21(3)(e) of the Act. The Respondent's demonstrated their position in various prongs:

    a) The nature of the offence of price fixing and output restriction

25. The stated that the Respondent's allegations of breach of the above provisions Sections 21(3)(a) and 21(3)(e) of the Act by the Appellant were based on Evidence 1, 2, 3, 6, 8, 19, 21A & B, 23, 26, 28, 31, 34, 35, 36, 38, 39, 40A, 41A, 44, 45, 48, 50, 51A, 51B, 52, 53A, 53B, 53C, 54, 55A, 55B, 55C, 56 and 57 which the Respondent allegedly collected during the search and seizures that were conducted during investigations and that it is all the evidence enclosed together with the Notice of Proposed Decision dated 4 May 2022 that was provided to the Appellant.

    a) **EVIDENCE 1**: an alleged email of 15 May 2018 from one Mr. Neelkamal Shah of Nail and Steel Products in which the Respondent alleges Mr. Devang, an alleged officer of the Appellant, was copied. The Respondent's relied on the email to allege that Mr. Shah proposed a revision of prices on sizes of Tubes Price List due to very low gross profit and also proposed revision of many 1mm items claiming weights were based on coils of 1.05mm.

26. According to the Respondent, this evidence comprised discussions on revision of sizes with the aim of increasing gross profit and margins and incriminated the Appellant. According to the Appellant the Respondent's allegations that the discussion was on revision of sizes with the aim of increasing gross profit and margins was purely speculative and unfounded for the following reasons:

    a. *As evidenced by paragraph 30 of the Decision, the alleged author of the email elaborated that the discussions were on standards.*

    b. *As evidenced by paragraph 32 of the Decision, the Chairman of the Metal and Allied sector clarified that the discussions were on standards and that is the reason why he was copied in the emails.*

    c. *As evidenced by the Statement of the Appellant's Managing Director, Mr. Kaushik Pandit (hereinafter referred to as "**Kaushik**"), appearing **at page 357 of the Appellant's Record of Appeal,** Kaushik clarified that Mr. Devang who was allegedly copied in the email is not an employee of the Appellant but works at a company known as Maisha Packaging. He further clarified that standards of products are recommended since manufacturers are part of the technical committee and then it is taken up by KAM. He was therefore of the view that the discussions were on standards to be recommended.*

27. The Appellant also noted that the representations of other companies or undertakings in response to the allegations of the Respondent in Evidence 1 were referenced by the Respondent in the Decision but the statements and representations of the Appellant were not considered nor referenced as having been considered despite the fact that Respondent proceeded to rely on Evidence 1 to hold the Appellant liable for the alleged restrictive trade practices.

28. Furthermore, the Appellant submitted that the use of Evidence 1 to incriminate it was unfair since they were not afforded the right to be heard or a fair hearing to respond to the allegation of discussing sizes with the aim of increasing gross profit and margins with competitors. Consequently, the holding of the Respondent was one-sided and pre-determined since the Respondent retained the same conclusions that formed the Notice of Proposed Decision to arrive at the Decision even despite receiving the statements of the representatives of undertakings excluding the Appellant whose statement was never considered by the Respondent.

29. The Appellant implored the Honourable Tribunal find that no evidence of a discussion on pricing and pricing decisions was present in the email and in place find that these were preliminary discussions by members of KAM on standards to be adopted by KEBS.

    b) **EVIDENCE 2**: an email of 24 September 2018 from one Mr. Nilesh Doshi of Doshi Group of Companies to Mr. Niral Salva of Tononoka. The subject of the email is "*Proposed Thickness for Tubes & Plates*" and it refers to a meeting of the members held at KAM on the morning of the same day.

30. In the email, Mr. Doshi initiates coordination of proposals and responses for standard of thickness of products so as to comply to the standard and a proposal was allegedly attached. In response, Mr. Niral of Tononoka who serves as the Vice-Chairperson of Pipes and Tubes sub-sector of the Metal and Allied sector of KAM requests that views or comments be given by the members by close of business 26 September so that members can agree on standards for plates thereafter.

31. That during the interviews following investigations by the Respondent, Mr. Nilesh in response to the Respondent's allegation that these were discussions on pricing of products submitted that the discussion was about creating a standard for plates which had stalled owing to Covid-19 pandemic and that KAM was aware of the discussion. Mr. Neelkamal also in response observed that plates do not have KEBS established standards and this discussion was the process of formulation of standards. This was also confirmed by Mr. Bobby Johnson, the Chairman of the of the Metal and Allied sector.

32. In response to the allegation under Evidence 2, the Appellant's officer, Mr. Kaushik, informed the Respondent that he was not the person copied in these emails and the "Kaushik" referred to is an employee of Mabati Rolling Mills which is a different undertaking. Furthermore, he clarified that the email seemed to refer to a formal meeting of KAM which was convened by the Metal and Allied sector in which each company had a representative in the Technical Committee. Mr. Kaushik further informed the Respondent that KAM gives recommendation for standards to be adopted and KEBS decides whether to follow or not. He indicated that the current standard used by KEBS is 15 to 20 years old and therefore the discussions in Evidence 2 related to review of the same.

33. The Appellant stated that the Respondent failed to consider the statement recorded on behalf of the Appellant which indicated that the meeting of 24 September 2018 presented in Evidence 2 seemed to be a meeting convened by the KAM in which every member of the Metal sector was represented to agree on measures to protect consumers of steel products from purchasing sub-standard products and give recommendations on standards of products to be adopted in Kenya before arriving at the Decision.

34. The Appellant submitted that the Respondent's conclusion in respect of Evidence 2 was unfounded, far-fetched and lacking any basis since the Respondent did not tender any evidence of the basis of forming these conclusions as the evidence used against the Appellant is purely hypothetical and circumstantial as it only incriminates the Appellant because a "Kaushik" from Mabati Rolling Mills and Mr. Devang who are not officers of the Appellant were copied in the email.

c) **EVIDENCE 23:** The Appellant argued that it was not given an opportunity to challenge Evidence 23 adduced against the Appellant on the allegations that they engaged in restrictive trade practices of Pricing and Pricing Decisions. This was evidenced by Mr. Kaushik's statement appearing at pages 354 to 359 of the Record of Appeal where no response to Evidence 23 that was noted down

35. According to the Appellants, the Respondent makes their desired conclusion, that the Kaushik referred to in Evidence 23 is, "*Mr. Kaushik Pandit of Devki*" without producing any evidence to support this conclusion. That there was no evidence of a statement or otherwise of the alleged author of the text, Mr. Neil, confirming that the person reported as having been talked to was Kaushik, an officer of the Appellant was according to the Appellant prejudicial.

36. In the upshot, the Appellant submitted that the Respondent's inference or conclusion that the Appellant was involved in pricing discussion based on Evidence 23 without affording the Appellant an opportunity to rebut or respond is unfair, farfetched, lacking any basis and prejudicial. Consequently, the Appellant reiterates that the Respondent had a desired outcome, and the Decision was predetermined since it can be noted that the conclusions that informed the Decision are similar to the conclusions formed in the Notice of Proposed Decision.

d) **EVIDENCE 57:** an alleged communication between third parties which does not involve the Appellant.

37. On Evidence 57, the Appellant submits that they were again not given an opportunity to challenge on the allegations that they engaged in price discussions. This evidence is further speculative since it does not prove the involvement of the Appellant in the alleged price discussions. The Appellant submitted that any finding that the Appellant engaged in price discussions on the basis of Evidence 57 is therefore misplaced and misconstrued as it is unfounded and lacking any basis.

e) **EVIDENCE 36, 45, 56** and **EVIDENCE 19, 26, 31, 34, 35, 38, 41, 48 and 50**

38. In evidence **45** the Respondent alleges that Mr. Gupta is seen to suggest that the Appellant is worried about sub-standard roofing sheets from China. It is alleged that he therefore indicates commitment and requests for a joint approach. Furthermore, the Respondent further alleges that one Mr. Manish confirms that there was a meeting of Steel Manufacturers held at Zen Garden on 14 September 2021 but no confirmation that the Appellant ever attended the meeting is given.

39. However, from the MRM internal email, the Respondent deduced that participants included the Appellant who may have agreed to increase the price and that suggestions and or discussions to increase prices were floated in this meeting without any confirmation.

40. In **Evidence 36** which the Respondent alleges is a communication of 21 November 2020 confirming a meeting to be held at Zen Garden, the Respondent claims the one Mr. Kush suggests that there will be a meeting to be held at Zen Garden on 21 November 2020 at 9 a.m. However, there is no mention that the Appellant attended. The Appellant states that no evidence of a statement or otherwise of the alleged author of these texts confirming that the Appellant attended these alleged meetings is presented by the Respondent.

41. **In Evidence 56** is further alleged to be an excerpt from a report alleged to be the "*Daily Sales Report*" of the Appellant which points out that there is an existence of price agreements between competitors where the Respondent alleges that the Appellant was complaining of failure by competitors to increase prices. The Respondent purports to rely on this Evidence 56 which is an incomplete document that does not lay any nexus of the Appellant's involvement in pricing of products since it cannot also be ascertained that Evidence 56 is an excerpt of a report created by the Appellant. The reason for the Respondent's failure to annex the full report to ascertain the author is unexplained and the Appellant thus submits that reliance of Evidence 56 was unfair and prejudicial to the Appellant.

42. Additionally, the Appellant argued that it was not given an opportunity to challenge Evidence 56 adduced on the allegations that the Appellant engaged in price discussions as evidenced by the statements appearing at pages 354 to 359 of the Appellant's Record of Appeal. Reliance on Evidence 56 is thus not only prejudicial and unfair but also speculative since the Appellant was not given an opportunity to examine the full report relating to the same.

43. According to the Appellant the Respondent purports to also rely on Evidence 19, 26, 31, 34, 35, 38, 41, 48 and 50 to prove alleged communications and meetings held to discuss alleged pricing of products and incriminate the Appellant but no evidence or even a basis to prove the involvement of the Appellant in these discussions or a confirmation by the authors that the Appellant ever attended these meetings is adduced since even in responses by other undertakings the Appellant is neither stated to have called for such meetings nor participated in it.

44. Additionally, on whether the Appellant was privy to the alleged agreements between undertakings (if any exists)? The Appellant sought to answer this question through an examination of the legal doctrine of privity of contract to determine whether the Appellant was a party to the alleged agreements on Pricing and Pricing Decisions. According to the Appellant, the legal doctrine of privity of contracts postulates that a contract cannot confer liability, rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.

45. To buttress this point, the Appellant relied on the High Court case of **Mark Otanga Otiende v Dennis Oduor Aduol [2021] eKLR** where the court further cited the case of **Agricultural Finance Corporation v Lengetia Ltd**, quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, which reiterated that:

> *"As a general rule, a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the*

consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

46. In the case of **Shanklin Pier vs Detel Products Ltd [1951] 2 KB 854** cited with approval in **Mark Otanga Otiende v Dennis Oduor Aduol [2021] eKLR**, the court also held as follows:

> *"66. The doctrine of Privity of Contract is a long-established part of the law of contract. It is one of the fundamental principles of the English Contract law. The essence of the Privity rule is that only the parties that actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Basically, it advances that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party."*

47. The Appellant submitted that central to proving the Appellant's alleged infringement of Section 21 of the Act *which prohibits any person from entering into 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,* the Respondent should first prove existence of the alleged agreement between the Appellant and other undertakings and the participation of the Appellant in negotiations for the agreements. Therefore, the Appellant notes that the evidence relied on by the Respondent to allege and prove that the Appellant engaged in agreements as stated in paragraph 118 of the Respondent's Decision was based on, *"the mere fact that it was copied in the email is sufficient to infer that it was a participant in the conduct together with other steel manufacturers and distributors."*

48. The Appellant contended that the Respondent's reliance on the case of **Toshiba Corp. vs European Commission Case** which is different from the circumstances facts obtaining in the present case and therefore irrelevant. This is because whereas the Respondent has failed to prove any direct or indirect participation of the Appellant in their allegation of existence of agreements relating to pricing and pricing decisions with other undertakings, the case relied on was one in which an undertaking was proven to have indirectly participated in meetings with anti-competitive object.

49. In response to the Appellants submissions, the Respondent commenced by highlighting Section 21(1) of the Act as read together with section 21(3)(a)(e) of the Act states as follows:

Section 21

(1) 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.

3) 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;

50. According to the Respondent, the Act prohibits any agreement, decision or concerted practices by undertakings whose object or effect is to prevent, distort or lessen competition of goods or services in Kenya unless it is exempt as provided under the Act. The Act further provides a non-exhaustive list of the prohibited agreements, decisions or concerted practices and in this matter, it was price fixing. The Respondent further brought to the attention of the Tribunal of definition by The Federal Trade Commission that define price fixing as an agreement (written, verbal, or inferred from conduct) among competitors that raises, lowers, or stabilizes prices or competitive terms.

51. Further, the Respondent highlighted clause 30 of the Consolidated Guidelines on Restrictive Trade Practices under the Competition Act ("Consolidated Guidelines ") which defines price fixing as: fixing the price itself; or fixing an element of the price such as fixing a discount, setting percentage price increase; setting the permitted range of prices between competitors; setting the price of transport charges (such as fuel charges), credit interest rate terms and an agreement or arrangement to indirectly restrict price competition in some way such as recommended pricing.

52. The Respondent further submitted that price fixing can take various forms and is not limited to the outright forms of what encompasses price fixing. To augment this point, the Respondent's made reference to the Competition Law, (7th Edition) book at page 523, which states that: *"It is also important to appreciate that prices can be fixed in numerous different ways, and that a fully effective competition law must be able to comprehend not only the most blatant forms of the practice but also a whole range of more subtle collusive behaviour whose object is to limit price competition."*[17]

53. Moreover, clause 39 of the Consolidated Guidelines on output restriction whereupon the Respondent posits that it occurs when competitors agree to prevent, reduce or restrict supply with the aim of creating scarcity with the sole aim of increasing prices or counter falling prices. The Respondent's notes that this can be inferred where the arrangement directly or indirectly prevents, restricts or limits the production, or likely production, of goods by any or all of the parties to the contract, arrangement or understanding, the capacity, or likely capacity, of any or all of the parties to the

[17] See page 6 Paragraph 22 of the Respondent's written submissions.

contract, arrangements or understanding to supply services, the supply, or likely supply, of goods or services to persons or classes of persons by any or all of the parties to the contract, arrangement or understanding.

54. Consequently, the Respondent submitted that it was a concerted practice which as defined in section 2 of the Act is a co-operative or coordinated conduct between firms, achieved through direct or indirect contact, that replaced their independent action, but which did not amount to an agreement. [14]

55. The Respodents relied on the case of ***Commission v Anic Partecipazioni, C 49/92 P, EU:C:1999:356 which defined*** concerted practice as:

> "..... *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*....."

Furthermore, the Respondent submitted that Clause 12 of the Consolidated Guidelines provides that a concerted practice can include any type of coordinated activity between undertakings which substitute practical co-operation between them for the risks presented by effective competition, and includes any practice which involves direct or indirect contact or communication between undertakings, the object or effect of which is either to influence the conduct of undertakings on a market or to disclose the course of conduct which an undertaking has decided to adopt or is contemplating to adopt in circumstances where the disclosure would not have been made under normal conditions of competition.

56. According to the Respondent, the concerted practice in the present case was between parties in a horizontal relationship, being undertakings trading in competition as described under section 21(2) (a) of the Act. Clause 27 describes a horizontal agreement is an agreement between undertakings which operate at the same level of the value chain.

57. The Respondent further relied on ***Competition Commission v South African Breweries Limited and Others*** **(129/CAC/Apr14) [2015] ZACAC 1; 2015 (3) SA 329 (CAC) (2 February 2015)** "*where the South African Competition Appeal Court followed the European Commission in its Guidelines to Technology Transfers Agreements (2004) which states that:-*

> ***'In order to determine the competitive relationship between the parties it is necessary to examine whether the parties would have been actual or potential competitors in the absence of the agreement. If without the agreement the parties would not have been actual or potential competitors in any relevant market affected by the agreement they are deemed to be non-competitors.'***

[14] See page 7 Paragraph 24 of the Respondent's written submissions.

51. The characterization principle above if applied to the Appellant shows that the nature of the agreement as exhibited in the Appellants rulebook i.e. brokers members be the only ones to offer tea for sale at an auction and producer members barred from acting as brokers shows that in absence of the agreements, brokers can compete with the producers.

52. Applying the characterization principle established in the case of ***Competition Commission v South African Breweries Limited and Others*** *(Supra) leads us to the conclusion that the members of the Appellant are in a horizontal relationship. Consequently, any price fixing within the auspices of the Appellant can be termed as a horizontal restriction.*

58. Furthermore, the Respondent emphasized on the provisions of clause 27 of the Consolidated Guidelines, which provides that horizontal collusive agreements are subject to "object" assessment, that is, strict or per se scrutiny for which no defences can be asserted and that the Respondent will only consider the content and nature of the agreement and not the effect of the agreement.

59. The Respondent further relied on the case of ***Case C-105/04 P Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission [2006] ECR I- 8725***, where at paragraph 125 of the Judgement, the Court held that:

> *"That paragraph of the judgment under appeal reveals no error of law on the part of the Court of First Instance, since, for the purposes of applying Article 81(1) EC, 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 within the common market....."*

60. The Respondent further submitted that clause 28 of Consolidated Guidelines provides for instances where the concerted practice is between undertakings in a horizontal relationship, therefore it is considered that the conduct is a hardcore restriction and that is by its very nature injurious to the proper functioning of competition and has no redeeming value whatsoever

61. The Respondent further submits that as noted under clause 29 of the Consolidated Guidelines, price fixing between undertakings in a horizontal relationship are hardcore restrictions that is by their very nature injurious to the proper functioning of competition and have no redeeming value whatsoever. This means that price fixing between undertakings in a horizontal relationship have automatically as their object the restriction of competition and therefore once established, there is no need to show effect of the conduct in the market.

62. The Respondent drew similarity of the Kenyan competition framework, the EU Courts and the European Commission on how they consider price-fixing agreements that inherently restrict competition under Article 101(1), thereby obviating the need to

demonstrate their actual effect on competition, as articulated on page 523 of the "Competition Law" (7th Edition).

63. The Respondent submitted that the price-fixing conduct engaged in by the Appellant was a concerted practice as it was coordinated activity between the steel manufacturing and distribution companies which substituted practical co-operation between them for the risks presented by effective competition.

64. Furthermore, the Respondent submits that there was direct contact and communication between the steel manufacturing and distribution companies with the object to influence the conduct of the companies on the market.

b Appellant's engagement in a concerted horizontal practice; price fixing

65. The Appellant argued The Respondent presented alleged price lists of the Appellant and compared them to the price list of other undertaking to infer the conclusion that the price lists indicated they were released at the same time and were exactly the same save for the logos of undertakings. This was demonstrated through Evidence 53A, 53B, 53C and 53D. However, out of the pricelists presented only one price list of the Appellant, the pricelist annexed as Evidence 53D, contains prices list for Black Pipes that had similarity in prices with prices of other undertakings and therefore the reliance of this pieces of evidence is unfounded and speculative and not even near circumstantial.

66. The Appellant challenges the allegation of simultaneous price revisions and exactness of prices and explains the reason for the Appellant's price revision of products which was influenced by the factors for example: the fluctuations of the United States Dollar and global cost of raw materials; a cash discount of 1.5% given by the Appellant to its customers. These discounts are dependent on the international pricing and the discount structure is dependent on payment terms and finally when the Appellant feels that there is an oversupply of the products, the Appellant is competitive in its pricing. These factors and explanations therefore disproved the allegation of simultaneous price revisions and exactness of price despite the Respondent failing to consider the same while inferring the conclusion that there was simultaneous price revisions and exactness of pricelists and arrive at its Decision.

67. Furthermore, that there was no evidence was tendered to point to collusion by the Appellant with other undertakings to jointly review prices and the Respondent relied on a mere coincidence of companies releasing prices at the same time which was turned to the disadvantage of the Appellant to prove the Respondent's allegation.

68. The Appellant argues that the evidence adduced by the Respondent is filled with generalities and only proves mere coincidence of price revisions but does not prove the alleged offence of agreements or collusion to fix prices committed by the Appellant. The appellant implored the Tribunal to be persuaded by the case of **Builders Association of India v. Cement Manufacturers' Association & Ors., 2012 CompLR 629** in which the Competition Commission of India (hereinafter the

"**CCI**") found that 11 cement manufacturers had colluded to control and limit production and supply of cement in India, and had acted in concert to maintain prices of cement at a high level, and that the actions of the cement manufacturers, together with the Cement Manufacturers Association ("CMA"), satisfied the definition of a "cartel" under the Competition Act.

69. In this Indian case decision, the CCI based its finding ***not only on the parallel movement of prices of cement in different geographical zones in India*** but also considered other additional factors presented such as:

a. Difference in the cost of production for each company;

b. Collection and distribution of data regarding production and capacity ***by the CMA to its members****;*

c. Evidence of a concerted restriction in supply of cement at given points in time; and

d. Statements of executives from certain smaller cement companies who stated that they followed price trends set by the larger cement companies hence the CCI found that the cement manufactures had indulged in price signaling practices resulting in coordination in prices across cement manufacturers.

70. To the Appellants, these pertinent additional factors require consideration before finding an undertaking liable for concerted practices i.e. concerted restriction in supply at given points in time, collection and distribution of data regarding production and capacity and evidence of difference in the cost of production for each company were not considered by the Respondent before arriving at the Decision

71. The Respondent's in response submitted that evidence 1 (Annexure marked BN. 5) which was an email of 15th May, 2018 from Mr. Neelkamal Shah of Nail & Steel Limited sent to Mr Niral Salva of Tononoka indicated the existence of concerted price fixing practice among steel manufacturers and distributors. According to the Respondent's, the following were copied in the email Brollo Kenya, Mr Nilesh Doshi of Doshi, Prakash of MRM/Safal group, Mr Murtaza of Tarmal, Mr Suraj of Corrugated, Mr Kunal Gupta of Athi Steel, **Mr Devang of Devki Steel**, Mr Neil Nathwani of Apex and Prabu of MRM and Amarjit Singh of Accurate.

72. The Respondent further submitted that the subject of the email was pricing and in the said email, Mr Neelkamal Shah indicated that they had spoken the previous week and many ***sizes*** on the ***tube pricelist*** needed to be revised as their ***gross profit margin*** was

low and, in some cases, ***negative*** for the 20*20*1, 25*25*1 40*40*1.2 and 30*30*1.2. The email further indicated that for the 20*20*1 they **were all** left with KES 12 to KES 13 ***gross profit*** and on 25*25*1 about KES 15 per length of 6 metres. Mr Niral Salva was tasked to look into it as they **were *all*** pushing huge tonnages but with ***no margin.***

73. According to the he Respondent, the discussions were on the revision of sizes with the aim of increasing their gross profit and margins. This is emphasized by the subject matter of the email which was "*pricing*". To emphasize further the Respondent relied on:

    a. That Niral Savla of Tononoka confirmed that the said email seemed like a price list revision though he does not recall seeing the particular email.[19]

    b. That Mr. Avraj Bhachu of Accurate indicated that the said email by steel manufacturers was in fact in support of the production of standards set up by the Kenya Bureau of Standards (KEBS) and that though there had been standard discussions within the industry, Accurate only produces what is required and does not engage in the discussions to reduce or increase thickness.[20]

    c. That Mr. Suraj Patel of Corrugated indicated that he received the email but did not respond to it. He further stated that he wouldn't know what was meant by the phrase that "sizes on the pricelists need to be revised"[21]

74. Furthermore the Respondent, relied on Evidence 2 (Annexure marked BN-7 in the Replying Affidavit of Benson Nyagol dated 2nd October 2023) which was an email of 24th September 2018 from Nilesh Doshi of Doshi, to Niral Savla, of Tononoka and also Chairman of the Pipes and Tubes sub-sector in KAM further illustrated the existence of concerted price fixing among steel manufacturers and distributors among them being the Appellant. In copy were Neil Nathwani of Apex Group and also Chair of Hot Rolling sub- sector, Kishore Gangadharan of Insteel, Prakash Chauhan of Safal Group, Neelkamal Shah of Nail & Steel Limited, Suraj of Corrugated, Kunal Gupta of Athi Steel, Ketan Doshi of Brollo, Jateen Patel of Abyssinia, Kaushik Pandit of Devki, Murtaza Tarmal of Tarmal Wire Products Limited, Davinda Bhachu of Accurate, Devang of Devki and Bobby Johnson of Steel Makers Limited.

75. It is the Respondent's submission that the attachment by Mr Nilesh Doshi in Evidence 2 confirmed the existence of a standard for water pipes thickness at the time of discussion as Kes.259 and Kes.109. Moreover, the Respondent stated that steel manufacturers were discussing the minimum tolerance to be adhered to by all, even when the standard allowed for a range within which the companies could operate, which in effect was a

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[19] See page 11 Paragraph 39(i) of the Respondent's Written Submissions.
[20] See page 11 Paragraph 39(ii) of the Respondent's Written Submissions.
[21] See page 11 Paragraph 39(iii) of the Respondent's Written Submissions.

discussion on minimum thickness.

76. Furthermore, the Respondent submitted that a column titled "standard thickness," along with two subsequent columns labelled "suggested minimum thickness" and "HR coils - suggested coils to be imported," demonstrates the existence of a recognized standard for water pipes. According to the Respondents, Evidence 2 further establishes that this standard for imported plates directly affects steel product pricing. Consequently, the email in question was an invitation for companies to coordinate the importation of similar sizes and thicknesses with the intent to align pricing strategies, thereby restricting competition. The Respondent contends that where a regulator has established such a standard, it is incumbent upon the regulated entities to independently and unilaterally determine acceptable tolerance levels, provided they comply with the prescribed standards. However, in this instance, Evidence 2 indicates a departure from these obligations.

77. In response to the Appellant's submission in paragraphs 23 to 33 of their Submissions that it did not engage in the discussions, its involvement was not expressly stated and that it cannot be condemned for merely receiving an email, the Respondent submitted that the fact that it was copied in the thread shows that it was a participant as there are many steel manufacturing and distribution companies but only specific companies were copied in the email.[22]

78. According to the Respondent, the fact that the Appellant was copied in the emails and by failing to distance itself in the prescribed manner or report the conduct to the Respondent, it passively participated in the conduct in question and is therefore liable for price fixing contrary to section 21(1) of the Act as read together with section 21(3)(a) of the Act.

79. In addition, the Respondent submitted that another instance of price coordination occurred on 23rd January 2020, when Mr Samir Patel of Apex communicated via WhatsApp with Mr Kush Nathwani, also of Apex, regarding the deformed bar pricelists scheduled for implementation on Monday, 20th January 2020. Mr. Patel noted that the pricing had been confirmed by key industry players, namely Devki, Abyssinia, Blue Nile, Jumbo, and Tanmal (as evidenced in Exhibit 52, annexure marked BN-12 in the Replying Affidavit). According to the Respondent's the communication further illustrates the coordinated efforts among competitors to influence market prices, which constitutes a violation of competition principles.[23]

80. Moreover, the Respondent submits that from a reading of evidence 52, there was a discussion and agreement by the companies mentioned including the Appellant to increase deformed bars prices. Additionally, Evidence 23 reveals a WhatsApp communication dated 20th August 2020 between Mr Kush Nathwani and Mr Neil Nathwani, both of Apex, in which Mr Neil reported a conversation with **Mr Kaushik Pandit of Devki**. During this discussion, it was confirmed that new prices for rebars

[22] See page 12 Paragraph 43 of the Respondent's Written Submissions.
[23] See page 12 -13 Paragraph 45 of the Respondent's Written Submissions.

would take effect on Monday, 24th August 2020, and for tubes on 1st September 2020. The Respondent submits, based on this evidence, that steel manufacturers and distributors were colluding by sharing future price changes, including their effective dates, with competitors, as detailed in annexure BN.8 of the Replying Affidavit clearly demonstrates coordinated anti-competitive practices aimed at manipulating market prices.[24]

81. The Respondent posits that the Appellant's attempt to distance itself from the allegations of price-fixing, by asserting that Mr Kaushik and Mr. Devang are not their employees, is futile. The respondent's stated that during a lawful search and seizure conducted in full compliance with the Data Protection Act No. 24 of 2019, the Respondent obtained emails directly addressed to the Appellant's Mr Devang via *"devang@devki"* as indicated in B.N 6 of the replying affidavit, from other entities in the steel sector, explicitly discussing price-fixing activities. This clear evidence underscores the Appellant's involvement, irrespective of its claims, and demonstrates a coordinated effort to manipulate market prices in violation of competition law. [25]

82. The Respondent avers that the pieces of evidence illustrated the Appellant's participation in price discussions with its competitors which is per se a prohibition under section 21(1) of the Act as read together with section 21(3)(a) of the Act and the Appellant has not produced evidence or provided any plausible explanations to exonerate them from the finding of their culpability of the offence of engaging in price fixing.

83. According to the Respondent the discussions on prices between competitors are strictly precluded by section 21(1) of the Act as read together with section 21(3)(a) of the Act as it restricts price competition between companies. The Respondent relied on the case of ***Case T-587/08 Fresh Del Monte Produce vs Commission*** wherein the Court held:

> ***302. While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question****, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market (see, to that effect, Suiker Unie and Others v Commission, paragraph 151 above, paragraph 174; Züchner, paragraph 301 above, paragraph 14; John Deere v Commission, paragraph 301 above, paragraph 87; and TMobile Netherlands and Others, paragraph 297 above, paragraph 33).*
>
> ***303 It follows that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that***

[24] See page 13 Paragraph 47 of the Respondent's Written Submissions.
[25] See page 13 Paragraph 48 of the Respondent's Written Submissions.

competition between undertakings is restricted *(John Deere v Commission, paragraph 301 above, paragraph 90; Case C194/99 P Thyssen Stahl v Commission [2003] ECR I10821, paragraph 81; and TMobile Netherlands and Others, paragraph 297 above, paragraph 35).*

84. The Respondent further submitted that the adherence by the concerned parties to the discussions is not required for a finding of infringement of section 21(1) of the Act as read together with section 21(3)(a) of the Act. To buttress this position, the Respondent relied on the decision in ***Associated Lead Manufacturers Ltd (White Lead) v OJ [1979] L 21/16, [1979] 1 CMLR 464;***

> *Where the Commission held that it was irrelevant that the quotas were not always meticulously observed: an agreement did not cease to be anti-competitive because it was temporarily or even repeatedly circumvented by one of the parties to it.*

c) Appellant's engagement in a concerted horizontal practice; output restriction

85. According to the Appellant, the Respondent alleged that there were engagements between parties through various fora like meetings, WhatsApp messages and emails that demonstrated that parties under investigation coordinates their pricing and output decisions and found that the Appellant was engaged in coordinated practices with other steel manufacturers on price fixing and output restriction but the Respondent failed to present evidence to support this allegation since all the evidence presented was hearsay, circumstantial and based on hypothesis.

86. The Appellant notes that Respondent presented Evidence 3, 28, 39, 44, 45(e), 50, 55A, 55B, 55C to support their contention that the Appellant allegedly engaged in conduct with the aim of restricting output. However, none of the evidence presented implicates the Appellant to the allegation of output restrictions and coordination, monitoring and consequences of deviation since this was all evidence obtained from third parties, that is alleged communications, analysis of imports, stock levels and emails that have no bearing on the case against the Appellant and therefore the Respondent's conclusion that the Appellant engaged in monitoring of players on quantities, stocks of raw materials and monitoring of stock levels as well a restriction on the importation of raw materials was erroneous, misleading and misplaced.

87. Additionally , Evidence 3 that is alleged to be Minutes of the Tubes Subsector Committee of KAM meeting held on 13 November 2019 at 8:30 a.m. at KAM Boardroom which the Appellant is alleged to have attended yet it is not confirmed to be a meeting that happened. The Appellant posits that despite the minutes annexed as Evidence 3 being unsigned, the evidence pertains to an official meeting of members of KAM to address a prevailing issue of sub-standard 0.9mm plates that had flooded the market where it was agreed that all actions to be taken were to be taken by all. It was the Appellant's submission that such an agreement (if at all it existed) was not an agreement that had the object or effect of prevention, distortion or lessening of competition in trade in any goods or services in Kenya but rather it was a discussion

on proposal for standards required to be adopted for products in which KAM and all members were formally engaged.

88. The Appellant submitted they were neither aware nor privy to and did not send any representative to attend or participate in the alleged meeting in which the Respondent alleges the main agenda was to restrict importation of 0.9mm coils and plates from China. The Appellant is therefore not privy to any decision reached in the alleged meeting held on 13 November 2019 at 8:30 a.m. at KAM Boardroom if at all any such meeting was held.

89. Moreover, the said attendance by Mr. Geoffrey who is alleged to have attended the meeting on behalf of the Appellant was not afforded an opportunity to respond to the allegations noting that he was not summoned by the Respondent, and he was no longer an employee of the Appellant.

90. With respect to Evidence 45(e) relied on by the Respondent in which it is alleged that one Mr. Manish confirms that there was a meeting of Steel Manufacturers held at Zen Garden on 14 September 2021 in which the Appellant was represented to discuss Kenya Re-bars market, the Appellant submitted that the Respondent did not accord them the opportunity to challenge this piece of evidence before relying on it to find the Appellant culpable and arriving at the Decision.

91. The appellant noted that the Respondent uses Evidence 28 which is communication that allegedly happened in the year 2016 to corroborate Evidence 45E on an alleged meeting held in September 2021, Evidence 31 on an alleged meeting that happened in November 2018 and Evidence 39 on an alleged discussion that occurred in November 2018. The Appellant further sated the Appellant is an artificial person and therefore the Respondent cannot purport to claim that the Appellant attended the meeting without specifically pointing out the specific persons who represented the Appellant so that these persons can be called to deny or confirm involvement of the Appellant and controvert allegations raised, consequently such evidence fails to meet the required standard of proving restrictive trade practices and therefore violates constitutional provisions of Article 47 of the Constitution which protects the right to Fair Administrative Action and provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

92. The Appellant's submission as to the issue whether the Appellant entered into agreements with other undertakings which agreements had as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, the Appellant concludes as follows:

a. *From the onset, the Respondent has failed to discharge the burden of proving existence of the alleged agreement between the Appellant and other undertakings and the participation of the Appellant in negotiations for the agreements that allegedly infringed Section 21 of the Act which prohibits any person from entering into 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.

b. *The Appellant invites this Honourable Tribunal to take note of the prejudice occasioned by the Respondent's reliance on the evidence of alleged third-party communications in emails and phones and third-party meetings in which no officer of the Appellant is proved to have attended.*

c. *Furthermore, there was great lapse of time noting that as evidenced by statements appearing at page 354 of the Record of Appeal, interviews of the respective third parties were conducted in the year 2022 and in this regard, the Appellant thus submits that in the end, delay dims memories and witnesses forget as evidenced by* ***paragraph 51 of the Respondent's Decision*** *where the Respondent confirms that evidence regarding the agenda of meetings could not be controverted because members of undertakings could not recollect having held the meetings in the first place.*

d. *We submit that the vagaries of time do not spare evidence and neither should this Honourable Tribunal since there are perspectives and dynamics of why some communications happened, why some meetings were held and why some actions were taken. Like in the present case because, at least in part, time has been allowed to pass before investigations were done and the Decision of the Respondent rendered, evidence of unsupported documents presented that date back to 4 years before hearings were conducted should not be heavily relied on and deemed uncontroverted based on failure of persons to recall the happenings of events relating to the same.*

e. *To this end, the evidence presented by the Respondent depended on memories of third-party witnesses or on documents and any delay would be prejudicial to an accused person especially where the evidence is circumstantial evidence and not direct such as the evidence used to hold the Appellant liable. In the case of* ***Republic v Boniface Isawa Makodi [2016] eKLR,*** *the court citing with approval the case of* ***Mohamed & 3 Others v Republic [2005] 1KLR 722 Osiemo J*** *as he then was explained what circumstantial evidence constitutes as follows:*

> *"Circumstantial evidence means evidence that leads to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue.*
>
> *The circumstances should be of a conclusive nature and the tendency and they should be such as to exclude every hypothesis but the one proposed to be proved."*
>
> *In the case of* ***Mwangi & Another v Republic [2004] 2KLR 32*** *the court of appeal held thus:*
>
> > *"In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its*

strength before the whole chain can be put together and a conclusion drawn that the chain of events as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge."

f. *It is the Appellant's submission that the circumstantial evidence relied on by the Respondent to prove hypothesis and reach the conclusion that the Appellant participated in agreements for price fixing of products and output restriction with other undertakings does not meet the required strength of a "chain that can be put together and a conclusion drawn that the chain of events as proved is incapable of explanation on any other reasonable hypothesis."*

g. *On the issue of lapse of time and reliance of age-old evidence which was used against the Appellant, the Appellant places reliance on the case of* ***Diamond Hasham Lalji & another - v- Attorney General & 4 others [2018] eKLR*** *in protest where it was held that:*

> *"[61] .... In view of the fact that the 5th respondent set in motion the criminal investigations twelve years after the commission of the alleged offences, and after encountering difficulties in the prosecution of the suits, the delay itself would, in the circumstances of the case be prolonged delay rendering the prosecution unfair and unjustifiably oppressive to the appellants and thus amounting to abuse of process." (Emphasis ours)*

h. *The Appellant further submitted that the Respondent was the judge and jury that had a pre-determined decision desired to be delivered against the Appellant, failed to exercise restraint and proceeded to make findings and conclusions. This is evidenced by the fact that conclusions made in the Decision were similar and resembled the Notice of Proposed Decision despite receiving the representations and statements given by the Appellant's Managing Director, one Kaushik and statements from other undertakings. This was contrary to the legal tenets of fairness and the requirement that justice must be seen to be done.*

i. *The findings of the Respondent were generalized and devoid of material facts obtaining in each case which was unfair to the Appellant since the Appellant was required to respond to evidence and facts which they were unaware of, were not relevant to the case against the Appellant and had no basis, foundation or bearing on the Appellant's case. The Respondent nonetheless proceeded to rely on these third-party communications to decide the Appellant's case.*

j. *The Respondent failed to draw a line and differentiate between prohibited anti-competitive acts and honest practices in industrial or commercial matters in pursuit of agendas and proposals formulated under the umbrella association of the KAM to drive the agenda on standards of products to be adopted in Kenya and to this end, there is a clear desire by the Respondent to implicate and indict the Appellant despite there being no cogent or credible evidence adduced to the required standard.*

k. *The Tribunal is invited to examine the evidence and facts tendered by the*

Respondent to prove that the Appellant engaged in restrictive trade practices which had the object or effect of ***"directly or indirectly fixes purchase or selling prices or any other trading conditions"*** *or* ***"limits or controls production, market outlets or access, technical development or investment".***

I. *The Appellant submits that in considering some of the evidence used against the Appellant such as Evidence 3 and finding the Appellant in breach of Section 21 of the Act, the Respondent failed to apply the correct test, that is the test of what the object or effect on competition in the market as held in the* ***Société Technique Minière v Maschinenbau Ulm [1966] ECR 235*** *where the court in considering whether an agreement breached competition laws held as follows:*

> *"...The agreement must have as its object of effect the prevention, restriction or*
> *distortion of competition. When the object of the exclusive dealing agreement is considered, this finding must result from all or some of the clauses of the agreement considered in themselves.*
> *In the absence of these conditions' being met, the consequences of the agreement must then be examined and must justify the conclusion either that the agreement prevents or that it restricts or distorts competition."*

93. In response to the Appellants submission on output restriction, Respondent submitted that output restriction arises when competitors collude to intentionally limit, reduce, or obstruct the supply of goods or services, with the objective of creating artificial scarcity to inflate or maintain higher prices, or to counteract declining prices. Such an arrangement may be inferred where it directly or indirectly restricts or limits the actual or potential production of goods by any or all parties involved, the capacity or potential capacity of the parties to supply services, or the supply, or anticipated supply, of goods or services to specific persons or groups. This conduct, whether explicit or implicit, constitutes an anti-competitive practice aimed at distorting market conditions.
94. The Respondent submitted that based on evidence 45A, 45B, 45C, 45 Dand 45E, annexures marked BN.11(a), BN.11(b), BN.11(c) and BN.11(f) in the Replying affidavit, that an email dated 11th September 2021 from Mr. Abhijeet requested the preparation of discounts ahead of a scheduled metal sector meeting on Monday, 14th September 2021, at Zen Gardens to discuss the Kenya re-bars market. Key points discussed included:
    a. Availability of 1 mm by some manufacturers, mainly with Abyssinia;
    b. Discussion on how to prevent the < 1 mm pipes and tubes coming from Uganda;
    c. 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; and
    d. Submissions alluding that Abyssinia/Prime had overstocked and had over 5k of 1mm.[26]

[26] See page 15 Paragraph 53 of the Respondent's Written Submissions.

95. Further the Respondent submitted that, in an internal email dated 15th September 2021, a day after the meeting, Mr Manish Mahra of MRM reported that MRM should not be involved too much in industry price discussion lest it was seen working in a cartelized manner. In addition to that he noted that there were some manufacturers like Apex and **Devki** among others who had stepped out. Therefore, it was the Respondent's submission that the appellant was found culpable of engaging in output restriction contrary to Section 21(1) of the Competition Act as read together with Section 21(3)(e) of the Competition Act. [27]
96. Moreover, the Respondent further submitted that based on Evidence 3 which comprises the minutes of the tube sub-sector committee meeting held on 13th November 2019 at 8:30 am in the KAM Boardroom 2, during which the Appellant was represented by Mr. Geofrey Mbithi. The agreed action points from the meeting were that Kenyan manufacturers would inform their suppliers of a decision not to import 0.9 mm coils and plates, and that all members of the tube sub-sector were to refrain from importing these items. This is evidenced by annexure marked BN.22 in the Replying Affidavit, referred to as Evidence 2. [28]
97. According to the Respondent's, MRM, Insteel, Abyssinia, Devki, Jumbo, Doshi, Corrugated, and Tononoka convened and collectively agreed to restrict the importation of 0.9 mm coils and plates. This concerted action effectively foreclosed the market to Chinese suppliers, whose competitive pricing had negatively impacted their profit margins. This agreement to limit imports was a deliberate anti-competitive measure aimed at protecting the participants' market position and profitability at the expense of free competition. [29]
98. The Respondent submitted that having established that the Appellant attended the anti-competitive meeting demonstrated in Evidence 45E, the Appellant, by merely denying attendance of the meeting has failed to distance itself from the cartel in the manner required to exonerate them of participation. The Respondent relied on the case of **Case T-83/08 Denki Kagaku Kogyo Kabushiki Kaisha and Denka Chemicals GmbH v Commission**, where the Court held that the Appellants' mere denial and failure to provide a possible alternative explanation for their presence at that meeting did not amount to them distancing themselves from the cartel in the manner required by the case-law. The Court stated as follows:

> *52. When agreements of an anti-competitive nature are reached at meetings of competing undertakings, it is sufficient for the Commission to establish that the undertaking concerned participated in meetings during which agreements of an anti-competitive nature were concluded in order to prove that the undertaking participated in the cartel. Where participation in such meetings has been established, it is for that undertaking to put forward indicia to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from*

[27] See page 15 Paragraph 54 of the Respondent's Written Submissions.
[28] See page 16 Paragraph 56 of the Respondent's Written Submissions.
[29] See page 16 Paragraph 57 of the Respondent's Written Submissions.

theirs. The reason underlying that rule is that, having participated in the meeting without publicly distancing itself from what was discussed, the undertaking gave the other participants to believe that it subscribed to what was decided there and would comply with it (see Joined Cases C-403/04 P and C-405/04 P Sumitomo Metal Industries and Nippon Steel v Commission [2007] ECR I-729, paragraphs 47 and 48 and the case-law cited).

53. It must be pointed out in this regard that the notion of publicly distancing oneself as a means of excluding liability must be interpreted narrowly. In order to disassociate itself effectively from anti-competitive discussions, it is for the undertaking concerned to indicate to its competitors that it does not in any way wish to be regarded as a member of the cartel and to participate in anti-competitive meetings. In any event, silence by an operator in a meeting during which an unlawful anti-competitive discussion takes place cannot be regarded as an expression of firm and unambiguous disapproval. A party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery (see, to that effect, Case T-303/02 Westfalen Gassen Nederland v Commission [2006] ECR I-4567, paragraphs 103 and 124).

197. ..... As regards that London meeting, during the administrative procedure the applicants merely denied having participated in the anti-competitive discussions and submitted no possible alternative explanation for their presence at that meeting, which was characterised as an anti-competitive meeting by all the other participants. The applicants' arguments that the Commission failed to prove their participation in the cartel during the period between those two meetings of May 1996 and July 1997 are ineffective. It is sufficient to note, as the Commission states, (i) that the applicants did not distance themselves from the cartel in the manner required by the case-law cited in paragraphs 52 and 53 above and (ii) that it would be artificial to subdivide into a number of distinct actions an anti-competitive agreement which is characterised by a series of efforts pursuing a single economic end (see the case-law cited in paragraph 180 above)

99. The Respondent submitted that based on evidence 45E, which pertains to an email regarding a Zen Garden meeting attended by steel undertakings, including Devki, that a decision was made by the attendees to slow down the implementation of raw material procurement, thus demonstrating clear output restriction. This according to the Respondent's further corroborated by evidence 31 from the Tononoka meeting, where manufacturers discussed strategies to manipulate prices and reduce stock levels to maintain price stability. Additionally, evidence 39 reveals discussions on excess material in the country, highlighting the need to control prices, manage stock, and stabilize the market. These actions are detailed in annexure BN.19 and clearly indicate coordinated efforts to restrict output and influence market conditions.[30]

[30] See page 18 Paragraph 59 of the Respondent's Written Submissions.

100. The Respondent submitted that, in accordance with clause 28 of the Consolidated Guidelines on Restrictive Trade Practices, hard-core restrictive agreements are inherently harmful to the proper functioning of competition and hold no redeeming value. Furthermore, clause 29 of the Guidelines categorizes output restriction as a hard-core restriction. Specifically, clause 39 provides a non-exhaustive list of the various forms in which output restriction can occur. Consequently, the clauses underscore the seriousness of such practices, as they fundamentally undermine competitive market dynamics.

101. The Respondent submitted that it has conclusively established that the Appellant, in conjunction with 12 other manufacturers and distributors of steel products, engaged in discussions aimed at restricting output, which constitutes a violation of section 21(1) of the Competition Act, as read together with section 21(3)(c) of the Act. According to the Respondent, these collusion seek to limit output directly thus contravening the legal provisions governing competitive practices, reinforcing the breach of statutory obligations under the Act.

102. Having considered the evidence presented, we are satisfied that the Respondent has proved its case beyond a reasonable doubt that the Appellant and other players in steel sector who are competitors in a horizontal relationship, discussed pricing and output restriction and exchange of commercial sensitive data which is prohibited under section 21 of the Act.

iii) *Whether the Appellant's Freedom of Association was limited by the Respondent's investigations; whether the Respondent breached the provisions of The Data Protection Act and whether the Respondent relied on inadmissible electronic evidence*

103. **The Appellant relied on Article 36(1)** of the Constitution provides for *freedom of association:*

> *(1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind."*

104. The Appellant submits that it is incumbent upon the Respondent to prove that indeed such a meeting had the object or effect of lessening competition vis-à-vis the Freedom of Association protected under **Article 36(1)** of the Constitution.

105. The Respondent alleged that there were engagements between parties through various fora like meetings, WhatsApp messages and emails that demonstrated that parties under investigation coordinate their pricing and output decisions and found that the Appellant was engaged in coordinated practices with other steel manufacturers on price fixing and output restriction but the Respondent failed to present evidence to support this allegation.

106. It is the Appellant's submission that evidence presented by the Respondent such as Evidence 1, 2 and 3 merely proves that the KAM association of members in the Metal and Allied sector had the objective of maintaining standards of products and did not

pertain alleged conduct to prevent, lessen or distort competition in Kenya. Accordingly, any such conclusion if drawn from meetings of KAM limits the Appellant's freedom of association.

107. The Respondent in response argued that while Article 36(1) of the Constitution provides for the freedom of association, it was not an absolute right and the constitutional safeguard does not extend to gatherings in furtherance of prohibited conduct. Further to the above, section 21(1) as read together with sec 21(3) (a) & (e) of the Act, prohibits agreements between undertakings, decisions by association of undertakings or concerted practices by undertakings which have as their object the prevention, distortion, or lessening of competition in trade in any goods in Kenya.

108. The deliberation in this regard that amount to agreement on price fixing and or output restrictions constitute a violation of the Act despite the fact that parties have freedom of association under the Constitution. It is our finding that the Appellant's have not proved to our satisfaction the violations of their client's rights under Article 36 of the Constitution and or how the Respondent investigations violated their freedom of association. The respondent has demonstrated through evidence that there were various meeting held through emails and physical meetings by undertakings in the steel sector.

109. On whether the Respondent in carrying out investigations, breached the provisions of the Data Protection Act, the Tribunal finds as follows:

a) The Data Protection Act No. 24 of 2019 is an Act of Parliament, *inter-alia;* to make provision for the regulations for the processing of **personal data**, to provide for data subjects and obligations for data controllers and processors.

110. Section of the 2 of the said Act defines ***"sensitive personal data"*** as meaning:

"..data revealing the natural person's race, health status, ethnic social origin, conscience, belief, genetic data, biometric data, property details, marital status, family details including names of the person's children, parents, spouse or spouses, sex or the sexual orientation of the data subject"

111. A plain reading of the said definition implies that data protection laws generally do not apply to companies themselves but to natural person's data. It is our finding that data related to a company like the Appellant's is not typically considered subject to data protection laws.

112. On admissibility of electronic evidence, the Appellant argued that no certificate of authenticity of electronic record authenticating the electronic record relied on by the Respondent has been provided to enable the Appellant to authenticate the evidence and the Appellant submits that reliance of the evidence contravened the mandatory provisions of **Section 106A** and **106B** of the Evidence Act which provides as follows:

"106A

The contents of electronic records may be proved in accordance with the provisions of section 106B.

106B *Admissibility of electronic records.*

(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.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

...

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),

shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it."

113. The Appellant relied in the High Court case **of Idris Abdi Abdullahi v Ahmed Bashane & 2 others [2018] eKLR** where the court held as follows:

> *"the law requires that **Section 78A** and **106B** of the Act are read conjunctively and complied with. The CD video recording in this case is both an electronic record and provides electronic and digital evidence. Therefore, it ought to be produced with a certificate as provided by **Section 106B of the Act** and fulfills the requirements of authenticity and validity of the information and/or evidence contained in the said CD video recording. The certificate shall contain information that complies with Section 78A(3) of the Act. The certificate shall provide vital information as to the source, process and delivery of the electronic record or evidence to the Court and parties so as to enable admission of the electronic record as evidence. **The content of the certificate would aid and satisfy the court as to reliability of generation of the electronic record/evidence; the integrity of the process and the origin of the content."***

114. The Appellant's submitted that a certificate of electronic record assists the Tribunal to determine:

a. *The source of the record;*
b. *The process used to obtain the record; and*
c. *The means used to deliver the record or evidence to court.*

115. The Appellant argued that such certificate satisfies the court on the reliability of the record, integrity of the process and origin of the record before it used as evidence. However, the Respondent failed to comply with this mandatory legal requirement of production of the abovementioned pieces of electronic records and this renders the communications and emails relied on as evidence in t\he **Respondent's Affidavit 1** and **Respondent's Affidavit 2** unreliable and inadmissible.

116. On admissibility of electronic evidence, we have carefully considered the submissions by the Appellant whilst we agree that the correct principals of rules of evidence in a court of law, we however note that the investigations carried out by the Respondent are administrative in nature and therefore strict rules of evidence do not generally apply to such administrative actions. We wish to distinguish the authorities cited by the Appellants which articulate the correct position in judicial proceedings.

117. Accordingly, it is our considered opinion that these three grounds of appeal fail and

are hereby not allowed

Iv Whether the Respondent's Decision and Penalty is a nullity for failing to consider the Appellant's immediately preceding year's gross annual turnover from the date of the Decision to impose a financial penalty?

118. The Appellant states that the Respondent erred in imposing a financial penalty against the Appellant based on a 0.5% of the Appellant's 2021 gross annual turnover whilst the decision was rendered in 2023 contrary to section 36 of the Act.

119. The Appellant argued that pursuant to **Section 36 (d)** of the Act, the Respondent is empowered to only 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"** while imposing a financial penalty and considering that the Respondent rendered the Decision was rendered in August 2023, the relevant financial period required for to determining the financial penalty is the year 2022.

120. Additionally, paragraph 2 of Annexure 1 of the Decision of the Respondent which contains the *"Computation of Devki's Financial Penalty"* identifies the year to be used to compute the annual turnover as follows:

> *"...the preceding year for restrictive trade practices shall be the year before the Authority reached a decision."*

121. In response, the Respondent argued that it commenced investigations in 2020 and finalized the same in august 2022 and therefore the preceding year for imposition of the financial penalty is 2021. According to the Respondent, the subsequent months upto the issuance of the determination in august 2023 was spent in seeking approvals.

122. The Respondent relied on the Competition Administrative Penalties and Settlement Guidelines, 2020 ("**the Guidelines**") as its justification for imposing the penalty at 0.5%.

123. The Respondent further argued that it requested the Appellant to submit its audited financial statement for the years 2019, 2020 and 2021 by a letter dated 8th September 2022 and the respondent declined to submit them[11] compelling the Respondent to obtain the audited financial statement from the Kenya Revenue Authority. We find that the penalty was premised on the law hence the Appeal fails on this leg.

F. ORDERS

The tribunal has considered all the evidence and arguments submitted by the Appellant and Respondent together with the authorities from both parties in support of their case in total and we accordingly arrive at the inevitable conclusion that the appeal is without merit as the Appellant has failed to prove its case beyond reasonable doubt. In the present circumstances we therefore order as follows:-

a. *That this appeal be and is hereby fails and dismissed.*
b. *That the Respondent's decision dated 17th August 2023 be and is hereby upheld.*

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[11] See Respondent's letter dated 8th September, 2022 to H.Kago & Company Advocates marked as exhibit BN 26(a) & 26(b) in Benson Nyagol Affidavit dated 2nd October 2023

c. *That the Appellant to bear the costs of this appeal.*

The Tribunal orders accordingly.

DATED at **NAIROBI** this .....9TH.....day of.....JULY.....2025

DANIEL OGOLA
CHAIRPERSON

VALENTINE MWENDE

MEMBER

ODONGO MARK OKEYO

MEMBER

KIPROP MARRIRMOI
MEMBER

RAYMOND NYAMWEYA
MEMBER

I certify that this is a true copy of the original

COMPETITION TRIBUNAL
P. O. Box 30041-00100,
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SECRETARY/CEO
COMPETITION TRIBUNAL