

REPUBLIC OF KENYA
IN THE COMPETITION TRIBUNAL AT NAIROBI
CASE NO CT/009 OF 2021

ROYAL MABATI FACTORY LIMITED.....APPELLANT

BETWEEN

COMPETITION AUTHORITY OF KENYA.....RESPONDENT

(BEING AN APPEAL FROM THE DECISION OF THE COMPETITION AUTHORITY OF KENYA DATED ON 21ST MAY 2020)

JUDGEMENT

A. BACKGROUND

1. The Appellant, Royal Mabati Factory Limited, is a manufacturing Company in Kenya dealing in the manufacture of roofing materials.
2. The Respondent is a State Corporation established under the Competition Act of 2010 (The Act). The Respondent has a wide mandate on matters competition law and policy under the Act. For purposes of this appeal, we shall focus on the Respondent's mandate to promote and protect effective competition in markets, and to protect consumers from unfair and misleading market conduct.
3. The genesis of this appeal are complaints received by the Respondent from customers of the Appellant, who were dissatisfied with the Appellant's terms of service. The Respondent identified thirteen (13) Complainants namely: Joseph Agwata Okari, Daniel Kariuki Mwangi, Gilbert Owino, Patrick Ondiek, Leonard Rono, Lewis Mose, Muthee Kagwa, Isaac Malanga, Valerie Wanjala, Joash Midiwo, Francisca Owour, George Njoroge and Gilbert Mabwai.¹
4. The complaints raised similar issues against the Appellant including but not limited to: -

¹ Paragraph 10, page 2 of the Respondent's Replying affidavit sworn by Wangómbe Kariuki on 23rd September 2021.

- i. Failure/delays to deliver purchased products within agreed timelines;
 - ii. Requests from Appellant to customers to pay for delivery where Appellant had advertised for free delivery,
 - iii. Requests by Appellant to customers to change order specifications after payment.²
5. The Respondent commenced investigations pursuant to the provisions of Section 70A and Section 31 of the Act and established as follows:
 - i. Lewis Mose, Gilbert Mabwai and Joash Midiwo were refunded money due after their orders failed to materialize but after a protracted wait.
 - ii. Muthee Kagwa, Joseph Okari, George Njoroge, Patrick Ondieki, Valerie Wanjala and Francisca Owour received late deliveries.
 - iii. Daniel Kariuki Mwangi, Gilbert Owino, Isaac Malanga and Leonard Rono were forced to change the profile of the iron sheets from the original order.
 - iv. Daniel Kariuki Mwangi was made to pay for delivery of the products.³
6. On various dates between *March 2018* and *April 2020*, the Respondent issued to the Appellant Notices of Investigations under Section 31(4) of the Act. The Respondent cited the various complaints by the Appellant's customers; set out the areas of possible infringement; invited responses thereto; and requested the Appellant to furnish the Respondent with documents relevant to the investigation.⁴
7. From the record, the Appellant, responded to only one of the Notices, in respect of the Complainant **Lewis Mose** vide a letter dated *5th April 2018*⁵ from its

² Paragraph 11, page 3 of the Respondent's Replying affidavit sworn by Wangómbe Kariuki on 23rd September 2021.

³ Ibid.

⁴ Pages 65 to 71 of the of the Respondent's Further List of Documents dated 6th December 2021.

⁵ Pages 66 to 68 of the Respondent's Replying affidavit sworn by Wangómbe Kariuki on 23rd September 2021

Advocates. The Appellant, through its Advocates denied that the said customer had been forced to change his order and indicated that there were internal avenues within the Appellant company to settle disputes which the customer had not exhausted. The Appellant in the said letter invited the Respondent and the customer to visit its factory with a view to resolving the dispute amicably.

8. Based on preliminary investigations, the Respondent was of the view that delivery of the Appellant's products was not free as indicated in their advertisements. Consequently, on *8th January 2019*, the Respondent issued a cease-and-desist order⁶ barring the Appellant from running the said advertisements in the print and social media. The Respondent alleges that despite the order, the Appellant still ran the advertisements on *12th and 13th February 2019*.⁷
9. In its Notice of Proposed Decision dated *10th May 2019*⁸, the Respondent notified the Appellant that its conduct, based on the Respondent's preliminary finding, could amount to a violation of *Sections 55(a)(ii)(v) and (b) (v), 56(1),(2)(a)(c) (e) and (3) of the Act* if proven.
10. The Respondent outlined possible remedies as provided under the Act and invited the Appellant to make written submissions and indicate whether the Appellant required an opportunity to make oral submissions as well within twenty-one (21) days.
11. In response to the Notice of Proposed Decision, the Appellant attended a meeting with the Respondent on *25th June 2019*⁹ and filed two sets of written submissions with the Respondent dated *2nd July 2019*¹⁰ and *23rd July 2019*¹¹.

⁶ Page 73 of the Respondent's Replying affidavit sworn by Wangómbe Kariuki on 23rd September 2021.

⁷ Paragraph 18 and pages 74 to 79 of the Respondent's Replying affidavit sworn by Wangómbe Kariuki on 23rd September 2021.

⁸ Pages 81 to 83 of the Respondent's Replying affidavit sworn by Wangómbe Kariuki on 23rd September 2021.

⁹ Pages 85 to 88 of the Respondent's Replying affidavit sworn by Wangómbe Kariuki on 23rd September 2021.

¹⁰ Pages 23 to 26 of the Record of Appeal dated 3rd September 2021.

12. Vide a letter dated 29th August 2019, the Respondent requested the Appellant for its audited accounts for roofing products for the years 2017 and 2018, and the same were furnished to the Respondent on 14th November 2019.

13. On 21st May 2020,¹² the Respondent rendered its final decision on the matter in the following terms:

(a) The Appellant was in violation of *Section 55 (a) (ii) (v) and (b) (v) of the Act* for:

- i. misleading consumers that they provide free delivery within 24 hours or other periods of time specified in their adverts.
- ii. Misleading the consumers that their orders would be fulfilled as is. However, customers were forced to change the profile of the orders.
- iii. Misleading the customers that they would deliver goods country-wide free of charge, but some customers were forced to pay for delivery.
- iv. Failing to refund the customers who cancelled the orders and yet the Appellant claimed to have refund policy in place. The customers were only refunded after the Respondent intervened.

(b) The Appellant's conduct was unconscionable contrary to *section 56(1) of the Act*. The Appellant's conduct met the criteria set out under Section 56(2) of the Act as follows:

- i. The Appellant was in a greater bargaining position in comparison to the individual customers. The factor applied was the turnover of the Appellant in comparison to the purchases of the Customers. The Appellant influenced the customer's decisions which were unfavorable

¹¹ Pages 90 to 97 of the Respondent's Replying affidavit sworn by Wangómbe Kariuki on 23rd September 2021.

¹² Pages 99 to 114 of the Respondent's Replying affidavit sworn by Wangómbe Kariuki on 23rd September 2021

to the customers. Further, the Appellant failed to deliver goods even after the Customers had paid for them.

- ii. The Appellant employed unfair tactics against the customers. Customers promised free delivery within 24 hours, but this was not done. The customers were forced to change their orders thereafter.
- iii. Though the customers had a choice of other suppliers, they were enticed with misleading information only to wait for non-forthcoming deliveries to their detriment
- iv. The Appellant in defiance of the cease-and-desist orders issued by the Respondent, continued to run the advertisements in the media.

14. Consequently, the Respondent made the following Orders:

- 1) *Pursuant to Section 36 of the Competition Act, No. 12 of 2010 ('the Act'), the Competition Authority of Kenya ("the Authority") has imposed a financial penalty of Kenya Shillings Two Million, Six Hundred and Fifty-Two Thousand Three Hundred and Sixty-Three and Forty-Seven cents (Kshs. 2,652,363.47) on Royal Mabati Factory Limited ("RMFL") for contravention of sections 55 (a) (ii) (v), (b) (v), 56 (1) of the Act which prohibit false and misleading misrepresentations and unconscionable conduct.*
- 2) *The Authority has in addition to (1) above, imposed the following Orders on Royal Mabati Factory Limited (RMFL):*
 - i. *A Declaration that the conduct of RMFL of advertising false and misleading representations on electronic , print, and social media in relation to its goods and services is in violation of Sections 55 (a) (ii) (v), (b) (v), 56 (1) and 89 of the Act.*

- ii. *RMFL to take action to remedy the effects of its infringement of Sections 55 (a) (ii) (v), (b) (v) and 56 (1) of the Act by either refunding the customers whose complaints have not been resolved within sixty (60) days from the date of receipt of this Determination, or by delivering the roofing materials to the customers at their preferred premises at no cost within thirty (30) days from the date of receipt of this Determination.*

- iii. *RMFL to pull down and cease further publication of the false and misleading advertisements upon service of this Determination, as indicated in (i), which have been published by RMFL on electronic, print and social media during the period January 2019 to present indicating:*
 - a. *That RMFL is offering free delivery on the advertised products yet the same is false;*

 - b. *availability of advertised products which turn out to be unavailable after the customer has purchased the product thus, forcing customers to change their orders; and*

 - c. *that delivery will take place during a specified period only for RMFL to delay or fail to deliver as per the stated delivery period.*

- iv. *RMFL to sensitize its sales team and customer care service team on the provisions of the Act, specifically part VI, within three (3) months from the date of this receipt of this Determination and provide evidence to the Authority of the compliance.*

15. Dissatisfied with the decision of the Respondent, the Appellant on 10th June 2020 filed a Notice of Appeal before this Tribunal. On 30th July 2021, the Appellant filed an application dated 27th July 2021 seeking leave to file its Appeal out of time. On 10th August 2021, when the matter came up before this Tribunal for directions, the Respondent conceded to the application.

16. Thereafter, the Appellant filed this appeal on 10th September 2021 on the following grounds:

- 1) *The Authority erred in both law and fact by imposing a financial penalty of Kenya shillings Two Million, Six Hundred and Fifty-Two Thousand, Three Hundred and Sixty-Three and forty-seven cents (Ksh. 2,652,363.47) in light of the evidence adduced.*
- 2) *THAT the Authority erred in law and fact by finding that the Appellant by advertising for its goods and services in electronic, print, and social media was engaging in false and misleading representations contrary to section 55(a) (ii) (v), (b) (v), 56 (1) and 89 of the Act while not taking into account entirely the submissions by the Appellant.*
- 3) *The Authority erred in law and fact by purporting to rewrite the contract of sale between parties when no coercion, fraud or undue influence had been pleaded or proved.*
- 4) *The Authority erred in both law and fact when it failed to consider adequately and/or at all the Appellant's written submissions on the allegations of false advertisement before it and thus arriving at a wrong decision.*
- 5) *The Authority erred in both law and fact when it failed to consider adequately the Appellant's written submissions on the allegations on the*

terms and conditions of sale of its products and therefore arriving at a wrong decision.

- 6) The Authority erred in both law and fact when she (sic) failed to consider adequately and/or at all the testimonials placed before it by the Appellant and the submissions made before it by the Appellant that not all of its products were on offer and only a select number of its products as advertised were on offer.*
- 7) The Authority erred in both law and fact when it failed to consider adequately the Appellant's written submissions no customer has ever been forced to change their order after paying for their preferred products due to shortage and despite the Appellant having confirmed its availability and therefore arriving at a wrong decision.*
- 8) The Authority while dismissing the Appellant's claim and submissions gave unreasonable and unmerited weight to the Respondents' allegations against the Appellant's without giving any weight and/or consideration to the contract between the parties and the terms of the advertisement in the various Media's (sic).*
- 9) The said decision by the Authority was not only unfair and unjust but it also demonstrated an outright bias against the Appellant.*
- 10) The Authority erred in both law and fact in its said decision in that the same was not only unreasonable, contrary to the provisions of law but the same was also wholly prejudicial on the part of the Appellant.*

B. DOCUMENTS AND EVIDENCE

17. The Appellant filed the following documents before the Tribunal for consideration in deciding this Appeal:-

- i. The Record of Appeal dated *3rd September 2021*
- ii. Appellant's submissions dated *15th October 2021*
- iii. A further affidavit sworn by Caleb Opondo on *6th December 2021*
(although no previous affidavit had been filed).

18. The Respondent filed the following documents before the Tribunal: -

- i. Index to and Respondent's Replying affidavit dated *23rd September 2021*
- ii. Respondent's submissions dated *26th October 2021*.
- iii. A Further affidavit sworn by Wangombe Kariuki on *2nd February 2022*
- iv. Respondent's further list and bundle of documents dated *6th December 2021*.

19. On *10th March 2022*, during the highlighting of submissions before the Tribunal, the Respondent sought to have the annexure marked "WK 1" in its Replying Affidavit sworn on *23rd September 2021* expunged from the record and the same be replaced with a new "WK 1" being the Further List of Documents dated *6th December 2021*. This was allowed.

C. THE APPELLANT'S CASE

20. The Appellant challenged the Respondent's decision dated *21st May 2020* on the following grounds:-

- (i) that at the time the Respondent rendered its decision, the Appellant had already met its obligations to the complaining clients. Consequently, the Respondent ought to have made this finding in its decision.

- (ii) that the only unfulfilled obligations were “for a refund due to things/circumstances beyond the control of the Appellant as had been submitted by the Appellant”.
- (iii) that the Respondent did not involve the Appellant in the investigation process.
- (iv) That the Appellant was not given an opportunity to demonstrate that it had, in fact, met the contractual obligation to its clients by “delivering goods ordered if the same were on offer or requesting the clients to come pick their products if the products were not on offer and therefor did not attract free delivery and/or refunding the clients who sought refunds after making payments for their products.”

21. The Appellant, therefore, contends that it was not given a fair hearing and the Respondent’s decision was not in accordance with fair administrative justice. The Appellant argues that it was not involved in the investigations and was not given an opportunity to be heard before the Respondent rendered its decision. The Appellant relied on the case of **Mea Limited v The Competition Authority of Kenya [2016] eKLR**.
22. The Appellant argues that the Respondent erred in relying on the information furnished to it by the complainants only and in failing to consider the submissions filed by the Appellant, thereby arriving at a decision not supported by the facts.
23. The Appellant contends that the Respondent failed to appreciate “that the Appellant for one has a wide array of products and not all these products were on offer for free delivery.” The Appellant further argues that although most of the complaints raised before the Respondent were on free delivery, the complainants had not purchased the products that attracted free delivery. It was not the

Appellant's fault, therefore, that the customers purchased products not on offer and were subsequently, advised to collect their products or pay for delivery.

24. The Appellant also contends that the Respondent's finding purported to rewrite the contract between the Appellant and its customers.

D. THE RESPONDENT'S CASE

25. The Respondent in defending its decision of *21st May 2020* argues that on various dates, it received complaints from a number of persons who had purchased and / or placed orders with the Appellant for its products, and were dissatisfied with the Appellant's terms of service. The Respondent identified thirteen (13) Complainants who raised similar issues against the Appellant including but not limited to:-

- (a) Failure or delay in delivering purchased products
- (b) Consumers paying for delivery services despite the Appellant advertising that it had a countrywide free delivery service
- (c) Consumers being forced to change orders, after payment for preferred products, on account of subsequent unavailability despite confirmation of availability by Appellant prior to payment.¹³

26. The Respondent, thereafter, launched investigations pursuant to Sections 70A and 31 of the Act. In its investigations, the Respondent sought to determine possible violations of Sections 55 (a)(ii) & (v) and (b) (v) of the Act which proscribe false or misleading representation by a supplier and Section 56(1) which prohibits unconscionable conduct by a supplier of goods and services.

27. Between *March 2018 and April 2020*, the Respondent issued Notices of investigations under Section 31(4) of the Act to the Appellant.¹⁴ The Notices

¹³ Supra. Note 1.

outlined the facts presented by each Complainant and the provisions of the law that the alleged conduct of the Appellant may have contravened. The Respondent invited the Appellant to respond to the allegations made by the complainants.

28. During the investigations, the Respondent was of a preliminary view that the Appellant was running false and misleading campaigns on the electronic media. On 8th January 2019, the Respondent issued a cease-and-desist order directing the Appellant to stop running any advertisement to the effect that it was offering free delivery service across the Country.¹⁵ According to the Respondent, the Appellant continued to run the advertisements despite the said cease and desist order.¹⁶

29. On concluding its investigations and considering the submissions of the Appellant, the Respondent was convinced that the Appellant had contravened the following sections of the Act:

(a) *Section 55 (a) (ii) of the Act* – that the Appellant had misrepresented to the customers that their goods would be delivered within 24 hours, and this was not the case. Further, that the customers’ orders would be fulfilled as ordered but the customers were forced to change their orders.¹⁷

(b) *Section 55 (a) (v) of the Act* – the Appellants had represented to the customers that the Appellants were offering free delivery of goods countrywide. However, some customers had to pay for this delivery.¹⁸

(c) *Section 55 (b) (v) of the Act* – The Respondent had in its investigations established that the “Refund Policy” under the Appellant’s “Terms and

¹⁴ Supra. Note 4.

¹⁵ See page 73 of the Replying Affidavit sworn by Wangombe Kariuki on 23rd September 2021.

¹⁶ Paragraph 18 Page 3 and paragraph 28 at page 5 of the Replying Affidavit sworn by Wangombe Kariuki on 23rd September 2021 and Exhibit WK-4 at page 75 to 79 of the Replying Affidavit sworn by Wangombe Kariuki on 23rd September 2021.

¹⁷ Paragraph 26 (i), Page 5 of the Replying Affidavit sworn by Wangombe Kariuki on 23rd September 2021.

¹⁸ Paragraph 26 (ii) Page 5 of the Replying Affidavit sworn by Wangombe Kariuki on 23rd September 2021.

Conditions of Sale” only existed on paper. Most of the customers only got a refund after intervention by the Respondent. ¹⁹

(d) *Section 56(1) of the Act* – According to the Respondent, the Appellant’s conduct was unconscionable. The Respondent was of the view that the Appellant uses free and specified time delivery claims to lure consumers to make orders, only for customers to be disappointed thereafter.²⁰

30. The Respondent contends that it was guided by the provisions of *Section 36 (d) of the Act* as read together with the *Consumer Administrative Guidelines for Consumer Protection* in arriving at its decision to fine the Appellant KShs 2,652,363.47, which according to the Respondent is justified.²¹

31. The Respondent defended the integrity of the procedure adopted in handling the matter and the merit of its decision. The Respondent contends that it did consider the submissions of the Appellant and was convinced that the Appellant was in breach of the Act as outlined above.²²

32. The Respondent urges this Tribunal to uphold its decision of *21st May 2020* and to dismiss the Appeal filed by the Appellant.

E. ISSUES FOR CONSIDERATION

33. The Appellant in its submissions identified only one issue for determination by this Tribunal, that is:-

i. *Whether the decision delivered by the Tribunal (sic) on 21st May 2020 should be set aside.*

34. The Respondent identifies the following issues for determination:-

¹⁹ Paragraph 26 (iii) Page 5 of the Replying Affidavit sworn by Wangombe Kariuki on 23rd September 2021.

²⁰ Paragraph 26 (iv) Page 5 of the Replying Affidavit sworn by Wangombe Kariuki on 23rd September 2021.

²¹ Paragraph 28 Page 5 of the Replying Affidavit sworn by Wangombe Kariuki on 23rd September 2021.

²² Paragraphs 29, 30, 31 and 32 at pages 5 to 6 of the Replying Affidavit sworn by Wangombe Kariuki on 23rd September 2021.

- i. *Whether the Respondent had the authority to initiate investigations following the complaints lodged by the Appellant's customers.*
 - ii. *Whether the Appellant breached the provisions of Sections 55(a)(ii)&(v) &(b)(v) and Section 56(1) of the Competition Act No. 12 of 2010.*
 - iii. *Whether the Respondent was accorded a fair hearing*
35. With respect to the Respondent's issue No.(i) above, we note that the Appellant did not, in its Appeal before this Tribunal, challenge the Respondent's authority to initiate investigations following the complaints lodged by the Appellant's customers. We shall therefore not delve into the said issue.
36. That in mind, and having carefully examined the pleadings of the parties, and their submissions, this Tribunal frames the following issues for determination: -
- (a) *Whether the Respondent was accorded a fair hearing.*
 - (b) *Whether the Appellant breached the provisions of Sections 55(a)(ii)&(v) &(b)(v) of the Competition Act No. 12 of 2010;*
 - (c) *Whether the Appellant breached the provisions of Section 56(1) of the Competition Act No. 12 of 2010; and*
 - (d) *Whether the financial penalty of Kenya Shillings Two Million, Six Hundred and Fifty-Two Thousand Three Hundred and Sixty-Three and Forty-Seven cents (Kshs 2,652,363.47) imposed on the Appellant by the Respondent was justified.*

F. ANALYSIS AND DETERMINATION

(i) *Whether the Respondent was accorded a fair hearing*

37. This ground of appeal is akin to a Judicial Review application. It brings to the fore constitutional and administrative law issues. *Section 73 of the Act* provides:

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

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

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

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

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

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

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

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

38. As this Tribunal previously observed In Telkom case²³

“A look at the jurisdiction and powers of this Tribunal under the Competition Act, 2010 reveals that the powers donated are appellate in nature and the remedies to which it can grant defined. Whether Parliament intended to give the Tribunal judicial review powers is doubtful as the same is exercised as supervisory powers by the High Court.Section 7 of the Fair Administrative Action Act (FAAA) empowers Tribunals to review administrative action or decisions subject to the written law regarding the exercise of jurisdiction of the Tribunal. Section 7 of the FAAA above therefore creates a two-tier approach to the effect that the statute establishing and governing the jurisdiction of the Tribunal must accommodate the powers contemplated under section 7...A look at the jurisdiction and powers of this Tribunal under the Competition Act, 2010 reveals that the powers donated are appellate in nature and the remedies to which it can grant defined”

39. We are, however, mindful, as an appellate tribunal, that appeals against exercises of discretion and questions of law tend to be indistinguishable many a times from judicial review claims.²⁴ This is because, they are both directed to re-examine the same exercise of power by administrative decision makers.²⁵ Consequently, the distinction is at times equivalent to “serving a fruitless task of categorisation for categorisation’s sake”.²⁶ This is not to say that this distinction is without meaning, but rather to recognise this overlap and be mindful not to exceed our jurisdiction.

²³ Telcom Kenya Limited & another v Competition Authority of Kenya [2020] eKLR

²⁴ Rodriguez Ferrere, “The Functional Convergence of Appeal and Judicial Review”, (2016), *The New Zealand Law Review*, 157 at p. 159 available at <https://ourarchive.otago.ac.nz/handle/10523/8824> as at 25th March 2021.

²⁵ *Ibid*, pp 160 -162.

²⁶ *Ibid*, p.177.

40. We have also considered that the Appellants are not seeking the prerogative writs of judicial review which are the preserve of the Court.
41. Further, this Tribunal is conscious that it is called upon to uphold, defend and protect the Constitution (Article 3 (1), protection of the bill of rights in interpretation (Article 20 (4), and the values and principles under Article 10, Article 20 and 47 (1) of the Constitution.
42. We are also guided by the Court of Appeal decision in the case of **Republic v National Environmental Management Authority [2011] eKLR** where the Court of Appeal stated that the availability of a statutory mechanism should be explored before judicial review issues are considered. The Court of Appeal more particularly held that:-

“On the remaining issues we think they must be looked at in the light of our finding, in agreement with the trial Judge, that the Appellant ought to have appealed to the Tribunal rather than coming to the High Court for orders of judicial review. So that whether he ought to have been heard before the stop order was made and the other remaining issues really fell by the wayside once the conclusion was reached that the appeal process was a much more efficacious and quicker way of resolving those issues than the process of judicial review.” (Emphasis ours)

43. Similarly, The High Court in **Republic v Kenya Revenue Authority Ex Parte Style Industries Limited** dismissed a Judicial Review application before it as the dispute resolution mechanism established under the Tax Appeals Tribunal was competent to resolve the issues raised in the matter before it. The court in the said case held that:-

“...The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application. The jurisdiction of the Tribunal is expressly provided under the act. A reading of the act shows that the Tribunal is clothed with jurisdiction to determine the dispute. 49. In view of my analysis and the determination of the issues discussed above, it is my conclusion that the applicant ought to have exhausted the available mechanism before approaching this court. This case offends section 9 (2) of the FAA Act.”

44. In the premises we find that the Act as read together with the Constitution of Kenya empowers this Tribunal to determine this issue as raised by the Appellant in this matter.

45. The Appellant contends that it was not involved in the investigation process and the Respondent therefore failed to appreciate the Appellant's position.²⁷
46. The Appellant faults the Respondent for exclusively relying on the information provided by the complainants and thereby arriving at a biased and wrong decision.²⁸ The Appellant further contends that the Appellant failed to consider the Appellant's submissions presented to the Respondent.
47. The Appellant relies on the case of **Mea v Competition Authority of Kenya & Another [2016]**. The court stated:
- “Decisions and determinations by administrative bodies as well as tribunals ordinarily commence with an investigation whether preliminary or substantive. An investigation essentially helps to determine whether a wrong has been committed. It is a critical step in any administrative, judicial, or even quasi-judicial proceeding which may lead to prosecution. If the investigation is perverted, then the course of justice itself as well as the administration of justice may be perverted. The process of investigation should thus not be soiled. The investigator should follow the due process, but he must also not be misled and ought to access as much information and material as possible. That way the course and administration of justice stays intact.”*
48. The Respondent has denied these allegations and argues that it followed due process as laid down under the Act. The Respondent also argues that it was guided by Articles 47 and 50(2) of the Constitution and Section 4 of the Fair Administrative Action Act.
49. According to the Respondent, the process was fair, and satisfied the provisions of the law. The Respondent cited the cases of **Selvarajan v Race Relations Board [1976] 1 All ER 12**, **Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR** and **Kenya Revenue Authority v Menginya Salim Murgami CA No 108 of 2009** amongst others.

²⁷ Page 3 of the Appellant's Submissions dated 15th October 2021.

²⁸ Page 5 of the Appellant's submissions dated 15th October 2021

50. We note that the Respondent initiated the process by sending Investigation Notices to the Appellant. At the hearing before this Tribunal, the Appellant's Advocate confirmed that the Notices appearing at pages 58 to 71 (Exhibit WK-2) of the Respondent's Replying affidavit were received by the Appellant. The Appellant did not deny receipt of these notices upon being served with the said affidavit. The notices are also contained in the Record of Appeal.²⁹
51. We have perused the said notices and note they contain a summary of the facts of each contravening event as alleged by the respective complainant. The Respondent in the said notices invites the Appellant to respond to the allegations within 14 days of each notice.
52. We note that the Appellant only responded to 1 out of the 13 Notices issued by the Respondent. Vide a letter dated *5th April 2018*,³⁰ the Appellant through their Advocate, Messrs K.M. Mburu & Associates, responded to the Notice of investigation dated *4th April 2018* in respect of the complainant, Lewis Mose.³¹
53. We further note that the Respondent thereafter served the Appellant with a Notice of Proposed decision dated *10th May 2019*.³² The notice of proposed decision outlines the Respondent's preliminary findings and highlights the possible contraventions by the Appellant.³³ The Respondent gave the Appellant an opportunity to submit written or oral representations within 21 days of the Notice pursuant to the provisions of Section 34 (2) (c) of the Act.³⁴ All documentary evidence relied upon by the Respondent were attached to the said Notice.³⁵

²⁹ Pages 4 to 8 of the Record of Appeal dated 3rd September 2021.

³⁰ Pages 66 to 68 of the Respondent's Replying Affidavit sworn by Wang'ombe Kariuki on 23rd September 2021.

³¹ Pages 115 to 116 of the Respondent's Further list of documents dated 6th December 2021

³² Pages 81 to 83 of the Respondent's Replying Affidavit sworn by Wang'ombe Kariuki on 23rd September 2021

³³ Page 82 of the Respondent's Replying Affidavit sworn by Wang'ombe Kariuki on 23rd September 2021

³⁴ Ibid.

³⁵ Page 83 of the Respondent's Replying Affidavit sworn by Wang'ombe Kariuki on 23rd September 2021.

54. On 25th June 2019, the Parties had a meeting³⁶ at the Respondent's Offices and thereafter, the Appellant filed its written submissions.³⁷
55. The Respondent rendered its final decision on 21st May 2020³⁸. The Respondent, in the said decision, summarises the facts of the case, delineates the process as provided under Section 31 of the Act, analyses the facts against the law and summarises the submissions and defence of the Appellant.
56. Considering the above, we find that the Appellant was given a fair hearing. The Appellant had notice of the case against it; was given sufficient time to prepare its case; had the opportunity to adduce evidence in support of its case; and generally, to defend itself, which it did.

(ii) Whether the Appellant breached the provisions of Section 55(a)(ii)&(v) &(b)(v) of the Competition Act No. 12 of 2010.

57. The Respondent in its decision dated 21st May 2020 found that the Appellant had violated *Sections 55(a)(ii)&(v) &(b)(v) of the Act* on false or misleading representations. The said Section of the Act provides as follows:-

"A person commits an offence when, in trade in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services, he—

(a) falsely represents that—

(ii) services are of a particular standard, quality, value, or grade.

(v) goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have

(b) makes a false or misleading representation—

(v) concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy.

³⁶ Minutes at pages 85 to 88 of the Respondent's Replying Affidavit sworn by Wang'ombe Kariuki on 23rd September 2021.

³⁷ Pages 23 to 26 of the Record of Appeal dated 3rd September 2021; also see Pages 90 to 97 of the respondent's Replying Affidavit sworn by Wang'ombe Kariuki on 23rd September 2021.

³⁸ Pages 101 to 114 of the Respondent's Replying Affidavit sworn by Wang'ombe Kariuki on 23rd September 2021.

58. The Canadian Court in the case of *Maritime Travel Inc. Vs- Go Travel Direct.com Inc* laid down the principles for determining a misleading advertisement as follows:-

- (i) *The general impression of the advertisement must be determined, and to do so, one has to consider the portion of the public to whom the advertisement is directed.*
- (ii) *The literal meaning of the advertisement is to be considered as well as the general impression.*
- (iii) *To try to determine whether the advertisement is false or misleading in a material respect, outside evidence may be considered, but not for the purpose of altering the general impression created by the advertisements.*
- (iv) *The question is whether the advertisement is misleading in a material respect; that is, it must be something that would have an effect on the purchase decision.*
- (v) *Aggressive advertising is permitted unless it is untruthful disparagement.*
- (vi) *The Court should not interfere with advertising unless the advertising is "clearly unfair."*
- (vii) *Even advertisements that "push the bounds of what is fair" may not be misleading in a material respect.*
- (viii) *In the civil context, the burden of proof on the plaintiff is a balance of probabilities; but it is a heavier burden. In the Court's words there must be "substantial proof of activity that is a very serious public crime."*

58. In determining whether the Appellant's advertisement of its products was misleading, the issue as to whether the representation made in the advertisements is false or misleading in a material aspect is key. Were the Appellant's customers, who received the messages in the Appellant's advertisements misled?

59. To be able to answer this question, we consider the specific advertisements of the Appellant, the message received by its customers and whether they were indeed misled by the said advertisements. *Exhibit CA-1a-1d*³⁹ of the Appellant's Further

³⁹ The Appellant's Further Affidavit sworn by Caleb O. Apondo on 6th December 2021.

Affidavit contains advertisements made in both electronic, print, and social media platforms.

- (i) Exhibit CA-I(a) is an advertisement of five different roofing products of the Appellant on social media with an offer for “Same day production.”
- (ii) Exhibit CA-I(b) is an advertisement of the Appellant’s roofing products on the Standard newspaper and indicates it is “Promotion on all profiles” and “free same day delivery.”
- (iii) Exhibit CA-I(c) is an advertisement of four different roofing products of the Appellant on social media on 5th March 2018 with an offer for “Free 24H delivery for all tiled profile”

60. The Respondent’s Further List of Documents contains further advertisements⁴⁰ made by the Appellant during the subject period as follows: -

- (i) Exhibit WK-I⁴¹ is an advertisement of the Appellant’s Royal stone coated sheet for 650/- on social media in August 2019 with an offer for “Free delivery within 48 hours”
- (ii) An advertisement of four different roofing products of the Appellant with an offer for “For All tiled Profile/ Free delivery service 24H”
- (iii) Exhibit WK-I⁴² is an advertisement of the Appellant’s roofing products made on social media on 21st December 2018 with an offer for “Free delivery within 24 hours” indicated at the bottom of the advertisement

⁴⁰ Pages 110 to 112 of the Respondent’s Further List of Documents dated 6th December 2021

⁴¹ Page 110 of the Respondent’s Further List of Documents dated 6th December 2021

⁴² Page 111 of the Respondent’s Further List of Documents dated 6th December 2021

and an offer for their Brick Red and Tile Red products indicated in red right in the middle of the advertisement.

(iv) Exhibit WK-I⁴³ is an advertisement of the Appellant's roofing products made on social media on 16th December 2018 and 17th December 2018 with an offer for "Free same day delivery" indicated at the bottom of the advertisement and an offer for their Brick Red and Tile Red products indicated in red right in the middle of the advertisement.

61. We shall now consider the kind of complaints raised by some of the customers of the Appellant who were led by the subject advertisements to make their orders.

(i) **Gilbert Owino.**-The customer alleged that on *17th August 2018*, after seeing an advertisement in the newspaper by the Appellant, that the Appellant would deliver his order within 48 hours, he ordered Charcoal grey Mabati and paid for it. Later, the Appellant asked him to change his order to blue corrugated which he accepted. As at the date of the Notice of Investigations dated *1st October 2018*, the delivery had not been made.

(ii) **Silas Koech** through **Joseph Agwata Okari** -The customer alleged that in April 2018 he purchased iron sheets and roll tops from the Appellant upon seeing an advertisement in the newspaper that the Appellant offered free delivery within 24 hours of making the order. The goods were delivered after 2 weeks. On 5th June 2018 the customer made an additional order of iron sheets and roll tops. The Appellant's representative assured the customer that the code details of the previous order were in the system and the customer did not need to respecify again. Delivery was promised within 7 days but was done on

⁴³ Page 112 of the Respondent's Further List of Documents dated 6th December 2021.

19th June 2018. On delivery, the customer realized that the delivery was not in accordance with the order, and he refused to take delivery. The Appellant's driver refused to take back the goods. The delay in putting up the Mabati caused the rains to damage the customer's roofing timber and the customer had to replace the same at an additional cost. As at the date of the Notice, the Appellant was yet to replace the wrong order.

(iii) **Patrick Ondieki.** The customer alleged that based on Facebook advertisements by the Appellant that they offer free delivery within 48 hours of an order, the customer ordered for iron sheets on 4th December 2018 and paid Kshs 60,900 on 7th December 2018. As at the date of the Notice, the customer was yet to receive the order.

62. The Appellant, in its submissions before this Tribunal, argued that there is a difference between "Same day production" and "Same day delivery". The Appellant contends that there was a confusion by its clientele between "Same day production" and "Same day delivery", and that the Respondent did not distinguish between the two hence arrived at a wrong decision.

63. We have perused the different advertisements, and note that the offers range from:-

- a. Free delivery within 48 hours
- b. Free delivery within 24 hours
- c. Free-same day delivery and
- d. Same day production

64. The Appellant in making the argument above, did not provide any evidence, in respect of any complainant, to demonstrate that the specific complainant expected a different service from what was advertised. The Respondent on its part, was able

to relate the Appellant's advertisements to specific customers who indeed relied on the adverts to make their orders, but the offers advertised were unavailable.⁴⁴

65. The Appellant in its submissions to the Respondent, and at the hearing before this Tribunal, admitted that its customers confused between "Same day production" and "Same day delivery". In its further affidavit, the Appellant admits that the advertisements posed challenges to its customers.
66. We have perused the advertisements by the Appellant, and it is our considered view that any reasonable man would assume same day production to also mean same day delivery. The Appellant in its said submissions, before the Respondent, states that such orders can take approximately ten (10) minutes to produce.⁴⁵ We pause and ask ourselves how the Appellant expects a reasonable person not to expect the same day production to include same day delivery.
67. It is also not clear from the advertisements that the 24-hour countrywide delivery was specific to some products and was not available to customers across the board.
68. It is evident that the Appellant indeed promised its customers vide its advertisements delivery within specified times, but the customers did not receive the deliveries within the time specified. Some customers were also forced to change their profile of goods ordered after the Appellant claimed that the ordered goods were out of stock.
69. Considering the expectations of an average consumer, who is reasonably well informed, observant, and circumspect, the advertisements are misleading.

⁴⁴ Pages 1-112 of the Respondent's Further List of Documents dated 6th December 2021

⁴⁵ Pages 92 of the Respondent's Replying Affidavit sworn by Wang'ombe Kariuki on 23rd September 2021.

70. We therefore find and hold that the Appellant contravened *Section 55(a)(ii) of the Act* by falsely representing to its customers that its services are of a particular standard, quality, value, or grade.
71. *Section 55(b)(v) of the Act*, provides that making a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy is a violation of the Act.
72. The Respondent contends that the Appellant in its advertisements represented to its customers that it provided free delivery of its products countrywide. This created an expectation in the Appellant's customers that the deliveries as advertised were free. By thereafter requiring their customers who relied on the said representation to pay for the deliveries, the Appellant was in breach of the Act.
73. The Appellant indicated to the Tribunal that they had a refund policy in place which it claims to be part of its terms and conditions. The Appellant's argument that it met its obligations with its clientele has not been proved as the evidence on record clearly shows that the customers insisted on refunds.
74. We note that in some instances, there was back and forth correspondence between the customers and the officers of the Appellant on refunds, which revealed great frustration on the part of the customers. One of the complainants GILBERT MABWAI⁴⁶ made an order on *3rd June 2017* and paid for it. The order was not processed within two(2) days as agreed between the parties and by December 2017 the product had not been delivered. The said customer was given an option to pick another product which he was again required to make additional payments. The offer was rejected by the customer and refund demanded. Despite the Appellant

⁴⁶ Pages 18-37 of the Respondent's Further List of Documents

promising to refund the amount paid to it, the Appellant failed to honour the pledge despite numerous phone calls and email correspondence. The Appellant did not provide any evidence of refund of the subject money despite the evidence on record, and the Appellant being granted leave by the Tribunal to provide any other documents that may assist its case, even at the highlighting of submissions stage.

75. We agree with the Respondent that the Appellant in representing that they deliver goods countrywide free of charge while requiring their customers who relied on the said representation to pay for the deliveries contravened Section 55(a)(v) of the Act.

(iii) Whether the Appellant breached the provisions of Section 56(1) of the Competition Act No. 12 of 2010.

76. In its decision of 21st May 2020, the Respondent cited the Appellant for unconscionable conduct in the dealings between the Appellant and some of its customers.

77. An unconscionable contract has been defined as

“One that is unjust or unduly one-sided in favour of the party who has the superior bargaining power. The adjective unconscionable implies an affront to fairness and decency. An unconscionable contract is one that no mentally competent person would accept and that no fair and honest person would enter into. Courts find that unconscionable contracts usually result from the exploitation of consumers.”

78. According to Black’s Law Dictionary, Ninth Edition unconscionable contract is defined in the following terms: -

“Traditionally, a bargain is said to be unconscionable in an action at law if it was “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other...”

79. One of the Complainants, Gilbert Awino,⁴⁷ ordered charcoal grey mabati on 17th August 2018, after seeing the Appellant's advertisement in the newspaper.⁴⁸ He was subsequently, advised by the Appellant to change his order to blue mabati on account of unavailability of his preferred order, which he agreed to. We note that the order was placed on 17th August 2018 and the request by the Appellant to the complainant to change the order made on 15th September 2018. In effect, it took a month for the Appellant to communicate the unavailability of a product to its customer.
80. Over and above the aforesaid failures of the Appellant, the Appellant neglected to deliver the complainant's order. The Appellant's position that the order was delivered on 18th September 2018,⁴⁹ does not make sense since Mr. Gilbert Awino presented his complaint to the Respondent on 19th September 2018.⁵⁰ The Appellant did not provide any evidence of the delivery to the Respondent or this Tribunal.
81. For the complainant known as Joseph Agwata Okari (representing Silas Koech), the customer states that he bought Old Roman Tile Red Matte. The first order was delivered but when he requested for a second batch, the Appellant delivered a different product. The customer's complaints for the correct delivery fell on deaf ears.⁵¹ The Appellant in response says that the customer made the orders himself and selected the different colours. The documents said to be attached by the Appellant to support its case were not attached.⁵²
82. The Complainant known as Joash Midiwo ordered roofing sheets on 29th April 2019. The Appellant promised to deliver within three (3) weeks, this was not done. Two months later, the complainant sought to terminate the agreement and requested for a

⁴⁷ Page 5 of the Respondent's further list of documents

⁴⁸ Page 1 of the Respondent's further list of documents

⁴⁹ Page 95 of the Respondent's Replying Affidavit sworn by Wangómbe Kariuki on 23rd September 2021.

⁵⁰ Page 1 of the Respondent's further list of documents

⁵¹ Page 8 and 9 of the Respondent's further list of documents.

⁵² Page 7 of the Respondent's Replying Affidavit sworn by Wangómbe Kariuki on 23rd September 2021.

refund. A refund was promised within ninety (90) days. After ninety (90) days, the customer went to collect his cheque, only to be advised that his order was now ready. The customer insisted he did not want the order. The Appellant advised the customer that he could only get his refund if he found another customer to purchase the order.⁵³ The Appellant did not respond to the allegations made against it by Joash Midiwo.

83. The complainant known as Francisca Awour made an order on *14th September 2019* and paid for the same on *24th October 2019*. The customer was promised delivery by *1st November 2019*. This did not happen. From the evidence, we note that the Appellant remained unresponsive to the desperate pleas of this Complainant to deliver her order.⁵⁴
84. The Complainant known as Gilbert Mabwai made an order for roofing sheets and paid for the same on *3rd June 2017*.⁵⁵ He was advised that production would take seven (7) days.⁵⁶ Seven days later he was advised that production of the product he had ordered had been suspended.⁵⁷ In December 2017, six (6) months later, the complainant was told that the product was no longer in production and was offered an option to take up a more expensive product.⁵⁸ He rejected the offer and demanded a refund. As of *15th April 2020*, he had not been refunded.⁵⁹ The Appellant did not respond to this complaint.
85. The Appellant argues that the terms of the contracts had already been agreed upon between the Appellant and its customers and it was not for the Respondent to rewrite the contracts between the parties.

⁵³ Page 12 to 15 of the Respondent's further list of documents.

⁵⁴ Pages 48 to 52 of the Respondent's further list of documents.

⁵⁵ Page 18 of the Respondent's further list of documents

⁵⁶ Page 22 of the Respondent's further list of documents

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

86. In **John Edward Ouko Vs National Industrial Credit Bank Ltd [2013] Eklr Quoting The Case Of Nation Bank Of Kenya Ltd V Pipeplastic Smakolit (K) Ltd And Another (2001) Klr** the court stated:

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”

87. In effect, although parties are bound by the terms of their contract, the courts will not shy away from interfering with or refusing to enforce contracts which are unconscionable, unfair, or oppressive due to a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. With respect to the complainants, Gilbert Awino and Gilbert Mabwai, the Appellant received money from its customers for products not in stock at the time the orders were made. The unavailability of the product was never communicated to the customers prior to the customers making the payments. The Appellant would first receive the money and thereafter recommend other products to the customers. Sometimes the recommended products were more expensive than what the customers had initially ordered.⁶⁰ The fact that the customers agreed to the new terms does not excuse the Appellant's conduct. We therefore agree with the Respondent that the conduct of the Appellant in this regard is unconscionable.
88. In the case of Gilbert Mabwai, Joash Midiwo and George Njoroge Kuria,⁶¹ the customers requested for a refund after the Appellant failed to meet its end of the bargain. In the case of Gilbert Mabwai, the customer had not gotten his refund three (3) years later. In the case of Joash Midiwo, the customer was advised to get his refund

⁶⁰ See also Isaac Malanga at page 75 and Leonard Rono at page 38 of the Respondent's further list of documents

⁶¹ For George Njoroge see page 58 of the Respondent's further list of documents

after 90 days only to be advised that his order was ready on the 90th day and if he wanted a refund, then he would need to get a buyer for the order. George Kuria was advised that he would get his refund after 60 days ⁶² and this did not happen.

89. There is no evidence that the customers were aware of the Appellant's refund policy prior to entering into the contracts. Some of the terms of the contracts were built into the contract, by the Appellant, as parties went along.

90. Further, we find no basis for the Appellant to hold onto the complainants' monies in respect of payments made for products it did not have. It is bad enough that the Appellant had misrepresented to its customers on the availability of products ordered. Continuing to hold onto these monies for up to ninety (90) days is unconscionable.

91. For Joseph Agwata Okari (representing Silas Koech), the Appellant delivered mismatched products and refused to replace the same. The customer was left with mismatched roofing mabati. The Appellant's conduct in this regard is unconscionable.

92. In all the above cases, the Appellant did not deliver the customers' orders within the timelines provided. The Appellant aggravated the delay by remaining unresponsive to the complaints of its customers who were already in despair as they continued to suffer loss because of the delay. In this regard we find that the conduct of the Appellant was unconscionable.

93. Section 56 (2) of the Act provides:

Without limiting the matters to which the Authority may have regard for the purpose of determining whether a person has contravened subsection (1) in connection with the supply or possible supply of goods or services to another person (in this subsection referred to as "the consumer"), the Authority may have regard to—

(a) the relative strengths of the bargaining positions of the person and the consumer;

(b) whether, as a result of conduct engaged in by the person, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of

⁶² Page 58 of the Respondent's further list of documents

the person;

(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the person acting on behalf of the person in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from another supplier.

94. We agree with the Respondent that the conduct of the Appellant vis-a -viz the customers, met the threshold outlined in *Section 56(2) of the Act*. Considering the relative bargaining strengths between the Appellant and the customers, we find that the complainants were in a weaker bargaining position vis-a -viz the Appellant.
95. We also note that the consumers were duped into paying for products that were not in stock and then forced to wait for refunds which meant that the Appellant was holding onto funds to its benefit and at the cost of the customers. The customers should have been entitled to an immediate refund where the Appellant was clearly at fault.
96. The Appellant engaged in unfair tactics by collecting deposits for products it did not have, and thereafter forcing the customers to switch its orders. We agree with the Respondent that the Appellant lured customers by misleading them into believing that the Appellant was offering free delivery services within twenty-four (24) hours throughout the country. The customers would only learn that this was an advertising gimmick and was not the case.
97. It is our finding that the Appellant breached the provisions of *Section 56(1) of the Act*.
- (iv) Whether the financial penalty of Kenya Shillings Two Million, Six Hundred and Fifty-Two Thousand Three Hundred and Sixty-Three and Forty-Seven cents (K.Shs. 2,652,363.47) imposed on the Appellant by the Respondent was justified.**

98. The Appellant in its Memorandum of Appeal contends that the Respondent erred in both law and fact by imposing a financial penalty of Kenya Shillings Two Million, Six Hundred and Sixty-Three and forty-seven cents in light of the evidence adduced.
99. *Section 36 of the Act* empowers the Respondent to impose a financial penalty of up to ten (10) percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question. The Respondent is guided by the *Consumer Administrative Guidelines for Consumer Protection* and the International Best practices regarding determination of disputes, in calculating the financial penalty to be imposed.
100. Uncontroverted evidence on record shows that despite having been issued with a cease-and-desist order, the Appellant continued to offend the said order and provisions of the Act. The Respondent continued to receive new complaints in the course of the investigations and after the issuance of the cease-and-desist order.
101. The Respondent having found the Appellant guilty of flouting the subject sections of the Act, proceeded to impose a financial penalty, and issued other orders as per the Act. Vide a letter dated *29th August 2019*, the Respondent requested for the Appellant's Annual Audited accounts for roofing products for 2017 and 2018, and the same were submitted by the Appellant on *14th November 2019*.
102. The Respondent's decision dated *21st May 2020* sets out how the Respondent arrived at the financial penalty imposed by basing it on the Gross Turnover for Roofing products for 2017 and applying a base penalty of 6%. Other factors such a mitigating factor were considered including but not limited to the effects of Covid-19 on businesses.

103. The Appellant, neither provided any evidence to support its said ground of Appeal nor made submissions on the same. We do not therefore agree with the Appellant's submissions that that the Respondent erred by imposing a financial penalty of Kenya Shillings Two Million, Six Hundred and Sixty-Three and forty-seven cents.

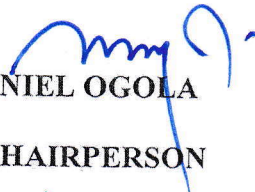
G. ORDERS

104. We accordingly arrive at the ineluctable conclusion that the Appeal herein is for dismissal. In the present circumstances we therefore order as follows:


- (i) This appeal be and is hereby dismissed
- (ii) The Respondent's decision dated 21st May 2020 be and is hereby upheld.
- (iii) The Appellant to bear the costs of this Appeal.

DATED at **NAIROBI** this12thday of.....April.....2022

DELIVERED at **NAIROBI** this12thday of.....April.....2022

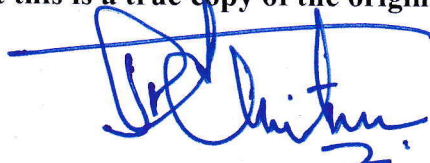

DANIEL OGOLA
CHAIRPERSON


REBECCA MOGIRE
MEMBER


VALENTINE MWENDE
MEMBER


DR. DESTAINGS NYONGESA
MEMBER

I certify that this is a true copy of the original



JOHN NDERITU MWANGI /SECRETARY/CEO

COMPETITION TRIBUNAL

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