REPUBLIC OF KENYA

IN THE COMPETITION TRIBUNAL

AT NAIROBI

CASE NO. CT/011 OF 2021

THE MAKINI SCHOOL LIMITED.....APPELLANT

AND

COMPETITION AUTHORITY OF KENYA .....RESPONDENT

(Appeal from the decision of the Competition Authority of Kenya at Nairobi dated the 8th day of December 2020.)

JUDGMENT

A. BACKGROUND

1. This appeal arises from a series of events which took place between September 2017 and April 2019. The Appellant describes itself as a group of schools which aim to provide quality education at an affordable cost.[1] Its goal is to become a world class Kenyan curriculum school in the region.[2] The Appellant originally comprised 4 campuses, 2 in Nairobi located on Ngong Road and State House Avenue ; and another 2 in Kisumu at Migosi and Kibos campuses.[3] In 2018, following the acquisition of the Appellant by Schole, (an education provider operating schools in Africa), the Appellant sought to expand its Kisumu campuses and began scouting for premises.[4]

2. The Appellant states that in 2018 it became aware of a school complex situate on Title Number Kisumu Municipality/Block 6/174 that was potentially available for lease (hereinafter referred to as the "School Complex).[5] The same was occupied by R.K. Bhayani Nursery and Primary School (hereinafter referred to as "Bhayani School").[6] The school

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[1] Page 10 of the Record of Appeal paragraph 1.3.
[2] Ibid. paragraph 1.4.
[3] Ibid. paragraph 1.1.
[4] Ibid. paragraph 1.5.
[5] Page 12 of the Record of Appeal.
[6] Page 10 of the Record of Appeal.

was operated as sole proprietorship by Mr. Narandas Ratanshi Bhayani, (hereinafter referred to as "Mr. Narandas")[7] who passed away on 17th September 2017.[8]

3. The land on which the School Complex was built was at all material times owned by the Registered Trustees of the Shree Lohana Mahajan-Kisumu (hereinafter referred to as "the Landlord").[9]

4. According to the Appellant, upon the death of the said Mr. Narandas, the executors of his estate sought to wind up the school.[10]

5. On 5th March, 2018, the Landlord issued a 6-month Notice to the Bhayani School to vacate the School Complex.[11]

6. It is not clear on the exact date in 2018 when the Appellant became aware of the availability of the School Complex as a possible addition to its Kisumu campuses. However,
    a. The Appellant entered a lease with the Landlord over the School Complex for an effective date of 1st April 2019.[12]
    b. The evidence on record reveals that Bhayani school terminated the services of its staff members in March 2019.[13]
    c. On 15th March 2019, Adam Nichols issued a circular to the old parents of Bhayani School welcoming them and the students to Makini School. The Circular detailed the student's transition process from Bhayani School to the Appellant.[14]

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[7] Page 19 of the Record of Appeal.
[8] Page 11 of the Record of Appeal paragraph 4.1.
[9] Page 27 of the Record of appeal.
[10] Page 11 and 12 of the Record of Appeal.
[11] Page 26 of the Record of Appeal.
[12] Page 72 of the Record of Appeal.
[13] Pages 112 to162 of the Record of Appeal.
[14] Pages 111 and 163 of the Record of Appeal.

7. On 29th October 2019, the Respondent wrote a letter to the Appellant requiring the Appellant to furnish the Respondent with details regarding the acquisition of Bhayani School by the Appellant.[15]

8. The Respondent is mandated to promote and protect effective competition in the Kenyan Markets and in this instance, control of mergers and acquisitions.

9. On 20th November 2019, an unnamed Director of the Appellant, responded to the Respondent's letter stating that,
    a. The Appellant had made a proposal to the Landlord to lease the premises comprised in the School Complex upon learning that Bhayani School was closing and vacating the premises,
    b. As a gesture of good faith, the Appellant elected to offer pupils of the Bhayani School a place with the Appellant,
    c. The Appellant did not acquire the business or assets of Bhayani School but was merely leasing the premises previously occupied by Bhayani School.

10. On 3rd December 2019, the Respondent wrote back to the Appellant requesting a meeting with the Appellant to discuss further details on the matter namely,
    a. The status of Bhayani School before the Appellant opened a campus on the School Complex,
    b. The chronology of events leading to the Appellant opening the Campus on the School Complex,
    c. The configuration of the premises, and
    d. The lease arrangements for the premises.

11. On 19th December 2019, the Appellant and the Respondent had a meeting, and the Appellant's Advocates did a follow up letter to the Respondent dated 9th March 2020.[16]In that letter, the said Advocates buttressed the point that the Appellant did not acquire the

[15] Page 1 of the Record of Appeal.
[16] Page 3 of the Record of Appeal.

business of the Bhayani School but entered a lease with the Landlord over the School Complex.[17] The Advocates confirmed that a total of 242 pupils and 11 members of staff of the former Bhayani School were absorbed by the Appellant.[18]

12. The Parties exchanged emails between March and April 2020.[19]

13. On 16th June 2020 the Appellant wrote another letter to the Respondent (with annextures) detailing the nature of transactions entered by the Appellant in respect of the School Complex.[20]

14. On 4th August 2020, the Appellant wrote another letter to the Respondent providing additional information on the Respondent. This included information on the former staff members of Bhayani school hired by the Appellant.[21]

15. It appears there was a meeting between the parties on 3rd December 2020 after which the Respondent rendered its decision on the matter comprised in a letter dated 8th December 2020.[22]

16. In its decision the Respondent stated that, based on information provided by the Appellant, and an independent investigation conducted by the Respondent, the Respondent finds:
    a. The Appellant took up an operational school. The Appellant signed a lease in March 2019 but entered the school complex in 2018. The lease in favour of Bhayani school was still operational and valid when the Appellant entered the school complex. Consequently, the business of Bhayani School had been transferred to the Appellant.

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[17] Ibid.
[18] Ibid.
[19] Pages 5 to 8 of the Record of Appeal.
[20] Pages 9 to 201 of the Record of appeal
[21] Page 202 of the Record of Appeal.
[22] Page 206 of the Record of Appeal.

b. By a letter dated 15th March 2019, the Appellant offered pupils of Bhayani School admission with the Appellant at the same fee the students had been paying at Bhayani School.
c. Final year students at Bhayani School and their teachers were accommodated within the Appellant to avoid inconveniences and disruption to the learning activities.
d. 11 members of Bhayani School staff were offered employment with the Appellant.
e. The School Complex has since been rebranded to Makini School and the Bhayani School is now operating as the Appellant.

17. The Respondent found that these were transactions requiring approval of the Respondent within the meaning of section 42 of the Competition Act. The Respondent requested the Appellant to furnish it with the Appellant's 2018 audited accounts to facilitate calculation of the penalty provided for under section 42 (6) of the Act.

18. The Respondent initially calculated a penalty of Kshs 36,199,380.95 as shown in letter from the Respondent dated 26th July 2021.[23] The penalty was subsequently reduced to Kshs 7,239,876 after mitigation by the Appellant as per the Respondent's communication dated 26th August 2021.[24]

19. Dissatisfied with the decision of the Respondent, the Appellant filed a Notice of Appeal before this Tribunal on 27th October 2021[25] and a Memorandum of Appeal dated 12th November 2021.[26]

20. In its appeal the Appellant urged the following grounds of appeal:

1) The Competition Authority erred in fact and in law in imposing a financial penalty of Kshs. 7,238,876 on the Appellant purported to imposed pursuant to Section 42(6) of the Competition Act (No. 12 of 2010).

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[23] Exhibit WK-8 annexed to Respondent's Replying affidavit sworn on 10th January 2022 by Wangombe Kariuki.
[24] Exhibit WK-9 (b) annexed to Respondent's Replying affidavit sworn on 10th January 2022 by Wangombe Kariuki.
[25] Page 209 of the Record of Appeal
[26] See Record of Appeal.

2) *The Competition Authority erred in fact and in law as aforesaid as a consequence of misapprehending, misconstruing and/or disregarding material evidence produced by the Appellant and thereby proceeding to declare the conduct of the Appellant to constitute an infringement of Sections 42(2) and/or 43 of the Competition Act (No. 12 of 2010) and an offence under Section 42(5) thereof.*
3) *The Competition Authority erred in law and fact by deeming the conduct of the Appellant to have constituted a merger as defined in Sections 2 and 42(1) of the Competition Act (No. 12 of 2010).*
4) *The Competition Authority erred in law and fact by finding that the Appellant had acquired a whole or a part of the business of the R.K Bhayani Nursery & Primary School, the purported target undertaking.*
5) *The Competition Authority erred in law and fact and misapprehending, misconstruing and/or disregarding the evidence produced by the Appellant including inter alia that;*

    a) *the R.K Bhayani Nursery & Primary School, the purported target undertaking, had been registered as a sole proprietorship owned by one Narandas Ratanshi Bhayani and had operated from the premises known as Title Number Kisumu Municipality/Block 6/174;*
    b) *the said Narandas Ratanshi Bhayani had passed away on or about 20th September 2017;*
    c) *the proprietor of the property known as Title Number Kisumu Municipality/Block 6/174 is the Registered Trustees of the Shree Lohana Mahajan- Kisumu and not the R.K Bhayani Nursery & Primary School;*
    d) *the only substantive transaction undertaken by the Appellant was the entry into a sub-lease over the premises known as Title Number Kisumu Municipality/Block 6/174 between the Appellant and the said Registered Trustees of the Shree Lohana Mahajan- Kisumu;*
    e) *the R.K Bhayani Nursery & Primary School did not and could not have transferred any lease to the Appellant in respect of the premises known as Title Number Kisumu Municipality/Block 6/174;*
    f) *no consideration was paid by the Appellant for the purported acquisition of the whole or a part of the business or assets of the R.K Bhayani Nursery & Primary School;*
    g) *accordingly, no merger could be deemed as having been implemented by the Appellant;*
    h) *there was not acquisition by the Appellant or transfer to the Appellant of the business or assets of the R.K Bhayani Nursery & Primary School as a going concern.*

6) *The Competition Authority consequently erred in law and fact by:*

a) *declaring the conduct by the Appellant to constitute an infringement of Section 42(2) of the Competition Act (No. 12 of 2010) and an offence under Section 42(5) thereof; and*

b) *Imposing a financial penalty of 1% of the deemed relevant turnover of the Appellant for the year 2018 of Kshs. 723,987,619 being the sum of Kshs. 7,239,876; notwithstanding the lack of any evidence or legal foundation to support the aforementioned conclusions and orders.*

c) *The Competition Authority misdirected itself on the issues before it for determination and the law and principles applicable thereto.*

d) *The Competition Authority erred in law by failing to appreciate and correctly apply; and/or otherwise misconstruing the provisions of the law and in particular the applicable provisions of the Competition Act (No. 12 of 2010).*

e) *In all the circumstances of the matter, the Competition Authority failed to render justice to the Appellant.*

21. The Appellant sought the following orders:

1) *The Appeal be allowed;*

2) *The decision and order of the Competition Authority dated 13th day of October, 2021 be and are hereby set aside in their entirety;*

3) *The costs of this Appeal be granted to the Appellant.*

4) *Such further and other Orders as this Honourable Tribunal may deem fit to grant.*

B. DOCUMENTS AND EVIDENCE

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

i. Record of Appeal containing: -

a. The Memorandum of Appeal dated 12th day of November 2021

b Supporting Affidavit sworn on 12th November 2021 by Horace Mthombeni

ii. Supplementary Affidavit sworn on 28th April 2023 by Horace Mthombeni

iii. Appellant's written Submissions dated 15th June 2023 together with the list and bundle of authorities attached thereto.

23. The Respondent filed the following documents:

    i. Replying Affidavit sworn by Wangómbe Kariuki on 10th January 2022 and the annexures thereto.

    ii. Respondent's written Submissions dated 5th July 2023 together with the list and bundle authorities attached thereto.

24. Parties highlighted their Submissions before the Tribunal on 25th July 2023.

C. THE APPELLANT'S CASE

25. The Appellant contends that the facts of the matter do not disclose the realisation of a merger. First, the purported target undertaking was not in existence at all material times. Bhayani School was operated as a sole proprietorship. The proprietor Mr. Narandas passed away in September 2017 and the business thereby ceased to exist. The executrix of Mr. Narandas' estate was in the process of winding up the school when the Appellant came to the scene. Bhayani school as a legal entity was indistinguishable from its owner, the late Mr. Narandas, and could not exist apart from him.

26. Second, the Appellant did not acquire a lease from Bhayani School as stated by the Respondent. The lease was negotiated between the Appellant and the Landlord who is distinct and separate from Bhayani School. The same was negotiated independently of Bhayani School. The only asset acquired by the Appellant, being the lease over the School Complex, was not acquired from the alleged target undertaking but the Landlord who was a completely different and independent party.

27. Third, the Appellant and the Bhayani School were fundamentally different organisations. The Appellant is for-profit while the Bhayani School was run as an "altruistic venture". The proprietor of Bhayani School aimed to provide education to the poor and needy in society. Bhayani School was a non-profit organisation and charged fees at cost. The Appellant on the other hand aimed to become a "world class Kenyan curriculum school

and is administered for profit. Consequently, the business and assets of Bhayani School were not and could not have been a target of acquisition by the Appellant.

28. Fourth, the Appellant avers that it did not acquire or inherit a "turnkey "operation from Bhayani School. The Appellant became aware of the availability of the premises in the course of 2018. Upon inspection of the premises, the Appellant established that the facilities were in a desperate state of disrepair. The Appellant thereafter made a proposal to the Landlord to lease the School Complex upon Bhayani School vacating the same. The Appellant and the Landlord thereafter negotiated the terms of the lease and the same was finally executed to commence in April 2019. After Bhayani School had vacated the premises, the Appellant embarked on renovating the School Complex to bring it to the Appellant's standards.

29. Fifth, that the Appellant only took on the former students of Bhayani School and some of the staff members as part of its social corporate responsibility. The Appellant gained no financial benefit from integrating the existing students from Bhayani School into the Appellant. The Appellant was moved by the appeal of the executrix Mr. Narandas 'estate to allow the existing students to complete their studies with the Appellant.

30. Further, that the students and staff members of Bhayani school did not in any event constitute "assets" within the meaning of Section 2 of the Competition Act. These, being natural persons they were incapable of being owned by another person or being a legal interest capable of acquisition, sale or transfer.
31. Moreso each member of staff and student of Bhayani School was free to independently seek employment or admission to another institution of their choice and did not have to join the Appellant.

32. Sixth, there was no purchase price for the alleged acquisition. Section 42(4) of the Act provides that a merger will be deemed to have been implemented upon payment of at least 20% of the Purchase Price. The Purchase Price is a critical element in any merger or acquisition process. Consequently, in the absence of a purchase price for the alleged assets,

it cannot be said that a merger had been implemented in violation of section 42(2) of the Act.

D. THE RESPONDENT'S CASE

33. The Respondent maintains that there was a transaction between the Appellant and Bhayani School and the same amounted to a merger as defined in Section 2 and Section 41 of the Act. The Respondent asserts that the conduct of the Appellant in the circumstances was contrary to Section 42(2) of the Act and the financial penalty imposed subsequently was justified.

34. First, the assertion that there was a merger is evidenced by the fact that Bhayani School was an operational undertaking at all material times. The Appellant directs this Tribunal to look at the definition of "undertaking" under section 2 of the Act.

> **"undertaking" means any business intended to be carried on or carried on for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or provision of any service and includes a trade association".**

35. The Respondent argues that an "undertaking" refers to any entity engaged in an economic activity regardless of its form or the way it is financed. The death of the proprietor of Bhayani School did not result in the automatic cessation or existence of the school's operations. In 2019, when the Appellant took over the School Complex, Bhayani School was still operational with students, teachers and other support staff.

36. Further, the Appellant, by a circular dated 15th March 2019, apprised the parents of Bhayani School of the transition process from Bhayani School to the Appellant; the communication by Bhayani School to the County Labour Office is dated 21st January 2019; the letters from Bhayani School terminating the services of their members of staff are dated 18th March 2019; the application letters by staff members to the Appellant were dated 20th March 2019; the sub lease between the Appellant and the Landlord was executed on 27th March 2019; and the communication by Bhayani School to the Labour Office on payment of final dues was done on 20th April 2019.

According to the Respondent, this sequence of events confirms that Bhayani School was still in operation and therefore capable of being acquired.

37. Second, the Respondent contends that the Appellant did in fact acquire control of the business of Bhayani School. The Respondent contends that the transfer of business was effected by transfer of students, teachers and support staff from Bhayani School to the Appellant.

38. The Respondent urges that of utmost importance, is whether the acquisition is an asset from which revenue can be generated or one which affects the strategic competitive impact of the business. The students and members of staff were therefore assets from which revenue could be generated. Buildings without teachers and students are not a business.

39. The Respondent points out that the Appellant confirmed that some of the teaching staff were retained from Bhayani School. Accordingly, as per the **European Commission's Notice on the concept of a concentration under Council Regulation (EEC) No 4064/89** on the control of concentrations between undertakings, a partial acquisition qualifies as an acquisition. Additionally, the acquiring of a revenue generating asset may translate to the acquisition of the business.

40. Third, the Respondent posits that the difference in the objectives and methodologies of conducting business as well as the intent of a merger are not due considerations in determining whether a merger has occurred or not.

41. According to the Respondent, while the mode of running the two institutions was different, both schools were offering Kenyan education curriculum. The fact that the Appellant absorbed 242 pupils and 11 members of staff from the Bhayani School shows that the core business was the same and integrable.

42. Fourth, the Respondent submits that Appellant having implemented a merger without the approval of the Respondent was in violation of section 42(2) of the Act.

43. Finally, the Appellant being in breach of the law was liable to fine as imposed by the Respondent by virtue of the provisions of section 45(5) and (6) of the Act.

E. ISSUES FOR CONSIDERATION

44. Having carefully examined the pleadings of the parties and their submissions, the following issues emerge:

a. Whether there was a merger between the Appellant and Bhayani School? In tackling this issue, the Tribunal will seek to answer the following questions:

i. Whether Bhayani School was a target capable of being acquired at all material times?

ii. Whether the teachers and students of Bhayani School constituted assets capable of being acquired within the meaning of section 2 of the Act

iii. Whether there was a transaction between the Appellant and Bhayani School resulting in the transfer and/or acquisition of assets and/or control of the Business of Bhayani School and specifically in respect of:

a) The lease over Kisumu Municipality/Block 6/174
b) Students
c) Staff (teaching and support staff)

b. Whether proof of payment of consideration is a mandatory requisite for proof of implementation of a merger

c. Whether the Appellant is in breach of section 42 (2) of the Act

d. Whether the financial penalty imposed by the Respondent on the Appellant is justified

e. Who bears the cost of this Appeal.

E. ANALYSIS AND DETERMINATION

a) Whether there was a merger between the Appellant and Bhayani School?

i. **Whether Bhayani School was a target capable of being acquired at all material times?**

45. Section 2 of the Act defines a merger as

> **an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover.**

46. The Respondent in its submissions before the Tribunal zeroed in the provisions of section 41 (1) and (2) (a) and (b) of the Act which provide:

Section 42

> **(1) For the purposes of this Part, a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.**
>
> **(2) A merger contemplated in subsection (1) may be achieved in any manner, including—**
>
> **(a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;**
>
> **(b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently**

47. The Appellant argued that Bhayani School was registered as a Sole Proprietorship and the Proprietor Mr. Narandas passed away in September 2017. The Appellant only acquired the lease over the School Complex in April 2019. Further, between 2017 and 2019, the Bhayani School was in the process of being wound up the executrix of the late Mr. Narandas. Bhayani School being a sole proprietorship ceased to exist as a legal entity upon the death of its proprietor. Consequently,

Bhayani School having no legal status in law was not capable of being acquired by the Appellant.

48. The Respondent posits that the legal status of the entity is immaterial; of significance, is that the school operations continued, and the business did not cease. Accordingly, Bhayani School was an operational undertaking between the years 2017 and 2019. In support of its case the Respondent relies on the following evidence;

a. Bhayani School fees structure for the year 2019;[27]
b. the circular issued by the Appellant on 15th March 2019;[28]
c. and correspondence between the Bhayani School and the County Labour Office.[29]

The Respondent cites these documents as proof that Bhayani School was operational in the year 2019 when it was acquired by the Appellant.

49. Section 2 of the Act defines an undertaking as:

> **any business intended to be carried on or carried on for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or provision of any service and includes a trade association.**

50. It is our considered view that in 2019 when the Appellant took over the School Complex, Bhayani School was an operational undertaking. The Administrators of Mr. Narandas' estate continued to operate Bhayani School as a business even after his death. The Appellant relies on the Notice to Vacate[30] issued to Bhayani School by the Landlord to illustrate that Bhayani School was in the process of ceasing operations by the time the Appellant took over the School Complex.

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[27] Exhibit WK-3 annexed to Respondent's Replying affidavit sworn on 10th January 2022 by Wangombe Kariuki.
[28] Exhibit WK-4 annexed to Respondent's Replying affidavit sworn on 10th January 2022 by Wangombe Kariuki
[29] Page 116 and 140 of the Record of Appeal
[30] Page 26 of the Record of Appeal

51. We note, however, that Bhayani School issued a school fees structure for the year 2019[31] despite the notice to vacate requiring them to hand over the premises by September 2018.

52. In view of the foregoing, and the evidence on record, we find that as of 2019 when the Appellant took over the School Complex, Bhayani School was not in the process of winding up as suggested by the Appellant. On the contrary, Bhayani School **(now hereinafter referred to as the Target)** was a fully operational undertaking and thus capable of being acquired.

ii. **Whether the teachers and students of the Bhayani School constituted assets capable of being acquired within the meaning of section 2 of the Act**

53. According to the Appellant, the word "assets" as defined under section 2 of the Act and under Black's law dictionary cannot be deemed to include human beings.

54. Section 2 of the Act defines an asset as

> **includes any real or personal property, whether tangible or intangible, intellectual property, goodwill, chose in action, right, licence, cause of action or claim and any other asset having a commercial value.**

55. Black's law dictionary defines as asset as

> **Property of all kinds real and personal, tangible, and intangible, including inter alia for certain purposes patents and choses in action which belong to any person or estate of a deceased. The entire property of a person, association, corporation or estate that is applicable or subject to the payment of his or her debts.**

[31] Page 21 of the Record of Appeal.

56. The Appellant submits that teachers and students are individually independent natural persons. Therefore, they are neither capable of being owned by another person nor subject to sale or acquisition by another.

57. The Respondent disagrees with the Appellant's sentiments. According to the Respondent a school with buildings but without students, teachers and support staff is not in business.[32] Consequently, the students, teachers and other support staff are assets of the school as a business.

58. It is our considered view that customers are the ultimate asset for any profit-making organisation. Students are the customers in a school and remain the main continuous revenue stream for any school that is run as a business. We are not persuaded by the Appellant's argument that students being natural persons cannot be classified as assets of a school. We would agree with the Respondent that a school without students is not in business.

59. In the case of ***Societe Cooperative de Production SeaFrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)***[33] one of the issues before the Court was whether the former employees of the alleged target had been acquired. It was never in doubt that employees of an organisation were capable of being acquired.[34] It was stated:

> **"... In others, such as skilled service industries, key staff may constitute an enterprise...The Commission considered that the enterprise of SeaFrance was constituted essentially by the combination of the vessels, the employees and to a limited extent the brand and goodwill. It approached the acquisition of these three classes of assets...."[35]**

60. We find therefore that the students and the teachers of a school are assets capable of being acquired within the meaning of section 2 of the Act.

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[32] Respondent's Submission Page 11 paragraph 41.
[33] See Page 133 of the Appellant's submissions
[34] See Page 141 paragraph 16 of the Appellant's submissions
[35] Ibid.

iii. **Whether there was a transaction between the Appellant and Bhayani School resulting in the transfer and/or acquisition of assets and/or control of the Business of Bhayani School and specifically in respect of:**

a) **The lease over Kisumu Municipality/Block 6/174**

b) **Students**

c) **Teachers and support staff of the Target**

61. The Appellant argues that the only asset it acquired with respect to this matter is the lease executed between the Appellant and the Landlord over the school complex. The lease was entered directly with the Landlord and was not acquired from Target. This asset having not been acquired from the Target undertaking, was therefore not subject to the Act.

62. The Respondent in the submissions filed before the Tribunal did not address this issue and in the oral submissions before the Tribunal confirmed that this ground had been abandoned.

63. In the case of ***Netto/Grocery Store at Armitage Avenue Little Hulton***[36] the court considered the transfer of a freehold property of a single real estate asset not to constitute a merger. The Court found:

> **"The transaction concerns the acquisition of the freehold property of the Target store...This freehold property will be transferred empty as it was stripped of all its previously installed fixtures and fittings. The transaction did not involve the transfer of any other tangible or intangible assets...the transaction should be viewed in essence as a real estate transaction consisting in the acquisition of an empty freehold property rather than as transfer of a business..."**[37]

64. It is our considered view that the execution of the lease, by the Appellant, by itself, would not have constituted an acquisition of an asset that would trigger the

[36] See page 96 of the Appellant's submissions.
[37] Ibid. paragraphs 8 and 16.

provisions of the Act. In this appeal, however, this was not the case as there were other activities, namely the retention of former teachers and students of the Target.

65. With respect to the students, the Appellant has admitted that they granted admission to a total of 242 students who were former students of the Target. Having determined hereinabove that students of a school are assets, we are satisfied that the Appellant acquired a portion of the Target's assets being the 242 students.

66. The Appellant's letter dated 15th March 2019[38] welcomes the new parents (formerly of the Target) to the Appellant, outlining the transition process of the former students of the Target into the Appellant. In the letter the Appellant assures the parents of a smooth continuation devoid of disruption of the students' education. It also confirms that the former teaching and support staff of the Target will be hired and trained as per the Appellant's standards of teaching, learning and operations.

67. With respect to the teachers and support staff, the Appellant has also admitted that they retained 7 teaching staff and 4 support staff.[39] The Appellant argued that the former employees of the Target were at all material times free to seek employment at any institution of their choice. The Appellant urges that the employees had already been declared redundant and paid their severance dues by the Target before being absorbed by the Appellant.

68. From the evidence on record, the transition from the Target to the Appellant was seamless; the teachers were terminated on 18th March 2019[40], application for

[38] Page 111 and 163 of the Record of Appeal
[39] See Page 201 of the Record of Appeal.
[40] Page 112 to 162 of the Record of Appeal.

employment with the Appellant received on 20th March 2019[41], and severance paid on 20th April 2019.[42]

69. In the ***Societe Cooperative case*** cited above, the court considered at length the distinction between acquisition of an enterprise as opposed acquisition of assets of a defunct enterprise.[43] Concentrations arising from acquisition of bare assets are not subject to merger control.[44] The Court stated

> **"The reason for the distinction is that it is thought to be inappropriate to inhibit the organic growth of businesses simply because it is achieved by means of factors of production previously employed in another business if control of the other business has not itself been achieved"[45]**

70. The majority in the Societe Cooperative case supra was of the view

> **They [the Acquirer] had unquestionably acquired the vessels but had they acquired the crews? [Sir Colin in his view thought] they would in all probability have acquired the crews if the SeaFrance assets had been acquired from the liquidator before 9th January 2012 when the French Court directed the Company to cease operations and to dismiss most of the employees."[46]**

71. The majority in the case above opined that the order of the Court terminated the link between the employees and the Target in that matter. Their future re-employment with the acquirer could therefore not amount to a transfer.[47]

72. We would distinguish the present appeal from the facts of the Societe case above. In the *societe case* the employees were terminated on 9th January 2012 and re-employed in July 2012. In the current appeal the employees and students may not have been directly transferred from the Target to the Appellant, but the connection between them and the Target was never severed. Though there was a legal

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[41] Page 167 of the Record of Appeal
[42] Supra, note 36.
[43] Page 135 of the Appellant's submissions
[44] Page 136 paragraph 4 of the Appellant's submissions.
[45] Ibid.
[46] Page 148 Paragraph 28 of the Appellant's submissions.
[47] Page 155 paragraph 43 of the Appellant's submissions.

delinking of the students and teachers from the target, their connection to the business was never severed.

73. The Court in the Societe Case went on

> **The test...is not satisfied if the acquiring entity reconstructs a business that was once conducted by a different entity, even if the assets of that entity were used to do so... The... test turns on two enterprises ceasing to be distinct because they are brought under common ownership or common control... it is critical that there are two enterprises not one enterprise (the acquiring enterprise) and a collection of assets...**[48]

74. In conclusion, we find that the Appellant did not just acquire bare assets of the Target. The students and teachers of the Target collectively constituted an enterprise; the enterprise just changed ownership and control from the Target to the Appellant. The assets were not fractured but continued to be used in combination. The student (candidates) in the Target School continued to learn under their old teachers to avoid disruption as they prepared for their final exams.

75. The Target never wound-up and never ceased operations. The teachers and students continued as an enterprise from the Target into the Appellant; there was no disruption or period of inactivity or limbo.

76. The Appellant did not just acquire assets but acquired a going concern and took control of Target's business. In **Blokker v Toys R Us**[49] the Court stated:

> **"Therefore, acquisition of control is not limited to cases where a legal entity is taken over but can also happen through the acquisition of assets. In this situation the assets in question must constitute a business to which a market turnover can be clearly attributed"**[50]

77. It is our conclusion and finding, therefore, that the Target was an undertaking capable of being acquired at all material times. Students and Teachers of the Target were assets capable of being acquired by the Appellant. The said Students and teachers were in fact

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[48] Page 143 of the Appellant's submisions.
[49] Page 94 of the Respondent's submissions
[50] Ibid.

acquired by the Appellant. The Target by declaring their staff redundant severed the legal link to but the economic link was not terminated. The students and teachers were not bare assets but constituted an enterprise and therefore the Appellant in acquiring them took control of a going concern. Therefore, the acquisition of the Target's business constituted a merger within the meaning of sections 2 and 41 of the Act.

b) Whether proof of payment of consideration is a mandatory requisite for proof of implementation of a merger

78. The Appellant argues that the Respondent did not demonstrate that the Appellant paid consideration in respect of the transaction. The Appellant relies on section 42 (4) of the Competition Act which provides:

> **Payment of the full purchase price by the acquiring undertaking shall be deemed to be implementation of the merger in question for the purposes of this section, and payment of a maximum down payment not exceeding twenty percent of the agreed purchase price shall not constitute implementation.**

79. In the absence of proof of payment, the Appellant is of the view that the Respondent did not prove a merger had taken place.

80. The Respondent argues that proof of payment is not necessary to prove whether a merger has occurred or not.

81. A reading of section 2 on the definition of a merger[51] and of section 41 (2) (a) and (b)[52] of the Act, do not refer to payment of the purchase price as a prerequisite for a merger to have occurred. It is our finding that once the parameters outlined thereunder are satisfied, a merger will be deemed to have taken place.

82. Our understanding of Section 42 (4) is that payment of at least 20% of the purchase price, under a merger transaction, would constitute implementation of a merger

[51] Supra paragraph 45.
[52] Supra paragraph 46.

even where the outcomes contemplated in section 2 and section 41 (2) are intended by the Parties but are yet to materialize.

c. Whether the Appellant is in breach of section 42 (2) of the Act

83. Having determined that there was merger, and the approval of the Respondent was not sought, we find that the Appellant was in violation of the provisions of section 42(2) of the Act.

d. **Whether the financial penalty imposed by the Respondent on the Appellant is justified**

84. Having determined that the Appellant was in violation of section 42 (2) of the Act, we find that penalty imposed by the Respondent was justified as per the provisions of section 42 (6) of the Act.

F. ORDERS

85. We accordingly arrive at the inevitable conclusion that the Appeal herein is ripe for dismissal. In the present circumstances we therefore order as follows:
    a. This appeal be and is hereby dismissed
    b. The Respondent's decision dated 8th December 2020 be and is hereby upheld.
    c. The Appellant to bear the costs of this Appeal.

Orders accordingly.

DATED at NAIROBI this 10th **day of** August **2023**

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

JOHN NDERITU MWANGI /SECRETARY/CEO
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