

Financial Services Sector Report

Q2 2024



I. ACTS OF PARLIAMENT

INVESTMENTS

The Trustees Perpetual Succession Act, CAP 164

The Statute Law (Miscellaneous Amendments) Act, 2024 has amended the Trustees Perpetual Succession Act as follows.

- a. **Reassignment of tasks relating to incorporation of trustees and maintenance of a register of trusts-**
The Act has now been amended to provide that the responsibilities of the Principal Registrar of Documents have been reassigned to the Registrar of Companies. The Registrar of Companies will take over all the tasks which were previously being carried out by the Principal Registrar including, but not limited to registration of trusts, issuance of certificate of incorporation, certification of appointment of new trustees and maintenance of a trust register.
- b. **New application form for registration**
– The application form for the registration of a trust, which is found within the First Schedule of the Act has been amended and updated.
- c. **Fees chargeable by the registrar for incorporation, inspecting documents or obtaining copies of documents or information.**

The Act has been further amended to provide a new second schedule that details the revised fees chargeable for:

- (i) Incorporation of trusts – KShs. 10,000; and
- (ii) Right under the Act to inspect the register of trusts and get copies of any public documents relating to a trust.

II. REPORT OF REGULATOR CIRCULARS, GUIDELINES, LEGAL NOTICES, POLICIES, PRACTICE NOTES AND REQUESTS FOR STAKEHOLDER COMMENTS OR PUBLIC PARTICIPATION FROM 1ST APRIL 2024 TO 30TH JUNE 2024

1. FINTECH

In June 2024, the ICT Authority posted a draft of the [Information and Communications Technology Authority Bill 2024](#) on its website proposed by the Cabinet Secretary Information, Communications and the Digital Economy. The Bill aims to regulate the ICT sector by, among other things, standardizing the provision of ICT resources which are defined as including:

- infrastructure and systems;
- digital connectivity;
- software;
- ICT services;
- domains;
- websites;
- ICT networks;
- data centres;
- documents; and
- any other ICT related resources.

The Bill also provides certain conditions for deployment of ICT resources which include:

1. the ICT Authority will be required to develop ICT codes which shall serve as a benchmark for ICT services, outline minimum, technical and operational requirements to be adhered to and provide standards for securing and protecting data and ICT systems;

2. all entities shall be required to adhere to the applicable ICT codes in their operations;
 3. any person who intends to provide ICT services to any entity shall apply to the ICT Authority for accreditation and obtain an operational licence for the service they provide; and
 4. the ICT Authority will have powers to suspend or revoke an ICT service provider's accreditation subject to certain conditions set out in the Bill.
- (c) unjustifiably returned goods nearing their expiry date.
 - (d) demanded free merchandise, which Carrefour later sold.
 - (e) forced it to deploy its own staff to man shelves at Carrefour's outlets thereby transferring labour costs to Orchads.
 - (f) unilaterally terminated the supplier contract in place mid negotiations.

III. HIGHLIGHTS OF THE RELEVANT HIGH COURT CASE LAW FOR THE FINANCIAL SERVICES SECTOR – Q2 [2024]

Majid Al Futtain Hypermarkets Limited v Competition Authority of Kenya & another (Civil Appeal E033 of 2021) [2024] KEHC 5812 (KLR) (Commercial and Tax) (23 May 2024) (Judgment)¹

BACKGROUND:

In April 2019, Orchads Limited (hereafter, "Orchads") lodged a complaint with the Competition Authority of Kenya (hereafter, "CAK") against Majid Al Futtain Hypermarkets Limited trading as Carrefour (hereafter, "Carrefour"). Orchads complained that Carrefour:

- (a) forced it to pay rebates and listing fees of Kshs.50,000.00 for each product sold.
- (b) declined to take full delivery of goods after ordering for the same.

Upon reviewing the evidence and parties' arguments, the CAK determined in 2020 that Carrefour had breached the provisions of the Competition Act by abusing its bargaining power. Accordingly, CAK directed Carrefour to, among other things:

- (a) amend all the existing supplier contracts to expunge provisions facilitating abuse of buyer power.
- (b) refund Orchads Kshs.289,482.00 in deducted rebates.
- (c) pay a fine of Kshs.124,768.00 to CAK.

Aggrieved by the decision of the CAK, Carrefour appealed to the Competition Tribunal.

In April 2021, the Competition Tribunal delivered a judgement in which it largely affirmed the findings and decision of the CAK. The Tribunal agreed that Carrefour had abused its bargaining power and upheld the order to amend all supplier contracts, refund rebates, and pay a fine.

¹

<https://kenyalaw.org/caselaw/cases/view/289845/>

Aggrieved by the decision of the Competition Tribunal, Carrefour lodged an appeal at the High Court.

CARREFOUR'S CASE:

In support of its appeal against the decision of the Competition Tribunal, Carrefour contended as follows:

1. the Competition Tribunal erred in holding that CAK gave Carrefour a fair hearing and followed the laid down procedure while conducting investigations.
2. the Competition Tribunal was wrong in determining that Buyer Power Guidelines were not statutory instruments. According to Carrefour, CAK had no legal basis for applying the Buyer Power Guidelines which were invalid for offending the provisions of the Statutory Instruments Act.
3. it was unreasonable for CAK to require Carrefour to amend all its supplier contracts even though only 1 supply agreement was before CAK.
4. CAK had no authority to investigate complaints into abuse of buyer power before 31 December 2019.
5. the Competition Tribunal erred in concluding that Carrefour was not permitted to return goods on grounds that they were false or defective. Carrefour asserted that the Tribunal failed to consider clauses 6 and 7 of the supplier agreements which permitted the return of goods nearing their expiry date.
6. rebates are a standard business practice in the market, provided there is an economic justification for

them. The Tribunal erred in failing to appreciate that volume rebates are a widely accepted practice in the retail industry and do not hinder competition. Carrefour referenced *Michelin v Commission (EU:2033:250)*, the Australian Competition and Consumer Commission Guidelines on Misuse of Market Power, and the Japanese Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act.

HELD:

CAK afforded Carrefour an opportunity to be heard and make Oral Representations

CAK dutifully followed the procedure laid down under the Competition Act in investigating Orchads' complaints, hearing Carrefour and Orchads and issuing a determination. Specifically, CAK issued Carrefour with a Notice of Investigations, conducted investigations, issued a Notice of Proposed Decision and invited Carrefour to defend itself through written submissions. since section 35 (3) of the Competition Act provides that proceedings are to be carried out in an informal manner, there was no obligation on the part of CAK to call for and allow cross examination of witnesses.

CAK was entitled to use Buyer Power Guidelines in determining Orchads' Complaint

The court upheld the Competition Tribunal's finding that the Buyer Power Guidelines were purely executive in character. Contrary to statutory instruments which bear a legislative character, the Buyer Power Guidelines were aimed at guiding the CAK in implementing Kenya's competition laws.

The Competition Tribunal erred in upholding CAK’s finding that Carrefour should amend supplier contracts that were not subject of CAK’s investigation

The court found that the Tribunal erred in affirming the directive of CAK that Carrefour amends all its existing supplier contracts to remove provisions facilitating abuse of buyer power.

According to the court, there was no evidence that Carrefour had notice of CAK’s intention regarding contracts between Carrefour and suppliers other than Orchards. CAK should have included the nearly 700 suppliers whose contracts could be affected in the proceedings from the outset. Both Carrefour and the Suppliers were legally entitled to an opportunity to address and respond to the alleged complaints.

The Tribunal was Correct in Finding that Carrefour’s Conduct Amounted to abuse of Buyer Power

The court affirmed the Tribunal’s decision that CAK had correctly determined that conditions such as volume rebates, rejection of unacceptable goods upon delivery and return of goods nearing their expiry date constituted abuse of buyer power under sections 24 (2A), (2B), (2C) and (2D) of the Competition Act.

CONCLUSION & IMPLICATION:

In conclusion, the court upheld the decision of the Competition Tribunal with the exception of the directive to amend all supplier contracts between Carrefour and its suppliers. The implications of the Honourable Court’s decision are significant for various stakeholders:

For Orchards:

- (a) Compensation: Orchards will receive compensation for the rebates and other financial losses

incurred due to Carrefour’s practices.

- (b) Vindication: the decision validates Orchard’s complaints against Carrefour.
- (c) Business Relations: Orchards might find more equitable terms in future dealings with Carrefour and other large retailers.

For Carrefour:

- (a) Legal Precedent: the decision sets a legal precedent, increasing scrutiny on the future dealings of Carrefour and other large retailers possibly leading to more stringent regulatory oversight.
- (b) Reputational Damage: the decision highlights Carrefour’s unfair business practices, potentially harming its reputation and relationships with suppliers and customers.
- (c) Operational Changes: Carrefour has to amend its supplier contracts to remove clauses that amount to abuse of buyer power or bargaining power, possibly requiring an overhaul of existing contracts.
- (d) Financial Impact: Carrefour will be required to settle rebates and pay fines prescribed by CAK.

For Consumers:

- (a) Consumer Trust: the decision can serve to enhance consumer trust in the retail market by demonstrating that regulatory authorities such as the Competition Authority of Kenya are actively working to ensure fair practices.

- (b) Indirect benefits: fairer and healthier supplier-retailer relationships can lead to more stable supply chains, potentially resulting in better product availability and pricing.

For Other Suppliers:

- (a) Contractual Fairness: other suppliers working with Carrefour can expect fairer contract terms
- (b) Empowerment: the decision empowers other suppliers to challenge unfair practices, knowing there exists a legal precedent for protection against abuse of buyer power.

For the Retail Industry:

- (a) Regulatory Scrutiny: the decision signals increased regulatory scrutiny on large retailers, prompting them

to review and potentially revise their supplier contracts and business practices.

- (b) Enhanced Industry standards: the decision may lead to higher industry standards regarding supplier treatment and contract fairness.

For Regulatory Bodies:

- (a) Precedent and authority: the decision reinforces the authority of regulatory bodies like the Competition Authority, establishing precedent for future cases involving the abuse of buyer power.
- (b) Policy enforcement: the decision highlights the importance of enforcing competition laws to maintain a fair and competitive marketplace.



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