

# Kenyan High Court rules on legality of dawn raids

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The High Court of Kenya handed down judgment on the first competition case in Kenya, in the matter between Mea Limited and the Competition Authority of Kenya (CAK), in August this year. The ruling confirms the principle that dawn raids, provided they are based on a reasonable suspicion which is supported by facts, are legal and no prior notice that a search warrant is being sought is required to be given to the company that is to be raided. This position is consistent with international best practice.



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The Court in this matter also touched on the fact that it is not always necessary for the CAK to even obtain a search warrant before conducting a dawn raid. However, while the Court did not decide in what circumstances this would be applicable, it did point out that at a minimum, the Constitution of Kenya and the Fair Administrative Action Act would need to be complied with.

While the Court in this case specifically lent its support to the CAK's submissions that, given the role the CAK plays, it ought to be able to perform its statutory mandate with minimal interference, the CAK is a relatively young regulator and both its powers and the ambit of the Competition Act are largely untested.

Business leaders, for instance, may be concerned about inordinate disruptions to their business operations during the course of the regulators' investigation. While a level of discomfort is necessary and possibly is even by design (as a deterrent against anti-competitive conduct), it must be accepted that not all investigations lead to findings of a contravention. In the circumstances, both the regulator and the broader competition community need to consider whether there is a reasonableness standard to the level of disruption to the respondents' business that the CAK is afforded during dawn raids.

Having carried out its first dawn raid and at the back of this recent success before the courts, it remains to be seen whether the CAK will have an increased appetite for dawn raids or whether it will opt for the softer approach of leniency policies, which appear to be the favoured approach by comparable regulators.

This is the first time that the Kenyan courts have examined the dawn raid process under the provisions of the Kenyan Competition Act and it is a somewhat welcome development since there is a need to build up competition law jurisprudence in Kenya.

What would perhaps have been interesting, and which may not have been applicable to this case, is whether the CAK is obliged to wait for the respondent company's legal counsel before commencing the dawn raid and/or interviewing staff. And if so, how long the CAK should wait for the respondent company's legal counsel before it commences the raid.

This is particularly important in circumstances where the Kenyan Competition Act contemplates criminal sanctions for contraventions of the restrictive trade practices provisions. As such, the consequences of not being afforded legal representation can be dire.

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