



APPROVAL OF EXEMPTION APPLICATION BY AZALEA HOLDINGS LIMITED AND MAJID AL FUTTAIM HYPERMARKET LIMITED FOR AN EXCLUSIVE SHOPPING MALL LEASE AGREEMENT.

1. The CAK partially **granted** an application by Azalea Holdings Limited and Majid Al Futtaim Hypermarket Limited seeking exemption of certain restrictive clauses contained in their proposed shopping mall lease agreement.
2. Azalea Holdings is a limited liability company incorporated in Kenya. The company is in the business of developing properties for commercial leasing. One of its properties is the Hub Karen Mall located in Karen, Nairobi.
3. Majid Al Futtaim is a limited liability company that is in the business of operating and managing retail hypermarkets under the trading name Carrefour. Majid Al Futtaim, the anchor tenant at the Hub Karen Mall, was seeking specific exclusivity rights for a period of **seven (7) years**.
4. The application was in adherence to the Competition Act No. 12 of 2010 which allows the Authority to grant exemption for parties to engage in certain restrictive practices.
5. The parties sought exemption since some elements in the proposed agreement contravened Section 21(3) of the Competition Act include. They were;
 - i. Majid Al Futtaim and Azalea Holdings to mutually agree in writing on food retail operators, except the existing ones, setting up business at The Hub Karen Mall.
 - ii. Azalea Holdings not to enter into lease agreements with other parties for premises it developed, owns or operates within a radius of five kilometers of the Hub Karen



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Mall unless mutually agreed and only in cases where the premises is over 2,500 square feet.

- iii. Majid Al Futtain not to operate a similar business within a radius of five kilometers of the Hub Karen Mall unless mutually agreed and only in cases where the premises is over 2,500 square feet.
6. The two parties argued for exemption of the anticompetitive clauses noting that, by Carrefour being the anchor tenant, it will make substantial investments in its operations, promoting the shopping mall's success.
 7. Further, they argued that Carrefour would promote attractiveness of the Hub Karen Mall to consumers by ensuring that it has a mix of tenants.
 8. The parties contended that the retail market in Kenya, and particularly in Nairobi, is wide and competitive and that their exclusivity pact will not negatively impact the industry.
 9. The Competition Act No.12 of 2010 expressly prohibits agreements which have the object or effect of preventing, lessening or distorting competition.
 10. Division of markets by allocating customers, suppliers or specific types of goods and limits or controls production, market outlets or access, technical development or investments are prohibited.
 11. However, Section 26(2) of the Competition Act provides that the Authority may grant an exemption if it will;
 - i. Maintain or promote exports.
 - ii. Improve, or prevent decline in the production or distribution of goods or the provision of services.
 - iii. Promote technical or economic progress or stability in any industry.
 - iv. Obtain a benefit for the public which outweighs or would outweigh the lessening in competition that would result or likely to result from the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices.

12. When analyzing the application by Majid Al Futtaim and Azalea Holdings, the CAK first sought to determine the relevant market that Carrefour operates in and whether there are options available to consumers with relative ease.
13. International best practice indicated that shoppers consider shopping malls that are within a 10 kilometer radius as being substitutes. Therefore, the Authority determined the relevant geographic market to be within a 10 kilometer radius.
14. The relevant market (Karen) has several retail centers which compete with Carrefour include Waterfront Mall, Galleria Mall, Milele Mall, Crossroads Mall and the Junction Mall.
15. These shopping centers are situated 1.7 kilometers, 7.6 kilometers, 8.4 kilometers, 2.3 kilometers and 7.7 kilometers respectively from the Hub Karen Mall.
16. The businesses, therefore, meet the 10 kilometer radius rule/threshold, meaning that they are substitutes of the Hub Karen Mall and occasioning intense competition for customers in this market.
17. Further, the Karen neighborhood is inhabited by a population that mostly drives their personal vehicles, meaning customers can shop at the location of their choice.
18. The CAK's analysis also showed that the Hub Karen Mall has a rentable space 35,000 square meters, 7,067 square meters of which is occupied by Carrefour. Other tenants occupy approximately 18,800 square meters.
19. The unrented space (approximately 9,133 square meters) is scattered across the shopping mall and, therefore, not ideal to operate a supermarket.
20. Premised on the above reasons, it is the Authority's assessment that by granting exclusivity as sought by the parties is unlikely to give rise to competition concerns.
21. The CAK therefore granted the exemption for **five (5) years** (instead of the seven years sought) on **two of the three clauses** deemed to contain anticompetitive elements;

- i. Azalea Holdings shall not enter into lease agreements with other parties for premises it developed, owns or operates within a radius of five kilometers of the Hub Karen Mall unless mutually agreed and only in cases where the premises is over 2,500 square feet.
- ii. Majid Al Futtain shall not operate a similar business within a radius of five kilometers of the Hub Karen Mall unless mutually agreed and only in cases where the premises is over 2,500 square feet.

22. However, the CAK **declined** to grant the exemption application that would necessitate the two parties to mutually agree in writing on food retail operators, except the existing ones, setting up business at the Hub Karen Mall.

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