



THE PROPOSED DECISION IN THE MATTER REGARDING ACQUISITION OF SHAREHOLDING IN ASANTE CAPITAL EPZ LIMITED BY MORINGA ENTITIES

1. The Competition Authority of Kenya has penalized Asante Capital EPZ Limited (Asante) Ksh. **549,019** for implementing a merger with Moringa Entities (Moringa SCA and Moringa Mauritius Africa) without seeking approval as stipulated by the Competition Act No.12 of 2010.
2. In 2017, the parties, sought clarification from the Authority if the acquisition of shareholding in Asante by Moringa Entities was subject to the provisions of Part IV of the Act regulating mergers and acquisitions. This was the first of three envisioned tranches of investment.
3. The Authority advised the parties that the proposed acquisition of 44.2% shareholding in Asante by the Moringa entities would not lead to acquisition of control in Asante and, therefore, the first tranche of investment did not require prior authorization by the Authority.
4. Further, in 2018, the parties wrote to the Authority in regard to the third tranche of investment, indicating that the second tranche had already been actualized.
5. The Authority advised the parties that the second tranche of investment was a notifiable transaction. Moringa Entities' stake in Asante had resulted in a change of control and therefore qualified as a merger within the meaning of Section 2 and 41 of the Act.
6. Section 42(2) of the Act states that: *"No person, either individually or jointly or in concert with any person, may implement a proposed merger to which this part applies unless this merger is approved by the Authority."*
7. Section 42(5) of the Act further provides that: *"Any person who contravenes the provisions of this section commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings, or both."*
8. Additionally, section 42(6) of the Act provides that: *"The Authority may impose a financial penalty in an amount not exceeding ten percent of the preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question."*
9. Moringa Entities are impact investment funds investing in agro-forestry businesses located in developing countries with the objective of scaling their social and environmental impact.
10. Asante, which is incorporated in Kenya, is an agro-forestry company located in the South coast

of Kenya. Asante is engaged in the growing of eucalyptus, ginger and drumstick tree (moringa). It also processes tress to veneer and makes briquettes.

11. The execution of the second transaction was contrary to the provisions of section 42(2) of the Act.
12. The Authority acknowledged the fact that the parties self-reported and that they were desirous of settling the matter administratively.
13. Administrative penalties take into account deterrence and proportionality of the infringement as guided by the Fining and Settlement Guidelines. They also reflect the infraction's effect on competition, public interest concerns, the level of cooperation of the parties, and whether the parties are repeat offenders or not, among others.
14. Some of the considerations in this particular matter included; nature of the infringement, cooperation by the parties, the possible effect of the transaction on competition, and public interest considerations such as employment.
15. Premised on the above, the Authority imposed a penalty of **KES 549,019** on Asante Capital EPZ Limited Petroleum (K) Limited for contravening section 42(2) of the Act and ordered them to initiate steps to regularize the transaction.