

**CONSUMER PROTECTION REGIMES IN KENYA WITH SPECIFIC INTEREST ON
THE ROLE OF COMPETITION LAW AND INTELLECTUAL PROPERTY LAW**

BY


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of the requirements for the degree of Master of Laws**

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DECLARATION

This research project is my original work and has not been submitted for any award in any other University.

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DR. PETER MUNYI

DEDICATION

I dedicate this research project to my family; Martha Koki, Teresia Kieti, Irene Mati, Dr. Peter Nzuki, Patrick Munyoki and Maureen Mawia. God bless you for your endless support.

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TABLE OF CONTENTS

DECLARATION	2
DEDICATION	3
ACKNOWLEDGEMENT	4
LIST OF ABBREVIATIONS	8
LIST OF CONSTITUTIONS	10
LIST OF STATUTES	11
LIST OF INTERNATIONAL CONVENTIONS AND INSTRUMENTS	12
TABLE OF CASES	13
ABSTRACT	14
CHAPTER ONE	15
INTRODUCTION	15
1.1 Background to the Study.....	15
1.2 Statement of the Problem.....	17
1.3 Justification of the Study	19
1.4 Research Objectives.....	20
1.5 Research Questions.....	21
1.6 Hypotheses.....	21
1.7 Literature Review.....	22
1.8 Theoretical Framework.....	27
1.8.1 Consumer Sovereignty Theory	27
1.8.2 Commercial Nuisance Theory	30
1.9 Research Methodology	31
1.10 Chapter Breakdown	31
CHAPTER TWO	33

CONSUMER PROTECTION REGIME IN KENYA.....	33
2.1 Introduction to Consumer Protection in Kenya	33
2.2 Consumer Protection in Kenya Pre-2010	34
2.3 Consumer Protection in Kenya Post-2010.....	37
2.4 Conclusion	40
CHAPTER THREE	42
THE EFFECTIVENESS OF COMPETITION LAW IN PROTECTION OF CONSUMER RIGHTS IN KENYA	42
3.1 Introduction.....	42
3.2 The Interaction between Competition Law Regime in Kenya and the Consumer Protection Act.....	43
3.3 Framework Governing the Promotion and Protection of Consumer Rights under Competition Law	44
3.4 Role of the Competition Authority of Kenya (CAK) and Competition Tribunal in the Promotion and Protection of Consumer Rights	49
3.5 Conclusion	51
CHAPTER FOUR.....	53
THE ROLE OF INTELLECTUAL PROPERTY RIGHTS IN THE PROTECTION OF CONSUMER RIGHTS IN KENYA.....	53
4.1 Introduction.....	53
4.2 Nature of Intellectual Property Rights	54
4.3 Intellectual Property Law <i>vis-à-vis</i> Consumer Protection	55
4.3.1 Copyright and Consumer Protection.....	55
4.3.2 Trade Mark, Well Known Marks and Consumer Protection	57
4.3.3 Patents and Consumer Protection	60
4.3.4 Plant Breeders Rights and Consumer Protection.....	62

4.4 Conclusion	63
CHAPTER FIVE	65
CONSUMER PROTECTION APPROACHES IN THE UNITED KINGDOM.....	65
5.1 Introduction.....	65
5.2 UK Legal Framework for Consumer Protection.....	65
5.3 Abuse of Dominance and Protection of Consumers under UK Competition Law	68
5.4 Consumer Protection under UK Intellectual Property Law	70
5.5 Consumer Protection Enforcement Mechanisms in the UK.....	71
5.6 Lessons Kenya can Borrow from the UK on Consumer Protection	73
5.6 Conclusion	75
CHAPTER SIX	77
CONCLUSION AND RECOMMENDATIONS.....	77
6.1 Summary of Chapters	77
6.2 Conclusion	78
6.3 Recommendations.....	80
BIBLIOGRAPHY	82

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CA	Competition Act
CAK	Competition Authority of Kenya
CAT	Competition Appeal Tribunal
CMA	Capital Markets Authority
COVID-19	Corona Virus Disease
CPA	Consumer Protection Act
CRA	Consumer Rights Act
EU	European Union
FCA	Financial Conduct Authority
GI	Geographical Indication
ICT	Information and Communication Technology
ID	Industrial Design
IP	Intellectual Property
IRA	Insurance Regulatory Authority
NGO	Non-Governmental Organization
PBR	Plant Breeder's Right
PVP	Plant Variety Protection
RTPMPCA	Restrictive Trade Practices, Monopolies and Price Control Act
SM	Service Mark
TM	Trade Mark
TRIPs	Trade-Related Aspects of Intellectual Property Rights

TS	Trade Secret
TSS	Trading Standards Services
UC	Unfair Competition
UK	United Kingdom
UM	Utility Model
UPOV	International Union for the Protection of New Varieties of Plants

LIST OF CONSTITUTIONS
Constitution of Kenya, 2010

LIST OF STATUTES

List of Kenyan Statutes

Central Bank of Kenya Act (Cap. 491)

Competition Act No. 12 of 2010

Consumer Protection Act No. 46 of 2012

Copyright Act, 2001

Fertilizers and Animal Foodstuffs Act (Cap. 345)

Foods, Drugs and Chemical Substances Act (Cap. 254)

Industrial Property Act, 2001

Kenya Information and Communications Act, 1998

Pharmacy and Poisons Act (Cap. 244)

Public Health Act (Cap. 242)

Restrictive Trade Practices, Monopolies and Price Control Act (Cap. 504)

Seeds and Plant Varieties Act (Cap 326)

Standards Act (Cap. 496)

Trade Descriptions Act (Cap. 505)

Trade Marks Act (Cap 506)

Weights and Measures Act (Cap. 513)

List of Foreign Statutes

Competition Act, 1998 (UK)

Consumer Rights Act, 2015 (UK)

Financial Services and Markets Act, 2000 (UK)

LIST OF INTERNATIONAL CONVENTIONS AND INSTRUMENTS

Agreement on Trade Related Aspects of Intellectual Property (TRIPs Agreement) 1994

The International Union for the Protection of New Varieties of Plants (UPOV) 1998

The Paris Convention for the Protection of Industrial Property 1883

TABLE OF CASES

Gladys Karimi Musyimi v. Fahari Cars Ltd & Another Civil Case No. 67 of 2019

Hoffman La-Roche v. Commission of the European Community (1976) Case No. 85

Majid Al Futtaim Hypermarkets Ltd v. Competition Authority of Kenya and Anor CT/006/2020

ABSTRACT

In the pre-2010 constitutional dispensation, Kenya had no specific law dealing with consumer protection. Various aspects of consumer protection were covered in numerous statutes, rules and regulations. The promulgation of the Constitution of Kenya in 2010 brought change to this position by providing consumer protection as a constitutional right and mandating parliament to enact the Consumer Protection Act 2012. However, parliament has also enacted various other statutes providing for the protection of consumer rights in Kenya. The overarching argument of this study is that despite the existence of a consumer protection statute, there are other relevant laws, rules and regulations that can be used to guarantee and protect consumer rights.

This research study will identify Kenya's legislative and administrative framework governing consumer protection. The study will seek to identify the interrelationship between consumer rights, competition law and intellectual property (IP) and interrogate the role competition law and IP play in consumer rights and protection. A comparative study with the United Kingdom (UK) will be undertaken to establish what lessons Kenya can draw from the UK consumer protection regime. A conclusion will be drawn at the end of the research study and recommendations made from the issues identified.

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

The overarching argument of this study is that despite the existence of a consumer protection statute, there are other relevant laws, rules and regulations that can be used to guarantee and protect consumer rights. Consumer protection law ensures that buyers are protected from coercion, deception, and other influences that are difficult to evade or to guard against.¹ However, this law does not protect buyers from the knowable influences of things like “image” advertising, which consumers could set aside if they desire.²

In the pre-2010 constitutional dispensation, Kenya had no single comprehensive law dealing with consumer protection. Various aspects of consumer protection were covered in numerous statutes, rules and regulations. These included the Trade Descriptions Act (Cap. 505), Standards Act (Cap. 496), Weights and Measures Act (Cap. 513), Restrictive Trade Practices, Monopolies and Price Control Act (Cap. 504) (now known as the Competition Act), the Foods, Drugs and Chemical Substances Act (Cap. 254), the Pharmacy and Poisons Act (Cap. 244), the Public Health Act (Cap. 242), the Central Bank of Kenya Act (Cap. 491), the Kenya Information and Communication Act (Cap. 411A) as well as private law measures in the law of contract and the law of tort.³

¹ Neil W. Averitt and Robert H. Lande, ‘Consumer sovereignty: A unified theory of antitrust and consumer protection law’ (1996) *Antitrust LJ* 65, 713.

² *ibid*; Hartzog Woodrow, ‘Unfair and deceptive robots’ (2014) *Md. L. Rev.* 74, 785.

³ Victor Nzomo, ‘E-Commerce and the Law in Kenya: Consumer Protection’ (2018) <<https://cipit.strathmore.edu/e-commerce-and-the-law-in-kenya-consumer-protection/>> Accessed 30 June 2021.

It is important to note that these statutes are criminal law oriented as they seek to ban malpractice and to prosecute offenders for breach of their provisions. These statutes however fail to empower consumers to sue their offenders to get redress, including compensation, where the said breach affected them adversely.⁴ Their criminal law orientation means that punishment for offenders is either fines or jail term sentences which does not necessarily compensate consumers for the loss suffered as compared to civil law which offers redress in the form of damages or restitution. This was a major setback in the pre-2010 constitutional dispensation in as far as consumer protection is concerned.⁵

It is on this background that Article 46 of the Constitution of Kenya, 2010 sought to entrench consumer protection as a constitutional right. Further, Article 46 (2) mandates Parliament to enact the Consumer Protection Act, 2012.

It is worth noting that even after the enactment of the Consumer Protection Act, there are still other legal regimes or statutes that can be used to complement the Consumer Protection Act.⁶ These include the competition law regime and the intellectual property rights regime. Competition law and IP rights regimes complement each as only their operational areas differ.⁷ IP encourages incentives for inventions while competition law on the other hand promotes or maintains market competition by regulating anti-competitive behavior in the market such as

⁴ Nicholas Amuti, 'An examination of the adequacy of the consumer protection act in protecting banking borrowers in Kenya. A case study of the national bank of Kenyan terms and conditions for an unsecured loan' (2016) University of Nairobi.

⁵ *ibid.*

⁶ Joy Malala, 'Consumer law and policy in Kenya' (2018) *Journal of Consumer Policy* 41(4), 355-371.

⁷ Rose Njeru, 'Intellectual property and consumer protection in Kenya' (2019) BOWMANS at <https://www.bowmanslaw.com/insights/intellectual-property/intellectual-property-and-consumer-protection-in-kenya/> Accessed 17 October 2021.

abuse of dominance.⁸ These regimes play a complimentary role to the Consumer Protection Act as they play an important role in ensuring that consumer rights are protected and promoted.

With the enactment of a statute on consumer protection, many scholars and legal commentators have argued for and against an isolated implementation of the Consumer Protection Act.⁹ The need to have other sectoral laws incorporated in the protection and enforcement of consumer rights has been underscored.¹⁰ This has prompted the study and academic debates on the roles of competition law and intellectual property law in enforcing consumer protection.¹¹ It is on this backdrop that the study seeks to assess the consumer protection regimes in Kenya with specific interest on the role of competition law and intellectual property law.

1.2 Statement of the Problem

The importance of consumer protection was stamped in Kenya's legislative framework when the country's supreme law provided for consumer rights in Article 46 of the Constitution of Kenya, 2010. It states: "Consumers have the right to goods and services of reasonable quality; to the information necessary for them to gain full benefit from goods and services; to the protection of their health, safety, and economic interests; and to compensation for loss or injury arising from

⁸ *ibid.*

⁹ Joy Malala, 'Consumer protection for mobile payments in Kenya: An examination of the fragmented legislation and the complexities it presents for mobile payments' (2013) *KBA Centre for Research on Financial Markets and Policy Working Paper Series*.

¹⁰ Simone Di Castri, 'Consumer Protection Diagnostic Study: Financial Consumer Protection in Kenya' (2011) at <<https://www.semanticscholar.org/paper/Consumer-Protection-Diagnostic-Study%3A-Financial-in-Castri-Flaming/2950ae8c90f106e8a6679d35e086783b4ed97fe3>> Accessed 17 May 2021.

¹¹ Gurushri Swamy, 'Kenya: Patchy, intermittent commitment' (1994) *Adjustment in Africa: Lessons from Country Case Studies*, 193-237.

defects in goods or services.”¹² The Consumer Protection Act, 2012 was enacted to give full effect to this constitutional provision.¹³

With the introduction of the Consumer Protection Act plus the already existing statutes that provide for consumer protection it would ideally be argued that the consumer protection regime is strong. However, this is not the case as most of the institutions tasked with the protection of consumer rights fall short of effectively executing their mandates.¹⁴ There is lack of co-operation between these institutions, for example, the Competition Authority of Kenya and Competition Tribunal, with each institution acting on its own mandate rather than working with the other to improve consumer protection. There is also an overlap on several areas of legislation on consumer protection which brings about the question of which legislation takes precedence over the other. Section 90 of the Consumer Protection Act provides for the modification, consolidation or updating of legislation providing protection to consumers in the areas covered under the Act or related to it. The Competition Act on the other hand requires that in case of a conflict between the provisions of the Competition Act and the provisions of any other written law with regard to matters concerning competition, consumer welfare and the powers or functions of the Competition Authority of Kenya under the Competition Act, the provisions of the Competition Act shall prevail.¹⁵ This needs to be addressed as both the Competition Act and

¹² Constitution of Kenya 2010, Article 46(1).

¹³ Constitution of Kenya 2010, Article 46(2).

¹⁴ Joy Malala (n 6).

¹⁵ Competition Act 2010, Section 5(2).

the Consumer Protection Act provide for cross-cutting issues on consumer welfare and it is not clear which Act should take precedence in case of a conflict.¹⁶

Over reliance on the Consumer Protection Act as the sole legislation for the protection of consumer rights has also been questioned.¹⁷ Hence, in order to guarantee the protection of consumer rights, there is need to integrate other sectoral laws, rules and regulations in the protection of consumer rights.¹⁸ This is important as it will provide a stronger legal framework and improve coordination of the various administrative institutions responsible in the protection and enforcement of consumer protection in Kenya. The mere existence of a consumer protection statute does not mean that it is the only approach available in protection of consumer rights in Kenya. Therefore, the study seeks to assess the consumer protection regimes in Kenya with specific interest on the role of competition law and intellectual property law. The study also seeks to review approaches on consumer protection taken by other jurisdictions with specific interest in the UK, and what Kenya can learn from the UK consumer protection regime.

1.3 Justification of the Study

The relationship between consumer protection, competition law and Intellectual Property (IP) law has been a controversial subject over the years. The main objective of competition law is to facilitate access to markets and redistribute market power.¹⁹ This is to facilitate the prevention of

¹⁶ Ben Sihanya, 'Consumer Protection Act and the Constitution of Kenya 2010: Review Area' (2015) Presentation during the Retreat on Strengthening Consumer Protection through Intergovernmental Linkages, organized by KECOPAC and the Ministry of East Africa Affairs, Commerce and Tourism at Sawela Lodge Naivasha from February 10, 2015 to February 12, 2015.

¹⁷ Jason G. Blechman, 'Mobile credit in Kenya and Tanzania: Emerging regulatory challenges in consumer protection, credit reporting and use of customer transactional data' (2016) *The African Journal of Information and Communication*, 61-61.

¹⁸ Simone Di Castri (n 10); Jason G. Blechman (n 17); Joy Malala (n 6).

¹⁹ UNCTAD Secretariat, 'The role of competition policy in promoting sustainable and inclusive growth' (2015) at https://unctad.org/system/files/official-document/tdrbpconf8d6_en.pdf Accessed 17 October 2021.

concentration of market power among few firms and undertakings which are prone to abuse it to the detriment of the economy and consumer welfare. On the other hand, IP rights grant exclusive rights which many have described as legal monopolies. At the center of both competition law and IP law is consumer rights and protection. Consumers play a critical role in the market which competition law seeks to regulate and which IP seeks to monopolize for the benefit of IP owners. Without consumers, competition law and IP cannot progress in the business market.

There is however a shortage of literature in Kenya on the convergence and divergence of consumer protection, competition law and IP law. The relationship between these three key fields remains largely unaddressed with the lack of a proper systematic or procedural guideline within the law on how the relationship is governed. The current Kenyan legal framework can thus be said to not have kept up with the dynamism of the innovation sector of the economy. This research study intends to fill the gap in literature on the relationship amongst consumer protection, competition law and IP law in Kenya. Further, this research study will make recommendations on how Kenya can improve the interrelationship between consumer protection, competition law and IP law.

1.4 Research Objectives

The main objective of this study is to assess the consumer protection regimes in Kenya with specific interest on the role of competition law and IP law.

The other objectives include:

1. To assess the state of the consumer protection regime in Kenya and the importance of the Consumer Protection Act 2012;

2. To assess the effectiveness of competition law towards protection of consumer rights in Kenya;
3. To assess the role of intellectual property in the protection of consumer rights in Kenya; and
4. To establish lessons that can be learned from the United Kingdom.

1.5 Research Questions

The main research question of the study is what are the consumer protection regimes in Kenya with specific interest on the role of Competition Law and intellectual property?

Other questions include;

1. What is the state of consumer protection regime in Kenya?
2. How effective is the competition law towards protection of consumer rights in Kenya?
3. What is the role of intellectual property in the protection of consumer rights in Kenya?
4. What lessons can be learned from the consumer protection approach in the United Kingdom (UK)?

1.6 Hypotheses

This study is premised on the author's hypotheses that:

1. Consumer protection law, competition law and intellectual property law share a similar goal and objective which is to protect the rights and interests of consumers; and
2. There is need to have comprehensive guidelines that will ensure a balance in the protection of consumer rights and the maintenance of a free, open and competitive market in Kenya.

1.7 Literature Review

The Constitution of Kenya, 2010 provides for the right to consumer protection.²⁰ This includes the right to goods and services of reasonable quality, right to the information necessary for them to gain full benefit from goods and services, right to the protection of their health, safety, and economic interests and right to compensation for loss or injury arising from defects in goods or services.

Consumer rights are intertwined between the rights of individual consumers and the obligations of a corporate entity that produces goods and services. Nordberg²¹ argues that businesses should have larger aims than maximization of profits. Businesses should take into account the interests not only of their shareholders (owners) but also of their stakeholders (consumers). Nordberg argues that one of the stakeholder's (consumer's) rights is the right to goods and services of reasonable quality which forms the gist of consumer rights.

In supporting the notion that businesses should be accountable to society, he argues that businesses should take into account that it is the society that grants them the licence to operate and therefore they should be accountable for their use of such licence. Additionally, he goes on to assert that in the decision-making processes of a business, it is important to take into account the interests of all the parties including employees, suppliers as well as the consumers. He notes that “respect for individuals is a greater good that businesses cannot ignore.” This he observes is of a long term and strategic value to the business. This research emphasizes the importance of

²⁰ Constitution of Kenya 2010, Article 46.

²¹ D. Nordberg, 'The Ethics of Corporate Governance' (2007) <<http://ssrn.com/abstract=1004038>> Accessed 8 October 2020.

consumers in the market. Without respect consumers, goods and service providers cannot thrive as consumers are the final recipients of the goods and services in the market.

Kibwana²² observes that human rights defined by both domestic and international law should be fully observed and respected. He notes that it is not only governments which violate human rights. Private individuals as well as corporations also violate human rights and should be held accountable. He contends that for human rights to be fully enjoyed by individuals, they should be effectively and fully enforced.²³

According to Mwaura,²⁴ businesses and corporations have taken advantage of the opportunities for trade presented by globalization to increase shares for the benefit of their shareholders. In their quest to maximize their profits, they have engaged in practices which violate the human rights of individuals and societies such as forced and child labor, discrimination, providing deprived working conditions to employees and environmental degradation among others. The recognition that corporate activity has had detrimental impact on human welfare has led to the need to hold corporations accountable for human rights violations.²⁵

He further argues that as a result of unethical activities carried out by businesses and corporations, they should have responsibilities for protecting human rights. While lauding the application of the Kenyan bill of rights to all persons, including corporations, he observes that

²² Kivutha Kibwana, *Fundamental Rights and Freedoms in Kenya* (Oxford University Press, 1990) 83.

²³ *ibid.*

²⁴ Kiarie Mwaura, 'Horizontalty and the Bill of Rights: Defining Parameters of Corporate Complicity in Human Rights Violations' (2011) *Law Society of Kenya Journal* 7(1), 1-21.

²⁵ *ibid.*

this will change the way business is carried out in the country as corporations will have to take into account human rights concerns as part of their business risks. He, however, contends that there still lacks clear identification of the parameters of indirect corporate liability for human rights violations which is necessary for the effective enforcement of human rights protection.

Ruggie²⁶ in seeking to provide clarity on the issue of human rights and business proposed the “protect, respect and remedy” framework. While acknowledging that the State has the primary duty to protect against human rights abuses, he observed that corporations also have a responsibility to respect human rights. He contends that the corporate responsibility with regard to human rights comprises doing no harm which means corporations should avoid violating human rights and in addition should take positive actions to address adverse human rights impacts which they have contributed to.

Consequently, Ruggie points out that effective discharge of the corporate responsibility to respect human rights requires due diligence to be carried out by corporations. By due diligence is meant the “steps a company must take to become aware of, prevent and address adverse human rights impacts.”²⁷ Hence, in Ruggie’s opinion, the extent of corporate responsibility to respect human rights should be determined by the sphere of influence and complicity of the corporation. Thus, the extent of the human rights responsibilities of corporations depends on the activities of a corporation in a specific context.

²⁶ John Ruggie, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’ (2008) Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc.A/HRC/8/5.

²⁷ *ibid.*

Williams and Conley²⁸ examine the respect of human rights by corporations as an issue that directors of corporations must consider when considering the other constituents or stakeholders of the corporation. They contend that respect for human rights forms part of the corporations' board of directors' fiduciary duties to their shareholders. This, they argue, is an emerging trend brought about by, among others, the changing institutional investor behavior as well as the growth of new governance regimes including government regulation and corporate governance standards and codes which is increasingly requiring disclosures by corporations relating to human rights issues.

They contend that board of directors of corporations are required to consider rights and interests exemplified in the international law of human rights. Although this requirement may not always be legally enforceable i.e. be a requirement of the law, it can be enforced through non-legal mechanisms such as market and norm-based mechanisms. Despite acknowledging that stakeholder leverage in the enforcement of human rights issues is largely dependent on non-legal enforcement mechanisms, William and Conley do not propose ways in which the legal enforcement of human rights protection within corporations can be enhanced.

By providing that the Bill of Rights is binding on all persons including corporations, the Constitution has made it clear that respect for human rights in Kenya is no longer a mere responsibility without legal consequences but a legal obligation. Consequently, it is important that corporate decision makers in Kenya seek to “understand how human rights relate to their

²⁸ Cynthia A. Williams and John M. Conley, 'Is there an Emerging Fiduciary Duty to Consider Human Rights?' (2005) 74 *University of Cincinnati Law Review*, 75.

management function”²⁹ and more essentially ensure that human rights requirements and considerations are incorporated in their corporate governance structures. Hence, a significant shift is required in the ways in which corporations and business enterprises understand and respond to human rights issues.³⁰

Like the above authors, this study advocates for the full enforcement of consumer protection as a constitutional right as provided by article 46 of the Constitution of Kenya 2010. It emphasizes the need for goods and service providers to provide the best quality products and services for the benefit of the consumer.

Consumer rights are also intertwined with the rights of traders as well as those of intellectual property (IP) owners. Victor Nzomo³¹ explains the link between IP, consumer protection and competition law in Kenya. He states that the enactments of the Competition Act, 2010 and the Consumer Protection Act, 2012 have played a major role in balancing the rights of IP owners in Kenya and IP users i.e. the consumers in Kenya by introducing several limitations to the rights of IP owners. One such limitation is the abuse of dominant position to include IP rights. This limitation on the dominant position ensures that no businesses or firms with a substantial market share distort or eliminate their competition by making the market conditions uncompetitive. This study takes a look at how consumer protection law, competition law and IP law are intertwined and the various provisions they make to enhance consumer protection in Kenya.

²⁹ John Ruggie (n 26).

³⁰ Rae Lindsay, Robert McCorquodale, Lara Blecher, Jonathan Bonnitcha, Antony Crockett and Audley Sheppard, ‘Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles’ (2013) *Journal of World Energy Law and Business* 6(1)(2), 16.

³¹ Victor Nzomo, ‘Intersections between Intellectual Property, Consumer Protection and Competition Law in Kenya’ (2014) IP Kenya Wordpress <<https://ipkenya.wordpress.com/2014/02/07/intersections-between-intellectual-property-consumer-protection-and-competition-law-in-kenya/>> accessed 23 July 2021.

Prof Carlos Correa argues that some of the challenges facing developing countries as a result of the intersection between consumer protection law, competition law and intellectual property law are due to lack of or inadequate legislation, poor implementation, and absence of appropriate policies. He argues for the adoption of policies, enactment of strict laws and guidelines and their implementation to facilitate the protection of consumer rights by integrating competition law and intellectual property law.³² This study agrees with Prof Correa on the challenges facing developing countries with Kenya being a good example.

This research study therefore seeks to interrogate the state of consumer protection in Kenya and its co-relation to competition law and intellectual property law and how Kenya can improve its consumer protection regime to ensure conformity with Article 46 of the Constitution of Kenya, 2010.

1.8 Theoretical Framework

1.8.1 Consumer Sovereignty Theory

Consumer sovereignty is a theory that states the fact that consumers have the power to determine which products or services are actually produced in a given economy.³³ Proponents of the consumer sovereignty theory argue that it is the set of societal arrangements that causes an economy to act. That the actions are primarily in response to the aggregate signals of consumer demand, rather than in response to government directives or the preferences of individual

³² Carlos M. Correa, 'Intellectual Property and Competition Law' (2007) A paper submitted to the ICTSD Programme on IPRs and Sustainable Development.

³³ Stefan Schwarzkopf, 'The political theology of consumer sovereignty: Towards an ontology of consumer society' (2011) *Theory, Culture & Society* 28(3), 106-129; Neil W. Averitt and Robert H. Lande (n 1).

businesses.³⁴ In addition, these proponents affirm that consumer sovereignty should prevail in a modern free-market economy.³⁵ It is the state of affairs in which the consumers are truly “sovereign,” in the sense of having the power to define their own wants and the opportunity to satisfy those wants at prices not greatly in excess of the costs borne by the providers of the relevant goods and services.³⁶

The concept of consumer sovereignty goes so far as to embody at least some implicit notions about the proper relationship between the individual and the state.³⁷ It is part of the Western world’s answers to the prescriptions of Marxism.³⁸ The essence of consumer sovereignty is the exercise of choice. It is by choosing some goods or some options over others that consumers satisfy their own wants and send their signals to the economy. It is, therefore, critical that the exercise of consumer freedom of choice be protected.

According to the consumer sovereignty theorists, effective consumer choice requires at least two things. First, options in the marketplace. And second, the ability to choose freely among them.³⁹

Critics of this theory have argued that the theory is not conclusive as it fails to offer the degree of quantification required to operationalize such policy.⁴⁰ In this regard, at least two questions have

³⁴ Neil W. Averitt and Robert H. Lande (n 1).

³⁵ Ryan Calo and Alex Rosenblat, ‘The taking economy: Uber, information, and power’ (2017) *Colum. L. Rev.* 117, 1623; Katalin Judit Cseres, ‘Competition Law and Consumer Protection’ (2005) *Kluwer Law International BV* 49.

³⁶ Katalin Judit Cseres (n 35).

³⁷ Stefan Schwarzkopf (n 33).

³⁸ Neil W. Averitt and Robert H. Lande (n 1).

³⁹ *ibid*; Robert H. Lande, ‘Consumer choice as the ultimate goal of antitrust’ (2000) *U. Pitt. L. Rev.* 62, 503.

⁴⁰ Joseph Persky, ‘Retrospectives: consumer sovereignty’ (1993) *Journal of Economic Perspectives* 7(1), 183-191; Joel Waldfogel, ‘Does consumer irrationality trump consumer sovereignty?’ (2005) *Review of Economics and Statistics* 87(4), 691-696.

been raised. First, how many options must be present in the market? And second, how free from external influences must consumers be? In response, the proponents have argued that in an imperfect world, the answers to these questions must be standards of sufficiency rather than standards of perfection.⁴¹

They further argue that antitrust law does not prevent all conduct or transactions that have the effect of reducing the number of options available to consumers. Nor does the law affirmatively require the creation of options. Rather, it prevents business conduct that artificially limits the natural range of options in the marketplace.⁴²

The consumer sovereignty theory is therefore significant to this study as consumer protection laws seek to protect the ability of consumers to make informed choices among competing options. The theory will help contextualize the available mechanisms of consumer protection within the competing interests as advanced in this theory.

The consumer freedom of choice in probably no consumer is a perfect reasoning machine, existentially free from all the extraneous influences of early upbringing, cultural values, or half-remembered advertising campaigns from years ago. What we ask of consumer protection law is, therefore, something relatively modest. We ask that consumers be enabled to make rational choices to the extent that they wish to concentrate on doing so.

⁴¹ Stefan Schwarzkopf (n 33).

⁴² Katalin Judit Cseres (n 35).

1.8.2 Commercial Nuisance Theory

The commercial nuisance theory argues that the fraudulent practices of some merchants, since they deprive the poor of much of their income, not only offend law and ethics but also impede efforts to alleviate the poverty upon which those practices depend.⁴³ The theory questions the key aspect of this study that even though regulatory statutes exist for protection of consumer rights, judge-made law may be increasingly important in affording relief to consumer.⁴⁴

However, the critics of this theory have argued that because courts cannot act until cases are before them, expansion of substantive doctrine is unlikely to cure breach of consumer trust.⁴⁵ And that in most economies, market economy dependent on consumer ignorance of their rights, and the lack of available counsel.⁴⁶ In such instances, the consumers always prefer not to litigate their rights.

The commercial nuisance theory therefore invites the criminal law sanctions and penalties to help address consumer protection. This theory also advocates for an equitable remedy which is responsive to special community needs, which may be initiated within the community, and which will influence future business conduct. The advocates of commercial nuisance theory also argue that based on the law of nuisance, the suit is designed to permit the victims of illegal business and credit practices to sue to enjoin them on the grounds that, as they are inadequately

⁴³ Peter H. Darrow, 'Commercial Nuisance: A Theory of Consumer Protection' (1966) *The University of Chicago Law Review* 33.3, 590-602.

⁴⁴ Robert G. Bone, 'Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920' (1985) *S. Cal. L. Rev.* 59, 1101.

⁴⁵ Bradford W. Wyche, 'A Guide to the Common Law of Nuisance in South Carolina' (1993) *SCL Rev.* 45, 337.

⁴⁶ Justin Pidot, 'The Applicability of Nuisance Law to Invasive Plants: Can Common Law Liability Inspire Government Action?' (2005) *Virginia Environmental Law Journal*, 183-230.

controlled by existing legal remedies, they constitute what might be termed a commercial nuisance.

1.9 Research Methodology

This study relies on the desktop literature review and comparative analysis as its main research methodology. The research also seeks to apply both primary and secondary sources. The study is based primarily on review of the available legal instruments. This includes the Constitution, statutes, rules, regulations and policies, case law, decisions of tribunals, as well as available literature on approaches to consumer protection in Kenya. A review is undertaken in relation to the law and practice in the United Kingdom (UK) with a view to establish whether there are any lessons to be learned from their approach to consumer protection.

Secondary sources are inclusive of scholarly works in journal articles and textbooks, reports from non-governmental organizations and institutions that have come in handy in the study. Some of the above materials have been accessed via internet and electronic sources.

The research adopts an analytical approach. This research methodology is employed when analyzing and elucidating the impacts of certain or specific provisions of the relevant statutes, rules and regulations.

1.10 Chapter Breakdown

This study is divided into six chapters. Chapter one is the introduction. It includes the background to the study, problem statement, literature review, research questions, research objectives, literature review, and chapter breakdown.

Chapter two of this study discusses the consumer protection regime in Kenya pre-2010, post-2010 and the effect of the enactment of the Consumer Protection Act. The chapter will also undertake an examination of how the consumer protection regime has improved after the promulgation of the Constitution of Kenya 2010 and the enactment of the Consumer Protection Act 2012.

Chapter three of this study assesses the effectiveness of competition law in the protection of consumer rights in Kenya. This chapter will also undertake an examination of how competition law regime in Kenya interacts with the Consumer Protection Act in providing for protection of consumer rights.

Chapter four assesses the role of intellectual property rights in protection of consumer rights in Kenya. The Chapter undertakes an examination of how IP law and consumer protection law intersect, whether or not IP law hinders or encourages consumer protection and how, if it is the case, IP protects consumers in the market.

Chapter five examines the lessons learnt from an examination of the approach to consumer protection in the United Kingdom. This has been influenced by the strong consumer protection history the UK has. In Chapter six, conclusions and recommendations arising from this study are provided.

CHAPTER TWO

CONSUMER PROTECTION REGIME IN KENYA

2.1 Introduction to Consumer Protection in Kenya

Consumer protection is about ensuring fair exchange between goods and services on the one hand and consumers on the other.⁴⁷ According to the UN Guideline on Consumer Protection, a consumer is someone who acquires goods or services for direct use or ownership rather than for resale or use in production and manufacturing.⁴⁸ In Kenya, a consumer includes any person who purchases or offers to purchase goods or services otherwise than for the purpose of resale, but does not include a person who purchases any goods or services for the purpose of using them in the production or manufacture of any goods or articles for sale.⁴⁹

As indicated in Chapter one, prior to 2010, consumer protection in Kenya lacked a cohesive policy and regulatory framework. This gap was filled by the Constitution of Kenya, 2010 which heralded a stronger regime for consumer protection.⁵⁰ Consumer protection in Kenya is now governed by the Constitution of Kenya, 2010, the Consumer Protection Act, 2012 and various statutes and subsidiary legislations made thereunder.

The promulgation of the Constitution of Kenya 2010 and enactment of the Consumer Protection Act 2012 has given the citizenry of Kenya clarity on legal redress on consumer rights with consumers now being able to seek legal redress for infringement of their consumer rights under provisions of the Constitution and the Consumer Protection Act.

⁴⁷ J. A. Spanogle and R. J. Rohner, *Consumer Law Cases and Material* (Thomas West Publishers, 1999), 8.

⁴⁸ Daniel Asher & Rijit Sengupta, 'State of the Kenyan Consumer 2012' (2012) CUTS International, 1.

⁴⁹ See Competition Act 2010, Section 2.

⁵⁰ Daniel Asher, 'Consumer Protection and Financial Issues in Kenya' (2010) Presentation to 2nd Annual Africa Dialogue for Consumer Protection Conference held on July 12-14, 2010, Arusha, Tanzania.

Article 46 of the Constitution of Kenya, 2010 outlines the rights of the consumer. They include the right to:

- (a) goods and services of reasonable quality;
- (b) the information necessary for them to gain full benefit from goods and services;
- (c) protection of their health, safety, and economic interests; and
- (d) compensation for loss or injury arising from defects in goods or services.

Article 46 of the Constitution of Kenya, 2010 grants consumer rights to goods and services of reasonable quality, right to information to them to gain full benefit from goods and services, to protection of their health, safety and economic interest and right to compensation for loss or injury arising from defects in goods or services.

2.2 Consumer Protection in Kenya Pre-2010

Kenya did not have an overarching consumer protection law pre-2010. Unlike the 2010 Constitution which expressly provides for consumer rights and protection, the 1963 and 1969 Constitutions did not make express provision for consumer rights. This led to consumers being exposed unnecessarily to false and misleading practices by goods and service providers. The existing consumer protection statutes were either confusing or inconsistent with international best practices.⁵¹ This led to Kenya suffering from inadequate local compliance to standards and weak enforcement by the relevant government agencies which allowed for the flooding of substandard, counterfeit and illegal goods and services being sold to unsuspecting consumers.⁵²

⁵¹ Asher & Sengupta (48).

⁵² *ibid.*

The pre-2010 consumer protection statutes which provided for some aspect of consumer protection included; first, the Trade Descriptions Act of 1979 (Cap 505). The Act which is still in force was and is still meant to prohibit misdescriptions of goods, services, accommodation and facilities provided in the course of trade, to prohibit false or misleading indications as to the price of goods among others.⁵³ The Act only provides for criminal sanctions being a fine not exceeding two (2) million Kenya shillings or imprisonment of a term not exceeding five (5) years.⁵⁴

Secondly, the Standards Act 1974 (Cap 496). The Standards Act, which is still in force, aims to ensure consumer protection by setting up specific requirements in terms of quality and safety conditions for goods and services to guard against consumer exposure to substandard and unsafe goods.⁵⁵ The Standards Act makes provision for KEBS as one of its institutions and gives it the mandate to launch investigations after receiving consumer complains on products brought in the market.⁵⁶

Thirdly, the Weights and Measures Act (Cap 513). It is still in force and provides a safeguard to consumers against sale of goods below the indicated quantity by traders. It requires that goods packed in advance for the purpose of sale be marked with the correct statement of the net quantity and in a manner that the statement is readily visible to the purchaser.⁵⁷ Fourth, the Food Drug and Chemical Substances Act 1992. It is an Act of Parliament which makes provisions for the prevention of adulteration of food, drugs and chemical substances.⁵⁸ It is enforced by the

⁵³ See Trade Descriptions Act 1979, Preamble.

⁵⁴ Trade Descriptions Act 1979, Section 15.

⁵⁵ Standards Act 1974, Section 4.

⁵⁶ *ibid.*

⁵⁷ Weights and Measures Act (Cap 513), Section 34.

⁵⁸ Food, Drug and Chemical Substances Act 1992, Preamble.

Public Health (Standards) Board and guards consumers against the sale of unwholesome, poisonous or adulterated food.⁵⁹ Fifth, the Public Health Act (Cap 242). This is an Act of Parliament which makes provisions for securing and maintaining public health in the country. It is the overall guiding legislation on health matters and services provided by healthcare providers.⁶⁰

Sixth, the Central Bank of Kenya Act (Cap. 491). The Central Bank of Kenya Act establishes the Central Bank of Kenya (CBK) which is the institution tasked with the regulation of financial services in Kenya.⁶¹ The CBK is charged with the mandate of formulating monetary policy, promoting price stability, issuing currency, formulating and implementing policies to promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems.⁶² The CBK is similarly mandated to licence, regulate and supervise banking and microfinance businesses, regulate and supervise payment systems and payments services providers.⁶³

Seventh, the Kenya Information and Communications Act 1998 (Cap 411A). This Act establishes the Communications Authority of Kenya (CA) to license and regulate information and communication services.⁶⁴ The CA is the primary regulator for the telecommunications sector in Kenya and is mandated to promote, develop and regulate information and communication services in accordance with the provisions of the Act.⁶⁵ The CA is also mandated

⁵⁹ Food, Drug and Chemical Substances Act 1992, Section 28(1)(b)(iv).

⁶⁰ Asher & Sengupta (48).

⁶¹ Central Bank of Kenya Act (Cap. 491), Section 3.

⁶² Central Bank of Kenya Act (Cap. 491), Section 4.

⁶³ *ibid.*

⁶⁴ Kenya Information and Communications Act 1998 (Cap 411A), Section 3.

⁶⁵ Kenya Information and Communications Act 1998 (Cap 411A), Section 5.

under sections 84Q to 84W of the Kenya Information and Communications Act to ensure fair competition and equality of treatment in the information and communication sector.⁶⁶

While these Acts provided for and still provide for some aspects of consumer protection, it can be argued that they are largely sectorial and thus do not cover consumer protection as a whole. They are largely criminal law oriented and thus do not offer specific reprieve to the consumers whose rights are infringed as a result. They do not offer civil law redresses such as damages and compensation.

2.3 Consumer Protection in Kenya Post-2010

The promulgation of the Constitution of Kenya 2010 led to the enactment and adoption of the Consumer Protection Act 2012. The Consumer Protection Act was enacted with a view of consolidating the various consumer protection provisions scattered in several pieces of legislation.

Section 4 of the CPA provides that the purposes of the Act are to promote and advance the social and economic welfare of consumers in Kenya by-

- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally;
- (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by consumers;
- (c) promoting fair and ethical business practices;

⁶⁶ *ibid.*

- (d) protecting consumers from all forms and means of unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices including deceptive, misleading, unfair or fraudulent conduct;
- (e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behavior;
- (f) promoting consumer confidence, empowerment and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism;
- (g) providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and
- (h) providing for an accessible, consistent, harmonized, effective and efficient system of redress for consumers.

Unlike the pre-2010 statutes, the CPA gives a consumer the right to commence legal action on behalf of a class of persons in relation to any contract for supply of goods and services to the consumer.⁶⁷ It also prohibits unfair practices and provides for sanctions against suppliers who engage in such practices.⁶⁸ This gives consumers the right to terminate agreements and sue for damages where suppliers engage in unfair practices.⁶⁹ Where the courts find a supplier guilty of engaging in unfair practices, they are expressly permitted to award exemplary or punitive

⁶⁷ Consumer Protection Act 2012, Section 4(1).

⁶⁸ Consumer Protection Act 2012, Section 15.

⁶⁹ Consumer Protection Act 2012, 16(1).

damages in addition to any other remedy that is available to the consumer.⁷⁰ An example is in the case of *Gladys Karimi Musyimi v Fahari Cars Ltd & another*⁷¹ where the Plaintiff filed a suit seeking exemplary and punitive damages under Section 84 of the Consumer Protection Act as a result of breach by the Defendant in their agreement. The court found in favor of the Plaintiff stating that exemplary and punitive damages are normally awarded to deter a Defendant from committing a future breach of the same kind that would make him or her a profit exceeding compensation of the Plaintiff.

However, there is need for clarification on some of the clauses regarding consumer dispute resolution in the CPA.⁷² For instance section 88 of the CPA requires that any acknowledgment in a consumer agreement that requires that disputes arising out of the consumer agreement be submitted for arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the High Court given under this Act.⁷³ This should be reviewed to ensure that the intention of the parties in drafting the contracts is respected and enforced.⁷⁴ This clause may limit the rights and freedoms of parties to an agreement who do not wish to settle the dispute through litigation. Litigation can take years before the parties can get justice in their

⁷⁰ Consumer Protection Act 2012, Section 16(9).

⁷¹ *Gladys Karimi Musyimi v. Fahari Cars Ltd & Another* Civil Case No. 67 of 2019.

⁷² Ben Sihanya, 'Consumer Protection Act and the Constitution of Kenya 2010: Review Area' (2015) Presentation during the Retreat on Strengthening Consumer Protection through Intergovernmental Linkages, organized by KECOPAC and the Ministry of East Africa Affairs, Commerce and Tourism at Sawela Lodge Naivasha from February 10, 2015 to February 12, 2015.

⁷³ Section 88 of the Consumer Protection Act.

⁷⁴ Roy Gachuhi, 'Mutunga's advice to keep away from courts whenever possible quite timely' (2011) <<http://www.nation.co.ke/oped/Opinion/Advice-to-keep-away-from-courts-when-ever-possible-quite-timely-/-/440808/1192132/-/ryfm54/-/index.html>> Accessed 19 October 2021.

matters due to the formality and resource limitations.⁷⁵ Litigation in Kenya is also slow and expensive and there is usually the challenge of case backlog in the courts.⁷⁶

The CPA also establishes the Kenya Consumers Protection Advisory Committee which is tasked with the responsibility of formulation of policy related to consumer protection, accreditation of consumer organizations, advising consumers on their rights and responsibilities, investigation of complaints and the establishment of conflict resolution mechanisms.⁷⁷

2.4 Conclusion

While the CPA is definitely as a step in the right direction in regards to consumer rights and protection in Kenya, there are concerns that it does not make enough provisions or provide the necessary mechanisms to deal with anti-competitive behaviors in the market which affect consumer rights. Competition law and IP law on the other hand make for such provisions. Competition law maximizes consumer social welfare by prohibiting abuse of dominance while IP law has inherent mechanisms to curb anti-competitive behavior such as the doctrine of exhaustion and compulsory licensing.⁷⁸

The CPA mainly focuses on the relationship between service providers and consumers. While this relationship is key in consumer protection it is also important to discuss the relationship amongst service providers in the market and the impact it has on the consumers.⁷⁹ Competition

⁷⁵ Kariuki Muigua, 'Utilising Alternative Dispute Resolution Mechanisms to Manage Commercial Disputes' (2018) Discussion Paper for the 1 st Nairobi Centre for International Arbitration (NCIA) Alternative Dispute Resolution (ADR) National Conference, held at the Intercontinental Hotel, Nairobi, on 5th - 6th June, 2018.

⁷⁶ *ibid.*

⁷⁷ Consumer Protection Act 2012, Section 90.

⁷⁸ Rose Njeru, (n 7).

⁷⁹ OECD, 'Protecting consumers in peer platform markets' (2016) OECD Digital Economy Policy Papers <<https://www.oecd-ilibrary.org/docserver/5jlvwz39m1zw->

law and IP law on the other hand focus on this relationship between service providers and make regulations that ensure that consumers as the final recipients of the services offered are protected and offered quality services.⁸⁰

The CPA as discussed above, also gives consumers the right to commence civil legal action in case of disputes. This is unlike the other consumer protection statutes which as discussed in Chapter one and this Chapter are largely criminal oriented. Consumers can therefore be compensated in the form of damages and other personal reliefs that may be awarded by the courts. However, there is need to clarify on the provisions of section 88 of the CPA which limits the rights of parties in a consumer dispute in the choice of forum to solve their dispute. There is need for the CPA to allow parties to consumer disputes to choose their favored method of dispute resolution and also provide comprehensive alternatives to litigation and arbitration as in the case in other jurisdictions such as the UK which will be discussed later in this study.

[en.pdf?expires=1634542678&id=id&acname=guest&checksum=42C01FD1A05943EFBFD56613F21CC610>](#)
accessed 18 October 2021.

⁸⁰ Rose Njeru (n 7).

CHAPTER THREE

THE EFFECTIVENESS OF COMPETITION LAW IN PROTECTION OF CONSUMER RIGHTS IN KENYA

3.1 Introduction

In this Chapter, the study undertakes a critical analysis of the extent of protection of consumer rights in competition law in Kenya. Consumer protection plays an important role in people's lives ranging from food, drinks, drugs amongst other goods and services. The importance of consumer rights and protection is so crucial that it is provided for under the Constitution of Kenya, 2010. Under the Constitution, consumers have the right to goods and services of reasonable quality, information necessary for them to gain full benefit from goods and services, protection of their health safety and economic interests and to compensation for loss or injury arising from defects in goods and services.⁸¹

Competition law on the other hand aims to ensure that there is healthy competition and free trading in the competitive market. It allows goods and service providers to provide products that consumers want and need. Competition law focuses on three main objectives. First, to prevent practices that have adverse effects on competition in the market place. Second, to promote and sustain competition in the market. And third, to protect the interest of consumers. For the purposes of this study, the main focus is on the third objective.

⁸¹ Constitution of Kenya 2010, Article 46.

3.2 The Interaction between Competition Law Regime in Kenya and the Consumer Protection Act

As discussed in the background of the study in Chapter 1, before the promulgation of the Constitution of Kenya, 2010 Kenya did not have a specific legislation governing consumer protection but rather had various aspects of consumer protection covered in numerous statutes, rules and regulations.⁸² The year 2010 saw the start of more elaborate consumer protection laws in Kenya with the coming into force of the Competition Act, No. 12 of 2010 (CA) which unusually captured provisions more typically found in specific consumer protection legislation.⁸³

The Consumer Protection Act (CPA) (No.46 of 2012) came into effect in 2013 pursuant to the provisions of Article 46 of the Constitution which provides for the right to goods and services of reasonable quality; to the information necessary for consumers to gain full benefit from the goods and services; to the protection of consumer health, safety and economic interests; and to compensation for loss or injury arising from the defects in goods and services.⁸⁴ The CPA defines “consumer” broadly to include not only the person who buys the goods or services but also a person who uses the goods or services irrespective of whether they were party to the transaction or not.⁸⁵

Since consumers are the ultimate recipients of goods and services, consumer protection therefore falls at the heart of competition law. This is because, like consumer protection, competition law

⁸² Victor Nzomo (n 3).

⁸³ *ibid.*

⁸⁴ Michael Kontos, ‘Bankers Beware: Consumer Protection in Kenya, Limits on Interest Recovery’ (2014) <<https://www.walkerkontos.com/uploads/news/id8/BANKERS%20BEWARE%20-%20Consumer%20protection%20in%20Kenya%20logo.pdf>> Accessed 30 June 2021.

⁸⁵ Consumer Protection Act 2012, Section 2.

seeks to ensure that consumer rights are guaranteed.⁸⁶ Competition law therefore provides and ensures that consumers are beneficiaries of a free and fair market economy.⁸⁷ It also provides for the possibility of Kenya to engage in regional co-operation and economic integration with her neighboring countries in the event of future plurilateral agreements on competition law.⁸⁸

3.3 Framework Governing the Promotion and Protection of Consumer Rights under Competition Law

Competition law plays an important role in the promotion and protection of consumer rights in Kenya. Competition law in Kenya is governed by the Competition Act (Act No. 12 of 2010). The Competition Act, 2010 is a broad piece of legislation as it seeks to promote and safeguard competition in the economy whilst protecting consumer rights.⁸⁹ It contains provisions on among others, restrictive trade practices, control of mergers and takeovers, unwarranted concentrations of economic power and the bodies charged with regulating these matters.

The CA came into force on the 1st of August, 2011 repealing the Restrictive Trade Practices, Monopolies and Price Control Act (RTPMPCA).⁹⁰

The key objectives of the Competition Act as stated in its preamble include:

“promoting and safeguarding competition in the national economy and protecting consumers from unfair and misleading market product and establishing the two dual

⁸⁶ Katalin Judit Cseres(n 35).

⁸⁷ *ibid*.

⁸⁸ Chris Brummer, ‘The Ties That Bind-Regionalism, Commercial Treaties, and the Future of Global Economic Integration’ (2007) *Vand. L. Rev.* 60, 1349.

⁸⁹ Victor Nzomo (n 31).

⁹⁰ Competition Act 2010, Section 99.

organs which are the Competition Authority and the Tribunal, prescribing the powers and functions of the two.”⁹¹

The Competition Act defines a consumer to include any person who purchases or offers to purchase goods or services otherwise than for the purpose of resale, but does not include a person who purchases any goods or services for the purpose of using them in the production or manufacture of any goods or articles for sale.⁹²

One of the main objectives of the Competition Act (CA) is to strengthen the posterity by encouraging effective competition in Kenya.⁹³ Besides consumer protection, the CA establishes the Competition Authority of Kenya (CAK) and the Competition Tribunal of Kenya as the main institutional bodies to oversee competition affairs in Kenya.⁹⁴

Some of the salient features of the Act include prescription of the establishment, powers and functions of the CAK,⁹⁵ provisions on restrictive trade practices,⁹⁶ the abuse of dominant position,⁹⁷ setting out a range of investigative powers for the CAK,⁹⁸ extensive provisions on mergers,⁹⁹ concentration of economic power, institutional powers and composition of the competition tribunal.

⁹¹ Competition Act, 2010, Preamble. The purpose of the RTPMPCA resembles the CA.

⁹² Competition Act 2010, Section 2.

⁹³ Competition Act 2010, section 3.

⁹⁴ Competition Act 2010, Sections 7 and 71. Also see Promoting Competitiveness & Efficiency in Kenya: The Role of Competition Policy & Law <<http://www.cuts-international.org/kenya-report.pdf>> accessed 27 May 2021.

⁹⁵ Competition Act 2010, Section 8.

⁹⁶ Competition Act 2010, section 22.

⁹⁷ Competition Act 2010, section 23.

⁹⁸ Competition Act 2010, Part E.

⁹⁹ Competition Act 2010, section 41-49.

Section 24(1) of the Competition Act (CA) expressly bars any behavior of undertakings that amounts to abuse of dominant position. Abuse of dominance refers to practices that allow an undertaking to preserve, entrench or enhance its market power. The European Court Justice in the landmark case of *Hoffman La-Roche v. Commission of the European Community* defined dominance as:

“a position of economic strength by an entity enabling it to prevent effective competition in the relevant market through behaving independently of its competitors and customers.”¹⁰⁰

It allows an undertaking to act independently of its customers and competitors. The existence of dominance may derive from a substantial market share but depends on an assessment of production, supply and demand.¹⁰¹ It is the abuse of dominance rather than dominance itself that is prohibited. This is the conduct, by dominant firms, which has the object of distorting, restricting or eliminating competition hence amounting to an abuse of dominance.

In order to establish the existence of abuse of dominance, there is need to establish first that the undertaking is dominant.¹⁰² Secondly, that the conduct prevents effective competition in the

¹⁰⁰ *Hoffman La-Roche v. Commission of the European Community* (1976) Case No. 85.

¹⁰¹ Richard Whish and David Bailey, *Competition Law* (Oxford University Press, 2012).

¹⁰² Rotich Caroline Jerobon, ‘The Interface between Competition Law and Intellectual Property in Kenya’ (2016) University of Nairobi.

market through the exploitation of its ability to act independently of its competitors and customers.¹⁰³

The dominance test is guided by the presumption that if an undertaking controls a share of 50 percent or more of the supply of goods and services, it is deemed to be dominant.¹⁰⁴ However, due to the fact that market share is not conclusive, another significant criteria for the determination of dominance is the market power.¹⁰⁵ Other factors include barriers to entry, countervailing power, product differentiation and the stability of market shares.¹⁰⁶

The determinative criteria for abuse of dominance captured under section 24(2) includes the following four practices. First, infringement of IP.¹⁰⁷ Second, preventing market production through predatory pricing and other techniques. Third, using different benchmarks to similar bargains. And fourth, engaging in unfair practices through exploiting consumers by capping unreasonable prices.¹⁰⁸ As appertains to range of investigative powers, section 31 gives the CAK the mandate to carry out an investigation on issues of abuse of dominance and restrictive trade practices. This is done either on its own motion or when it receives complaints from consumers, or other entities.¹⁰⁹

¹⁰³ *ibid.*

¹⁰⁴ Competition Act 2010, Section 4 (3); see also Competition Act 2010, Section 23.

¹⁰⁵ R.K. Gitonga, 'Social and Political Goals of Mergers in Competition Law: Comparative Analysis of the Efficiency and Public Interest Provisions in Kenya and South Africa' (2015) University of Cape Town.

¹⁰⁶ M. Kiveu and G. Ofafa 'Enhancing market access in Kenyan SMEs using ICT' (2013) *Global Business and Economics Research Journal* 2(9), 29-46.

¹⁰⁷ Competition Act 2010, Section 28.

¹⁰⁸ Robert Mudida, Simon Ndiritu and Thomas Ross, 'Kenya's New Competition Policy Regime' (2015) Kluwer Law International BV.

¹⁰⁹ *ibid.*

Part VI of the Competition Act provides for consumer welfare. Under section 55, consumers are protected against false or misrepresentations by suppliers. It makes it an offence for suppliers to falsely represent that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; services are of a particular standard, quality, value or grade; goods are new; a particular person has agreed to acquire goods or services; goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits they do not have; the product has a sponsorship, approval or affiliation it does not have.¹¹⁰

The Part also places a mandate on the CAK to publish a notice to the public to inform them where goods of a kind specified are under investigation to determine whether the goods will or may cause injury to any person and also warn the public of possible risks involved in the use of goods of a kind specified in the notice.¹¹¹ In this regard the CAK has established the Consumer Protection Department which enforces Part VI (Sections 55 to 70) of the CA. The main function of the Department is to investigate complaints relating to false or misleading representations, unconscionable conduct as well as supply of unsafe, defective and unsuitable goods.¹¹² The Department also investigates undertakings that fail to comply with prescribed Consumer Product Safety Standards and prescribed Product Information Standards. Other functions of the Department are; promoting the creation of consumer bodies and the standards they should adhere

¹¹⁰ Competition Act 2010, Section 55.

¹¹¹ Competition Act 2010, Section 58.

¹¹² Competition Authority of Kenya, 'Consumer Protection' <<https://cak.go.ke/what-we-do/consumer-protection/overview>> accessed 22 June 2021.

to, working with consumer bodies to promote consumer welfare, sensitizing consumers about their rights and obligations under the CA.¹¹³

3.4 Role of the Competition Authority of Kenya (CAK) and Competition Tribunal in the Promotion and Protection of Consumer Rights

The CAK is established under section 7(1) of the Competition Act (CA). Its mandate is to enforce the CA with the objective of enhancing the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing misleading market conduct throughout Kenya.¹¹⁴ It is empowered to investigate complaints from legal or natural persons and consumer bodies on matters competition.¹¹⁵

CAK is also tasked with promoting the creation of consumer bodies and the establishment of good and proper standards and rules to be followed by such bodies in protecting competition and consumer welfare and carrying out inquiries, studies and research into matters relating to competition and the protection of the interests of consumers.¹¹⁶ The essence of the CAK is that of a regulatory body and plays a crucial role in protecting consumers from false and misleading representations and unconscionable conduct from businesses operating in Kenya.¹¹⁷

The Competition Tribunal is established under section 71 of the CA. The Tribunal adjudicates disputes emanating from the decisions of the CAK. The disputes may arise from the following areas: restrictive trade practices; restrictive trade practices applicable to trade associations; abuse

¹¹³ *ibid.*

¹¹⁴ CAK Website <<https://cak.go.ke/get-know-us>> accessed 23 June 2021.

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ Jane Wachira, 'Consumer Welfare as a goal of Competition Law' (2017) Nairobi Business Monthly <<https://www.nairobibusinessmonthly.com/consumer-welfare-as-a-goal-of-competition-law/>> accessed 23 June 2021.

of dominant position; exemption of certain restrictive trade practices; mergers and acquisition; control of unwarranted concentration of economic power; and consumer welfare cases, which include false or misleading representation regarding standards, quality, value, grade, composition, style and model of a product or service.¹¹⁸

The CAK is increasingly vigilant in its enforcement of the Kenyan competition laws, control of restrictive trade practices (specifically on horizontal, vertical and abuse of dominance cases) and regulation of mergers and acquisitions with a view to ensure consumer protection in the most effective manner. With the COVID-19 pandemic, CAK has been confronted with its implication on the enforcement of competition law and consumer protection.¹¹⁹ This is because COVID-19 has provided businesses with incentives and opportunities to engage in excessive pricing and making false and scientifically unsupported claims about products to consumers and creates a platform for businesses to engage in anti-competitive conduct to the detriment of consumers.¹²⁰

In March 2020, the CAK issued a cautionary notice to businesses against engaging in illegal price increases and hoarding. This was after the Government announced the confirmation of COVID-19 which caused panic amongst many consumers who in turn resorted to bulk buying of various goods and services causing some businesses to contemplate collusive increases of prices and hoarding with the intention of subsequently increasing prices.¹²¹

In carrying out its mandate as provided by Section 70A of the CA, the CAK in 2020 found Cleanshelf Supermarket guilty of adjusting prices of sanitizers in contravention of section 56(1)

¹¹⁸ Judiciary, 'Competition Tribunal' <https://www.judiciary.go.ke/competition-tribunal/> accessed 24 June 2021.

¹¹⁹ Vellah Kedogo Kigwiru, 'The COVID-19 and Competition Law: Which Way for the Competition Authority of Kenya?' (2020) <https://www.linkedin.com/pulse/covid-19-competition-law-which-way-authority-kenya-kigwiru-?trk=public_profile_article_view> accessed 23 June 2021.

¹²⁰ *ibid.*

¹²¹ *ibid.*

of the CA.¹²² To provide reprieve to consumers, CAK issued a remedial order to the supermarket and ordered it to contact and refund all consumers who had purchased the said sanitizers at an inflated price and to submit evidence to support the same to the CAK by 26 March, 2020.¹²³

The Competition Tribunal in April 2021 upheld the decision by the CAK which had found the French based retail giant Carrefour guilty of abuse of buyer power.¹²⁴ Buyer power refers to the influence exerted by a business over a weaker trading partner in the upstream market with the intention of securing more favorable terms at the other party's expense, and which would not be possible in a competitive market.¹²⁵ Carrefour had been accused of pushing anti-competitive pricing to boost sales and increase its market share including forcing huge discounts on products which it ended up cashing on. It was also accused of pressing suppliers for discounts during annual contract negotiations, payment of Kenya Shillings Fifty Thousand (Kshs. 50,000.00) as a listing fee for every product supplied and forcing suppliers to post their own staff at its outlets at their expense and rejecting goods already delivered.¹²⁶

3.5 Conclusion

The main objective of this Chapter is to identify the role and extent competition law provides for the protection and promotion of consumer rights. From the discussions in the Chapter it is evident that while competition law primarily promotes and safeguards competition in Kenya's

¹²² Vellah Kedogo Kigwiru, 'Enforcing Competition Law and Consumer Protection During the COVID-19 Pandemic in Africa: The Competition Authority of Kenya' (2020) Competition Policy International.

¹²³ *ibid.*

¹²⁴ *Majid Al Futtaim Hypermarkets Ltd v. Competition Authority of Kenya and Anor* CT/006/2020.

¹²⁵ Martin Mwitwa, 'Carrefour to Pay Local Supplier in Exploitation Case' (2021) The Star <<https://www.the-star.co.ke/business/kenya/2021-04-22-carrefour-to-pay-local-supplier-in-exploitation-case/>> accessed 23 June 2021.

¹²⁶ *Majid Al Futtaim Hypermarkets Ltd v. Competition Authority of Kenya and Anor* CT/006/2020.

national economy it also plays a crucial role in the protection of consumers from unfair and misleading market conduct and practices.¹²⁷

The CA makes various provisions whose main aim is to ensure that consumers in Kenya are protected and dedicates a whole part on consumer welfare. It also establishes legal bodies to ensure that there is enforcement of consumer rights by way of the CAK and the competition tribunal. From the discussions above, we can see that the CAK has been quite active during the COVID-19 pandemic to ensure that consumers are protected from unscrupulous traders. The CAK has also put in place the Consumer Protection Department whose main function is to investigate complaints relating to false or misleading representations, unconscionable conduct as well as supply of unsafe, defective and unsuitable goods.

In the next Chapter, the study discusses the role intellectual property plays in the protection of consumers.

¹²⁷ Dominic Rebelo and Edwina Warambo, 'Kenya' in Maurits Dolmans and Henry Mostyn, *The Dominance and Monopolies Review* (The Law Reviews, 2017).

CHAPTER FOUR

THE ROLE OF INTELLECTUAL PROPERTY RIGHTS IN THE PROTECTION OF CONSUMER RIGHTS IN KENYA

4.1 Introduction

Intellectual Property (IP) is regarded the as the recognition, protection and promotion of the work or product of the mind; of human creativity embodied in tangible form.¹²⁸ It is the law concerned with fostering human creativity without unduly restricting dissemination of its fruits. It concerns the full spectrum of human creativity; literature, the visual arts, music, drama, compilations of useful information, computer programs, biotechnology, electronics, mechanics, chemistry, product design, new plant varieties, semiconductor circuitry design, human identity gestures and trade identity symbols.¹²⁹

Intellectual Property is divided into two broad categories: First, copyright and related rights and industrial property.¹³⁰ And second, industrial property rights. Industrial property rights include patent, trade secret (TS), trade mark (TM), service mark (SM), utility model (UM), unfair competition (UC), geographical indication (GI), mask work or layout design of integrated circuits, plant breeder's right (PBR) or Plant Variety Protection (PVP) and industrial design (ID).¹³¹

¹²⁸ Ben Sihanya, *Intellectual Property Law in Kenya and Africa: Transferring Technology for Sustainable Development* (Sihanya Mentoring and Innovative Lawyering, 2016).

¹²⁹ Donald S. Chisum and Michael A. Jacobs, *Understanding Intellectual Property Law* (Matthew Bender & Co. Inc, New York, 1992).

¹³⁰ Ben Sihanya (n 129).

¹³¹ *ibid.*

The rights of the various categories of IP rights holders are guaranteed under Articles 11, 40 and 69 of the Constitution of Kenya, 2010 whereas the rights of IP rights licensees as users are guaranteed under Article 46 of the Constitution of Kenya, 2010.¹³²

Many aspects of IP law concern and regulate the relationship among manufacturers, producers and other suppliers of goods and services, in their capacity as competitors and owners of industrial property rights, as well as the relationship between such manufacturers, producers and suppliers, on one hand, and consumers of goods and services, on the other hand.¹³³ Such relationships affect social as well as individual interests of great importance. One of the principal functions of IP law is to protect and reconcile such interests. The protection of consumers in intellectual or industrial property law is a topic of worldwide relevance.¹³⁴

Naturally, IP law is not the only branch of law that has an important role in the protection of consumers. However, IP law certainly plays a very important role in the protection of consumers. Effective consumer protection certainly cannot be accomplished without ensuring that relevant IP laws be responsive to consumers' rights, interests and needs.

4.2 Nature of Intellectual Property Rights

The nature and subject of IP rights has been a subject of discussion for a long time with some scholars, policy makers and administrators arguing for it while others argue against it. It has been

¹³² Victor Nzomo (n 31).

¹³³ Moni Wekesa and Ben Sihanya, *Intellectual Property Rights in Kenya* (Konrad Adenauer Stiftung, 2009).

¹³⁴ *ibid.*

argued that IP stifles innovation because of its monopolistic nature and enhances costs. The proponents of this position provide various arguments.¹³⁵

The first argument is that IP limits the supply of consumer products especially in the high technology sectors. Examples are mainly drawn from biotechnology (pharmaceutical and food products), audiovisual works (like films) and information and communication technology (ICT) where in many situations protected products are expensive because royalty has to be paid on the patented or trademarked drugs, or on the copyrighted or licenced software. High costs usually provide the excuse or basis for parallel importation and compulsory licensing as well as infringement, piracy and counterfeiting. The second argument is that IP in some cases limits the free flow of information as it encourages trade secrecy and the treatment of information as proprietary and may thus stifle innovation.¹³⁶

It is important to note that IP is not necessarily monopolistic though it is largely exclusive. IP requires investment and is not an automatic monopoly. It does not provide the power or right to monopoly but rather the right to exclusion. It is for this reason that IP lasts for a limited duration of time ensuring that it eventually falls into the public domain for social and consumer benefit.¹³⁷

4.3 Intellectual Property Law *vis-à-vis* Consumer Protection

4.3.1 Copyright and Consumer Protection

Copyright refers to a set of exclusive rights enjoyed by the author or creator of an original work, including the right to reproduce (e.g. copy), distribute or adapt the work. Copyright does not

¹³⁵ Ben Sihanya (n 129).

¹³⁶ *ibid.*

¹³⁷ *ibid.*

protect ideas, only their expression or fixation.¹³⁸ Copyright owners have the exclusive statutory right to exercise control over copying and other exploitation of the works for a specific period of time, after which the work is said to enter the public domain.¹³⁹

The relation between copyright law and consumers' rights is not easy or evident. Mainly because the consumer has in principle no role to play in copyright law. Copyright governs the relationship between creators and their producers or publishers, as well as the relationship between the latter and other providers of copyrighted works. Independently, consumer protection law operates only in the relationship between the providers of goods and services, irrespective of their protection by copyright, and consumers.¹⁴⁰

However, with the digital advent, the consumer has taken a more central role in copyright, as the mere use of a work has now entered into the copyright realm. The consumer plays a twofold role in copyright law. On the first hand, the consumer is a member of the public, that is the normal recipient of copyrighted works, and as such, is concerned by an adequate balance between protection and limitations thereto, a balance that ensures access to information and culture. Consumers also want to be provided with attractive legal offers and access to a wide range of copyrighted content, which can only be achieved if copyright regime works in an efficient way.¹⁴¹

¹³⁸ Ben Sihanya 'Understanding Copyright' (2015) *Utafiti News*.

¹³⁹ *ibid*.

¹⁴⁰ Severine Dusollier, 'The Relations between Copyright Law and Consumers' Rights from a European perspective' (2010) European Parliament.

¹⁴¹ *ibid*.

As a member of the public, consumers have a strong interest in an effective and limited copyright protection, ensuring the access to a vast range of digital content and guaranteeing their fundamental rights to expression and access to information and culture.

The principle of exhaustion permits the further distribution or sale of tangible copies of a copyrighted work, once the distribution of such copies has been made within the copyright jurisdiction with the consent of the right holders. It is not applicable to digital products provided online which creates a divergence that might not be understood by the consumer.¹⁴² A digital exhaustion could however be applied online, provided that the consumer effectively transfers the good and deletes any subsisting copy.¹⁴³ The principle also allows the resale of works on second-hand markets. Consumers can thus resell copyrighted goods they have in their possession. Such a “first sale” rule preserves the right to ownership of consumers but also plays a role in fostering a greater access to works by the public and the circulation of culture.¹⁴⁴

4.3.2 Trade Mark, Well Known Marks and Consumer Protection

Trade mark (TM) is a bundle of IP rights granted to distinguish the goods and services of one trade mark owner from those of the competitors. TM law is a branch under IP law which seeks to protect innovators, legitimate traders, and consumers from unscrupulous traders.¹⁴⁵ TM law has at least four key important roles in consumer protection. First, it helps the consumer to choose, among the countless variety of products and services, those which he trusts and wants, rather

¹⁴² WIPO, ‘Interface between exhaustion of intellectual property rights and competition law’ (2011) WIPO at https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_4rev_study_inf_2.pdf Accessed 18 October 2021.

¹⁴³ *ibid.*

¹⁴⁴ *ibid.*

¹⁴⁵ Ben Sihanya, ‘Intellectual property audit, valuation, commercialization, securitisation and taxation in Kenya’ (2018) *JKUAT Law Journal*, 41-86.

than those which he does not trust or want. Second, by identifying a given enterprise trade mark law helps the consumer to deal with enterprises with which he wants to deal, rather than with one with which he does not want to deal.¹⁴⁶

Third, in conjunction with the geographical indication law, trade mark law helps the consumer in choosing a product from that country or region or locality which he wants, rather than one that comes from somewhere else. Fourth, because the law on unfair competition prohibits, among other things, in the marketing of products and services, untrue allegations or insinuations, it helps the consumer to be correctly informed rather than misled.¹⁴⁷

The essential feature of the legal protection of marks is the prevention of the concurrent use of an identical or confusingly similar mark, by an enterprise other than the owner of the mark, for the same or similar goods or services.¹⁴⁸

Protection against infringement of TM benefits both mark owners and consumers. On the one hand, it prevents competitors from diverting sales from the mark owner and otherwise unfairly benefiting from his mark's reputation and goodwill as well as from undermining such reputation if the quality of the goods or services sold under the infringing mark is inferior. On the other hand, consumers are protected against likely confusion and deception primarily as to the source and possibly quality of marked goods or services.¹⁴⁹

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*

¹⁴⁸ Rose Njeru (n 7).

¹⁴⁹ *ibid.*

Certain marks, even if they are neither registered nor used in a country, are well known to the average consumer in that country. If such a “well-known mark” is used by an unauthorized third party, the consumer might erroneously believe that the goods or services for which such mark is thus used originate from or have some link with the owner of the well-known mark.¹⁵⁰ The consumer might also expect a certain quality which the well-known mark represents. Well-known marks should be protected, and in the laws of most countries, are protected, even if they are not registered or not used by their owners in the country. Unfortunately, well-known marks are frequently used by unauthorized third parties, particularly where the consumers have difficulty in distinguishing between the genuinely marked goods and imitations thereof. Another confusion arises where the market is too small to make the cost of prosecution worth while for the owner of the well-known mark.¹⁵¹

The unauthorized use of well-known marks for different goods or services other than for which the well-known mark is legitimately used is not covered by Article 6bis of the Paris Convention.¹⁵² Yet, in certain cases, consumers might be confused even if a well-known mark is used by an enterprise other than its legitimate owner for products entirely different from those for which such owner uses the mark. For instance, if the mark has been the subject of extensive publicity, and the quality of the genuinely marked product or service has led consumers to associate such mark with a certain origin and quality consistency rather than with any specific kind of product or service, the unauthorized use of the well-known mark, regardless of the

¹⁵⁰ Hà Thi Nguyet Thu, ‘Well known trade mark protection’ (2010) WIPO at https://www.wipo.int/export/sites/www/about-wipo/en/offices/japan/research/pdf/vietnam_2010.pdf Accessed 18 October 2021.

¹⁵¹ *ibid.*

¹⁵² Ben Sihanya (n 129).

similarity of the products or services concerned, might confuse consumers as to the origin of those products and possibly also as to their quality.¹⁵³

Consumers therefore have an interest in being protected against such confusion. In such instances, the countries to which the Paris Convention applies are free to extend the minimum protection required by Article 6bis. Even in cases where the unauthorized use of a well-known mark for different goods or services is not likely to cause confusion, it might eventually dilute the originality, distinctiveness and reputation of the well-known mark. Protection against dilution of a well-known mark is evidently in the interest of its owner.¹⁵⁴ However, the consumer also has an interest that dilution should not reduce the information value of well-known marks.

4.3.3 Patents and Consumer Protection

A patent is an exclusive right granted to an inventor to an invention, which is a product or a process that provides, in general a new way of doing something, or offers a new technical solution to a problem.¹⁵⁵ It is also the property right to enjoy or exclude others from using an innovation.¹⁵⁶ Patent deals with high technology inventions rather than lower level innovations or discoveries; inventions that embody scientific intervention or a qualitative leap in technology. Patents give the patentee or owner of the patent the exclusive right to make, import, offer for

¹⁵³ *ibid.*

¹⁵⁴ Hà Thi Nguyet Thu (n 151).

¹⁵⁵ WIPO, 'What is a patent?' (2021) at <https://www.wipo.int/patents/en/> Accessed 20 October 2021; David Bainbridge, *Intellectual Property* (Pearson Education Limited, 2012).

¹⁵⁶ Ben Sihanya, 'Patent law and practice in Kenya' (2007) *International Review of Intellectual Property and Competition Law* Vol 38. 6, 648–658.

sale, sell or use the product.¹⁵⁷ It is for this reason that patents are regarded to be highly monopolistic.

To limit this highly monopolistic nature of patents in the interest of consumer protection, patents are therefore only granted for a specific period of time, usually 20 years,¹⁵⁸ after which they fall into public domain. There is a consumer interest served by granting patents of limited duration. Patents have the capacity to stimulate free market competition by increasing the consumer options through various new inventions and ideas.¹⁵⁹ Because patentees must publicly disclose their inventions to obtain patents, the system encourages other inventors to design around or develop their own improvements. Consumers then are presented with an array of new and improved inventions, as has happened recently in such fields as pharmaceuticals, computer science, and biotechnology.¹⁶⁰

Another way in which consumers are protected when using patented inventions is through compulsory licensing. Compulsory licensing in regards to patents occurs where legitimate expectations of consumers are not being met in terms of price, quality and quantity, among others. Compulsory licensing ordinarily falls within two broad categories: in the event of abuse of patent or other IP (e.g. failure to work a patent or avail copyrightable materials) and in the public interest.¹⁶¹ The compulsory licensee may be a private enterprise, an NGO, or a

¹⁵⁷ *ibid.*

¹⁵⁸ Industrial Property Act 2001, Section 60.

¹⁵⁹ Mohammed Abdel-Ghany, 'The High Cost of Invention: Patent Law and the Consumer Interest' (2001) Maurice A. Deane School of Law at Hofstra University.

¹⁶⁰ *ibid.*

¹⁶¹ Ben Sihanya, 'Intellectual property confronts counterfeiting in Africa: protecting innovators and consumers in the cyber society' in Thomas Wilhelmsson, *et al.* (eds.) *Consumer Law in the Information Society* (Kluwer Law International, London 2001).

Government agency. Compulsory licensing is related to Government use in the sense that the concerned instrumentality of the state will exploit a patent, a copyright or any other IP right in the interest of the public.¹⁶²

The State, on behalf of society, compels an innovator or relevant IP owner to license an IP, an innovation or a technology. It is premised on the theory that the market may be inequitable and allowing the innovator to do as she wills may harm society socially, economically, politically or culturally. For example, some IP owners or innovators who occupy a dominant market position, supply technology on unreasonable terms or decline to sufficiently supply the product.¹⁶³

4.3.4 Plant Breeders Rights and Consumer Protection

Plant Breeder's Rights (PBRs) are defined by the International Union for the Protection of New Plant Varieties (UPOV) as exclusive rights over the commercial production and marketing of the reproductive or vegetative propagating material of the protected variety.¹⁶⁴ PBRs are granted by the state to protect the proprietary rights of a plant breeder with regard to breeding or discovery of a new plant variety. A grant of a plant breeder's right for a new plant variety gives the holder the exclusive right to produce for sale and to sell propagating material of the variety.¹⁶⁵ Under UPOV the minimum protection period for PBRs is 15 years.

While PBRs give breeders certain exclusive rights there are several exceptions that do not constitute infringement.¹⁶⁶ First, to grow or use a protected variety for non-commercial purposes.

¹⁶² *ibid*; TRIPs Agreement, Article 21.

¹⁶³ Ben Sihanya (n 90).

¹⁶⁴ Tshimanga Kongolo, *Unsettled International Intellectual Property Issues* (Kluwer Law International, New York, 2008) 68-69.

¹⁶⁵ *ibid*.

¹⁶⁶ Ben Sihanya, 'Plant breeder's rights in Kenya and Africa' (2015) *East African Law Journal*, 68-100.

Second, to use the plants or parts of the protected variety for human consumption or other non-propagating purposes. And third, to use a protected variety for plant breeding.¹⁶⁷

As is with the case with patents, compulsory licensing is also available to PBRs in the interests of consumer protection. Any person may apply for a compulsory licence in respect of that right in either of two contexts. First, where the person who is of the opinion that the holder of a plant breeder's right has unreasonably refused to grant to her a licence under section 25 of the Plant Breeders Rights (PBR) Act.¹⁶⁸ Second, where such a holder imposes unreasonable conditions for the issue of such a licence.

4.4 Conclusion

This chapter of the study has sought to establish what is the role of IP in the protection of consumer rights. Primarily, the main objective of the IP law is to protect the rights of its owners. For this reason IP has been argued to be monopolistic and that it hinders innovation. However, this does mean that IP does not play an important role in protecting consumers.

Strengthening the IP regime in Kenya can serve not only the interests of IP owners but also of consumers. In formulating and applying IP policy and laws, the competent public authorities must, of course, as in any other field, take into account the particular realities of their country and the public interest at large, which, in the case of IP, must include the interests of consumers.

Since IP rights create a monopoly in favour of the owner, IP law has inherent mechanisms to curb anti-competitive behavior such as the doctrine of exhaustion and compulsory licensing. These doctrines and principles play an important role in society to ensure that consumer rights

¹⁶⁷ *ibid.*

¹⁶⁸ UPOV 1978, Article 9.

are not neglected by the monopolistic nature of IP rights and providing consumers with avenues to goods and services that they would not have ordinarily been able to obtain without infringing on the IP rights of the owners.

CHAPTER FIVE

CONSUMER PROTECTION APPROACHES IN THE UNITED KINGDOM

5.1 Introduction

This chapter seeks to review the consumer protection regime in the United Kingdom (UK) and the lessons Kenya can learn from it. The UK and Kenya share some similarities and comparisons in regards to the legislative and administrative structure in relation to consumer protection as will be evident in the discussions below. The UK also has a strong history of protecting consumer rights.¹⁶⁹ UK consumers have relied on laws that protected purchasers of goods and services and outlawed unfair contract terms, before the EU acted in this area.¹⁷⁰ However with the UK leaving the EU through Brexit, this has meant that it has had to review various laws including consumer protection, competition law and intellectual property. The current UK legal framework for consumer protection is made up of several statutes and statutory instruments and rules of common law, some of which have recently been consolidated following the decision to leave the EU.¹⁷¹

5.2 UK Legal Framework for Consumer Protection

Majority of rights and protections for UK consumers are found in the Consumer Rights Act, 2015 (CRA) which came into force on October 1, 2015. The CRA came as a result of the UK consolidating and clarifying the already existing UK consumer protection legislation. The Act defines a consumer as an individual acting for the purposes that are wholly or mainly outside that

¹⁶⁹ Peter Cartwright, *Consumer Protection and the Criminal Law: Law, Theory and Policy in the UK* (Cambridge University Press, 2004).

¹⁷⁰ *ibid.*

¹⁷¹ Robert Tuner, 'The Effect of Brexit on UK Consumer Protection Law' (2021) <<https://www.lexology.com/library/detail.aspx?g=eac7d3fc-4da6-49c6-b6d1-db87c5ff0f25>> Accessed 17 June 2021.

individual's trade, business, craft or profession. It also sets out a coherent framework of consumer protections across the spectrum of consumer goods, services and digital content supply contracts. Organizations like Citizens' Advice, Trading Standards and the Competition and Markets Authority (CMA), as well as the Government, work to ensure that consumers are aware of their rights and what to do when things go wrong.¹⁷² The CRA aims to simplify, strengthen and modernize UK consumer law, consolidating in one place fundamental consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts.¹⁷³

The Consumer Rights Act, 2015 (CRA) contains several key features. First, it provides for statutory terms in all contracts for the supply of goods and digital content. The terms ensure that goods and services are of satisfactory quality, fit for purpose, match the given description and correspond to any provided sample. As a remedy for breach of these terms, the consumer has the right to reject up to 30 days after delivery or installation. In case of a breach, a consumer is entitled to a repair, replacement, price reduction or a final right to reject the goods.¹⁷⁴ Second, it provides that all unfair contractual terms, except for core terms, are not binding if they, contrary to good faith, create a significant imbalance in the parties' rights and obligations to the detriment of the consumer. Third, the CRA obligates the courts to assess the fairness of contractual terms without expressly being requested by consumers as long as there is sufficient factual and legal material to allow the assessment to be conducted.¹⁷⁵

¹⁷² P. Giliker, 'The Consumer Rights Act 2015 – A Bastion of European Consumer Rights?' (2017) *Legal Studies*, 37(1) 78-102.

¹⁷³ *ibid.*

¹⁷⁴ Christine Riefa and Chris Willett, 'Enforcement and Effectiveness of Consumer Law in the UK' (2018) <https://www.researchgate.net/publication/326227266_Enforcement_and_Effectiveness_of_Consumer_Law_in_the_UK> accessed 17 June 2021.

¹⁷⁵ *ibid.*

There are also other key statutes, rules and regulations which provide for consumer protection.¹⁷⁶ These include; the Consumer Protection from Unfair Trading Regulations, 2008 (CPR) which include a general duty on traders not to trade unfairly and prohibits misleading and aggressive practices; the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. These regulations impose various information and other requirements on traders when selling to consumers; and the Consumer Health and Safety Protections in the Consumer Protection Act, 1987 (CPA) and the General Product Safety Regulations, 2005 (GPSR).¹⁷⁷

There are three primary agencies responsible for the enforcement and regulation of consumer protection in the UK. First, the Competition and Markets Authority (CMA) which is also the primary regulator of competition law in the UK. Second, the Financial Conduct Authority (FCA). And third, the Trading Standards Services (TSS) which are accountable to UK local authorities and therefore have the primary responsibility for consumer protection enforcement at a local level.

The CMA is established by section 25(1) Enterprise and Regulatory Reform Act, 2013 replacing the Competition Commission and the Office of Fair Trading. The CMA is responsible for investigating company mergers that could lessen competition, conduct studies into market where there could be competition or consumer problems, investigate companies that may be breach anti-competitive agreements or abused their dominant position, bring criminal proceedings

¹⁷⁶ Robert Tuner (n 165).

¹⁷⁷ *ibid.*

against individuals who commit cartel offences, enforce consumer protection legislation and conduct regulatory appeals.¹⁷⁸

The FCA was established by section 1A(1) Financial Services and Markets Act 2000 as amended by section 6(1) Financial Services Act, 2012 replacing the Financial Services Authority. The main objectives of the FCA are consumer protection, protecting and enhancing the UK financial system and promoting effective competition in the financial services market.¹⁷⁹ The main functions of the FCA are to make regulatory rules, codes of practice, provide guidance and determine policy and principles for the financial services industry.¹⁸⁰ The authority must supervise the financial market,¹⁸¹ consult with practitioners and consumers¹⁸² and has the right to obtain any documents that would be reasonably required to complete its investigations¹⁸³ conducted through its duty to investigate and report on any regulatory failure.¹⁸⁴

5.3 Abuse of Dominance and Protection of Consumers under UK Competition Law

In the UK, abuse of a dominant position is prohibited by the provisions of Chapter II of the UK Competition Act, 1998.¹⁸⁵ However, it is important to note that holding or acquiring a dominant

¹⁷⁸ Competition and Markets Authority, 'Towards the CMA – CMA Guidance' (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212285/CMA1 - Towards the CMA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212285/CMA1_-_Towards_the_CMA.pdf)> accessed 17 June 2021.

¹⁷⁹ Financial Services and Markets Act 2000, Section 1B(3)(a-b) as amended by the Financial Services Act 2012, Section 6(1).

¹⁸⁰ Financial Services and Markets Act 2000, Section 1B(6)(a-d) as amended by the Financial Services Act 2012, Section 6(1).

¹⁸¹ Financial Services and Markets Act 2000, Section 1L(1) as amended by the Financial Services Act 2012, Section 6(1).

¹⁸² Financial Services and Markets Act 2000, Section 1M as amended by the Financial Services Act 2012, Section 6(1)

¹⁸³ Financial Services and Markets Act 2000, Section 1T(1)(a) as amended by the Financial Services Act 2012, Section 6(1).

¹⁸⁴ Financial Services Act 2012, Section 3(3).

¹⁸⁵ UK Competition Act 1998, Section 18.

position is not unlawful under UK competition law.¹⁸⁶ A dominant business or company only infringes the Chapter II Prohibition if it ‘abuses’ its dominance to restrict competition. ‘Abuses’ fall into two main categories; conduct that ‘exploits’ customers directly for example charging excessive prices and conduct that ‘excludes’ competitors from the market.¹⁸⁷

Section 18(2)(a) of the Competition Act, 1998 refers to ‘directly, or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.’ The test for excessive pricing follows two stages: the difference between the dominant business or company’s costs incurred and the price charged is excessive; and the imposed price is either unfair in itself or when compared to the price of competing products.¹⁸⁸

Public enforcement of UK competition law is carried out primarily by the Competition and Markets Authority (CMA). However, the CMA has investigated relatively few abuse of dominance cases, albeit with a modest increase in activity since 2016. The two main reasons usually cited to explain this relative lack of enforcement are; first, cross-border cases affecting the UK often fell to be investigated by the European Commission, depriving the CMA of jurisdiction to investigate the same conduct in parallel; and second, cases involving natural monopolies generally fall to be investigated by the concurrent sectoral regulators.¹⁸⁹

The UK also has a specialist competition court, the Competition Appeal Tribunal (CAT). Any person who is found to have infringed the Chapter 2 Prohibition by the CMA or a regulator has a

¹⁸⁶ Alexander Waksman and Henry Mostyn, ‘Abuse of Dominance in the United Kingdom’ (2021) *Lexology*.

¹⁸⁷ *ibid*.

¹⁸⁸ *ibid*.

¹⁸⁹ Paul Gilbert and John Messent, ‘The Dominance and Monopolies Review: United Kingdom’ (2021) <<https://thelawreviews.co.uk/title/the-dominance-and-monopolies-review/united-kingdom>> Accessed July 30, 2021.

right of appeal to the CAT. The CAT can also hear follow-on damages claims in competition cases and, since October 2015, has had the power to hear stand-alone claims for damages or injunctive relief, or both. The civil courts can also hear competition claims, but may transfer cases or parts of cases to the CAT.¹⁹⁰

5.4 Consumer Protection under UK Intellectual Property Law

The UK IP system has always been required to strike a balance between the protection offered to creators and investors, and the need to allow fair competition, wide consumer choice and fair market pricing.¹⁹¹ However, the IP regime in the UK is currently in a transition period after the UK officially severed ties with the EU from January 1, 2021. Prior to Brexit, the UK was bound by the EU legal framework. Because of Brexit the UK has had to review its IP regime to align it with its new position and hence the need to review its current IP laws including the Trade Marks Act 1994, the Registered Designs Act 1949 and the Copyright, Designs and Patents Act 1988.¹⁹² From January 2021, the UK has adopted the Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations 2019.¹⁹³

Under the UK IP law, the system or doctrine of exhaustion of rights means that trader and service providers can supply goods and services to consumers without the right holder's permission.¹⁹⁴ This supports a market of secondary sales of legitimate goods, also known as

¹⁹⁰ *ibid.*

¹⁹¹ Intellectual Property Office, 'Consultation on the UK's future exhaustion of intellectual property rights regime' (2021)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/991669/Consultation-on-the-UKs-future-exhaustion-of-intellectual-property-rights-regime.pdf> Accessed 21 October 2021.

¹⁹² Maria Isabel Manley, 'The UK retains the Doctrine of Exhaustion of IP rights after the transition period' (2020) <<https://www.sidley.com/en/insights/newsupdates/2020/12/the-uk-retains-the-doctrine-of-exhaustion-of-ip-rights-after-the-transition-period>> Accessed 21 October 2021.

¹⁹³ Intellectual Property Office (n 185).

¹⁹⁴ *ibid.*

parallel trade, and not counterfeit goods which might be defective and have adverse effects on consumers. The doctrine of exhaustion allows consumers to be able to get quality goods and services at a fair market price while still promoting healthy competition amongst products in the market.

5.5 Consumer Protection Enforcement Mechanisms in the UK

The UK has in place various consumer protection mechanisms. These include private redress which includes general court; small claims; Alternative Dispute Resolution (ADR) mainly through the Financial Service Ombudsman; prudential or supervisory regulation; administrative or collective enforcement which involves prevention through assurances, enforcement orders in relation to behavior harming the collective interests of consumers; criminal law enforcement and self-regulation.¹⁹⁵

Courts play a crucial role in the enforcement of consumer rights in the UK. The UK imposes a three track system for the handling of claims based on their financial value and legal nature. The three tracks are small claims,¹⁹⁶ fast¹⁹⁷ and multi-track.¹⁹⁸ There is no specialist court for consumer disputes, instead claims are handled through the regular civil procedure. Enforcement of consumer protection through the courts in the UK has at least four advantages. First, courts are able to provide a final resolution to consumer disputes, with the opportunity for appeal. Second, for any consumer related issues that overlap with criminal law, courts are able to prosecute individuals for any offences they that have been committed. Third, for complex issues the courts

¹⁹⁵ Christine Riefa and Chris Willett (n 168).

¹⁹⁶ Ministry of Justice, 'Civil Procedure Rules – Rules and Directions, Part 27' <<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part27>> Accessed 18 June 2021.

¹⁹⁷ *ibid* Part 28.

¹⁹⁸ *ibid* Part 29.

system is a more cost effect route for dispute resolution.¹⁹⁹ Fourth, judges have a wide range of remedies at their disposal, including the granting of damages, injunctions, price reductions and replacement of goods.

Consumer protection is also enforced through Alternative Dispute Resolution (ADR) by way of the Financial Services Ombudsman. The Financial Ombudsman Service is a free and easy-to-use service that settles complaints between consumers and businesses that provide financial services.²⁰⁰ The benefits of handling consumer disputes through the Financial Services Ombudsman are; first, it provides an informal alternative to the courts and is seen as being quicker, cheaper and more accessible; second, it allows disputes to be resolved at relatively low cost and is free to consumers (funded by industry); third, it provides consumers with the certainty that a complaint will be taken forward and a decision made on it; fourth, it can help to improve consumer trust and confidence in the industry; fifth, it can help businesses to learn from situations where things have gone wrong to help prevent future problems; and sixth, it provides strong incentives for businesses to resolve complaints effectively and efficiently in the first place.²⁰¹

The CMA, FCA and TSS also play an important role in the administrative enforcement of consumer protection in the UK. They are responsible for ensuring that consumers are aware of their rights and what to do when things go wrong, free information, advice, and campaigning for

¹⁹⁹ Department for Business, Innovation and Skills, ‘Government response to call for evidence – EU proposals on Alternative Dispute Resolution’ (2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190192/12-674-government-response-eu-proposals-alternative-dispute-resolution_1_.pdf> accessed 18 June 2021.

²⁰⁰ Caroline Wayman, ‘The role of the Financial Ombudsman Service in the UK Redress Landscape’ <https://www.lawscot.org.uk/media/6424/ilg_financialombudsmen_slides.pdf> accessed 18 June 2021.

²⁰¹ *ibid.*

consumer protection law reform.²⁰² Together with other regulators, the CMA, FCA and TSS have the power to seek assurances from traders that they will cease unfair practices affecting consumer protection and seek court actions to prevent the continued use of unfair contract terms.²⁰³ This is enforcement of consumer protection by way of collective redress.

5.6 Lessons Kenya can Borrow from the UK on Consumer Protection

From the discussions above, several similarities and comparisons can be drawn in regards to the legislative and administrative structure in relation to consumer protection in Kenya and the UK. First, both countries have a primary consumer protection legislation i.e. the Consumer Protection Act, 2012 (CPA) in Kenya and the Consumer Rights Act, 2015 (CRA) in the UK.

The UK's CRA provides for separate Chapters which provide for extensive provisions on what types of goods and services are covered by the protections relating to the quality of goods and services compared to Kenya's CPA. For example, under the UK's CRA, goods refers to any tangible and moveable items, including water, gas and electricity if, and only if, they were put up for supply in a limited volume or set quantity.²⁰⁴ It also provides for the definition of digital content as data that is produced and supplied in digital form.²⁰⁵ Chapter 4 of the UK's CRA provides exclusively for services and applies only to a contract for a trader to supply a consumer²⁰⁶ and does not include a contract of employment or apprenticeship, or specific services which may be specified by the UK's Secretary of State.²⁰⁷ Kenya's CPA does not

²⁰² P. Giliker (n 166).

²⁰³ Consumer Rights Act 2015, Schedule 3.

²⁰⁴ Consumer Rights Act 2015, Section 2(8).

²⁰⁵ Consumer Rights Act 2015, Section 2(9).

²⁰⁶ Consumer Rights Act 2015, Section 48(1).

²⁰⁷ Nigel Parr and Christopher Eberhardt, 'UK: Consumer protection laws and regulations 2021' (2021) <<https://iclg.com/practice-areas/consumer-protection-laws-and-regulations/united-kingdom>> Accessed 27 October 2021.

provide for specific chapters or sections that deal exclusively with either goods or services but rather combines the two in its provisions. Kenya can borrow this aspect of making separate provisions for goods and services from the UK.

The UK's CRA also provides for and governs unfair contract terms. As per section 62(1) of the CRA, unfair contract terms in consumer agreements are not binding on consumers and may be subject to enforcement action. The UK's CRA goes further to provide for an indicative list of terms which may be regarded as unfair (the 'Grey List'), as well as a list of blacklisted terms which are automatically unenforceable.²⁰⁸ Blacklisted terms include terms which exclude or restrict liability for death or personal injury resulting from negligence, or terms which seek to exclude or restrict statutory rights and remedies.²⁰⁹ Kenya can borrow from the UK's CRA by making similar provisions in the CPA to act as a guide to both traders and consumers.

Second, both countries have tribunals that deal with disputes in relation to competition issues and consumer protection matters i.e. the Competition Tribunal (CT) in Kenya and Competition Acts Tribunal (CAT) in the UK.

While Kenya and the UK have similarities in their legislative and administrative institutional structures, the UK has been far more successful in the implementation of consumer protection. One of the main issues with protection of consumer right in Kenya is that the institutions tasked with the protection of these consumer rights have fallen short of effectively executing their mandates.²¹⁰ The UK has managed to coordinate the various administrative institutions responsible for the protection and enforcement of consumer rights.²¹¹ The Competition Authority

²⁰⁸ *ibid.*

²⁰⁹ *ibid.*

²¹⁰ Joy Malala (n 6).

²¹¹ See discussion in sub topic 4.2.

of Kenya (CAK) and other consumer regulatory institutions such as the Communications Authority (CA) and Insurance Regulatory Authority (IRA) can follow suit of the conduct of the CMA, FCA and TSS in their mandate in regards to consumer protection.

One of the main key features Kenya can borrow and introduce from the UK is the aspect of a financial service ombudsman. The financial service ombudsman would provide an alternative to Kenya's court system which can be argued takes time to settle matters due to the large number of cases pending hearing and determination. In the UK the financial service ombudsman provides for a quicker, cheaper and more accessible solution to consumers to resolve their disputes.²¹² The adoption of a financial service ombudsman in Kenya would provide consumers with an alternative to the court system whereby their matters can be effectively and efficiently dealt with.

5.6 Conclusion

The main objective of this Chapter is to review consumer protection practices in the UK and the lessons Kenya can borrow. From the discussions above, it is evident that Kenya and the UK share some similarities in their administrative and institutional structure in regards to consumer protection. However, the main point of difference between Kenya and the UK when it comes to consumer protection is the actual and effective enforcement of the mechanisms set in place to ensure consumer rights are well protected.

The main institutional structures in the UK responsible with consumer protection play an active role in ensuring that consumers are well protected and that there is coordination amongst themselves in the conduct of their mandate. This is not the case in Kenya where the various institutions responsible for consumer protection can be said to have under achieved in the

²¹² Caroline Wayman (n 194).

performance of their duties. It is therefore important for these Kenyan institutions, i.e. CAK, CA, IRA amongst others to work together for the benefit of the consumer to ensure that the rights of the consumer are adequately protected and thus improving the business market in the process.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Summary of Chapters

This is the last Chapter of the study. It provides a summary of the discussions in the previous Chapters. This Chapter seeks to confirm whether or not the hypotheses have been proven or disapproved. The overarching argument in this study is that whereas Kenya has a specific consumer protection statute, there are several other laws and regulations that provide for consumer rights and protection.²¹³ The study sought to answer the following three key questions. First, the effectiveness of competition law in consumer protection in Kenya. Second, the role IP plays in ensuring consumer protection in Kenya. And third, what lessons Kenya can learn from consumer protection practice in the UK.

The first chapter of this research study discussed the background of the study, problem statement, research objectives, research questions, hypotheses, literature review, theoretical framework and the chapter outline. It sought to assess the relationship between consumer protection, competition law and intellectual property law in Kenya. This was outlined in the chapter's research objectives and research questions.

The second chapter provided an overview of the consumer protection regime in Kenya. It discussed consumer protection in Kenya pre-2010, post 2010, and the effect of the enactment of the CPA. The third chapter undertook to assess the effectiveness of competition law in the protection of consumer rights in Kenya. It sought to establish the role competition law plays in

²¹³ See Subtopic 1.1.

the protection of consumer rights and the various administrative, regulatory and institutional structures in Kenya.

The fourth chapter took a deeper look into the relationship between intellectual property law and its role in consumer protection in Kenya.

The fifth chapter focused on consumer protection in the UK. It discussed the legislative, administrative and institutional structures responsible for consumer protection and the enforcement mechanisms in place to ensure that consumers are protected. The main aim of the chapter was to analyze the lessons Kenya can learn from the UK consumer protection system.

6.2 Conclusion

The study sought to establish the following two hypotheses. First, consumer protection law, competition law and IP law share a similar goal and objective which is to protect the rights and interests of consumers. Second, that there is need to have comprehensive guidelines that will ensure a balance in the protection of consumer rights and the maintenance of a free, open and competitive market in Kenya. There is need for the harmonization of these laws to ensure the effective and efficient protection of consumer rights in Kenya by introducing comprehensive guidelines balancing the relationship and interactions amongst consumer protection, competition law and intellectual property law as well as the various administrative and institutional structure responsible. These have been discussed and tested in chapters 2, 3 and 4 of the study.

The study established the importance of competition law in consumer protection. The key objective of competition law in Kenya as provided in the Competition Act is to promote and safeguard competition of Kenya's national economy as well as protecting consumers from unfair

and misleading market products.²¹⁴ One of the main measures competition law aims at ensuring consumer protection in the Kenyan market is by way of monitoring abuse of dominance. As discussed in Chapter 3 of the study, abuse of dominance is where a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially.²¹⁵

The study has also drawn the relationship between consumer protection and IP and the role IP plays. The study has shown that while IP is largely considered to be monopolistic in nature and that it stifles innovation and creativity in the market, it does provide for various doctrines and practices such as the doctrine of exhaustion and compulsory licensing which have proven to be very key in consumer protection. These doctrines and practices ensure that IP owners do not exercise their IP rights to the detriment of consumers but rather balance their rights.

The discussions in the study have indeed proven that there are other laws and regulations that provide for consumer protection. They have also shown the various administrative and regulatory institutions or bodies in place in Kenya that are tasked with the responsibility of ensuring consumer protection i.e. the CAK and Competition Tribunal. The discussions have also highlighted the increase in vigilance of these institutions in their mandate to ensure consumer protection in the height of the COVID-19 pandemic.

The study has concluded by making several proposals and recommendations to which Kenya can adopt to improve the interrelationship between consumer protection, competition law and IP.

²¹⁴ Competition Act, 2010, Preamble.

²¹⁵ *Hoffman La-Roche v. Commission of the European Community* (n 62).

6.3 Recommendations

From the discussions in the study, it is evident that there is need for reforms in the protection and enforcement of consumer protection in Kenya. While there are several laws and regulations that make provision for consumer protection, there has been an over reliance on the Consumer Protection Act. This has led to the underperformance of the various institutions tasked with the mandate of ensuring that consumer rights are adequately protected in Kenya. In light of this, this research study makes the following proposals.

First, there is need for harmonization of the various laws rules and regulations governing consumer protection laws in Kenya. This can be done by establishing comprehensive guidelines linking the various rules and regulations in the fields of consumer protection, competition and intellectual property law. The establishment of such comprehensive guidelines will assist in the coordination amongst the various institutions mandated to ensure consumer protection. This will assist in inter-agency or inter-institutional cooperation and coordination, and help prevent the issue of wrangles usually caused as a result of overlapping duties and responsibilities.

Second, Kenya can borrow from the UK and introduce a special consumer protection body or tribunal responsible with handling consumer rights disputes. The UK has had success with its Financial Services Ombudsman which is tasked with the responsibility of settling consumer disputes by way of ADR. A specialized consumer protection tribunal or agency will provide Kenyan consumers an alternative to the courts where disputes can be settled. As seen from the UK, a specialized consumer protection tribunal or agency will provide consumers with a quicker, cheaper and more accessible dispute resolution way of settling their disputes.

Third, there is need for empowerment of the competition law and IP law institutions in handling of consumer protection. From the discussions in this research study it is evident that consumers play a very important role in both competition and IP law. Without consumers, completion and IP law will operate in a vacuum. There is therefore the need to empower the competition law and IP institutions through capacity building to improve their handling and dealing of consumer protection.

BIBLIOGRAPHY

Abdel-Ghany M, 'The High Cost of Invention: Patent Law and the Consumer Interest' (2001) Maurice A. Deane School of Law at Hofstra University.

Amuti N, 'An examination of the adequacy of the consumer protection act in protecting banking borrowers in Kenya. A case study of the national bank of Kenya terms and conditions for an unsecured loan' (2016) University of Nairobi.

Asher D, & Rijit Sengupta, 'State of the Kenyan Consumer 2012' (2012) CUTS International, 1.

Asher D, 'Consumer Protection and Financial Issues in Kenya' (2010) Presentation to 2nd Annual Africa Dialogue for Consumer Protection Conference held on July 12-14, 2010, Arusha, Tanzania.

Averitt W.N and Robert H. Lande, 'Consumer sovereignty: A unified theory of antitrust and consumer protection law' (1996) *Antitrust LJ* 65, 713.

Blechman G.J, 'Mobile credit in Kenya and Tanzania: Emerging regulatory challenges in consumer protection, credit reporting and use of customer transactional data' (2016) *The African Journal of Information and Communication*, 61-61.

Bone G.R, 'Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920' (1985) *S. Cal. L. Rev.* 59, 1101.

Brummer C, 'The Ties That Bind-Regionalism, Commercial Treaties, and the Future of Global Economic Integration' (2007) *Vand. L. Rev.* 60, 1349.

Calo R and Alex Rosenblat, 'The taking economy: Uber, information, and power' (2017) *Colum. L. Rev.* 117, 1623; Katalin Judit Cseres, 'Competition Law and Consumer Protection' (2005) *Kluwer Law International BV* 49.

Cartwright P, *Consumer Protection and the Criminal Law: Law, Theory and Policy in the UK* (Cambridge University Press, 2004).

Castri D.S, 'Consumer Protection Diagnostic Study: Financial Consumer Protection in Kenya' (2011) at <<https://www.semanticscholar.org/paper/Consumer-Protection-Diagnostic-Study%3A-Financial-in-Castri-Flaming/2950ae8c90f106e8a6679d35e086783b4ed97fe3>> Accessed 17 May 2021.

Chisum D.S and Michael A. Jacobs, *Understanding Intellectual Property Law* (Matthew Bender & Co. Inc, New York, 1992).

Competition Act 2010, Sections 7 and 71. Also see Promoting Competitiveness & Efficiency in Kenya: The Role of Competition Policy & Law <<http://www.cuts-international.org/kenya-report.pdf>> accessed 27 May 2021.

Competition and Markets Authority, 'Towards the CMA – CMA Guidance' (2013) <[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212285/CMA1 - Towards the CMA.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/212285/CMA1_-_Towards_the_CMA.pdf)> accessed 17 June 2021.

Competition Authority of Kenya, 'Consumer Protection' <<https://cak.go.ke/what-we-do/consumer-protection/overview>> accessed 22 June 2021.

Correa M.C, 'Intellectual Property and Competition Law' (2007) A paper submitted to the

Darrow H.P, 'Commercial Nuisance: A Theory of Consumer Protection' (1966) *The University of Chicago Law Review* 33.3, 590-602.

Department for Business, Innovation and Skills, 'Government response to call for evidence – EU proposals on Alternative Dispute Resolution' (2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/190192/12-674-government-response-eu-proposals-alternative-dispute-resolution_1_.pdf> accessed 18 June 2021.

Dusollier S, 'The Relations between Copyright Law and Consumers' Rights from a European perspective' (2010) European Parliament.

Gachuhi R, 'Mutunga's advice to keep away from courts whenever possible quite timely' (2011) <<http://www.nation.co.ke/oped/Opinion/Advice-to-keep-away-from-courts-whenever-possible-quite-timely-/-/440808/1192132/-/ryfm54/-/index.html>> Accessed 19 October 2021.

Gilbert P and John Messent, 'The Dominance and Monopolies Review: United Kingdom' (2021) <<https://thelawreviews.co.uk/title/the-dominance-and-monopolies-review/united-kingdom>> Accessed July 30, 2021. Ministry of Justice, 'Civil Procedure Rules – Rules and Directions, Part 27' <<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part27>> Accessed 18 June 2021.

Giliker P, 'The Consumer Rights Act 2015 – A Bastion of European Consumer Rights?' (2017) *Legal Studies*, 37(1) 78-102.

Gitonga R.K, 'Social and Political Goals of Mergers in Competition Law: Comparative Analysis of the Efficiency and Public Interest Provisions in Kenya and South Africa' (2015) University of Cape Town.

Intellectual Property Office, 'Consultation on the UK's future exhaustion of intellectual property rights regime' (2021)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/991669/Consultation-on-the-UKs-future-exhaustion-of-intellectual-property-rights-regime.pdf> Accessed 21 October 2021.

Jerobon R.C, 'The Interface between Competition Law and Intellectual Property in Kenya' (2016) University of Nairobi.

Judiciary, 'Competition Tribunal' <https://www.judiciary.go.ke/competition-tribunal/> accessed 24 June 2021.

Kaniaru D, 'Environmental Courts and Tribunals: The Case of Kenya' (2012) *Pace Envtl L Rev* 29, 566-572.

Kibwana K, *Fundamental Rights and Freedoms in Kenya* (Oxford University Press, 1990) 83.

Kigwiru V.K, 'Enforcing Competition Law and Consumer Protection During the COVID-19 Pandemic in Africa: The Competition Authority of Kenya' (2020) Competition Policy International.

Kigwiru V.K, 'The COVID-19 and Competition Law: Which Way for the Competition Authority of Kenya?' (2020) <https://www.linkedin.com/pulse/covid-19-competition-law-which-way-authority-kenya-kigwiru-?trk=public_profile_article_view> accessed 23 June 2021.

Kiveu M and G. Ofafa 'Enhancing market access in Kenyan SMEs using ICT' (2013) *Global Business and Economics Research Journal* 2(9), 29-46.

Kongolo T, *Unsettled International Intellectual Property Issues* (Kluwer Law International, New York, 2008) 68-69.

Kontos M, 'Bankers Beware: Consumer Protection in Kenya, Limits on Interest Recovery' (2014) <<https://www.walkerkontos.com/uploads/news/id8/BANKERS%20BEWARE%20-%20Consumer%20protection%20in%20Kenya%20logo.pdf>> Accessed 30 June 2021.

Lande H.R, 'Consumer choice as the ultimate goal of antitrust' (2000) *U. Pitt. L. Rev.* 62, 503.

Lindsay R, Robert McCorquodale, Lara Blecher, Jonathan Bonnitcha, Antony Crockett and Audley Sheppard, 'Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles' (2013) *Journal of World Energy Law and Business* 6(1)(2), 16.

Malala J, 'Consumer law and policy in Kenya' (2018) *Journal of Consumer Policy* 41(4), 355-371.

Malala J, 'Consumer protection for mobile payments in Kenya: An examination of the fragmented legislation and the complexities it presents for mobile payments' (2013) *KBA Centre for Research on Financial Markets and Policy Working Paper Series*.

Manley M.I, 'The UK retains the Doctrine of Exhaustion of IP rights after the transition period' (2020) <<https://www.sidley.com/en/insights/newsupdates/2020/12/the-uk-retains-the-doctrine-of-exhaustion-of-ip-rights-after-the-transition-period>> Accessed 21 October 2021.

Mudida R, Simon Ndiritu and Thomas Ross, 'Kenya's New Competition Policy Regime' (2015) Kluwer Law International BV.

Muigua K, 'Utilising Alternative Dispute Resolution Mechanisms to Manage Commercial Disputes' (2018) Discussion Paper for the 1st Nairobi Centre for International Arbitration (NCIA) Alternative Dispute Resolution (ADR) National Conference, held at the Intercontinental Hotel, Nairobi, on 5th - 6th June, 2018.

Mwaura K, 'Horizontality and the Bill of Rights: Defining Parameters of Corporate Complicity in Human Rights Violations' (2011) *Law Society of Kenya Journal* 7(1), 1-21.

Mwita M, 'Carrefour to Pay Local Supplier in Exploitation Case' (2021) *The Star* <<https://www.the-star.co.ke/business/kenya/2021-04-22-carrefour-to-pay-local-supplier-in-exploitation-case/>> accessed 23 June 2021.

Njeru R, 'Intellectual Property And Consumer Protection In Kenya' (2019) <<https://www.bowmanslaw.com/insights/intellectual-property/intellectual-property-and-consumer-protection-in-kenya/>> Accessed 1 July 2021.

Nordberg D, 'The Ethics of Corporate Governance' (2007) <<http://ssrn.com/abstract=1004038>> Accessed 8 October 2020.

Nzomo V, 'E-Commerce and the Law in Kenya: Consumer Protection' (2018) <<https://cipit.strathmore.edu/e-commerce-and-the-law-in-kenya-consumer-protection/>> Accessed 30 June 2021.

Nzomo V, 'Intersections between Intellectual Property, Consumer Protection and Competition Law in Kenya' (2014) *IP Kenya Wordpress* <<https://ipkenya.wordpress.com/2014/02/07/intersections-between-intellectual-property-consumer-protection-and-competition-law-in-kenya/>> accessed 23 July 2021.

Persky J, 'Retrospectives: consumer sovereignty' (1993) *Journal of Economic Perspectives* 7(1), 183-191; Joel Waldfogel, 'Does consumer irrationality trump consumer sovereignty?' (2005) *Review of Economics and Statistics* 87(4), 691-696.

Pidot J, 'The Applicability of Nuisance Law to Invasive Plants: Can Common Law Liability Inspire Government Action?' (2005) *Virginia Environmental Law Journal*, 183-230.

Rebelo D and Edwina Warambo, 'Kenya' in Maurits Dolmans and Henry Mostyn, *The Dominance and Monopolies Review* (The Law Reviews, 2017).

Riefa Cand Chris Willett, 'Enforcement and Effectiveness of Consumer Law in the UK' (2018) <https://www.researchgate.net/publication/326227266_Enforcement_and_Effectiveness_of_Consumer_Law_in_the_UK> accessed 17 June 2021.

Ruggie J, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (2008) Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc.A/HRC/8/5.

Schwarzkopf S, 'The political theology of consumer sovereignty: Towards an ontology of consumer society' (2011) *Theory, Culture & Society* 28(3), 106-129.

Sihanya B, 'Consumer Protection Act and the Constitution of Kenya 2010: Review Area' (2015) Presentation during the Retreat on Strengthening Consumer Protection through Intergovernmental Linkages, organized by KECOPAC and the Ministry of East Africa Affairs, Commerce and Tourism at Sawela Lodge Naivasha from February 10, 2015 to February 12, 2015.

Sihanya B, 'Intellectual property audit, valuation, commercialization, securitisation and taxation in Kenya' (2018) *JKUAT Law Journal*, 41-86.

Sihanya B, 'Intellectual property confronts counterfeiting in Africa: protecting innovators and consumers in the cyber society' in Thomas Wilhelmsson, *et al.* (eds.) *Consumer Law in the Information Society* (Kluwer Law International, London 2001).

Sihanya B, 'Patent law and practice in Kenya' (2007) *International Review of Intellectual Property and Competition Law* Vol 38. 6, 648-658.

Sihanya B, 'Plant breeder's rights in Kenya and Africa' (2015) *East African Law Journal*, 68-100.

Sihanya B, 'Understanding Copyright' (2015) *Utafiti News*.

Sihanya B, *Intellectual Property Law in Kenya and Africa: Transferring Technology for Sustainable Development* (Sihanya Mentoring and Innovative Lawyering, 2016).

Swamy G, 'Kenya: Patchy, intermittent commitment' (1994) *Adjustment in Africa: Lessons from Country Case Studies*, 193-237.

Spanogle J.A and R. J. Rohner, *Consumer Law Cases and Material* (Thomas West Publishers, 1999), 8.

Thu H.T.N, 'Well known trade mark protection' (2010) WIPO at https://www.wipo.int/export/sites/www/about-wipo/en/offices/japan/research/pdf/vietnam_2010.pdf Accessed 18 October 2021.

Tuner R, 'The Effect of Brexit on UK Consumer Protection Law' (2021) <<https://www.lexology.com/library/detail.aspx?g=eac7d3fc-4da6-49c6-b6d1-db87c5ff0f25>> Accessed 17 June 2021.

Wachira J, 'Consumer Welfare as a goal of Competition Law' (2017) Nairobi Business Monthly <<https://www.nairobibusinessmonthly.com/consumer-welfare-as-a-goal-of-competition-law/>> accessed 23 June 2021.

Waksman A and Henry Mostyn, 'Abuse of Dominance in the United Kingdom' (2021) *Lexology*.

Wayman C, 'The role of the Financial Ombudsman Service in the UK Redress Landscape' <https://www.lawscot.org.uk/media/6424/ilg_financialombudsmen_slides.pdf> accessed 18 June 2021.

Wekesa M and Ben Sihanya, *Intellectual Property Rights in Kenya* (Konrad Adenauer Stiftung, 2009).

Whish R and David Bailey, *Competition Law* (Oxford University Press, 2012).

Williams A.C and John M. Conley, 'Is there an Emerging Fiduciary Duty to Consider Human Rights?' (2005) 74 *University of Cincinnati Law Review*, 75.

WIPO, 'Interface between exhaustion of intellectual property rights and competition law' (2011) WIPO at https://www.wipo.int/edocs/mdocs/mdocs/en/cdip_4/cdip_4_4rev_study_inf_2.pdf Accessed 18 October 2021.

WIPO, 'What is a patent?' (2021) at <https://www.wipo.int/patents/en/> Accessed 20 October 2021; David Bainbridge, *Intellectual Property* (Pearson Education Limited, 2012).

Woodrow H, 'Unfair and deceptive robots' (2014) *Md. L. Rev.* 74, 785.

Wyche W.B, 'A Guide to the Common Law of Nuisance in South Carolina' (1993) *SCL Rev.* 45, 337.

OECD, 'Protecting consumers in peer platform markets' (2016) OECD Digital Economy Policy Papers <<https://www.oecd-ilibrary.org/docserver/5j1wvz39m1zw-en.pdf?expires=1634542678&id=id&accname=guest&checksum=42C01FD1A05943EFBFD56613F21CC610>> accessed 18 October 2021.

UNCTAD Secretariat, 'The role of competition policy in promoting sustainable and inclusive growth' (2015) at https://unctad.org/system/files/official-document/tdrbpconf8d6_en.pdf
Accessed 17 October 2021.