ORARO & COMPANY
ADVOCATES

LEGAL & KENYAN

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Good Tidings We Bring: Issue Nine

Greetings!

As 2018 draws to a close and we look towards a new year, it is yet again my undiminished privilege to present to you our periodic newsletter, Legal & Kenyan, now in its ninth issue. I take this opportunity to thank those who have given us feedback on previous issues of the publication, as we continue to strive to deliver the ultimate reading experience on legal matters to our readers.

In this "home-grown" issue, we have an array of exciting and insightful articles authored by experienced lawyers in the respective areas of the law.

Georgina Ogalo-Omondi and Jill Barasa examine the validity and enforceability of prenuptial agreements, which is a topic of great interest not least to those considering marriage. Next, Chacha Odera and Sandra Kavagi have a final say on the 2017 Presidential elections in the context of section 83 of the Elections Act, 2011. This is followed by Walter Amoko who discusses the "trouble" with compound interest as a means of compensating a person who has been kept out of his money for a long period of time. Jacob Ochieng teams up with Milly Mbedi to analyse restrictive trade practices which are prohibited under the Competition Act, 2010, while Noella Lubano and Eva Mukami look at the cost effectiveness of international arbitration. Pamella Ager and Tesrah Wamache join the conversation with a piece on the latest legislation aimed at regulating cyberspace, the Computer Misuse and Cybercrimes Act, 2018. Beryl Rachier and I examine the effectiveness of physical development plans against the backdrop of an ever expanding population while Pamella Ager and James Kituku take us through the process relating to extension and renewal of leases under new land regulations. All under one cover!

We do hope that you enjoy the read!

Sincerely,

John Mbaluto,
Editor

Senior Partner's Note

Looking back on the past year, it is remarkable how the country has made significant economic strides and I am hopeful that Kenya's economy is poised to make remarkable growth in 2019. We are consistently committed to providing you with practical and up-to-date insights to keep you well informed on developmental changes in Kenya's legal landscape and with the release of our ninth edition of Legal & Kenyan, we deliver a basketful of articles to keep you informed.

Enjoy the read.

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IFLR 1000
TOP TIER FIRM
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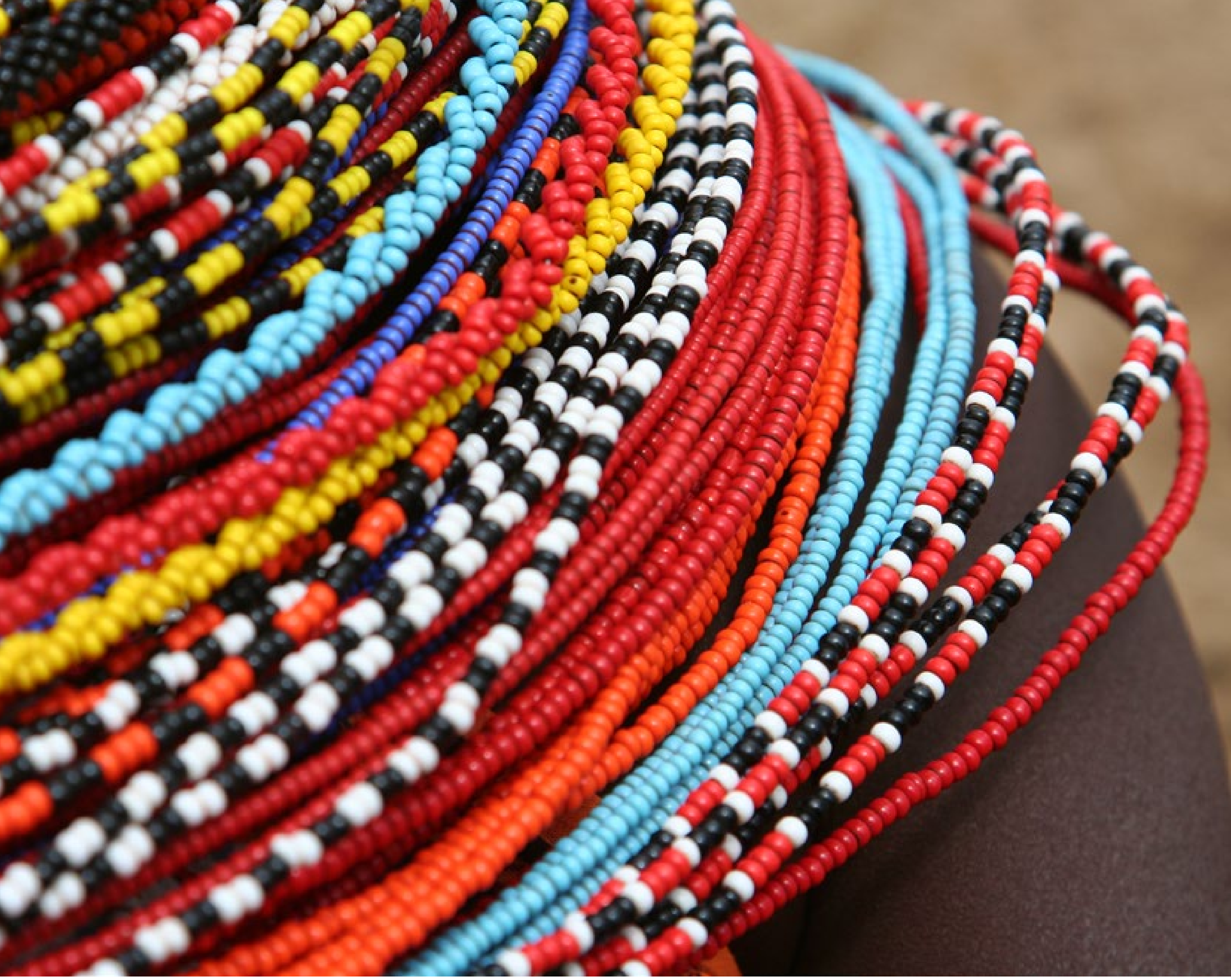
"The law firm is very professional and diligent in providing its services and undertaking the work. They have very competent lawyers with wide experience and are very thorough in their work. The law firm is also sensitive to clients needs and they go out of their way to understand the clients' needs and provide the advise and service required."

IFLR 1000, 2019



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BEFORE 'I DO':

VALIDITY AND ENFORCEMENT OF PRENUPTIAL AGREEMENTS IN KENYA

Issue No. 2 of this newsletter featured an article titled **For Better or Worse: A Reflection on the Matrimonial Property Act, 2013 (the Act)**, in which we explored the salient features of the Act and introduced our readers to section 6(3) of the Act on prenuptial agreements. In the present article, we take a closer look at prenuptial agreements, which are gradually gaining recognition in Kenya as an efficient and cost effective way for couples to iron out, before entering marriage, property rights issues that could arise in the event of separation, divorce or death.

Legal Framework Governing Prenuptial Agreements

Article 40(1)(b) of the Constitution of Kenya, 2010 (**the Constitution**) provides for the right to own property in any part of Kenya either individually or in association with others. Further, Article 40(2)(b), as read with Article 27(4), provides that Parliament shall not enact any laws that permit the State or any person to limit or in any way restrict the enjoyment of any right to own property on the basis of marital status.

Nevertheless, it was not until the enactment of the Act that prenuptial agreements gained official recognition in Kenya. The Act came into force on 16th January, 2014 and repealed the Married Women's Property Act of 1882, which made no provision for prenuptial agreements. Its main objective is to provide for the rights and responsibilities of spouses in relation to matrimonial property and connected purposes.

Section 6(3) of the Act provides that parties to an intended marriage may enter into an agreement prior to their marriage to determine their property rights. Indeed, in the case of *MBK v MB (2016) eKLR*, the Court was called upon to determine whether an apartment that the defendant had bought prior to the marriage formed part of the matrimonial property. The prenuptial agreement had only two clauses and provided, *inter alia*, that any property acquired by either party prior to their intended marriage would belong to that party after marriage. The Court held that since there was no evidence that the parties had agreed that the apartment would form part of the matrimonial property, it followed that the property belonged exclusively to the defendant.

Grounds for Invalidating a Prenuptial Agreement

Section 6 (e) of the Act provides that prenuptial agreements should be entered into freely by the spouses while section 6 (4) states further that a party to a prenuptial agreement may apply to the Court to set aside the agreement on the ground that the agreement was influenced by fraud, coercion or is manifestly unjust. However, the Act is silent on what amounts to fraud or coercion or what would render an agreement manifestly unjust.

It should be noted that common law principles and other laws of England have played an important role in shaping the history of Kenya's legal framework. Kenyan jurisprudence has continually been influenced by that of England and as a result, English jurisprudence is still influential in Kenya. In fact, it is not uncommon for Kenyan Courts to refer to and apply English cases, particularly to fill gaps in the legislation or where certain matters have only recently been given force of law in Kenya and have not been dealt with in depth by the Courts, as is the case with the provisions on prenuptial agreements under the Act.

In England, the case of *Radmacher v Granatino (2010) UKSC 42* provided the first significant judgment about the status of prenuptial agreements. In its judgment, the United Kingdom Supreme Court set out the following factors that increase the likelihood of a prenuptial agreement being binding the parties:

(i) The agreement must be freely entered into.
(ii) The parties must have a full appreciation of the implications of the agreement.
(iii) It must not be unfair to hold the parties to their agreement in the circumstances prevailing.

Before entering into a prenuptial agreement, it is important that each party seeks independent legal advice. Taking independent legal advice will aid in establishing that an individual was fully aware of the terms of the agreement and therefore freely entered into it, particularly if warnings were raised at a preliminary stage. For instance, in the case of *DB v PB (2016) EWHC 3431 (Fam),* the wife's assertion of misrepresentation failed because it revealed that she had received independent legal advice in the United States advising her not to sign the agreement.

A person's emotional state at the time of making the agreement is also relevant to whether the person entered into the agreement of his or her own free will, without undue influence or pressure. The Courts will also take into account the individual's age and maturity and whether either or both had been married or been in long-term relationships before. Timing is equally important and signing the prenuptial agreement immediately before the marriage increases the risk that one party will be considered to have put undue pressure on the other.

The parties should have a full appreciation of the implications of the prenuptial agreement. This requires an exchange of financial disclosure before the agreement is signed to ensure that each party is aware of the extent of the claims he or she may potentially be giving up. On this point, in the case of *Y v Y (2014) EWHC 2920*, the Court refused to give effect to a French-style prenuptial agreement entered into by a French couple

Parties should seek independent legal advice as a prerequisite to signing the agreement even where one of the parties insists that he or she has read and understood the terms of the agreement and the rights and obligations that he or she will be surrendering.

living in London who signed the agreement barely two days before their wedding. The Court took the view that while the wife had understood the function of the agreement when she signed it, she had not had any understanding of the financial consequences should the marriage break down.

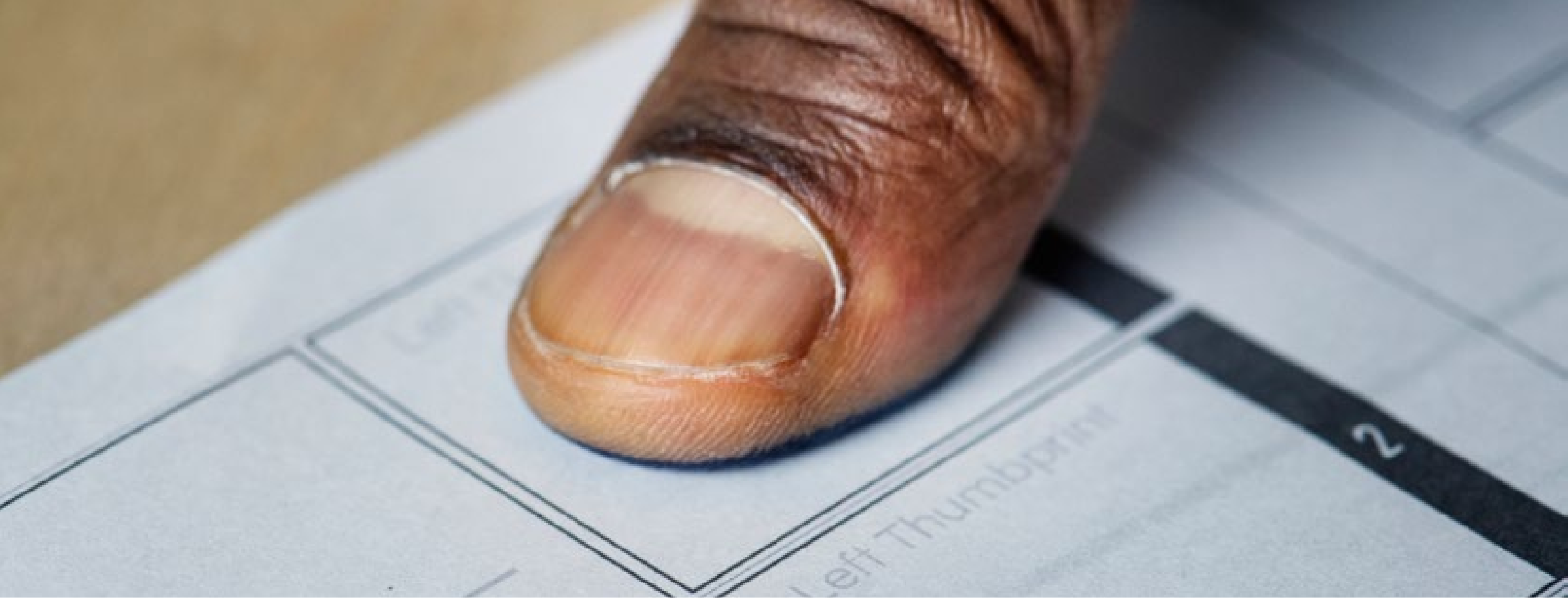
The agreement must also be fair in the circumstances of the case. Concept of fairness has been subjected to much debate. The English courts have a broad discretion in financial remedy proceedings and at an absolute minimum will seek to ensure that both parties' needs, and in particular the needs of the financially weaker party, and the needs of any children of the family are met. As a general rule, the longer the marriage, the lower the chance that the prenuptial agreement will be upheld, particularly if there have been significant or unforeseen changes in circumstances.

In the case of *WW v HW (2015) EWHC 1844*, the Court accorded significant weight to the prenuptial agreement and went on to find that it would be fair to hold the husband to its terms unless his needs dictated a different outcome.

Way Forward

In view of the provisions of the Act on prenuptial agreements and the jurisprudence, couples contemplating signing a prenuptial agreement should be mindful of the following points:

- The parties should seek independent legal advice as a prerequisite to signing the agreement, even where one of the parties insists that he or she has read and understood the terms of the agreement, the rights and obligations that he or she will be surrendering. This is an essential element as it tends to show that the agreement was freely entered into by the parties without coercion or fraud.
- The parties should make full and frank disclosure of all of their assets including those that they intend to exclude under the prenuptial agreement. This is a requirement at common law.
- The parties should note that the agreement could be set aside by the Courts on the ground that it was unfair or manifestly unjust; therefore, the parties should ensure that the agreement does not have the effect of producing gross inequality between them either at the time of execution or during the marriage and that the division of assets is not weighted too heavily in favour of one party.
- The right of the child to support should be addressed prior to signing the Agreement, noting that the interests of the child take precedence over all other interests under Kenyan law. As was held in *Radmacher v Granatino*, the agreement cannot be allowed to prejudice the reasonable requirements of any children of the family.
- While there is no minimum time requirement for a party to review and sign a prenuptial agreement under the Act, the position at common law appears to be that prenuptial agreements must not be entered into less than twenty-one (21) days before the marriage.
- Signing the prenuptial agreement closely before the wedding is not recommended. The party initiating the process should therefore ensure that the other party is provided sufficient time to review the prenuptial agreement and the financial disclosures.

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THE LAST WORD:
A LOOK AT SECTION 83 OF THE ELECTION ACT, 2011

Kenya has marked slight over a year since the Supreme Court rendered its decision on the nullification of the presidential elections held on 8th August, 2017. The dust having settled, it is an appropriate time to reflect on the historic decision, albeit from a legal perspective.

Kenyans went to the polls on 8th August, 2017 to elect their president. Uhuru Muigai Kenyatta was declared the winner with his closest challenger Raila Amolo Odinga coming in second from a field of eight (8) candidates. Mr. Odinga and his running mate, Stephen Kalonzo Musyoka were dissatisfied with the way the elections were conducted and the outcome of the said presidential elections. Mr. Odinga and Mr. Musyoka challenged the declaration of results by the Independent Electoral and Boundaries Commission (**IEBC**) at the Supreme Court of Kenya in *Raila Amolo Odinga & Another –vs- IEBC & Others (2017) eKLR* (**the 2017 Presidential Election Petition**). This was the second time the result of a presidential election was being challenged in the Supreme Court the first one having been challenged in the year 2013.

After receiving arguments from counsel representing the parties, the Supreme Court delivered its judgment on 1st September, 2017. By a majority decision of four (4) to two (2), the Court held that the presidential elections was not conducted in accordance with Constitution of Kenya, 2010 (**the Constitution**) and the applicable law thereby rendering the declared result invalid, null and void. The Court proceeded to order the IEBC to organise a fresh presidential election in conformity to the Constitution and the applicable election laws, within sixty (60) days of the judgment.

In this article, we discuss the position of the law as relates to the application of section 83 of the Elections Act, 2011 (**the Elections Act**) to the determination of election petitions. This section sets the standard of proof for election petitions in Kenya. The position on the interpretation of the provisions of section 83 of the Elections Act and its application to the determination of election disputes was settled in the 2017 Presidential Election Petition.

Elections in Kenya are governed by the Constitution and other principal legislations in addition to the Elections Act include the Independent Electoral and Boundaries Commission Act, 2011 (**the IEBC Act**) and the Election Offences Act, 2016 (**the Elections Offences Act**). The Constitutional threshold is set out in Articles 10, 38, 81, 86, 88 and 138 and the principles cutting across all these Articles include integrity, transparency, accuracy, accountability, impartiality, simplicity, verifiability, security and efficiency as a free and fair election by way of secret ballot, free from violence and an election conducted by an independent body in transparent, impartial, neutral, efficient, accurate and accountable manner.

Section 83 of the Elections Act

Section 83 of the Elections Act provides that:

"No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election."

The term *"or"* used makes the two limbs of the provisions of section 83 of the Act disjunctive under our law unlike under English law which is conjunctive where the term "and" is used in a similar provision in the English Act. The conjunctive term has also been used in the Election laws of various Commonwealth countries such as Nigeria, Ghana, Zambia, Tanzania and Uganda.

The Supreme Court explained the disjunctive application of section 83 of the Elections Act to be that an election can be nullified if it showed either that the elections were not conducted in accordance with the Constitution and the written law relating to elections or that the non-compliance affected the result of the election. In other words, a petitioner who proves that conduct of the election in question substantially violated the principles laid down in the Constitution as well as other written law on elections, will on that ground alone, void an election. A petitioner will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was so fraught with irregularities or illegalities as to affect the result of the election. The Supreme Court majority however rejected the English position that even trivial breaches of the law should void an election stating that that position was not realistic; in recognition of a global truism that the conduct of an election is rarely perfect.

Applying this test to the evidence presented before them on the presidential elections conducted in Kenya in August of 2017 the Supreme Court in its majority decision found that the elections were neither transparent nor verifiable and that on that ground alone and on the basis of the interpretation of section 83, they had no choice but to nullify the election and to direct the IEBC to conduct fresh presidential elections.

Quantity vis-à-vis Quality

The Supreme Court discussed at length the quantitative and the qualitative test as a basis of determining whether an election result ought to be voided. In a paper titled *Election Technology Law and the Concept of "Did the irregularity affect the result of the elections?"* prepared by Hon. Justice Prof. Otieno-Odek prior to the determination of the 2017 Presidential Election Petition, the author discusses the quantitative and qualitative test. Justice Odek states that the quantitative element consists of requirements for an accurate, verifiable and accountable system while the qualitative element requires that elections must be free from violence, intimidation, improper influence and corruption and that there must also be transparency and administration of elections in an impartial, neutral and efficient manner. The quantitative test is therefore most relevant where the numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire election process is questioned and the Court has to determine whether or not the election was free and fair.

In the Court of Appeal decision of *Daniel Ongong'a Abwao* vs *Mohamed Ali & 2 Others* (2018) *eKLR* which was an appeal filed by a voter within Nyali Constituency against the decision of the High Court upholding the election of Mohamed Ali Mohamed as the Member of the National Assembly for Nyali Constituency, this threshold was applied by the Court and it was found that the appellant was unable to prove that the elections substantially violated the principles laid down in the Constitution as well as other written laws on elections. The appeal was dismissed.

Amendment

The annulment of the presidential elections by the Supreme Court of Kenya triggered the introduction of the Election Laws Amendment Bill, 2017 (**the Bill**) in Parliament to amend various provisions of the Elections Act, the IEBC Act, the Election Offences Act. The Bill, despite strong opposition from a section of Kenyans, was passed by Parliament, the Senate and finally transmitted to the President for assent. The President neither assented to the Bill nor returned it to Parliament and after fourteen (14) days of its passing, the Bill became law by virtue of the provisions of Article 116 of the Constitution.

The law was published in the Kenya Gazette on 2nd November 2017 thus becoming effective as the Election Laws Amendment Act No. 34 of 2017 (**the Election Laws Amendment Act**).

The Katiba Institute Petition

Following the passing of the Election Laws Amendment Act, *Katiba Institute & 3 Others vs Attorney General & 2 Others (2018) eKLR* (***the Katiba Institute Petition***) was a Constitutional Petition filed contending that the amendments were unconstitutional. Under the amendments, section 83 of the Election Act now reads as follows:

"(1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that- (a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and (b) the non-compliance did not substantially affect the result of the election."

The annulment of the Presidential elections by the Supreme Court of Kenya triggered the introduction of the Election Laws Amendment Bill, 2017 in Parliament to amend various provisions of the Elections Act, the IEBC Act, the Election Offences Act.

The petitioners' argument was that by amending the law from a disjunctive test to a conjunctive one by use of the word "and" instead of "or", it would be difficult to challenge an election even where there was violation of Constitutional principles.

The High Court (Mwita J) delivered its decision in the *Katiba Institute Petition* on 6th April, 2018 noting that any amendments to the election laws must be forward looking in order to make elections more free, transparent and accountable, than to shield mistakes that vitiate an electoral process. The Court therefore held that "*there was no constitutional compulsion or rational in amending section 83 of the Act to remove the disjunctive word 'or' and introduce the conjunctive word 'and' so that only where there are failures in complying with the constitution and election laws and they substantially affected the results should an election be nullified. Removing the twin test for annulling faulty election results negates the principles of electoral system in the Constitution … allowing such an amendment would be to ignore constitutional principles in our transformative Constitution that there should be free, fair, transparent and accountable elections.*" The Court declared that the amendment of section 83 along with other specified sections of the Elections Act was invalid.

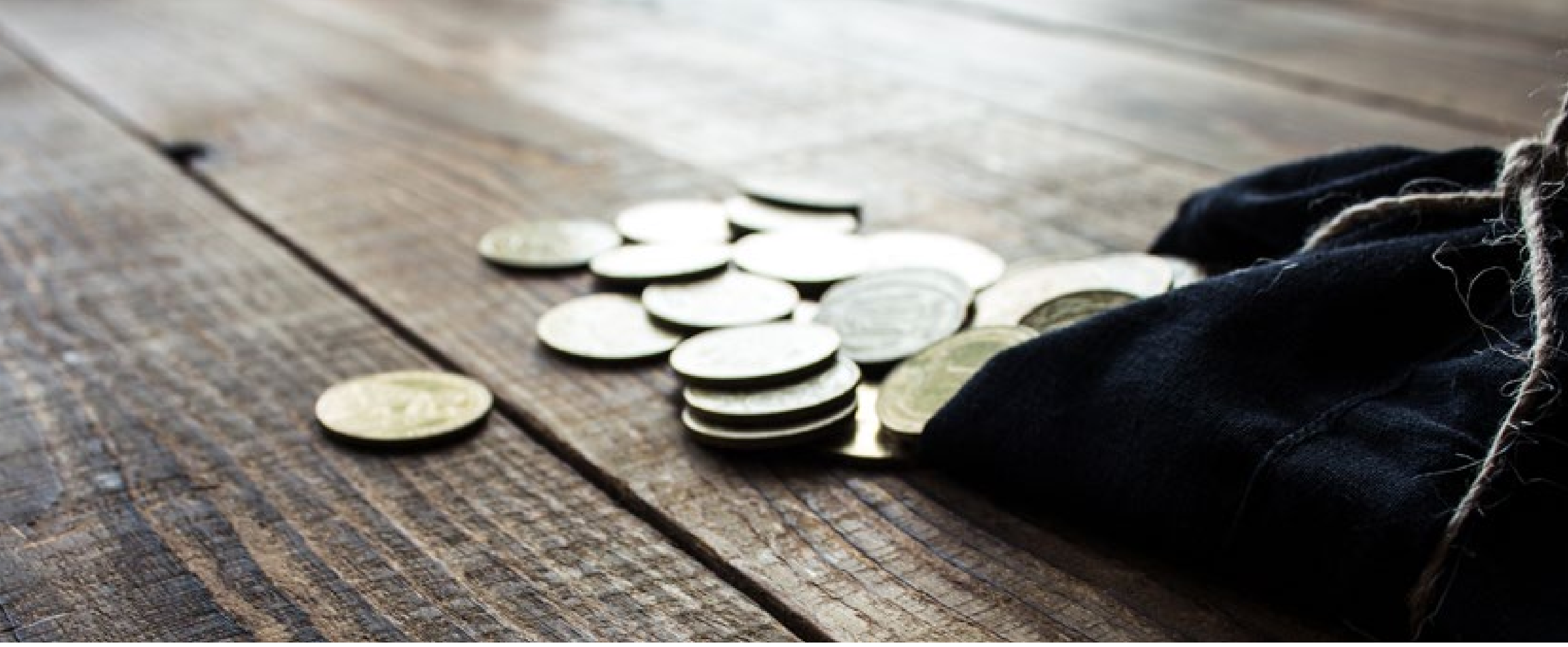
Conclusion

The position as relates to the interpretation of section 83 of the Election Act is now settled both by the Supreme Court of Kenya and also by the other Superior Courts. It is now for Parliament to effect the necessary changes by deleting the amended section 83 of the Act and restoring the initial disjunctive provision. Our fidelity to the Constitution that we gave unto ourselves should be maintained and upheld at all times.

It is apt to close with the words of the Supreme Court in the 2017 Presidential Election Petition:

"Therefore, however burdensome, let the majesty of the Constitution reverberate across the lengths and breadths of our motherland; let it bubble from our rivers and oceans; let it boomerang from our hills and mountains; let it serenade our households from the trees; let it sprout from our institutions of learning; let it toll from our sanctums of prayer; and to those, who bear the responsibility of leadership, let it be a constant irritant …

It is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to the Constitution and strict adherence to the rule of law, and above all, the fear of God. The Rule of Law ensures that society is governed on the basis of rules and not the might of force."



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BAD PENNIES:

THE TROUBLE WITH COMPOUND INTEREST

One of the perennial problems which have bedeviled the common law is interest. Even though a rule that has been under sustained attack, successful litigants who had been kept out of their money, could never be fully compensated by an appropriate award of compound interest, it was not available unless allowed in a contract or authorised by statute. The criticism being that the law was failing in its principle function of making an injured party who was blunted by a seemingly canonical catechism that has a hallowed entrenched common law rule and which despite having occasion to revise, Parliament had left intact.

Taking the rather sensible but apparently radical attitude that it is up the Courts, and not always Parliament to undo Judge-made wrongs or correct doctrinal errors, the Australian and Canadian Courts relieved their respective laws of the judicial catechism creating an exception to the role of damages being to make the injured party whole when it came to delayed or late payment. If the compensation was to fulfill this primary function, then compound interest must be available as a remedy for it takes into account the time value of money.

Less timorous Judges in the Kenyan High Court, inspired by a decision of the High Court of Australia in *Hungerfords v Walker* (1989) *171 CLR 125* started taking some tentative steps towards qualifying the catechism but these could not take hold, if challenged on appeal, they were inevitably shot down. The *Hungerfords* approach for allowing compound interest was quite straightforward - damages for loss of use of the money by an award of such interest would make the injured party whole- the primary purpose for compensation. Yet the restrictions against awarding such compound interest on delayed payments were not only inconsistent with this but the reasons given were also incoherent and unjustifiable.

This fitful local pattern of shedding the common law's hostility to compound interest was simply replication of a longer fitful pattern which English Courts had long but inconsistently established. This would lead to irrational distinctions resulting in anomalous results. For example:

- Compound interest was available in cases concerning breach of trust or betrayal of fiduciary duties
- Compound interest was also be available in cases where it was in the reasonable contemplation of the parties - an incoherent distinction upheld by the House of Lords
- Compound interest was often awarded in construction disputes was on the basis that money was the lifeblood of the construction industry. Here, Lord Denning carved out an exception from the catechism on interest to allow contractors to claim compound interest for late payments even when the contract was silent and there was no statutory foundation.

Whilst the award of compound interest served contractors well, what was the empirical basis or commercially compelling reason for assuming by judicial fiat that others were not as equally hurt by late payments? It hardly takes any great leap of imagination to see a large contractor easily surviving (though not always) recalcitrant creditors while a small farmer (one less likely to have a contract assuring her compound interest for late payment) supplying groceries failing.

The examples highlighted above were all exceptions (and anomalous ones) to a rule that was increasingly difficult to explain. The law was dead set against the award of compound interest under common law as damages for deprivation of its use.

Then, came *Sempra Metals v Inland Revenue Commissioners (2007) 4 All ER 657* which was supposed to set matters right. As Lord Nicholls evocatively put it:

"Legal rules which are not soundly based resemble proverbial bad pennies: they turn up again and again. The unsound rule returning once more for

consideration by your Lordships' House concerns the negative attitude of English law to awards of compound interest on claims for debts paid late."

Lords Nicholls and Hope were the two most enthusiastic in wiping the slate clean of the unsoundness of that hostility to compound interest though all agreed that this hostility needed to the abandoned. Beyond that, determining what the "great and important" decision in *Sempra Metals* actually held is not that settled.

A high-level and very incomplete summary leaving analysis for the inevitable headaches it must have caused and will continue to cause law students and researchers. Confronted by binding authority on English law, the lower Court relied on EU law to allow the taxpayer's claim for compound interest as restitution for losses on taxes which had been wrongfully charged prematurely. While the reasoning of the Law Lords was certainly informed by the need for updating the law to ensure to provided an effective remedy as required by EU law, their principal motivation was plainly to rid the law of an antiqued irrational relic:

"A benefit is not always worth its market value to a particular defendant… when it is not it may be unjust to treat the defendant as having received a benefit possessing the value it has to others… we live in a world where interest payments for the use of money are calculated on a compound basis. Money is not available commercially on simple interest terms" (as per Lord Nicholls).

"Simple interest is an artificial construct which has no relation to the way money is obtained or turned to account in the real world. It is an imperfect way of measuring the time value of what was received prematurely" (as per Lord Hope).

A majority of the Judges (Lords Nicholls, Hope and Scott) found the solution in the law of restitution under the rubric of relieving the wrong-doer of the benefit he received. A somewhat more skeptical Lord Walker joined the bandwagon of reform though his preferred solution was on the basis of the Law of Equity. All four were markedly unimpressed by the argument that such reform was best left to Parliament and the admittedly adverse impact of such change on the law, which because it was by judicial determination would be deemed to apply retroactively, would have the on the public.

One of the principal areas of disagreement was whether what a person claiming interest had to show to be deserving of relief. Lords Nicholls and Hope (joined by Lord Walker - somewhat) were content that it was not necessary to show that a defendant had actually profited from the money. This was to be assumed much to Lords Scott's and Mance's chagrin who would have required actual proof of benefit was being disgorged of.

Kenyan Courts have embraced the approach of the majority in *Sempra Metals* without necessarily unraveling the doctrinal confusion it wrought. Even the Court of Appeal in the case of *Mumias Sugar Company Ltd v Nalinkumar M Shah Civil Appeal No. 21 of 2011* relying on several decisions of the Commonwealth has accepted that compound interest was available under section 26 of the Civil Procedure Act (Cap. 21):

"*We too would interpret section 26 of the Civil Procedure Act as conferring jurisdiction on the court to award both pre and post suit interest and to determine the rate of interest including whether simple or compound. That interpretation is more consistent with developments in other jurisdictions, but more importantly the realities of business in Kenya today. The jurisdiction conferred is a discretionary to be exercised judiciously based on the facts of each case."*

Finally, this year the dissenters in *Sempra Metals* were vindicated in *Prudential Assurance Company Ltd v Her Majesty's Revenue and Customs (HMRC) (2018) UKSC 39*. The writing was on the wall that *Sempra Metals* days were numbered. Faced by claims of compound interest running into billions on refunds due to tax-payers for, HMRC went on the war front scoring early success in a case known as *Littlewoods Ltd v HMRC (2017) UKSC 70* when HMRC persuaded the Supreme Court that contrary to the view taken by the lower Courts, EU law on effective remedy did not require domestic law to allow for compound interest.

"Legal rules which are not soundly based resemble proverbial bad pennies: they turn up again and again. The unsound rule returning once more for consideration by your Lordships' House concerns the negative attitude of English law to awards of compound interest on claims for debts paid late."

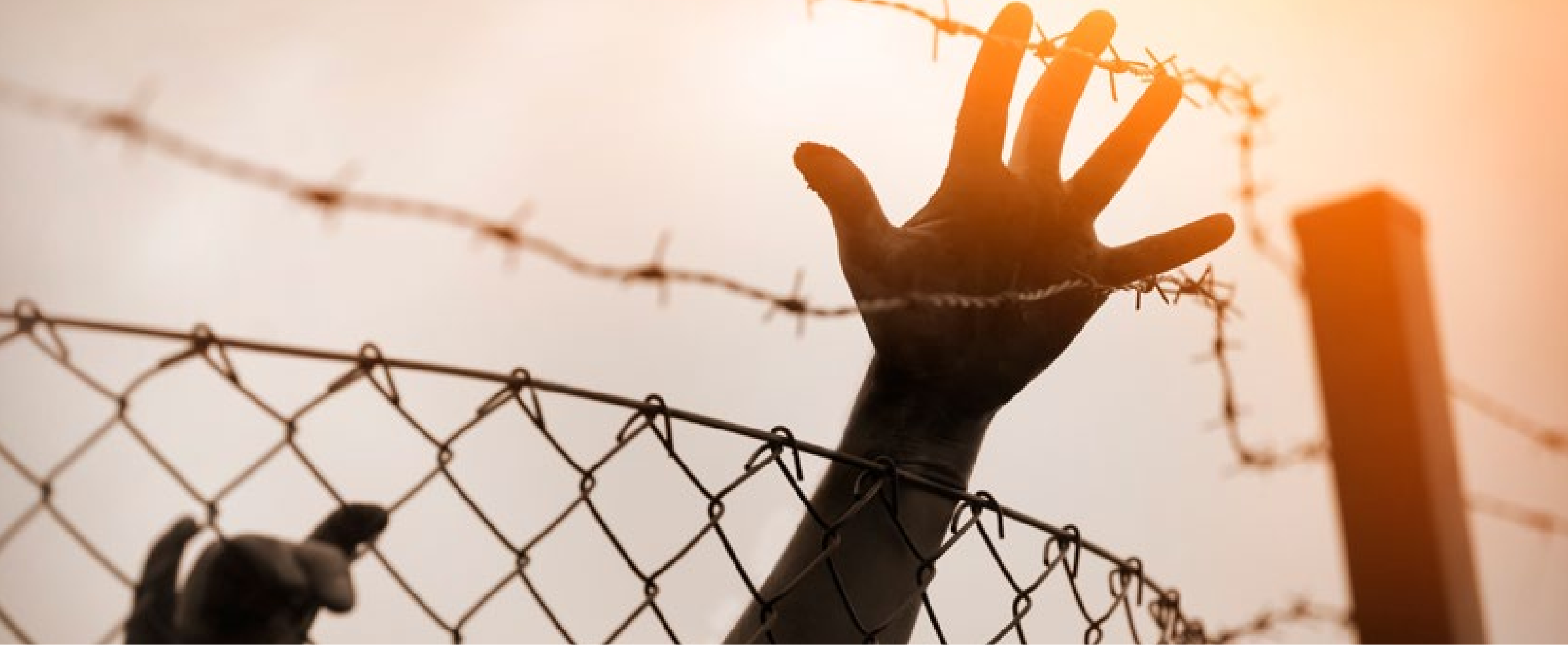
The joint Judgment of Lords Mance, Reed and Hodge for a unanimous Supreme Court can only be described a skewering (of course ever so polite fully within the bounds of judicial decorum - no Scalia-like tantrum here) of the majority in *Sempra Metals* and surprise, surprise, full-throttled vindication of Mance's dissent. Whether it was a convincing skewering is entirely a different matter on which several respectable commentators would no doubt demur. According to the Supreme Court, the law as stated in *Sempra Metals* was not in fact soundly based.

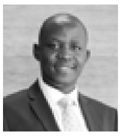
Some of the reasons given to this attack do not seem that persuasive. Take the argument that *Sempra Metals* got EU law wrong. Even accepting that is true, EU law played a very minor role in the majority's reasoning. Nor is it clear, except by judicial *ipse dixit*, that a statute which was relied in argument as somewhat limiting judicial reconsideration of a common law rule on interest because the amendments left such law intact.

Lords Mance, Reed and Hodge were on secure footing in their criticism of the restitutionary basis of compound interest as depriving HMRC of the benefit on the money. That was always hoary for in the case of taxes which upon being collected are used for common public purposes it hard to envisage what benefit the tax authority is being disgorged of. To use the technical terms, we have thus far avoided, there has been no transfer of value from the taxpayer to the HMRC which the latter has exploited to its advantage.

Reading the Judgments of the UK Supreme Court in both *Littlewoods* and *Prudential Assurance*, it is hard to resist that conclusion that the Judges balked at the prospect of paying windfalls on private parties running into tens of billions of pounds at the expense of a strained economy - something which legal pragmatists would commend as a perfectly valid concern. It is probably unfortunate that in the United Kingdom the spur to busy an outdated remnant of prejudice against compound interest arose in a case of tax refunds where such concerns loom large. There is no reason why in disputes between private parties, such concerns should play any role.

It is unlikely that the decision of the UK Supreme Court in *Littlewoods* and *Prudential Assurance* should be adopted in Kenya. The reasons given for departing from *Sempra Metals*, (save on the restitutionary point) are peculiar to England and Wales. Even on the valid criticism of restitution, there was additional or alternative basis relied on by Kenyan Courts following for instance, *Hungerfords* as well as others, for allowing, as a matter of discretion for the award of compound interest under section 26 of the Civil Procedure Act. So whatever the resolution of those doctrinal controversies as to restitution or equity, would not affect the developments in Kenyan law. It will, however, be necessary, for the Courts to revisit the issue afresh and iron out some of the doctrinal wrinkles Lord Nicholl's left behind.





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WITHIN LIMITS:

UNDERSTANDING RESTRICTIVE TRADE PRACTICES UNDER THE COMPETITION ACT, 2010

Imagine arriving at your work place bright and early one morning, only to find police officers barricading the door to your office and officials from the Competition Authority of Kenya (**the Competition Authority**) collecting documents, flash disks, computer drives etc. Members of staff are stopped from entering the office and are informed that the company is under investigation for engaging in anti-competitive conduct. The company is later invited for a hearing and is eventually served with a hefty fine amounting to ten percent (10%) of the company's previous year turnover.

This hypothetical scenario highlighted above indeed recently happened to two Kenyan companies because they knowingly or unknowingly engaged in practices that are prohibited by the Competition Act, 2010 (**the Competition Act**). It is trite that ignorance of the law is no excuse. It is therefore imperative that all companies are aware of the provisions of the Competition Act and the practices that will expose them to sanctions including fines and jail term. The Competition Authority has in the past few years become very aggressive in using its enforcement powers to rein in companies that are engaging in anti-competitive conduct.

With the turbulent economic climate, companies are increasingly considering mergers, joint ventures, restructuring, vertical and horizontal integration aimed to reduce high operational costs. All these options have some competition element which would in most cases require notification to the Competition Authority. It is therefore vital that businessmen and in-house counsel appreciate what practices are restricted under the Competition Act.

What are Restrictive Trade Practices?

The Competition Act defines restrictive trade practices as agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya or a part of Kenya. Restrictive trade practices are generally prohibited, unless they have been expressly exempted pursuant to the provisions of the Competition Act.

The Competition Authority considers that the words "object" or "effect" are used disjunctively and will therefore use an alternative as opposed to a cumulative approach in assessing an infringement. Under the "object" test, the Competition Authority considers whether there is evidence of an agreement or concerted action. If there is evidence of an agreement, the infringement has been proved and no further assessment needs to be conducted. The existence of an agreement that entails a restrictive trade practice establishes *prima facie*, the prohibited conduct has, in fact and in law, been committed. In effect, the mere existence of an agreement which appears on the face of it to prevent, distort or lessen competition runs afoul of the restrictive trade prohibitions under Competition Act, whether or not the agreement has been performed.

The "effect" test is used to assess certain conduct that could have a redeeming competitive value such as information sharing among competitors, unilateral or single-firm anti-competitive conduct like vertical pricing arrangements, collaborations on technical, safety, and educational standards for an industry and also other activities which generally tend to promote or preserve quality preservation in an industry. The Competition Authority considers that collusive horizontal agreements, such as collusive tendering, market division or customer allocation agreements and horizontal price fixing agreements may be subject to strict or object assessment. While most vertical agreements, such as tying and bundling, exclusive dealing and licensing agreements and vertical pricing and distributorship agreements may be subject to an effect assessment or a full rule of reason analysis.

Examples of agreements, decisions or concerted practices contemplated by the Competition Act include:

a) Agreements between parties trading in competition (undertakings in a horizontal relationship).

b) Agreements between an undertaking and its suppliers or customers or both (parties in a vertical relationship).
c) Agreements or practices which:
   - directly or indirectly fix purchaser or selling prices, or any other trading condition
   - divide markets by allocation of customers, suppliers, areas or specific types of goods or services
   - involve collusive tendering
   - involve a practice of minimum resale price maintenance
   - limit or control production, market outlets or access, technical development or investment
   - apply dissimilar conditions to equivalent trans-actions with other trading parties, as a result of which they are placed at a competitive disadvantage
   - make the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject of the contracts
   - amount to the use of an intellectual property right in a manner that goes beyond the limits of legal protection
   - The list set out above is not exhaustive and any combination of undertakings that engage in any other practice which prevents, distorts or lessens competition in any other way may be deemed to be engaging in a restrictive trade practice that is prohibited under the Competition Act. Oral agreements are also included in the above list.

In addition, there is a presumption that a prohibited agreement or concerted practice exists between two parties if one of the parties owns a significant interest in the other or has at least one director or one substantial shareholder in common. However, this presumption may be rebutted if a party, director or shareholder concerned establishes that a reasonable basis exists to conclude that any practice in which the parties engaged was a normal commercial response to conditions prevailing in the market.

For the purposes of this presumption, the term director is defined broadly and includes a director of a company as defined under Companies Act, 2015; a trustee of a trust; in relation to an undertaking conducted by an individual or a partnership, the owner of the undertaking or a partner of the partnership; in relation to any other undertaking, a person responsible either individually or jointly with others for its management.

However, agreements between or practices engaged in by a company and its wholly owned subsidiary or a wholly owned subsidiary of that subsidiary; or undertakings other than companies, each of which is owned or controlled by the same person(s) are not deemed to be restrictive trade practices within the meaning of the Competition Act.

Exemptions

Exemptions are outlined under the Competition Act for certain agreements that, though restrictive or bear some risk of distortion of competition, have certain compelling qualities such as:
a) maintaining or promoting exports
b) improving, or preventing decline in the production or distribution of goods or the provision of services
c) promoting technical or economic progress or stability in any industry
d) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices

A professional association is permitted to apply for the exemption where their rules contain a restriction that has the effect of preventing, distorting or lessening competition in a market.

Any undertaking or association of undertakings may apply to be exempted from the aforesaid provisions of the Competition Act. Such application is to be made in a prescribed form and manner accompanied by any information as required by the Competition Authority.

Upon consideration, the Competition Authority may grant an exemption subject to certain conditions that they deem fit. The exemption may later be revoked or amended.

With regards to intellectual property rights, the Competition Act allows for an exemption to be granted with regards to copyright, patents, industrial designs, trademarks, plant varieties and other intellectual property rights.

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All other agreements not subject of an exemption and which prevent, distort or lessen competition are subject to enforcement proceedings.

Companies entering into distributorship agreements, agency agreements, contracts of sale franchise agreements, licencing agreements should consider engaging legal counsel to review the agreements to ensure that they do not infringe on the provisions of the Competition Act.

Penalties

The Competition Act sets out severe financial penalties of up to ten percent (10%) of the preceding year's gross annual turnover in Kenya of the undertaking engaging in restrictive trade practices. In addition, a person who contravenes the provisions of the Competition Act on restrictive trade practices commits an offence and is liable on conviction to imprisonment for a term not exceeding five (5) years or to a fine not exceeding KES 10 million (USD 100,000) or both.

Immunity

The Competition Authority can offer full or partial immunity to an undertaking in respect of restrictive trade practices committed by it. The Leniency Programme Guidelines which were gazetted on 19th May 2017, allow the Competition Authority to grant immunity in exchange for provision of evidence and full co-operation by the undertaking concerned so as to enhance compliance. There is a prescribed form that the applicant completes for the Competition Authority to consider immunity after which the applicant may be granted conditional leniency pending investigations. The applicant may also seek confidentiality in respect of the information submitted to the Competition Authority. Once the investigations are complete, the applicant may be granted full, partial or no immunity. Where full immunity is not granted, an undertaking may approach the Competition Authority with a view to negotiating a settlement. A leniency agreement covers the applicant's directors and employees as long as they comply with the obligation to cooperate with the Competition Authority.


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WORTH YOUR WHILE?:

COST EFFECTIVENESS OF INTERNATIONAL ARBITRATION

Arbitration as a preferred method of dispute resolution has gained popularity in the recent past because it is considered to be flexible, allows for party autonomy and confidentiality, and more importantly, saves time and money in comparison to litigation. There is however, increased concern and discussion around the costs of international commercial arbitrations and the length of time within which disputes are resolved. It has been particularly noted that arbitral proceedings are increasingly exhibiting the negative aspects associated with litigation such as high costs, delay and inefficiency. The question of cost effectiveness and efficiency in international commercial arbitration is one that cannot be overemphasised.

Parkinson's law states that work expands to fill the time available for its completion. This adage is especially true where the person executing the task is remunerated on an hourly basis as is customary in most if not all international arbitrations. In the context of an international arbitration, this means that the lengthier the proceedings, the higher the costs.

Fortunately, arbitration as a dispute resolution mechanism is designed to allow parties to control the costs and the procedure or process within which this can be done. Party autonomy in arbitration means that parties are the masters of the arbitration process and they can determine and agree on virtually all the steps taken from the commencement to the conclusion of the arbitral proceedings. If utilised effectively, party autonomy can be a powerful tool for controlling the costs and avoiding delays in arbitral proceedings.

In this article, we discuss various factors that parties to arbitral proceedings must consider if they wish to have the dispute resolved in a cost effective, expeditious and efficient way.

The general costs associated with international arbitration mainly include the arbitrators' fees and expenses, legal or other costs of the parties such as witness expenses, investigation fees, expert witnesses and the fees and expenses of the arbitral institution concerned. Interestingly an analysis of the breakdown of general arbitration costs done by Louis Flannery of Stephenson Harwood reveals that administrative costs (fees of the administering institution) amount to two percent (2%) of the total cost, the arbitrator's fees and expenses amount to sixteen percent (16%) of the total cost, while legal counsels' costs for legal representation amount to eighty-two percent (82%) of the total cost.

What this data shows is that greater focus should be on bringing down the costs for legal representation. In this article, we identify various stages of an arbitration at which costs may be controlled.

a) Administering Bodies and Institutional Rules

From the outset, the parties should decide between an institutional (or administered) arbitration versus an ad hoc (non-administered) arbitration. There are numerous institutions that provide assistance in running the arbitration in exchange for a fee. These institutions assist in the administrative aspects of the arbitration such as organising hearings, handling communication between the parties and the arbitrators, and handling payments. However, they do not decide on the merits of the dispute - this is left entirely to the arbitral tribunal. An ad hoc arbitration on the other hand, places the burden of running the proceedings on the parties and the arbitrators. However, parties may choose a set of arbitration rules designed to aid in ad hoc arbitrations such as those developed by the United Nations Commission on International Trade Law (**UNCITRAL**).

An institutional arbitration may particularly be beneficial to parties without arbitration experience as it will provide guidance and avoid time consuming discussions between the parties on preliminary issues that are incidental to the main dispute.

Examples of leading international arbitration institutions include; the International Chamber of Commerce (**ICC**), London Court of International Arbitration (**LCIA**), the American Arbitration Association (**AAA**), the International Centre for Settlement of Investment Disputes (**ICSID**), China International Economic and Trade Arbitration Commission (**CIETAC**), and the World Intellectual Property Organisation (**WIPO**). However, some of these institutions are specific to certain types of disputes, for example, ICSID only caters to legal disputes arising out of an investment between a state party to the ICSID convention and a national of another state party to the ICSID convention.

It should be noted however, that fee structures differ depending on the institution, with some institutions charging on the basis of the amount in dispute and others charging on a flat hourly rate basis. The decision to use or not to use an administering body and institutional rules or institutional rules will have an impact on the costs of the arbitrations and parties are encouraged to compare costs of the various institutions beforehand.

b) Drafting the Arbitration Agreement

A well drafted arbitration agreement or clause will avoid preliminary arguments such as whether the dispute is subject to arbitration. Disputes as to the meaning or scope of the arbitration agreement clause are ordinarily determined first and tend to substantially add to the length and cost of the arbitration. Parties should as far as possible, avoid attempting to limit the scope of disputes that are subject to the arbitration unless special circumstances require it. This is because, even when drafted carefully, exclusions may provide an opportunity for preliminary arguments to be raised regarding the jurisdiction of the arbitral tribunal to hear and determine the dispute.

A good arbitration agreement or clause should be clear and should specify the number of arbitrators, the arbitration institution and rules if any, the seat of the arbitration, having regard to practical considerations such as neutrality, availability of hearing facilities, proximity to witnesses and evidence. While the seat of the arbitration does not determine the governing law of the contract and the merits, it determines the law that governs certain procedural aspects of the arbitration. Where parties choose institutional arbitration, ideally, the rules adopted should coincide with the institutional rules. It is also advisable that the parties use the model clause recommended by the institution as a starting point for drafting the arbitration agreement as this would have been tried and tested.

c) Choice of Counsel

Given the significant costs and expenses of international arbitrations, it would be foolhardy for a party to declare a dispute and initiate arbitration proceedings without first carrying out a cost benefit analysis. A lawyer with experience in international arbitration and is familiar with the fee structure and workings of the various administering bodies would be in a position to provide a legal opinion on the merits of the dispute which can then assist a party to take a commercial view on the matter.

Ultimately, the parties should set a realistic budget for the arbitration at the initiation of the arbitration and cross-check with their legal counsel on whether the funds set aside will suffice. Parties may also require that their counsel seek their approval before exceeding a set limit.

The choice of legal counsel is therefore vital if a party is to keep the costs and length of the arbitration down. Parties are encouraged to select lawyers with a reputation for efficiency and availability. Selected lawyers should also have specific arbitration expertise as opposed to litigation. In fact, there is nothing to prevent a party from interviewing or pre-screening potential legal counsels and requiring that they confirm their "*availability for an efficient and reasonably expeditious schedule.*"

d) Terms of Reference and Case Conferences

The terms of reference and case management conferences have been hailed as the kernel of cost effectiveness in international arbitration. Both are very useful tools for managing arbitrations in order to ensure the fast and efficient progress of arbitral proceedings as they set out framework of the arbitration from the beginning to the end.

The terms of reference are drawn and signed by mutual consent of the parties and include information relating to the parties and arbitrators, a summary of the pleas and defences of the parties, the claims, the dispute in question, and the procedural provisions which shall be applied. More importantly it may be used to compel the parties to provide case summaries in order to narrow down the issues and empowers the arbitral tribunal to decide procedural issues while dispensing with physical meetings as much as possible and using conference calls.

At this stage, parties may also consider whether it is necessary to join other parties or consolidate disputes with a view to avoiding a multiplicity of suits thereby cutting down costs and enhancing efficiency.

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e) Evidence Production, the Hearing and the Award

The production of numerous unnecessary documents that are not material to the matters in dispute can spike the costs of arbitration and cause significant delays in the expeditious resolution of the dispute. It is therefore imperative that parties produce only those documents that are *material* to the dispute rather than all documents that are *relevant* to the dispute. For example, there is no need to produce documents in respect of non-controversial facts. Parties should also agree on an organised system of producing and identifying the documents and as far as possible avoid duplication and adopt a coherent system of numbering. As a general rule all documents should be submitted in electronic form and should be considered authentic unless their authenticity is challenged.

As a preliminary matter, parties should consider whether it is entirely necessary to have an oral hearing, and whether the dispute can be determined on the basis of the documents produced by the parties. This can significantly cut down the on the costs of witnesses, accommodation, travel expenses, hiring a venue among others. It also greatly reduces the length of the arbitration.

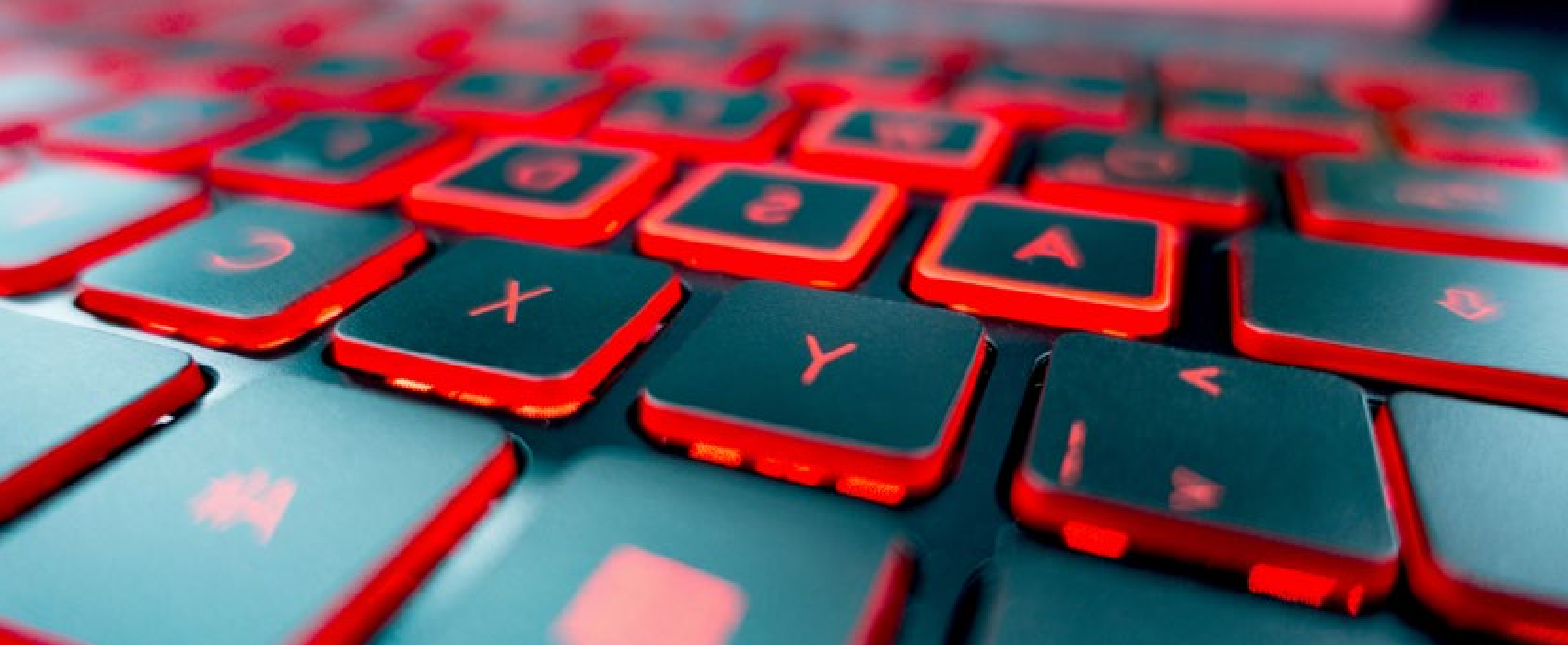
The existence of a hearing agenda, a fixed timetable and time keeper as well as regular "housekeeping" sessions throughout the hearing aid in saving time. Other considerations include, whether the location of the hearing is convenient for all parties, whether the number of witnesses may be limited, whether consecutive hearing dates can be scheduled to avoid back and forth travel and minimise travel costs and conducting a pre-hearing conference in order to discuss logistics of the hearing;

At the end of the hearing, parties should seriously consider whether closing submissions are necessary, and if they are, they should elect to have either oral or written submissions but not both. It will also save time and costs for the arbitral tribunal to specify the questions that they wish to be addressed in the closing submissions.

The arbitral tribunal must use its best efforts to submit the draft award to the administering institution as quickly as possible and within the timeline set by the administering institution if any and must ensure that time has been reserved in their diaries after the hearing for deliberation on the dispute. It may be prudent to select an administering institution that scrutinizes and reviews the award before it is issued as it avoids further litigation that may be initiated in local courts as grounds for setting aside the award.

Conclusion

Whereas there are a wide range of tools and devices that are available in arbitrations to ensure that the arbitration is conducted in a cost effective and efficient manner, the ultimate decision depends on the various stakeholders involved in international arbitration that are key in monitoring and determining the ultimate cost and length of the arbitration. These are, the parties to the arbitration (or in-house counsel), external counsel, the administering institution and the arbitral tribunal, all of whom have a role to play in assessing the objectives and merits of the arbitration, drafting the arbitration agreement, engaging in pre-arbitration negotiations, setting a budget for the arbitration, selecting the arbitral tribunal, determining the procedure and procedural rules applicable to the arbitration among other matters. Arbitration may indeed be cheaper than litigation. However, in the realm of international institutional arbitration, the cost effectiveness of the arbitral process requires conscious effort from the various stakeholders.



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REGULATING CYBERSPACE UNDER THE COMPUTER MISUSE AND CYBERCRIMES ACT, 2018

The technological era has seen the need to develop a more adaptive and responsive piece of legislation to regulate the digital world. With the increasing need and rise of the use of technology, crimes such as cyber harassment have been on the rise.

Until very recently, there was no law in Kenya regulating the use of the digital space. It is important to note that the principle of legality prescribes that a person cannot be prosecuted unless the law provides that the conduct is illegal, despite the fact that the conduct may be harmful to others. This, coupled with the rising need to control availability, access and use of online information, necessitated the passing of the Computer Misuse and Cybercrimes Act, Number 5 of 2018 (**the Act**) which was assented into law on 16th May, 2018.

The main purpose of the Act is to protect the confidentiality, integrity and availability of online data, prevent unlawful use of computer systems and facilitate prevention, detection, investigation, prosecution and punishment of cybercrimes.

To achieve these objectives the Act establishes the National Computer and Cybercrimes Co-ordination Committee to oversee its implementation, and whose functions under the Act include amongst others to:

(a) advise the National Security Council on computer and cybercrimes
(b) co-ordinate national security organs in matters relating to computer and cybercrimes
(c) receive and act on reports relating to computer and cybercrimes
(d) develop a framework for training on prevention, detection and mitigation of computer and cybercrimes and matters connected thereto

New Offences

Notably, the Act attempts to provide a comprehensive legal framework for data protection by creating new offences relating to cyber infringement and prescribes penalties. Some of the offences created under the Act are as follows:

a) **Unauthorised interference:** Unauthorised interference is defined in the Act as any impairment to the confidentiality, integrity or availability of a computer system, or any program or data on a computer system, or any act which impairs the operation of the computer system, program or data. A person who intentionally and without authorisation does any act which causes an unauthorised interference, commits an offence and is liable on conviction, to a fine not exceeding KES 10 million (USD 100,000) or to imprisonment for a term not exceeding five (5) years, or both.

b) **Unauthorised interception:** Interception under the Act means monitoring, modifying, viewing or recording of non-public transmissions of data from a computer system over a telecommunications system. Interception resulting into the transmission of data to or from a computer system over a telecommunication system, is an offence and upon conviction one is liable to a fine not exceeding KES 10 million (USD 100,000) or to imprisonment for a term not exceeding five (5) years, or both.

c) **False publications:** Intentionally publishing false, misleading or fictitious data with intent that the data shall be considered or acted upon as authentic, with or without any financial gain is an offence punishable by fine not exceeding KES 5 million (USD 50,000) or imprisonment for a term not exceeding two (2) years, or both.

d) **Publication of false information:** Under the Act, a person who knowingly publishes false information in print, broadcast, data or over a computer system, that is calculated or results in panic, chaos, or violence among citizens of Kenya, or which is likely to discredit the reputation of a person, commits an offence and shall on conviction, be liable to a fine not exceeding KES 5 million (USD 50,000) or to imprisonment for a term not exceeding ten (10) years, or both.

e) **Child pornography:** The Act provides that intentionally publishing child pornography through a computer system or producing child pornography for the purpose of its publication or downloading, distributing, transmitting, disseminating, circulating, delivering, selling or offering for sale or making available in any way from a telecommunications apparatus pornography, is an offence punishable by a fine not exceeding KES 20 million (USD 200,000) or to imprisonment for a term not exceeding twenty-five (25) years, or to both. Child pornography includes data which whether visual or audio depicts a child or a person who appears to be a child engaged in sexually explicit conduct.

f) **Cyber harassment:** The Act makes it an offence to communicate with another person if such communication is indecent or grossly offensive, is likely to cause such person's apprehension or fear of violence to him/her or damage or loss on his/her property or such information detrimentally affects that person. This offence is punishable by a fine not exceeding KES 20 million (USD 200,000) or to imprisonment for a term not exceeding ten (10) years, or both.

g) **Identity theft and impersonation:** A person who fraudulently or dishonestly makes use of an electronic signature, password or any other unique identification feature of any other person commits an offence and is liable, on conviction, to a fine not exceeding KES 200,000 (USD 2,000) or to imprisonment for a term not exceeding three (3) years or both

h) **Employee responsibility to relinquish access codes:** Of particular importance to employers and employees alike, is the fact that the Act places a responsibility on employees subject to any contractual agreement between the employer and the employee, to relinquish all codes and access rights to their employer's computer network or system immediately upon termination of employment, failure to which such employee will be liable on conviction, to a fine not exceeding KES 200,000 (USD 2,000) or imprisonment for a term not exceeding two (2) years, or both.

i) **Cyber-squatting:** This offence entails intentionally taking or making use of a name, business name, trademark, domain name or other word or phrase registered, owned or in use by another person on the internet or any other computer network, without authority or right. It is punishable by a fine not exceeding KES 200,000 (USD 2,000) or imprisonment for a term not exceeding two (2) years or both.

j) **Cyber terrorism:** Accessing or causing access to a computer or computer system or network for purposes of carrying out a terrorist act is an offence punishable by a fine not exceeding KES 5 million (USD 50,000) or to imprisonment for a term not exceeding ten (10) years, or both.

k) **Wrongful distribution of obscene or intimate images:** A person who transfers, publishes, or disseminates, including making a digital depiction available for distribution or downloading through a telecommunications network or through any other means of transferring data to a computer, the intimate or obscene image of another person commits an offence and is liable, on conviction to a fine not exceeding KES 200,000 (USD 2,000) or imprisonment for a term not exceeding two (2) years, or to both.

l) **Interception of electronic messages or money transfers** - A person who unlawfully destroys or aborts any electronic mail or processes through which money or information is being conveyed, commits an offence and is liable on conviction to a fine not exceeding KES 200,000 (USD 2,000) or to a term of imprisonment not exceeding seven (7) years or to both.

m) **Intentionally withholding message delivered erroneously** - A person who intentionally hides or detains any electronic mail, message, electronic payment, credit or debit card which was found by the person or delivered to the person in error and which ought to be delivered to another person, commits an offence and is liable on conviction to a fine not exceeding KES 200,000 (USD 2,000) or imprisonment for a term not exceeding two (2) years or to both.

Until very recently, there was no law in Kenya regulating the use of the digital space. It is important to note that the principle of legality prescribes that a person cannot be prosecuted unless the law provides that the conduct is illegal, despite the fact that the conduct may be harmful to others.

The BAKE Petition

The advancements provided by this law are significant and must be recognised. However, the Act comes into force in a Constitutional dispensation era that demands observance of fundamental human rights and freedoms. It therefore came as no surprise when the new law was tested following its assent, in *Bloggers Association of Kenya (BAKE) v The Attorney General & Others Petition No. 206 of 2018* where the petitioner challenged the Act's constitutionality, contending inter alia that:

(a) The Act infringes the freedom of opinion and belief protected by Article 32 of the Constitution, by limiting publication of information.

(b) The Act limits the freedom of expression under Article 33 of the Constitution, which entails the freedom to seek, receive or impart information or ideas.

(c) The Act threatens freedom of media and print under Article 34 of the Constitution, as it seeks to restrict broadcasting of ideas which only a certain section of the society may consider false.

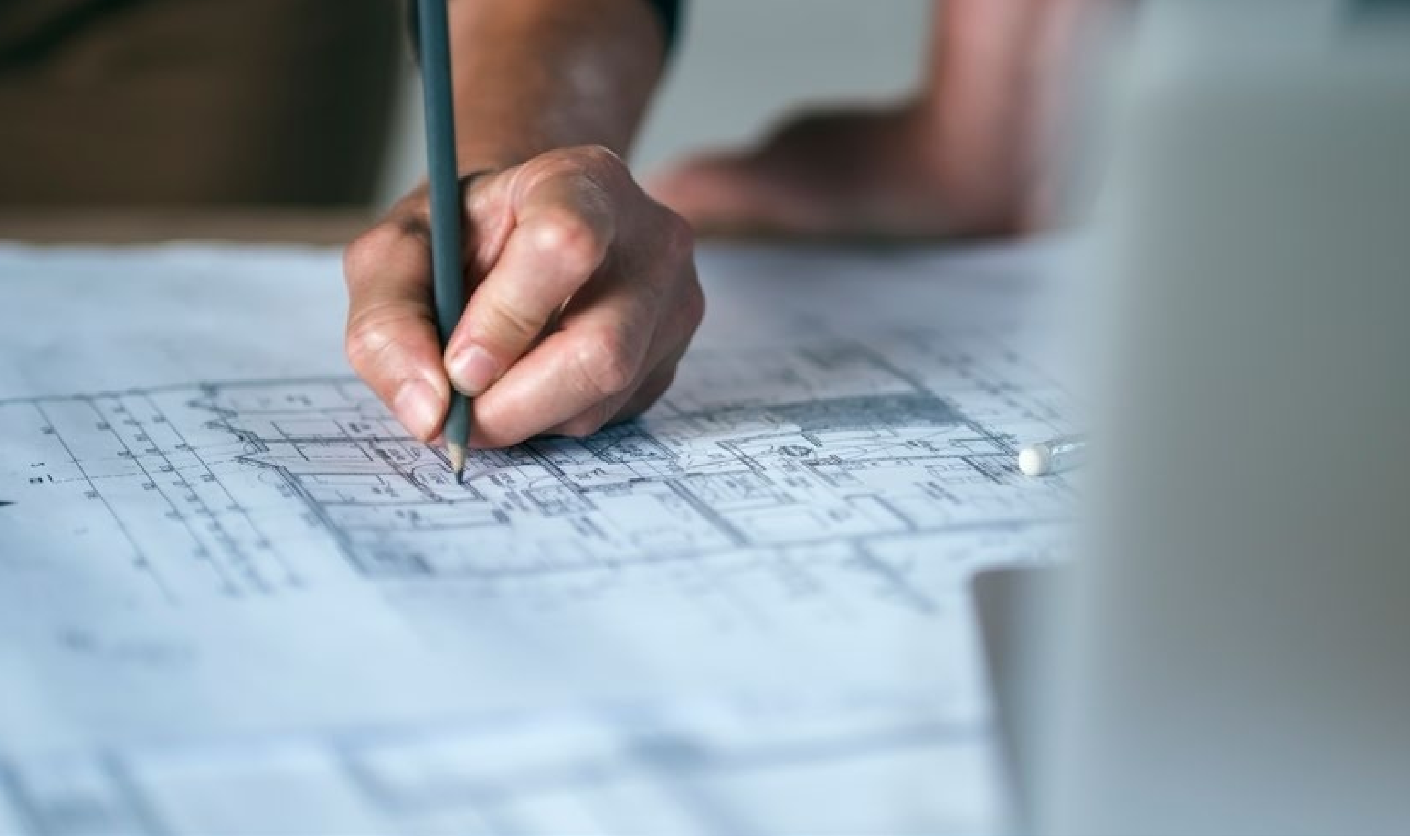
(d) The Act intends to limit fundamental freedoms and at the same time its provisions are not specific and precise contrary to Article 24 (2) of the Constitution which requires that any law that curtails fundamental rights and freedoms must be clear and specific about the nature and extent of limitation.

(e) The penalties prescribed under the Act are not commensurate to the offences and are too high, thus curtailing the freedom of liberty and security of the person that is guaranteed under Article 29 of the Constitution.

The Court agreed that BAKE's petition raised arguable points of law and issued conservatory orders, suspending the operation of the contentious provisions of the Act pending the hearing and determination of the case. In some aspects, BAKE's petition is similar to *Geoffrey Andare v Attorney General & 2 Others (2016) eKLR* where the Court declared unconstitutional section 29 of the Kenya Information and Communication Act (Cap. 411A), finding that the said section intended to limit the freedom of expression.

The impugned section provided that a person who "by means of a licensed telecommunication system sends a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or sends a message that he knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person" was guilty of an offence punishable by a fine not exceeding KES 50,000 (USD 500) or to imprisonment for a term not exceeding three (3) months, or to both. While declaring the above section unconstitutional, the Court stated that it imposed a limitation on the freedom of expression in vague, imprecise and undefined terms that went outside the scope of the limitations allowed under Article 33(2) of the Constitution.

Similar arguments have been advanced by BAKE in its petition and it will be interesting to see the reasoning of the Court upon determination of the case. This is in light of the need to regulate the use of online content, without infringing upon Constitutionally guaranteed human rights and freedoms. The challenge is to establish jurisprudence that will strike the balance between the two issues.



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MAPPED OUT:

EFFECTIVENESS OF PHYSICAL DEVELOPMENT PLANS

The last official population census conducted in Kenya was in 2009 and at the time, Nairobi's population was approximately 3.1 million. This number, according to the World Population Review, has since grown to 4.3 million as at 2018 and is projected to continue growing at a rate of over four percent (4%) annually. As the population continues to grow, considerations as to the availability of resources for the ever-expanding population must be borne in mind by the government. One such resource is land.

Nairobi has experienced an exponential growth in development. Areas that were previously reserved as residential zones have now turned commercial or mixed use (residential and commercial) development. Single dwelling houses have given way to multistoried apartment blocks. In light of these development trends considered against the scarcity of land, the importance of proper land use planning and control cannot be overemphasised.

Land Use Planning and Development Control

Land use planning is the manner in which land is allocated between competing uses for purposes of ensuring the rational, efficient, orderly and sustainable development of land.

Development control is the power of the government to regulate property development to ensure that all development conforms to the prescribed policies or standards. There needs to be an adequate legal framework which provides the justification and parameters for land use planning and control.

The preamble of the Constitution of Kenya, 2010 (**the Constitution**) affirms the people of Kenya as *"respectful of the environment, which is our heritage and determined to sustain it for the benefit of future generations"* while one of the national values and principles of governance is sustainable development as espoused under Article 10 (2) (d) of the Constitution.

There are numerous provisions in the Constitution that provide the foundational basis for land rights and use. For example, Article 42 provides that every person has the right to a clean and healthy environment, while Article 66 provides that the State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning. Article 69 (1) provides some of the obligations of the State in relation to the environment including the obligation to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources.

Apart from the Constitutional framework, there is also legislation and government policy that governs land use planning and development control. This includes the Physical Planning Act No. 6 of 1996, the County Governments Act No. 17 of 2012, the Urban Areas and Cities Act No. 13 of 2011, the Environmental Management and Coordination Act No. 8 of 1999, the National Land Policy (Sessional Paper No. 3 of 2009), among others.

A question that arises is whether the existing legislative and policy framework, adequately provides for proper land use planning and development control in the context of the ever-expanding population. Answering this would entail a comprehensive analysis of all relevant legislation and policies. In this article however we focus on the Physical Planning Act, 1996, the recently passed Physical Planning Bill, 2017 and particularly on the issue of land use planning.

The Physical Planning Act, 1996 and the Physical Planning Bill, 2017

The Physical Planning Act, 1996 (**the Act**) has been in operation well in advance of the promulgation of the Constitution, having come into force on 29th October, 1998. As would be expected, some of the provisions in the Act are "out of synch" with the Constitution.

Some of the key issues in respect of land use planning as identified in the National Land Policy include the preparation of land use plans at national, regional and local levels based on predetermined goals and integrating rural and urban development as well as the need to review and harmonize existing land use planning laws. The problems manifest themselves in terms of unmitigated urban sprawl, land use conflicts, environmental degradation, spread of slum developments and low levels of land utilization among others.

It is under this premise that Parliament sought to amend the Act by the tabling of the Physical Planning Bill, 2017 (**the Bill**). The Bill was passed by the National Assembly and forwarded to the Senate for consideration on 14th May, 2018.

County Planning

The Act provides the framework for the regulation of national, regional and local physical development. As it predates the Constitution, there is no provision for county physical development plans. However, it is important to note that there exists a detailed regime on county physical development plans as prescribed under the County Governments Act, which provides for the various plans including, county integrated development plan, county sectoral plan and county spatial plan. The Urban Areas and Cities Act , 2011 also provides for cities and urban areas plans.

The Act establishes the Director of Physical Planning, who is responsible for the formulation of national, regional and local physical development policies, guidelines and strategies. The Bill now establishes the role of a County Director of Physical Planning who takes over the role of formulating physical planning policies, guidelines and standards at county level, and is responsible for the preparation of county and local physical development plans. The County Director of Physical Planning is required to advise the County Executive Committee Member in charge of physical planning.

Section 32 of the Bill provides for the preparation of a county physical development plan (**the County Plan**). The purpose of the County Plan is to guide rural development and settlement at county level. The County government is required once in every ten (10) years to prepare the County Plan while ensuring that it conforms to the national physical development plan and any relevant regional physical development plan.

Section 32 of the Bill goes on to state that the County Plan shall suffice for purposes of the provisions of section 110 of the County Governments Act, 2012 (**CG Act**) which provision deals with county spatial plans. The Bill is surprisingly silent on whether the County Plan does away with the county integrated development plan, county sectoral plan or county municipal plans. This is particularly of concern where the county integrated development plan under the CG Act is to operate for five (5) years as compared to ten (10) year operational period for the County Plan.

Some of the key issues in respect of land use planning as identified in the National Land Policy include the preparation of land use plans at national, regional and local levels based on predetermined goals and integrating rural and urban development as well as the need to review and harmonize existing land use planning laws.

Members of the public can participate and give their comments before the County Plan is approved. In so far as regional and local plans were concerned, the Act only required the publication of a notice inviting the public for comments in the Kenya Gazette. Section 36 (1) of the Bill also requires publication of the notice in two newspapers of national circulation. This increases the awareness of members of the public that do not ordinarily refer to the Gazette. However, the detailed provisions dealing with timelines for submissions by the public and feedback from the County Director of Physical Planning are not clear.

Under section 37 (2) of the Bill, the county executive committee member in charge of physical planning is required to submit the completed County Plan to the governor who shall cause it to be placed before the county assembly for deliberation.

Local Planning

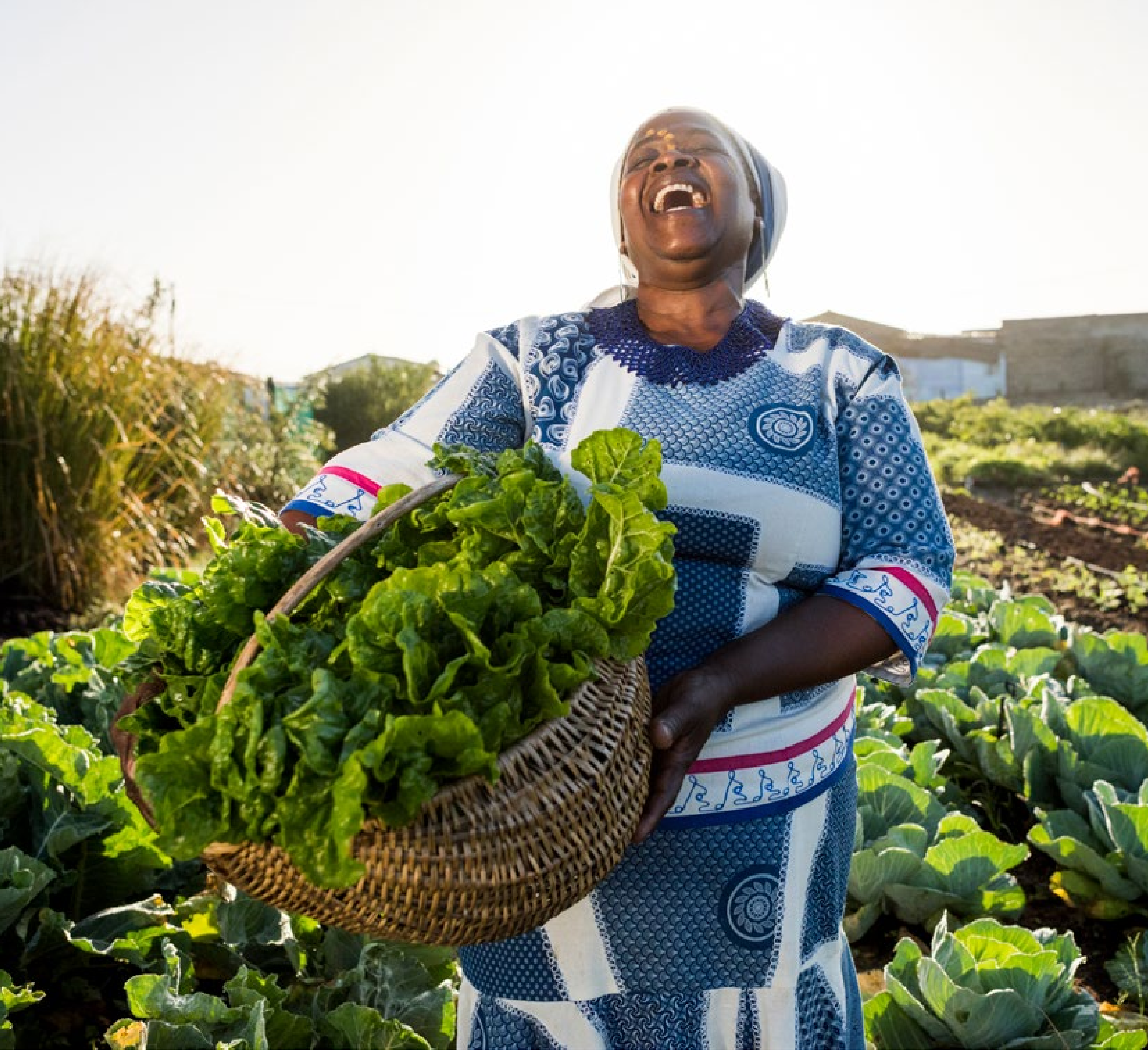
As earlier stated, the role of the preparation of the local physical development plan previously held by the Director of Physical Planning will now be taken up by the County Director of Physical Planning as prescribed under the Bill. A county government is therefore required to prepare a local physical development plan (**the Local Plan**) in respect of a city, municipality, town or unclassified urban area. The Local Plan is to provide for inter alia zoning, urban renewal, or redevelopment.

The Bill provides that the Local Plan shall be consistent with an integrated city or urban development plan as contemplated under Part V of the Urban Areas and Cities Act, which in the case of Nairobi, is the Nairobi Integrated Urban Development Master Plan (**the Nairobi Master Plan**) which was developed in 2014. It is not clear how the Local Plan will interplay with the Nairobi Master Plan and there might appear to be duplication of plans thus creating greater confusion as opposed to harmonization.

The provisions for public participation as they apply to the County Plan are applicable however under section 45 of the Bill, though he Local Plan need not be placed before the county assembly. It is not clear why the county government's approval is not required and this may jeopardise the process of harmonisation.

The issues faced in Nairobi and the rest of the country in respect of uncontrolled development can on one hand be attributed to the disregard of physical development plans and regulations. This can be as a result of lack of knowledge of the relevant plans or contribution to their preparation. To this extent, the requirement that a notice be published in two newspapers of national circulation may remedy the lack of awareness.

The Bill, though providing for devolved government participation in the preparation of the plans does not state with certainty the position of the existing plans under the various Acts. This may create a situation of duplication and uncertainty as to the applicable plans. It is hoped that the Bill will settle the functional disconnect between the plan preparatory authorities and implementing agencies as well create an effective coordinating framework for preparation and implementation of the planning proposals and regulations.



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A FRESH START:

NEW RULES ON THE EXTENSION AND RENEWAL OF LEASES

Kenya has over the years grappled with challenges bedeviling the land sector such as historical land injustices and irregular allocation of public land. It is in this context that the country has continued to witness extensive legislative reform in land administration.

The genesis of the current reforms can be traced back to 2010, when the Constitution of Kenya was promulgated. The Constitution contains an entire chapter on land and environment that anchors the land laws which were subsequently enacted including the National Land Commission Act, 2012, the Land Registration Act, 2012 and the Land Act, 2012. Pursuant to these Acts, various subsidiary legislation which buttress the effect and role played by these statutes were gazetted by the National Land Commission (**the Commission**) and are now in force.

This article highlights some of the major recent developments in the legal framework governing the extension and renewal of leases which is a significant milestone in enhancing accountability, transparency and addressing a previous lacuna in the law.

The Land (Extension and Renewal of Leases) Rules, 2017

The Land (Extension and Renewal of Leases) Rules, 2017 (**the Rules**) were gazetted vide Legal Notice Number 281 of 2017 and seek to protect lessees from losing their interests in land upon the expiration of leases. The Rules outline the specific requirements and processes for obtaining extension and renewal of leases. The Rules were made pursuant to section 13 (2) of the Land Act, 2012 (**the Land Act**).

Extension of Leases

A lessee can at any time before the expiry of the term of the lease, apply to the lessor, whether the national or county government for an extension of the term. The application is made through the Commission's county offices in a prescribed form (Form LA 22).

The Commission is subsequently required to act on such application within seven (7) days by forwarding the same to the Cabinet Secretary for Lands and Physical Planning (**the Cabinet Secretary**), where the national government is the lessor, or the County Executive Committee Member responsible for land matters (**the County Executive Committee Member**), where the county government is the lessor.

There are several factors that are considered to determine whether to allow an application for extension of lease. For example, where the lessee is a company, the particulars of its directors, their citizenship and their shareholding as provided in a company search from the Registrar of Companies, are taken into account. The lessee's payment of land rent and rates, existence of encumbrances against the land's title, the lessee's compliance with the subsisting lease's terms and conditions are also considered. Lastly, the issue of whether the resultant term where extension is sought by a non-citizen exceeds ninety-nine (99) years is also factored in.

After receiving and considering the application, the Cabinet Secretary or County Executive Committee Member as the case may be, is required to respond to the application within ninety (90) days either by approval or denial, with reasons for the decision.

Where the application for extension is approved, the Commission shall require revaluation of the land to ascertain the applicable outgoings. It shall also require the land to be resurveyed and geo-referenced, where applicable. Finally, it shall prepare a lease for the extended term, have it executed and forward it to the Land Registrar for registration.

The grant of an extension of lease does not extinguish the unexpired term and shall take effect from the last day of the unexpired term. Where the application for extension of lease is rejected, the national or county government shall communicate the decision to the applicant within seven (7) days of receipt of the decision and advise the applicant of their right to appeal.

Renewal of Leases

The Commission should notify the lessee, within five (5) years before the expiry of a leasehold term, that a lease is about to expire, as well as the lessee's pre-emptive right to apply for a renewal. Where the lessee does not respond within one (1) year, the Commission shall then publish the notification in two (2) newspapers of nationwide circulation and require the lessee to respond within six (6) months from the date of publication.

Should the lessee still fail to respond to the notice, the Commission shall physically verify the land. If the lessee is still in occupation of the land, the Commission shall advise the lessee on the need to apply for renewal and the consequences of failure to do so. However, such notification will not preclude the lessee from seeking an extension under the Rules.

Renewal can be done either before or after the expiry of a lease. An

There are several factors that are considered to determine whether to allow an application for extension of lease. For example, where the lessee is a company, the particulars of its directors, their citizenship and their shareholding as provided in a company search from the Registrar of Companies, are taken into account. The lessee's payment of land rent and rates, existence of encumbrances against the land's title, the lessee's compliance with the subsisting lease's terms and conditions are also considered.

application for renewal is made through the respective county offices of the Commission in prescribed form (Form LA 23). Upon receipt of the application, the Commission is required to forward the same within seven (7) days to the Cabinet Secretary or County Executive Committee Member as the case may be.

There are several requirements that should be satisfied by the lessee in this process. Where a company is the lessee, details of its directors, their citizenship and shareholding should be furnished, together with the results of a company search. The land rent and/or rates clearance certificate(s) from the relevant authority should also be furnished. Finally, evidence that the lessee has complied with the terms of the existing lease to the satisfaction of the lessor should also be availed.

While the application is under review, the national or county government may notify the Commission that it requires the land for a public purpose and the Commission shall advise the lessee accordingly. The national or county government is required to revert to the Commission, within ninety (90) days of receipt of the application for renewal. Where the application is approved, the Commission shall require the land to be re-valued to determine the appropriate amount of land rent and other fees. It shall also require the lessee to have the land resurveyed and geo-referenced. The Commission shall also issue a new letter of allotment in prescribed form (Form LA 5).

However, if the renewal is denied, the national or county government shall communicate the decision to the applicant within seven (7) days of receipt of the decision and advise the applicant of their right to appeal.

Large Scale Investments

Where the renewal involves substantial transactions, the Commission shall consult the national and/or county government to ensure that such renewal is beneficial to the economy. It is imperative that the investment purpose is in line with the national/regional/county policies and plans.

Such investment must take into account various factors such as public interest, public safety, public order, public morality, public health and land use planning. However, the Land Act does not define what substantial transactions are and therefore they may be deemed to mean transactions involving huge tracts of land.

Appeals

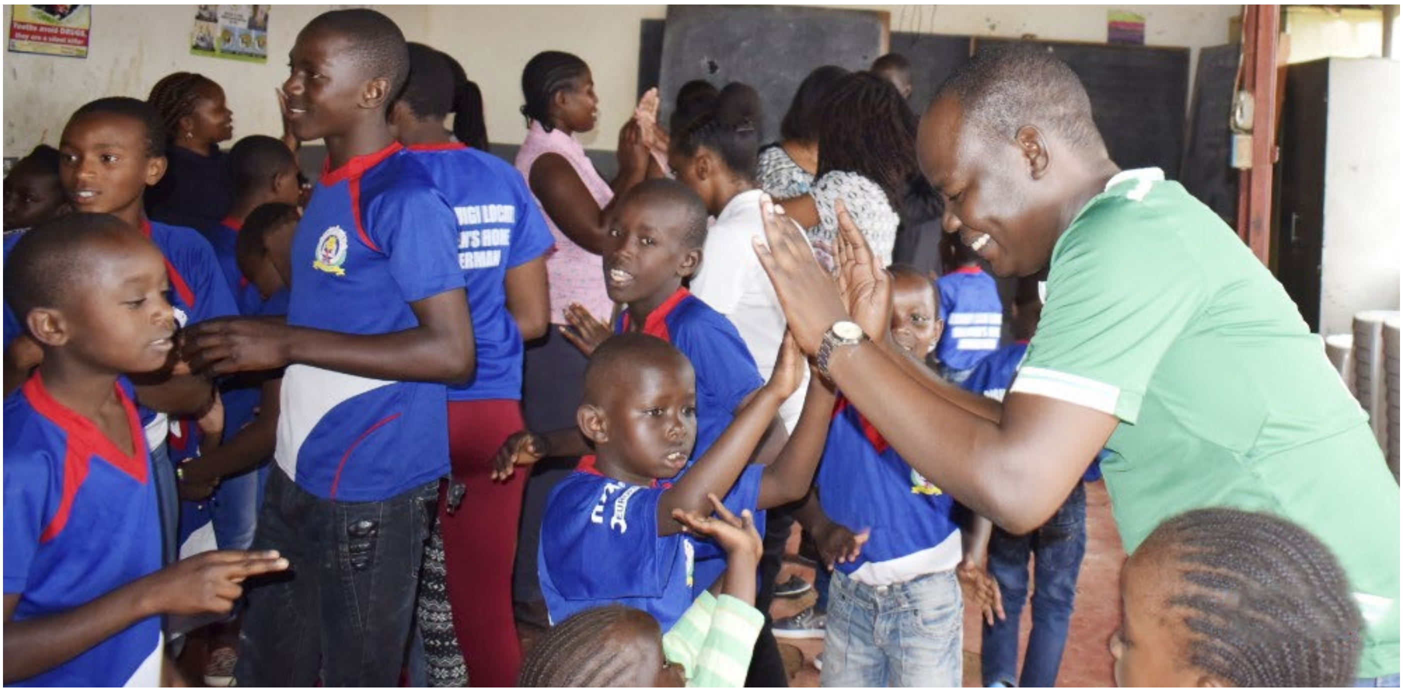
The Commission is required to establish an *ad hoc* Independent Appeals Committee (**the Appeals Committee**) at the county level to handle all complaints and appeals from parties who are aggrieved by the decision not to extend or renew a lease.

An aggrieved lessee is required to submit such an appeal within thirty (30) days of receipt of the decision for denial. The Appeals Committee is required to hear and determine the appeal within sixty (60) days from the date of receipt of the appeal. The decision arising from the appeal shall be binding, and dissatisfied parties may appeal to the Environment and Land Court.

A CARING TOUCH

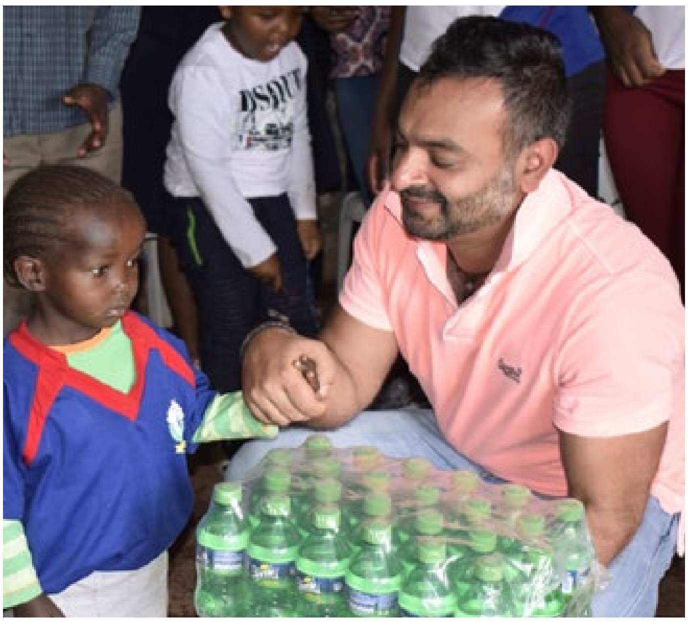
GOING BEYOND LEGAL PRACTICE TO IMPACT & CHANGE LIVES

Oraro & Company Advocates has continued to transform lives in the community through impactful partnerships. As a core value, the firm believes all people deserve access to economic and social rights. Chacha Odera, the firm's Managing Partner, noted that *"As a firm we like to see ourselves not just as a top-tier firm offering legal services but one that is driven by a selfless desire towards alleviating the challenges that exist in the community in which we operate."* This year, the firm's annual CSR campaign was focused on improving health services, access to clean water and education, leading to a partnership with Bishop Luigi Locatti Children's Home and the Nairobi Hospice.

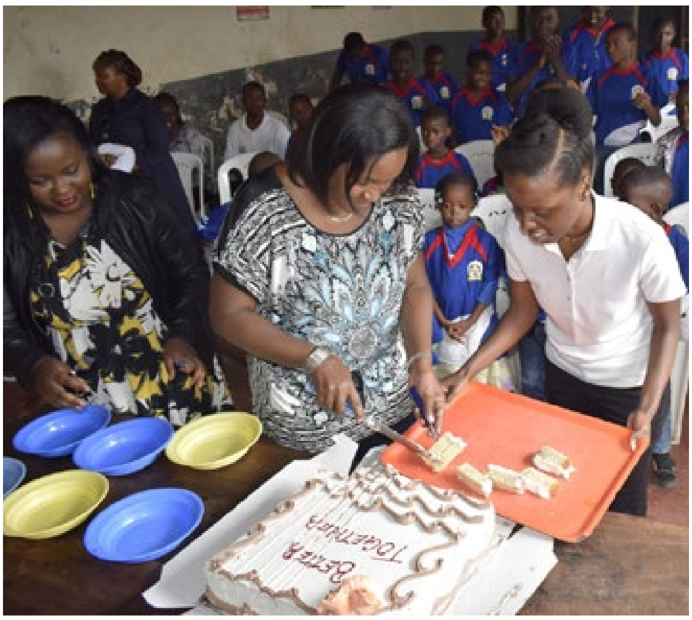


Senior Associate Daniel Okoth having fun as he plays with the children.

Founded in early 2005 by Bishop Luigi Locatti and Riccardo Lizier, Bishop Luigi Locatti Children's home is located in Zimmerman, Nairobi. It's primary objective is to rescue, rehabilitate and educate vulnerable and orphaned children. Owing to resource constraints, the home has faced a myriad of operational challenges which saw the Firm step in and donate a 10,000 litre water tank, 10 custom made double decker beds, 20 mattresses and beddings as well as clothing and foodstuffs.

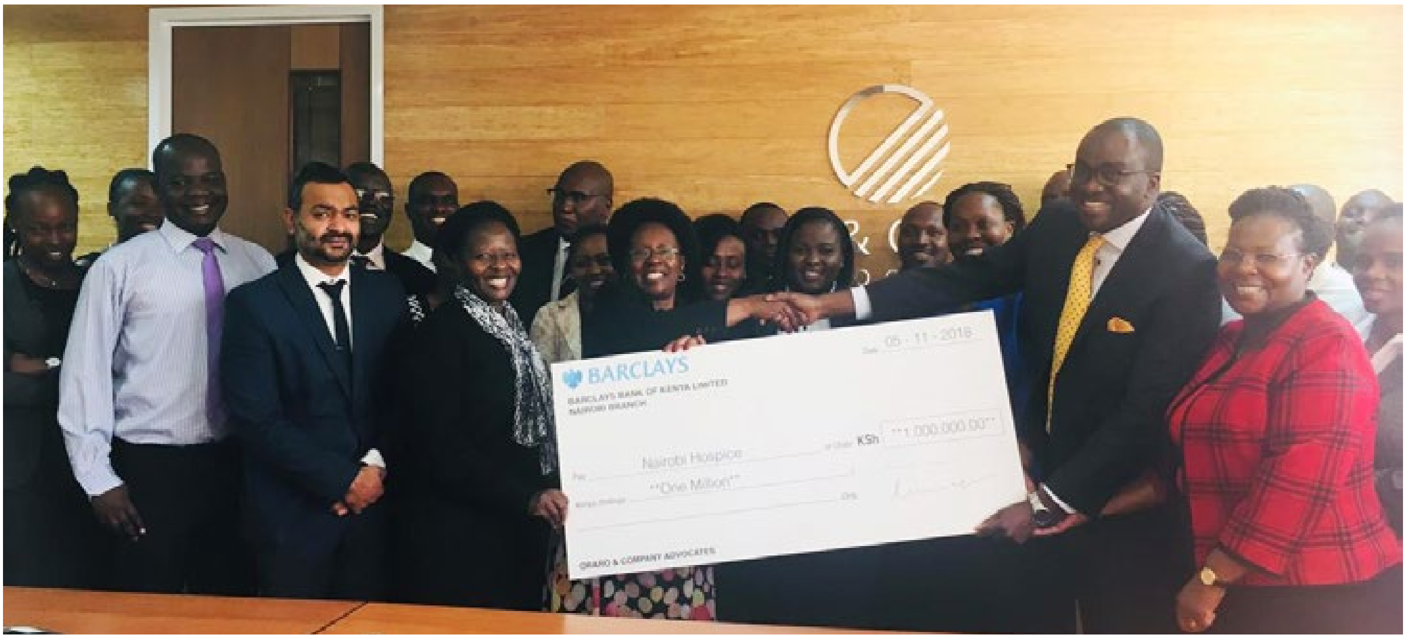


Senior Associate Gibran Darr lending a hand



Partner Cindy Oraro and our Office manager Stell Kyeba preparing to share cake. Onset is Milly Mbedi (Senior Associate)

The firm also donated KES 1 million to the Nairobi Hospice, a charitable organisation which provides care for patients facing life limiting illness and conducts training for healthcare professionals, community health workers and volunteers in palliative healthcare to allow patients and their families to have comfort and an improved quality of life. In a country with a soaring population currently at over 45 million people, access to quality healthcare is a struggle for most low to middle income earners who form 85% of Kenyans without any form of health insurance cover relying largely on out of pocket means to foot medical bills.



Our Managing Partner Chacha Odera, joined by our members of staff in the handing over of the firm's contribution to Ruth Were, C.E.O of Nairobi Hospice.

Geoffrey Muchiri, a Partner in the firm and the Chair of the CSR Committee, reiterated the firm's social impact efforts by saying "*We have a vision as firm to have our footprint in health, education, water, sanitation and hunger alleviation as part of the blueprint of the Sustainable Development Goals in order to achieve a more sustainable future for all.*" Through its CSR initiatives, the firm continues to create a lasting physical, economic and social impact going beyond the courtroom to transform lives and build better communities.

Moments before starting the "A ring a ring o' roses" rhyme.

Anne Kadima (Associate) learning a new game from the young boys.

A distinguished African law firm providing legal services drawing from local knowledge and global perspectives

Why us?

Oraro & Company Advocates is a market-leading African law firm established over 40 years ago with a strong focus on **dispute resolution** and **corporate & commercial law**. We have been at the forefront of some of the most legal complex transctions which is affirmed by the consistent global recognition by leading legal directories Chambers & Partners, Legal 500 and IFLR 1000 as a top tier firm.Central to our culture, is a commitment to deliver legal solutions that are **Partner-led**, while fostering **deep client relationships**.

Over the years, Oraro & Company Advocates has build **a strong reputation** as the trusted adviser, providing **tailored** and **practical** advice to both international and local clients in the fields of:

Mergers & Acquisition

Our Mergers & Acquisition practice comprises a **robust team of lawyers** who have **proven experience** in providing advice on structuring, due dilligence, regulatory, compliance, drafting of contracts and undertaking filings at the Competition Authority of Kenya. Some of our recent work highlights include:

- Acting for a Kenyan investment company in the acquisition of 48.9% stake in a company providing serviced offices. We co-ordinated the due diligence exercise conducted by counsel in Ghana and Nigeria on the target's subsidiaries in those countries and reviewing the term sheet.
- Acting as legal counsel in relation to the acquisition of 40% shareholding in a duty free retailer by an investment holding company.
- Advised a leading private bank on the competition aspects of its purchase of shares in a leading insurance company (the target).
- Acting for sole shareholder of the company that owned a high-end shopping mall on the acquisition of 50% equity stake in a company owning a high-end shopping mall in Nairobi.

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Dispute Resolution

Our Dispute & Resolution practice is **highly respected** for its litigation skills with a **strong bench of litigators**. With an **in-depth** understanding of complex commercial disputes, we have represented :

- A Pan-African bank in a claim of USD 52 million arising from a facility of USD 300 million advanced to the defendants to fund the construction of the Nairobi – Mombasa oil pipeline.
- Standard Chartered Bank in a rare application seeking to have the Court of Appeal re-open, re-examine and set aside its decision. In addition, we sought to have the Court of Appeal declare its earlier decision a nullity and direct that the appeal be heard afresh. The matter value is USD 2.1 million with an interest growth of 14% per annum.
- Toyota Kenya Limited in a class action product liability claim with respect to Toyota's HINO FC 500 motor vehicles. The plaintiffs allege that the motor vehicles were sold with patent manufacturer's defects and that their consumer protection rights under the Constitution were violated. The matter value is unquantifiable, however the Plaintiffs issued a demand for payment of USD 7.5 Million before filing suit.
- Acting in a claim seeking the tracing and recovery of approximately USD 340 million which was fraudulently siphoned from a Kenyan bank (It is one of the largest banking fraud disputes unquantifiable, however the Plaintiffs issued a demand for payment of USD 7.5 Million before filing suit.

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A globally recognised Kenyan law firm with professional,

Restructuring & Insolvency

Our Restructuring & Insolvency practice is led by a team of Partners with specialist experience in advising both contentious and non-contentious aspects of debt & equity restructurings, asset tracing and insolvency. Our long track-record includes advising:

- The Government of Kenya (through the office of the Attorney General) on the legal implications of the most complex debt and equity restructuring of KQ as well as reviewing the restructuring documentation including advice on the applicable law relating to granting of guarantees by the GoK. This is Kenya's largest and most complex debt and equity restructuring which aimed at repositioning the National carrier for long-term growth and business sustainability. The matter is valued at USD 2.3 billion.
- A consortium of banks involved in a non-contentious insolvency matter with a value of USD 64.5 million. Our role includes advising the consortia on their legal options under contract including drafting agreements.
- A commercial bank in Kenya on its rights as a lender against a leading supermarket currently in insolvency; and in particular on the right of a lender to enforce third party securities under the Insolvency Act, 2015. The matter value is USD 7 million.
- The corporate restructuring of a Kenyan commercial bank (in receivership) on the powers of Kenya Deposit Insurance Corporation under the Kenya Deposit Insurance Act, 2012 to undertake the proposed restructuring, including, the powers to require the shareholders in the company to sell their shares and the company to issue additional shares to third party investors.

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Tax

Our Tax practice is well respected for its **forward thinking** in tax disputes due to the **complexity** of Kenyan tax laws. We have recently advised on income tax, capital gains tax, VAT, and tax compliance Our experience includes:

- Acting for a Kenyan based company that manufactures branded beer, spirits, and non-alcoholic beverages in an appeal against excise duty and VAT assessment on alcoholic beverages amounting to USD 180 million.
- Acting for a Kenyan mining company in a matter that involved an assessment raised against the company in respect of VAT, Withholding tax and Corporation tax (resulting from an intercompany transaction). The matter value is USD 10 million.
- Acting for a Kenyan solar technology firm in a judicial review application under the Fair Administrative Actions Act, 2013 against the KRA. The suit resulted in favourable judgment against tax demands in excess of USD 350 thousand issued by the KRA.
- Represented a construction company in arbitration proceedings arising out of a breach of a building contract. The claim was for VAT on the contract works and the cost of additional works and variations. The approximate claim value was USD 6.5 million.

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competent and knowledgeable advocates.

[Ranked by IFLR 1000 in the 2019 Edition]

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