LEGAL & KENYAN

ORARO & COMPANY ADVOCATES NEWSLETTER | ISSUE 7 | DECEMBER 2017

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A matter of time and growth: Issue seven

Greetings!

The year 2017 will be remembered by many for different things but for us, one of the key watershed moments includes our recent rankings in IFLR 1000 as one of Kenya's top financial & corporate firms. Traditionally, many have known us for our strong disputes resolution practice and yes, that is still a very robust part of our practice but we now can comfortably say that we are full-service - having competences in both contentious and non-contentious work, to make it easier for our clients to find the answers and legal solutions they need to grow their businesses. Speaking of growth and diversification, this issue we feel is a reflection of both. We have brought on some "fresh blood" within our ranks and have some new contributors adding their insights to this last issue of the year - for instance Anne Kadima an associate in our disputes team has paired with our managing partner Chacha Odera to share their perspectives, on what is no doubt a major issue to Kenyan companies and their directors - Minority Shareholders' Rights Under the Companies Act, 2015. The article is quite timely as the voluminous Act was passed fairly recently and we continue to get a floodgate of questions on the implication of its provisions on several aspects of management. The Act's passing has definitely been a milestone for Kenyan business law and so, we expect that many of our readers will find the article valuable long after this issue and the end of year festivities, come and go. There is an African proverb that says, "If you wish to move mountains tomorrow, you must lift stones today", it aptly describes the current fervent efforts of Kenya to diversify its economy and attract more foreign investment. To this end, Kenya recently passed the Nairobi International Financial Centre Act, 2017. That is the focus of Pamella Ager's article which dissects the key portions of the Act and encourages investors to approach it with cautious optimism. Other highlights from this issue include JMiles&Co. (who made their debut as contributors in the last issue of this newsletter), giving us a much-needed Pan-African look at how ADR and more specifically mediation is doing in Africa. In banking, often a vital aspect of business, we get a bit more technical and look at the Kenyan and South African approach to the *in duplum* rule which simply expresses that a borrower should only be made to repay no more than double of the amount borrowed.

Being a firm heavily involved in high-value complex commercial litigation, we could not close the issue and indeed the year without looking at a significant development at the Courts i.e the jurisdictional boundaries of specialized courts. Finally, an almost universal conundrum that businesses of all sizes and in different industries face, is the issue of defining who is an employee and who is an independent contractor, one of our highly regarded employment lawyers Georgina Ogalo-Omondi seeks to help business owners navigate those waters with an article comparing employees and independent contractors. So many insights and so many pages, here goes...enjoy the read!

Merry Christmas and a Happy 2018.

Sincerely,

John Mbaluto,
Editor

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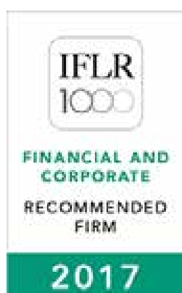

"They have a fast turnaround time, good individuals and thorough quality of work."

IFLR 1000, 2018.

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LOCATION, LOCATION, LOCATION:

THE MAKING OF NAIROBI AS A FINANCIAL HUB

For quite some time, intense efforts have been made to further diversify the Kenyan economy and attract more foreign investors into the country. This is in line with Kenya's long-term development plan dubbed "Vision 2030", which hopes to secure the country's middle-income status, based on a vibrant and globally competitive financial sector. The Kenya Government hopes to establish a regional financial hub to encourage major economic growth and to position Kenya as a prime financial centre in East and Central Africa. A key milestone in these efforts is the coming into force of the Nairobi International Financial Centre Act (**the Act**) on 16th August, 2017. The Act seeks to provide the legal framework for the development of an efficient and globally competitive financial services sector in Kenya.

A financial centre is a location that is home to a cluster of national or international financial service providers such as banks, investment managers, hedge-funds or stock exchanges. Such a centre is usually modeled by harmonising various regulations and laws that affect a business, for example Company Law, Trust Law, Insurance Law, as well as Banking and Tax regulations, with a view of attracting investors. The measures put into place have to be tax-efficient when compared to those established in other countries in the region. International finance centres have been successful in many major cities including Frankfurt, Hong Kong, Johannesburg, London, New York, Zurich, among others. Some of the benefits usually extended to investors include attractive tax rates, encouragement to foreign investors to do business, efficiency in financial transactions and overall economic growth.

The Nairobi International Financial Centre

The Nairobi International Financial Centre (**NIFC**) and the Nairobi International Financial Centre Authority (**the Authority**) are established pursuant to sections 4 and 5 of the Act, respectively. The NIFC is an operating framework managed by the Authority to facilitate

and support the development of an efficient and globally competitive financial services sector in Kenya. The Authority is established under section 5 as a body corporate, whose management vests in a Board of Directors with a non-executive chairperson, appointed by the President.

Objectives of the Authority

The main objective of the Authority is to establish and maintain an efficient operating framework to attract and retain firms to the NIFC. The Authority is also tasked to develop and recommend strategies and incentives, in collaboration with the relevant regulatory authorities, to develop Kenya as an internationally competitive financial centre. The Authority is further expected to be responsible for developing, managing and enforcing the regulatory environment, based on the principles of efficiency, transparency and integrity.

Certification of Firms

Under section 28 of the Act, a person who intends to operate a NIFC firm is required to apply to the Authority in the prescribed form to be certified. The application should be accompanied by the prescribed fee and any other additional information as the Authority may require. Once certified, the firm may conduct any business which the Cabinet Secretary responsible for matters relating to finance (**the Cabinet Secretary**) may designate in the Gazette as a qualified activity. In a bid to regulate those who engage in the qualified activities, the Act makes it an offence for a person to conduct any qualified activity as a NIFC firm or hold itself out as such, unless that person is duly certified by the Authority under the Act. A person who contravenes this provision of the Act 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 to both.

Confidentiality of Information

Under section 17 of the Act, a director, officer, employee or agent of the Authority or any person who for any reason has access to any record, document, material or information relating to the affairs of the Authority shall not divulge and or publish such information, unless it is required to be disclosed under any law or by Court order. A person who contravenes this provision of the Act 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 to both.

Foreign Ownership

In a move that would be attractive to foreign investors, the Act allows NIFC firms to be fully owned by persons who are not nationals, or resident in, Kenya. This is amended though section 32 of the Act, which provides that NIFC firms shall not be subject to any nationalisation or expropriation measures or any restrictions on private ownership.

Repatriation of Profits

The legal framework which is modeled closely after Qatar's Financial Centre allows firms to have the freedom to repatriate profits and realise investments without any restrictions. This is also geared towards attracting foreign investors. The firms will also have the freedom to recruit and employ staff of their choice, on such terms agreeable to them, subject to work permit provisions and any international treaty obligations, entered into by the Government, in respect of the terms of employment. This is strategic since the firms will be in a position to employ expatriates from other jurisdictions to help in their management, although it may be argued that this may not help in the transfer of knowledge and such valuable skills to Kenyans.

The legal framework which is modeled closely after Qatar's Financial Centre allows firms to have the freedom to repatriate profits and realise investments without any restrictions. This is also geared towards attracting foreign investors.

The Steering Council

The Steering Council (**the Council**) which is established under section 19 of the Act consists of the President as the Chair, the Deputy President as the Vice Chair, the Cabinet Secretary, the Attorney General, the Governor of the Central Bank of Kenya, the Chief Executive Officer of the Capital Markets Authority, the Chief Executive Officer of the Insurance Regulatory Authority, the Chief Executive Officer of the Retirements Benefits Authority and the Chairperson of the Authority.

The Council has the mandate to review the progress of the NIFC, provide direction and address any challenges in the development of the NIFC and the overall financial services sector in Kenya. It may from time to time, give such directions to any person as the Council considers necessary, in order to achieve the objectives of the Act.

Dispute Resolution

In a bid to establish a world-class legal environment, the Act has embraced Alternative Dispute Resolution (**ADR**) as a mode of resolving disputes through the establishment of the Financial Centre Tribunal (**the Tribunal**). The main objective for the Tribunal is to avoid the high costs of litigation which have become prohibitive, making parties to commercial transactions keen on procedures of resolving disputes which are more affordable, quicker and which maintain parties' confidentiality. Under section 35(7) of the Act the Tribunal has jurisdiction to hear and determine appeals against any decision or order of the Authority.

Regulations

The Cabinet Secretary is expected to come up with regulations for the operationalisation of the Act. In doing this, the Cabinet Secretary is expected to designate qualified activities to be conducted by NIFC firms, determine any benefits, exceptions and incentives available to the firms, determine the general conditions of entry of firms to the NIFC, provide the certification process and to prescribe information required of the firms to facilitate operationalisation of the Act.

Whether or not the NIFC will be an attractive and competitive financial hub in the region remains to be seen and will depend on a number of factors, including the provision of effective business infrastructure, innovation, a balanced regulatory environment, attractive tax incentives, an effective legal system and dispute resolution mechanisms that provide cost-effective and expeditious resolution of all business disputes. Plus, the Government's willingness to adopt international best practices from other successful international financial institutions.

It is only through careful consideration of such issues that the NIFC will offer a lucrative base for investors to base their operations in Nairobi. The commencement of the Act is only the beginning of the journey towards making Nairobi a financial hub. A lot more will, however, need to be done for the Act to fully achieve its objectives.

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TAKING CONTROL:

MINORITY SHAREHOLDERS' RIGHTS UNDER THE COMPANIES ACT, 2015

The Companies Act, 2015 (**the Act**) has significantly enhanced the rights of minority shareholders by specifically enacting into law, the duties of directors and providing for an enforcement mechanism of those duties. The Act also makes clear what amounts to oppressive conduct or conduct that is unfairly prejudicial and provides for the remedies available to members of a company who have been treated in an oppressive or unfairly prejudicial manner. The Act further provides a statutory basis for derivative actions, which were previously a feature of common law. Previously, the duties of directors were also not codified but rather arose under common law. The Act now provides for numerous duties to be observed by company directors. These duties can be categorised as general duties and specific duties.

General Duties

These are what used to be known as common law duties of directors. In other words, these are duties that were, before the coming into force of the Act on 11th September, 2015, administered and enforced under the common law of England and Wales. These duties include:

- The duty to act within powers, which requires a director to act within the company's articles of association and to only exercise powers for the particular purpose for which they are given
- The duty to promote the success of the company which enjoins directors to act in the way that they consider in good faith and to be in the best interest of shareholders as a whole
- The duty to exercise reasonable care, skill and diligence in the performance of the directors' functions
- The duty to avoid conflict between the directors' interests and those of the company. This means that if a director is in any way interested in a transaction or arrangement that the company has entered into or is about to enter into, that director has a duty to declare the interest and the extent of his interest to the other directors and where the company is a public company, to the shareholders of the company

Breach of any of these duties is actionable by civil suit.

Specific Duties

Unlike the general duties outlined above, specific duties require directors to take or refrain from taking particular acts. Specific directors' duties include:

- The duty to obtain shareholders' approval before entering into certain transactions which include, for example, transactions where a director of the company or of its holding company acquires or is to acquire from the company a substantial non-cash asset
- The duty to convene general meetings requisitioned by members and to prepare individual financial statements, send the financial statements and reports to persons entitled to receive notice of general meetings and present the same in general meetings
- The duty of directors of a private company not to allot shares except in accordance with section 328 of the Act or as authorised by the company's articles or by a resolution of the company
- The duty to ensure that the company keeps proper accounting records
- The duty to include in the notes to the company's financial statement details of individual director's benefits other than remuneration

Unlike the general duties, which are enforceable by a civil suit, the specific duties outlined above attract criminal sanction for non-compliance.

Oppressive Conduct and Unfair Prejudice

The Act sets out what amounts to oppressive conduct or conduct that is unfairly prejudicial and provides for remedies available to a member who has suffered oppressive conduct or unfair prejudice. Members now have the *locus standi* (right) to go to Court and challenge conduct that they think is oppressive or unfairly prejudicial on grounds that:

- The company's affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the interests of members generally or of some of its members
- An actual proposed act or omission of the company (including an act or omission on its behalf) is or would be oppressive or so prejudicial

If, on hearing this application, the Court finds the grounds on which the application is made, to be substantiated, it may make such orders in respect of the company as it considers appropriate for giving relief, in respect of the matters complained of. In making such an order, the Court may do all or any of the following:

- Regulate the conduct of the affairs of the company in the future
- Require the company -
  - To refrain from doing or continuing an act complained of (or)
  - To do an act that the applicant has complained it has omitted to
- Authorise civil proceedings to be brought in the name and on behalf of the company, by such person or persons and on such terms as the Court directs (this is what is known as a derivative suit)
- Require the company not to make any or any specified, alterations in its articles without the leave of the Court
- Provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly

It has been held by English Courts that the exclusion of a party from the management of a company or removal of a member as a director where there is no misconduct, breakdown in relations, or other circumstances to justify the exclusion from the management of the company is conduct that is unfairly prejudicial. It has also been held that the dilution of a member's stake in the company if it is shown the member was not in a financial position to take up more shares, so as not to dilute their stake in the company is oppressive conduct.

Previously, the only remedy a member claiming oppression could seek from the Court was the winding up of the company, which was often times viewed as a draconian measure.

Previously, the only remedy a member claiming oppression could seek from the Court was the winding up of the company, which was oftentimes viewed as a draconian measure. The Act has now brought about other remedies such as the purchase of the oppressed member's shares at fair value, which can be viewed as a remedy more geared towards the general members' interests and keeping the company as a going concern.

Derivative Actions

It is a general principle in company law that a company is a juristic person in law and as such capable of bringing a suit on its own behalf when it is wronged. It, therefore, followed that an individual shareholder could not sue for wrongs done to a company. This principle is commonly known as the rule in *Foss v Harbottle,* after the case that first laid out the rule.

This rule is derived from two general legal principles of company law. Firstly, a company is a legal entity separate from its shareholders. Secondly, the Court will not interfere with the internal management of companies acting within their powers. This simply means that if the majority can ratify an act, the minority cannot sue on behalf of the company.

However, there are situations whereby the company is unable or unwilling to institute a suit to enforce one or more of its rights. To remedy this, the English Courts came up with what has come to be known as a derivative action or in other words, an action brought by the shareholders to enforce the rights of the company on its behalf. The effect of this was to give shareholders legal standing otherwise vested exclusively in the company. Derivative actions are therefore an exception to the rule in *Foss vs Harbottle.*

Previously, the Companies Act did not provide for derivative actions and a derivative suit was resorted to under common law pursuant to exceptions to the rule in *Foss vs Harbottle.* As such, the shareholders of a company faced enforcement difficulties because they could not litigate in the name of the company. The Act has now codified derivative actions and members need not rely on the exceptions to the rule in *Foss vs Harbottle* to bring a derivative action. Derivative actions can now be brought directly under the Act or as a result of a Court order in proceedings for the protection of shareholders against unfair prejudice.

Conclusion

The Act has gone a long way towards the protection of minority shareholders in Kenya. This has been done through the provision of statutory directors' duties, the codification of derivative actions and the protection of members from oppressive conduct or conduct that is unfairly prejudicial. There are likely to be several suits filed in Court emanating from these provisions by shareholders seeking to enforce their rights. It will be interesting to see the Courts' application of these provisions and the building of jurisprudence in this area of law.

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IN THE OPEN:

DISCLOSURE REQUIREMENTS UNDER THE NEW COMPANY REGULATIONS

Pursuant to the Companies Act, 2015 (**the Act**), directors of a company are required to prepare a directors' remuneration report for each financial year of the company. The Act requires regulations to be in place, which regulations shall prescribe the information to be included in a directors' remuneration report, how the information is to be set out in the report and what is to be the auditable part of the report. Previously, the Companies (General) Regulations, 2015 (**the 2015 Regulations**) were in place. The 2015 Regulations had set out the information to be disclosed in a directors' remuneration report. This included an aggregate amount of remuneration and benefits paid to or receivable by the directors of the company, in respect of their qualifying services.

In September 2017, the Companies (General) (Amendment) Regulations, 2017 (**the 2017 Regulations**) came into effect. The 2017 Regulations have amended the 2015 Regulations and seek to introduce more disclosure requirements for the directors' remuneration report. The 2017 Regulations now require disclosure to be made with regard to each individual director as opposed to the aggregate amount of the directors' remuneration, as was the case in the 2015 Regulations. Consequently, disclosure requirements in the directors' remuneration report are now more extensive. In addition to the requirement for the report to disclose the remuneration of each individual director, the 2017 Regulations also seek to provide further guidelines for additional information that the directors' remuneration report should contain. The information to be contained in the directors' remuneration report is broadly categorised into two; information not subject to audit and information subject to audit.

Not Subject to Audit

The directors' remuneration report needs to capture major decisions on directors' remuneration, including any substantial changes relating to the directors' remuneration, made during the year and the context in which the decisions and changes were made. To this extent, the 2017 Regulations require the report to contain a statement of voting at the previous general meeting as follows:

- In respect of a resolution to approve the remuneration report, the percentage of votes cast for and against the report and the numbers of votes withheld
- In respect of a resolution to approve the directors' remuneration policy, the percentage of votes cast for and against the report and the number of votes withheld

The 2017 Regulations further require that where there is a significant percentage of votes against the resolutions highlighted above, the report should contain a summary of the reasons for those votes, as far as the directors are aware and any actions taken by the directors in response to those concerns. Directors are also required to prepare a policy statement detailing the summary of each director's performance conditions for the director to be entitled to share options or a long-term investment scheme. A summary of the methods to be used in assessing performance conditions also needs to be stated. The policy statement should also disclose the duration of directors' contracts, notice periods and termination payments under the contract. In relation to a director's contract of service, the report shall state whether a director is entitled to compensation in the event of early termination of a contract and such details that enable members of the company to estimate the liability of the company, in the event of such early termination.

The above information though not subject to audit is required to be in the directors' annual remuneration report.

Subject to Audit

The following information required to be disclosed in the directors' report is subject to audit:

- **Directors' Emoluments and Compensation**
  Under this, the following information should be disclosed:
  - The total amount of the salary and fees paid to the director
  - The total amount of bonuses paid or receivable by the director
  - The total amount paid as expense allowances that are chargeable to tax or would be chargeable to tax if the director were an individual
  - The total amount of any compensation for loss of office paid to the director
  - The total estimated value of any benefits received by the director, other than in cash

- **Share Options**
  The report should also contain, in respect of each director of a company, the details of their share option information. This includes the number of shares that are subject to a share option at the beginning and end of the financial year, the number of shares that have been awarded, exercised or have expired or if there has been any variation to the rights. With regard to unexpired share options, the report should state the price paid for each share and the period within which a right should be exercised.

- **Long-term Incentive Schemes**
  Any details of a scheme of interests that a director may have at the beginning of a financial year or if later, on the date of their appointment as a director of the company, should be disclosed. The details of the schemes of interests awarded to the director in the relevant financial year, as well as those that the director may have at the end of the financial year, also need to be disclosed.

  The 2017 Regulations recognise the fact that the long-term incentive schemes are subject to certain qualifying conditions and require that the report sets out the period within which the qualifying conditions for the long-term investment scheme have to be fulfilled and whether there are any variations. A long-term incentive scheme for purposes of the 2017 Regulations means an interest in respect of which assets may become receivable, in respect of the qualifying services of a director.

The 2017 Regulations are also expected to bring an end to the current reporting practice where listed firms only provide an aggregate amount of total director emoluments, leaving shareholders to guess what each executive or director takes home.

- **Pension**
  The report also needs to disclose pension information of a director of a company who has served during the relevant financial year and has rights under the pension scheme. The pension information includes the details of the pension arrangement and any changes to those arrangements and the management of the assets and financial affairs of the pension scheme.

- **Past Directors' Compensation**
  The details of any significant award made in the relevant financial year to any person who was not a director at the time of making the award, but was previously a director of the company must be disclosed.

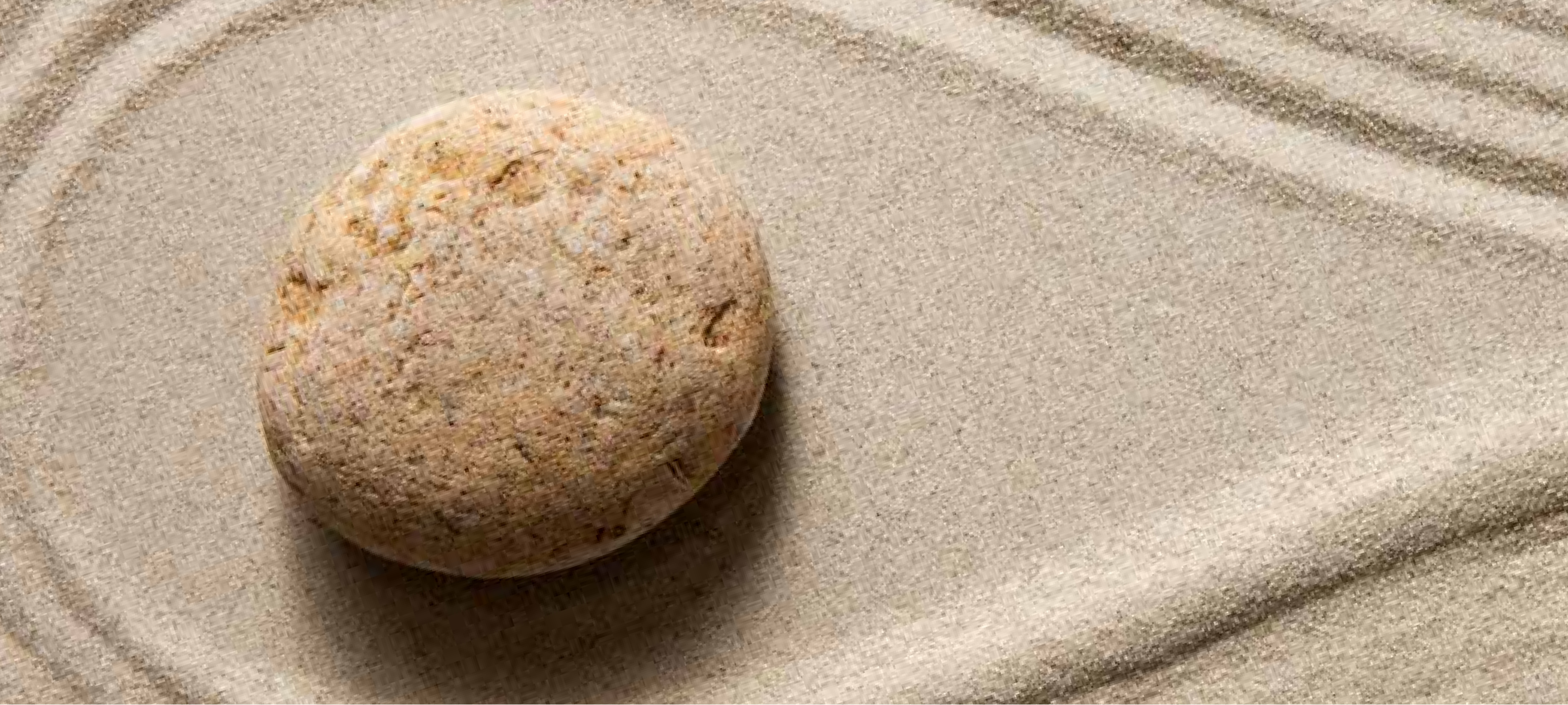
- **Payments to Third Parties**
  The directors' remuneration report should also contain the aggregate amount of any consideration paid or receivable by third parties, for making available the services of a director of a company. Payments made to a person who is a director of a company and is involved as the director of any of the company's subsidiary undertakings or has dealt with any other undertaking by virtue of the company's nomination should be disclosed.

It is important to note that the Regulations require the above information to be provided with respect to each individual director, save for information relating to share options, where the Regulations allow for aggregation, in the opinion of the directors. Disclosure in respect of each individual director will result in a disclosure of excessive length.

The 2017 Regulations will with no doubt enhance transparency in the remuneration of company directors. With the new rules in place for instance, it is now mandatory that companies integrate details of individual director remuneration into their annual financial reports. The 2017 Regulations are also expected to bring an end to the current reporting practice where listed firms only provide an aggregate amount of total director emoluments, leaving shareholders to guess what each executive or director takes home. Shareholders will now more transparently have the power to approve directors' pay at general meetings, a move that may see boards of loss-making companies take a pay cut to match the company's economic situation.

The liability of companies at the time a director joins and leaves a company, as well as after a director has left a company, will now be more certain and can be projected without causing any economic effect to the performance of listed companies.

Notably, the 2017 Regulations are in line with constitutional requirements that every citizen has the right of access to information. The 2017 Regulations are also in line with the guidelines on corporate governance practices by publicly listed companies in Kenya, which require companies to establish a formal and transparent procedure for remuneration of directors, which should be approved by the shareholders. The Regulations are therefore a remarkable and progressive legislative development.



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LINES IN THE SAND:

EXAMINING THE JURISDICTIONAL BOUNDARIES OF KENYAN SPECIALIZED COURTS

Background

When the Constitution of Kenya, 2010 (**the Constitution**) was promulgated on 27th August, 2010, it contained clauses restructuring the judicial system and more particularly the Superior Courts which included the Supreme Court of Kenya as the apex Court, the Court of Appeal, the High Court and two other Courts with equal status as the High Court (**the Specialized Courts**). One to hear and determine matters relating to employment and labour relations and the other to hear and determine matters relating to the environment, the use, occupation and title to land.

Article 162 (2) of the Constitution thus provided, albeit in broad terms, the jurisdiction of the Employment and Labour Relations Court (**ELRC**) and the Environment and Land Court (**ELC**) but left it to parliament to establish the Specialized Courts and elaborate on the limits of their jurisdictions by way of legislation. The establishment of the ELC was inspired by the objective of specialisation in land and environment matters, thus, in addition to the general criteria for appointment as Judges of Superior Courts, section 7 (1) (b) of the Environment and Land Court Act, 2011 requires that ELC Judges have some measure of experience in land and environment matters.

It was also of great significance that the Committee of Experts who midwifed the Constitution-making process, ensured the insertion into the Constitution of a statement on the status of the Specialized Courts, being equal to that of the High Court, which was aimed to stem the jurisdictional rivalry that had been witnessed between the High Court and the former Industrial Court.

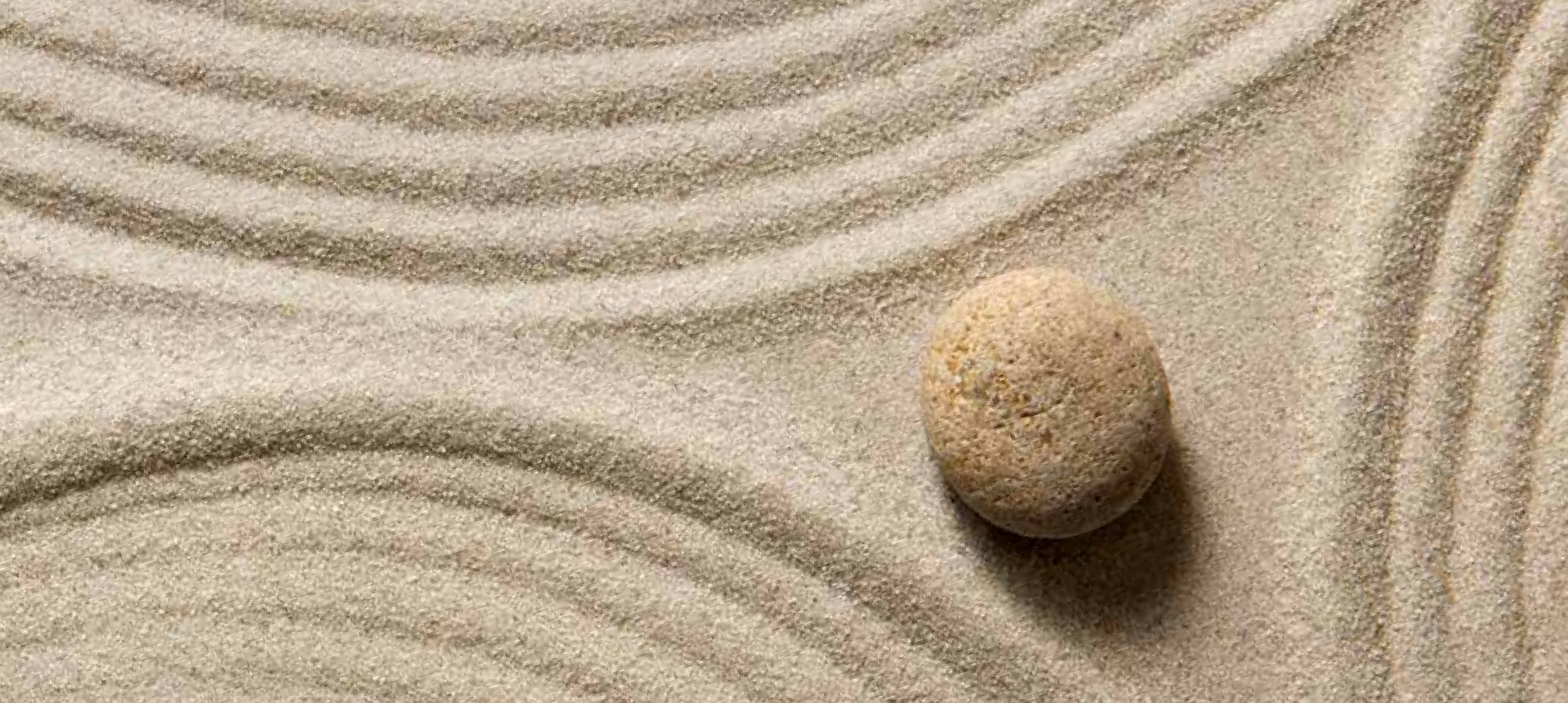
In the case of *United States International University v Attorney-General (2012) eKLR*, Justice Majanja found that under the former Constitution, the status of the Industrial Court in relation to the High Court had been somewhat controversial, in view of conflicting decisions of the High Court. For instance, whilst in some cases, the High Court took the view that the Industrial Court was a subordinate Court subject to the supervisory jurisdiction of the High Court, in other cases, a contrary view was expressed to the effect that the High Court lacked supervisory powers over the Industrial Court based on legislative policy favouring finality of labour disputes.

It is against this backdrop that Article 162 (1) of the Constitution categorised the ELC and ELRC among the superior Courts of equal status to the High Court to obviate the recurrence of similar rivalries under the new constitutional dispensation.

The *Karisa Chengo* Case

In an effort to deal with the backlog of criminal appeals then pending before the High Court, the former Chief Justice, Dr. Willy Mutunga, declared 14th to 18th October, 2013 to be a "Judicial Service Week" dedicated to the hearing of criminal appeals in the High Court and by Gazette Notice No. 13601 dated 4th October, 2013, the Chief Justice empanelled Judges of the ELC and ELRC to sit with Judges of the High Court, to hear and determine criminal appeals during that week.

One such criminal appeal related to Karisa Chengo, Jefferson Kalama Kengha and Kitsao Charo Ngati, who were the Respondents in the Court of first instance. The Respondents were charged in various Magistrates' Courts, with the offence of robbery with violence, with the 3rd Respondent facing an additional charge of rape. Upon trial, the Respondents were all convicted and sentenced to death, while the 3rd Respondent was in addition also convicted on the charge of rape, though the sentence was held in abeyance. During the Judicial Service



Week, Justice Meoli of the High Court, sitting with Justice Angote of the ELC, heard and dismissed the Respondents' appeals. Aggrieved by that decision, the Respondents preferred a second appeal to the Court of Appeal.

One of the main grounds of appeal raised by the Respondents was that the proceedings before Justices Meoli and Angote were a nullity for want of jurisdiction. In its determination the Court of Appeal held that though the High Court, the ELRC, and the ELC are Courts of equal status, they are different Courts standing in their distinct autonomies, each exercising a special dedicated jurisdiction. The Court of Appeal further held that it was only the High Court that was vested with jurisdiction to hear and determine criminal appeals from the Magistrates' Courts. It therefore upheld the Respondents' contention that Justice Angote having been appointed as a Judge of the ELC, had no jurisdiction to sit on their appeals. Consequently, the Court of Appeal declared the proceedings before the mixed bench a nullity and directed that the Respondents' appeals be heard afresh by Judges of competent jurisdiction.

Aggrieved by the Court of Appeal's decision the Director of Public Prosecutions appealed to the Supreme Court in *Republic v Karisa Chengo & 2 Others (2017) eKLR.* The Appeal raised a fundamental issue namely, whether or not the Judges of the High Court, Judges of the ELC and Judges of the ELRC have jurisdiction to sit in any or all of the three (3) Courts.

Two schools of thought emerged on the issue; the first school of thought contended that the Judges of the three (3) Courts are of equal status, but that a Judge of one Court cannot be a Judge in any other Court. For example, a Judge of the High Court cannot assume jurisdiction over a matter in the ELRC or the ELC, and conversely, a Judge of the ELRC or ELC, cannot sit as a Judge of the High Court. The opposing school of thought took the position that since all three (3) Courts are of equal status, as long as a person has been duly appointed as a Judge, he/she could sit in any of the three (3) Courts at the administrative discretion of the Judicial Service Commission or the Chief Justice.

The *Karisa Chengo* Case, therefore, presented the Supreme Court, as the highest Court in the land, with an opportunity to clarify and settle the law once and for all. By its judgment handed down on 26th May, 2017, the Supreme Court concluded that Article 162 (1) of the Constitution categorised the ELC and ELRC among the Superior Courts and it may be inferred that the drafters of the Constitution intended to delineate the roles of the ELC and ELRC, for the purpose of achieving specialisation, and conferring equality of the status between the High Court and the Specialized Courts. Flowing from this, the Supreme Court held that status and jurisdiction are different concepts, where status denotes hierarchy while jurisdiction covers the sphere of different competence and authority. Consequently, Courts can therefore be of the same status, but exercise different and distinct jurisdictions.

It is imperative that fidelity to the Constitution and the law is not sacrificed at the altar of expediency.

In addition, the Supreme Court was of the view that from a reading of the Constitution, the Environment and Land Court Act, 2011 and the Employment and Labour Relations Court Act, 2011, a special cadre of Courts, with unique jurisdiction, was provided for. The Supreme Court therefore agreed with the Court of Appeal and held that as the Constitution precludes the High Court from entertaining matters reserved to the Specialized Courts, it should, by extension, be inferred that the Specialized Courts similarly cannot hear matters reserved to the jurisdiction of the High Court. It, therefore, followed that a bench comprising of a Judge of the High Court and a Judge of the ELC such as the one that heard the *Karisa Chengo* Case was improperly constituted for the purposes of hearing criminal appeals.

Conclusion

It is clear that the decision of the Supreme Court in the *Karisa Chengo* Case comes as a setback to the earnest efforts of the former Chief Justice to clear the backlog of cases by drawing upon the judiciary's human resource and empaneling mixed benches of Judges from the different Courts. However, it is imperative that fidelity to the Constitution and the law is not sacrificed at the altar of expediency.

Going forward, the Judges of the Specialized Courts will have to focus their industry and energy in discharging their mandates by delivering a speedy resolution of disputes, falling within the confines of their respective jurisdictions and without straying into matters reserved for the High Court.

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EMPLOYED OR NOT?

COMPARING EMPLOYEES AND INDEPENDENT CONTRACTORS

It has been said that the traditional model of employment is moribund. With factors such as the entry of millennials into the employment market and technological advancements, employers have increasingly found themselves having to re-invent their employment models. The most prevalent change has been the shift from hiring fully-fledged employees to engaging independent contractors/consultants. It would seem that millennials have slightly different ideals of employment than older generations, with millennials valuing independence and flexibility over stability and job security. This phenomenon has been termed as the "gig economy" which is the growing preference for temporary or short-term engagements.

However, millennials are not solely responsible for the paradigm shift as employers too have sought to engage more independent contractors, or consultants, in a bid to minimise their responsibilities. The question that therefore arises is whether the line between an employee and an independent contractor is clearly demarcated. The South African Labour Guide gives the following quote:

Employers must clearly understand exactly how the Act defines "an employee". Many employers sit back smiling, falsely believing that all the people who work for them are not employees – so the employer has successfully circumvented the Act. "They are not employees – they are all independent contractors!! It is time to smell the coffee!!"

As aptly put in the quote above, it is vital to distinguish between employees and independent contractors, more so with the disruption of traditional employment models. A person's status as an employee or an independent contractor could mean the difference between an employer incurring or avoiding liability for acts done by the person.

In the case of *South African Broadcasting Corporation v McKenzie (CA8/98) (1998)*, the South African Labour Appeal Court was of the opinion that the legal relationship between the parties must be deduced primarily from a construction of the contract which they concluded and from the realities of the relationship between them and not simply from the way the parties chose to describe it, so the Court has to give effect to what the relationship really is and not what it purports to be.

Similarly in the Kenyan case of *Fredrick Byakika v Mutiso Menezes International Unlimited (2016) eKLR*, the Employment and Labour Relations Court (**ELRC**) found that the use of the terms such as salary, employment terms and conditions, summary dismissal do not, by themselves, confer an employment relationship. The Courts would have to look into factors such as the intention of the parties, to determine whether they give rise to an employment contract or that of an independent contractor.

In *Dewhurst v Citysprint UK Ltd ET/2202512/2016*, the Central London Employment Tribunal held that it matters not how many times an employer proclaims that he is engaging a man as a self-employed contractor; if he then imposes requirements on that man which are the obligations of an employee and the employee goes along with them, the true nature of the contractual relationship is that of employer and employee.

In the Kenyan case of *Maurice Oduor Okech v Chequered Flag Limited (2013) eKLR*, the ELRC found that in determining the existence of an employment relationship, the Court is expected to go beyond mere terminologies employed by the parties either in their pleadings or in their testimony. The Court is called upon to inquire into the entire spectrum of facts and circumstances to establish whether an employer/employee relationship as defined in the Employment Act, 2007 (**the Act**) actually exists.

Kenyan law distinguishes between an employee (contract of service) and an independent contractor (contract for service). A *contract of service* is one that creates rights and responsibilities between parties to an employment relationship, whereas a *contract for service* implies that a person is self-employed where the work is under their own terms, as against a person who is employed and is under specified terms with legal protection and defined remuneration. The issue of whether there is a contract of service or a contract for service is one that can be established in law or in fact but also noting that most independent contractor contracts are not written, the facts of each case are paramount and worth consideration as to the intentions of the parties to such a contract.

Section 2 of the Act defines an employer as, "*any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual.*" The Court in *Stanley Mungai Muchai v National Oil Corporation of Kenya (2012) eKLR*, held that under section 2 of the Act 2007, a contract of service is a necessary ingredient in the definition of

"... it matters not how many times an employer proclaims that he is engaging a man as a self-employed contractor; if he then imposes requirements on that man which are the obligations of an employee and the employee goes along with them, the true nature of the contractual relationship is that of employer and employee."

employer. The Act defines a contract of service as, "*an agreement, whether oral or in writing, and whether expressed or implied, to employ or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership.*"

Courts have held that there is a thin line between an employee who is under an employment contract or under a contract of service as against an employee who is employed under a contract for service. The employment contract/contract of service entails an employee undertaking work with rights and duties for specified remuneration, while a contract for service indicates independence, lack of control and an employee who is not integrated into the workforce of an employer for purposes of acquiring certain rights and responsibilities.

Factors to consider in determining the existence of an employment contract include; the degree of control exercised by the employer; whether the worker's interest in the relationship involved any prospect of profit or risk of loss; whether the worker was properly regarded as part of the employer's organisation; whether the worker was carrying on business on his own account or carrying on the business of the employer; the provision of equipment; and the incidence of tax and national insurance and the parties' own view of their relationship. Independent contractors are normally given the contract for service for specific periods while the employment contracts provide for long-term contracts with direct services being provided by the employee.

There are also specific tests employed to determine the status of the relationship. These include:

- The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work
- The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business
- The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit
- Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time

Courts have however cautioned that the tests are not to be used exclusively by themselves as they only serve as guides based on the facts of each case. The hallmarks of a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, run his own business, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his/her services and be paid accordingly and will not be subject to usual "employment" matters such as the deduction of PAYE (tax on income), will not get annual leave, sick leave and other normal entitlements of an employee.

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DOUBLE-DOUBLE

THE KENYAN AND SOUTH AFRICAN COURTS' APPROACH TO THE *IN DUPLUM* RULE

In literal terms, *in duplum* means "double the amount". The *in duplum* rule generally holds that interest ceases to accrue once the sum of the unpaid or accrued interest equals the amount of the outstanding principal, whether or not any principal or interest is payable at the time. In simpler terms, one should not be made to pay back more than double what one borrowed. For example, if one borrows KES 10 million, then the limit placed on the interest under the *in duplum* rule is KES 10 million, meaning that the borrower cannot be required to repay more than KES 20 million, in total. The *in duplum* rule is applied to non-performing loans and its aim is to prevent exploitation of borrowers by lenders through the levying of excessive interest on outstanding loans.

The *in duplum* rule is based on South African common law and has its roots in ancient Roman and Dutch law. The rule was codified into South African statute law through section 103(5) of the National Credit Act No. 34 of 2005, which stipulates that, "*despite any provision of the common law or a credit agreement to the contrary, the amounts … that accrue during the time that a consumer is in default under the credit agreement may not, in*

aggregate, exceed the unpaid balance of the principal debt under that credit agreement as at the time that the default occurs."

Prior to the introduction of the in *duplum* rule into Kenyan law, Kenyan Courts could only pay lip service to the rule. For instance, in the case of *Pelican Investment Ltd v National Bank of Kenya Ltd (2000) 2 EA 488*, Onyango-Otieno J stated:

> *"I agree that it would be an excellent law but I cannot apply it here because it is a legal proposition that has arisen from the legislation in South Africa... Unfortunately, it is applicable under ancient Roman and Dutch law and is applicable in South Africa, but not in this country...I do agree that such a legal proposition might be ideal in this country as it would ensure that the debtors don't suffer the requirement upon them to extra-large interests caused by the indolence and lapse or deliberate failure by the creditors so as to let the unserviced loans accumulate interest to unimaginable levels... However, to introduce this Dutch law by way of a judgment or a ruling into the common law country will in my opinion be too drastic a step to take..."*

There was an initial attempt to introduce the in *duplum* rule into Kenyan law vide the Central Bank of Kenya (Amendment) Act, 2000, popularly known in its Bill form as the 'Donde Bill' after the lawmaker who first tabled the Bill in Parliament, Hon. Joe Donde. However, the Donde Bill had included a provision that criminalised its violation and had a retrospective commencement date of 1st January, 2001. Upon challenge of the law by the Kenyan Bankers Association, the retrospective application of criminal charges was held to be unconstitutional. The statute was later repealed by the Central Bank of Kenya (Amendment) Act No. 8 of 2004 and it appeared that the *in duplum* rule was destined to remain an illusion for Kenyan borrowers.

However, all this changed with the passing into law of the Banking (Amendment Act) Act No. 9 of 2006 (**the Amendment Act**). The Act came into force on 1st May, 2007 and amended the Banking Act (Cap. 486) (**the Act**) to include a new section 44A and with it, the *in duplum* rule. The section provides as follows:

(1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).

(2) The maximum amount referred to in subsection (1) is the sum of the following:
- The principal owing when the loan becomes non-performing;
- Interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing, and
- Expenses incurred in the recovery of any amounts owed by the debtor

With the in *duplum* rule having been codified into Kenyan law, the question of its applicability and scope arose, particularly with regards to the specific institutions and types of loans covered under the rule. The wording of section 44A suggests that the *in duplum* rule only applies to loans given by "institutions" which is a term that is expressly defined under the Act.

In contrast, the South African Courts have accorded the *in duplum* rule a wide scope so as to extend its application to cover all contracts involving a loan or capital amount that is subject to interest. In the case of *Ethekwini Municipality v Verulam Medicentre (PTY) Ltd (2005) ZASCA 98*, the Supreme Court of South Africa held that the rule, "*does not only relate to money lending transactions but applies to all contracts where a capital amount that is subject to interest at fixed rate is owing.*"

For example, if one borrows KES 10 million, then the limit placed on the interest under the in duplum rule is KES 10 million, meaning that the borrower cannot be required to repay more than KES 20 million, in total.

However, the Kenyan Courts have taken a different approach from the South African Courts and given the rule a narrower application. In the case of *Lee G. Muthoga v Habib Zurich Finance (K) Limited & Another (2016) eKLR*, the Court of Appeal stated that, "*the application of the in duplum principle in Kenya has been specifically designed to apply to formal loans given by financial institutions.*"

The High Court also had occasion to consider the scope of the in *duplum* rule in *Desires Derive Limited v Britam Life Assurance Co. (K) Limited (2016) eKLR*. In limiting the application of the rule to financial institutions as defined under the Act, the Court stated that:

> *"..the in duplum rule which was given statutory clothing in Kenya by section 44A of the Banking Act is applicable to institutions as defined in the Act. Under the Act, bank means "a company which carries on, or proposes to carry on, banking business in Kenya but does not include the Central Bank". While a financial institution means "a company, other than a bank, which carries on, or proposes to carry on, financial business and includes any other company which the Minister may, by Notice in the Gazette, declare to be a financial institution for the purposes of this Act". A schedule to the Central Bank of Kenya Act has a list of banks and financial institutions under section 2 of the Act. The Defendant is not one of the banks and institutions in that schedule. The submission by the Defendant's Counsel that the provisions of section 44A of the Banking Act does not bind the Defendant is therefore not without force."*

The High Court's decision in *Desires Derive Limited v Britam Life Assurance Co. (K) Limited* followed an earlier decision in *Karige Kihoro v Industrial Commercial Development Corporation (2011) eKLR*, involving the Industrial and Commercial Development Corporation (**ICDC**). Upon the Plaintiff seeking to rely on the *in duplum* rule, ICDC pleaded that it was a creature of the Industrial Commercial and Development Corporation Act (Cap. 445) and was thus not bound by the provisions of section 44A of the Act. In upholding ICDC's argument, the Court stated as follows:

> *"Section 2 of the Central Bank of Kenya Act also makes reference to specified financial institutions which simply means a financial institution or mortgage finance company within the meaning of the Banking Act which is specified by the bank for purposes of the Act. There is a schedule of such specified financial institutions. That schedule does not include ICDC. It is therefore evident that the defendant is not a financial institution and is therefore not subject to the provisions of section 44A of the Banking Act."*

It may, therefore, be concluded that unlike their South African counterparts, Kenyan Courts have consistently restricted the application of the i*n duplum* rule under section 44A of the Act to loans offered by banks and financial institutions, within the strict meaning of the Act. Accordingly, institutions and other business entities that fall outside this scope are not subject to the rule, borrowers from such institutions and business entities would have no recourse to the rule in an attempt to limit their interest exposure. Such borrowers would thus be liable to repay their lenders such amounts as are provided under the terms of the lending agreements, whether or not they are in excess of "double the amount" borrowed.

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IN TRUST:

STEPS OF ESTABLISHING A CHARITABLE TRUST

A charitable trust is an entity that is usually set up for benevolent causes. It comprises of a "settlor" who advances property to a "trustee" under a trust, to hold and manage the property for the benefit of another person known as the "beneficiary". In Kenya, the law governing the establishment or registration of a charitable trust is contained in the Trustees (Perpetual Succession) Act (Cap. 164) (**TPSA**). Section 3(1) of the TPSA provides that:

> *"Trustees who have been appointed by any body or association of persons established for any religious, educational, literary, scientific, social, athletic or charitable purpose, or who have constituted themselves for any such purpose, or the trustees of a pension fund or provident fund may apply to the Minister in the manner provided in this Act for a certificate of incorporation of the trustees as a corporate body."*

The Minister under reference is the Lands Cabinet Secretary.

Step 1: Preparation of a Trust Deed

The first step involves the preparation of a trust deed which is the constituting document of the trust. A trust deed should contain the following information:-

- The name of the trust
- The objects of the trust
- Appointment of trustees and the powers of the trustees
- Procedures for resignation, removal and/or replacement of the trustees
- All matters relating to meetings of the trustees

Once prepared, the trust deed is executed by the founding trustees.

Step 2: Stamping

The trust deed is then taken for assessment of stamp duty. Once assessed, stamp duty is paid and the trust deed is stamped as evidence of the payment. Currently, the duty payable is a nominal amount of KES 200.

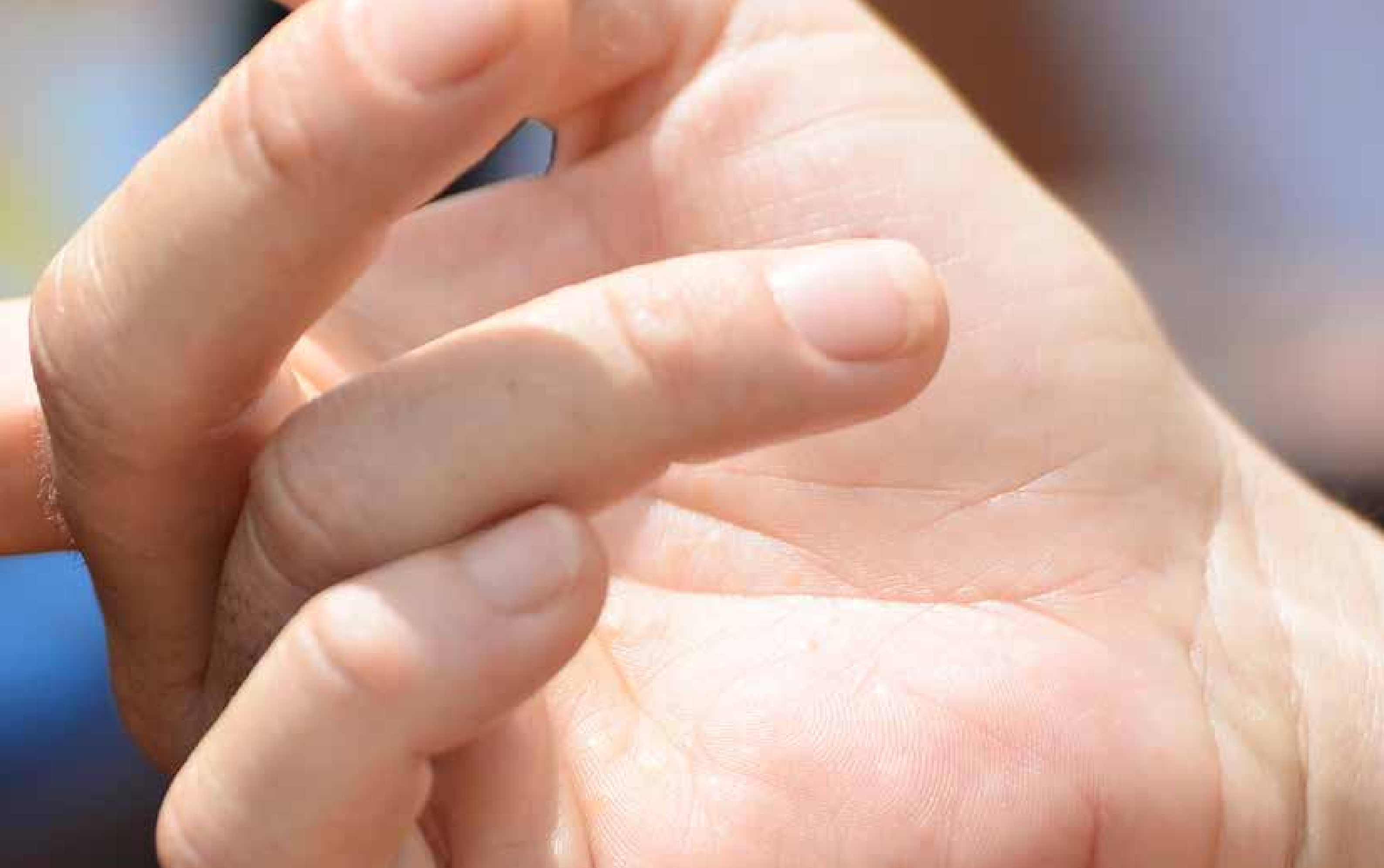
Step 3: Registration

The registration process is in two (2) stages:

Stage 1: Registration under the Registration of Documents Act

The Registration of Documents Act (Cap. 285) (**RDA**) is a general statute under which various document may be registered. Section 4 of the RDA provides among others, that all documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) shall be registered.

There are two (2) registries of documents in Kenya. The Nairobi Registry (also known as the Inland Registry), caters for Nairobi and



the rest of the country apart from the Coast region while the Mombasa Registry (also known as the Coast Registry) caters for registrations of documents in the Coast region. The Inland Registry is located at Ardhi House in Nairobi while the Coast Registry is located at the Mombasa Lands Registry offices. The registration fee for a trust deed is KES 500.

Stage 2: Incorporation under the Trustees (Perpetual Succession) Act

A formal application in the form of a petition signed by the proposed (founding) trustees is made to the Cabinet Secretary, for incorporation of the trust under the TPSA. The petition should contain the following details:

- The objects and constitution of the trust together with the date of and parties to, every deed, will or other instrument, if any, creating, constituting or regulating it
- A statement and short description of the property or interest therein which at the date of application, is held or intended to be held by the trustees
- A statement as to whether the trust concerned is a society registered or exempted from registration under any other registration statute together with the relevant certificate of registration, exemption or incorporation
- The names and addresses of the trustees
- The proposed title of the corporate body, of which title the words "trustees" and "registered" shall form part of
- The proposed device of the common seal (pictorial representation)
- The regulations for the custody and use of the common seal

The petition should also be accompanied by the following documents:

- Copy/copies of title(s) as proof that there's property to be held by the trust
- The trust's current financial status
- A statement concerning the proposed trust's source of funding
- Curriculum vitaes of the proposed trustees or employees

A charitable trust is an entity that is usually set up for benevolent causes. It comprises of a "settlor" who advances property to a "trustee" under a trust, to hold and manage the property for the benefit of another person known as the "beneficiary".

The filing fee for the petition is KES 3,000. This second stage is usually a slow process, as the input of different agencies is required in the various attendant approvals, including clearance of the proposed trustees. The trustees are usually vetted extensively, so as to ascertain whether they are persons of integrity, who can be entrusted with the oversight and management of resources of the proposed trust.

The trust will be incorporated once the process is complete. Upon incorporation, a Certificate of Incorporation is issued as evidence of due compliance with the requirements of the TPSA. The trust now enjoys the same powers as a company i.e. it becomes a body corporate with perpetual succession, with power to sue and be sued in its name, as well as power to acquire, hold and deal with its property as per the conditions contained in the certificate of incorporation.

The trustees may be replaced by others whenever necessary during the trust's operations in the manner stipulated in the trust deed. The trustees may also apply to change the name of the trust, if need be.

It is important to note that where a trust holds land, any change of trustees should (where applicable) be updated in the records at the relevant Registry, for the sake of transparency and constructive notice to the public.

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RISING IN AFRICA:

A LOOK AT THE GROWTH OF MEDIATION

In recent years, there has been a move by lawmakers towards encouraging mediation as opposed to Court litigation and the use of private mediations (where parties either appoint a private mediator directly or have the mediator appointed through an organisation) is now a popular and effective method of dispute resolution.

What is Mediation?

Mediation is a form of alternative dispute resolution (**ADR**), which can be performed without the need for engaging or continuing with litigation through the Court system. It is a voluntary, confidential and non-binding process, managed and facilitated by a neutral person (the mediator) who assists the parties to work towards a negotiated settlement. Any decision to settle is made entirely by the parties, who cannot be forced to settle and will only settle if the terms of that settlement have been agreed and are mutually acceptable. This means that parties have control and choice over the settlement structure, that best suits them. They are also able to withdraw from the mediation at any time if the process proves unworkable.

Role of a Mediator

A mediator's role is to facilitate discussion between the parties, encourage reflection on the key issues and identify areas of common ground that may lead to a resolution. The mediator will not give an opinion on the merits of the dispute, but, will test each party's position with them, highlighting strengths and weaknesses, in order to assist each party in considering whether settlement is possible.

At the outset, it is important to recognise that a mediator plays an intermediary role in the mediation. This is embodied by the duties a mediator owes to mediating parties which are to remain impartial, maintain confidentiality of both parties (unless permission to disclose information is given) and ensuring that all parties are agreeable to, and have authority to approve any settlement terms.

That said, the choice of mediator is an important factor in the process. A mediator's professional background, industry knowledge and experience are all equally important considerations. Though it is not necessary for a mediator to have specific expertise in the subject matter

of a dispute, a mediator who is well-versed in a particular subject matter may be an added advantage, as it may aid in the negotiations and settlement considerations.

Advantages of Mediation

The development and increasing relevance of mediation is highlighted by the advantages it offers parties over other forms of dispute resolution. These include:

- *Confidentiality*: Any information shared by either party with a mediator remains confidential, unless express consent to disclose the information to the other party is given. Furthermore, parties usually agree that any details shared, whether relevant to the dispute or the terms of settlement (other than the fact of the mediation) remain confidential
- *Flexibility*: Parties are freed from the encumbrance of rules of procedure involved in litigation or arbitration and so a mediator is able to tailor the process to meet the needs of the parties
- *Cost-effectiveness*: The cost of mediation is generally much lower as compared to the costs required in litigation or arbitration
- *Without prejudice*: Mediation is a without prejudice, non-binding process. This allows parties to adopt compromise solutions during negotiations, which will not prejudice their position in any litigation should a settlement not be reached. This in itself increases the options available to parties in considering alternatives for settlement
- *Low-risk opportunity for a speedy resolution*: In a sense, parties have 'nothing to lose' in agreeing to mediate. If the mediation proves unsuccessful, parties will benefit from the opportunity of discussing the issues in dispute, as well as considering the strengths and weaknesses of their position
- *Address problems with communication*: A breakdown in communication is often the core catalyst to any dispute. The neutrality of a mediator allows him/her to act as an intermediary between parties to explore, address and possibly overcome this challenge. This creates a better opportunity for preserving social, family and/or business relationships that would have otherwise not survived the adversarial systems of litigation or arbitration

Mediation in Africa

Key jurisdictions in Africa have made notable strides to develop and encourage the use of mediation. This is due to a combination of factors challenging judicial systems in Africa, such as a backlog of cases, high litigation costs and distrust in the independence of legal systems.

Court-annexed mediation is a common model where in pending judicial proceedings, a Judge will refer parties to a third-party mediator. This has now been adopted in a number of jurisdictions on the continent.

In Nigeria, the Multi-Door Courthouse Scheme started in Lagos in 2002, in order to address the backlog of cases in the Nigerian Courts by providing ADR processes (including mediation) within the state judiciary. Parties were provided with access to ADR processes facilitated by the judiciary, with the final recourse being litigation, if a settlement was not reached. Then, in a further deliberate measure to advance ADR practices, the Lagos State High Court Civil Procedure Rules were implemented on 31st December 2012, in which it is mandatory for parties to attempt ADR before approaching the court for litigation of their disputes.

In Egypt, the establishment of Economic Courts in 2008 required Judges to assist parties in reaching a settlement at the pre-trial stage. Further, in 2009, the International Finance Corporation started a

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project to train mediators to manage disputes through mediation and raise public awareness on the advantages of mediation.

In South Africa, the Rules of Voluntary Court-Annexed Mediation became operational on 1st December, 2014, with pilot projects first implemented in Gauteng and the North-West provinces. These rules not only availed an opportunity for restorative justice under mediation but also allowed parties to refer their disputes to mediation at any stage in the proceedings provided a judgment had not been handed down by the presiding judicial officer.

In Kenya, the High Court (Family and Commercial Divisions) implemented a pilot project for Court-annexed mediation following the enactment of the Mediation (Pilot Project) Rules, 2015. Under these Rules, all civil actions are screened by the Mediation Deputy Registrar with suitable cases being referred to mediation. The Mediation Accreditation Committee (established by section 59A of the Civil Procedure Act (Cap. 21)), maintains a register of qualified mediators and appoints a mediator to manage each mediation.

The Future of Mediation in Africa

In the context of Court-annexed mediation, there has been a debate on whether it is appropriate for Courts to 'coerce' parties into mediating their dispute, when they have initiated litigation. This is as contrasted to private mediation where parties choose to mediate and agree upon a mediator of their choice.

Plainly, Court-annexed mediation, even where it is a mandatory process, does not amount to forcing the parties into entering a settlement. Parties can opt-out of the mediation at any point, emphasising the 'nothing to lose' nature a mediation process offers parties. This is in contrast to the position in England, whereby parties can face sanctions in costs if they fail to engage in ADR. For example, if a party unreasonably refuses an offer to mediate, a Court can sanction this behaviour by making that party pay a portion of the other party's costs, even if that party is ultimately successful in the dispute.

The examples of the developments in Egypt, Kenya, Nigeria and South Africa and all point to the recognition of the benefits of mediation in Africa. As such, it is clear that courts in Africa are not only giving significance to mediation as a dispute resolution practice but also encouraging it. These successes should encourage parties to consider the option of engaging in private mediation at an early stage of their involvement in a dispute. Conversely, the shift of judicial policies of Courts in Africa to embrace Court-annexed mediation, should prompt parties to mediate before the Courts impose it.

In conclusion, the need for parties to consider whether mediation would be a suitable form of resolving a dispute cannot be gainsaid. The voluntary and flexible nature of private mediation empowers parties to resolve their disputes, avoiding the need for protracted litigation, or being restricted by the formality and structure of litigation/arbitration procedures.

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