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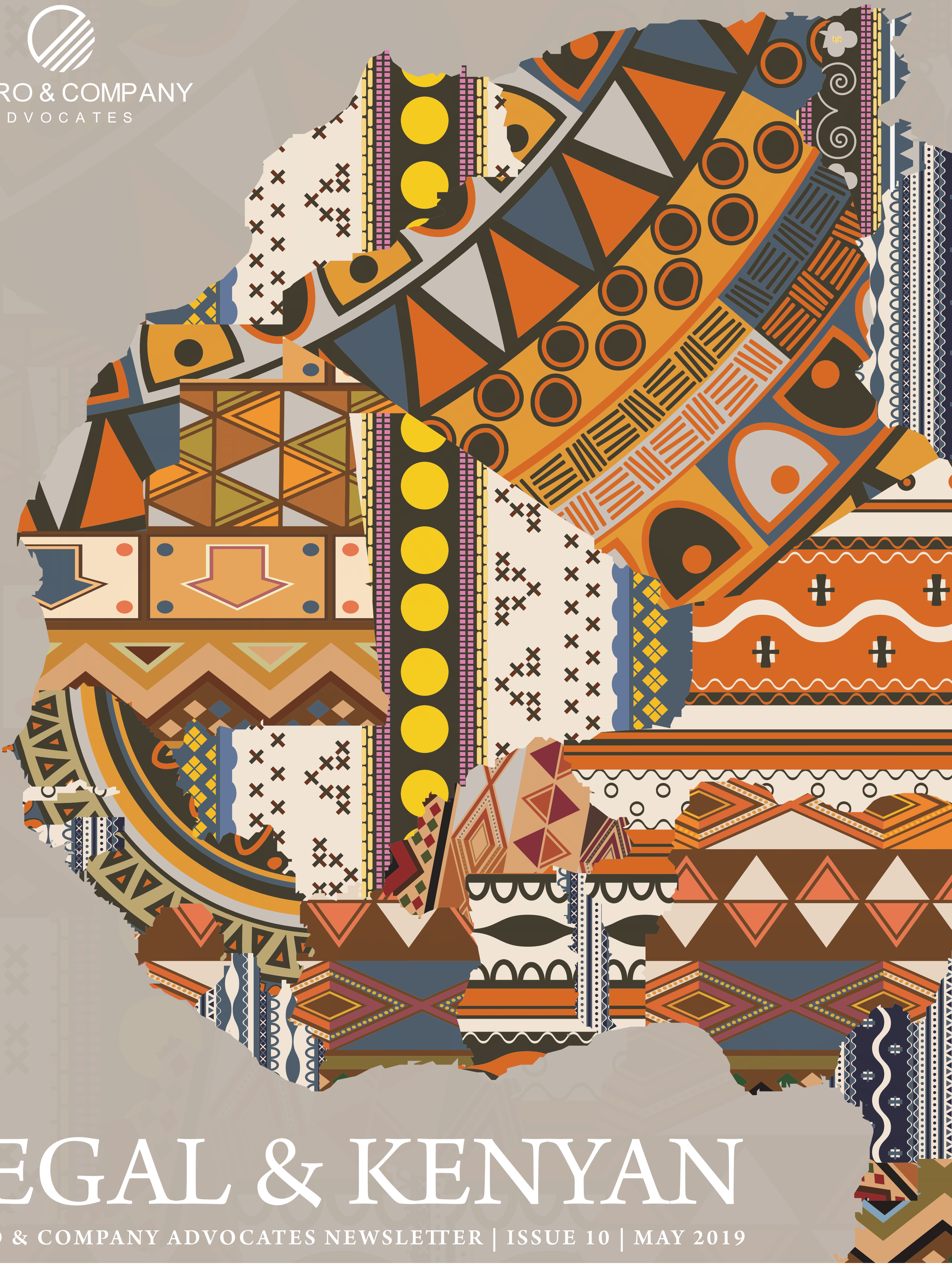
ADVOCATES



LEGAL & KENYAN

ORARO & COMPANY ADVOCATES NEWSLETTER | ISSUE 10 | MAY 2019

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Milestone Mark: Issue Ten

Greetings!

The idea of this newsletter was conceived sometime in May of 2015. This issue therefore marks a significant milestone, being the publication's tenth issue since inception, while Legal & Kenyan also turns four years old. Age notwithstanding, we are as excited now in the release of this issue as we were when we first launched this publication back in 2015!

As is the norm, our writers deliver an exciting repertoire of articles on wide ranging legal topics. In addition to our home-grown contributors, we are pleased to have external contributors in this issue, including Rubin Mukkam-Owuor of JMiles & Co., a legal services entity that provides specialised services in the fields of international arbitration and legal consulting.

In the pages that follow, Geoffrey Muchiri discusses the essentials of marine cargo insurance while Angela Ogang and I examine the challenging of wills and other claims that may be made to the estate of a deceased person. Patricia Mutiso explains what green bonds are and how they might help in achieving sustainable development goals while Noella Lubano, Jill Barasa and Eva Mukami team up to provide an analysis of alternative dispute resolution mechanisms in the context of online commerce. Pamella Ager and James Kituku deliver two articles on land matters one, an assessment of the National Land Commission and the other, an overview of new Land Regulations that govern the process of conversion of land (from public land to private or community land) and just compensation of land owners in cases of compulsory acquisition. Nelly Gitau and Tesrah Wamache discuss the pros and cons of purchasing commercial premises vis-à-vis leasing, while Rubin Mukkam-Owuor of JMiles & Co. finishes off with an insightful article about the need for arbitral tribunals to ensure the expeditious and efficient conduct of proceedings before them. All under one cover.

Enjoy the read!

Sincerely,

John Mbaluto,
Editor

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Senior Partner's Note

"*Safari ndefu huanza kwa hatua moja*" - a Swahili proverb that is translated to mean, a long journey starts with a single step. Four years ago, we made a commitment to engage with you and to create a communication channel that will continuously update you in the recent developments of the dynamic legal landscape and with that, we published the first edition of our newsletter. With the release of this tenth issue, I am proud and happy with what Legal and Kenyan has become. Particularly, I would like to thank you for continuously interacting with our newsletter and for the feedback shared with us both formally and informally.

Asante.

George Oraro SC
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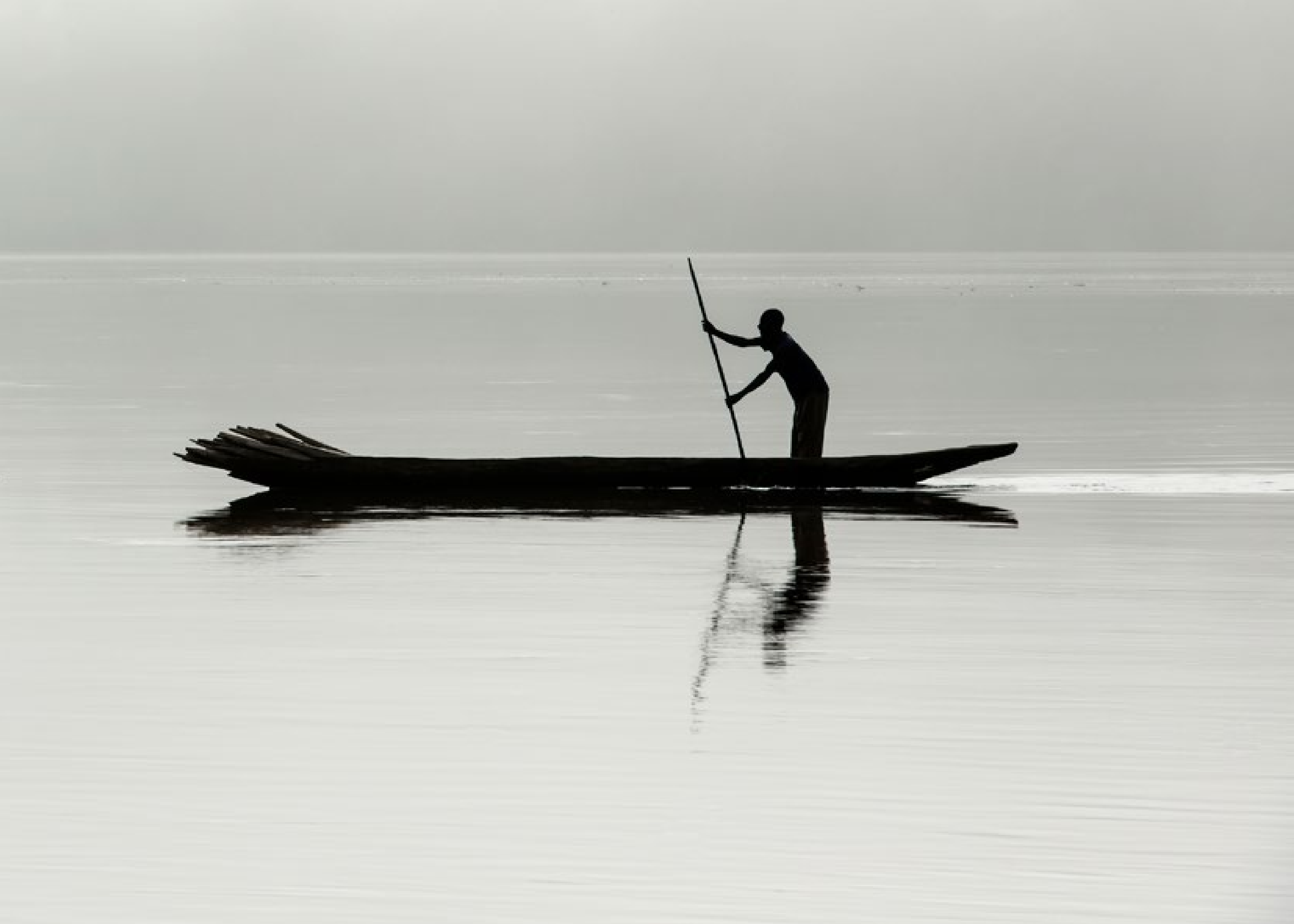
RECENT ACCOLADE

TOP RANKED Chambers GLOBAL 2019

"They're very pleasant to work with. They have a very collegiate atmosphere and a great work ethos."

Chambers Global Guide, 2019.



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SAFE SAILING:
THE ESSENTIALS OF MARINE CARGO INSURANCE

Kenya has been for a very long time, a net importer of goods which provide (quite literally) the very steam and engines used to drive Kenya's economy forward. From the 1990s, Kenya has been a liberalised economy and a clear indication of this has been the fact that despite being a net importer of goods and services, importers have never had any restriction on their choice of insurers, who predominantly were foreign and sourced more often than not by the seller under a Cost Insurance Freight contract. This was despite the provisions of the Insurance Act (Cap. 487), in particular, section 20 which provided that there was a duty to procure local insurance policies unless expressly exempted in this regard by the Commissioner of Insurance (**the Commissioner**).

However, this express provision of the Insurance Act was not strictly enforced with regards to importation of goods into Kenya. Consequently, on 1st January, 2017 new conditions were imposed on importers requiring them to ensure that they procured insurance policies from local insurers for goods destined for Kenya. The proverbial sting in the tail would be provided by corresponding "support" from the Kenya Revenue Authority (**KRA**), which operates the software that tracks imported goods. KRA was under strict instructions to ensure that the goods imported into Kenya after 1st January 2017, were allowed into the country only if the goods were covered under insurance policies issued by Kenyan insurance companies.

What informed this decision? As mentioned above, Kenya as a net importer, was not only on the receiving end with the rest of the world insofar as the balance of trade was concerned but was also haemorrhaging insurance premiums which were being paid out to foreign insurance companies as opposed to local insurance companies. The Intergovernmental Standards Committee on Shipping made up of members drawn from Kenya, Tanzania, Uganda and Zambia put the figure of lost insurance premiums at a sum of USD 800 million annually. Accordingly, in late 2016, the Kenyan Principal Secretary in charge of transport, in conjunction with the KRA, issued new guidelines which required traders and importers to ensure that goods destined for Kenya and imported through Kenyan ports were insured with Kenyan insurers. These guidelines have now received legislative backing through amendments to the Insurance Act, and the Marine Insurance Act (**the Act**).

In 2017, the Act was amended to incorporate a section that gave special cognisance to marine cargo insurance. The new section 3A of the Act defines a contract of marine cargo insurance as a contract whereby the insurer undertakes to indemnify the assured in the manner and to the extent thereby agreed, against the losses incident to any movable property other than a ship including money and other valuable securities. In addition, the Act makes it mandatory for a person with insurable interest in marine cargo to place marine cargo insurance with an insurer registered under the Insurance Act unless prior exemption has been granted by the Commissioner.

The Act provides that a contract of marine insurance is inadmissible in evidence unless it is embodied in a policy in accordance with the Act. The policy may be executed and issued either at the time when the contract is concluded or afterwards. As for the specific contents of the policy, the Act provides that as a bare minimum, the policy must be signed and/or sealed by the insurers and must contain:

- The name of the assured (or of the person who effects the insurance on behalf of the assured)
- The subject matter insured
- The risk insured against
- The voyage or period covered by the Policy
- The sum(s) insured
- The name of the insurer(s)

Types of Policies

There are numerous marine cargo policies which are available from Kenyan insurers. However, despite the appellations that local Kenyan insurers may give to their policies they really are based on the widely recognised Institute Cargo Clauses (**ICC**) Policies - A, B and C.

ICC Cargo Clauses A Policy

This is the most comprehensive cargo policy that one can obtain, as it is often said to operate on an "all risks" basis as it is cover granted against "all risks of loss of or damage to the subject-matter insured except as provided" to the contrary in the policy. These excluded risks are damage or loss to the subject matter insured on account of the willful misconduct of the assured; ordinary leakage or loss in weight in volume or ordinary wear and tear; insufficiency or unsuitability of packaging or preparation; inherent vice; damage or expense caused by delay; loss, damage or expense arising from the insolvency of the owners/managers or charterers /operators of the vessel; use of any weapon of war employing atomic or nuclear fusion of radioactive matter; unseaworthiness of the vessel (where the assured is privy to such unseaworthiness); war/civil war/revolution, rebellion, civil strife or the hostile act by or against a belligerent power; capture, seizure, arrest or detainment (piracy excepted); derelict mines, torpedoes, bombs; strikers, locked-out workmen or persons taking part in labour disturbances, riots or civil commotions; terrorist or any person acting from political motive.

ICC Cargo Clauses B Policy

This type of policy adopts a named perils approach to the scope of cover. In the words of Professor Howard Bennett, this policy enumerates the perils which are covered under the "risks covered" clause provided they are capable of qualifying as perils of the sea if fortuitous in their occurrence. The perils covered are loss or damage to the subject matter insured attributable to fire or explosion; vessel of craft being stranded grounded sunk or capsized; overturning or derailment of land conveyance; collision or contact of vessel craft or conveyance with any external object other than water; discharge of cargo at port of distress; earthquake, volcanic eruption or lightning; general average sacrifice; jettison or washing overboard; entry of sea lake or river water into vessel/craft/hold/conveyance, container, liftvan or place of storage; total loss of any package whilst loading into or unloading from vessel or craft; general average and salvage charges; and proportion of liability under a "both to blame collision" clause. The excluded perils are no different from those excluded under the ICC Cargo Clauses A Policy.

ICC Cargo Clauses C Policy

These cover almost the same risks as an ICC Cargo Clauses B Policy save for entry of sea, lake or river water into the vessel. The exclusions which are excluded under ICC Cargo Clauses Clauses B Policy are equally excluded under this Policy.

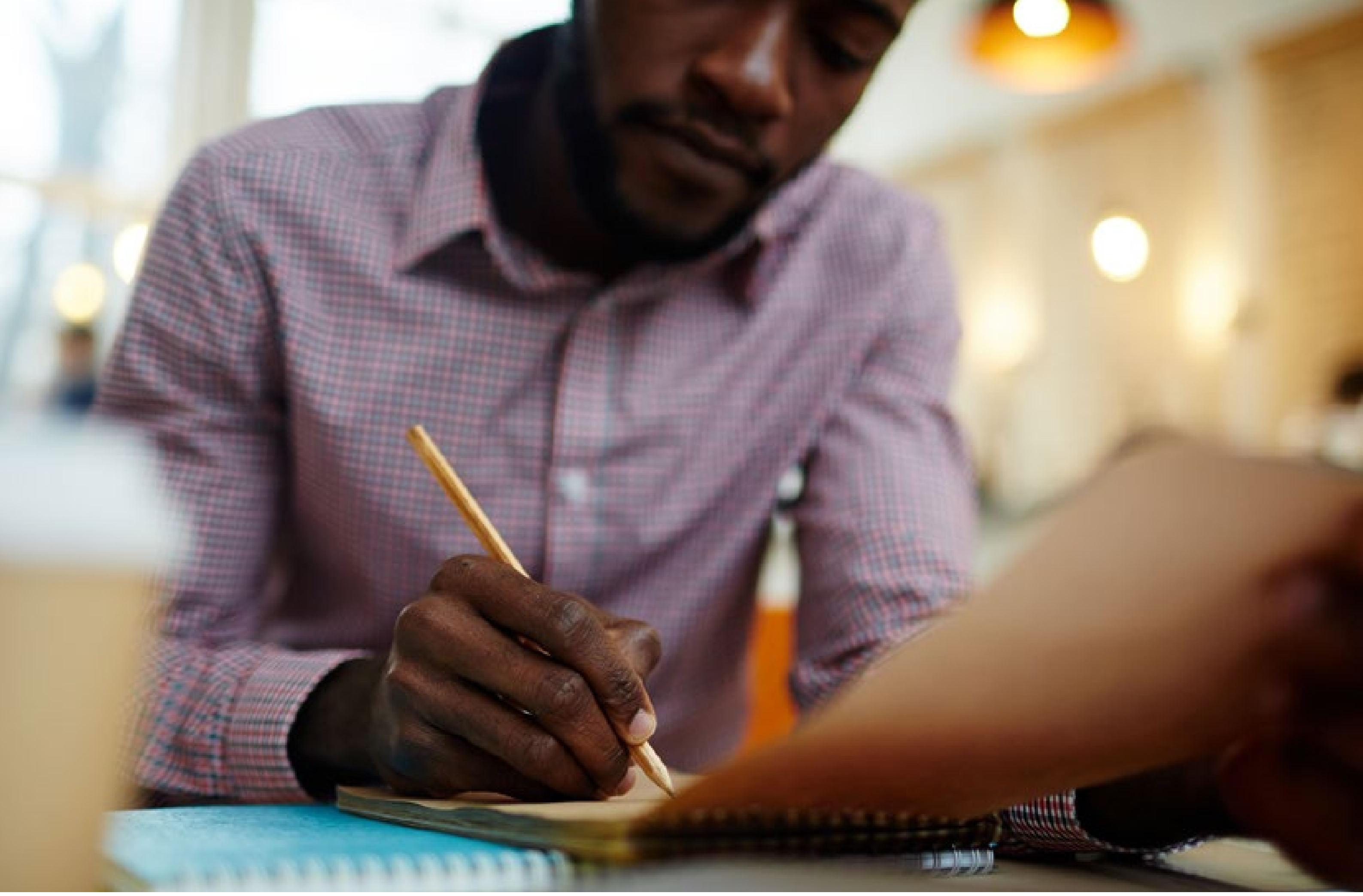
Piracy

According to Martin N. Murphy in his book, *Somalia The New Barbary*, since the early 1990s the waters of Somalia have been among the most pirate-infested in the world. The author goes on to state that the International Maritime Bureau (**IMB**) had in its statistics noted with concern that by 2006 piracy attacks off Somalia had grown to such an extent that they exceeded those of any other State since the records begun being kept by the IMB in 1991. This unfortunately has continued to be the case thereby posing risks to cargo interests and shipping in general, as the piracy menace continues to imperil trade and travel in East Africa despite the various coalitions of countries attempting to stamp out this piracy menace through their navies (and having some success in that regard).

It is no wonder that in the year 2011, the English Court of Appeal had to address, amongst other issues, the legality of ransom payments paid to Somali pirates to secure the release of a shipping vessel and the cargo onboard in the case of *The Bunga Melati (2011) 1WLR 2012*. Given the fact that piracy is a menace that cargo interests will continue to encounter it will be prudent to ensure that whatever policy of marine cargo insurance one secures, cover is adequately provided against piracy attacks and the attendant consequences as the last decade or so has witnessed increasing incidents of piracy which have been reported off the coast of Somalia threatening marine interests over the Indian Ocean.

Useful Tip

So the next time you import your vehicle from Japan, Germany or any other country, ask your agent (if you are using one) for a copy of your marine insurance cargo policy that should bear your name as the assured, and should emanate from a local Insurer. In the event you need an exemption to procure insurance cover from outside Kenya, bear in mind that you would need to seek an exemption from the Commissioner.



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FAIR AND SQUARE:

CHALLENGING WILLS AND OTHER CLAIMS TO THE ESTATE

Sad tales abound of heirs and beneficiaries fighting over assets left behind by a deceased person in protracted legal disputes, often with devastating and deleterious effects on family relationships. Such disputes usually occur in situations where the deceased accumulated vast amounts of wealth during his or her lifetime and set up a trust to manage his or her estate posthumously. They may also arise where family members feel that they have been unfairly left out of the deceased's will, or simply where there are divergent views on how property should be distributed or managed. Regardless of the reasons for the disagreements amongst family members, challenging a will is a difficult and emotional decision which merits careful consideration of the basics of a will contest, and prospects of success.

Generally, a will should not be challenged simply because one believes the estate would be better off in the hands of another relative or because one holds the view that a beneficiary did not receive a fair share of the deceased's estate. One needs to show that there is an issue with the form of the will, or that the deceased was not competent when the will was executed or was unduly influenced by someone who stands to benefit financially from the terms of the will. One may also challenge the will on the basis that a dependant of the deceased was left out of the will or was not reasonably provided for in the will.

Grounds for Challenging the Validity of a Will

There are several grounds upon which the validity of a will can be challenged. These include the following:

- The testator (the person who created the will) was not of sound mind when the will was executed, either because he was suffering from a physical or mental illness at the time or for some other reason, but evidence to that effect will need to be adduced (e.g. medical records and diagnosis).
- The testator was coerced into making the will or any part thereof. This requires evidence of the fact that the testator did not make the will of his own free will but was influenced by some external factors. It is important to note that the courts have held that some undue influence or force must be exerted on the testator.
- The will fails to carry out the testator's intentions either due to a clerical error or a failure on the part of the person preparing the will to understand the testator's intentions. To illustrate, in the English case of *Re Morris (deceased) (1970) 1 All ER 1057*, the testatrix executed a will bequeathing money to a particular beneficiary in sub-clause 7(iv). She later instructed her solicitor to prepare a codicil altering the provisions of the said clause, but instead the solicitor mistakenly prepared a codicil revoking all of clause 7, thus depriving the intended beneficiary of his bequest. The court ruled

that it had the power to omit words from the will upon proof that they had been made in error, so as to give effect to the testator's true intention.

- There is an allegation of fraud, for instance where it can be shown that the testator's signature was forged or where additional pages were inserted, or where a beneficiary knowingly used false statements which caused the testator to change the contents of the will to the benefit of the beneficiary. As a rule of thumb, one should only raise challenges of this nature in good faith and if one believes there is enough evidence to show that the will is the result of fraud. It should also be borne in mind that the standard of proof required in order to establish fraud is quite high and is akin to the criminal standard of proof i.e. beyond reasonable doubt.
- The will was not signed by the testator or attested by at least two competent witnesses as required under section 11 of the Law of Succession Act (Cap. 160) (**the Act**). Although witnesses who are also beneficiaries under the will can attest the will, their bequest will be invalidated unless two other competent and independent witnesses attested the will.
- Alterations were made to the will but the signature of the testator and the subscription of the witnesses were not made in the margin or on some other part of the will opposite or near the alteration as per section 20 of the Act.

If a decision is made to challenge the will in circumstances where another person has already applied for a Grant of Probate in respect of the deceased's estate, it is still possible to file an objection to the making of the Grant within the period specified in the notice of the application published in the Kenya Gazette which is normally thirty (30) days. Essentially, the objector (the person making the objection) will argue that there is no basis upon which the court should issue the Grant as the will is not valid. If the challenge is successful, the court will invalidate the will and the matter will proceed in accordance with the rules of intestacy (administration of the deceased's estate in the absence of a will), which may be more favourable to some of the testator's beneficiaries.

Provision for Dependants

A will can also be challenged on the ground that a dependant of the deceased was not reasonably provided for under the will or was excluded from the will.

In that regard, section 26 of the Act allows a dependant who is not properly provided for by the will of the deceased to make an application to court for reasonable provision. However, this type of application can only be brought before the Grant is confirmed, i.e. within six (6) months of the issuance of the legal document authorising the executor(s) to manage the estate of the deceased in accordance with the provisions of the deceased's will. If the application is not brought within that time, the only remedy would be to seek to have the Grant revoked or annulled.

Section 29 of the Act defines a dependant as:

- A wife or wives, or former wife or wives, and the children of a deceased whether or not maintained by the deceased immediately prior to his death; and
- Such of the deceased's parents, step-parents, grand-parents, grandchildren, step- children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death.

In considering whether an order for the reasonable provision of a dependant should be made, the court will have regard to various factors, including the relationship of the dependant to the deceased, the value of the deceased's estate, any present or future income of the dependant, the conduct of the dependant in relation to the deceased, the circumstances of the deceased's other dependants and beneficiaries under the will, the deceased's reasons for not making provision for the dependant, and whether the deceased had made any other gift to the dependant during his lifetime.

If the court is satisfied that the disposition of the deceased's estate is not such as to make reasonable provision for that dependant, the court will order that reasonable provision be made for that dependant out of the deceased's net estate. Provision may be in the form of a specific share of the estate or by way of periodical payments or a lump sum payment.

Caveat and Affidavit of Protest

If an application for a Grant of Probate in respect of the deceased's estate has been made by someone else, one can file a Caveat under Rule 15 of the Probate and Administration Rules, 1980 to receive notice from the Registry of any application for the Confirmation of Grant. Upon receipt of the notice, one should file an Affidavit of Protest within fifteen (15) days to object to the Confirmation of Grant. In case of failure to file a protest within the prescribed time, the Caveat ceases to have effect.

The party filing the Affidavit of Protest may raise various grounds, including:

- An application under section 26 of the Act (provision for dependants) is pending.
- Close relatives of the deceased that he supported are not mentioned in the application.
- Some of the deceased's assets have been omitted.
- The beneficiaries have not consented to the mode of distribution.

Conclusion

Challenging wills can be a complex and emotionally taxing experience due to the nature of the proceedings and the parties usually involved, who in most cases are family members. Seeking early and professional legal advice would help parties make an informed and dispassionate decision on how best to proceed. The deleterious effects of bitter and protracted litigation are well chronicled, and ought to be avoided where possible and at very least the risk of such protracted litigation should be understood by the parties from the outset.

Charles Dickens' tale in ***Bleak House*** is no less compelling today as when it was first written back in 1852, and it is apt to close with a quotation from that classic work:

"Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises... Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out...but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless."

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GOING GREEN:

INTRODUCTION OF GREEN BONDS AS A MEANS OF SUSTAINABLE DEVELOPMENT

Green bonds may be defined as regular bonds with a distinctively unique feature – the proceeds of the bonds are applied exclusively to projects with environmental benefits, for example, climate change mitigation, conservation of natural resources, promotion of biodiversity and reduction of air, water and soil pollution. In light of their specific utility function, there are several sectors on which the proceeds of green bonds can be utilised in, such as; energy, agriculture, waste management, water, transport and urban planning. Green bonds are therefore very useful in supporting the notion of sustainable development duly espoused as a national value in Article 10 (2) (d) of the Consitution of Kenya, 2010.

Green Bond Principles

The Green Bond Principles (**GBP**) were initially released in January 2014 and a revised version was published in June 2016. GBP provide guidelines for the issuance of green bonds, including providing guidance to issuers on the key components involved in launching a credible green bond and providing investors with available information that is necessary to evaluate the environmental impact of their green bond investments. GBP also assist underwriters by moving the market towards standard disclosures which facilitate transactions. GBP have four (4) main core components, namely, use of proceeds, process for project evaluation and selection, management of proceeds and reporting.

Types of Green Bonds

The following are the types of green bonds that are widely recognised:-

- **Use of proceeds bonds** - where the proceeds from these bonds are earmarked for green projects but are backed by the issuer's entire balance sheet. It entails a standard recourse- to- the- issuer debt obligation.
- **Use of proceeds revenue bonds** - where the proceeds are assigned to eligible green projects, and bondholders have recourse to a specified revenue stream (which may be unrelated to the eligible green projects) but not to the issuer.
- **Project bonds** - where the proceeds are invested in a specific green project and the investors have direct exposure to the green project itself. Debt recourse under a project bond is to the project's assets and balance sheet.
- **Securitised bonds** - where the relevant revenue stream is generated by a group of green projects or assets. Debt recourse under this type of bond is to a group of projects which have been grouped together (e.g. solar leases or green mortgages).

Supranational development banks have historically dominated the global green bond market, but now issuers are more diverse. Financial corporates led the market in 2018 and issuance by sovereign-related entities, like various water authorities, has also increased. The European Investment Bank issued its first green bond, named the Climate Awareness Bond, in 2017, with the proceeds of this bond dedicated to renewable energy and energy efficiency projects. In 2008, the World Bank issued its first green bond, a SEK 2.3 billion (USD 248 million) six (6) year issue that was sold to Scandinavian pension funds. The first corporate green bonds were issued in 2012 and after that, the issuance of green bonds has been exponential. The green bond market grew from USD 10 billion in 2013 to over USD 40 billion in 2015 and Moody's estimate that by 2019, the green bond market would have reached an annual value of over USD 200 billion.

In terms of "country appetite" for green bonds, China, France and the United States of America, lead the way accounting for fifty six per cent (56%) of global issuance in 2017, while Canada, Germany, Mexico, Netherlands Spain and Sweden fill out the remaining top ten (10) positions. Other countries participated minimally in the issuance of green bonds.

The exponential growth of the green bond market may be attributed mainly to two (2) factors. Firstly, governments globally are racing to mitigate the devastating effects of global warming in line with the Paris Agreement on Climate Change of December 2015. Secondly, in order to attract new investors, issuers of green bonds have developed innovative products such as green covered bonds and green residential mortgage backed securities amongst others, with the wider choice of investments products tending to attract a wider pool of investors.

The Kenyan Market

The Green Bonds Programme Kenya was launched in March 2017 with the aim of catalysing the market for green bonds. Subsequently, on 20th February 2019, the Capital Markets Authority (**CMA**) launched the green bonds market which was duly entrenched in law through the publication of a Policy Guidance Note on Issuance of Green Bonds and making amendments to the Nairobi Securities Exchange Listing Rules to allow for the listing of green bonds.

With CMA having approved the legal framework to issue both listed and unlisted green bonds, there is likely to be an increase in the issuance of green bonds and the funding for green projects in the country as well as the regional market.

Kenya is the third sub-Saharan African country to introduce a local green bond market after South Africa and Nigeria. In June 2017, the City of Cape Town issued a USD 74 million ten (10) year note maturing in 2027, with proceeds dedicated to projects that will mitigate and adapt to climate change, in particular, refinancing and financing water, sanitation and transportation projects. This was followed closely by Nigeria which, in December 2017, issued a USD 29.7 million green bond with proceeds reserved for renewable energy and afforestation projects.

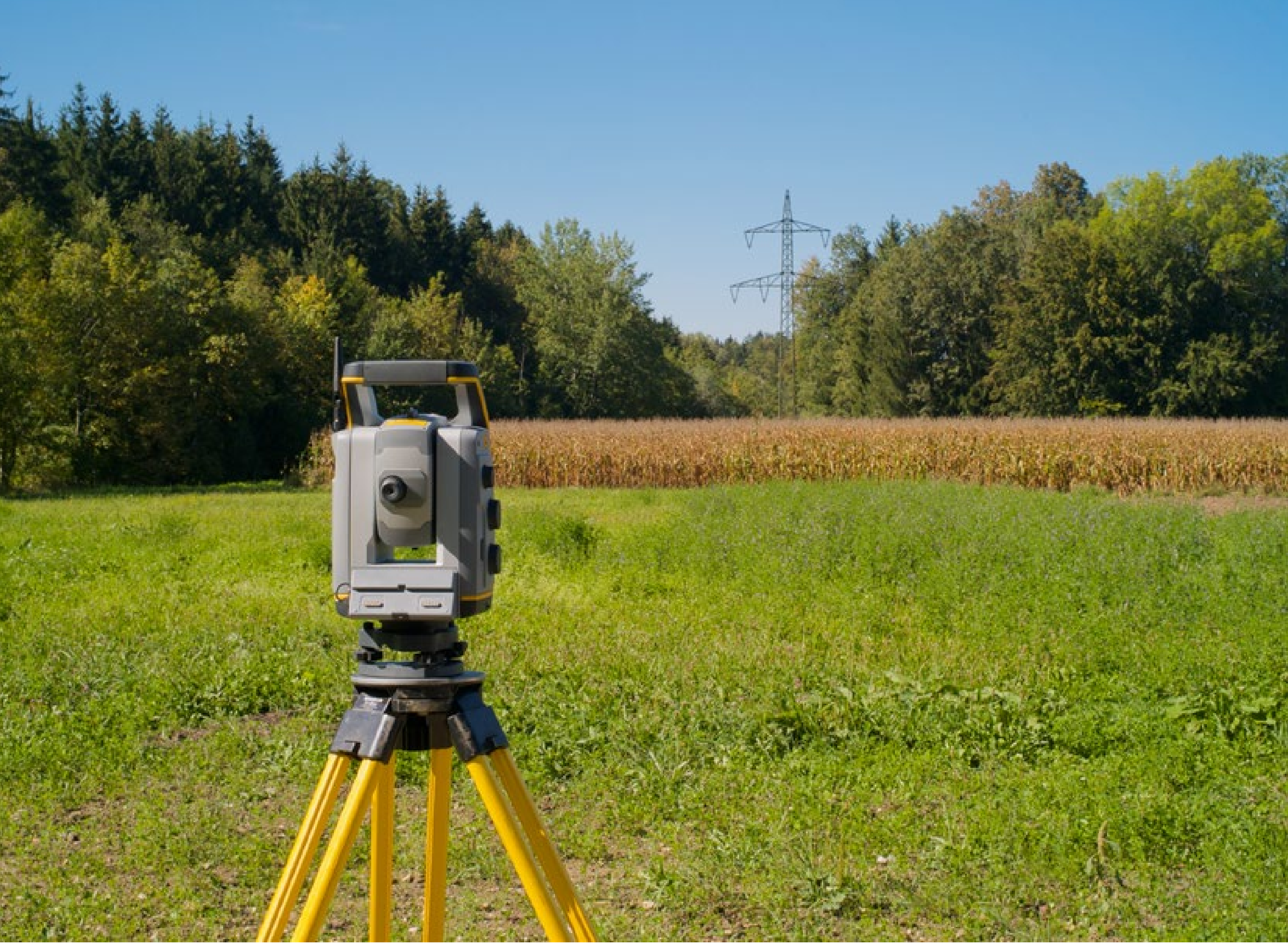
Currently, Kenyan banks mainly rely on deposits with maturities of less than one (1) year and, to a lesser degree, development finance institutions for funding. Bond issuance by commercial banks is limited and the introduction of green bonds is expected to spur new environmentally friendly projects for banks to finance, creating opportunities for banks to grow and diversify their loan books. Banks will also be able to diversify their funding and investor profiles, increase available financing and raise funding with maturities beyond five (5) years to finance these projects.

Over the next few years and beyond, green instruments will play an important and niche role in driving the growth of Kenya's capital markets, in line with the Marrakech Pledge for fostering green capital markets in Africa which calls for an increase in the volume, flow and access to finance for climate projects, alongside improved capacity and technology from developed to developing countries.

According to the Green Bonds Kenya Annual Report 2018, fifty percent (50%) of Kenya's gross domestic product is attributable to sectors that are directly or indirectly reliant on natural resources. This dependence highly exposes Kenya to the risk of climate change, adverse weather conditions and related environmental risks and the country would thus do well in taking advantage of the opportunities for sustainable development that green bonds offer.

Research by Strategic Business Advisory in partnership with the Kenya Bankers Association, among others, shows that Kenya has a demand for climate-friendly bonds amounting to KES 91 billion (USD 910 million) in the next five (5) to ten (10) years. There are three critical sectors which the research selected as demanding green bond financing, namely, agriculture, transport and manufacturing. In addition, this report recommends that for green bonds to be competitive the pricing needs to competitive and simplified while incentives such as tax exemptions should be given.

Henceforward, sovereigns and sovereign-related issuers are likely to leverage investor interest to advance their environmental policies. According to Moody's, multinational development banks will in the future support inter-regional issuance. It is worth noting that multinational development banks have moved away from being primarily green bond issuers in emerging markets to being facilitators of green bond issuance by providing technical assistance, credit enhancements and anchor investments in green bonds. Greener times, both financially and environmentally, lie ahead.



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VIEWPOINT:

A LOOK AT THE NEW LAND CONVERSION AND COMPENSATION RULES

The Constitution of Kenya 2010 (**the Constitution**), recognises the need to regulate the manner in which land may be converted from one regime to another. In this regard, Article 68 (c) (ii) of the Constitution provides that Parliament may enact legislation to regulate the manner in which land may be converted from one category to another. This stems from the need to govern the said process, noting the irreversibility of the exercise, once conducted.

Likewise, compensation for compulsory acquisition of land is a very pertinent issue, especially in this dispensation in which the goverment has sought to stimulate economic growth by, amongst other things, launching mega infrastructural projects such as the construction of the standard guage railway. Here, Article 40 (3) of the Constitution protects the citizenry from deprivation of property unless the deprivation is for a public purpose or in the public interest and in such a case, the Constitution requires that the affected proprietor is promptly compensated in full and his or her right to seek legal redress is unfettered.

The Government has therefore taken cognisance of the need to address these vital issues by promulgating the following sets of regulations.

The Land (Conversion of Land) Rules, 2017

In exercise of the powers conferred under section 9 (5) of the Land Act, 2012 (**the Act**), the National Land Commission (**the Commission**) gazetted the Land (Conversion of Land) Rules, 2017 (**the Land Conversion Rules**) vide Legal Notice No. 282 of 2017. The Land Conversion Rules focus on the procedural aspects of the conversion of land from public land to either private or community land and seek to ensure the process is clear, efficient and conducted procedurally.

The National or County Government may on its own motion or upon request, identify land and notify the Commission of its intention to convert land under section 9 of the Act. The procedure is meant to be transparent.

Conversion of Public Land to Private Land

Upon receipt of the notification, the Commission should satisfy itself that:

- The land is, at the time of the intended conversion, public land
- The purpose of its intended use is compatible with land use planning for the respective area
- The land is not part of an ecologically sensitive area
- The conversion complies with provisions of the Act or any other law
- The land is not controlled land i.e. land within a zone of twenty-five kilometres from Kenya's inland boundary, within the first and second row from the high-water mark of the Indian Ocean and any other land declared controlled land by law

Where the Commission is satisfied that the land meets the set out criteria and the matter amounts to a substantial transaction, the Commission will then refer the matter to the National Assembly or County Assembly for approval. Upon approval, the land is allocated by the Commission and its particulars entered in the Land Register.

Where the proposed conversion does not amount to a substantial transaction as defined in the Act, the Commission is required to invite the public for consultation by publishing a notice in at least two (2) dailies of nationwide circulation, affixing the notice in prominent places in a County or Sub-County including the headquarters, announcing the notice in official and vernacular stations of nationwide coverage and announcing in public meetings and places of worship. The notice must contain details of the land, proposed mode of conversion, specify the date, venue and time for the consultations and allow for representations within fifteen (15) days.

Where the Commission approves the intended conversion of land after scrutiny of the public representation, it will then allocate the land and enter the particulars in the Land Register.

Conversion of Public Land to Community Land

Upon receipt of an application for conversion of public land to community land, the Commission is required to satisfy itself that the land is public land and it will be used for the benefit of the community, as provided for under Article 63 of the Constitution.

The Commission is also required to invite comments or objections on the intended conversion of public land to community land by placing a thirty (30) day notice in the same form and mediums, as the notice for conversion from public to private land.

Where there are objections, the Commission is required to notify the National or County Government of the same for determination. In case there are no objections, the Commission will proceed to publish a notice in the Kenya Gazette on the conversion of the public land to community land. The conversion is then entered in the Land Register.

The Land (Assessment of Just Compensation) Rules, 2017

The Land (Assessment of Just Compensation) Rules, 2017 (the Land Compensation Rules) were developed by the Commission in exercise of the powers conferred under section 111 (2) of the Act, and gazetted vide Legal Notice No. 283 of 2017. The Land Compensation Rules focus on the assessment of compensation payable to persons who possess an interest in land, at the time which the Commission takes possession of such land.

The Land Compensation Rules provide that in assessing the appropriate compensation for compulsory acquisition of land, the Commission will consider the following factors:

- The market value of the land
- The damage sustained or likely to be sustained by persons interested at the time the Commission takes possession of the land
- Reasonable expenses incidental to the relocation of any of the persons interested
- Damage genuinely resulting from the diminution of the land between the date of the publication in the gazette of the notice of intention to acquire land and the date the commission takes possession of the land

With regard to market value of the land, the Commission is required to consider the stipulated user of the land and whether there has been any increase in the value of the land, either after publication of the notice of intention to acquire the land; or by reason of use of the land in an illegal manner or a manner detrimental to the user. Conversely, the Commission does not consider the following matters when assessing compensation:

- The degree of the urgency which has led to the acquisition
- Any disinclination of the person interested to part with the land
- Damage sustained by the person interested which, if caused by a private person would not be a good cause of action
- An increase in the actual value of the land as at the date of the publication in the gazette, of the notice of intention to acquire likely to accrue from the use to which land will be put when acquired
- An outlay on additions or improvement to the land, incurred after the date of publication in the Gazette of the notice of intention to acquire land, unless the additions or improvements were necessary for the maintenance of any building in proper state of repair

The Commission will determine an award based on the market value of land which is taken as the value of the land at the date of publication in the Gazette of the notice of the intention to acquire the land. It should be noted that additional compensation is payable for disturbance over and above the compensation amount. Additional compensation is calculated at fifteen per cent (15%) of the market value of such land.

Conclusion

The efforts of the Commission to address the challenges affecting the land sector should be commended. It however remains to be seen to what extent the Rules will be implemented in order to determine their impact in addressing these challenges.

Still, strict implementation of the Rules is not enough. Corruption should also be tackled as it is a serious impediment in the Government's efforts to address land issues. An example is the assessment and compensation of the compulsory acquisition exercise for one of the current flagship projects in the transport sector, which has been marred by allegations of corruption. This has resulted in the arraignment of senior officials in the Commission to answer to graft charges. We hope these efforts at curbing corruption will be sustained so that the contentious issues in the land sector will be addressed where possible, substantively and with finality.

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'ADD TO CART':

THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION IN ONLINE COMMERCE

Simply put, e-commerce refers to the sale or purchase of goods and services conducted over computer networks by methods specifically designed for the purposes of receiving and placing orders. The spectrum of goods and services sold online is wide, encompassing goods and services delivered physically, as well as intangible digital goods such as music, films, books, software and services such as online banking.

The United Nations Conference in Trade and Development (**UNCTAD**) reported that as of 2017, e-commerce accounted for six percent (6%) of all purchases made in Kenya. A natural consequence of electronic trading is implications under intellectual property laws or tort such as negligence and defamation. Electronic trading may also raise issues on privacy and data protection. Majority of online transactions were in the form of business-to-consumer or consumer-to-consumer transactions as opposed to business-to-business transactions, raising the question on the need for an effective dispute resolution mechanism. Albeit a relatively emerging area, online dispute resolution (**ODR**) may be one of the suitable dispute resolution mechanisms for online transactions.

Several definitions have been formulated to describe ODR, for example, the American Bar Association defines ODR as follows:
"ODR uses alternative dispute resolution process to resolve a claim or dispute. ODR can be used for disputes arising from online, e-commerce transactions, or disputes arsing from an issue not involving the internet called an "offline" dispute. It is an alternative to the traditional legal process which usually involves a court judge and possibly a jury."

Authors Kah-Wei Chong and Len Kardon in the publication *E-Commerce: An Introduction* describe ODR in the following manner:-
"ODR uses the internet as a more efficient medium for parties to resolve their disputes through a variety of methods similar to traditional ADR. It brings parties online to participate in a dialogue about resolving their disputes."

It is clear that the term ODR is used to describe the process by which a dispute is resolved on an online platform such as the internet by means of arbitration, mediation or negotiation, all of which are alternatives to litigation or court processes.

Some of the means employed in ODR include, video conferencing, emailing, fax, virtual meetings in chat rooms, teleconferences etc. Parties may upload their written claim, evidential documents and written submissions, respond to questions from the arbitrator on email and receive the arbitrator's decision on email.

With traditional arbitration increasingly incorporating modern technology into its proceedings, the distinction between online arbitration and traditional arbitration is becoming less clear. It is therefore imperative that legal practitioners and jurists continuously keep themselves abreast and familiarise themselves with technological developments to avoid falling on the wayside.

Why does ODR Matter?

In *The World is Flat* by Thomas L Friedman, the author argues that the advancement of the internet and computers has equalised the playing field in commerce. This is because a vendor located in different part of the world can sell his products to a consumer located in another part of the world without the two (2) ever physically meeting.

Indeed, it is impossible to deny the rapid rise in the number of commercial transactions that happen on an online platform. This has been further enhanced by the rise in use of the mobile phones that have internet connectivity capabilities. It is now no longer necessary to physically walk into a shop or meet a vendor before one can purchase an item. Many of the day-to-day commercial functions that we undertake are now a "click" or a "swipe" away. Only recently, it was announced that Tesla, the largest electric car dealer in the world had taken the decision to close most of its stores and shift to online–only sales.

It is inevitable that the increase in online commercial transactions would result in an increase in disputes on the same, thereby informing the need for a quick, efficient and cost effective dispute resolution mechanism that is suited for online transactions.

Most online purchases involve parties located in different parts of the world and are unlikely to involve large or significant sums of money. As a result, the traditional means of dispute resolution which primarily involve courtroom litigation may in the case of an online purchase dispute be inconvenient, impractical, time consuming and prohibitive.

Of concern therefore, is whether consumers of online purchases are sufficiently protected from injury and have an efficient, effective and cost efficient means of seeking redress for such injury.

Related to this issue is whether there is a need for the formulation of a legal framework for ODR. As things stand, there is no law in Kenya that governs or addresses ODR nor is there any indication of an intention by Parliament to pass laws to regulate ODR.

This second question must be considered against the divergent regulatory approaches of the United Kingdom and the United States with the former preferring to pro-actively regulate ODRs while the latter prefers a self regulatory approach which leaves the task of regulation to private actors involved or participating in ODR.

These issues are all part of and should be looked at as part of a broader discussion on the Constitutional right to access to justice and consumer protection guaranteed under Articles 48 and 46 respectively of the Constitution of Kenya.

How Does ODR Work in Practice?

The Virtual Magistrate Project (**the VMAG**) launched in the US in 1996 was one of the first ODR initiatives. The VMAG served as an arbitrator for online disputes submitted to it and all proceedings would be done by email and decisions transmitted within days. However, this initiative collapsed because several complaints were not within its jurisdiction, a lack of awareness of the service, failure by parties to participate and the inability of the VMAG to enforce its decisions.

Another significant ODR initiative is the Internet Corporation for Assigned Names and Numbers (**ICANN**) which resolves disputes regarding domain names. As commercialisation of the internet grew, domain name registry services identified potential issues surrounding the jurisdictional nature of trademarks and their involvement in potential litigation.

At the time of registering a domain name, parties agree to be bound by the ICANN dispute resolution mechanism. What makes ICANN effective is once an arbitrator decides that a domain name should be transferred or cancelled, the decision is binding on the domain name provider who will effect the change as determined by the arbitrator. The decision is however not binding on the parties and may be referred to court. Also, the domain name is instantly suspended on the submission of a complaint. The entire process is concluded using online procedures within about two (2) months. So far ICANN has resolved over five thousand (5,000) domain name disputes.

Other ODRs are Square Trade which has partnered with among the largest online businesses such as eBay, and PayPal among others and has resolved over two hundred thousand (200,000) disputes to date. Also worth mentioning is CyberSettle which was established in 1998 uses a three-round blind bidding system to settle monetary disputes particularly insurance related and workers compensation disputes. CyberSettle is a software technology that automatically compares the ranked bids to determine if the parties have arrived at a settlement. So far it has assisted in settling claims worth approximately USD 500,000 (KES 50 Million).

Advantages of ODR

The following are some of the advantages of ODR that make a compelling case for its adoption as a formally recognised dispute resolution mechanism in Kenya:

- It is cost effective as it eliminates the necessity of expenses associated with printing paper, travel, accommodation, hiring meeting rooms among others
- It is less time consuming as most claims are completed online
- It is less confrontational because of the removal of the physical presence of an opponent also, given that everything is done on email, it allows parties to reflect on their positions before articulating them without time pressure
- The internet provides a "neutral" forum for resolution of the dispute and denies either part a "home court advantage"
- It facilitates record keeping as the entire dispute resolution process is committed to writing which is transmitted electronically

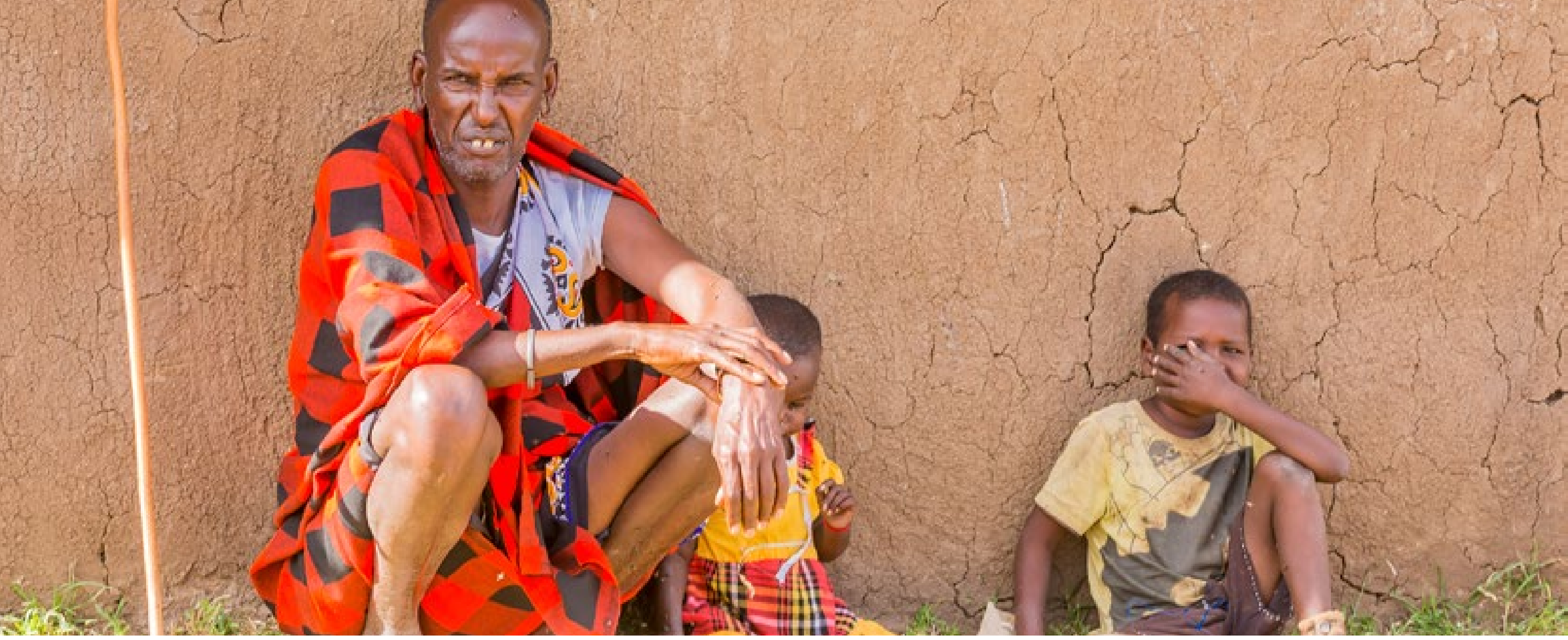
Disadvantages of ODR

- The impersonal nature of ODR means that the subtleties of non-verbal communication are lost and the lack of face-to-face interactions deprives mediators and arbitrators an opportunity to evaluate the credibility of parties and witnesses
- Inadequate security and confidentiality as the internet is susceptible to hacking thereby compromising the security of confidential documents
- Inability of a party to verify or confirm the authenticity of the communications received and whether they originate from the other party and not a third party that has impersonated any of the parties to the dispute
- Online arbitration agreements may face validity problems on account or their failure to meet the "writing" requirement under various domestic laws which may give rise to problems in the enforcement of an award arising from an online arbitration agreement
- ODR also presumes that parties and their counsels have unlimited access to the internet, email and other technologies involved in ODR and may also fail to appreciate that parties may not be sophisticated enough to effectively use the ODR technologies
- ODR is only suited for a very limited class of disputes such as e-commerce disputes and domain disputes, in most cases, the size of a claim arising from an online transaction will not correspond with the cost of possible litigation proceedings

Way Forward for ODR in Kenya

It has been said that when law and technology converge, change is inevitable. It is therefore doubtful that Kenya will have a choice in the matter other than to adapt to the changing faces of dispute resolution. Rather than wait for private actors to shape and develop ODR, there may be merit in a pro-active approach that is continuously and actively working to formulate regulatory legislation which has the objective of protecting online consumers and promoting their right to access to justice which are both Constitutional guarantees.

Kenya will need to develop a regulatory framework for ODR before this initiative is overtaken by more complex online dispute resolution initiatives such as smart contracts and block chain arbitrations among others.



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UNRESOLVED:

AN ASSESSMENT OF THE NATIONAL LAND COMMISSION

The land "problem" in Kenya dates back to the colonial times, with the alienation of land to European settlers stoking the fires of the struggle for independence. Subsequent allocation of the same land after independence to well positioned individuals and companies, did not solve the problem. Since independence, the legal and institutional framework relating to land has been fraught with tension, strife and copious litigation.

The Constitution of Kenya, 2010 provides for the formation of the National Land Commission (**NLC**) under Article 67 (1). Article 67 (2) stipulates the functions of the NLC. Further, Article 68 provides that the Parliament should revise and rationalise existing land laws and enact new ones. Pursuant to these provisions, the Land Act, 2012 (**the Land Act**), Land Registration Act, 2012 (**the Land Registration Act**) and the National Land Commission Act, 2012 (**the NLC Act**), were enacted. The NLC Act makes further provisions on the functions and powers of the NLC, including qualifications and procedures for appointment to the NLC. It also gives effect to the objects and principles of devolved government in land management and administration, and for connected purposes.

The establishment of the NLC was touted as a catalyst to Kenya's land reforms that would have a domino effect of spurring economic growth. The key functions of the NLC include managing public land on behalf of the national and county governments, recommending a national land policy to the national government, advising the national government on a comprehensive program for the registration of title in land throughout Kenya and conducting research related to land and the use of natural resources, and make recommendations to appropriate authorities.

The NLC also has the mandate to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress, encourage the application of traditional dispute resolution mechanisms in land conflicts, assess tax on land and premiums on immovable property in any area designated by law and monitor and have oversight responsibilities over land use planning throughout the country.

The coming to an end of the tenure of the first commissioners of the NLC on 19th February 2019, invites the opportunity to assess and appraise the work of the NLC and to consider whether the NLC achieved its mandate as stipulated in the Constitution and the NLC Act.

The establishment of the NLC brought with it rays of hope that the recurrent land issues in the country would be addressed with finality. The recognition of the NLC as a constitutional commission exuded a new dawn in the arena of land management and administration policy, having been anchored in the supreme the law of the land. However, the following issues bedeviled the NLC no sooner had it commenced its operations.

Conflict over Roles

The jurisdictional conflict between the Ministry of Lands and Physical Planning (**the Ministry**) and the NLC erupted right from inception of the NLC. There was a vicious "turf war" between the Ministry and the NLC as to whose responsibility it was to undertake critical functions such as the extension and renewal of leases. This led the NLC to seek an advisory opinion from the Supreme Court concerning its roles vis-à-vis those of the Ministry.

By its advisory opinion *In the Matter of the National Land Commission (2015) eKLR*, the Supreme Court underscored the interdependence of the two institutions, in the sense that none was intended to work independently from the other. Rather, both were meant to work in consultation, to ensure that a system of checks and balances was enforced.

In analysing the NLC's role under the Land Act, including functions such as the extension and renewal of leases over private land, conversion of land from public to private or vice versa, compulsory acquisition of land for a public purpose or undertaking land settlement programmes, the Supreme Court observed that *"the foregoing provisions entrust the NLC with the responsibility of protecting and overseeing the public's rights and interest, under the Constitution. However, the NLC's mandate in that regard is not held exclusively and is not unqualified – provision is made for approval from the National Assembly and the consent of the National Government or relevant County Government. This provides a check-and-balance system, to ensure that the NLC operates within the prescribed limits."*

The Supreme Court noted that the NLC's mandate entailed the processes leading to the issuance of title, whilst the Ministry's role was the actual issuance of titles. On this point, the Court observed that *"…The NLC has a mandate in respect of various processes leading to the registration of land, but neither the Constitution nor statute law confers upon it the power to register titles in land. The task of registering land title lies with the National Government, and the Ministry has the authority to issue land title on behalf of the said Government."*

Notwithstanding the distinction of roles, the Court nevertheless reiterated the aspect of interdependence as follows:

"The Constitution's mandate falls to the three State organs, in an operational context of check-and-balances: and the various Commissions act as oversight and watchdog mechanisms. Hence, each of the functions of the NLC and the Ministry stands to be checked by the one or the other, in order to avoid abuse of power in matters relating to land. The unchanging theme throughout the Constitution, is that the relationship between these two bodies is inter-dependent and based upon co-operation; it is not an agency relationship. As the Ministry conducts its functions, the NLC acts as a watchdog, to ensure compliance with the Constitution, and with legislation. Likewise, the NLC as an oversight body, maintains its functional, financial and operational independence, while still being overseen and checked by the public, by other independent offices, and by the three arms of Government."

Revocation of Titles

The NLC had been holding periodic sittings concerning the legality of titles at the end of which, it would revoke titles for properties considered to have been acquired illegally or irregularly. It would then proceed to publish lists of revoked titles in the Kenya Gazette and in newspapers of nationwide circulation. These revocations were challenged in the Environment and Land Court and several cases have thus addressed the point.

In *Robert Mutiso Lelli and Cabin Crew Investments Limited v National Land Commission & 3 Others (2017) eKLR,* whilst considering whether the NLC had jurisdiction to revoke titles to land even where it finds, after inquiry, that such title was irregularly acquired, the Court noted that there was no legal provision for the NLC to revoke titles even if upon inquiry it establishes that such titles were unlawfully or irregularly acquired. The power to revoke title was vested in the Registrar and not the NLC which could only recommend revocation.

Historical Land Injustices

Article 67 (2) (e) of the Constitution empowers the NLC to investigate historical land injustice and recommend the appropriate redress. The NLC Act replicates the same functions in section 5. Section 15 of the NLC Act defines historical land injustice as a grievance which meets the following criteria:

- Was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement
- Resulted in the displacement of persons from their habitual place of residence
- Occurred between 15th June, 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when the Constitution was promulgated
- Has not been sufficiently resolved and subsists up to the period specified above
- The act which the claim is based on should be verifiable as having resulted in the displacement of the claimant or other form of historical injustice
- The claim cannot be addressed through the ordinary court system on the basis that it was illegal at the time the injustice occurred or is time barred
- The claimant was either the proprietor or occupant of the land upon which the claim is based
- The claimant did not at any time surrender or renounce his right to the land in question
- The claim is brought within five (5) years from the commencement of the NLC Act i.e. 2nd May, 2012

Going by the last requirement, it is clear that the window period for lodging claims for historical injustices, expired on 1st May, 2017. This means that the NLC's role as far as historical injustices are concerned has lapsed and it cannot receive new complaints after 1st May, 2017, but can only dispense with matters that were lodged before then.

It is noteworthy that there was an opportune moment for extending the said deadline when the Land laws were revised in 2016. However, this provision was not addressed, meaning the deadline of 1st May, 2017 remains effective.

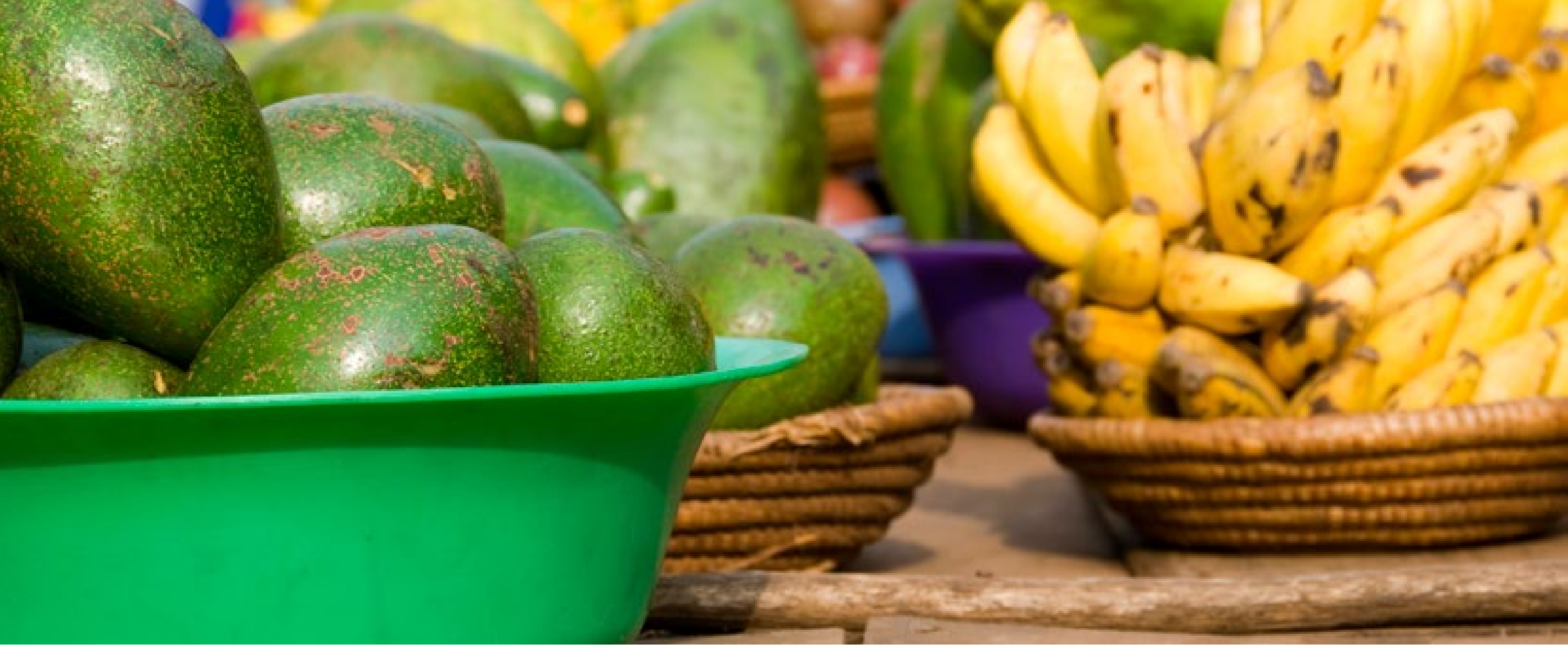
It is also interesting to note that The National Land Commission (Investigation of Historical Land Injustices) Regulations, which were meant to operationalise section 15 of the NLC Act, were gazetted on 6th October, 2017, some five (5) months after the deadline lapsed.

Equally interesting is the fact that time is fast running out for the claims the NLC admitted before the deadline and is currently handling. Section 15 (11) of the NLC Act provides that the provisions of the entire section 15 will be repealed within ten (10) years. The NLC Act as previously noted, came into force on 2nd May, 2012. Therefore, the statutory timeframe on addressing historical land injustices will lapse on 1st May, 2022. This means that all the cases the NLC is handling should be concluded within the next three (3) or so years.

The Way Forward

The importance of the interdependent relationship between the NLC and the Ministry, as advised by the Supreme Court, cannot be overemphasised. If the spirit of the Constitution is to be upheld, the two (2) institutions should work in harmony and consult each other. As their roles and functions are interdependent, none can fully discharge its mandate in isolation of the other. Consultations will also be invaluable as a check and balance mechanism to ensure that the NLC does not exceed its mandate in future, as it did with the revocation of titles.

There is also need to revise the timelines on the investigation of land injustices, as the ten (10) year deadline may not be realistic, especially for sensitive matters that may have been protracted due to the plurality of claims. In the interest of substantive justice, there may be need to extend the NLC's mandate in this regard, to ensure it has adequate time to determine such important matters. Perhaps it may also be necessary to extend the five (5) year window on admission of claims, as there may be genuine cases where persons were prevented from lodging their claims before 1st May 2017.



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SPOILED FOR CHOICE:

LEASE AND PURCHASE OPTIONS IN COMMERCIAL REAL ESTATE

The last few years have seen rapid developments in the real estate sector in Kenya. With the growth in the economy, there is an increasing need by both local and international investors for commercial space to carry on business. One of the decisions that entrepreneurs have to grapple with is whether to buy or lease their business space. There are pros and cons to either of the options and the decision of whether to buy or lease requires proper analysis and prior planning.

Legal Framework

In the recent years, there have been major developments in the legal framework governing land transactions in Kenya. These developments are anchored in the Constitution of Kenya, 2010 (**the Constitution**) which is the supreme law of the land and which lays down the legal principles governing land transactions. Under the Constitution, land is classified as either public land, private land or community land. Public land includes but is not limited to land lawfully held, occupied or used by any state organ. Community land is land that vests in and is held by a community while private land is land registered and held by a person or body corporate under a leasehold or freehold tenure.

Alongside the Constitution, other key statutes governing land are the Land Act, 2012, which sets out the substantive law relating to land; the Land Registration Act, 2012, which lays down the principles governing the registration of title land and regulations of dealings in registered land; and the National Land Commission Act, 2012, which provides for the formation and lays down the functions of the National Land Commission.

Under the above legal framework, an interest in land can either be held as freehold or leasehold interest. Freehold tenure in land is the greatest interest a person can have in land as it gives the holder absolute ownership interest in the land. A leasehold interest in land on the other hand, is an interest accorded to a lessee by a lessor for a specific period subject to various conditions which may include payment of a fee or rent to the lessor. A leasehold interest only grants the lessee an exclusive right to the land and does not grant the lessee absolute ownership in the land. Under the Constitution, non-citizens are not allowed to hold land on a leasehold tenure for a term exceeding ninety nine (99) years.

Against the above legal background, an important decision that business owners in Kenya always need to make is whether to buy or lease commercial premises. Both options present their unique benefits, risks and shortcomings and the decision as to whether to buy or lease commercial space is mainly dependent on both the short-term and the long-term objectives of the business. The benefits and risks presented by both options are as outlined below:

Advantages of Buying

- **Capital investment** – Ownership of property is a capital investment with long-term benefits of security and equity. Over time, the value of property appreciates and a property owner has the opportunity to benefit from such capital appreciation upon resale of such property.
- **Terminal value of improvements** – Improvements made on property increase the value of the property. Unlike in leasing, any improvements that one makes on property as a legal owner eventually benefit the owner both during ownership and at the point of selling. Upon resale, the property will be valued to include the improvements made thereon translating to better profits.
- **Control** – Buying of property vests both the legal and beneficial ownership of the property to the buyer thus allows greater freedom in dealing with the property without restrictions. Having the power to make all decisions relating to commercial premises is important for any person or company setting up a business.
- **Sub-letting for additional revenue** – In the event that the property has more space than needed, there is room for renting out the additional space and bringing in additional revenue. Additionally, where the business decides to relocate and still wants to retain legal title over the Property, the whole of the property may be leased and rent collected, thus becoming an additional source of revenue for the business.

- **Stability** – If the business uses specialised equipment, machinery or fixtures that are difficult and/or expensive to move, ownership of the property may be preferable. Otherwise, if the owner fails to renew the lease upon determination of the term, the lessee is likely to incur additional costs in relocating especially if the lease requires that property be restored to its original condition at the beginning of the lease.
- **Collateral** – Land or premises owned by a business are an asset that can be used as collateral for debt or equity financing. This is not open to businesses that operate on leased property.
- **Value addition** – The location of a business plays a key role in determining how well a business will perform. If one secures property in a prime space or location or in an area that is considered a hub for the business intended to be put up, one is better off purchasing the land as opposed to leasing. This puts the owner in a good position to set up a business without worrying about the uncertainties that come with having to renew a lease on such prime properties upon expiry of the term of the lease.

Disadvantages of Buying

- **Upfront spending** – The initial capital investment involved in purchasing commercial premises is usually high. As opposed to the continuous but relatively lower cost of leasing property, the initial capital investment for a purchase is one-off and is required to be paid within the period between execution of the agreement for sale and completion which in most cases is ninety (90) days.
- **Lengthy processes** – The process of buying land, typically involving both a pre-contractual and a contractual stage, is lengthier than that of leasing property, especially where one is targeting to start business within a short period.
- **Capital loss** – Though this is a very unlikely eventuality in the current market conditions, in the event that the market conditions or the business environment change and values of land depreciate, reselling the property will result in a capital loss to the business.
- **Changes in market supply** – A certain location may be prime during the purchase of property. However, infrastructure improvements in other areas, development of new and refurbished premises may pose a threat to existent business hubs and a shift in business to the new upcoming areas. This may necessitate a change of location for a business to align to the market conditions with the business either reselling the property or abandoning it for a different purpose and thus increasing the cost of doing business.

Advantages of Leasing

- **Reduced upfront capital cost** – There is a reduced upfront capital cost in leasing as opposed to buying. All one has to do is to pay the rent and security deposit and whatever other nominal charges as may be required under the lease. This frees up a lot of capital that would have been spent in purchasing property and the same can be invested in other ways.
- **Lower maintenance costs** – When property is leased, the property owners or landlords take care of the property and building maintenance. Depending on how the lease is negotiated, one may avoid certain costs such as insurance and general repairs and maintenance. The lessee thus focuses entirely on the business and does not have to worry about operational costs.
- **Flexibility** – Leasing is a good option for businesses that operate in a volatile industry or require moving into new markets occasionally. Leasing offers flexibility in terms of easy changing of the location of doing business to more strategic locations at the end of the term of the lease.

Disadvantages of Leasing

- **No control** – As a Lessee, one only acquires beneficial interests in the property. Legal ownership vests in the lessor. This limits dealings in the property as any such dealings can only be done with prior consent of the lessor. The law imposes a condition upon the lessee that the lessee shall not sub-lease, charge or otherwise assign rights under the lease without the lessor's consent. Certain modifications and fit-outs on the Property may also require prior authority from the lessor.
- **Cost variability upon renewal of the lease** – Leases are for specific periods, upon expiry of which renewal of the term is necessary. In most leases, renewal of the lease term is left at the discretion of the lessor and the risk of non-renewal is an issue that businesses have to grapple with. The other exposure upon renewal of a lease is that a lessor could introduce new terms on the lease which may include enhanced rent. Where the lease term is not renewed or where renewal is subject to some onerous terms, a business may be forced to relocate to alternative premises which will have an effect on the costs and customer base as other business relations that will need to be established.
- **Lack of certainty of renewal of the lease** – As stated above, renewal of an expired lease is not guaranteed. Renewal of a lease term is discretionary at the option of the lessor. This denies the lessee certainty of business especially if the remainder of the term of the property being leased is a short period given that it is possible that a lessor may refuse to renew the lease for a further term upon expiry.
- **No terminal value** – Any improvements made on the land will directly benefit the lessor as opposed to the lessee. If the lessee makes major improvements on the land that cannot be removed at the end of the lease, the benefits of those improvements will go to the lessor.
- **High recurrent expenditure** – For businesses that intend to be in operation for a long time, the rent paid on the property may add up to the amount of purchasing the property and above. Most owners will increase the rent payable annually as well as other fees payable under the lease. The lessee also incurs additional incidental costs such as legal fees for both the advocates of the lessor and the lessee and stamp duty on the lease each time the lessee renews the lease.

Conclusion

The decision on whether to buy or lease commercial space should be informed by a side by side comparison of the cost and convenience of renting as opposed to buying and can only be assessed on a case by case basis.

For long-term businesses, you may be better off buying rather than renting in order to have certainty of business and do away with landlord interferences during the lease period and at the point of termination.

Leasing commercial premises, on the other hand, would be ideal for small businesses that are in the growth phase and need more liquidity. Similarly, businesses that are in operation for a shorter period may prefer leasing as opposed to buying.

Generally, business owners may also want to consider that most landlords execute leases for a period of more than five (5) years in order to avoid controlled tenancies as the same can be problematic for the lessor. Business owners, therefore, need to consider whether five (5) year terms and above are viable for the business in terms of meeting the associated costs.

There is a thin line between the two options and one needs to carefully consider which of the two is the best option for the intended business.

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MOVE WITH HASTE:

ARBITRAL TRIBUNALS' OBLIGATION TO ENSURE THE EFFICIENT CONDUCT OF ARBITRAL PROCEEDINGS

It is accepted that arbitral tribunals have not only the power but also, an obligation, to ensure the efficient and cost-effective conduct of arbitral proceedings. Most arbitral institutions have made provision in their rules to make this obligation express. For example, Article 22 of the International Chambers of Commerce (**ICC**) Rules sets out that the arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute. It also empowers the tribunal, "after consulting the parties", to adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.

The London Court of International Arbitration (**LCIA**) Rules go a step further and empower tribunals to adopt procedures even in the face of party resistance. The 2014 version of the LCIA Rules place the responsibility for ensuring procedural efficiency squarely on the arbitral tribunal, and remove that power from the parties. The LCIA Rules use language such as the parties may "agree on joint *proposals* for the conduct of their arbitration for *consideration* by the arbitral tribunal". Ultimately, however, it is the arbitral tribunal which has a "duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute". Article 14 of the LCIA Rules gives arbitral tribunals the "widest discretion" to discharge this duty, and places an obligation on parties to "do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration", including the tribunal's discharge of its said duty.

This obligation is taken seriously, and failure of arbitrators to conduct the proceedings in an efficient manner may be penalized.

Article 14(1) of the United Nations Commission on International Trade Law (**UNCITRAL**) Model Law goes as far as to penalize any arbitrator who "fails to act without undue delay", enabling parties to agree on an arbitrator's termination in such circumstances.

This is echoed in Rule 17.3 of the Singapore International Arbitration Centre (**SIAC**) Rules, which state "The President (being the President of the SIAC Court of Arbitration) may, at his own initiative and in his discretion, remove an arbitrator… if the arbitrator does not conduct or participate in the arbitration with due diligence and/or in a manner that ensures the fair, expeditious, economical and final resolution of the dispute".

In other cases, the efficiency of the arbitrator may affect the fees paid to them. Appendix III of the ICC Rules states that the ICC Court shall take into consideration *"the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award"* in arriving at the fees of the arbitrator.

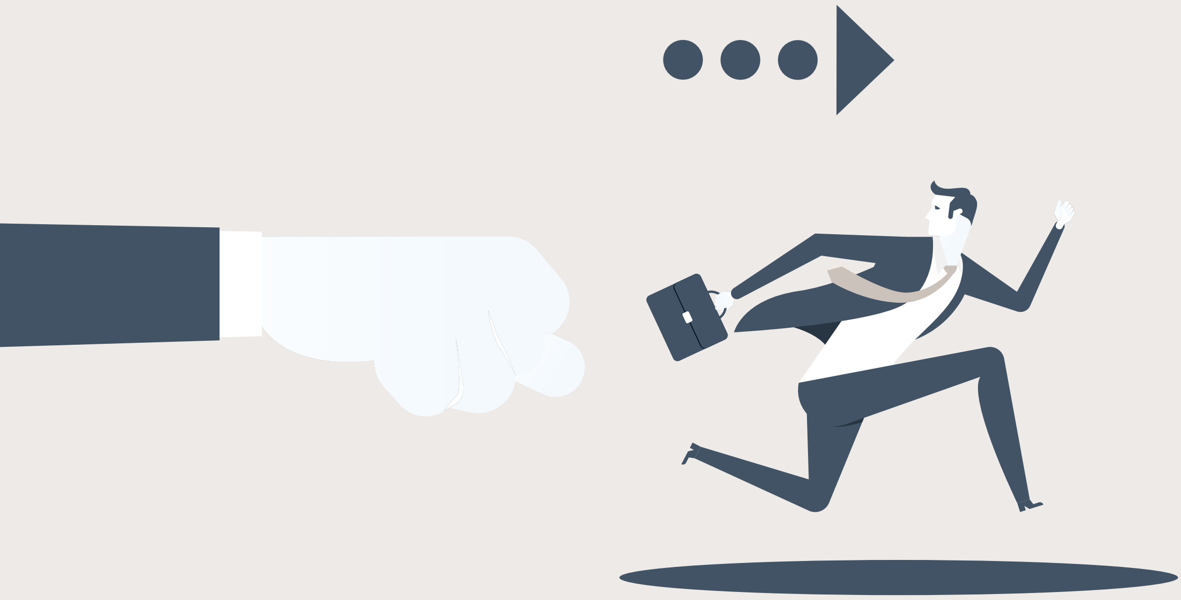
These provisions were borne out of a growing sentiment that arbitration has not lived up to its users' expectations of being faster and cheaper alternative to litigation. Indeed, the Queen Mary International Arbitration Survey conducted in 2015 (**the 2015 QMUL Survey**) listed the issue of delay as one of the worst features of arbitration. As one user put it, *"Even if you don't get the result you want, at least you get it quickly… There is nothing worse than waiting five years for a bad award."* The speedy resolution of disputes is therefore considered key, particularly in cases where there is a continuing relationship between the parties to the dispute.

Due Process Paranoia

However, the manner in which to achieve the balance between efficiency on the one hand, and due process on the other, particularly in a process whose single most defining characteristic is party autonomy, is an ongoing debate.

It is no coincidence that almost every iteration of an arbitral tribunal's obligation to conduct arbitration proceedings in an expeditious manner, in the various institutional rules is contained in the same article as its obligation to act fairly and impartially. At the same time, each party is given a reasonable opportunity to present its case thereby contributing to "due process paranoia", a growing concern that arbitral tribunals are reluctant to act decisively for fear of the award being challenged on the ground that a party has not had an opportunity to present its case.

Due process paranoia can manifest itself in a number of ways for instance, granting repeated extensions of time at the request of a party, accepting multiple amendments to a party's pleadings, agreeing to the belated introduction of new or additional evidence, acceding to last minute requests for adjournments, etc.



Arbitrators tend to err on the side of caution and accede to such requests from parties, rather than take the risk that the parties might challenge their award on the basis that they were too rigorous in their procedural decisions, rendering the process unfair. This is particularly so given that enforcement/setting aside proceedings are often in the public domain, and therefore may negatively affect the market reputation of the relevant arbitrators, thereby hurting their prospects of future appointments.

This concern, however, is unwarranted in most cases. It is very rare indeed that awards are successfully challenged on the basis that the procedural orders made by the tribunal were too strict. Indeed there is no reported decision in which the English courts have set aside an award because of an overly robust case management decision. To the contrary, a number of decisions unambiguously rejected setting aside applications based on robust case management.

Not only is the risk of rendering an unenforceable award illusory in most cases, but the 2015 QMUL Survey also found that parties much prefer arbitrators who are "willing to decisively manage proceedings". Even as far back as in 2010, the QMUL International Arbitration Survey noted that "parties prefer pro-active arbitrators who take control of proceedings."

Ultimately, it is the arbitrator who is best-placed to make procedural suggestions. No party wants to be seen as making concessions, even where a procedure proposed by the opposing party seems reasonable and efficient. It is much more palatable when the arbitral tribunal proposes measures for establishing an efficient process. Furthermore, parties are less likely to reject proposals made by the arbitral tribunal, given that they must persuade the same tribunal to issue an award in their favour.

Efficient Case Management

The 2015 QMUL Survey found that the most effective procedural innovation for reducing time and cost was a requirement for arbitral tribunals to commit to and notify parties of a schedule for deliberations and delivery of the final award. Stronger pre-appointment scrutiny of arbitrators' availability and the requirement for an early procedural conference were also seen as useful procedural innovations.

Both of these latter innovations were incorporated in the ICC Rules which now require arbitrators to make a "statement of acceptance, *availability*, impartiality and independence", thereby giving arbitrators' availability the same importance as the key qualities of independence and impartiality. Article 24 of the ICC Rules also makes it mandatory for arbitrators to hold an initial case management conference between the parties and tribunal.

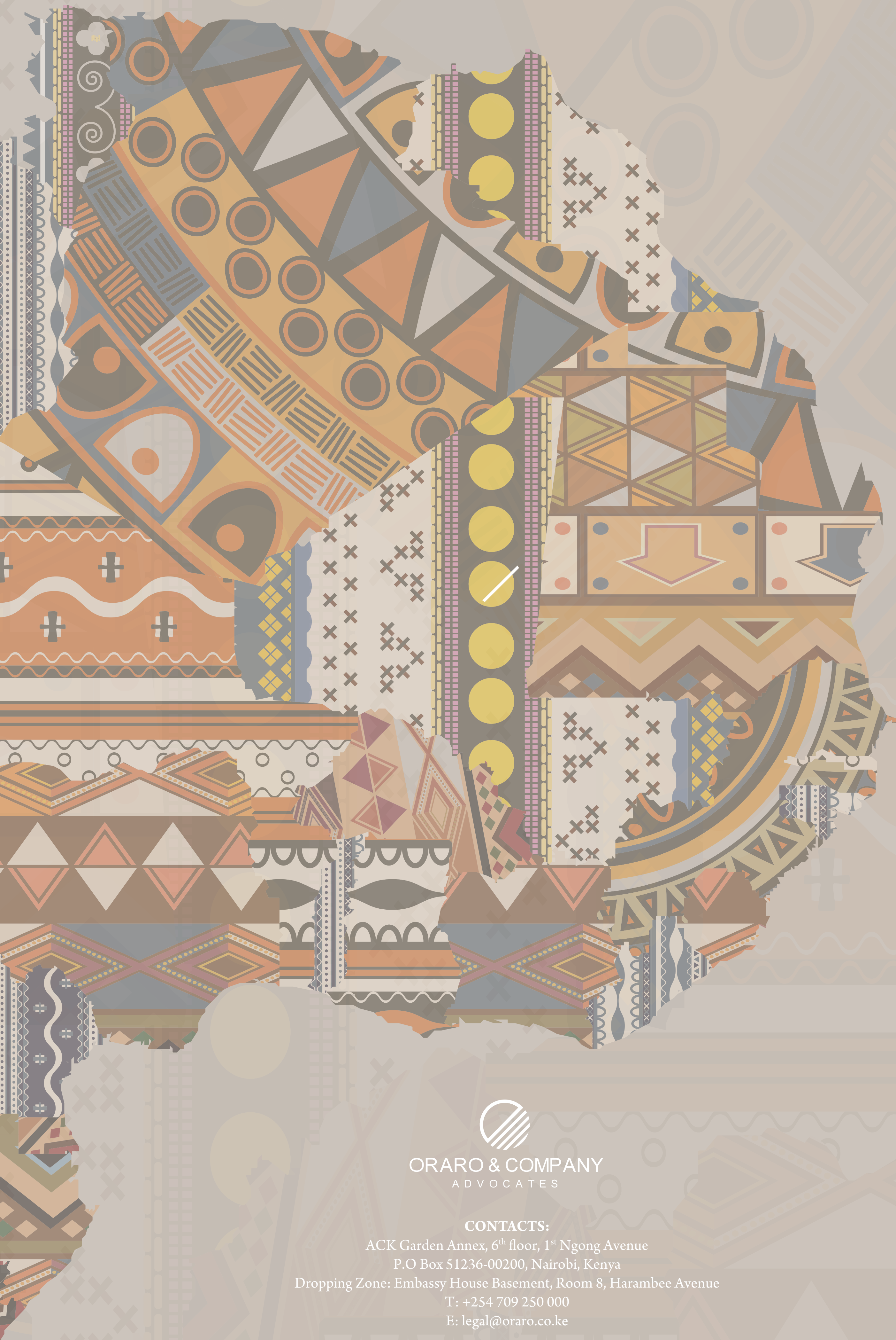
Arbitrators appointed to an LCIA tribunal must also now sign a written declaration stating "whether the candidate is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration".

However, as opposed to assessing each individual arbitrator's availability, the calendars of the arbitrator(s) and both parties' external counsel, and perhaps even key witnesses, should be assessed as a whole. This will determine the likelihood of the dispute progressing at a reasonable pace, and to set parties' expectations of the timeline for the resolution of the dispute.

Involving the parties directly in case management conferences also ensures that procedures are set which work best for the parties (and not just for their external counsel or the arbitral tribunal). The parties will also be able to convey which issues are most important for them in resolving the dispute, directly to the arbitral tribunal.

In drafting claims or defences, external counsel often take an "everything but the kitchen sink" approach, and throw in any and all issues in which their client has a decent chance of argument. However, it may be that while there are several issues in dispute, only one is of crucial importance to the parties – if so, a hearing on that issue should ideally be held in short order, rather than putting both parties to the expense of developing argument and evidence on the entirety of their claims or defences. This might then prompt settlement on any remaining issues, and in the event that it does not, the tribunal should consider if there is any real need to employ all of the usual steps (written pleadings, oral witness evidence, etc.) in disposing of these remaining issues.

Arbitrators have a crucial role to play in ensuring the continued popularity of arbitration as a cost-effective and efficient mechanism for resolving disputes. Approaching each dispute with a clean slate and making an effort to understand parties' concerns and the issues central to the dispute, will go a long way in ensuring that users of arbitration remain satisfied with the process.



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