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Hope and Resilience: Issue Twelve

The only certain thing at the moment is that these are uncertain times. As we wait to see what the future holds, it is our sincere hope that you have managed to adapt to *"the new normal"* in one way or another. We at Oraro & Company have, by God's grace, successfully navigated these choppy waters thus far. We look forward to better days ahead once the dust settles, all the while remaining resilient and embracing hope.

As a welcome break to what seems like a constant deluge of information relating to the COVID-19 pandemic, we have put together under our flagship publication, Legal & Kenyan, an exciting ensemble of articles on wide-ranging legal topics. We hope you find the read both refreshing and insightful.

Still, feel free to visit our dedicated resource center at https://www.oraro.co.ke/covid-19-hub/ which contains an array of useful material on legal matters relating to the pandemic. For now, I turn to give a brief overview of the articles featured in our twelfth issue:

The indefatigable Geoffrey Muchiri starts us off with an analysis of a recent decision by the Supreme Court of Canada regarding Courts' jurisdiction to deal with preliminary questions concerning the validity of arbitration clauses, vis-à-vis the arbitral tribunal's jurisdiction to do the same under the *kompetenz kompetenz* doctrine. Next, I write on the enhanced role and power of the Capital Markets Authority in combating the problem of insider trading, followed by an insightful piece by the dynamic duo of Pamella Ager and James Kituku highlighting the salient changes brought about by the new Business Laws (Amendment) Act, 2020 which will no doubt go a long way in making it easier to conduct business in Kenya. Daniel Okoth and I examine the vexed question as to the right of appeal to the Court of Appeal from decisions of the High Court on the setting aside of arbitral awards, and what this might portend for arbitration in Kenya, followed by Naeem Hirani with an interesting write-up on the advent of open banking, in terms of both the opportunities and risks that come with it. Noella Lubano reminds us of the importance of *"knowing your damages"* with an erudite analysis of the different types of damages recoverable in law, while Quinter Okuta and I consider the principles and practice relating to the empanelment of extraordinary benches in the Court of Appeal. Last but certainly not least, Pamella Ager, James Kituku and Tesrah Wamache team up to deliver an incisive look at the new regulations for the operation of Credit Reference Bureaus.

Enjoy the read and stay safe!

Sincerely,

John Mbaluto, FCIArb
Editor

Senior Partner's Note

In the midst of the current COVID-19 pandemic which has wreaked havoc and shifted norms throughout the world, we find ourselves in difficult and uncertain times. It however gives me great comfort to see the resilience that we have shown and continue to show during this period.

It is my hope and belief that there will be better days ahead, and that we will come out of this stronger, wiser, and better.

Stay safe.

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The information in this publication is for general purposes and guidance only and does not constitute legal or professional advice. Figures given in USD are approximate amounts. For exact amounts, please refer to the prevailing CBK mean rate.

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RECENT ACCOLADES

Personalised service, flexible on fees and top-notch lawyers.

THE LEGAL 500 EMEA, 2020

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CLAW-BACK:

KEY DECISION BY CANADIAN SUPREME COURT ON JURISDICTIONAL QUESTION IN ARBITRATION

In the arbitration world, Model Law countries refer to countries which have adopted the UNCITRAL Model Law on Arbitration of 1985 (**Model Law**) as part of their domestic law. The objective behind the Model Law was to harmonize the arbitration laws of different jurisdictions across the world. Model Law countries are characterized by minimal Court interference in the arbitral process often limited to interim measures of protection, appointment and removal of arbitrators, enforcement of arbitral awards and challenge to arbitral awards.

Courts in Model Law countries have often deferred to the arbitral process so much so that they have consistently held that when an arbitration clause exists, any challenges to the jurisdiction of the arbitrator ought to be raised with the arbitrator, as an arbitrator's jurisdiction extends to determining whether the arbitration agreement is valid and/or confers him with the jurisdiction to hear the dispute under what is known as the *kompetenz kompetenz* doctrine.

With the foregoing in mind, it came as a surprise when on 26th June 2020, the Supreme Court of Canada (a Model Law jurisdiction) handed down its Judgment in the case of *Uber Technologies Inc. v David Heller (2020) SCC 16,* wherein the majority upheld the decision of the Court of Appeal which had held that objections by a party to an arbitration clause need not be referred to an arbitrator under the *kompetenz kompetenz* doctrine.

The facts of the case were that David Heller provided food delivery services in Toronto, Canada using Uber's software application. To become a driver for Uber, Heller had to accept the terms of Uber's standard form services agreement which required him to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process required the payment of an up-front administrative and filing fees of USD 14,500 plus legal fees and other costs of participation. These fees represented most of Heller's annual income. In 2017, Heller started a class action against Uber in Ontario for alleged violation of employment standards legislation.

Uber brought a motion to stay the class action and have the matter referred to arbitration in the Netherlands. In so doing, Uber relied on the arbitration clause in the services agreement with Heller. Heller argued that the arbitration clause was unconscionable and therefore invalid. The motion Judge agreed with Uber, stayed the proceedings, and held that the arbitration agreement's validity had to be referred for determination within the arbitration to be conducted in the Netherlands, in accordance with the *kompetenz kompetenz* principle. Dissatisfied, Heller successfully appealed to the Court of Appeal which set aside the motion Judge's order and concluded that Heller's objections to the arbitration clause could be dealt with by a Court in Ontario. It also found the arbitration clause to be unconscionable, based on the inequality of bargaining power between the parties and the improvident cost of arbitration.

On further appeal this time by Uber to the Supreme Court of Canada, the apex Court upheld the decision of the Court of Appeal and dismissed the Appeal upon finding that the arbitration agreement in issue made it impossible for one party to arbitrate and it was thus a classic case of unconscionability. The majority held that Courts could in certain circumstances assume jurisdiction and determine the validity of arbitration agreements by derogating from

the doctrine of *kompetenz kompetenz.* The rationale for the majority decision was based on the doctrine of unconscionability determined upon application of a two-pronged test as follows:

Firstly, whether there was an inequality of bargaining power. With regards to this element the majority held that there was inequality of bargaining power between Uber and Heller because the arbitration clause was part of an unnegotiated standard form contract and there was a significant gulf in sophistication between the parties, and a person in Heller's position could not be expected to appreciate the financial and legal implications of the arbitration clause.

Secondly, whether there was a resulting improvident bargain. With regards to this second limb of the two-pronged test the majority held that the arbitration clause was improvident because the arbitration process required the up-front payment of USD 14,500 in administrative fees (a figure which was close to Heller's annual income and effectively served as a hurdle in the way of accessing the arbitral tribunal and obtaining relief). As a result, the arbitration clause was unconscionable and therefore invalid. For these reasons there was a real prospect that if the matter was sent to be heard by an arbitrator, Heller's challenge to the validity of the arbitration agreement may never be resolved.

Fully cognizant that they were departing from the venerable rule of systematic referral by clawing-back jurisdiction from the arbitral tribunal and turning the doctrine of *kompetenz kompetenz* on its head, the majority framed a further issue that would assist Courts in determining whether they should assert jurisdiction, namely, accessibility to Courts or dispute resolution tribunal.

In so doing, they held that in addition to the two exceptions to arbitral referral set out in the case of *Dell Computer Corp. v. Union des consommateurs (2007) 2 SCR 801,* and *Seidel v. TELUS Communications Inc.(2011) 1SCR 531,* a Court may depart from the general rule of arbitral referral if an issue of accessibility arises. The assumption made in *Dell* was that if the Court did not decide an issue, then the arbitrator would. The majority posited that the *Dell* case did not contemplate a scenario wherein the matter would never be resolved by the arbitral tribunal if the stay were granted by the Court. In the instant case, they highlighted that the validity of an arbitration agreement would not be determined by the arbitral tribunal and was thereby open for determination by the Courts given that:

- The arbitration agreement was fundamentally too costly or otherwise inaccessible by Heller and other drivers in his position given the USD 14,500 required to begin the arbitration relative to the claim.
- The plaintiff could not reasonably reach the physical location of the arbitration.
- The choice of a foreign law clause might have circumvented mandatory local policy, such as a clause that would prevent an arbitrator from giving effect to the protections in Ontario employment law.

The majority found that in such situations, staying the action in favour of arbitration would be tantamount to denying relief for all claims made under the agreement, and the arbitration agreement would, in effect, be insulated from meaningful challenge. The majority went on to hold that a Court should not refer a challenge to an arbitrator's jurisdiction to the arbitrator if there was a real prospect that doing so would result in the challenge never being resolved. The majority also held that upholding the arbitration clause would be tantamount to providing an illusory contractual right incapable of enforcement - reason being that although arbitration was the envisaged dispute resolution mechanism available per the contract, it unfortunately fell out of reach for Heller and the other drivers for it was neither cost effective nor attainable and thus in effect a non-existent option.

...the Canadian Supreme Court decision in Uber v Heller confirms that Courts do have the jurisdiction to examine the validity of the arbitral agreements and need not cede jurisdiction to the arbitral tribunal.

Justice Russell Brown in his concurring opinion chose to agree with the majority that the appeal ought to be dismissed. He however disagreed with the majority's reliance on the doctrine of unconscionability as the basis for upholding the Court of Appeal's decision as he felt that they had vastly expanded the scope and application of the doctrine of unconscionability thereby leading to a possibility of introducing uncertainty in the enforcement of contracts where predictability was paramount. According to Justice Brown, the answer to the conundrum lay in the doctrine of public policy because in the instant case the arbitration agreement had undermined the rule of law by denying Heller access to justice. The arbitration clause in the case was contrary to public policy as it was not an agreement to arbitrate but an agreement not to arbitrate as it expressly provided for arbitration while simultaneously having the effect of precluding, thereby dissolving, curial respect for arbitration. Accordingly, in such instances the principle of public policy would operate so as to prevent an ouster of Court jurisdiction. Despite the foregoing, Justice Brown reiterated the Court's deference to the arbitral process by stating that a Court should show due respect for arbitration agreements, particularly in the commercial setting and it would be only be in the rarest of cases such as where an arbitration agreement imposed undue hardship and acted as an effective bar to adjudication that Courts would interfere.

Lady Justice Suzanne Côté wrote a powerful dissent wherein she held that she would have allowed the appeal and upheld the arbitration clause thereby allowing a stay of proceedings on condition that Uber advanced the funds needed to initiate the arbitration proceedings. According to Justice Côté, the rule of systematic referral should take precedence as it required that any challenge to the arbitrator's jurisdiction would be resolved first by the arbitrator (who would determine the validity of the arbitration clause before the Courts). She cautioned the Courts against creating an exception to the rule of systematic referral and stated that reference to the Courts would only be necessary if the arbitration agreement was found to be null and void under the Model Law or the Arbitration Act. Justice Côté held that a Court would only depart from the rule of systematic referral where the jurisdictional challenge was based solely on a question of law or a question of mixed law and fact that required only a superficial review of the documentary evidence, and was not a delaying tactic or one intended impair the conduct of the arbitral proceedings.

This decision is of great importance in a country such as Kenya where various technological companies have engaged the services of drivers and other employees based on their standard form contracts. Kenya, being a Model Law country, is characterized by the Courts giving great effect to arbitration agreements in accordance with sections 6 and 17 of the Arbitration Act,1995 as well as Article 159 (2) (C) of the Constitution. However, the Canadian Supreme Court decision in *Uber v Heller* confirms that Courts do have the jurisdiction to examine the validity of the arbitral agreements and need not cede jurisdiction to the arbitral tribunal.

Only time will tell how the decision of Canadian Supreme Court in *Uber v Heller* will be looked upon in other jurisdictions, particularly Model Law countries. What is clear however is the need to re-look at *"manifestly expensive arbitral clauses"* and the decision serves as a clarion call for companies in *"strong bargaining positions"* to negotiate balanced agreements and in particular practical and cost effective dispute resolution clauses, lest they be found to be invalid or unconscionable as was the case in *Uber v Heller.*

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TIGHTENING LOOSE ENDS:

CAPITAL MARKETS AUTHORITY'S POWER AND ROLE IN COMBATING INSIDER TRADING

In 2013, the then Cabinet Secretary for the National Treasury, Henry K. Rotich informed the Budget and Appropriations Committee of the National Assembly that insider trading and market manipulation were a threat to the growth of Kenya's capital market. Among the amendments he proposed to the Capital Markets Act (**the Act**) was a broader definition of the term insider trading. On 24th December 2013, these amendments came into law through the enactment of the Capital Markets (Amendment) Act, 2013.

Insider Trading

Following the amendments, insider trading was defined as encouraging another person, whether or not that other person knows it, to deal in securities or their derivatives which are price-affected securities in relation to the information the insider possesses. Further, the person must know or have reasonable cause to believe that the trading would take place. It also includes disclosing the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.

Such an act is only illegal if done by a person who deals in listed securities or their derivatives whose prices may be affected due to information in the person's possession. In simpler terms, it is dealing in shares or securities of a listed company by insiders such as directors, managers, employees or any other connected persons such as auditors, consultants and lawyers who possess information that is not available to the public. The aim of prohibiting insider trading is to protect investors and the public at large since it only serves to profit the few insiders with advantageous information. For this and other reasons, the Act extends the mandate of the Capital Markets Authority **(the Authority)** to combating insider trading, as analysed below.

Section 2 of the Act defines an insider as any person who is or was connected with a company, or is deemed to have been connected with a company and is consequently reasonably expected to have access to unpublished information which, if made generally available, would be likely to materially affect the price or value of the securities of the company. Additionally, an insider is one who has received or has had access to such unpublished information. In the case of *Aly Khan Satchu v Capital Markets Authority (2019) eKLR,* it was emphasized that in considering whether a person was an insider, the Court was called upon to look into the true nature of the relationship of the person to the company, particularly whether the person had access to price-sensitive information which was otherwise not accessible to the public.

Section 32 of the Act defines inside information as information relating to particular securities or to a particular issuer of securities, which has not been made public and if it were made public is likely to have a material effect on the price of the securities. Therefore, if an insider acts on information that is in the public domain, then an allegation of insider trading cannot be sustained.

To illustrate, in *Republic v Benard Mwangi Kibaru (Criminal Case No. 1337 of 2008) (Unreported)*, the accused person was an employee of Uchumi Supermarkets Limited and had been attending the listed company's board meetings on invitation to discuss the profitability and turnaround efforts of the company. He then sold his shares in the company, after which he was accused of insider trading. The Court returned a finding of not guilty since information on the supermarket's poor performance was public knowledge and the prosecution did not prove beyond reasonable doubt that the accused person exploited information not generally available to the public.

Capital Markets Authority

The Authority is established under section 5 of the Act and consists of eleven members – a Chairperson appointed by the President on recommendation of the Cabinet Secretary in charge of matters relating to finance; the Chief Executive of the Authority, six other members appointed by the Cabinet Secretary; and representatives from the office of the Permanent Secretary to the Treasury, the Central Bank of Kenya, and the Attorney-General's office. Of relevance to this article are the objectives of the Authority to create and maintain a market in which shares and securities are traded and issued in an orderly, fair and efficient manner and to protect the interests of investors.

The Authority has the power to conduct investigations and inspections of the books, accounts or activities of undertakings approved or licensed by the Authority. Related to this is the power of entry and inspection, which the Authority's Chief Executive Officer may authorize an officer of the rank of Senior Officer or above to exercise on the Authority's behalf. Notably, the Authority must apply for a warrant in the Magistrate's Court to exercise this power.

The Authority is empowered to impose sanctions for breach of the Act's provisions, levy financial penalties, order a person to remedy or mitigate the effects of a breach of the Act, publish findings of malfeasance by any person; and suspend or cancel the listing or trading of any securities or exchange-traded derivatives contracts. However before the Authority imposes sanctions, it must give the person it investigates an opportunity to be heard.

The Kenol Kobil Matter

An example of the Authority's exercise of its powers was witnessed in relation to the Kenol Kobil takeover by French company, Rubis Énergie. On 8th July 2019, the Authority published a press release to the effect that it had exercised its powers when it noted suspicious trading in the run-up to the announcement of the takeover. Fourteen (14) accounts were identified in connection with purchasing a total of 62,699,700 Kenol Kobil shares worth KES 938,382,800 (USD 9.38 Million) with potential illegal gains amounting to KES 503,710,300 (USD 5.03 Million). The Authority placed a caveat on the accounts and obtained a warrant from the Magistrate's Courts to seize relevant electronic machines and devices to establish the persons who might have shared non-public price sensitive information or used the information to trade in Kenol Kobil shares.

As the Act also empowers the Authority to delegate its powers to an ad-hoc committee, the Authority formed an ad-hoc committee and tasked it to conduct a hearing on the matter, with a view to determining whether the suspicious activity constituted insider trading. The committee consisted of the Board's Chairperson, four members of the Authority and four external members. Upon consideration of the matter, the committee found Mr. Andre DeSimone, Mr. Aly Khan Satchu and Mr. Kunal Somchand Bid culpable of insider trading and meted out various sanctions including financial penalties, forfeiture of financial gains made through commissions, and disqualification from holding office in listed companies for periods of one (1) year for Mr. DeSimone and three (3) years for Mr. Satchu.

Section 32 of the Act defines inside information as information relating to particular securities or to a particular issuer of securities, which has not been made public and if it were made public is likely to have a material effect on the price of the securities.

Appeal Mechanisms

A person aggrieved by the decision of the Authority may appeal to the Capital Markets Tribunal (**the Tribunal**) within fifteen (15) days of the decision being communicated to them. This provides a statutory remedy, which means that aggrieved persons do not necessarily have to seek recourse from the Court at this stage. A person aggrieved by a decision of the Tribunal may have recourse to the High Court within thirty (30) days of the order or decision.

The Tribunal has all the powers of the High Court to summon witnesses, take evidence, call for production of books or documents, award costs and direct the taxation of costs. Notably, the Tribunal may admit evidence it considers relevant to the case before it even if it might otherwise be inadmissible before a Court of law under the law relating to evidence. This leniency in the rules of evidence gives parties more flexibility when making their case before the Tribunal.

In the *Aly Khan Satchu* case, the Court found that the Applicant ought to have lodged an appeal to the Tribunal instead of applying for judicial review orders in the High Court. Nonetheless, the Court proceeded to consider the case on its merits and ultimately ordered that it be remitted to the Authority for an independent and impartial committee to be constituted to hear the matter. The Court set aside the orders that the committee had given in relation to the dispute and ordered that the dispute be determined afresh within six (6) months of the Judgment. However, the Judgment has since been appealed against to the Court of Appeal and is awaiting determination.

It is also noteworthy that in the *Aly Khan Satchu* case, it was argued that the Authority was undertaking inquisitorial proceedings to find the Applicant guilty of a crime, which the Authority lacked the jurisdiction to do, as insider trading is proscribed as a criminal offence under the Act. It was therefore contended that the matter ought to be prosecuted as a criminal offence through the office of the Director of Public Prosecutions.

To resolve this issue, the Court distinguished between criminal and administrative sanctions, stating that while the administrative sanctions at the Authority's disposal had punitive aspects, they were neither criminal nor quasi-criminal in nature. The Court further found that a single act could have multiple consequences and potentially give rise to liability of criminal, civil, administrative, or disciplinary kind, and that while the facts relating to the matter before the Authority could as well have given rise to a criminal charge, this did not alter the nature of the proceedings before the Authority, which were essentially administrative in nature.

Conclusion

That the Authority is empowered to take robust administrative action to combat insider trading is not in doubt. However in so doing, the Authority is required to at all times adhere to the principles of natural justice, the Fair Administrative Action Act, 2015 and the Constitution. The Act provides for an appeal process to the Tribunal where a person is aggrieved by a decision of the Authority, and further appeal to the High Court, thereby providing sufficient corrective mechanisms, if need be, to mitigate and safeguard against any potential excesses or errors that the Authority might make.

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SMELLING THE COFFEE:

SALIENT CHANGES BROUGHT ABOUT BY THE NEW BUSINESS LAWS (AMENDMENT) ACT

Introduction

Kenya has for years lagged behind countries like Rwanda, which has been touted as one of the most investor-friendly countries in the region and the continent. From an investor's standpoint, Rwanda is reputed to have a quicker turnaround time in critical parameters, such as registration of businesses, procurement of government licences, conclusion of land transactions, amongst others.

It is against this background of playing catch-up to business-friendly countries that the Business Laws (Amendment) Act, 2020 (**the Act**) was enacted. The Act came into force on 18th March 2020, with the intention being to make conducting business in Kenya easier, thus making the country an attractive investment destination, which would in turn create a conducive climate for the attainment of longer term objectives such as the Big 4 Agenda and Vision 2030. In this article, we highlight some notable amendments to existing statutes brought about by the Act.

Electronic Signatures

Previously, the Law of Contract Act (Cap. 23) Laws of Kenya, did not expressly provide that a contract could be executed electronically. The Act has now amended the provisions of section 3 (6) of the Law of Contract Act to the extent that advanced electronic signatures shall going forward, be recognized as valid signatures. Therefore, contracts bearing such signatures would be considered to have been validly executed.

Section 44 of the Land Registration Act, 2012 (**LRA**), sets out the requirements for execution of instruments. A new subsection 3A has been introduced by the Act. It states that where an instrument is executed either by electronic signature or advanced electronic signature by persons consenting thereto, it shall be deemed to have been validly executed. The Act further introduces a new section 45 (3) (c) of the LRA, empowering the Registrar to dispense with verification of signatures, if an instrument has been electronically processed and executed by the parties consenting to it.

The definition section of the Registration of Documents Act (Cap. 285) Laws of Kenya (**RDA**) has also been amended by the Act, to recognize an advanced electronic signature and electronic signature as a means of signing documents under that statute. The upshot of this amendment is that both execution of documents and countersigning of alterations is to be considered valid, if done electronically. Furthermore, the endorsement by the Registrar of Documents under section 26 of the RDA, as proof of registration of documents, may also be done electronically. The recognition of the validity of electronic signatures is intended to make execution of documents easier, by dispensing with the mandatory requirement of manual signing of documents by the signatories, especially when dealing with voluminous documents. At the same time, the need to ensure the uniqueness or exclusivity of such electronic signatures is not compromised.

It is also noteworthy that the LRA expressly states in the new section 44(3A) that an instrument effecting a disposition in land can either be signed by an electronic signature or an advanced electronic signature, where parties consent. This means that an electronic signature or an advanced electronic signature can be used in the alternative. Since a disposition includes a sale, charge or transfer, one wonders how a signatory's execution will be authenticated where he or she opts to use an electronic signature in a sale agreement and an advanced electronic signature in the transfer instrument?

Interestingly, the mandate of regulation of the use of electronic signatures rests with the Communications Authority of Kenya (**CA**). The Cabinet Secretary responsible for Information, Communication and Technology is required, in consultation with CA, to prescribe regulations governing the use of electronic signatures as per section 83R of Kenya Information and Communications Act, 1998 (**KICA**). It will be interesting to see the interplay between CA and the Ministry of Lands and Physical Planning, as far as the verification of electronic signatures is concerned. It is hoped that such regulations will address the concerns raised above.

Electronic Registries and Records

The Act has amended the definition of a *"book"* in section 2 of the RDA to include an electronic book. This is in tandem with the introduction of a new section 3(2) of the RDA which has been introduced by the Act, to enable the Registrar of Documents to establish both the Principal Registry in Nairobi and the Coast Registry in electronic form.

The relevance of these amendments is that the records i.e. the different registers that are kept by the Registrars of Documents as per section 19 of the RDA, may also be kept in electronic form. This may be useful as far as the safeguarding of information is concerned, as there have been instances where some of these registers are either misfiled or misplaced, hence registrations cannot proceed unless they are found or other registers opened in their place. Furthermore, electronic records will facilitate a multi-user platform, as different Registrars will be able to access the same records concurrently, instead of the manual system where they had to wait for use one person at a time.

Equally, a new section 4 (2) of the RDA has been introduced to authorize the registration of a document either physically or electronically. This is intended to ease the process of registration of documents under the RDA, as one may not require to physically present a document for registration at either of the two Registries. One would be able to apply for registration remotely, notwithstanding their location in the country.

Lastly, section 83B (1) (c) of KICA has also been amended by the Act, thereby bringing the execution of documents of title within the ambit of Part VI of the KICA. This means that such execution is subject to the same provisions governing the use of electronic signatures and records and maybe perceived as a means of digitizing signatures and title records.

Electronic Processing of Documents

Sections 5 (1) and (2) of the Act as read together with section 32 of the Survey Act (Cap. 299) Laws of Kenya (**Survey Act**) provide that the Director of Surveys may imprint the seal of the Survey of Kenya on the survey plans authenticated by the Survey Department. The Act introduces a new section 5 (3) of the Survey Act which provides that documents processed electronically and which bear a prescribed security feature, shall be deemed to bear the imprint of the seal of the Survey of Kenya. Section 30 (1) of the Survey Act is also amended to provide that a surveyor who undertakes a survey shall send to the Director of Surveys all the supporting field documentation either physically or electronically.

These amendments to the Survey Act are meant to ensure the survey process is expedited. Survey documents e.g. deed plans, may be prepared electronically hence it will be faster and easier, especially where editing or correction of information is necessary. Furthermore, a surveyor irrespective of where he or she is based in the country, will no longer need not travel to the Survey of Kenya offices located along the Thika Superhighway, to physically present the supporting field documentation for every survey undertaken. The surveyor will simply electronically dispatch or upload such documents, to the designated email address or portal, from the comfort of their office. This will save both time and expenses.

Electronic Stamping

Section 119 of the Stamp Duty Act (Cap. 480) Laws of Kenya has been amended to provide that documents can be electronically stamped, extending the scope of the initial provision which only recognized stamping by a franking machine or an adhesive stamp. This will come in handy in terms of easing the backlogs that are oftentimes witnessed at the Lands Offices, especially for documents that must be franked. There have been instances where either the franking machine breaks down and has to be repaired, or attains the monetary limit, hence has to be taken to the Collector of Stamp Duty in Nairobi to be reset. These interruptions have resulted in delays in finalizing the stamping formalities and will hopefully now be a thing of the past.

> ***The Act came into force on 18th March 2020, with the intention being to make conducting business in Kenya easier, thus making the country an attractive investment destination...***

Land Rent and Rates

Sections 38 and 39 of the LRA required a person seeking to register an interest in land to provide proof of payment of land rates and land rent before registration is effected. An application for registration therefore had to be accompanied with Rates and Rent Clearance Certificates where rent and rates were payable.

Sections 22 and 23 of the Act have deleted these provisions entirely from the LRA. This implies that it shall no longer be mandatory to produce Land Rent and Rates Clearance Certificates, when applying for registration of an interest in land. Transferees therefore have to individually carry out due diligence and satisfy themselves that rent and rates have been paid in order to avoid assuming these liabilities.

It is however important to note that although sections 38 and 39 have been expunged from the LRA, sections 55 (b) and 56 (4) of the LRA which require the production of a Rent Clearance Certificate and Consent to Lease or Charge prior to registration remain in force. It will therefore be necessary to address this disparity going forward, in order to clarify the applicable completion documents in property dealings.

Company Seal

Sections 29 to 33 of the Act deleted sections 37 (1), 38, 42 and 43 of the Companies Act, 2015 (**Companies Act**). In summary, these provisions required a company to maintain a common seal and use it in the execution of its documents. In addition to its common seal, a company would also have had an official seal for use either outside Kenya or on other documents such as share certificates or securities. Lastly, section 495 of the Companies Act has been amended to the effect that share certificates do not have to be sealed, so as to be considered as sufficient proof of a member's shareholding in a company.

The essence of these amendments can be summed up by the provisions of section 37 (2) of the Companies Act. It states that a document will be considered as validly executed by a company if signed by either two signatories on its behalf, or by a director in the presence of a witness who will attest his or her signature. This has simplified the execution process of company documentation by doing away with the additional sealing requirement that existed previously. However, it is noteworthy that the issue of electronic signatures or advanced electronic signatures has not yet been incorporated into the new execution requirements of company documents.

Conclusion

The main objective of the amendments is to expedite business processes by dispensing with unnecessary formalities, which have tended to delay transactions over the years. However, the quest for Kenya to attain the coveted status of an investment hub requires a holistic approach, not restricted to a few legislative amendments. Other relevant considerations include proper infrastructure, political stability and security of both citizens and foreigners. Nevertheless, the Act is good progress, noting that the journey of a thousand miles begins with a single step.

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THE BEAT GOES ON:

THE RIGHT OF APPEAL FROM HIGH COURT DECISIONS ON ARBITRAL AWARDS

Background

In the maiden edition of this newsletter published in August 2015, we featured an article considering whether it was time to rethink arbitration in Kenya – informed by a Ruling handed down by the Court of Appeal in *Nyutu Agrovet Limited v Airtel Networks Limited (2015) eKLR* (***Nyutu I***). In the Ruling, the Court of Appeal affirmed the principle of finality in arbitration and snuffed out further avenue of appeal in case a party was dissatisfied with a decision of the High Court in either setting aside or enforcing an arbitral Award.

The article posited that the decision in *Nyutu I* could have the effect of dissuading parties from including arbitral clauses in their contracts to avoid situations where parties would have no viable process of error correction since arbitral Awards would be impervious to challenge beyond the High Court. Subsequent to the decision in *Nyutu I*, there have been further developments in this area of the law, in particular, whether there is a right of Appeal to the Court of Appeal from the decision of the High Court pursuant to section 35 of the Arbitration Act, 1995 (**the Act**).

Court Intervention

It is apposite to compare various provisions of the Act which permit the intervention of the High Court in arbitral proceedings, so as to contextualise the developments alluded to above. The Act, being based on the UNCITRAL Model Law in Arbitration, was designed to limit, or reduce Court interference in the arbitral process and enable Courts to play a more supportive role as espoused under section 10 of the Act. Sections 12, 14, 15 and 16A of the Act also prescribe limited instances of Court intervention in relation to the appointment, challenge, impossibility to act and withdrawal of an arbitrator through an application to the High Court.

However, all the said sections expressly provide that a decision of the High Court in respect thereof shall be final and not subject of an Appeal. It flows from the foregoing provisions that a party dissatisfied with the decision of the High Court arising from an application made under the aforesaid sections would have no further recourse to the Court of Appeal. Section 17 (7) of the Act similarly prohibits an Appeal from the decision of the High Court arising from a challenge on the jurisdiction of an arbitrator.

On the other hand, section 39 (3) of the Act expressly provides for the right of an Appeal to the Court of Appeal from a decision of the High Court arising from either an application or an Appeal on a question of law upon agreement of parties to a domestic arbitration and under the specified circumstances. The said circumstances include an agreement of the parties that an appeal shall lie prior to delivery of the award or where the Court of Appeal is satisfied that a point of law of general importance is involved.

Section 35, being consistent with the principle of finality in arbitration, provides that recourse to the High Court against an arbitral award may be made by an application for setting aside the award only. It then goes on to specify the limited grounds for such challenge to include, incapacitation of a party at the time of entering into an arbitration agreement; invalidity of an arbitration agreement; where an award goes beyond the scope of the arbitral reference; improper composition of the tribunal; where an award is tainted by fraud, bribery or undue influence; or where an award is in conflict with public policy.

The Contrast

Contrastingly, section 35 of the Act is silent on whether a decision of the High Court on an application made thereunder is final or appealable. In the case of *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited (2017) eKLR*, the Court of Appeal, in considering whether an appeal to the Court of Appeal lies only under section 39 and not under section 35 of the Act, departed from its earlier position in *Nyutu I* by holding that the fact that section 35 of the Act is silent on whether such a decision made thereunder is appealable does not by itself bar the right of appeal.

In arriving at that decision, the Court of Appeal was informed by Article 164 (3) of the Constitution which empowers the Court of Appeal to hear appeals from the High Court. It therefore upheld the view that the Constitutional right of appeal can only be denied, limited or restricted by express statutory provisions. This position had been pronounced by the Court in the case of *Judicial Service Commission & 3 Others v Justice Kalpana H. Rawal (2016) eKLR*, where the Court noted that just as the jurisdiction of the Court of Appeal now flows from the Constitution itself, the right of Appeal equally flows from the Constitution. As per Justice Kiage, who expressed reservation as to whether *Nyutu I* had been correctly decided:

"I state and hold, unhesitatingly, that both the jurisdiction and the right of appeal from the High Court to this Court are now founded, in the first instance, on the Constitution of Kenya 2010. The jurisdiction invested on this Court is not qualified by words such as "where a right of appeal arises". It provides both the right of approach from the High Court and the power to hear those who have so approached. That constitutional right to appeal can only be denied, limited or restricted by express statutory provision properly justified as required by the Constitution itself. The wording of Article 164(3) of the Constitution admits to no other interpretation. It would be inimical to the general tenor of the Constitution and the centrality of the Bill of Rights were this or any other Court to pronounce itself that in matters to do with the interpretation or application of the Constitution and the enforcement of fundamental rights and freedoms, this Court has no role to play. There is neither rhyme nor reason; neither doctrine nor policy that can justify such a conclusion."

Further Developments

There being no consensus by the Court of Appeal on how section 35 of the Act should be interpreted, the Supreme Court, the apex Court of the land, was called upon to bring an end to the debate thus ensure certainty of law on the issue in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited & Another (2019) eKLR* (**Nyutu II**). The Supreme Court appreciated that section 35 of the Act does not expressly indicate whether the decision of the High Court made thereunder is final. After considering the interpretations made by Courts in other jurisdictions in relation to their respective arbitration statutes similarly drawn from the Model Law, the Supreme Court found that the Arbitration Act and the UNCITRAL Model Law do not expressly bar further appeals to the Court of Appeal.

The Supreme Court then proceeded to hold that whereas there was a need to shield arbitral proceedings from unnecessary Court intervention, there may also be legitimate reasons seeking to appeal High Court decisions. For instance, a manifestly unfair determination by the High Court should not be immune from appellate review. As a result, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. The Supreme Court thus opined and held that there is a right of Appeal from the High Court to the Court of Appeal under section 35 of the Act. However, the Supreme Court was quick to circumscribe the circumstances under which the right of appeal could be exercised, i.e. where it is shown that in setting aside an arbitral award, the High Court went outside the grounds set out in section 35 of the Act. For example, where an award is set aside on Constitutional grounds. The Supreme Court also pointed out that this circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction.

The Supreme Court then proceeded to hold that whereas there was a need to shield arbitral proceedings from unnecessary Court intervention, there may also be legitimate reasons seeking to appeal High Court decisions. For instance, a manifestly unfair determination by the High Court should not be immune from appellate review. As a result, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness.

In *Synergy Industrial Credit Limited v Cape Holdings Limited (2019) eKLR* (***Synergy***), the Supreme Court reiterated that purpose of section 35 of the Act is to ensure that Courts are able to correct specific errors of law which, if left unchallenged, would lead to a miscarriage of justice. Therefore, in the interest of safeguarding the integrity of the administration of justice and particularly in the absence of an express bar, the Court of Appeal should have residual jurisdiction but only in exceptional and limited circumstances.

The two decisions of the Supreme Court have effectively afforded parties to arbitration some recourse especially where the High Court, has in determining an application under section 35 of the Act, clearly misdirected itself resulting in a miscarriage of justice.

Critique

The reasoning by the Supreme Court in both *Nyutu II* and *Synergy* draws heavily from comparative jurisprudence from Canada, the United Kingdom and Singapore. However, the respective arbitration statutes in these jurisdictions specifically provide instances when leave to appeal a decision confirming or setting aside an award may be granted.

Taking cognisance of this fact, the Supreme Court in the *Synergy* case above stated in passing that it is expected that a leave mechanism would be introduced into our laws by Parliament to sieve frivolous appeals. It is therefore arguable that the Supreme Court jumped the gun and has, by exercise of judicial craft, proceeded to amend the Act thus stepping into the exclusive domain of the Legislature. Yet, the Supreme Court would be justified for being ill-at-ease in precluding avenues of judicial redress in the face of miscarriages of justice all for the sake of upholding the principles of *"finality"* and *"minimal or limited Court intervention"* in arbitration.

Parting Shot

Whereas we expressed an underlying concern for the future of arbitration in Kenya post *Nyutu I*, the two Supreme Court decisions in *Nyutu II* and *Synergy* would, in our view, work to bolster confidence in the arbitral process by allowing for further (albeit limited) appellate redress from decisions of the High Court where circumstances allow – despite seemingly watering down the allure of finality. For the time being, we return the verdict that it is not yet time to rethink arbitration in Kenya.

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DIGITAL AGE:

THE ADVENT OF OPEN BANKING AS TECHNOLOGY AND FINANCIAL SERVICES CONVERGE

Banking transactions have evolved from the traditional model with technology disrupting how payments are made. Functions such as international money transfers and loan applications that previously required one to physically visit a financial institution can now be done through mobile phone applications. The convergence of technology and financial services has increased competition within the banking industry as traditional banking customers shift to mobile platforms that ease banking transactions and enhance overall customer experience. Such competition demands that banks tailor their transactions models to meet their customers' needs.

Open banking is such an attempt. It aims to meet this revolution head-on by giving customers more control over their transactions, by sharing customer-permission data with third-party applications. This allows third-party developers to build solutions around this data and to provide services such as real-time payments and fund transfers which in turn, increase the convenience of banking transactions.

Regulatory Framework

Open banking involves the transmission of customer-related data from a bank to third-party services. For this reason, the Data Protection Act, 2019 (**DPA**) serves as the key reference point in actualising open banking transactions. Open banking places banks within the purview of the DPA through their roles as data controllers and data processors within the meaning of section 2 of the DPA. The section defines data controllers as *"… a natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purpose and means of processing of personal data."* On the other hand, a data processor is defined as *"… a natural or public authority, agency or other body which processes personal data on behalf of the data controller."*

This section further defines processing to include *"… any operation or sets of operations which is performed on personal data or on sets of personal data whether or not by automated means, such as… disclosure by transmission, dissemination, or otherwise making available."*

By the foregoing definitions, banks are both data controllers and processors as their core functions involve the processing and controlling of customer data. Therefore, banks are under an obligation to meet the principles set out to protect personal data under section 25 of the DPA. These principles impose various obligations on data processors and data controllers pertaining to the processing of data. In part, these include the obligation to ensure that personal data is processed in accordance with the right to privacy, in a lawful manner and for explicit purposes amongst other requirements.

The Risk

While open banking holds a wealth of opportunities for banks to reinvent themselves in the digital age, it simultaneously poses a myriad of risks for the banking industry. To begin with, the third-party applications which provide access to open banking services in some instances have no direct contractual obligation with the customers' banks which deprives banks of any privity as to the terms and conditions of use and service for these applications as they are independently executed by the customers authorising the transfer of their data.

As a result, banks have no means of controlling the extent or use of customer information, nor can banks verify the integrity of third-party applications which seek access to such information. Consequently, a customer may inadvertently give consent to a malicious application which compromises the security of a bank. Additionally, given that banks may have no contractual relationship with the third-party, it would be difficult to apportion liability in cases of financial loss arising from use of the application.

In light of the foregoing, there are various mitigation measures that banks might employ at an institutional level to monitor and manage the risks associated with third-party applications, as highlighted at the end of the article.

Data Transfers

Banks have a fiduciary obligation to keep their customers' information confidential. In open banking, this duty is essentially waived by customers who instruct and give their consent to the banks to share their information with third-parties. The transmission of such data carries with it the risk of data loss and fraud where there are no secure platforms to transfer such data.

Section 41 of the DPA provides that all data processors and controllers have a duty to integrate necessary safeguards that implement the data protection principles set out in section 25 of the DPA. This means that banks and the third-party applications have an obligation to ensure that their systems do not fall afoul of the provisions of the DPA or occasion any loss to the data subject.

According to Jim Marous in his article *"The Future of Banking Depends on Open Banking"* published in *The Financial Brand*, banks that offer open banking services have resorted to the use of Application Programming Interfaces (**APIs**) so as to ensure the secure transmission of such data. APIs work by providing a structure through which two applications can communicate. For example, an API may be used to communicate with the customer's bank and a third-party application to complete payment to services provided by the third-party application to the Bank's customer. While the use of APIs mitigates the risk of data loss, it does not guarantee the safety of such data. For instance, open APIs, which are the preferred APIs to use in open bank ing, pose a security and legal risk to banks as they allow third-party applications to access the banks customers' information without any assurance as to the security of the third-party applications.

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Marous points out that given that there are no contracts between banks and third-party applications, it is hard to determine who is liable in the event of such loss as the parties would not have contracted on:

- the means by which data will be transferred
- the security of the third-party platform
- who bears the risk in the event of data or financial loss occurring after the transmission of such data

Furthermore, the terms of use and services for most third-party applications tend to incorporate general exclusion clauses that limit or exclude their liability for any data loss that accompanies the use of their products which would put the banks at risk of being wholly liable for any loss arising from release of customers' data to a third-party.

Comparative Analysis

In 2015, the European Union adopted the Payment Services Directive (**the Directive**). The Directive was an attempt to formalise the relationship between banks that provide open banking services and third-party applications by setting industry standards in the conduct of open banking transactions. The industry standards include amongst others:

- imposing upon banks and regulators an obligation to set up a reporting mechanism
- a pronouncement that payment service providers are responsible for the security risks concerned

The adoption of the Directive resulted in the development of Open Banking Europe which was launched in 2017 with the aim of providing a single, standardised and open directory on authorities and third-party providers in open banking. While the adoption of the Directive has reduced the risks of open banking in the European Union by setting standards for the regulation of open banking, no such directive applies in Kenya, bearing in mind that the DPA is a fairly recently enacted statute, with various guidelines and regulations envisaged under the law yet to be rolled out.

Therefore, it is fair to state that banks in Kenya are at a higher risk of incurring liability in the event of data or financial loss occurring from the use of open banking.

Recommendations

In order to mitigate the potential liability arising from open banking, it is recommended that banks should consider:

- developing an open banking policy that outlines the extent to which banks can integrate with third-party applications whilst adhering to the provisions of the DPA
- imposing privacy by default-or-design thresholds to third-party applications before allowing them into their eco-system
- updating their terms of service and use to outline their stance on liability where third-party applications are involved

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BACK TO BASICS:
A LOOK AT THE LAW ON AWARDING DAMAGES

The principal remedy under common law for breach of contract is an award of damages, with the purpose of damages being to compensate the injured party for the loss suffered as a result of the breach, rather than (except for very limited circumstances) to punish the breaching party. This general rule, which can be traced back to the decision in the case of *Robinson v Harman (1848) 1 Ex 850,* is to place the claimant in the same position as if the contract had been performed, with the guiding principle being that of restitution. As was held by the Court in *Robinson v Harman:*

"The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

In this article, we explore various types of damages that a Court of law might award depending on the nature of the case. It is important for parties to be aware of the types of damages available in law and the circumstances upon which such damages might be awarded, so as not to pursue that which one is not entitled to, and perhaps more importantly, not to omit that which one is entitled to.

Special Damages

Special damages are awarded to compensate a claimant for actual out-of-pocket expenses and provable losses that have been incurred as a direct result of the defendant's actions or behaviour. Special damages are amenable to precise monetary quantification and as such the claimant must be able to support their claim with compelling and accurate evidence of the losses sustained.

In *Equity Bank Limited v Gerald Wang'ombe Thuni (2015) eKLR,* the Court highlighted the importance of special damages being specifically pleaded and thereafter strictly proved before they can be awarded. This position was further buttressed by the Court in *Okulu Gondi v South Nyanza Sugar Company Limited (2018) eKLR,* where it was held that *"special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity."*

General Damages

General damages, or non-pecuniary losses, are those damages which cannot be mathematically assessed as at the date of the trial. These damages are not amenable to precise monetary quantification and are assessed by the Court, ordinarily guided by precedents of a similar nature.

It is noteworthy that general damages are ordinarily not recoverable in cases concerning breach of contract as highlighted in the Court of Appeal case of *National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another (2015) eKLR.*

Further, the Court of Appeal has on numerous occasions held that allowing a claim for general damages in addition to quantified damages under a breach of contract would amount to duplication. In addition, where there has been a breach of contract but the innocent party has not sustained any actual damage therefrom, or fails to prove that he has, only nominal damages would be recoverable by the innocent party.

Expectation Damages

Expectation damages are a form of compensation awarded to the party harmed by a breach of contract for the loss of what was reasonably anticipated from the transaction that was not completed and are aimed at placing the innocent party in the position he would have been, had the breach not occurred.

Expectation damages are recoverable only where they can be calculated to a reasonable certainty, and where this is not possible, the injured party will only be able to recover nominal damages.

Typically, the issue of certainty arises in cases where the damages suffered are in the form of lost profits. The general rule regarding lost profits and certainty in calculating damages is that if the injured party is an established business, lost profits are not treated as speculative because they can be estimated from past profits. Therefore, an established business will generally recover its lost profits, based on reasonable estimates derived from previous records.

Consequential Damages

Consequential damages are intended to reimburse a claimant for indirect losses other than contractual loss. However, this head of damages is not as open ended as it seems; the standard of proof is higher than that of special damages, as the loss needs to have been foreseeable or communicated in advance.

The general rule with regard to consequential damages is that the breaching party either knew, or ought to have known, that the damages claimed would probably result from his or her breach of the contract. In the absence of such damages being foreseeable, they are only recoverable where the innocent party mentioned their special circumstances in advance of the breach as was held in *Hadley v Baxendale (1854) ER 145.*

Punitive Damages

As mentioned earlier, the general aim of awarding damages is compensation, and not punishment. However, there are certain instances

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where a Court might order the breaching party to pay punitive (also known as 'exemplary' or 'aggravated') damages to deter him or her from committing future breaches of the same kind. Such instances include where:

- Servants of government have acted in an oppressive, arbitrary or unconstitutional manner
- The conduct was calculated by the defendant to make him a profit which would exceed the compensation payable to the plaintiff
- The payment of exemplary damages is authorized by statute

Duty to Mitigate

Even after having suffered breach of contract and loss arising from such breach, a plaintiff has a legal duty to mitigate the damages suffered, and not to the allow the damages, as it were, to *"snowball into an avalanche."* If the plaintiff unreasonably fails to act so as to mitigate its loss, or acts unreasonably so as to increase its loss, the law treats those actions as having broken the chain of causation and measures damages as if the plaintiff had instead acted reasonably.

The law further recognizes that a failure to mitigate damages means that the level of damages recoverable by the plaintiff would be commensurately affected by the extent of that failure.

The burden of proving that the plaintiff failed to take all reasonable steps to minimise or avert loss falls on the defendant. As was held in the case of *Lombard North Central PLC v Automobile World (UK) Limited (2010) EWCA Civ 20:*

"... it is well recognised that the duty to mitigate is not a demanding one. Ex hypothesi, it is the party in breach which has placed the other party in a difficult situation. The burden of proof is therefore on the party in breach to demonstrate a failure to mitigate. The other party only has to do what is reasonable in the circumstances."

Interest

In addition to a determination on the quantum of damages, the Court will often award interest on the damages awarded. Such interest may be pre-Judgment or post-Judgment, where the former entails interest accruing on the award from the date of injury or the time of filing the claim to the time of the award, while the latter is interest accruing on the award from the time of entering the award to the time of payment.

An award of interest is not always discretionary. The general rule is that the applicable rate should be sourced from the contract, and where the contract is silent on the applicable interest rate, the rate may be implied from trade usage. In some cases, the contract may be so extensive as to stipulate for default interest. Similarly, an award of compound and simple interest should derive from the contract. In other words, the rate on interest will only be discretionary if it is not provided for in the agreement, implied from trade usage, or prescribed by statute.

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THE MORE, THE WISER:

EMPANELMENT OF EXTRAORDINARY BENCHES IN THE COURT OF APPEAL

Empanelment of a bench of judges refers to the administrative action of appointing several judges, to preside over a case or to hear an appeal. In the Court of Appeal empanelment of a bench would entail appointing an uneven number of judges being not less than three (3) in number, to hear and determine the matter either through a unanimous decision or by way a majority decision.

Section 13 (1) (b) of the Court of Appeal (Organization and Administration) Act, 2015 provides the President of the Court of Appeal is *"… responsible for the allocation of cases and the constitution of benches, including ordinary and extraordinary benches, of the Court"* amongst other functions. The Act does not define what an extraordinary bench is but from the meaning of the word extraordinary, it is taken to mean that the Court would be constituted in a unique, unusual or exceptional manner i.e. in a numerically greater coram than usual. This was remarked upon by the President of the Court of Appeal, Justice Ouko (P), in the case of *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others (2020) eKLR*:

"The Act does not define what extraordinary benches are but, in my assessment, these would not be the usual benches of one judge (in chambers) or three in open Court, but of a number greater than these provided that the number is odd."

Whereas section 5 (3) of the Appellate Jurisdiction Act (Cap. 9) Laws of Kenya provides for making of rules for the purposes of *"fixing the numbers of judges who may sit for any purpose"*, this provision has not been taken advantage of and no such rules have ever been made. In the circumstances, empanelment of appellate benches (whether ordinary or extraordinary) has come to be matter of practice, rather than procedural rule, and is a function carried out by the President of the Court. This observation is well captured in the aforementioned case of *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited:*

"Though the Rules Committee is empowered under section 5 (3) (i) of the Appellate Jurisdiction Act to make rules to fix the number of judges of

the Court comprising an uneven number not being less than three, no such rules, unfortunately have been made. So that, apart from section 5 (3) (i) and the general provisions in section 13 (1) (b) of the Court of Appeal (Organization and Administration) Act, the empanelling of benches has been a matter of practice and not rules of procedure."

In the *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited* case, Justice Ouko took a walk down memory lane and re-traced the practice of empanelment of a five-judge (or extraordinary) bench, pointing out that the power to empanel a five-judge bench rested with the President of the Court, while the process could be initiated either through an oral application made by a party before a three-judge bench, or through a formal letter to the President of the Court:

"I take advantage of this appeal to, briefly outline… the correct practice and the proper circumstances for constituting a bench of more than three judges in this Court because the long-held practice appears to have been lost along the way. In the past it was the function of the President of the Court (in the years 1954 to 1977 when the predecessor of the Court had President) or the Presiding Judge in the years immediately preceding the promulgation of the 2010 Constitution, to constitute such benches. Today acting on an oral application, a three-judge bench would direct that the President of the Court constitutes an enlarged bench… Sometimes, in response to mail from advocates, the Presiding Judge or President would empanel the bench. As way back in history as 1954, it was recognized by the predecessor of this Court… that the role of empanelling a five-Judge bench rested with the President of the Court."

Having touched upon the process and means through which an extraordinary bench might be empanelled, we turn now to consider the grounds or basis upon which such empanelment might be made.

Departure from Previous Decisions

One of the grounds upon which one may request for the empanelment of an extraordinary bench would be where one would be asking the Court to depart from one or more of its previous decisions i.e. potentially upsetting precedent, in recognition of the fact that while the Court should abide by the doctrine of precedent, it is nevertheless free in both civil and criminal cases to depart from previous decisions, when it is right to do so.

In the case of *Income Tax v T (1974) EA 549*, Justice Spry (Ag. P) explained as follows (being a reiteration of an earlier decision of the Court of Appeal in *PHR Poole v R (1960) EA 63*:

"A full Court of Appeal has no greater powers than a division of the Court; but if it is to be contended that there are grounds, upon which the Court could act, for departing from a previous decision of the Court, it is obviously desirable that a matter should, if practicable, be considered by a bench of five judges."

Review of Conflicting Decisions

Closely related to a situation where the Court is directly asked to depart from a previous decision, (not previously thought to be wrong), is where the Court has unwittingly given varying opinions on a matter. Whilst the Court is not bound by its previous decision, the doctrine of stare decisis calls for deference to precedent, while conflicting decisions on the same issue necessarily means that one school of thought is wrong.

Thus, while stating that the *"strengthening of the normal bench of three by two more heads"* was desirable when the Court was called upon to review inconsistent decisions, the Court of Appeal rendered itself as follows in *Eric V. J. Makokha & 4 Others v Lawrence Sagini & 2 Others (1994) eKLR*:

The Act does not define what an extraordinary bench is but from the meaning of the word extraordinary, it is taken to mean that the Court would be constituted in a unique, unusual or exceptional manner i.e. in a numerically greater coram than usual.

"Some muted but not impolite observation was made about the numerical composition of the Court by the applicant's counsel but the breadth and sophistication of the submissions made to us for four whole days, justified the strengthening of the normal bench of three by two more heads. Because of the hierarchical structure of the Court, it is also the practice adopted to review inconsistent decisions of this Court."

Substantial Question of Law

The Constitution does not define what a substantial question of law is (it may well be argued that any question of law is substantial), but Justice Majanja attempted a definition in the case of *Harrison Kinyanjui v Attorney General & Another (2012) eKLR*, where he held that:

"… the meaning of 'substantial question' must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the Court delivered by three judges."

In *Santosh Hazari v Purushottam Tiwari (2001) 3 SCC 179*, the Supreme Court of India summarized the question of whether a matter raises a substantial question of law as follows:

- directly or indirectly, it affects substantial rights of the parties
- the question is of general public importance
- it is an open question, in that the issue has not previously been settled by the Court
- the issue is not free from difficulty
- it calls for a discussion for alternative view

The above considerations shed some light as to what would amount to *"a substantial question of law"* for the purposes of empanelment of an extraordinary bench. As Justice Odunga succinctly stated in *Wycliffe Ambetsa Oparanya & 2 Others v Director of Public Prosecutions & Another (2016) eKLR*:

"… a Court seized with the question as to whether or not an extraordinary bench is required may also consider whether the matter is moot in the sense that the matter raises a novel point; whether the matter is complex; whether the matter by its nature requires a substantial amount of time to be disposed of; the effect of the prayers sought in the petition and the level of public interest generated by the petition."

Upshot

There is no doubting the juridical benefit derived from drawing upon the collective wisdom, experience and understanding of an increased number of judicial heads put together, where the circumstances call for the same. It is a recourse that perhaps the Rules Committee of the Court of Appeal might make readily available by promulgating the Rules envisaged under section 5 (3) of the Appellate Jurisdiction Act, which would stipulate the procedure and grounds for the empanelment of an extraordinary bench.

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ANALYSE THIS:

AN OVERVIEW OF THE RECENTLY PUBLISHED CREDIT REFERENCE BUREAU REGULATIONS

A Credit Reference Bureau (**CRB**) is an entity that gathers past and current credit information on customers of financial institutions such as banks, microfinance institutions, saving and co-operative societies, analyses the information and generates reports on the credit standing of those individuals.

The Cabinet Secretary for the National Treasury and Planning promulgated the CRB Regulations on 8th April 2020 (**the new Regulations**), pursuant to section 31(3) of the Banking Act (Cap. 488) Laws of Kenya. The new Regulations repealed previous Regulations published in 2013. The new Regulations provide a framework for sharing customers' credit information and seek to enhance the protection of borrowers.

The Central Bank of Kenya (**CBK**) advised that the new Regulations were developed through a consultative process that lasted about two (2) years, with one of the key objectives being to strengthen Kenya's Credit Information Sharing System (**CIS**) which has been operational since 2010.

Registering a CRB Business

In order to operate a CRB business in Kenya, the company must obtain a licence from the CBK. The application should be submitted in the prescribed form together with supporting documents. These documents include the company registration documents, sworn declarations of the proposed officials, the company's audited financial statements for the last three (3) years and a prototype of the credit report. The application must be accompanied by a non-refundable fee of KES 10,000 (USD 100).

Since CRBs are expected to handle vital financial information, a site inspection of the applicant's premises may also be conducted. This is intended to enable the CBK to determine the adequacy of the applicant's safety and security systems. The application for a licence should be determined by the CBK within ninety (90) days from the date of receipt of all the required information.

Once a licence is issued, a CRB is required to submit to the CBK an irrevocable Bank Guarantee for KES 1,000,000 (USD 10,000). The guarantee may be used by the CBK to recover penalties that may be imposed on the CRB from time to time, and which the CRB does not settle as and when required. Whenever such recovery is made from the guarantee, the CBK shall notify the CRB, which is required to furnish the CBK with a new guarantee within thirty (30) days of the notification.

It is important to note that a CRB licence is non-transferable to third-parties. Further, the holder of the licence is required to renew it annually on or before the 31st of December each year.

Information Sharing

Previously, there were complaints by disgruntled members of the public who had been blacklisted for loans they had never taken or had cleared a long ago. With this in mind, CRBs are now obligated to ensure that customer information is obtained from credible and verifiable sources and is accurate. The new Regulations seek to achieve these objectives by several means.

First, a CRB must undertake a due diligence and suitability assessment on any third-party information provider it seeks to engage. This exercise should unravel the nature and character of the third-party's ownership, business, soundness of the third-party's information management system and the accuracy and integrity of the third-party's information records. A CRB should not engage a third-party whose information is based on estimates.

Secondly, a CRB must seek approval of the CBK, in order to obtain or disseminate information obtained from a third-party or is publicly available. Such information includes information from government registries, licensing authorities, county governments or the Kenya Revenue Authority (**KRA**). This approval is necessary given that some information in public offices may not be up to date or the records may be missing or misplaced.

Where public information is obtained, the CRB is required to undertake measures to confirm the information's accuracy and authenticity from an independent source with direct knowledge of the information, prior to including it in a report. Similarly, where information relates to Court proceedings, the CRB is required to verify the accuracy of the information not more than twenty-one (21) days before the information is included in the report. This is to ensure that such information is both accurate and current.

Thirdly, all customer information shall be submitted to CRBs with such identification details as would enable them link a customer to all transactions with another person or persons. Where incomplete or inaccurate information is submitted to a CRB, the CBK may impose a penalty on the financial institution or third-party, as it may consider appropriate.

Lastly, the officials of CRBs, financial institutions or third-party credit information providers are under a perpetual duty of confidentiality as regards information that may be exchanged between the parties pursuant to the Regulations. The duty is indeterminate as it extends beyond the persons' tenure of employment or association of any of the parties. Moreover, any unauthorized disclosure of information amounts to a criminal offence.

Reporting Requirements

The new Regulations also impose strict reporting requirements on CRBs, in terms of which information may or may not be held or disclosed. In this regard, a CRB should not include in its database or credit report, information concerning a customer's race, belief, colour, ethnic origin, religion, political affiliation, sexual orientation, physical and mental handicaps, state of health or medical information. This is to prevent the CRB's clients from developing any bias when processing loan applications from their customers. However, noting that *Shar'iah* compliant products usually infuse the Islamic religion to commerce, the above restriction does not apply to them.

A credit score may be computed in such a manner as the CBK may specify. Every report is required to contain the credit score of the person to whom the information relates and a customer's credit score should not solely be used to deny the customer a facility. However, it is one of factors to be considered in arriving at the decision. A credit appraisal by an institution integrating the customer's credit score is required to be in writing and to be provided to the customer as part of its notification to the customer.

Customer Safeguards

The new Regulations have included some progressive provisions, to safeguard a customer's interest in the exchange of information between concerned parties. For example, a third-party must obtain its customer's written consent before furnishing a CRB with the customer's credit information.

Moreover, where an institution intends to submit negative credit information to a CRB, it should furnish the customer with thirty (30) days' written notice or such a shorter notice as the contract between the institution and the customer may provide.

A CRB should not charge for any first application by a customer for a clearance certificate. Further, a customer has a right to access his/her credit report free of charge from a CRB in any of the following cases:

- Once a year
- Within thirty (30) days of receiving an adverse action notice
- Once every six (6) months after requesting the CRB to correct inaccurate information

A credit score may be computed in such a manner as the CBK may specify. Every report is required to contain the credit score of the person to whom the information relates and a customer's credit score should not solely be used to deny the customer a facility. However, it is one of factors to be considered in arriving at the decision.

Finally, a minimum threshold has been introduced in the regulations, to the effect that a CRB shall not receive from any third-party a report on any negative credit information involving a customer where the value of the subject matter is less than KES 1,000 (USD 10). This is an important safeguard for customers, as it will ensure only relevant information is exchanged and considered in the credit evaluation.

Offences

As is often said, *"with great power comes great responsibility"*. Since CRBs are at the epicenter of a network handling sensitive customer information, the law has established some offences related to the mishandling of such information.

Such offences include the unauthorised disclosure of information by a director, member, officer or other employee of a CRB or subscriber, where the penalty upon conviction is a fine of KES 500,000 (USD 5,000) or two (2) years imprisonment or both.

Failure by a CRB to comply with any of its responsibilities under the new Regulations is also punishable upon conviction through a fine of KES 500,000 (USD 5,000) or such other sanction as might be issued by the CBK.

The denial of a customer of a credit facility or other financial service solely on the basis of a credit score is also proscribed at the penal consequence upon conviction of a fine of KES 2,000,000 (USD 20,000) or such other sanctions as might be prescribed by law.

Failure to comply with the requirements governing the cross-border sharing of information attracts a potentially heavy penalty, upon conviction, of a fine of up to KES 10,000,000 (USD 100,000) together with such other sanction as the CBK might prescribe.

Conclusion

CRBs have been previously accused of misusing sensitive or confidential information of Kenyans. They include the questionable blacklisting of persons as uncreditworthy, even where loans have been long paid, thereby denying such persons financing. Other complaints have centered around the materiality of debt, as some people with minimal loan balances have also found themselves listed by these organizations.

The new Regulations have clearly demonstrated the government's attempt to sanitize the industry, whether in terms of heavily regulating information circulation, relevance or materiality of information in CRB reports or the creation of offences in the event of a CRB's non-compliance. Apart from penal sanctions, CRBs also run the risk of losing their licences in the event of contravention of the new Regulations. This will hopefully tilt the balance of power in favour of customers, as the dissemination of their sensitive information will going forward be undertaken by CRBs under strict protocols.

It is also important to note that all information held by a CRB is the property of the CBK. Upon the CRB's winding up or cessation of operations, the information shall revert to the CBK. This guarantees the safety of customer information, so that it is at all times safeguarded from access by unauthorized persons.

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