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John Mbaluto
Partner | john@oraro.co.ke

THE EDITORIAL TEAM
Daniel Okoth - Senior Associate
Emmanuel Abok - Lawyer
Eva Mukami - Associate
Hellen Mwongeli - Associate
James Chepkwony - Legal Assistant
Jessica Detho - Associate
John Mbaluto - Partner
Kipkirui Kosgei - Head of Business Development
Linda Kisilu - Business Development Assistant
Pamella Ager - Partner
Radhika Arora - Associate

CONTRIBUTORS
Anna Kandu - Associate
Chacha Odera - Managing Partner
Georgina Ogalo-Omondi - Partner
Hellen Mwongeli - Associate
James Kituku - Senior Associate
Jessica Detho - Associate
John Mbaluto - Partner
Nancy Kisangau - Associate
Pamella Ager - Partner
Radhika Arora - Associate
Renee Omondi - Tax Partner
Rosemary Sossion - Associate
Wanjala Opwora - Associate

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For further information on this publication, contact insights@oraro.co.ke

A "Hi-Tech" Edition: Issue Thirteen

It is safe to say that technology has become mainstay in our day-to-day lives and its impact will only increase, if recent times are anything to go by.

In this Issue, we highlight different aspects of technology and its interplay with the law, as we first tackle the advent of the digital land transactions systems, where Pamella Ager and Anna Kandu highlight the digital changes adopted by the Ministry of Lands and Physical Planning. Next, Nancy Kisangau and I share our thoughts on direct digital marketing and data protection in the information age, looking at the shift from traditional advertising to digital advertising and what that means in terms of data protection. It all comes full circle when Jessica Detho and I analyse what consent really means in relation to data protection. Lastly in this category, we have an article done by the dynamic duo - Pamella Ager and James Kituku, who offer their insights on the regulation of digital lending in Kenya.

Moving on to other areas of the law, our veritable tax experts - Renee Omondi and Wanjala Opwora, demystify the labyrinth of transfer pricing in a punchy and immensely informative article. This is followed by Chacha Odera and Radhika Arora who address the twin topics of exhaustion of alternative remedies and exceptional circumstances within judicial review. Next, Georgina Ogalo-Omondi, Rosemary Sossion and Hellen Mwongeli team up to examine the pros and cons of part-time employment.

All this, and much more lie in wait in the pages ahead.

Enjoy the read!

Sincerely,

John Mbaluto, FCIArb

Editor

Senior Partner's Note

2021 is a significant year for us here at Oraro & Company Advocates. The year marks 44 years since the firm started from humble beginnings, back in 1977. As I reflect on this four-decade journey, it is clear to see how the value of commitment to service has kept us going. And will continue to do so.

Most importantly, I am filled with a deep sense of appreciation towards all of you, for your continued support throughout the years.

It is my sincere hope that this year will prove to be a better one for us all.

George Oraro SC

Senior Partner | goraro@oraro.co.ke

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"They are consultative in their approach, which is great from a client perspective as one feels involved, and able to add their views which are considered in line with the legal strategy."

CHAMBERS GLOBAL, 2021

Pamella Ager
Partner | pamella@oraro.co.ke

Anna Kandu
Associate | anna@oraro.co.ke

GOING PAPERLESS:

ADVENT OF DIGITAL LAND TRANSACTIONS SYSTEMS IN KENYA

In tandem with the advent of the digital age, states and organisations are moving to adopt modern, open, data-centric and digitally enabled operations and systems. These systems offer many benefits both to the public and private sector including efficiency, cost-saving and convenience. It is on this premise that there is a distinct transition from manual to paperless and digitised records and systems.

Kenya has not been left behind. The Ministry of Lands and Physical Planning (**the Ministry**) has recognized the need to embark on its own transformative journey. As such, the Ministry has embarked on an initiative to digitise the Registry and the introduction of electronic land transactions systems. This initiative has been named the National Land Information Management System (the **NLIMS**) which we highlight in this article.

We also highlight the key features of the conversion process under the Sectional Properties Act No. 21 of 2020 (**the SPA**), an Act which has far-reaching effects on land ownership for developments such as apartments, units and offices.

The Digitisation of Land Records

NLIMS is a digitised land records system aimed at improving service delivery for the general public in relation to land transactions. NLIMS' objective, as pronounced by the Ministry, is to enhance efficiency, transparency and security of land records, while reducing land transaction costs and opportunities for fraud. This digitised system is set to go hand-in-hand with the other land management developments, creating a platform for the smooth transitioning of other proposed mechanisms.

Legislative Background

The recent milestones in the development of a digitised land registration framework are anchored in various laws and statutes as stipulated below:

a. The Constitution of Kenya, 2010

The Constitution of Kenya, 2010, at Chapter Five deals with matters relating to land and the environment. Article 60 of the Constitution provides that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, in accordance with principles such as sustainable and productive management of land resources and transparent and cost-effective administration of land.

b. Land Act, 2012

Pursuant to section 6 (h) of the Land Act, 2012 the Cabinet Secretary is empowered to co-ordinate the development and implementation of a National Land Information System, in collaboration with the National Land Commission. This section has ushered in the advent of the digitised records at the Registry through a contemplated "*one-stop shop*" system.

c. Land Registration Act, 2012

The Land Registration Act, 2012 (**LRA**) at section 54 (5), aims at streamlining land administrative processes. It stipulates that the Registrar shall register long-term leases and issue certificates of lease over apartments, flats, maisonettes, town houses or offices having the effect of conferring ownership, if the property comprised is properly geo-referenced and approved by the statutory body responsible for the survey of land.

d. Sectional Properties Act, 2020

The SPA at section 13 (2), provides that all long-term sub-leases that are intended to confer ownership of an apartment, flat, maisonette, town house or an office that were registered before the commencement of the SPA, shall be reviewed to conform to section 54 (5) of the LRA highlighted above.

e. Land Registration (Electronic Transactions) Regulations, 2020
The Land Registration (Electronic Transactions) Regulations, gazetted in July 2020 (**the Regulations**), provide the framework for the roll-out of an electronic land transactions system. The Regulations provide for the conduct of searches on an electronic system, valuation for payment of stamp duty online and registration of interests in land on the electronic land register. The Regulations also make provision for the execution of instruments using electronic signatures by parties.

The Conversion of Units
In a bid to harmonise legislative provisions specifically in the LRA and SPA, the Ministry is spearheading various initiatives including the conversion of titles. This is being undertaken by replacing old land reference numbers with new title numbers, created under newly established land registration units. The conversion process is set to unify the land registration systems, while conforming to sustainable land management principles.

In this regard, on 7th May 2021, the Ministry issued a Notice (**the Notice**) stating that it would work towards the conversion of long-term leases registered based on architectural drawings to conform to section 54 (5) of the LRA. The Notice also provides that the Ministry shall no longer register long-term leases supported by architectural drawings to confer ownership. Additionally, registration will be premised on a sectional plan with the property being geo-referenced and approved by the Director of Surveys. We shall keep abreast with any developments on this Notice post publication of this edition of the Newsletter and shall issue further insights on the same as and when necessary.

Sectional Property
Some eight (8) years since the enactment of the land laws in 2012, the newly enacted SPA has come into force, replacing the earlier Sectional Properties Act of 1987. The enactment of the SPA was intended to align registration of sectional properties with current land legislation, noting that the Registered Land Act (Cap. 300) Laws of Kenya (**RLA**), which substantively governed sectional units under the 1987 statute, was repealed. The SPA has not departed significantly from the RLA. However, the SPA emphasises the aim of regulating and providing for the division of buildings into units that can be owned by individuals, while providing for the use and management of common property. Some of the salient features introduced by the new SPA include:

a. Unexpired Residue of the Term on the Title
The SPA provides that it shall only apply in relation to land that is held on freehold or leasehold title with a residual term of not less than twenty-one (21) years, with an intention to confer ownership.

b. Conversion of Units and Issuance of Certificates of Lease
Where sub-leases intended to confer ownership of an apartment, flat, maisonette, town house or an office and were registered before the commencement of the SPA, the said sub-leases shall be reviewed in order to conform with the provisions of the LRA to the extent that the property is geo-referenced and approved by the Director of Surveys, in order to issue Certificates of Lease within a period of two (2) years.

c. Closure of Old Registers
The SPA also provides that the Registrar shall close the registers made under the Certificate of Title/Lease and register the sectional plan in a sectional plan register. The Registrar shall proceed to open new registers depending on the nature of interest that was in the Title/Lease that was submitted.

d. Restriction of Use and Density
The SPA also introduces restrictions on the by-laws of a corporation under the statute from materially changing the use or density of the common property, without the approval of the relevant county government.

NLIMS' objective, as pronounced by the Ministry, is to enhance efficiency, transparency and security of land records, while reducing land transaction costs and opportunities for fraud.

e. Dispute Resolution Mechanisms
The SPA provides for both internal dispute resolution mechanisms through a Dispute Resolution Committee (**DRC**) and recourse to the Environment and Land Court (**ELC**) on appeal from the DRC's decision.

Procedure for Conversion
With regard to the process to be followed for conversion, firstly, all sectional plans submitted for registration will need to be geo-referenced; to indicate the parcel plans, the number identifying the unit, the approximate floor area of each unit, and the user of the units. Thereafter, the plans must be signed by the proprietor, signed and sealed by the Director of Surveys, registered and a Certificate of Title/Lease issued for each unit.

For purposes of conversion of already registered long-term sub-leases, the owners of the property will be required to submit the following documents at the Registry:

- A sectional plan
- The original title document (i.e. head title)
- The long-term lease previously registering the unit
- The rent apportionment for the unit

The Registrar may dispense with the production of the original title, if the developer is unwilling or is unavailable to surrender the title for the purposes of conversion. Upon submission of the above, the sectional plan will be registered and the original register closed. A new register will thereafter be opened for each unit, with a registered sectional plan. Finally, a Certificate of Lease shall be issued.

Way Forward
We note that digitisation of land records does not come without its fair share of challenges. Not only does the adoption of technology pose a major challenge due to a cultural heritage of "*paper filing*", but several rules and regulations still require approval by the relevant state agencies, to effectively implement a digitised system. Further, the digitalisation of any record management systems including that of land, requires security features that would guarantee the security of land records and boost public confidence.

Moreover, in spite of the developments, there are various concerns around the conversion process. Some aspects of the conversion procedure for instance remain unclear, while the Conversion Guide issued by the Ministry does not exhaustively address the concerns. In this regard, it is noted that the draft Sectional Property Regulations (currently undergoing stakeholder consultation) are under consideration. The Regulations, once promulgated, are set to provide clarity on the processes and documentation required for the conversion process. Until then, stakeholders and the general public remain in the dark on some of the procedures prescribed in the SPA.

Nonetheless, the Ministry must be applauded for the significant steps it has made towards the realisation of an effective land management system, as contemplated under the Constitution. It is the hope of Kenyans that the next steps taken by the Ministry will accelerate and improve the ongoing digital transformation with effective stakeholder participation, to ensure that all views are taken into account.

John Mbaluto
Partner | john@oraro.co.ke

Nancy Kisangau
Associate | nancy@oraro.co.ke

'AD-SENSE':

THOUGHTS ON DIRECT DIGITAL MARKETING AND DATA PROTECTION IN THE INFORMATION AGE

The rise of the information age has forced businesses to re-evaluate their modes of carrying on business with a key shift in advertising. Advertising is no longer the dominant way to pay for information and culture. What previously was the purview of corporate logic has been replaced by algorithms and informational architecture meant to create a personalised experience for the user. In the heightened noise of marketing, with all fighting for the user's attention, the temptation to directly engage the user with a targeted and personal advertisement is understandable, yet such engagement often comes at the risk of violating the user's right to privacy. In this article, we explore ways through which a business can navigate these murky waters and strike a balance between respecting a customer's right to privacy whilst creating an effective and satisfactory user experience through direct marketing.

Direct Digital Marketing: The Basics

Hamman and Papaodulos define direct digital marketing (**DDM**) as a system of marketing where the marketer communicates directly with the intended customer over a medium, with the expectation that such interaction will elicit a measured response, often positive. Whereas traditional direct marketing can take various forms such as the use of fliers, DDM involves the use of a digital medium such as a mobile phone, e-mail, television, or web-based platforms for the direct or indirect purpose of promoting a good or a service. Practically, this can take the form of Short Message Services (**SMS**) alerts sent to a person informing them of the latest offers in a particular restaurant or email alerts notifying a user of an ongoing promotion in a department store.

In Kenya, an attempt to codify the meaning of DDM has been made under regulation 13 of the Draft Data Protection (General) Regulations, 2021 (**the Draft Regulations**) which are still under consideration. Regulation 13 stipulates that a data processor or controller will be deemed to have used data for commercial purposes where they send a catalogue through any medium which addresses a data subject; display an advertisement on an online media site where a data subject is logged on using their personal data relating to the website the data subject has viewed - this includes the use of data collected by cookies to target users; send an electronic message to a data subject about a sale or other advertising material relating to a sale, using personal data provided by a data subject.

The foregoing definition of DDM casts a wide net as to the possible forms of DDM that may be used by advertisers in marketing. This includes covert methods of targeting audiences such as the use of cookies and data analytics to determine the age, gender and sites visited by a data subject for the purposes of determining which forms of advertisements should be displayed to the user, as well as overt methods such as the use of SMS to target a data subject.

It is critical to note that under the Draft Regulations, a person will not be considered to have utilised a data subject's personal data for DDM purposes, where the personal data is not used or disclosed to identify or target particular recipients. For instance, the use of data analytics by a data processor or controller for the purposes of estimating the content most viewed by users, or the resources a user sought when using an organisation's website, would not qualify as DDM. However, should the organisation proceed to either use personal data collected from an analytical review of their website, such as one's age and gender to then target the user during their next visit to the organisation's website or to sell that data to an advertiser, then such use would effectively qualify as DDM thus calling for the application of the Data Protection Act, 2019 (**DPA**).

The Risk

For DDM to be successful, marketers need to address a target audience. To accomplish this, marketers will ordinarily require large volumes of personal data thus the crux of direct marketing. This is premised on the fact that most of the data sought by marketers is often of a personal nature such as details of a person's name, age, gender, residence, purchase habits or preferences. In most instances, this data is likely to be collected from a consumer's interaction with the concerned entity or platform. DDM may however present a risk to a marketer, where the marketer obtains a consumer's personal data without their consent. An example would be the collection of one's phone number by a hotel while booking one's accommodation where the hotel uses such information to send promotional messages on their discounted rates, without disclosing to the customer that they intended to use the customer's phone number for that purpose. As innocuous as such collection, storage and subsequent use might seem, it presents a real legal risk to the enterprise. To begin with, such collection would be a violation of a data subject's rights under section 26 (1) (a) of the DPA which provides that a data subject has the right to be informed of the use to which their personal data is to be put. Further, these actions would constitute a violation of section 30 (1) of the DPA which prohibits the processing of a data subject's personal data without their consent. In addition to this, the resultant storage and use of a customer's data in the example above would be in further breach of the DPA which prohibits the use and storage of personal data without obtaining a data subject's consent. As such, the enterprise is likely to incur liability for breaching the user's right to privacy thereby exposing the business to the risk of lawsuits and regulatory fines. The unlawful disclosure of personal data constitutes an offence under the section 72 (1) of the DPA and upon conviction, one would be liable to a fine not exceeding KES 3,000,000 (USD 30,000) or to a term of imprisonment not exceeding ten (10) years or both.

Solutions

a. Obtain consent

Businesses that intend to adopt a DDM strategy should obtain consent from their intended audience before carrying out any advertising campaign. This obligation is founded on the provisions of section 30 (1) of the DPA which imposes the obligation to obtain a data subject's consent before processing any data upon a data controller or data processor. The above position is further bolstered by the provisions of regulation 14 (1) of the Draft Regulations which sets out the instances in which commercial use of personal data other than sensitive data may be permitted.

Under regulation 14 (1), a data controller or processor would be permitted to use personal data if they meet five (5) conditions. Firstly, the data controller or processor must have collected the personal data sought to be used from the data subject. Secondly, the data subject must be notified that direct marketing is one of the purposes for which the data has been collected. Additionally, the data subject must have consented to such use of their personal data. Further, the data controller or processor must provide an opt-out mechanism for the data subject to not receive the DDM communications.

Generally, opt-out mechanisms allow a data subject to withdraw their consent from the use of their personal data in DDM. Practically, this may be in the form of an unsubscribe button. To effect this, regulation 15 (1) of the Draft Regulations prescribes the features that should accompany an opt-out mechanism. First, opt-out mechanisms must have a visible, clear, and easily understandable explanation of how to opt-out, such as instructions written in simple language and in a font size that is easy to read. Also, opt-out mechanisms must use a simplified process for opting-out that requires minimal time and effort. In addition, opt-out mechanisms must provide a direct and accessible communication channel and be free or involve not more than a nominal cost to a data subject. Finally, the data subject must have not made an opt-out request at the time of the collection, use and/or processing of the data.

b. Use the data obtained for a limited purpose

The obligations of a business entity are not strictly limited to lawfully obtaining data. A business must also ensure that they use the data obtained for the purpose for which it was acquired. Where the initial purpose for which personal data was obtained changes, a data controller may still use the data, subject to obtaining consent from the data subject for the changed use. This is in line with regulation 5 (3) of the Draft Regulations which provides that where the data controller or processor intends to use personal data for a new purpose, it shall ensure that the new purpose is compatible with the initial purpose. For instance, if a business collects a customer's phone number for the purposes of determining whether payment made through a mobile money payment platform has been effected, the same number should not be used to send out promotional messages. To use such data for a purpose which is not intrinsic to the root purpose would constitute a violation of the data subject's rights under section 26 of the DPA.

It is critical to note that under the Draft Regulations, a person will not be considered to have utilised a data subject's personal data for DDM purposes, where the personal data is not used or disclosed to identify or target particular recipients.

c. Respect the data subject's rights

A data subject has a right under section 26 (c) of the DPA to object to the processing of their personal data. Examples of this include the sending of SMSs to specific codes calling for the cessation of promotional marketing messages or the clicking of an unsubscribe button on email marketing. It is critical to note that once a customer has objected to the processing of their data, then, any subsequent use of such data becomes unlawful, and the marketer runs the risk of incurring liability for such use. For this reason, once a customer objects to the use and or processing of their data, a business is obliged to comply with the same and cannot continue to use the customer's data.

d. Adopt data protection by design in devising DDM Strategies

The use of DDM as a marketing strategy involves the collection and subsequent storage of data. Therefore, a business which seeks to adopt DDM must at the very core ensure that its technical and organisational measures are designed at all times to implement the data protection principles in an effective manner and integrate necessary safeguards for the purposes of processing. The above obligation is consistent with the provisions of section 41 (2) of the DPA, which mandates data processors and data controllers to adopt technical and operational measures that implement the data protection principles at the time of determining the means of processing the data and at the time of processing data. Failure to adopt technical and organisational measures that ensure data protection by design, may expose the business to a data breach and potential legal liability. It is thus important for a business to ensure that the technical and operational measures adopted comply with this principle.

e. Notify the data subject in case of breach

If a data breach occurs, the business must first notify the data subject of the breach, the nature of data lost, and the intended remedial action taken up to prevent further loss of data. This obligation is imposed by section 43 (1) (b) of the DPA which mandates a data controller to notify a data subject of any unauthorised access or risk of unauthorised access to the data subject within forty-eight (48) hours. Such notification not only serves to alert the data subject of the expected loss of personal data, but also allows the data subject to take on remedial actions as an end-user such as changing or updating their credentials, which can stave off the worst of attacks.

In conclusion, the use of DDM, whilst a viable and useful method of reaching and engaging with one's clientele, is often laden with the risk of violating a customer's right to privacy. To avoid such risk, businesses are advised to adopt a DDM strategy that is alive to the target's right to privacy and data protection duties and obligations.

Renee Omondi
Tax Partner | renee@oraro.co.ke

Wanjala Opwora
Associate | wanjala@oraro.co.ke

'CHEQUE-MATE':

TRANSFER PRICING DEMYSTIFIED

Assume a hypothetical scenario where company A based in country Y is a subsidiary of company B based in country Z. Given the relationship between the two companies, there is a possibility of company A purchasing goods and services from company B at an inflated cost, so as to exaggerate company A's expenditures thereby reducing its taxable income. Transfer pricing regulations are intended to stamp out the hypothetical scenario above from playing out in reality, thus ensuring that related entities do not improperly reduce their taxable income.

The Organisation for Economic Co-operation and Development (**OECD**) defines a transfer price as a price adopted for book-keeping purposes, used to value transactions between affiliated enterprises integrated under the same management at artificially high or low levels so as to affect an unspecified income payment or capital transfer between those enterprises. In other words, transfer pricing is the pricing of goods, services and intangibles between related parties located in different countries.

Section 18 (3) of the Income Tax Act (Cap.470) Laws of Kenya (**ITA**) provides for transfer pricing in the following terms:

"Where a non-resident person carries on business with a related resident person and the course of such business is such that it produces to the resident person or through its permanent establishment either no profits or less than the ordinary profits which might be expected to accrue from that business if there had been no such relationship, then the gains or profits of such resident person or through its permanent establishment from such business shall be deemed to be of such an amount as might have been expected to accrue if the course of that business had been conducted by independent persons dealing at arm's length."

Key Elements of Transfer Pricing

The key elements of transfer pricing include the existence of a relationship between two related enterprises located in two different tax jurisdictions; the manipulation of profits; and the application of the arm's length principle to determine pricing.

The Income Tax (Transfer Pricing) Rules, 2006 (**TP Rules**) define related enterprises as one or more enterprises whereby one of the enterprises participates directly or indirectly in the management, control or capital of the other or a third person who participates directly or indirectly in the management, control or capital or both. Transfer pricing also applies to transactions between a permanent establishment and its head office or other related branches, in which case the permanent establishment shall be treated as a distinct and separate enterprise from its head office and related branches. These transactions include the sale and purchase of goods; lending or borrowing of money; sale, transfer, lease or use of tangible and intangible assets; provision of services; and transactions that largely affect the profits or losses of an enterprise.

Arm's Length Prices

Arm's length prices are prices that would otherwise have been charged if independent enterprises had transacted with each other with the ordinary market's forces existing. Arm's length prices are considered unaffected by any underlying contractual obligations and are determined using various methods provided for in statute or guided by international best practice.

The TP Rules provide that where an enterprise applies arm's length pricing, that enterprise is required to develop an appropriate transfer pricing policy. The law allows the Commissioner General to specify conditions and procedures on the application of methods of determining the arm's length price and adjust the prices if they do not conform to the arm's length principle. The transfer pricing policy should be prepared and submitted to the Kenya Revenue Authority (**KRA**) upon request.

Both the TP Rules and the ITA are silent on the form and nature of the document required. The Court in the case of *Unilever Kenya Ltd v Commissioner of Income Tax (2005) eKLR*, affirmed that in the absence of specific legislation, rules or guidelines the determination of transfer pricing principles may be determined using international best practice as represented by the OECD. Therefore, where there is a lacuna in local law, the OECD principles provide the fallback position.

Transfer Pricing Methods

There are five (5) methods of transfer pricing divided into traditional transaction methods and transactional profit methods. These methods are provided for in the TP Rules and are summarised as follows:

a. Comparable Uncontrolled Price Method

The Comparable Uncontrolled Price (**CUP**) method compares the terms and conditions (including the price) of a controlled transaction to those of a third-party transaction. There are two kinds of third-party transactions, namely, a transaction between the taxpayer and an independent enterprise (Internal CUP); and a transaction between two independent enterprises (External CUP).

b. Resale Price Method

This method is also known as the Resale Minus Method (**RMM**). Its application looks to transactions between unrelated parties as a means to determine an arm's length price for the intercompany controlled transaction under review. RMM is seldom used as it is difficult to find comparable transactions. However, where it is applied, it is suitable to examine gross margins of associated enterprises engaged in sales and distribution to third parties.

c. Cost-Plus Method

In this method, gross profits are compared to the cost of sales. Firstly, the costs incurred by the supplier in a controlled transaction for products transferred to an associated purchaser are determined. The downside of the Cost-Plus Method (**CPM**) is that it requires controlled and uncontrolled transactions to be highly comparable. To establish such level of comparability, detailed information on the transactions should be available. Examples are the types of products manufactured, actual activities, cost structures and the use of intangible assets. If information is unavailable CPM cannot be applied.

d. Transactional Net Margin Method

The application of the Transactional Net Margin Method (**TNMM**) is similar to the application of the CPM or the RMM but requires less product comparability than the other two methods. In this method, the net profit of a controlled transaction is compared to the net profit realised by comparable uncontrolled transactions of independent enterprises. TNMM is preferred where other transfer pricing methods cannot be applied, however, a disadvantage of using of the TNMM is that the level of comparability of independent transactions in some cases can be questioned by the tax authorities.

e. Profit Split Method

Associated companies sometimes engage in transactions that are very interrelated and cannot be examined on a separate basis as they agree to split the profits. The Profit Split Method (**PSM**) examines the terms and conditions of these types of controlled transactions by determining the division of profits that independent enterprises would have realised from engaging in those transactions. PSM applied in cases where the controlled transaction is highly integrated. This method is rarely used in practice but is rising in popularity, mainly because it looks at profit allocation in a holistic rather than on a transactional basis.

Conversely, due to the subjective profit allocation criteria based on score cards, it can offer tax authorities the possibility to allocate a disproportionate amount of profits to an associated enterprise engaging in a particular transaction, leading to a non-arm's length out

> ***The TP Rules do not compel a taxpayer to submit to KRA the transfer pricing policy or method that it applies. However, a taxpayer is only bound to submit to KRA the relevant method or policy adopted, upon KRA's request.***

come and disputes with the tax authorities.

Rule 8 of TP Rules provides for the application of one of the foregoing methods to determine the price payable for goods and services for the purposes of section 18 (3) of ITA. The rule further states that a person may apply the most appropriate method in relation to their enterprise having regard to the nature of transaction, or class of transaction, or class of related persons or function performed by such persons in relation to the transaction.

Rule 9 of the TP Rules gives the Commissioner General of KRA powers to request for certain documents relating to the selection of the transfer pricing method and the reasons for the selection; the application of the method including the calculations made and price adjustment factors considered; the global organization structure of the enterprise; the details of the transaction under consideration; the assumptions, strategies, and policies applied in selecting the method; and other background information on the transaction as may be necessary including the transfer pricing policy.

Penalty

Both the TP Rules and the ITA do not specify the penalty for transfer pricing, however, pursuant to the general provisions of ITA where any amount remains unpaid after the due date a penalty of twenty percent (20%) of the amount due is applicable. These provisions would also apply to transfer pricing.

Compliance with the Transfer Pricing Rules

The TP Rules do not compel a taxpayer to submit to KRA the transfer pricing policy or method that it applies. However, a taxpayer is only bound to submit to KRA the relevant method or policy adopted, upon KRA's request.

Advance Rulings

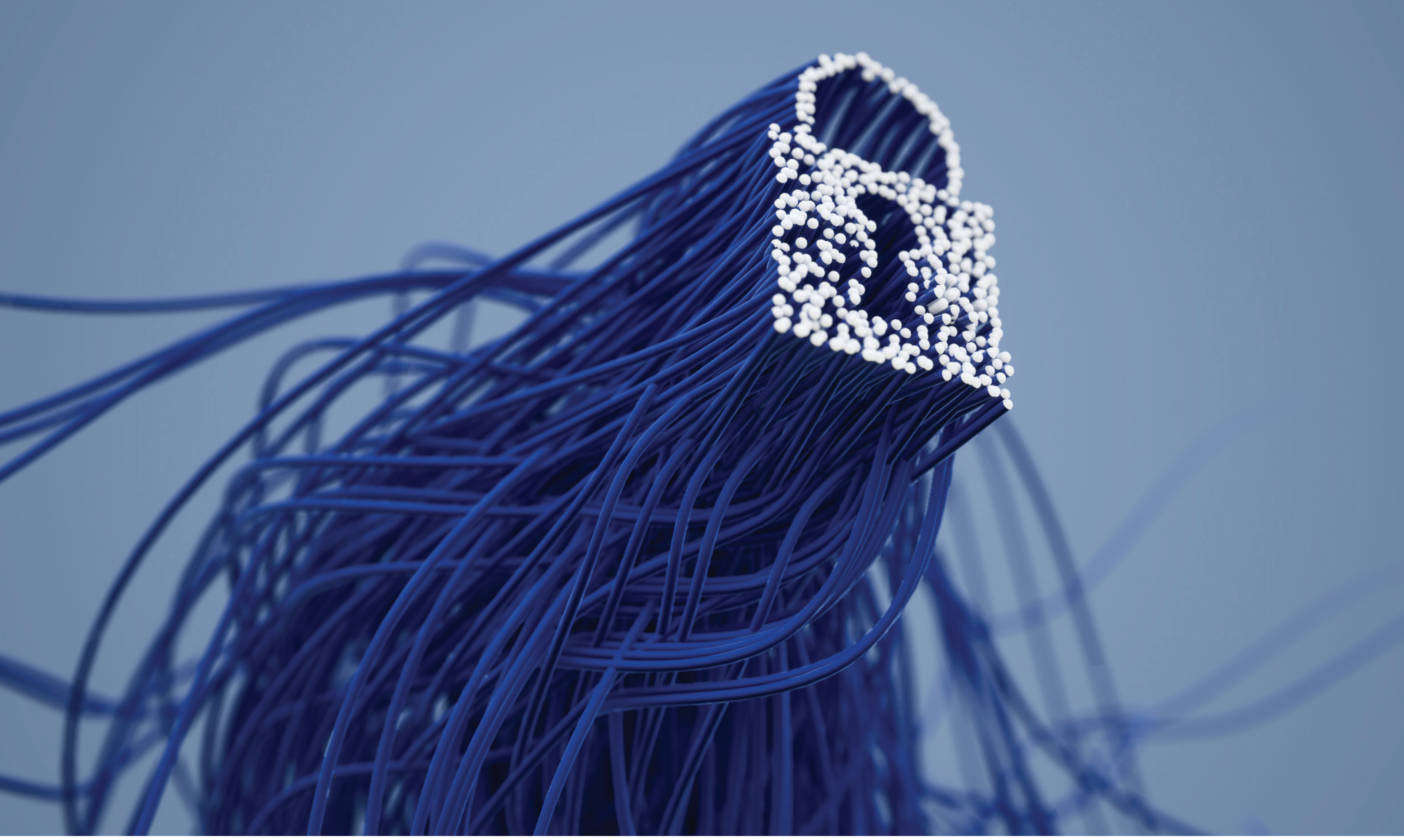
The United Nation Practical Manual on Transfer Pricing (2017) (**UN Manual**) recommends the practice of issuing advance rulings with respect to the application of certain tax laws in a particular country. The UN Manual further provides that advance rulings may be structured as Advance Pricing Agreements (**APAs**). They provide guidance in order to avoid tax disputes. Presently, there is no framework for application and issuance of advance rulings on transfer pricing by KRA. However, the lack of a framework does not prevent a party from seeking an advance ruling. If anything is to go by, Courts have held that international best practice should be relied upon to fill in any lacuna on matters relating to transfer pricing.

Advance Pricing Arrangements

APAs are arrangements that are used to determine the appropriate criteria for the determination of transfer pricing transactions over a fixed period of time. This tool has been adopted in various notable tax jurisdictions and is provided for in the UN Manual. APAs are meant to ensure greater certainty on tax liability and the fair application of the arm's length principle. Nevertheless, just like advance rulings, KRA does not have an APA framework in place to facilitate the arrangement.

Transfer Pricing Policy

A transfer pricing policy provides for the transfer pricing methodology selected and applied by an entity as well as the justification for using the selected method. Companies are expected to formulate a transfer pricing policy and to have prepared the relevant documentation enumerated under the TP Rules. This is to ensure that upon request by KRA, companies are in a position to comply.



John Mbaluto
Partner | john@oraro.co.ke

Jessica Detho
Associate | jessica@oraro.co.ke

YES, I AGREE:

A GUIDANCE NOTE ON CONSENT IN RELATION TO DATA PROTECTION

Introduction

In today's world, there is exponential growth in the dissemination of personal data by the average person. From registering a mobile phone number, applying for a job opportunity, enrolling in a course, or creating a social media account, the sharing of personal data is as inevitable as it is pervasive. The increasing need for data sharing raises concern over whether the data gathered is always used in a proper and lawful manner.

To effectively address this concern, the Data Protection Act, 2019 (**the Act**) was passed into law. The Act provides for an obligation on the person who determines the purpose and means of processing data (**Data Controller**) and the person who processes data (**Data Processor**) to obtain consent from the person to whom the personal data relates (**Data Subject**) prior to obtaining and processing data.

Definition of Consent

Consent is only considered lawful when the Data Subject is offered a genuine opportunity to accept or decline the terms offered for the processing of his personal data. To that end, section 2 of the Act defines consent as any express, freely given, specific, informed indication by a Data Subject that he or she wishes for their personal data to be processed in a certain manner.

That express agreement may be given by a statement or a clear affirmative action. This definition brings out four elements of consent:

a. Choice

The Data Subject should be given a genuine choice and control over the use of their data. This is actioned by allowing them to refuse the consent without any detriment and being able to withdraw their consent easily once consent has already been given. Further, consent should not be bundled up as a condition of service unless it is necessary for that service, otherwise it will not be deemed as freely given. Any undue influence and pressure put upon the Data Subject to provide his or her consent invalidates the consent.

b. Specificity

There must not be any room for doubt as to whether the Data Subject was sufficiently informed. The request for consent should be separate from other terms and conditions, communicated clearly, simply and in plain language.

Consents should be reviewed and refreshed as necessary where purposes or processing activities evolve. Informed consent also covers the issue of capacity, where it is assumed that adults have the capacity to consent unless there is reason to believe the contrary.

The Data Subject must be informed of all circumstances surrounding the data processing including which data is to be processed, the duration, manner and specific purposes of processing, as well as its consequences. They must also know who is processing the data, whether the data will be transferred to third parties, the consequences of refusing consent, as well as whether consenting to the data processing is a condition for concluding the contract.

To ensure that specific and informed consent has been obtained, the Data Controllers and Data Processors should provide the following information as a bare minimum:

- The name of the Data Controller, Data Processor and each of the third parties who will rely on the consent
- The purposes of processing the data. Separate consents should be obtained for each processing purpose as the notion of 'evolving consent' does not exist
- Separate consents should be obtained for each processing activity unless those activities are clearly interdependent
- Details of the right to withdraw consent at any time

c. Express
Express consent refers to a clear oral or written statement confirming the granting of consent.

Where consent has been obtained orally, a record of the script should be kept. In no circumstance would an implied consent inferred through actions be deemed to be express, even if the said actions are apparent enough to satisfy the basic definition of consent. The same must be confirmed in words.

d. Affirmative
This is an obvious indication that a Data Subject has consented to their personal data being processed and in the manner it is being processed. However, the United Kingdom's Information Commissioner's Office published a guidance on consent in which it confirmed that affirmative action leaves room for implied methods of consent. The guidance gives the example of an individual dropping a business card into a prize draw box at a coffee shop. Though implied, it is a clear indication that the Data Subject agrees to their personal data being processed solely for the purposes of the prize draw.

Nevertheless, affirmative action is required to establish consent and it can be achieved by a deliberate and specific action agreeing or "*opting-in*" to processing. This could include signing a consent statement, selecting from equally prominent yes/no options, responding to an email requesting consent or ticking a box on paper or electronically.

Silence or a failure to "*opt out*" is not consent as it does not involve clear affirmative action. The Court of Justice of the European Union (**the CJEU**) recently delivered Judgment in *Bundesverband der Verbraucherzentralen und Verbraucherverbande - Verbraucherzentrale Bundesverband eV v Planet49 (2020) 1 WLR 2248* a case which provided further clarity regarding the validity of a consent where a Data Subject failed to opt out. The case was brought to the CJEU against Planet49, an online gaming company that hosted a promotional lottery on its website. The website had consent checkboxes for use of personal data. Among the checkboxes provided, was one to obtain consent for use of web analytics cookies for the purposes of providing targeted ads to the Data Subject, which was pre-ticked. The issue for determination was whether a pre-ticked checkbox constituted valid consent.

In its Judgment, the CJEU held that there was no valid consent for the following reasons:

i. access to information already stored in the data subject's terminal equipment was permitted by way of a pre-ticked checkbox
ii. the data subject needed to deselect to refuse his consent which does not show active behaviour on the part of the data subject
iii. the consent was given not separately but at the same time as confirmation in the participation in an online lottery

The CJEU also considered whether the consent was specific and informed and noted that the duration of the operation of cookies and whether or not third parties may have access to those cookies

> ***To that end, section 2 of the Act defines consent as any express, freely given, specific, informed indication by a Data Subject that he or she wishes for their personal data to be processed in a certain manner.***

must be provided.

Conditions for Consent
It ought to be borne in mind that a Data Controller or Data Processor bears the burden of proving that they obtained a Data Subject's consent for the use of their personal data for a specified purpose.

Further, the Data Subject has the right to withdraw his or her consent at any time. Such withdrawal shall not affect the lawfulness of processing based on prior consent before his or her withdrawal.

In order to determine whether consent was freely given, it will be considered whether the consent was provided such that, performance of a contract or provision of a service was conditional on the consent and further whether, the consent was truly necessary for the performance of that contract or service.

It is noteworthy that a Data Controller and a Data Processor should be consistent in their application of a lawful basis over another. For example, when investigating the validity of consent obtained, they cannot retrospectively utilise another lawful and favourable basis as envisaged in section 30 of the Act to justify the processing of data.

In addition, obtaining consent does not diminish the Data Controller's or Data Processor's obligations to observe the principles of processing data with regard to fairness, necessity and data quality. It is therefore important for Data Processors and Data Controllers to determine the most appropriate legal ground for processing personal data prior to obtaining the said data.

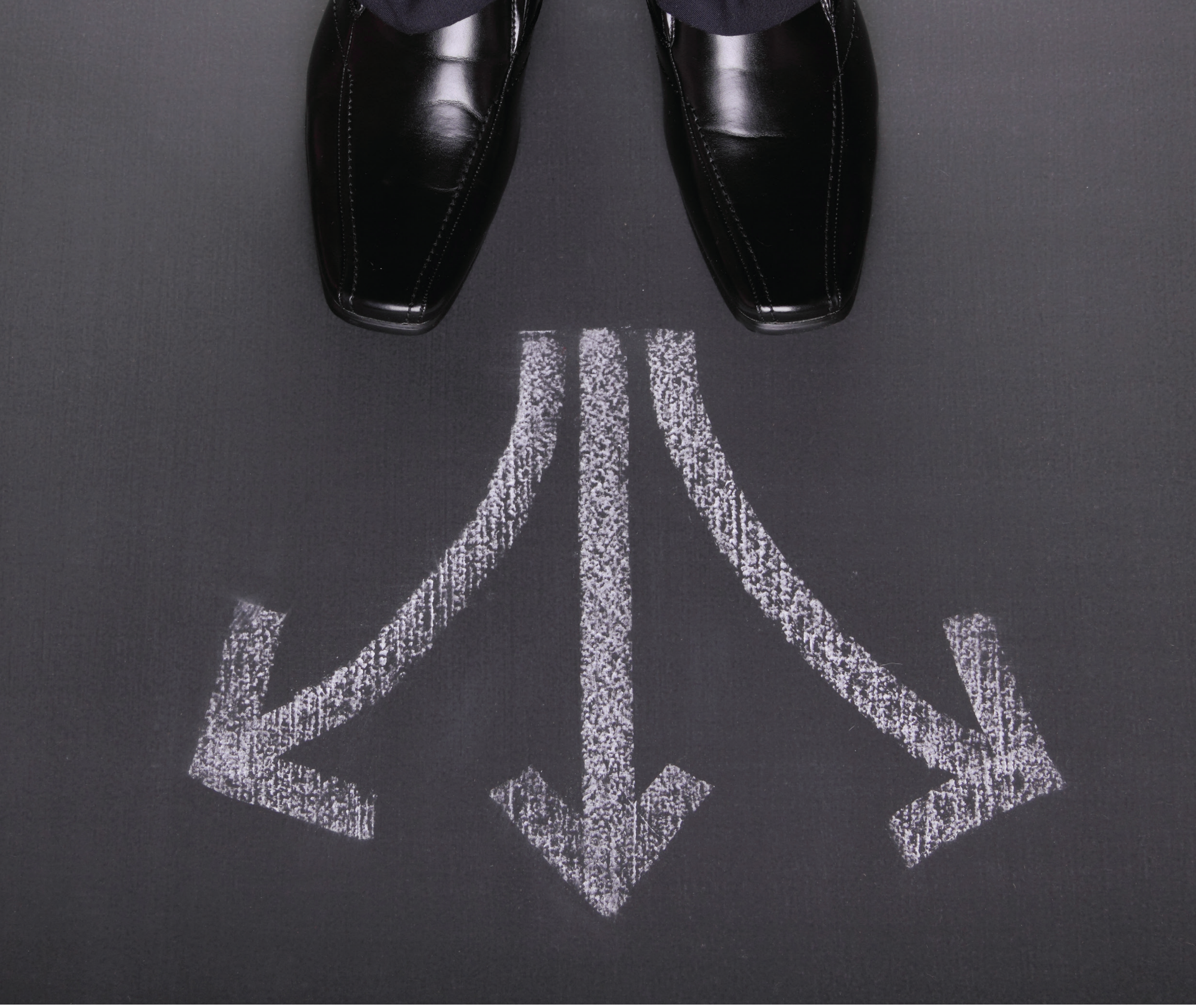
Consent by Children
Section 33 of the Act provides that a Data Controller or Data Processor shall incorporate appropriate mechanisms for age verification and only process data relating to a child where consent is given by the child's parent or legal guardian.

Recording and Managing Consent
Records of consent should be kept and retained for as long as the data is being processed based on the consent, so that compliance with the accountability obligations under the Act is demonstrated.

Records can include who consented, what they consented to, what they were told at the time, how they consented and whether consent has been withdrawn. In the event the consent has been withdrawn, the retention of personal data shall be permitted if it is strictly necessary for putting forward or defending a legal claim in accordance with the Act.

Additionally, consents should be kept under review. As stated above, evolving consents do not exist and as such data processors and data controllers are expected to refresh consents at appropriate intervals as the purpose or processing activity evolves or changes.

Conclusion
In ending, we reiterate that it is crucial for Data Controllers and Data Processors to review and update their internal processes for obtaining, storing, and using personal data as the Act has placed an enormous burden on them to prove the legality of their said processes, especially with regard to validity of consent. In this regard, the office of the Data Commissioner has issued a guidance note on the subject, which should be referred to when navigating the issue of consent under the Act.



Chacha Odera
Managing Partner | chacha@oraro.co.ke

Radhika Arora
Associate | radhika@oraro.co.ke

WAY TO GO:

EXHAUSTION OF ALTERNATIVE REMEDIES AND EXCEPTIONAL CIRCUMSTANCES IN JUDICIAL REVIEW

Historically, the basis of judicial review in Kenya was derived from the Law Reform Act (Cap. 26) Laws of Kenya and Order 53 of the Civil Procedure Rules, 2010 as better developed by case law on the area. On this basis, judicial review was limited to ensuring compliance by administrative bodies with the principles of proportionality, legitimate expectation and reasonableness in the carrying out of their functions.

However, the promulgation of the Constitution of Kenya, 2010 (**the Constitution**) brought with it Article 47 which expressly provides for the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In operationalising Article 47, Parliament subsequently enacted the Fair Administrative Action Act, 2015 (**the FAAA**). The FAAA has transformed judicial review in Kenya by expanding its scope from a review of the decisions of only public entities or administrative bodies, to include any person, body or authority which exercises a judicial or quasi-judicial function.

In this article we shall look at section 9 of the FAAA, which provides for the procedural aspect of judicial review applications by delineating the circumstances under which one may institute such proceedings. We will then examine the exceptional circumstances that might allow a party to bypass a prescribed statutory remedy and pursue a judicial review remedy through Court instead.

Statutory Remedies

Section 9 (1) of the FAAA provides that a person aggrieved by an administrative action may apply for judicial review of such a decision in the High Court or a subordinate court upon which original jurisdiction is conferred pursuant to Article 22 (3) of the Constitution. However, section 9 (2) of the FAAA limits this avenue of redress by providing a specific threshold to be satisfied whereby administrative action is only subject to judicial review if alternative mechanisms (including internal mechanisms for appeal or review), as well all remedies available under any other written law, are first exhausted.

Section 9 (2) of the FAAA may be viewed as a codification of the doctrine of exhaustion of administrative remedies. In applying the said doctrine, the Court of Appeal in the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others (2015) eKLR*, stated that the requirement is in conformity with Article 159 of the Constitution as it encourages the use of alternative dispute resolution. Of note was the Court's holding that:

"It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews… as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of Courts."

For the above reason, a Court before which an application for judicial review is placed often satisfies itself, before seizing jurisdiction, that the parties seeking its intervention have first exhausted the prescribed statutory mechanisms for redress. In the case of *Aly Khan Satchu v Capital Markets Authority (2019) eKLR*, the High Court (Mativo, J) quashed the decision of the Capital Markets Tribunal on the basis *inter alia*, that the Tribunal that rendered the impugned decision was not properly constituted and that the applicant had not satisfied the ecxceptional circumstances requirement under section 9 (4) of the FAAA. Further, in recognizing that the Capital Markets Act (Cap. 485A) Laws of Kenya, provides for an express dispute resolution mechanism, the Court remitted the dispute back to a properly constituted Capital Markets Tribunal.

It is notewothy that a person aggrieved by the decision of an administrative body prescribed by statute to hear a dispute has recourse to pursue redress in the High Court, either as a consequence of a provision of the statute providing for an appellate procedure to the High Court, or in exercise of the Constitutional right of access to justice. An appeal procedure under statute ordinarily clothes the High Court with appellate jurisdiction which is often confined to determining the propriety of both the decision making process as well as a limited review of the merits of the decision itself.

It is also important to note that administrative bodies created under statute are intended to be constituted by persons who are specially trained or have knowledge in the field in question. This ensures that any grievance arising under the statute is heard by persons who are uniquely qualified to handle the issues at hand and who have the ability to foresee the implications of any decision made.

Exceptional Circumstances

In order to address unique and peculiar circumstances, the Courts have recognised exceptions to the doctrine of exhaustion of remedies, which exceptions are also provided for under the FAAA. Section 9 (4) of the FAAA provides that in exceptional circumstances, and on application by a party, the Court may exempt such party from the obligation of exhausting alternative remedies if the Court considers such exemption to be in the interest of justice. The exceptional circumstances are not outlined in the Act, thus leaving the Courts to exercise their discretion when faced with an application for exemption.

The High Court in the case of *Krystalline Salt Limited v Kenya Revenue Authority (2019) eKLR* expressed its view on the definition of

Section 9 (4) of the FAAA provides that in exceptional circumstances, and on application by a party, the Court may exempt such party from the obligation of exhausting alternative remedies if the Court considers such exemption to be in the interest of justice.

"*exceptional circumstances*" as follows:

"What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.

The Fair Administrative Action Act does not define 'exceptional circumstances'. However, this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy."

In *Republic v Council for Legal Education ex parte Desmond Tutu Owuoth (2019) eKLR*, the High Court went further to state that in determining whether an exception to internal remedies should be granted in allowing parties to institute judicial review proceedings, the Court must look at whether the internal appeal mechanism available to a party under statute would serve the ends of justice. The Court had previously stated that the doctrine of exhaustion of remedies would not be applied where a party may not have an audience before the forum created, or the party may not have the quality of audience before the forum created which would be proportionate to the interests the party wishes to advance within the suit.

Therefore, a Court is obliged to look at whether the dispute resolution mechanism established under the statute in question is competent in the circumstances of the case to serve the interests of justice, or whether it warrants a party applying for an exemption from the doctrine of exhaustion of remedies.

Of interest, when faced with an application under section 9 (4) of the FAAA, the Courts have looked at the practicality and efficacy of the statutory remedies as well as the nature of the issue at hand when making their decision. For instance, in the case of *Republic v Kenya Revenue Authority ex parte Style Industries Limited (2019) eKLR*, the Court held that it would grant exemption where it would be impractical to make an application to the administrative body. For example, where the issue at hand is legal in nature and thus ought to be decided by the Courts rather than an administrative body, the Court would grant the exemption.

Upshot

Our review of case law reveals that parties tend to institute judicial review proceedings in Court for a variety of reasons. It may be that the statutory body that ought to hear the dispute at hand has not been constituted, and yet the dispute is time sensitive in nature, or the nature of the complaint is such that the statutory body cannot render an effective, impartial or dispassionate decision.

However, the downside of pursuing judicial review remedies through Court action is the comparatively longer time that Courts take to hear and determine matters. Another downturn is the fact that judicial review proceedings are restrictive, and save for exceptions, the Courts have been reluctant to delve into a review of the merits of the decision, placing the focus more on the propriety of the decision making process itself.

Georgina Ogalo-Omondi
Partner | georgina@oraro.co.ke

Rosemary Sossion
Associate | rosemary@oraro.co.ke

Hellen Mwongeli
Associate | hellen@oraro.co.ke

9 TO 5?:

EXAMINING THE PROS AND CONS OF PART-TIME EMPLOYMENT

The early 1990s saw a transformation in the Kenyan labour market with the marked rise in part-time and casual workers. This was brought about by efforts to cut labour costs since casual and part-time workers were thought to be ineligible to employment benefits as compared to full-time employees. The trend continues to date, more so in the wake of the Covid-19 pandemic which has wreaked havoc on the global and national economy and is set to continue doing so. It is therefore an appropriate time to consider the nature and meaning of part-time employment; the advantages and disadvantages it offers to both employers and employees alike; and the prevailing law on part-time employment.

What is Part-time Employment?

The International Labour Organization Part-Time Work Convention, 1994 (**the Convention**) defines a part-time worker as an employed person whose normal hours of work are less than those of comparable full-time workers. Locally, the term "*normal*" working hours is not defined in the Employment Act, 2007 (**the Act**) making it difficult to define a part-time worker. The Act confers power on employers to regulate employees' working hours in line with their contract of service but does not expressly state the maximum working hours of an employee.

Rule 5 of the Regulation of Wages (General) Order which constitute the regulations under the Labour Institutions Act, 2007 provides that the normal working week shall constitute a maximum of fifty-two (52) hours spread out over six (6) days of a calendar week. It further provides that the normal working week of a person doing night work should be not more than sixty (60) hours per work week. While this rule provides the law on maximum working hours, nothing is stated about normal working hours or the threshold from which part-time work begins. This is despite part-time workers constituting a significant number of the workforce in Kenya. Foreign legislations are known to provide a threshold under which an employee is considered to be working part time, which should stand as a challenge to the Kenyan Parliament to define normal working hours as well as to provide clarity in matters concerning part-time employees.

Pros and Cons of Part-time Work to Employees

Whilst most employees would opt to be employed on a full-time basis, some are forced to take the part-time work route for diverse reasons. However, it is important to note that part-time work offers certain advantages to employees. First, it can be a suitable learning process for a young person hoping to gain clarity as to which field they should pursue a career in. It also allows people with other pressing commitments to take up work in a flexible manner. This proves to be a viable option for students who ordinarily attend classes as well as primary care givers who have to take care of their loved ones at home.

Part-time work also has its disadvantages considering that it is perceived to be a cost cutting measure for employers meaning that such employees often do not enjoy the employment benefits that full-time employees do. These include health benefits, provision of food, water and housing, paid leave and set out procedure during termination and dismissal. Further, part-time workers often do not get the full protection of the Act as accorded to full-time employees, hence providing a platform for employers to exert greater control over them. This is more so because such employees are not unionisable given the temporary nature of their work. For these reasons, most employees tend to seek full time employment as the employment benefits, legislative protection and ability to join a union contribute towards greater stability and security at work.

Pros and Cons of Part-time Work to Employers

Offering part-time employment is an attractive option to employers because of the cost cutting opportunities it presents owing to the fact that part-time workers are considered to be ineligible for employee benefits. Furthermore, employers can exert greater control over the labour force since the employees are not unionisable. In addition to the above, hiring and dismissing part-time workers does not require the procedural rigmarole that is envisaged under the Act.

From the employers' perspective, more so those that require less-skilled labour, there are no pitfalls in hiring part-time employees. For those that require highly skilled employees such as universities when hiring lecturers, there is need to consider the cost of high employee turnover especially where the employees find better terms elsewhere. Suffice to state, recruitment and training processes for highly skilled employees, whether employed on a part time of full-time basis tend to be costly.

Rights of Part-time Employees under the Convention

From the above exposition, Kenyan labour legislation does not provide for part-time employees. Therefore, Kenyan Courts tend to look to the Convention to determine the meaning of part-time work and the rights of such workers. This is the practice despite the fact that Kenya has not ratified the Convention.

The Convention largely treats part-time employees the same way it does full-time employees. It engenders the view that the only difference between part-time and full-time employees should be in the pay they receive. To this end, the Convention states that part-time workers have the right to unionize and are entitled to the conditions that full-time employees are entitled to. This includes maternity/paternity leave, sick leave, paid annual leave and public holidays, and procedural fairness when it comes to termination of employment. The Convention also proffers voluntary transition from full-time to part-time work arrangements on the part of employees. This is to prevent such employees from being relegated to part-time status against their will. Taking the approach of the Convention, part-time employees ought to be treated as full-time employees and be entitled to the full benefits that come with such status. If the hours worked is all that separates full-time and part-time employees, then it is only just to accord them the same rights and benefits.

Kenyan Jurisprudence

The Act defines an employee as a person employed for wages or a salary and includes an apprentice and indentured learner. It does not go on to differentiate between full-time and part-time employees but makes reference to the type of work employees undertake using the terms "*piece-work*" and "*task*." Piece-work is defined as any work that an employee does and is paid according to the amount of work performed irrespective of the time occupied in its performance. On the other hand, a task is defined as such amount of work as can, in the opinion of an authorised officer, be performed by an employee in an ordinary working day.

These definitions are only used to define how an employee is to be paid. For a task, they are to be paid on a quantum meruit basis, i.e. for the portion of the task that has been done as at the time their pay is due. For piece-work, employees are to be paid in proportion to the amount of work they have done that month or when they complete the work, whichever is earlier. Notably, in both cases the worker is identified as an employee, and not a casual worker. This means that they are entitled to the full benefits and conditions of work that employees are entitled to.

The Convention largely treats part-time employees the same way it does full-time employees. It engenders the view that the only difference between part-time and full-time employees should be in the pay they receive.

In *Valentine Ataka v Karatina University (2019) eKLR*, the claimant, a lecturer employed on a part-time basis, sought to be paid his dues as per the oral contract of employment he had entered with the respondent. The Court found that he was indeed a part-time employee at the university as per the contract and performed work that was in the nature of piece work even though the employer defined the periods within which he was to do his work. The Court considered the provisions of the Convention in making a finding that the employee was indeed a part-time employee but did not consider the rights of such employees as the issue did not arise. The Court ordered the respondent to pay the claimant his dues for the work he had done.

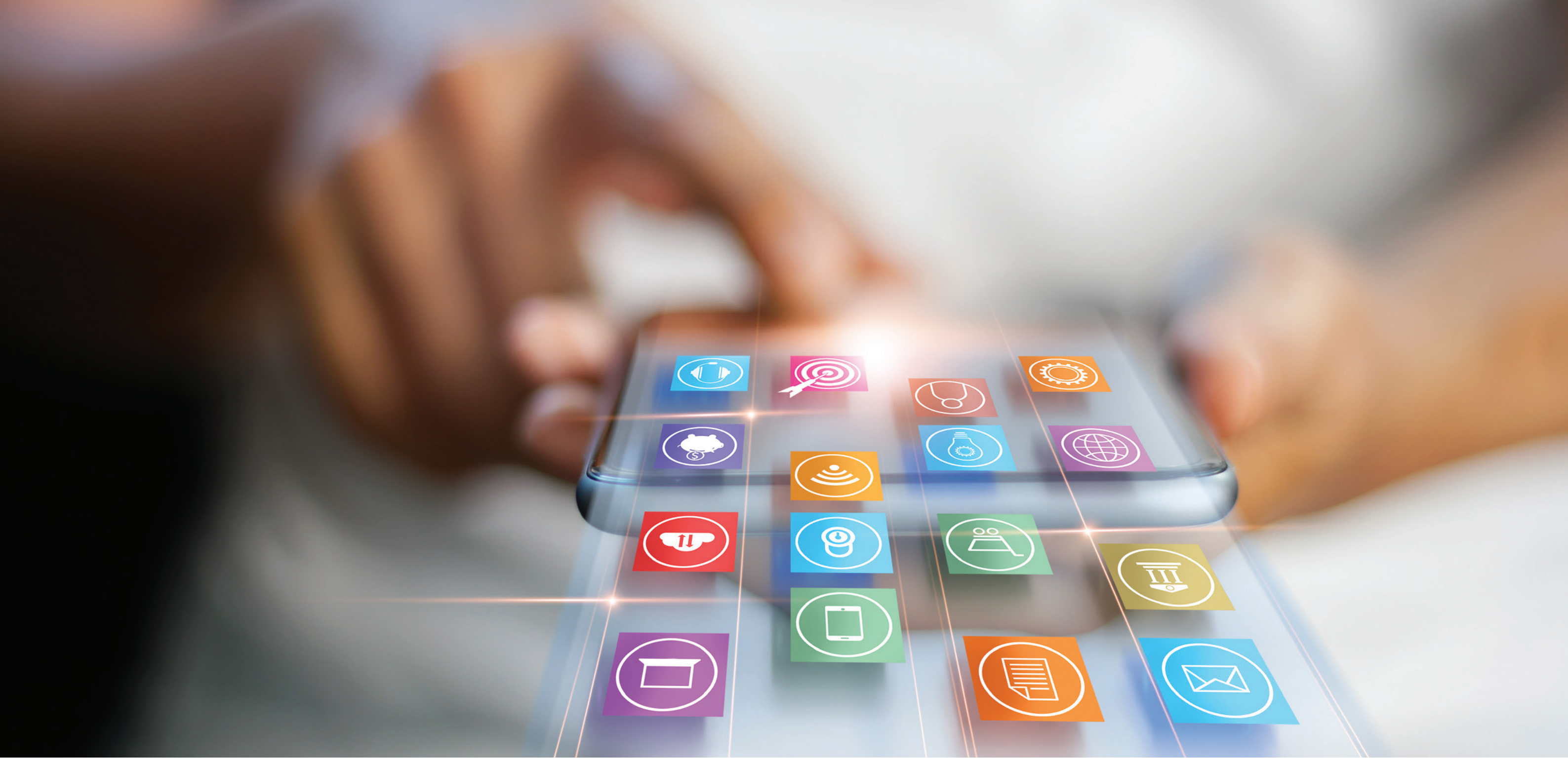
In *Peterson Guto Ondieki v Kisii University (2020) eKLR*, the claimant, who was a lecturer, sought among other prayers, that the Court compel the respondent to engage him on a full-time basis as a permanent employee as he was being treated differently compared to his colleagues. His claim for discrimination was met with the defence that he was a part-time lecturer and therefore could not expect to be treated the same way as full-time lecturers. Further, the Court cited the freedom of contract that allowed employers and employees to agree on the terms and conditions of employment. The position of a part-time worker in Kenya was not explored nor the attendant rights. However, the Court cited the Act's protections and provisions without distinguishing the position of the employee as a part-time worker.

Lastly, in *Simon Ndungu Kabau v Hillock Country Club (2014) eKLR*, the Court considered a claim alleging unlawful termination seeking terminal dues and certificate of service, among others. One of the issues that the Court considered is whether the claimant was a part-time employee as the respondent had claimed. The Court considered the hours that the employee worked to determine this issue. On finding that it was common ground that the employee worked forty (40) hours a week, the Court held that the claimant was a full-time employee and proceeded to apply the protections outlined in the Act for employees.

From the jurisprudence above, Kenyan legislation remains unclear as to the definition and the rights of part-time employee. It could therefore be argued that since the Act does not differentiate employees on this basis, part-time employees should be treated the same as full-time employees, with the difference between them being the salary paid. In addition to the above, the maximum working hours as stated in the foregoing, is fifty-two (52) hours in a six (6) days' work week, presents the need for Parliament to clearly set out the working hours that constitute part-time work.

Parting Shot

Part-time employees are only differentiated from full-time employees in that the former work for comparatively lesser hours. Kenya has neither defined the work-hour threshold that differentiates the two nor the rights of such employees. Part-time work offers advantages and disadvantages for both employees and employers, which both should consider carefully before entering into an employment contract. Whilst the Convention treats full-time and part-time employees the same with a difference in salary, the Act is silent on their position, leaving the labour market to treat them largely as casual workers. Notably, Courts have also not offered express guidance on the rights of part-time employees as against full-time employees. The ball is therefore in the Kenyan Parliament's court; to adopt the Convention and provide clarity as to the status of part-time work and the rights of such workers.



Pamella Ager
Partner | pamella@oraro.co.ke

James Kituku
Senior Associate | james@oraro.co.ke

'PESA PAPO HAPO!':

A LOOK AT THE REGULATION OF DIGITAL LENDING IN KENYA

The development of mobile based financial transactions in Kenya cannot be discussed without paying homage to the M-Pesa platform. M-Pesa is a mobile money application, managed by Safaricom PLC (**Safaricom**), which is the largest mobile telecommunication company in the country.

M-Pesa was conceptualised during deliberations between Vodafone (Safaricom's parent company based in the United Kingdom (**UK**)) and the UK Government's Department for International Development (**DFID**). The intention was to come up with a solution aimed at addressing the lack of financial inclusion among various sectors of the African population. According to Mr. Michael Joseph, a former Chief Executive Officer of Safaricom, it had been noted that various segments of the populace did not have access to banking facilities, hence a mobile based transaction platform was proposed in order to induct these people into the financial economy.

The original vision was to have M-Pesa operate as a platform through which subscribers would repay microfinance loans. However, during its 2006 pilot phase undertaken in Thika, it was noted that subscribers not only repaid loans via M-Pesa but also used the platform to send money around. It is on this basis that Safaricom launched M-Pesa as a mobile money service nationwide on 6th March 2007.

Following this, in the year 2012, M-Pesa laid the foundational infrastructure for Safaricom's next mobile money financial product, namely M-Shwari. Launched on 27th November 2012 as a partnership between Commercial Bank of Africa (now NCBA Bank Kenya PLC) and Safaricom, M-Shwari is a financial service available to Safaricom's M-Pesa subscribers that enables them to operate mobile based bank accounts, through which funds can be accessed and transacted. Apart from deposits, M-Shwari subscribers are able to access loans from the financial institution.

The launch of M-Shwari signaled a new era of mobile based lending, with the entry of other products such as Mkopo Rahisi in 2014 (later rebranded Tala), with KCB M-Pesa and Branch following suit in 2015.

Forms of Digital Lending

In her Master of Laws thesis, Ann K. Muli notes that scholars have categorised the various transactions in this sector into four main models.

In the first model, mobile telephone companies team up with financial institutions to offer financial services or products. NCBA's M-Shwari and KCB M-Pesa are examples of this arrangement.

The second model is where private companies disburse loans through mobile applications, (commonly referred to as Apps). In this model, the lenders rely on their own financial resources to engage in the business. This model has increased in popularity, going by the most recent statistics on App downloads. As at March 2019, both Tala and Branch had each enjoyed over a million downloads from Google's Play Store and Apple's App Store platforms.

The third model is the where financial institutions set up their own mobile network platforms, that enable them offer financial services and products to their customers. Currently, the only institution that has rolled out its own mobile phone network with integrated financial services is Equity Group Holdings Limited. The bank's customers can access loans through the bank's mobile network.

The last model is "*peer-to-peer*" lending. This is an informal arrangement where people use the available platforms, such as M-Pesa, to advance money to their relatives, friends, colleagues and others on agreed terms. This is also another popular model, as it is primarily driven by peoples' day to day social interactions.

Legal Framework

There are various legal provisions that generally apply in digital financial transactions highlighted as follows:

a. The Constitution of Kenya, 2010

The 2010 Constitution is the supreme law of the land and applies to all people and organs (including corporate entities). There are various relevant constitutional provisions, in the context of digital transactions and inter-party relations, including Article 27 on the protection of the right to privacy; Article 40 on the right to property and Article 46 on consumer protection.

b. Law of Contract Act (Cap. 23)

This is the general statute underpinning all contractual matters in the country. Section 2 of the Act extends the application of English common law regarding contracts to Kenya. This means that even digital lending transactions in Kenya, are governed by English common law to the extent possible and save as provided by any other written law.

c. National Payment Systems Act, 2011

This is a statute that provides the legal framework for prescription of means of payment and the regulation of those means and service providers by the Central Bank of Kenya (**CBK**). Electronic payments such as loan disbursements or loan repayments by financial institutions including banks or other entities gazetted by the Cabinet Secretary for Finance, fall within the scope of this Act.

d. Consumer Protection Act, 2012

The Consumer Protection Act, 2012 was promulgated in accordance with the requirement as stipulated under Article 46 (2) of the Constitution. Section 4 of the Act lists purposes of the legislation as including the promotion of ethical business practices and protection of consumers from unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices, including deceptive, misleading, unfair or fraudulent conduct. These objectives are meant to protect the consumer of any goods or services, from receiving the proverbial "*short end of the stick*".

Section 31 of the Act provides that a consumer should receive the necessary information from a supplier before entering into an internet agreement. Moreover, under Section 32 of the Act, a supplier is required to avail a copy of the agreement to the consumer after the parties have entered into the agreement.

Credit agreements including loan agreements are governed under Part VII of the Act (sections 53 to 71 of the Act). Some noteworthy provisions include section 61, which prohibits a lender from imposing default charges on the borrower, except reasonable costs incurred by the lender in pursuing repayment, associated costs such as legal fees in security realisation and costs associated with dishonored cheques issued by the borrower. Section 62 entitles the borrower to fully settle any outstanding balance under a credit agreement at any time, without incurring prepayment charges or penalties from the lender.

e. Data Protection Act, 2019

The Data Protection Act, 2019 was enacted in furtherance of Article 31 (c) and (d) of the Constitution. It regulates the use of personal data collected from persons (data subjects) by third parties, whether as data controllers or data processors. Under section 26 of the Act, a data subject has various rights including the right to be informed of the intended use of the personal data, to object to the processing of all or part of that data and to correct erroneous data. Personal data shall also be collected directly from data subjects, so as to enable them grant or decline consent to such an exercise.

f. Kenya Information and Communications Act, 1998

Section 83J of the Act recognizes that contracts may be formed electronically, by exchange of electronic messages. Therefore, such contracts' validity and enforceability shall not be denied simply on the basis that electronic messages were used. This provision is critical as it is legitimizes digital transactions, whereby the lender and borrower engage digitally, to establish a money lending contract.

Some noteworthy provisions include section 61, which prohibits a lender from imposing default charges on the borrower, except reasonable costs incurred by the lender in pursuing repayment, associated costs such as legal fees in security realisation and costs associated with dishonored cheques issued by the borrower.

Contemporary Legal Issues

There have been various concerns regarding the operations of digital money lenders, especially private entities (non-financial institutions) which are not currently regulated by CBK as they do not take deposits from members of the public. A major complaint has been the unconventional methods that some of these lenders have used to compel borrowers to repay their loans. One radical approach has been "*public shaming*" where the lenders circulate information regarding a borrower's indebtedness, among persons in the borrower's contact list. This is intended to fully exploit social stigma and odium, so as to induce the borrower to promptly repay the outstanding loan. This has been in breach of the borrower's rights to privacy, including contractual confidentiality as private information that should be kept between the lender and borrower, has been used to tarnish the borrower's reputation in his or her social circles, by portraying him or her as a "*loan defaulter*".

Another concern has been the free reign of such entities, as far as imposition of interest rates is concerned. The situation has been further compounded by the decision in the case of *Desires Derive Limited v Britam Life Assurance Co. (K) Limited (2016) eKLR*, where it was noted that the *in duplum* rule only applies to financial institutions that are recognized under the Banking Act (Cap. 488) Laws of Kenya. Since digital lending companies do not fall within the definition of "*financial institutions*" under the Banking Act, their lending terms are not regulated.

Given the lacuna on legal oversight of these digital lenders, the Central Bank of Kenya (Amendment) Bill, 2020 (**the Bill**) was tabled in the National Assembly. The Bill seeks to amend section 4A of the Central Bank of Kenya Act (Cap. 490) Laws of Kenya to empower CBK to regulate and supervise the conduct of providers of digital financial products and services; the conduct of digital credit providers and digital credit service providers; the conduct of providers of financial products and services; and the conduct of financial services. If the proposed amendments are passed into law, CBK's scope of oversight will be expanded to include the currently unregulated lenders. As at the date of publication the Bill is currently before the National Assembly's Committee on Finance and National Planning, awaiting public participation before further debate by Parliament.

Conclusion

As noted in the Bill's Memorandum of Objects and Reasons, the intention of the said Bill is to enable CBK ensure that there is fairness and non-discrimination in the credit marketplace. So far, the milestones the Bill has reached are encouraging, and it is hoped it will sail through the remaining legislative stages, until enactment.

Without doubt, CBK's entry into the digital lending space is long overdue. However, as the age-old adage states, "*better late than never*". The pleas of affected Kenyans to curtail the free hand of oppressive digital lenders have eventually reached the legislative seat of the country. It is our hope that Kenyans will adequately exploit the constitutionally entrenched avenue of public participation and suggest possible improvements on the Bill, that may further enhance regulation of the digital lending sector.

John Mbaluto
Partner | john@oraro.co.ke

Hellen Mwongeli
Associate | hellen@oraro.co.ke

DELVING DEEPER:

SUPREME COURT AFFIRMS DUAL ENFORCEMENT AND INVESTIGATORY MANDATES OF THE CAPITAL MARKETS AUTHORITY

In Issue 12 of our Newsletter published in August 2020, we featured an article on the powers and role of the Capital Markets Authority (**the Authority**) which concluded that the Authority is empowered to take robust administrative action in combating insider trading, albeit obligated to adhere to the principles of natural justice, the Fair Administrative Action Act, 2015 and the Constitution, while doing so. We also highlighted the appeal processes provided in the Capital Markets Act (**the Act**) which are to ensure that there are sufficient corrective mechanisms to mitigate and safeguard against any potential excesses or errors that the Authority might make in the carrying out of its mandate.

In this edition we consider a recent decision of the Supreme Court of Kenya in the case of *Alnashir Popat & 7 Others v Capital Markets Authority (2020) eKLR*, in which the Supreme Court considered the inquisitorial and enforcement mandate of the Authority.

The Authority's Inquisitorial and Enforcement Mandate

The Act provides for the inquisitorial powers of the Authority by mandating it to inquire into the affairs of persons it has granted a licence or an approval to, and any public company whose securities are publicly traded or offered on an approved securities market or over the counter market. The Authority may also appoint an auditor to investigate the affairs of any collective investment scheme or public company whose securities are publicly offered or traded on an approved securities exchange or on an over-the-counter market. The Authority's inquisitorial mandate exists contemporaneously with an enforcement mandate, which ordinarily comes into play after the inquisitorial stage. To this end, the Authority may impose sanctions, give directions, and trace assets of persons it has found to have engaged in fraudulent dealings or insider trading. The Act empowers the Authority to order the placing of caveats against the title to assets or prohibit suspected persons from operating their bank accounts pending the determination of charges that the Authority may have levelled against them. The Authority may also have recourse against any person whose act or omission has resulted in a payment from the Compensation Fund established under the Act to compensate investors who suffer losses due to the failure of a licensed broker or dealer to meet its contractual obligations.

The Imperial Bank Matter

Alnashir Popat & 7 Others v Capital Markets Authority concerned a corporate bond issued by Imperial Bank Limited (now in receivership) (**the Bank**) that had been approved by the Authority. Things took a grim turn when the Bank's Managing Director, Mr. Janmohamed, collapsed and died. After his passing, the Acting Managing Director and his deputy revealed to the non-executive Chairman of the Bank's Board, Mr. Popat (one of the Petitioners in the case) that the deceased had authorised many illegal disbursements of vast amounts of the Bank's monies in transactions that were concealed from the Central Bank of Kenya (**CBK**) and the Bank's Board.

Mr. Popat then moved the Board to appoint a consultant to carry out a forensic audit of the Bank's financial affairs and report on its accurate financial position. The Board authorised this and also resolved not to utilise the corporate bond issue pending the outcome of the investigations by the consultant. The consultant's report confirmed the assertions made by the Acting Managing Director and his deputy, and that the Bank had incurred losses running into billions of shillings. The Board reported the matter to the CBK, which on 13th October 2015, placed the Bank under receivership and appointed the Kenya Deposit Insurance Corporation as the Bank's receiver manager for a period of twelve (12) months. A moratorium was also placed on the Bank.

On this same day, the Authority instructed the Nairobi Securities Exchange not to proceed with the listing of the Bank's bond issue until further notice. The Authority then decided to inquire into the circumstances prevailing in the Bank during the bond application and approval period to determine whether the Petitioners, i.e. the directors of the Bank, had contravened regulatory requirements. On 6th May 2016, the Respondent served the Petitioners with notices to show cause and required them to respond within fourteen (14) days to various allegations of negligence in the discharge of their mandate as directors of the Bank. The Petitioners were summoned to appear before the Authority's Board on 24th May 2016 to answer those allegations. However, the hearing did not proceed as the Petitioners filed a Petition before the High Court challenging the proceedings before the Authority.

Proceedings before the High Court and Court of Appeal

In the High Court, the Petitioners challenged the propriety of the Authority's conduct of the enquiry. The main argument that the Petitioners made was that the Authority, having approved the bond issue, and certain officers, including the Chairman of the Board, having conducted the preliminary enquiry, was conflicted and could not be impartial in the enforcement proceedings. The Petitioners consequently sought an order of certiorari to quash the notices to show cause.

The High Court noted the Authority's dual inquisitorial and enforcement mandate and the fact that it had considered and approved the bond issue. It found that a well informed and fair-minded observer, given all the facts, would conclude that there existed a possibility of bias on the part of the Authority against the Petitioners. The High Court quashed the notices to show cause as prayed, holding that since the Authority's regulatory mandate would not be hampered as under Section 11A of the Act, it could delegate its functions to an independent body.

The Authority appealed this decision to the Court of Appeal, the outcome of which was a finding that the overlapping inquisitorial and enforcement functions of the Authority are expressly authorised in the Act. Therefore, the Authority was expected to make unprejudiced judgment on matters it had investigated. The Court of Appeal allowed the appeal and clarified that the Authority was at liberty to continue with the administrative proceedings it had commenced against the Petitioners.

Supreme Court Decision

The Petitioners petitioned the Supreme Court pursuant to Article 163 (4) (a) of the Constitution which provides that appeals shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution. On this basis, the live issues before the Court were whether the overlapping roles that the Act vests in the Authority constitute a violation of the Constitution and whether the Respondent's attempted enforcement proceedings were or were likely to be biased against the Petitioners.

The apex Court held that whereas the dual roles were not unconstitutional *per se*, the manner of discharging the dual mandate is what might turn out to be unconstitutional. The Court reasoned that the for the purpose of efficiency and in carrying out the objectives of the Act i.e. expeditious disposal of disputes that arise in the operations of the capital markets, the functions of enforcement and investigation could not be performed by separate bodies. However, when it came to judicial and quasi-judicial proceedings or those

The Authority's inquisitorial mandate exists contemporaneously with an enforcement mandate, which ordinarily comes into play after the inquisitorial stage.

that are likely to adversely affect the rights of the persons or bodies under investigation, the Authority was obligated to comply with the requirements of impartiality and independence under Articles 50 (1) and 47 of the Constitution. The Court noted that the Authority's power to delegate its functions and powers to other bodies or persons would enable it to fulfil the objectives of the Act while complying with the constitutional requirements of impartiality and independence.

On the issue of bias, the Court held that there was a possibility of bias in the case. It reasoned that the Authority had approved the corporate bond issue and thereafter it emerged that the management of the Bank had been running a scheme of fraudulent disbursements leading to losses in the billions of shillings. As this was a matter that the Authority probably ought to have discovered when conducting due diligence on the bond issue, it would cast aspersions on the Authority's diligence. Therefore, the Court held that the Authority was unlikely to approach the proceedings with the impartiality appropriate for that decision.

The Court allowed the appeal to the extent that the Authority could proceed with its enforcement proceedings against the petitioners through its delegated authority under section 11A (1) or section 14 (1) of the Act.

The Position in Canada

The case of *Brosseau v Alberta Securities Commission (1989) 1 SCR 301* illustrates the Canadian position on the issue of the dual investigative and enforcement mandate of an administrative body. In this case, Brosseau, a solicitor, prepared the prospectus of a company that later became insolvent. The Respondent, who had approved the prospectus of the company, investigated the company to determine whether the Appellants should be subject to a cease trading order and deprived them of certain exemptions provided by the Canadian Securities Act.

In the hearing before the Alberta Securities Commission, the Appellants sought an order that the Commission did not have jurisdiction to hold a hearing against them. The Commission ruled that it had jurisdiction and directed that the hearing proceed. Aggrieved by this decision, the Appellants lodged an appeal with the Alberta Court of Appeal which was unsuccessful. The Appellant then lodged an appeal with the Alberta Supreme Court.

The Alberta Supreme Court found that the relevant statute permitted the Commission to be involved in both the investigatory and adjudicatory functions, which does not by itself, give rise to a reasonable apprehension of bias. The reasoning given is that securities commissions, by their nature, undertake several different functions. They would therefore have repeated dealings with the same parties. The Court held that it is not enough to merely claim bias because a Commission, in undertaking its preliminary internal review, did not act like a Court. If it is clear from its empowering legislation that certain activities which might otherwise be considered "*biased*" formed an integral part of its operations and the Commission has not acted outside its statutory authority, the doctrine of reasonable apprehension of bias cannot be sustained. Therefore, this ground of appeal was dismissed.

The position in Canada is thus similar to that prevailing in Kenya as highlighted by the reasoning of the Kenyan Supreme Court in *Alnashir Popat & 7 Others v Capital Markets Authority*, which concurred with the Alberta Supreme Court in *Brosseau v. Alberta Securities Commission*.

ORARO & COMPANY
ADVOCATES

CONTACTS:
ACK Garden Annex, 6th Floor, 1st Ngong Avenue
P. O. Box 51236-00200, Nairobi, Kenya.
Dropping Zone: Embassy House Basement, Room 8, Harambee Avenue
T: +254 709 250 000
E: legal@oraro.co.ke
| Oraro & Company Advocates

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