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2021 – A Learning Curve: Issue Fourteen

The festive period brings about a moment to pause and catch one's breath following a full year's output. For some, the period is filled with the uncertainty that comes with not knowing what the future holds, while for others, it is a time for reflection on what went right, what went wrong, and what could have been, with a renewed hope for what lies ahead in the coming year.

As I look back upon this year, I have the clear realisation that for many, it has not been particularly easy owing to the continuing impact of the COVID-19 pandemic. However, just like any other year, it is important that we take stock and analyse areas of learning, so as to come back better and stronger. It is on this premise that I am pleased to share with you the fourteenth issue of our flagship publication, Legal & Kenyan, where we similarly take stock and analyse emerging legal issues.

For starters, we are delighted to have the contribution of Sena Abla Agbekoh, who is an Associate Partner at AB & David Africa (Ghana), which is a pan-African business law network that Oraro & Company Advocates is an affiliate member. Sena delivers an insightful article on the importance of proper contract administration in the context of construction projects.

Moving on, we set sight on our very own array of authors. Kicking us off is Noella Lubano, who discusses the rescue options available for distressed companies under the Insolvency Act, 2015. Next, we have Jacob Ochieng and Sheila Nyakundi-Marilu who delve into the investment options in private equity and venture capital firms for pension schemes in Kenya. Claire Mwangi and I then follow with a piece that makes a case for the need to exercise caution in the appointment of non-lawyer arbitrators. Cindy Oraro then offers an illuminating piece on the potential of Kenya's proposed renewable energy auctions policy, followed by Daniel Okoth who highlights the notable shift from a "*process-only*" inquiry to "*merit review*" of administrative action. Jacob Ochieng and Milly Mbedi join the fray and address the do's and don'ts for directors in relation to their duties and potential liabilities when companies are in financial difficulties. Bringing things to a close, Hellen Mutua and I reflect on a key High Court decision on a copyright claim relating to an insurance policy.

We do hope that you enjoy the read!

Sincerely,

John Mbaluto, FCIArb
Editor

Founding Partner's Note

As human beings, we have a tendency of reviewing the year as it draws to an end, and this year is no different.

For us here at Oraro & Company Advocates, we have had a tremendous year full of challenges – both positive and negative alike. In all those, I am reminded of the African proverb that says, *"If you want to go fast, go alone. If you want to go far, go together."* In all honesty, this has been the glue that has gotten us this far. From our people here within the firm, to our clients who have stuck by us, this proverb holds true.

As we set our sights on the new year, my encouragement to you is that we keep up this spirit, because only then, can we achieve far greater things.

I wish you a Merry Christmas and a Happy New Year 2022!

George Oraro SC

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"An exemplary team that goes the extra mile to ensure their clients' interests are well taken care of and, more importantly, plans and prepares for any overseen eventuality and contingencies. A total team that works in concert for its clients' interests whatever it takes."

IFLR1000, 31ST EDITION [2021-2022].

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SAVE ME!:

RESCUE OPTIONS AVAILABLE FOR DISTRESSED COMPANIES UNDER THE INSOLVENCY ACT, 2015

Insolvency is arguably one of the most daunting outcomes for a company. However unfathomable it may be, it cannot be completely written off as companies are prone to financial difficulties which may be attributed to cut-throat competition, reduction in demand of the product coupled with an increase in the cost of production, increase in bad debts, among a host of other reasons.

For a long time, the only recognised outcome for insolvent and distressed companies in Kenya was winding up and in rare cases, receivership. However, the Insolvency Act, 2015 (**the Insolvency Act**) ushered a move away from these draconian outcomes and introduced the concept of rescue procedures.

To this end, the Insolvency Act has placed emphasis on maintaining companies as going concerns for the benefit of all concerned through various rescue procedures including but not limited to company voluntary arrangements, administration, and administrative receivership.

Administration

Administration commences with the appointment of an administrator who may be appointed by the company or its directors, the Court, or the holder of a floating charge. The objectives of administration are to maintain the company as a going concern, to obtain a better outcome for the company's creditors than would be if the company was liquidated, and to realize the property of the company so as to distribute the same to secured or preferential creditors.

Once an administrator is appointed, a moratorium comes into play. During the existence of the moratorium, proceedings and execution against the company are stopped and creditors may only exercise their rights against the company with the consent of the Court or administrator.

The main difference between an administrator and an administrative receiver is that the latter is available to a debenture holder in respect of a debenture that was created before the coming into force of the Insolvency Act. However, the roles and obligations of an administrative receiver are, in essence, no different from an administrator appointed under the Insolvency Act since he or she is required to be a qualified insolvency practitioner, a designation with specific obligations under the Insolvency Act.

The main attraction of administration is the protection it affords a company by deflecting any liquidation attempts by creditors. This gives the company time to turn around its financial affairs. On the flipside, administration bears some downsides such as the ceding of controlling rights over the company from the directors to an insolvency practitioner. In addition, being a public process, administration is in the public domain and this may act to deter suppliers, affect investor confidence, and reduce employee morale.

Company Voluntary Arrangement

A company voluntary arrangement (**CVA**) is, on the other hand, a scheme where the company's directors propose a plan to settle the debts of the creditors. If the plan is approved, the company will continue trading on a more flexible repayment schedule. A CVA is usually managed by an insolvency practitioner who is either selected by the directors and confirmed by the creditors or appointed directly by the creditors. Once a CVA is approved, a moratorium comes into place and prevents any debt recovery proceedings or action against the company unless with the approval of the Court.

Unlike administration, CVA's are rarely in the public domain and as such, the process enjoys some privacy. Moreover, due to the informality of the process, it gives greater latitude to stakeholders to come up with ideal solutions tailored specifically to the difficulties facing the company. Of note is that since CVA's are largely controlled by creditors, unless most of the creditors approve the process and for the duration of it, it may well collapse should the creditors not fully buy into the process.

Corporate Restructuring

The Companies Act, 2015 (**the Companies Act**) also contains rescue procedures such as compromises, arrangements, reconstructions, and amalgamations, all of which permit a company that is in distress to initiate negotiations with its creditors to obtain a favourable outcome for all concerned parties.

The umbrella term for the above processes is corporate restructuring which may be commenced by a company, its directors, members, creditors, and insolvency practitioners. There are no defined parameters for corporate restructuring and it may include reorganization of a company's shares, an amalgamation of two or more companies, compromises with creditors, or any act that alters the company's financial position.

A restructuring takes effect once approved by the Court and the stakeholders in a meeting. It comes with several advantages as the arrangement is predicated on making the business more profitable with the idea of obtaining a positive result for the creditors.

Corporate restructuring is generally a good response for a company with a declining business as it helps revive it thereby increasing the value of the company. However, if not done properly, a restructuring may result in increased losses being incurred by the company due to substantial costs and expenses attendant to the restructuring process such as consultation fees, professional fees and legal compliance costs.

To this end, the Insolvency Act has placed emphasis on maintaining companies as going concerns for the benefit of all concerned through various rescue procedures including but not limited to company voluntary arrangements, administration, and administrative receivership.

As highlighted above, companies in distress in Kenya have a range of options available to them under both the Insolvency Act and the Companies Act which, when properly applied, can improve the financial position of the company and delay, or avoid liquidation altogether.

The Courts in Kenya have also been supportive of rescue arrangements and have been reluctant to interfere with entities that are pursuing corporate rescue procedures. Prominently, there was an attempt by some creditors to stop the debt restructuring that had been commenced in respect of Kenya Airways in 2017 in the case *Equity Bank Kenya Limited v Kenya Airways PLC & 11 others (2017) eKLR*. The applicants argued that there were no legal provisions that permitted the restructuring process that was happening at the time.

The Court, however, in rejecting this position, stated that the said restructuring was undertaken pursuant to section 926 of the Companies Act, which permits companies to enter such arrangements, and pronounced itself as follows:

"It is common ground that the 1st respondent is in the process of restructuring in an effort to secure additional capital that will see it continue as a going concern. The Companies Act provides a mechanism under which a company may enter into a scheme of arrangement with its creditors. Under section 926 of the Act, a company may present a compromise or arrangement to the Court for sanction where a majority of the creditors, or the members voting at a meeting, convened in accordance with section 923 have agreed with the compromise or arrangement."

Under the said provision of the law, companies experiencing financial difficulties may opt to enter any arrangement that will help alleviate their financial situation and these may include ceding entitlements by creditors, trading reorganization, use of derivatives (where applicable), debt to equity swaps, share capital restructuring, mergers and acquisitions and halting proceedings against the company.

Conclusion

A distressed company should act early to avoid going into liquidation. Whereas there is a wide range of options available to a company in distress, these options may be limited if an insolvency situation is left unaddressed rather than dealt with immediately.

Some of the subtle signs of impending insolvency that companies can look out for include cases where the business is expanding too fast, missing forecast targets consistently, entry of competition into the market amongst others.

Finally, it is important to note that a selected statutory rescue procedure can only achieve its intended goal if the relevant stakeholders are involved and cooperate. These stakeholders include financiers, suppliers, employees and landlords who must lend support to the selected rescue procedure for the same to be successfully implemented.

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'A HAND FULL OF ACES':

INVESTMENT OPTIONS IN PRIVATE EQUITY AND VENTURE CAPITAL FIRMS FOR PENSION SCHEMES IN KENYA

Introduction
Over the recent past, there has been a notable shift by pension schemes towards seeking alternative investment options arising out of diversification considerations. This move has seen the percentage of investments in private equity and venture capital (**PEVC**) firms in the asset management register of pension schemes increase, indicating a positive reception of these alternative investment avenues by pension schemes.

PEVC firms offer viable investment options to individuals, companies and entities seeking to expand their portfolio. Although PEVC firms are normally used as a generic term for entities involved in investing in private equity, this misconception stems from the lack of appreciation of the different roles they play.

First, private equity firms inject capital in companies whose operations are deeply rooted in the economy, that is, mature companies with some level of established market accessibility. On the other hand, venture capital firms usually assist companies that are seeking to breakthrough at the initial stages.

Ideally, for an entity to fall within the radar of venture capital firms, it would first have to create a base, by either using seed capital and later turning to angel investors (if necessary) and finally resort to venture capital firms when growth is constant. Thus, as is discerned from the foregoing, venture capital is in fact a subset of private equity.

In Kenya, private equity firms unlike venture capital firms, are largely unregulated.

Investing Pension Funds
Pension provides some level of security upon retirement which in turn helps maintain and sustain the standard of living after retirement. Due to their very nature, pension fund assets require a high degree of management to guarantee returns for retirees. For the longest time pension funds were limited to fixed securities or government securities, which resulted in a stable return for the assets invested. However, this also meant low returns as most fixed investments usually have a low return rate.

Changing market conditions and the need to improve the range of income generating sources, have seen a diversification in the range of pension fund investment classes. Consequently, most pension schemes have started allocating a portion of the pension fund's assets to alternative investments, which are essentially investments that do not form part of the orthodox asset types such as listed equity, government securities, bonds or cash.

Unlike the traditional forms of investments, alternative investments come with an element of high risk-adjusted returns, meaning that whereas there is a higher risk in specific investments, the same comes with the possibility of better returns.

Sections 37 and 38 of the Retirement Benefits Act (**RBA**) lists the range of permissible investments and the restrictions in dealing with retirement funds. The said sections of the RBA provide that scheme funds shall be invested with a goal of securing market rates of return on the investment, and to do so, schemes should formulate a provident investment policy. However, pension schemes are prohibited from using the funds in the scheme for advancing loans, or investment that goes against the guidelines prescribed by the Cabinet Secretary, National Treasury.

The RBA is supplemented by several guidelines and regulations, including the Retirement Benefits (Forms and Fees) Regulations, 2000 (**the Regulations**). The Regulations provide a category of permissible investments for pension schemes under Table G. PEVC firms are included under the table at part 13 and the extent of investment in percentage is also specified for such firms to be ten percent (10%) of the total scheme funds.

It is important to note that the Regulations do not provide the type of PEVC firm that a pension scheme can invest in. Therefore, it is upon the trustees of schemes to identify the most suitable PEVC firm and proceed to invest the funds to the extent of statutory limits.

The steady growth of investment in PEVC by pension schemes is remarkable, as was noted by Charles Mwaniki when writing in the Business Daily on 2nd October 2020. With the expansion of pension funds, it is almost certain that investment in PEVC by pension schemes will similarly grow.

PEVC firms come with inherent and unique risks, hence an investment which initially appears appealing on paper, may result in substantial loss. It is important for pension schemes to review a company's performance, financial position and portfolio and to assess the chances of a positive return on an investment.

This would create a level of predictability which aligns with the pension scheme's investment plan. However, it is noteworthy that companies are often susceptible to unforeseeable factors including market forces which may make it difficult to project the company's business performance based on previous years' financial yields.

Regulatory Framework

A look at the regulatory framework is necessary to understand the environment in which PEVCs operate in Kenya and whether the law offers enough protection to safeguard the retirement benefits of retirees.

PEVC firms are subject to several laws depending on the structure of the legal entity. If the private equity firm is a company, then the provisions of the Companies Act, 2015 and regulations thereunder will govern the conduct of business, whereas if it is a partnership, then the relevant partnership laws will apply depending on the structure of the partnership. However, there are no sector specific laws that govern private equity firms.

Venture capital firms on the other hand, have been under the regulatory ambit of the Capital Markets Authority (**CMA**). To operate as a registered venture capital firm, one must satisfy the eligibility requirements as set out under the Capital Markets Act (Cap 485A Laws of Kenya) (**CMA Act**) and the Capital Markets (Registered

It is important for pension schemes to review a company's performance, financial position and portfolio and to assess the chances of a positive return on an investment. This would create a level of predictability which aligns with the pension scheme's investment plan. However, it is noteworthy that companies are often susceptible to unforeseeable factors including market forces which may make it difficult to project the company's business performance based on previous years' financial yields.

Venture Capital Companies) Regulations, 2007. Once the prerequisites for qualification are met, the venture capital firm is then required to lodge an application for approval with the CMA.

It is important to note that private equity firms were recently brought under the control of the CMA. Section 30 of the Finance Act 2020 amended section 11 of the CMA Act to include PEVC firms that have access to public funds in the list of entities that must be licensed or approved by the CMA. This followed the CS National Treasury's remarks while reading out the 2020/2021 Budget Statement whereby he proposed an amendment to the CMA Act to subject PEVC firms to the oversight of the CMA due to the risk factor posed by such firms especially in relation to public funds.

Subsequently, the CMA Act was amended to provide that the CMA shall have authority to license, approve and regulate PEVC firms that have access to public funds. However, this amendment still leaves a lot to be desired as what constitutes public funds has not been defined and is therefore ambiguous.

Furthermore, there are no provisions detailing the requirements, procedure for approval and obtaining of licences by PEVC firms that have access to public funds. It is hoped that this might become clearer upon promulgation of the relevant regulations.

PEVC stakeholders have however advised against the move to regulate PEVC in Kenya stating that the current regime is already sufficient. Speaking through their representative, the East Africa Private Equity and Venture Capital Association, PEVC firms have stated that this would amount to "*overregulation*", noting that pension schemes are already governed by the Retirement Benefits Authority.

It is important that a balance is struck to ensure that PEVC firms operate with the business flexibility plans that have thus far been the success of these type of alternative investments. It is also noteworthy that at a very basic level, PEVC firms are governed by the law relating to contract.

Outlook

In the coming years, depending on the performance of PEVC firms and the returns made for pension schemes, the discussion is likely to move towards increasing the share of funds deposited with PEVC firms. Currently, however, the laws governing investments in PEVC by pension schemes are inadequate to facilitate proper security for pension funds while at the same time allowing diversification of investments by pension schemes.

It is for this reason that there is need for better regulation on investment of pensions funds in PEVC firms in Kenya. The regulations should indicate, amongst others, what amounts to public funds, the threshold for approval for PEVC firms to handle public funds and the prerequisites to be met before the CMA issues trading licenses. This is likely to translate to increased confidence in PEVC firms and higher investments in them by pension schemes.

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CHOOSE WISELY:

THE NEED FOR CAUTION IN THE APPOINTMENT OF NON-LAWYER ARBITRATORS

An arbitration process is only as good as the arbitrator appointed to hear and determine the dispute. If the parties appoint a good arbitrator i.e., one who is well experienced, qualified, skilled etc, then the arbitration process is bound to be efficient and even enjoyable, with the converse being equally true – the appointment of a bad arbitrator i.e., one who is incompetent, biased, corrupt etc, tends to result in an arduous arbitration. The Arbitration Act, 1995 however does not prescribe any qualifications or qualities for a person to be appointed as an arbitrator. Indeed, the 21st edition of *Russel on Arbitration* states as follows:

"Are there professional arbitrators? The law does not impose general restrictions on who may be appointed an arbitrator. It is not a recognised profession like that of a solicitor or barrister. It is a feature of English arbitration practice that non-lawyers may become arbitrators in specialist fields such as shipping and construction."

This is contrasted with other professions like the legal profession where the Advocates Act (Cap. 16) Laws of Kenya gives the professional and academic qualifications necessary for admission as an Advocate of the High Court of Kenya. There being no minimum requirements provided in law for qualification as an arbitrator, the field of arbitration is open to anyone to be appointed as an arbitrator. This has resulted in arbitrations being conducted by different professionals including advocates, architects, quantity surveyors, engineers, accountants, among others.

This article posits that since the nature of disputes referred to arbitration are often contractual, therefore the role of an arbitral tribunal is a legal role that entails the legal interpretation of, inter alia, the contract from which the dispute arose. The 2nd edition of the *Handbook of Arbitration Practice* by Ronald Bernstein and Derek Wood describes an arbitration agreement in the following manner:

"Where two or more persons agree that a dispute or potential dispute between them shall be decided in a legally binding way by one or more impartial persons in a judicial manner, that is upon evidence put before him or them, the agreement is called an arbitration agreement or a submission to arbitration."

The basis of parties entering into an arbitration agreement is thus that parties wish to have any disputes arising determined in a manner required by law. This exercise inevitably calls for legal interpretation of both the underlying contract, knowledge of the relevant law, taking of evidence, issuance of interim measures of protection and interim orders e.g. security for costs, all of which require an appreciation and understanding of the applicable law and legal principles. The question that then arises is whether such a legal exercise is best undertaken by non-lawyer arbitrators or should ideally be a preserve of lawyer arbitrators. The Handbook of Arbitration Practice observes as follows:

"In countries where the English common law system prevails, judges are recruited from practising lawyers of experience and standing. Before appointment, the new judge will have seen, and heard trials conducted by many hundreds of judges of various ranks. This aural tradition consciously or subconsciously shapes the way in which each new judge in turn functions. An arbitrator, or the chairman of a tribunal, if he has not been a lawyer with a litigation practice, has no such experience or tradition to rely on. He may have appeared as an advocate, or an expert witness, in a few arbitrations or trials. But he has nothing like the depth of experience of a litigation lawyer. If he is often appointed as arbitrator, he will in most cases learn from his experience-that is to say-from his own mistakes-and his performance of the judicial function will improve as he goes along."

Quasi-judicial Function

It is this legal and judicial role of arbitrators that results in the arbitral function being likened to that of a private judge, as an arbitrator performs a quasi-judicial role, with his or her mandate being to apply the law and administer justice just like a judge would. Herein lies the mismatch in the analogy made between the judicial function of arbitrators on the one hand, and that of judges on the other, because even though their duty is similar, the academic and professional qualification between the two is at variance.

As indicated at the beginning of this article, there exists no qualification for a person to be appointed as an arbitrator. However, the qualification for appointment as a High Court judge is stipulated under Article 166 (5) of the Constitution as follows:

a) at least ten (10) years' experience as a superior court judge or professionally qualified magistrate; or
b) at least ten (10) years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or
c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten (10) years.

Likewise, the qualification for appointment as a magistrate, who similarly renders judicial decisions, includes being an advocate of the High Court of Kenya as provided for under section 32 of the Judicial Service Act, 2011. From the foregoing, it is apparent that legal education is a necessity for a person to exercise a judicial role or a quasi-judicial role for that matter.

The question that arises is whether the arbitral function and mandate can ably be exercised by a non-lawyer arbitrator who is required to render an arbitral award that is final and binding. It is imperative to note that any erroneous interpretation of the contract or the attendant facts by an arbitrator cannot be challenged.

Appointment of non-lawyer arbitrators is thus akin to giving a legal mandate to a non-legal mind and such appointments must be approached with careful consideration.

Similarly, an erroneous interpretation of the law by an arbitrator in the final award can only be challenged on appeal by agreement of the parties as provided for under section 39 of the Arbitration Act.

Additionally, it important to note that these errors cannot be challenged as being contrary to the public policy of Kenya as was held by the Court of Appeal in the case of *Christ for All Nations Church v Apollo Insurance Co. Ltd (2002) 2 EA 366* where the Court expressed itself as follows:

"In my judgment this is a perfect case of a suitor who strongly believed the arbitrator was wrong in law and sought to overturn the award by invoking the most elastic of grounds for doing so. He must be told clearly that an error of fact or law or mixed fact and law or of construction of a statute or contract on the part of the arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the public policy of Kenya."

With these limited grounds of challenging arbitral awards stemming from the quasi-judicial function of an arbitrator, is it advisable for parties to bind themselves by appointing a non-lawyer arbitrator to perform what is largely a legal function?

Speciality Area Disputes

Non-lawyer arbitrators with professional expertise and qualifications are often appointed when the underlying dispute emanates from a contract in the respective specialist professional field. However, as highlighted above, an arbitrator's role is a quasi-judicial function, and the speciality expertise of an arbitrator may not have a bearing on the final award.

It is also important to note that non-lawyer arbitrators with professional qualifications are restricted from investigating matters within their expertise. This is because arbitrators are not expert witnesses, and they cannot therefore apply their special professional knowledge to the dispute before them. Theirs remains a quasi-judicial function, with arbitrators allowed to appoint experts to report to them on speciality or technical matters through filing expert reports and attending the arbitral proceedings to testify as to their expert opinions as captured in their expert reports.

Accordingly, and given the fact that non-lawyer arbitrators appointed for their professional expertise may not apply the said expertise to the dispute, there is need to reconsider why they are appointed in the first place, when their role is to exercise a quasi-judicial function, and not to apply their professional expertise to the dispute. Appointment of non-lawyer arbitrators is thus akin to giving a legal mandate to a non-legal mind and such appointments must be approached with careful consideration.

Parting Shot

Although the appointment of non-lawyer arbitrators remains an outcome that flows from the principle of party autonomy, the attendant shortcomings that might arise in non-lawyer arbitrators' inability to properly exercise the quasi-judicial function that is necessarily attendant to arbitration potentially outweigh the benefits.

Appointment of non-lawyer arbitrators should thus be undertaken cautiously, and with the full appreciation of the effect of that choice in the final award that substantively resolves the dispute. Lawyer arbitrators have the advantage of the depth that comes with the knowledge of the law and of legal practice and tend to present a better choice for the effective determination of disputes through arbitration.

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SCALING UP:

THE POTENTIAL OF KENYA'S PROPOSED RENEWABLE ENERGY AUCTIONS POLICY

Like many other developing countries, Kenya requires low-cost electricity to boost economic growth. Various key sectors would benefit from cheaper electricity. For example, the manufacturing sector would be able to offer competitively priced goods in the global export markets, whilst large infrastructure projects would benefit from increasingly attractive returns. Above this, there has been widespread concern about the high cost of electricity in Kenya. This is amongst one of the factors that prompted the President, H. E. Hon. Uhuru Kenyatta, to appoint a taskforce to review Power Purchase Agreements (**PPAs**) on 29th March 2021.

This article will explore one of the means of procuring competitively priced generation tariffs, being renewable energy auctions. The adoption of renewable energy auctions has increased significantly across the globe as more countries look to this method as being effective in the price discovery of power projects. With a global shift towards the use of renewable energy, countries are procuring renewable energy through auctions as a means of leveraging on the market-based prices and competitive nature of auctions. Auctions envisage a competitive bidding process for the procurement of renewable energy, where bidders are evaluated solely on a set criterion determined by the government.

Since 2008, Kenya has procured its renewable energy under the Feed in Tariffs Policy on Wind, Biomass, Small-Hydro, Geothermal, Biogas and Solar Resource Generated Electricity, which was last revised in 2012 (**2012 FiT Policy**). To power project developers and their investors, the 2012 FiT Policy is ideal because of the tariff guarantees, which allow power generators to sell the generated electricity at pre-determined tariffs under standardized PPAs for a specified period.

However, while the 2012 FiT policy offers lower pre-determined tariffs, investors have on numerous occasions made submissions for generation tariffs higher than those contemplated under the 2012 FiT Policy. Following this trend, there was a proposal to review the 2012 FiT Policy with a view to maintain the lower pre-determined tariffs and introduce renewable energy auctions to handle the submissions for higher generation tariffs. Additionally, in 2016, the Ministry of Energy undertook a feasibility study to explore the practicality of introducing renewable energy auctions. Renewable energy auctions were first contemplated in the Energy Act, 2019 (**the Energy Act**) where under section 119 (2), the Energy and Petroleum Regulatory Authority can through a fair, open and competitive process issue a generation licence.

In January 2021, pursuant to this provision of the Energy Act, the Ministry of Energy released the draft Renewable Energy Auctions Policy (**Auctions Policy**). Once approved, the Auctions Policy will ensure that renewable energy is procured competitively and in line with the Least Cost Power Development Plan (**LCPDP**)/ Integrated National Energy Plan (**INEP**). The Auctions Policy is yet to be approved by the Ministry of Energy and its implementation will be dependent on the recommendations of the Presidential Taskforce on the Review of PPAs.

Scope of the Auctions Policy

If approved by the Ministry of Energy, the Auctions Policy will govern the procurement of all solar, wind power, and other renewable energy projects larger than 20MW, to the exclusion of geothermal projects. Notably, Small Hydro power projects not exceeding twenty megawatts (20 MW), Biomass and Biogas projects will be procured under the 2021 Feed in Tariffs Policy on Renewable Energy Resource Generated Electricity (Small-Hydro, Biomass, Biogas) (**2021 FiT Policy**), while geothermal power projects will be procured under the Policy on Licensing of Geothermal Greenfields.

Secondly, the Auctions Policy will apply to all solar and wind power projects that are currently under the 2012 FiT Policy but have not signed a PPA, despite having an approved Expression of Interest. The Auctions Policy will be subject to review every five (5) years from the date of its publication, subject to exceptional cases that may warrant an earlier review. Once reviewed, the Auctions Policy will apply prospectively to power projects.

Role of the Ministry of Energy

The Ministry of Energy will be tasked to announce the auctions upon receiving advice from the LCPDP/INEP Committee on the appropriate timing and targeted capacity. The Ministry will further have the responsibility of determining the site selection requirements necessary for bidders to participate in the auctions. As part of its guiding role, the Ministry of Energy will provide the bidders with the information necessary to prepare their proposals.

The Auction Mechanism

Once approved, the renewable energy auctions under the Auctions Policy will be done through a two-stage bidding process, with the first one being the prequalification stage, where bidders will undergo a preliminary evaluation process, and the second stage, where the bidders undergo a technical and financial evaluation (if they pass the first stage).

Stage 1 (Preliminary Evaluation)

At the preliminary evaluation stage, bidders will have to demonstrate that they have: the requisite experience to implement the project; sufficient financial capability; an appropriate (stage 1) bid bond; land rights/access rights to the plant and interconnection infrastructure; the proposed technology, preliminary design/configuration, scale and annual energy is viable and consistent with the site constraints as outlined in the maximum megawatts export rating from the site; the proposed grid connection route; and provision of constitutional documents. Bidders who successfully demonstrate the above will be invited to submit a full proposal for the second stage of the auction mechanism. For unsuccessful bidders, the bid bond submitted during stage 1 will be returned to them.

Stage 2 (Detailed Technical and Financial Evaluation)

For the detailed technical evaluation, the successful bidder will be required to submit a proposal in response to a Request for Proposal; a sealed price bid; and a stage 2 bid bond. The sealed price bid will not be opened until the bidder successfully passes the second stage of the auction mechanism. At this stage, the bidders will receive their stage 1 bid bond. The stage 2 bid bond is returned to the bidders who are be unsuccessful in this second stage.

Once implemented, Kenya will be well placed to benefit from the following advantages of this procurement method:

a) Enhanced Competition and Transparency

By their very nature, renewable energy auctions are a competitive way of procuring electricity. The auctions require participants to submit their bids for the development of power projects, and the bids are then compared against each other to determine the lowest possible bid. This comparison of bids allows for competitive pricing of power. Renewable energy auctions also create market opportunities for investors in the electricity sector and allow consumers to benefit from low electricity prices as a result of the competition.

b) Price Discovery Mechanism

Unlike FiT Policies, the proposed Auctions Policy will not apply pre-determined tariffs as the tariffs will be determined on a market basis. This gives way for the application of price discovery, which is the process of determining the spot price for renewable energy based on factors such as supply and demand. Bidders will state the price they are willing to sell their renewable energy for, while buyers will indicate the price they are willing to pay for the renewable energy. Through this price discovery, parties can find an equilibrium price. A price discovery mechanism will further enhance energy sector planning by improving the ability of the relevant stakeholders to assess what renewable energy is undersubscribed or oversubscribed in the renewable energy auctions.

c) Reduced Demand Risk

Demand risk exists where the demand for power is higher or lower than what was projected by the relevant stakeholders. The country's current energy strategy seeks to mitigate this risk by ensuring

If approved by the Ministry of Energy, the Auctions Policy will govern the procurement of all solar, wind power, and other renewable energy projects larger than 20MW, to the exclusion of geothermal projects.

that the LCPDP is aligned to the proposed Auctions Policy to ensure that the projected demand meets the country's energy needs. Therefore, while the LCPDP ensures that the correct demand is projected and the project pipeline is clearly determined, the Auctions Policy ensures that the auction-specific projects under the LCPDP are implemented.

The implementation of the Auctions Policy seems inevitable. This notwithstanding, the Ministry of Energy needs to consider gaps that might undermine the success of the Auctions Policy in Kenya.

a) Absence of Deadlines and Penalties

As currently drafted, the Auctions Policy lacks an accountability framework. For example, there are no consequences under the Auctions Policy for a bidder who fails to develop a power project within a prescribed time upon winning a bid.

To remedy this, the possible challenges associated with the proposed renewable energy auctions need to be identified, and stakeholders must determine what penalties and deadlines would be best suited to address these challenges. However, these punitive measures ought not to be counteractive. Excessive deadlines and penalties might lead to high bids for power projects to avoid the adverse effect of tight deadlines. More specifically, to cater for the penalties, bidders would increase the price of their submitted bids, ultimately leading to higher electricity costs for consumers.

b) Risk of Collusion between the Bidders

The success of the Auctions Policy is pegged on ensuring that the process is competitive and free from influence. However, there is a risk that participants in the renewable energy auctions might collude to drive up the prices of electricity and exclude other bidders from the process.

A renewable energy auction can either be static or dynamic in nature. Under a static auction, the participants submit the bids simultaneously while under a dynamic auction the participants submit their bids through several rounds. A static auction is one way of dealing with collusion as the bidders are unaware of the other participants' bids. However, under a dynamic auction, participants are able to see the other bids and amend their bids accordingly. Therefore, static auctions are ideal for countries which are new to renewable energy auctions as they can reduce the risk of collusion.

c) Absence of a Ceiling Price

A ceiling price is the price at which bids are capped, with bids submitted above this price being disqualified. Creating a ceiling price under the Auctions Policy would allow the Ministry of Energy to control the price of electricity and ensure that it is affordable for consumers. Where auctions are undersubscribed, a ceiling price ensures that bidders do not price their electricity at exorbitant prices. However, it will be important for the Ministry of Energy to disclose, in advance, the ceiling price to bidders once the same is determined. This is to ensure that genuine bidders are not disqualified for pricing their bids above the ceiling price because of lack of knowledge.

Conclusion

While Kenya is on the right path towards implementing renewable energy auctions, a lot is yet to be done to ensure its success. The power sector stakeholders face a tall order to ensure that the country not only benefits from the Auctions Policy, but that the gaps in the proposed Auctions Policy are addressed.

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CHANGING TIMES:

THE SHIFT FROM A PROCESS-ONLY INQUIRY TO MERIT REVIEW OF ADMINISTRATIVE ACTION

In the *locus classicus* case of *Republic v Commissioner of Lands ex parte Hotel Kunste (1997) eKLR,* the Kenyan Court of Appeal described judicial review as proceedings sui generis that are neither civil nor criminal in nature and pronounced that judicial review is concerned only with the decision-making process and not the merits of the decision itself, harking back with due homage to the time-hallowed words of Lord Hailsham of St. Marylebone in *Chief Constable of the North Wales Police v Evans (1982) 1WLR 1155:*

"The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the Court."

The foregoing encapsulates what may be referred to as *"the traditional approach to judicial review"*. This article discusses the apparent paradigm shift in the approach to judicial review following the promulgation of the Constitution of Kenya, 2010 and the subsequent enactment of the Fair Administrative Action Act, 2013.

The Traditional Approach

Under the traditional approach to judicial review, an applicant was restricted to demonstrating that the administrative decision or act complained of was tainted with illegality, irrationality, or procedural impropriety.

In the case of *Keroche Industries Limited v Kenya Revenue Authority & 5 Others (2007) eKLR,* the Court expounded on the foregoing by setting out the description of illegality, irrationality, and impropriety. Illegality happens when the decision-making body commits acts that are ultra vires, in other words, outside the scope of the powers granted by law, resulting in an error of law. Irrationality manifests itself when there is evidence of gross unreasonableness in arriving at the decision, such that no reasonable authority exercising its right properly would have arrived at such a decision. Procedural impropriety comes in when there is a failure to act fairly by among others, failure to uphold the principles of natural justice.

Kenyan Courts have hitherto consistently upheld and applied the traditional approach, even after the promulgation of the Constitution of Kenya, 2010. For example, in the case of *Republic v Inspector General of Police & another ex parte Patrick Macharia Nderitu (2015) eKLR,* the Court was emphatic that judicial review was a common law remedy, applicable in Kenya by virtue of the Law Reform Act (Cap. 26) Laws of Kenya and was only concerned with the process followed to arrive at a decision.

A Move to the Merits

All was seemingly clear, then in came the Constitution of Kenya, 2010. Article 23 (3) thereof provides for the Orders of judicial review as one of the available remedies in relation to the enforcement of the bill of rights. It is noteworthy that the Constitution of Kenya, 2010 contains a comprehensive bill of rights which includes the right to fair administrative action as espoused under Article 47. Resultantly, the orders of judicial review have become available not only within the previous confines of the Law Reform Act and Order 53 of the Civil Procedure Rules, 2010 but also in instances of breach of any of the fundamental rights and freedoms conferred under the Constitution.

To give effect to the right to fair administrative action under Article 47 of the Constitution, Parliament enacted the Fair Administrative Action Act, 2015 (**FAAA**). The FAAA has widened the scope of judicial review in Kenya by going beyond the traditional approach restricted to procedural considerations which was previously the focus of judicial review, to now include a consideration of the merits of administration action or decision forming the subject of the judicial review proceedings.

Though cautiously, there is an evolution towards the application of the "*hard look doctrine*" in judicial review which permits Courts to also consider the merits of a case as opposed to the traditional process-only inquiry. This paradigm shift is evinced by the jurisprudence emanating from Kenyan Courts though laced with some controversy or inconsistency with some Courts upholding the traditional process-only approach, with others embracing the merit based approached flowing from the Constitution of Kenya, 2010 and the FAAA.

Which Way to Go?

In the case *Trusted Society of Human Rights Alliance v Attorney General & 2 others (2012) eKLR,* the issue arose as to whether in reviewing the procedure of appointment of Mumo Matemu as the head of the Ethics and Anti-Corruption Commission, the High Court could, in addition to reviewing the procedure followed by the appointing authority, also review the merit of the decision.

The High Court held that it could properly review both the procedures of the appointment as well as the legality of the appointment itself – including determining whether the appointee met the constitutional threshold for appointment to the position. Simply put, the High Court was of the view that it had powers to delve into the merits of the decision forming the subject of the judicial review. However, on appeal, the Court of Appeal faulted the High Court for having misapplied the doctrine of rationality and reasonableness by reviewing the merits of the decision which was a great affront to the doctrine of separation of powers. The Court of Appeal was of the considered view that the High Court ought to have restricted itself to the process that was followed in arriving at the appointment.

Subsequently, in the case of *Suchan Investment Ltd v s. Ministry of Natural Heritage & Culture & 3 Others (2016) eKLR,* the Court of Appeal changed tact and held that Article 47 of the Constitution of Kenya 2010, as read with the FAAA, reveals the implicit shift of judicial review to include aspects of merit review of administrative action. The Court of Appeal attributed the change in landscape to

Though cautiously, there is an evolution towards the application of the "hard look doctrine" in judicial review which permits Courts to also consider the merits of a case as opposed to the traditional process-only inquiry.

the grounds for judicial review identified under section 7 (2) of the FAAA such as rationality of the decision, scope of authority, etc which invited aspects of merit review. However, the Court of Appeal hastened to clarify that there is no power for the reviewing Court to substitute the decision of the administrator with its own. Indeed, section 11 (1) (e) and (h) of the FAAA preserve the decision-making power on merits to the administrator or authority, by giving the Courts the power to remit the matter back to the decision-making body.

The Shift Confirmed

More recently, the Court of Appeal entrenched the paradigm shift from the traditional approach to merit review in the case of *Judicial Service Commission & another v Lucy Muthoni Njora (2021) eKLR.* In this case, the Deputy Registrar of the Supreme Court received an interdiction prohibiting her from performing her duties as Deputy Registrar pending her appearance before the relevant Committee of the Judicial Service Commission (**JSC**). Following the disciplinary proceedings, the Deputy Registrar was dismissed from employment by the JSC. Aggrieved by the decision, she moved to the Employment and Labour Relations Court alleging violation of her constitutional right to a fair administrative action. The Court found in the Deputy Registrar's favour prompting an Appeal to the Court of Appeal. One of the grounds of appeal was that the Court erred by usurping the JSC's disciplinary mandate and interfering with its human resource functions, and that the Court had thereby ventured into a merit-based review of the JSC's decision to dismiss the Deputy Registrar.

In determining this issue, the Court of Appeal pointed out that even the traditional process-only approach inevitably contained an element of merit analysis. It would therefore be unrealistic for a Court to engage itself only with a formalistic approach while excluding the merits since it was only from merits that a Court could have a meaningful engagement with the question of reasonableness and fairness of the decision. The Court of Appeal, (as per Kiage JA) was emphatic that there has been a seismic shift towards a merit-based approach, and held as follows:

"We emphatically find and hold that there is nothing doctrinally or jurisprudentially amiss or erroneous in a judge's adoption of a merit review in judicial review proceedings. To the contrary, the error would lie in a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process while strenuously and artificially avoiding merit. That path only leads to intolerable superficiality. Being of that mind, on the critical complaint that the learned Judge misconstrued the nature of the complaint, and even violated jurisdictional bounds by engaging in a merit-review, I find that the learned Judge did not err. I answer the first issue in the negative."

Upshot

The decision by the Court of Appeal in *Judicial Service Commission & another v Lucy Muthoni Njora* has confirmed the paradigm shift from the traditional process-only approach in judicial review to a merit-based review. Consequently, decisions of entities exercising administrative functions will now be subjected to greater scrutiny, including the merits or demerits thereof. Such bodies should thus be concerned that their decisions are up to scratch in terms of passing both procedural as well as substantive muster.

Changing times are indeed firmly upon us.

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DO'S AND DON'TS IN THE BOARDROOM:

DIRECTORS' DUTIES AND POTENTIAL LIABILITIES WHEN COMPANIES ARE IN FINANCIAL DIFFICULTIES

It is unquestionable that the COVID-19 pandemic has had a devastating impact on economies all over the world. While it is uncertain when the pandemic will end, analysts have predicted that this impact will stay on for years to come. According to the Organisation for Economic Co-operation and Development, the impact of the COVID-19 pandemic is likely to translate into an enduring risk and a wave of corporate insolvencies as well as a significant increase in leverage, therefore depressing investment and job creation for a long time to come. Kenyan companies have not been spared from the effects of the pandemic, and some have either become insolvent or are on the verge of being insolvent.

It is against this backdrop of COVID-19 ravaged economies and the resultant financial difficulties, that it bears reminder that a director is under a duty to act in the best interests of the company and its shareholders. However, this is the position when the solvency of the company and its long-term future is not in question. The position changes dramatically when the company becomes insolvent or begins to face financial difficulty. Generally, a company is deemed to be insolvent if either the value of its liabilities exceeds the value of its assets, commonly known as the *"Balance Sheet Test"*, or if it is unable to discharge its liabilities as they fall due, commonly referred to as the *"Cash Flow Test"*. If a company meets the threshold of either of these two tests then it is technically insolvent. A financially distressed company may well satisfy both tests at the same time.

This article outlines the duties of directors of companies in financial distress and the ways in which a director could become personally liable to pay money to a company for distribution to the company's creditors as prescribed under the Kenyan Insolvency Act, 2015 (**the Insolvency Act**).

Wrongful Trading

Wrongful trading will occur if during liquidation of a company, it appears that a person (who, at a time before the commencement of the liquidation, was an officer of the company) knew or ought to have known that there was no reasonable prospect that the company would avoid being placed in insolvent liquidation. The liquidator of the company can seek a Court declaration that the officer contributes to the company's assets.

However, the Court may not make such an order if it is satisfied that the person took such steps to avoid potential loss to the company's creditors as he or she ought reasonably to have taken, assuming that they knew that there was no reasonable prospect of the company avoiding going into insolvent liquidation. The person must be a director of the company at the time he or she knew or concluded that there was no reasonable prospect of the company avoiding insolvency.

Liability would only arise if it is shown that the company is worse off because of the continuation of trading with the intention of defrauding creditors. Directors can only escape this liability if they took every step possible with a view to minimizing the potential loss to the company's creditors as they ought to have taken.

In the case of *Trust Bank Limited v Ajay Shah & 3 others (2019) eKLR,* the Kenyan High Court referred to *Gower's Principles of Modern Company Law* 4th Edition where it was stated that the corporate identity of a company can be pierced in the interest of the company's creditors where it is suspected that the company has violated the law, or where a company has traded fraudulently.

A similar observation is made in *Halsbury's Laws of England* 4th Edition Volume 7 where it was posited that the law is prepared to recognize a company as an alias of its members when corporate personality is being blatantly used as a cloak for fraud or improper conduct.

The directors cannot simply avoid the issue of wrongful trading by resigning from the company. If a director concludes that the company cannot continue to trade, he must put in place one of the insolvency procedures as soon as possible to avoid liability.

Fraudulent Trading

Fraudulent trading would occur if during the liquidation of a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose. The liquidator can seek a Court declaration that anyone who was knowingly party to the fraudulent business contributes to the company's assets.

A person found guilty of the offence of fraudulent trading may be held liable upon conviction to imprisonment for a term not exceeding ten (10) years or to a fine not exceeding KES 10,000,000 (USD 100,000) or to both.

Section 505 of the Insolvency Act empowers the Court to make orders against officers of a company and others found to have participated in fraudulent trading by a company in liquidation. The same section provides that such persons would be disqualified from acting as directors of a company by the Court for a period not exceeding fifteen (15) years.

Fraud is defined in *Black's Law Dictionary* 9th Edition, as a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. In the same text, a fraudulent act is defined as conduct involving bad faith, dishonesty, a lack of integrity or moral turpitude. From the foregoing, a fraudulent breach of trust would be conduct in bad faith that violates a person's obligation while in a position of trust.

In the case of *Edward Ndungu & 9 Others v Patch Osodo (2006) eKLR,* the Court referred with approval to the definition of the term intent to defraud as was held in *Re William Leitch Bros Ltd (1932) 2 Ch 71,* where Maugham J held:

"… I must hold with regard to the meaning of the phrase carrying on business with intent to defraud that, if a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intent to defraud …"

Even when a company is on the verge of insolvency or facing financial difficulty, directors, as agents of the company, are under an obligation to perform the fiduciary duties accorded to them under the law and to consider the interests of the company's creditors when making decisions for the company.

Only those who were knowingly parties to the fraudulent trading would be caught up by section 505 of the Insolvency Act including directors. However, as per the holding in *Re Patrick and Lyon Ltd (1933) Ch 786,* it is not enough to show that the company continued to run up debts when the directors knew that it was insolvent. There has to be *"actual dishonesty, involving according to current notions of fair trading among commercial trading, real moral blame".*

It is important to note that allegations of fraud are by their nature serious as they carry with them penal consequences that may deprive a person of his or her right to liberty, hence fraud ought to be specifically pleaded, with particulars thereof, and proved on a higher standard than on a balance of probabilities.

Misfeasance or Breach of Fiduciary Duty

Misfeasance or a breach of fiduciary duty would occur if during the liquidation of a company, it appears that an officer or former officer of the company has or may have misapplied or retained, or become accountable for money or property of the company, or committed misfeasance or a breach of any fiduciary or other duty in relation to the company. In such an instance the Court may order the director to repay, restore or account for the money or property with interest, or contribute such sum to the company's assets by way of compensation as the Court thinks fair and reasonable.

Conclusion

Even when a company is on the verge of insolvency or facing financial difficulty, directors, as agents of the company, are under an obligation to perform the fiduciary duties accorded to them under the law and to consider the interests of the company's creditors when making decisions for the company. This fiduciary duty requires directors to ensure that the company's assets are not dissipated or exploited for their own benefit to the prejudice of creditor's interests.

The Courts are allowed to lift the corporate veil of the company and to hold the directors responsible for any actions that are intended to defraud creditors. However, commercial transactions made with the objective of creating or extending a lifeline to a company suffering financial difficulty should ordinarily not be questioned.

Directors who find themselves in situations where they are concerned that the company is facing, or may be likely to face financial difficulty, are advised to keep matters under continual review. In this regard it is prudent for directors to:

- Ensure that the company's financial records are accurate and up to date
- Convene and hold consistent board meetings to review the company's financial status and maintain accurate records of the discussions in the meeting
- Systematically review the company's financial status
- Obtain professional legal and financial advice aimed at reviewing whether insolvent liquidation is inevitable or whether there is some way of resolving or mitigating the company's financial difficulties
- Consider resigning and record any contrary views with other directors at a full board meeting and outline the reasons in a resignation letter to the whole board
- Engage with creditors and explore the possibility of payment holidays, preferable payment terms, return of surplus stock etc.

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WHOSE COPYRIGHT IS IT ANYWAY?:

THE HIGH COURT DELIVERS A KEY DECISION ON A COPYRIGHT CLAIM RELATING TO AN INSURANCE POLICY

The question of the copyrightability of insurance policies arose for determination in a case pitting J. W. Seagon & Co. Insurance Brokers (Kenya) Limited (**the Plaintiff**) against Liaison Group (I.B.) Limited, Jubilee Insurance Company Limited and Satib Insurance Brokers (PTY) Limited (**the 1st, 2nd and 3rd Defendants**) for alleged infringement of the copyright in the Plaintiff's insurance policy (**the Safari Plan Policy**). The Plaintiff accordingly filed suit against the 1st, 2nd, and 3rd Defendants in *J.W. Seagon & Co. Insurance Broker (Kenya) Limited v Liaison Group (I.B.) Limited & 2 Others (2021) eKLR,* seeking a permanent injunction to restrain the Defendants and their agents from using, copying, selling, offering for sale, distributing or making available to the public their insurance policy (**the Safari Shield Policy**) which the Plaintiff claimed was a copy of the Safari Plan Policy. The Plaintiff also asked the Court to restrain the Defendants from infringing the Plaintiff's copyright in the Safari Plan Policy and sought general damages for copyright infringement, interest on the same and the costs of the suit.

The Plaintiff's Case

The Plaintiff's case was that it had, through the *"sweat of the brow"* efforts of its employee, one Jeremy Clayton, developed and authored a Safari Plan Policy, which was an insurance product that was not available in Kenya before, for the purpose of bringing under one cover all risks involved in the tourism and hospitality industry. The Plaintiff complained that in breach of its copyright over the Safari Plan Policy, the Defendants had introduced into the market a similar product known as the Safari Shield Policy, which was essentially a replica of the Safari Plan Policy, to the extent that even typographical errors in the Plaintiff's Safari Plan Policy had found their way into the Defendants' Safari Shield Policy.

The Defendants' Case

The Defendants argued that insurance policies are not copyrightable in Kenya as they do not qualify as literary works under the Copyright Act, 2001 and that the Plaintiff had not shown any originality in the Safari Plan Policy. The Defendants also proffered the argument that the doctrine of merger in copyright law was applicable in this case, which holds that where an idea and the expression of that idea are so intertwined that there is only one way, or a limited number of ways of expressing the idea, then the expression of the idea is not copyrightable. The Defendants also contended that since insurance policies contained boilerplate clauses as a matter of industry practice, it followed that insurance policies were not copyrightable.

High Court's Decision

The High Court, through Hon. Mr. Justice Tuiyott (as he then was) handed down its Judgment on 21st January 2021, by which the Plaintiff's case was dismissed with costs. In arriving at its decision, the Court addressed the following issues:

Literary Work

A key point of contention in the case was whether an insurance policy would be eligible for copyright protection under the Copyright Act, 2001 (**the Act**), in particular, whether an insurance policy qualifies as a literary work under the provisions of the law. In finding that an insurance policy would indeed qualify as a literary work, the Court considered the definition of literary work under section 2 of the Act as well as the Berne Convention for the Protection of Literary and Artistic Works (**the Berne Convention**), which was ratified by Kenya and is therefore part of Kenyan law by dint of Article 2(6) of the Constitution of Kenya.

The Court found that under both the Act and the Berne Convention, the list of literary works was neither closed nor exhaustive, and upon a proper reading of the definitions set out therein, including the application of the ejusdem generis rule of construction, an insurance policy would qualify as a literary work and would thus be eligible for copyright protection.

Doctrine of Merger

Another issue the Court was called upon to resolve was whether the doctrine of merger was applicable in the circumstances of the case. The Court considered the *Black's Law Dictionary* definition of merger as well as the American cases of *American Family Life Insurance Co. of Columbus v Assuant, Inc. No. 1:05-CV-1462-BMM* and *Morrissey v Procter & Gamble Co. 379 F.2d 675 (1967)* in which the doctrine was discussed.

In the *America Family Life Insurance Co. of Columbus* case, the Court had pronounced itself as follows on the merger doctrine:

"Significantly, even if AFLAC successfully shows copying, copyright infringement occurs only if one copies protected elements of a copyrighted word; in other words, the portion of the copyrighted work that is copied must satisfy the constitutional requirement of originality… To this end, the Court noted that copyright protection "does not extend to ideas, procedures, processes, or systems regardless of their originality… Additionally, in certain cases there are so few ways of expressing an idea that the idea and its expression merge. Under the so-called "merger doctrine" these few expression do not receive copyright protection, since protection of the expression would thus extend to protection of the idea itself."

Similarly, in *Morrissey v Procter & Gamble Co.* the United States Court of Appeals for the First Circuit held as follows:

"When the uncopyrightable subject matter is very narrow, so that the topic necessarily requires if not only one form of expression, at best only a limited number, to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance. In such circumstances it does not seem accurate to say that any particular form of expression comes from the subject matter. However, it is necessary to say that the subject matter would be appropriated by permitting the copyrighting of its expression. We cannot recognize copyright as a game of chess in which the public can be checkmated."

Whilst finding that the Plaintiff's policy should indeed be scrutinized in the context of the doctrine of merger, the Court ultimately held that the onus is on the party invoking the doctrine to sufficiently demonstrate which parts, if any, of the policy would be caught up by the doctrine of merger, which had not been done in this case.

The case highlights that the subsistence of copyright in an insurance policy might be established by showing the intellectual and creativity effort put into the expression of the policy.

Originality

Section 22 (3) of the Act provides that literary works are only eligible for copyright *"if sufficient effort has been expended on making the work to give it an original character and the work had been written down, recorded or otherwise reduced to material form".*

The Court considered various tests applied in various persuasive authorities and found the decision of the Court of Justice of the European Union in *Infopaq International A/S v Danske Dagblades Forening Case C-5/08,* to be most persuasive since the test applied therein in tandem with the general scheme of the Berne Convention, which is part of Kenyan law. In that case, the Court found that the protection of certain subject matters as artistic or literary works presupposed that they were intellectual creations which included a small element of creativity.

Based on the evidence adduced, the Court found that whereas it had been proved that sufficient skill, labour and effort had been expended in the development of the Plaintiff's policy, it had not been shown that the policy was the Plaintiff's (through Mr. Clayton) own intellectual creation, with an element, even slightly so, of creativity. The Court held that combining of various insurance covers or policies into one constituted an idea, and not the expression of an idea, the latter of which is what was copyrightable under law. The Court also found that the burden of proving an element of creativity for the Plaintiff became greater when it emerged from the Plaintiff's own evidence, it had itself benefitted from copying and pasting of other policies during the development of the Safari Plan Policy.

For these reasons, the Court found that copyright did not subsist in the Plaintiff's Safari Plan Policy, due to lack of originality or creativity.

High Court's Disposition

Despite dismissing the Plaintiff's suit, the Court nevertheless proceeded to indicate that had the Plaintiff been successful, liability would have attached against the 1st and 3rd Defendants in damages for infringing upon the copyright on the Plaintiff's policy – based on the fact that the Safari Shield Policy was a blatant copy of the Safari Plan Policy. In addition, whereas the Court absolved the 2nd Defendant of any role in the copying, liability would also have attached against the 2nd Defendant in terms of injunction, delivery up and forfeiture, on the basis that, on a balance of probabilities, the 1st and 3rd Defendants had engaged the 2nd Defendant as an underwriter in respect of the Safari Shield Policy.

Conclusion

The High Court's decision is of monumental importance in copyright law particularly as pertains to insurance policies. The case highlights that the subsistence of copyright in an insurance policy might be established by showing the intellectual and creativity effort put into the expression of the policy. Further, the decision demystifies the doctrine of merger in copyright law and sets out the evidentiary burden required to be discharged by the party invoking the doctrine. As the Plaintiff has lodged an Appeal to the Court of Appeal against the High Court's decision it will be interesting to see what the appellate Court makes of the matter. For now, suffice to quote Justice Tuiyott's opening and profound remarks:

"The sine qua non of copyright is originality."

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FOLLOWING THROUGH:

WHY CONTRACT ADMINISTRATION IN CONSTRUCTION IS IMPORTANT

Imagine having to spend a great deal of time, effort and resources to resolve an otherwise avoidable project-related dispute that arises from a contractor's inability to complete your project within schedule and budget. What's more, consider having to expend money to resolve a misunderstanding on the parties' obligations simply because you failed to monitor and ensure that your project objectives were met. The expense, both financially and in terms of time, for the resolution of such avoidable disputes especially in relation to construction contracts, can lead to financial loss, project cost overruns and delays with attendant opportunity costs. This and many other reasons are why it is vital that upon the execution of contract for any project or works, steps are taken to manage and monitor performance of the contractual obligations of the parties.

The construction sector is one of the most active sectors in Ghana with activities cutting across all forms of infrastructure. The construction sector is ranked as one of the highest contributors to Ghana's gross domestic product and ranked as one of the fastest growing sectors of the economy. The sector witnessed a positive growth of approximately fourteen percent (14%) in the first quarter of 2021 according to figures from the Ghana Statistical Services. As a capital intensive activity, the costs associated with the construction of any infrastructure would warrant that its execution should be without disputes or have minimal disputes. A major factor in avoiding (or at least minimizing) such disputes and attendant implications is effective contract administration. The focus of this article is to discuss the importance and requirements of administering contracts. It makes a case for the need for prudent contract management or administration and provides a guide for entities and individuals already implementing projects so as to improve their contract administration practices to achieve excellent results.

Scope and Practice of Contract Administration

In our day-to-day activities, administration of contracts is evident in one way or the other, when we strive to ensure we get what we pay for from service providers. The constant monitoring of a project delivery to ensure that one is satisfied with the product or services being obtained under a contract is administering the contract. This is done to ensure that we obtain an end product that is of the requisite quality, delivered on time, and within budget. Indeed, the failure to monitor the progress of one's "order" from a service provider may result in having to deal with all manner of disputes and misunderstandings.

From the above, contract administration simply refers to the effective management of contracts between an employer or client and a contractor in order to ensure the successful realization of the contract objectives. The administration of any contract is not limited to any identifiable group of professionals or specialized practice or industry. If one is minded to monitor the progress of personal projects, then it is undeniable that for major construction projects in which huge resources are invested, the lack of a diligent and professional administration of the contract may come with unfavourable outcomes.

Thus, it is important that project sponsors or financiers, contractors and in some cases regulators, ensure that prudent administration of contract is made a part of any project to help the parties effectively measure the performance of contractors. Instituting this as part of any project also helps to achieve a clear understanding of the contract requirements in order to maximize contractual benefits and avoid all manner of challenges. Even if challenges should exist, the contract administration would ensure early detection and resolution of challenges, thereby reducing bigger or more complex problems in the future.

The initiation or commencement of any project or works requires that the parties (client and the supplier) agree on the scope of the required services, the obligations of each party, the reporting requirements agreements on how potential disputes will be resolved, and other matters. These details are usually outlined in a written contract after negotiation of the key terms. An important aspect of the entire contract execution cycle is the contract administration process. The process is all inclusive and often begins from when the contract is awarded through to when the works/project is completed and accepted by the owner; when the contract is terminated in accordance with the contract terms; payment has been made; defects have been rectified; or where disputes have been completely resolved.

The administration of any contract may vary from project to project depending on the project type and size. However, the management or administration of the contract requires the contract administrator to possess a high level of accountability and responsibility. The individual must have the knowledge and skill to understand the relevant contractual provisions, obligations and rights of the parties, the nature of each contracting party's objectives and ensure that the agreed terms are complied with to ensure those objectives are met. The individual appointed to undertake this role could be an employee or representative of the project owner whose responsibility is to monitor the contract implementation.

Technically, the role of the administrator will commence when the contract is in place, although practically, the responsibilities will have commenced before the contract comes into existence. It is therefore important to ensure that, a contract administrator is involved at each stage of the contract process until finalization. At the early stages of the contractual cycle for a typical construction project, some of the contract administrator's role would generally include advice on the appropriate procurement method to deploy, the selection of the contractor, and the appropriate contract form to use for the project, etc.

In managing the day-to-day activities of any project, the contract administrator must keep a keen eye on any potential issues that may give rise to future disputes and ensure that these are addressed at an early stage. In order to successfully administer the contract, the contract administrator will have to put in place appropriate steps to be adopted to achieve specific outcomes. These steps should clearly identify the specific tasks to be undertaken, break down the tasks into activities, indicate the timelines for performing each activity, and lay out the precise steps involved in carrying out each activity.
In order to have an efficient administration process, it is recommended to set out in a practical manner, the activities to be undertaken at each stage of the project. That is, the contract preparation stage, the implementation stage and the completion stage. The following activities or actions are recommended at each stage:

a) Preparation of a Contract Administration Matrix
It is crucial to develop a schedule that outlines all the key deliverables or work structure. It must also incorporate dates or milestones in the contract for achieving specific phases or output of the work. The matrix should ideally contain the following:
- A schecule of obligations – the obligations of each party to the contract (including subcontract) must be clearly identified with a list of the specific people who will perform each task.
- Timelines with an inbuilt buffer or lead time for performance – the timelines for the performance of each obligation identified must also be noted. The schedule must ensure adequate lead times in order to avoid delays.
- Risks or dangers – issues that may lead to project delays, cost overruns and inability of service provider to perform, etc., must be flagged in the matrix and steps that must be taken to address them.
- Risk prevention or mitigation measures – having identified those potential issues that may pose a risk in one way or the other, the specific actions that must be undertaken to address or reduce the impact of the risks should be outlined.

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b) Implementation
It is essential to develop a list of all the actions that must be undertaken as part of implementation of the contract. These include:
- Checklist – specific documents such as permits, licenses, guarantees that must be submitted, notices to be issued, reports to be submitted, etc., must be included in the check list as appropriate.
- Alerts – reminders for required activities and reports including the formats of the reports and the mode of delivery must be included in the schedule.
- Notices – ensure that a good communication process is established to help both parties achieve a clear understanding of issues. For example, setting up a project-specific email addresses for all persons involved with different aspects of the project implementation is essential for regular updates.
- Meetings – periodical meetings (including site meetings) must be held between all the stakeholders to help facilitate better communication and manage the project successfully. Records of such meetings must be properly kept.
- Use of payment-tied deliverables – adopting a system where payments are tied to successful execution of various aspects of the project (which are measureable) will aid in effective administration.
- Proactive engagement – it is important to plan ahead, be in control and manage all the stakeholders and aspects of the project for timely execution.
- Fall back mechanism – to help counter risks that have a higher impact, the development of a contingency measure is necessary in managing risks so that alternative options can be readily deployed where necessary.

c) Completion
The completion stage should also be monitored in a detailed and effective manner to ensure that all relevant matters are attended to at the tail end of the contract. These include the following:
- Testing and handover – clearly identify the persons who will engage in quality control and testing and also establish clear criteria or protocols to be followed for testing, inspection and handover of the project.
- Defect period monitoring – there should be periodic review of the completion of all defects and any outstanding works. A final inspection with all relevant parties must be carried out ahead of the expiration of the defect period.

Conclusion
An effective contract administration is beneficial to all parties involved in any contract in one way or the other. The need for project sponsors or owners, contractors and financiers to ensure that the project in which resources are invested are executed within budget and time cannot be overemphasized. Project sponsors will find that an efficient contract administration will afford them the opportunity to make some real-time decisions, review and understand all relevant details of the project during implementation. The opportunity to monitor costs, promote transparency in project cost variations as well as enhanced engagement with relevant stakeholders are some of the numerous advantages that come with contract administration. It is not, therefore, enough to simply execute a contract and hope that the contractor and all other professionals involved will deliver a good project. Attaining quality services that meet the specifications of the contract, timely completion of project within budget and problem free close out do not happen by chance. It requires thorough management and supervision to ensure that these objectives are met.

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