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Step lightly:
Matters to consider during M&A deals in Kenya

"[Oraro & Co. is] an esteemed firm for the full spectrum of dispute resolution matters. Extensively experienced in areas such as contract disputes, IP and insolvency cases. Also recognized for its expertise in class actions."

Chambers Global 2015

John Mbaluto
Partner | john@oraro.co.ke

Welcome to the 2nd Edition of the Oraro & Company Advocates Newsletter!

Exciting developments in the law have taken place over the last few months, from the enactment of a new Companies Act and Insolvency Act to the making of a ground-breaking decision by the Supreme Court on the fate of the documents drawn up by Advocates who do not hold current practising certificates.

Our Advocates continue to be involved at the forefront of a wide range of practice areas and we are excited to share with you the news about developments in the various practice areas through our quarterly Newsletter.

We hope you will enjoy the read and welcome you to email the writers should you have any query or further interests in any of the articles.

Sincerely,

John Mbaluto,
Editor, Oraro & Company Advocates Newsletter

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"Our firm's cross-border strategy is very simple. It is to remain the same steadfast partner we have always been. To continue to care for our clients, way beyond one-time engagements. In short, to remain a great top-tier Kenyan partner. This newsletter, is a demonstration of this commitment to our clients"

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ON LAND:

LAND RIGHTS' ISSUES IN THE EXTRACTIVE INDUSTRY

Introduction

With the discovery of oil in Turkana and the prospecting of mines and minerals in various parts of the country, it is becoming more and more important to educate the public on issues pertaining to land rights in such areas.

The extractive industries are industries that deal in oil, gas or minerals and are governed under the Mining Act and the Petroleum (Exploration and Production) Act. These are presently before Parliament; the Mining Bill, 2015 which proposes to overhaul the current Mining Act and the Petroleum (Exploration, Development and Production) Bill, 2015 which seeks to overhaul the current Petroleum (Exploration and Production) Act.

The right to own and acquire land is enshrined in the Constitution of Kenya, 2010 however, this right is not absolute and may be limited to a certain extent; this right is also provided for under the Land Act and the Land Registration Act.

Land Rights in the Mining Industry

All unextracted minerals (other than common minerals) under or upon any land are vested in the Government. This is however subject to any rights which have been granted, or recognized as being vested, in any other person for example by lease or licence. In light of this, the rights of private and communal land owners and the ownership rights of the Government over minerals found in such lands must be considered.

Land excluded from mining and prospecting

The law offers protection to certain classes of land by prohibiting the carrying out of mining and prospecting activities on the land. These included land dedicated as a place of burial, any area situated within any municipality or township or trading centre, trust land and private lands among others. Mining and prospecting on such land may only be permitted with the consent of the owner or relevant county council. Private lands are considered to be land held under freehold or leasehold tenure.

Compulsory acquisition of private land

Despite the exclusion of certain classes of land from mining and prospecting, as discussed above, the Government has the power to compulsorily acquire the land where the Cabinet Secretary considers that the owner has unreasonably withheld consent. Further, the Government is required by law to compensate, in addition to any other compensation, the owners of land held under a lease, exclusive prospecting licence or special licence where there has been any disturbance of their prospecting or mining rights. However, despite the legislative protection afforded, private land owners have on numerous occasions petitioned the Courts seeking injunctive remedies to prevent compulsory acquisition of private property without proper consultation or agreement as to adequate compensation for the land.

Compensation for disturbance

The Mining Act further attempts to protect the rights of owners and occupiers of land by providing for their compensation with respect to any disturbance of their rights or any nuisance or damage to such lands. The party undertaking prospecting or mining operations or their successor in title is required to fairly and reasonably compensate the owner or occupier. Where no or inadequate compensation is made, the owner or occupier of the land has recourse to the Court.

The Court is tasked to assess and determine the amount of compensation to be paid. The sum awarded by the Court is required to be paid within 14 days from the date on which the compensating party is notified of the award. It follows that where a party defaults in making such compensation, the Cabinet Secretary may suspend their licence or the right to work on a location until the amount awarded has been paid. The defaulting party may also be required to deposit funds with the Government as security for future payment. Failure to adhere to this requirement may result in the revocation of respective licences held by the defaulting party.

The Natural Resources (Benefit Sharing) Bill, 2014 is expected to streamline natural resource sharing between the two levels of government (county and national) with specific emphasis on trickling benefits back to the communities in areas with abundant resources.

Protection of mining customs

It is interesting to note that the Mining Act seeks to protect the rights of an individual's customs as pertains to mining. The Mining Act provides that its provisions will not prevent any citizen of Kenya from taking, subject to such conditions as may be prescribed, iron, salt or soda from lands (other than lands within the area of a mining lease or location) from which it has been the custom of the members of the community to which that citizen belongs to take the same. This is a positive recognition of the protection of rights of many communities that rely on extraction of such minerals.

Government officers and Mining rights

The Mining Act prohibits a person who is in civil or military service of the Government, from directly or indirectly acquiring or holding any right or interest under any prospecting right, exclusive prospecting licence, special licence, location or mining lease. Any document purporting to convey such rights is deemed to be unenforceable in law. A temporary employee may, however, retain such rights and interests that may have been acquired prior to accepting Government employment.

Challenges relating to access and acquisition of land

Land rights' issues are not only experienced by private individual land owners but also mining companies. Such companies face challenges relating to access to and acquisition of land. The Courts have adjudicated over disputes involving challenges to leases obtained by companies especially those with respect to trust land where parties have alleged that land has been irregularly acquired. Similarly, there have been disputes challenging special mining licences over land which is the subject of a previous lease held by another company. This litigation trend is likely to continue where several disputes with respect to the historical irregular allocation of land continue to plague Kenya.

Communal Land

Local communities have faulted the Government and mining companies for their failure to consult them on proposed extractive activities on communal land. There have been, for example, challenges made in Court concerning the irregular issuance of leases over land without public participation or challenges to whether certain parties have an enforceable interest in such lands. With respect to the latter, issues have arisen where certain elders have consented to mining activities, more often than not in the face of claims by communal landholders who claimed that they were not adequately represented.

There has been no satisfactory framework securing the rights of the host communities to benefit from the natural resources found on their land. The recent introduction of the Community Land Bill, 2015 proposes to provide for the management of natural resources found in community land and provides a framework within which the Government can share profits with the community. The Bill also proposes to provide for dispute resolution where it is prescribed that disputes should initially be resolved through internal dispute resolution mechanisms. If the Community Land Bill passes, then the effect of the latter provision is to encourage alternative dispute resolutions encouraging individuals not to resort to litigation.

The Mining Bill, 2015 and Land rights

The Mining Bill seeks to make provision for mineral rights on private land and on community land. Though the consent of the land owner and the National Land Commission is required respectively, it is interesting to note that there are instances where such land may be compulsorily acquired by the Government through the Cabinet Secretary. The Mining Bill also sets out the principles of compensation in case of loss or damage caused as a result of a mining activity including the deposit of a compensation guarantee bond.

Land rights in the petroleum and natural gas industry

The Petroleum (Exploration and Production) Act provides that all petroleum, being crude oil, natural gas and hydrocarbons, that exist in its natural condition in strata lying within Kenya and the continental shelf is vested in the Government. This is however subject to any rights that have been granted or recognized as being vested in any other person in the form of non-exclusive exploration permits. No person is allowed to engage in any petroleum operations, which include exploration, development, extraction, production, among other activities, without having previously obtained the permission of the Cabinet Secretary. The Government may conduct petroleum operations either through an oil company established by the Government or through contractors.

Access to land for petroleum operations

The Petroleum (Exploration and Production) Act provides protection to land owners and occupiers. Particularly, where a contractor intends to enter upon any private land for the purposes of conducting petroleum operations, the contractor is required to give not less than 48 hours' notice of his intention to the occupier. In certain circumstances, the contractor may if required by the owner or occupier, deposit security for the purpose of meeting any compensation payable.

As is provided under the Mining Act, the Petroleum Act provides for the compensation of private land owners or occupiers whose rights are aggrieved by petroleum operations. Whenever, in the course of carrying out petroleum operations, any disturbance of the rights of the owner or occupier of private land, or where there is damage to the land, or to any crops, trees, buildings, the contractor is required, upon demand, to pay the owner or occupier. It is expected that the compensation will be fair and reasonable having regard to the extent of the disturbance or damage and to the interest of the owner or occupier in the land. If the owner or occupier is dissatisfied with the amount of compensation offered, they may, within 6 months of the date on which the demand or offer is made, institute proceedings in Court for the recovery of the amount.

Land rights under the Constitution

Inasmuch as the Mining Act and the Petroleum (Exploration and Production) Act provide for instances where property may be compulsorily acquired thus requiring compensation to the land owner, the Constitution, the supreme law of the land, also has provisions relating to compulsory acquisition. The power of compulsory acquisition is however not absolute as the Constitution provides that Parliament shall not enact a law that permits the State to arbitrarily deprive a person of property of any description or interest in the property. The Government is required not to deprive a person of property unless the deprivation results from an acquisition or conversion of land or an interest in land in accordance with the Constitution. Further, deprivation will only be permitted if it is for a public purpose or in the public interest in accordance with legislation that requires prompt payment in full, of just compensation to the person; and allows the affected party a right of access to the Courts.

In keeping with the Constitution, the Land Act provides that land may be acquired compulsorily if the National Land Commission certifies, in writing, that the land is required for public purposes or in the public interest as related to and necessary for fulfilment of the stated public purpose. If land is acquired compulsorily under the Land Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined. However, a notable difference as seen in other legislation discussed above is that the National Land Commission has the mandate to make rules to regulate the assessment of just compensation.

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A TALE OF TWO COUNTRIES:

A COMPARATIVE LOOK AT TRUSTS IN MAURITIUS AND NEW ZEALAND

Effective 1st January 2016, the transfer of shares listed on the NSE and any other Securities Exchange that is licensed by the Capital Markets Authority is no longer subject to Capital Gains Tax.

Introduction

Trusts have been in existence since the 12th Century from the time of the crusades under the jurisdiction of the King of England. English land owners went to the battlefield, leaving ownership of their lands to the crusaders who would manage the land in their absence. However, the Trust system faced one major challenge; on their return, the crusaders refused to hand over the land to the owners. Unfortunately, as far as the King's Courts were concerned, the land belonged to the Trustee, who was under no obligation to return it, i.e the crusader had no legal claim.

What is a Trust?

A Trust is an equitable relationship arising when property is held by a Trustee for the benefit of a third person, a beneficiary, and subject to obligations owed in favor of the beneficiary. As such, a Trust can be described as an entity created for purposes of ensuring that a property interest is held by one person; a Trustee, at the request of another; a settlor, for the benefit of a beneficiary.

A Trustee therefore holds the property subject to personal obligations to manage and apply it in accordance with the terms of the Trust deed for the benefit of the beneficiaries or in the manner prescribed. In a Trust, it is not easy for a Trustee to use the settlor's property for personal gains. A Trustee who deals with the Trust property inconsistently with the terms of the Trust is personally liable to the beneficiaries for breach of trust and in the absence of any defences, the Trustee will be required to compensate the beneficiaries for the loss.

Trusts can be designed in a way that the benefits of the Trust belong to the settlor in their lifetime ensuring early set off of the management of the Trust.

Family Trusts

A Family Trust is a relationship between the settlor, who creates the Trust and decides what goes into the trust deed (the trustees, who hold title to the Trust assets in their own names and deal with them as instructed in the trust deed) and the beneficiaries, who receive the benefits from the Trust. The income and assets owned by a Family Trust are not owned outright by either the trustees or the beneficiaries. Trust assets only become the property of the beneficiaries when trustees transfer the assets from the Trust to the beneficiaries personally.

Unlike a will, a Family Trust provides continuity of the estate of a deceased person by ensuring that the estate devolves to future generations and more importantly through capable and reliable people. The concept of a Trust is one that involves an owner of a specific property being able to govern how the same property should be used or administered over.

Establishment of a Trust

A Trust is established by way of a Trust deed. The Trust deed, amongst other things, contains the objects of the Trust, the name of the Trust, the properties held under the trust, the power of the trustees, meetings of the Trustees and the Trust's administration. The Trust deed has to be signed by all the trustees, should be stamped and then

registered at the Lands Office under the Registration of Documents Act (Chapter 285 of the Laws of Kenya). Once registered as indicated above, the Trust is duly established as an unincorporated Trust which does not have a legal personality of its own. Thus, the Trust can only own property, enter into contracts or do any other thing in the names of its trustees but not in its own name.

As noted above, an unincorporated Trust does not have a separate legal existence of its own separate from its trustees. Therefore, in order for the Trust to be able to have a separate legal status and be able to own property, enter into contracts and do any other thing in its own name, it has to be incorporated.

The law providing for the incorporation of certain Trusts and related matters is set out in the Trustees (Perpetual Succession) Act, (Chapter 164 of the Laws of Kenya). Section 3 (1) of the Act provides that the trustees who have been appointed by any body or association established for any religious, educational, literary, scientific, social, athletic or charitable purpose or who have constituted themselves for any such purpose may apply in the manner provided for in the Act, for a certificate of incorporation of the trustees as a corporate body.

Section 5 of the Act provides that for the Trust to attain its own legal personality, an application has to be made to the Cabinet Secretary in charge of matters relating to lands. This application shall be in writing, signed by the person or persons making it, and shall contain the prescribed particulars. This application must be accompanied by the registered Trust deed and the evidence of a parcel of land that is owned or to be owned by the Trust.

A Trust as a tool of Tax Planning

It is noteworthy that Trusts are not only instrumental towards estate planning but can also be used as a tool for tax planning. This is particularly so where the beneficiaries of the estate are resident in different jurisdictions and also where the properties of the estate are situated in different jurisdictions, which may trigger high tax obligations on the estate. In this regard, offshore Trusts have gained popularity as an avenue not only for estate and tax planning but also for purposes of protecting assets from creditors, to postpone the time of vesting of property, to pass on to Trustees the decision of who receives the Trust income or the Trust capital and to enable the settler to choose professional persons to administer and pass on assets according to his wishes, among others.

As such, it is advisable for an estate to consider establishing a Trust in a favorable jurisdiction to mitigate against high tax implications. The question therefore is what are the benefits of establishing a Trust and should one consider a local or an offshore Trust? In Kenya for instance, Trusts are considered to be corporate bodies and therefore they will be taxed at a considerably high rate. As already stated above, an estate may have properties in different jurisdictions; furthermore the beneficiaries of the Trust may be resident in different countries. This may have high tax implications and may also result in double taxation especially considering Kenya's current double tax treaty network. Therefore, it may be prudent for estates to consider establishing Trusts in other countries, which will not only benefit them from a tax perspective but will also help facilitate estate planning.

While deciding on a suitable location, it is important to consider the regulatory framework and the taxation regime in the respective jurisdiction. In this regard, Mauritius is considered a favourable location for offshore Trusts on the basis of its tax regime, regulatory framework and its proximity to Kenya. New Zealand has also of late become a strong contender in the race towards being the most favourable offshore Trust jurisdiction.

Should we go the Mauritius Way?

Mauritius has integrated its laws on Trusts under the Trust Act of 2001. This law applies to both residents and non-residents of Mauritius and incorporates the latest trends in international Trusts legislations.

Non-residents can set up different types of Trusts in Mauritius. These can either be Trusts with interest in possession, charitable Trusts, purpose Trusts, accumulation and maintenance Trusts, bare Trusts, protective Trusts, discretionary Trusts, employee benefit Trusts and Trusts for the disabled, among others. Discretionary Trusts have proven to be very popular with non-residents due to the optimum flexibility they offer in the organisation of the Trust property and for the distribution of income to beneficiaries. A Discretionary Trust is basically a settlement where both capital and income may be paid or applied, at the sole discretion of the Trustee(s), to any one or more of a class of beneficiaries, as the Trustee(s) deem(s) fit.

Mauritius-resident Trusts are taxed at the rate of 15% on their chargeable income (gross income less expenses but before any distribution). They are also eligible for an 80% presumed foreign tax credit on foreign source income and entitled to tax treaty benefits, under the various double taxation agreements between Mauritius and some 33 countries.

An offshore Trust of which the settlor is a non-resident and of which all the beneficiaries are also non-residents, is exempt from income tax in Mauritius, where it has deposited a declaration of non-residence with the local tax authority. Furthermore, non-resident beneficiaries of a Trust are exempt from tax in respect of income under the terms of the Trust, as well as from value added tax, whereas resident beneficiaries having received such income will be taxed at a flat rate of 15%.

Or is New Zealand a better option?

New Zealand is a jurisdiction that has in the recent past gained popularity as a location for offshore Trusts. This is not only because of the favorable tax and regulatory framework that it has in place in relation to Trusts but unlike other traditional tax haven jurisdictions (like Mauritius), New Zealand is a reputable member country of the Organisation for Economic Co-operation and Development (OECD) with a highly regarded legal, political and economic environment.

In New Zealand, Trusts are exempt from assessment in respect of tax on income and capital gains arising outside of New Zealand, in the event that the settlor of the Trust is non-resident. Accordingly, the Trustee may make distributions out of a Trust fund established in New Zealand without any withholding or deduction for New Zealand income or capital gains tax.

New Zealand's tax regime does not have inheritance, wealth or capital gains tax regimes. This means that any creation or transfer of assets to a Trust by a non-resident of New Zealand will not be taxed. Furthermore, the same transaction will not be subject to indirect taxes including gift duty, stamp duty, value added tax as they are not applicable to New Zealand Trusts.

From a compliance perspective, foreign Trusts established in New Zealand are not obliged to file income tax returns with the New Zealand Inland Revenue Department, in so far as they do not have New Zealand sourced income, nor distribution made to a New Zealand resident beneficiary. Moreover, New Zealand has very limited disclosure obligations in relation to the settlor and the beneficiaries. It is also noteworthy that New Zealand, like Mauritius has an extensive network of double taxation agreements in force with its main trading and investment partners.

Conclusion

It is never too late for taxpayers with expansive estates to organize their affairs in a way that not only enables easy and more efficient management of their affairs but also allows them to take advantage of tax planning opportunities that may alleviate the tax burden on both the estate and its beneficiaries. It is therefore a viable option to consider establishing a Trust, and where appropriate consider establishing offshore Trusts in a favourable jurisdiction.

FOR BETTER OR WORSE

A REFLECTION ON THE MATRIMONIAL PROPERTY ACT, 2013

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The matrimonial property regime is a system of property ownership between spouses providing for the creation or division of a marital estate, and if created, what properties are included in that estate, how and by whom it is managed and how it will be divided at the end of the marriage. The Kenyan matrimonial property system is governed by the Matrimonial Property Act, 2013 which came into operation on 16th January 2014.

Prior to its enactment, the matrimonial property regime was governed by the outdated English Married Women Property Act of 1882 which had no substantive provisions, therefore leaving a lot for the court's discretion in interpretation and creation of jurisprudence.

The promulgation of the Constitution of Kenya, 2010 breathed new life into the matrimonial property regime with Article 45 of the Constitution which provides for equality in marriages at the time of marriage, during the marriage and at the time of dissolution of the marriage. It is upon the protection of these rights that the Kenyan Parliament enacted the Matrimonial Property Act, in an attempt to borrow from the spirit of the Constitution. The Act provides for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes.

Definition of matrimonial property

Matrimonial property is defined under Section 6 of the Matrimonial Property Act as the matrimonial home or homes, household goods and effects in the matrimonial home or homes, any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. The matrimonial home is any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.

Trust property including property held in trust under customary law does not form part of matrimonial property. Furthermore, subject to Section 6 of the said Act, the interest of any person in any immovable or movable property acquired or inherited before marriage does not form part of the matrimonial property.

The Act has also introduced (and recognizes) pre-nuptial agreements which were previously not recognized by the courts. The Act allows parties to any intended marriage to enter into an agreement before their marriage to determine their property rights, which is enforceable provided that agreement is not influenced by fraud, coercion or is manifestly unjust. This means that if the property inherited before marriage is used as the matrimonial home then it falls within matrimonial property.

Equal ownership of property

The Constitution of Kenya at Article 45 (3) provides for the equal rights of parties to a marriage at the time of the marriage, during the marriage and at the dissolution of the marriage.

It also provides, at Article 60 (1) (f), for the elimination of gender discrimination in law, customs and practices related to land and property in land. It goes without saying that the issue of equality in marriage has come of age. Indeed the Marriage Act at Section 3 (2) provides that parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage. Notwithstanding Islamic law, customary law or any other law, a married woman has the same status as a married man protected under the Constitution and the Act.

The provisions of Sections 2, 6 and 7 of the Act have been touted by the Court of Appeal of Kenya as enlivening the rights provided in Article 45 (3) of the Constitution in the case of VWN v FN (2014) eKLR.

Section 9 of the Act recognizes that both monetary and non-monetary contribution should be taken into account in determining contribution. The Matrimonial Property Act, which repealed the Married Women Property Act, recognizes the equal status of spouses. That is to say that a married woman has the same rights as a married man to acquire, administer, hold control, use and dispose of property whether movable or immovable, to enter into a contract and to sue and be sued in her own name. Historically, the doctrine of coverture applied where once married, a woman could not enter into a contract or sue and be sued in her own name. Upon marriage, a woman's legal existence as an individual was suspended; this is no longer the position.

Two other pieces of legislation being the Land Act and Land Registration Act were also enacted to safeguard the rights of a spouse to matrimonial property by requiring the consent of a spouse for the transfer or charge of the matrimonial home.

The equality of the rights of spouses in a marriage was recognized by the Court of Appeal in the case of Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes, Civil Appeal No 127 of 2011 where the Court of Appeal observed that Article 45 (3) of the Constitution gives parties to a marriage equal rights before, during and after a marriage ends. The Marriage Act and the Constitution provide for equal rights in marriage, and similarly, this new Act seems to favour an approach that takes into account the contribution of either spouse towards its acquisition. This is however, according to the Act, subject to the provisions of Section 6 (3) of the Act that provides that parties to an intended marriage can agree on their property rights prior to entering the marriage. The Act takes into account non-monetary contribution and provides that a party may acquire beneficial interest in property by contribution towards the improvement of the property equal to the contribution. Contribution is couched both in terms of monetary and non-monetary contribution. The contribution includes: domestic work and management of the matrimonial home; child care; companionship; management of family business or property; and farm work.

Gifts between spouses

The Act provides that where a spouse gives any property to the other spouse as a gift during the subsistence of the marriage there shall be a rebuttable presumption that the property thereafter belongs absolutely to the recipient.

In addition, there are special provisions relating to matrimonial property under Section 12 of the Matrimonial Act. In particular, Section 12 (1) provides that no spouse in a monogamous marriage can alienate an estate or interest in matrimonial property during the subsistence of such a marriage and without the consent of both spouses. This alienation is any form, whether sale, gift, lease, mortgage or otherwise. So stringent are these requirements that the Court of Appeal took this into consideration in the case of V W N v F N [2014] eKLR; the Court found that the applicant had unilaterally disposed of the matrimonial property without seeking the consent of her spouse where she had given a gift to her children contrary to Section 12 (1) of the Matrimonial Property Act.

Property rights of polygamous marriages and recognition of customary law

These have been some of the greatest changes brought about by the new statute; Section 8 of the Act specifically deals with these rights. The section provides that where parties to such a marriage divorce or the marriage is dissolved, the matrimonial property acquired by the man and the first wife shall be retained equally by the man and the first wife only, if the property was acquired before the man married another wife.

Further, matrimonial property acquired by the man after he marries another wife shall be regarded as owned by the man and the wives taking into account the contributions made by the man and each of the wives. However, despite this provision, where there is a clear agreement between the parties that a wife shall have her matrimonial property with the husband separate from that of the other wives, such a wife shall own that matrimonial property equally with her husband without the participation of the other wives.

In addition to the special provision relating to consent of both spouses prior to alienating any rights or interest in property, Section 12 also provides that a spouse in a monogamous marriage or in the case of a polygamous marriage, the man and any of his wives, have an interest in matrimonial property that is capable of protection by caveats, caution or otherwise under the law relating to land registration. The Act further offers protection to spouses by providing that a spouse shall not during the subsistence of the marriage, be evicted from the matrimonial home by another spouse or their instance unless by an order of court.

The instances under which a spouse can be evicted from a matrimonial home are: on the sale of any interest in the matrimonial home in the execution of a decree; by a trustee in bankruptcy or by a mortgagee or chargee in exercise of a power of sale or other legal remedy.

The Act at Section 11 provides for the recognition of customary law principles during the division of matrimonial property between and among spouses. This is however subject to constitutional values and principles. The Act specifically identifies and sets out what constitutes the customary principles to be taken into account. These include: the customary law relating to divorce or dissolution of marriage; the principle of protection of rights of future generation to community and ancestral land as provided for under the Constitution; and the principles on access and utilization of ancestral land and the cultural home by a wife or wives or former wife or wives.

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FAIR ADMINISTRATIVE ACTION ACT, 2015

A BLESSING OR A CURSE?

The Constitution of Kenya, 2010 has enshrined a number of rights under the Bill of Rights, one such right is the right to fair administrative action; it is provided for under Article 47. This right, like many others provided under the Bill of Rights, has been borrowed from the South African Constitution albeit with some minor changes. Article 47 (3) provides that Parliament shall enact legislation to give effect to the right to fair administrative action and in accordance with that provision, the Fair Administrative Action Act No. 4 of 2015 (the FAAA) was promulgated on 27th May, 2015. According to Article 47, in addition to giving effect to the right to fair administrative action, the FAAA shall provide for the review of administrative action and shall also promote efficient administration.

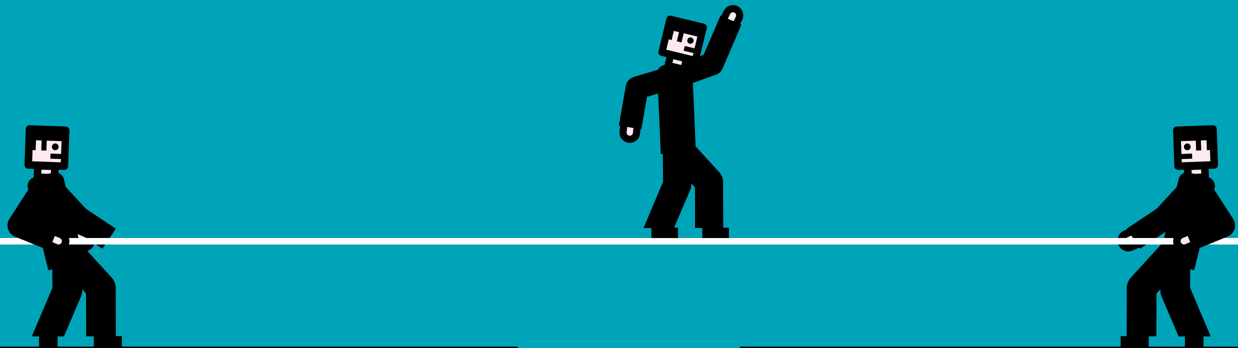
As, unfortunately, Article 47 fails to define "administrative action", the FAAA seeks to fill the missing definition. By Section 2, administrative action is defined as including; the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body, authority that affects the legal rights or interests of any person to whom such action relates. The FAAA further provides under Section 3 (1) (c) that it applies to all state and non-state agencies, including any person; exercising administrative authority; performing a judicial or quasi-judicial function under the Constitution or any written law; or whose action, omission, or decision affects the legal rights or interests of any person to whom such action, omission of decision relates.

The obvious (perhaps) unwitting import of these provisions is that the FAAA applies to the exercise of both public and private persons and functions without any exceptions. As a result, the ambit of the FAAA is quite broad. It has created room not only for potential abuse of Article 47 and the FAAA but also for the misapplication of the same. This is antithetical to the South African right to just administrative action and the original South African statute that gives effect to it (the Promotion of Administrative Justice Act, 2015 (PAJA)) notwithstanding the fact that it is from there that Kenya borrowed the concept.

Under the South African Constitution and PAJA, administrative action is defined as any decision taken, or any failure to take a decision by; an organ of state when exercising a power in terms of the Constitution or a provincial constitution; or exercising a public power or public function in terms of any legislation; or a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct external legal effect.

Therefore the object of the right to just administrative action under PAJA is to check the exercise of public power and the performance of a public function; in terms of an empowering provision which adversely affects the rights of any person and which has a direct external legal effect. The focus is not on the individual or body that is exercising the power or performing the function but in the nature of the power exercised and of the function performed and the resultant adverse effect on any person's legal rights. Consequently for PAJA to apply, the test is twofold; the power exercised and the function performed must be of a public nature and the exercise of the same must adversely affect the rights of any person and have a direct legal effect.

Contrary to this, under the FAAA the power or function exercised need not be of a public nature, the only test applicable is whether the action, omission or decision affects the legal rights or interest of any person to whom such action, omission or decision relates. In doing so, the drafters have bastardized the exercise of the right to fair administrative action and have exposed unwary and unsuspecting individuals, non-state agencies and organisations to the wide-reaching application of the FAAA. This has in effect expanded the scope of Administrative Law to unintended parameters. But perhaps this might be progressive as private parties are held to the same high standards of conduct when it affects the rights of others as public authorities; this remains to be seen. In the meantime, all private actors are supposed to be astute to remember that their actions will fall within the ambit of the FAAA and are therefore open to administrative action.



Kenya's current constitution was enacted in August 2010; approximately 67% of Kenyans voted in favour of the new constitution.

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LIGHTING THE WAY

A LOOK AT KENYA'S GROWING RENEWABLE ENERGY SECTOR

There has been a lot of talk about the changes in weather, depletion of the ozone layer and the general deterioration of the earth since the 1990s. As a result of this, there have been a lot of policy changes in various parts of the world in order to ensure that the environment is preserved. Energy policy changes have been made to ensure that the climate crisis does not worsen.

In the past 5 years, East Africa has emerged as a global leader in the implementation of renewable energy projects. Some of East Africa's largest clean energy projects include a 280 MW geothermal project in Olkaria and a 310 MW wind farm in Turkana, Kenya. Ethiopia has embarked on the 6,000 MW Grand Renaissance Dam hydropower project, while Uganda has implemented the 600 MW Karuma and the 183 MW Isimba hydropower projects.

Rwanda and Burundi have also made strides in the renewable energy sphere with Rwanda having a 100 MW methane gas power project at Lake Kivu, the 28 MW Nyaborongo hydropower project and the 8.5 MW Rwamagana solar farm. It is also noted that Burundi has added 7.5 MW to its grid through the Mupuga Solar Farm Project. The projects above constitute the major energy renewable projects across East Africa. Several small-scale clean energy projects particularly in the solar energy field are dotted across the East African region.

The Kenyan Government seems committed to promoting electricity generation from renewable energy sources. The Energy Act, Act No. 12 of 2006 (the Energy Act) requires the Cabinet Secretary in charge of energy to develop and manage a prudent

Reports indicate that Kenya is Kenya is now the world's ninth largest producer of geothermal energy.

national energy efficiency and conservation programme.

The Energy Act defines renewable energy as energy from all non-fossil sources including, but not limited to biomass, geothermal, small hydropower, solar, wind, sewage treatment and plant gas.

Kenya's Sessional Paper No. 4 on Energy (the Sessional Paper) encourages implementation of indigenous renewable energy sources to enhance the country's electricity supply capacity. The Sessional Paper is implemented through the Energy Act of 2006, which provides for mitigation of climate change, through energy efficiency and promotion of renewable energy. In 2008, the Government of Kenya (GoK) adopted the so-called "Feed-in Tariffs Policy" through the Feed in Tariffs (FiTs) policy of 2008 (revised 2012) (FiT Policy) to attract private investment into the renewable energy sector. The FiT Policy guarantees fixed rates and connection to the grid for electricity generated from renewable energy sources. Projects are eligible for conditions of the FiT Policy if they have a certain size and are based on wind, biomass, small hydropower, geothermal, biogas and solar. Below is a quick run through on the progress being made on the different types of renewable energy sources in Kenya.

Solar

Solar energy can be used for lighting bulbs, heating houses and water, drying and generating electricity. Kenya's location astride the equator gives it a unique opportunity to invest in solar energy since the country experiences high radiation. This makes solar energy an ideal source of energy.

Many Kenyans have opted to using this form of energy on a full time basis because of its cost effective nature.The use of solar energy is also common in large buildings and industrial plants that require lot of energy for the nature of their work. The Energy (Solar Water Heating) Regulations, 2012 requires all premises within the jurisdiction of a local authority with hot water requirements of a capacity exceeding 100 litres per day to install and use solar heating systems. Contravention of this provision attracts a fine of KES 1 million or imprisonment for a term not exceeding 1 year or both. Developers of a housing estate, architects, engineers and an owner of premises are advised to keep in mind the provisions of these particular Regulations.

It should be noted that one needs to be licensed by the Energy Regulatory Commission (ERC) as a solar water heating system technician or a contractor before undertaking any solar water heating system installation work.

Wind

The Government of Kenya together with various project financiers have agreements for the funding and construction of the Kinangop Wind Park and Lake Turkana Wind Farm. Preparations for a feasibility studies for 12 wind sites are also underway together with the continued expansion of the Ngong wind power project. There are also steps being taken towards the implementation of a grid management program to assist Kenya in managing integration of intermittent renewable energy. Kenya has a high installed wind energy capacity to the grid. Exploitation of wind energy in Kenya has however been hampered by high capital costs and the lack of sufficient wind regime data among other factors.

Biomass and biogas

There are 14 prospective geothermal sites spread out in the Rift Valley. There are also ongoing upscaling projects for the smaller biogas plants for agricultural producers and processors for example, supporting co-generation by Mumias Sugar (one of Kenya's largest sugar producers). There is also support for an initiative for the improved cook stoves for households and institutions. With regards to biogas, Kenya has various organisations supporting market transformation initiatives for efficient biomass stoves for institutions and SMEs with the help of the United Nations Environment Programme (UNEP) who are also providing support for cogeneration market in Eastern and Southern Africa, and the United Nations Development Programme who are promoting public-private partnerships in sustainable charcoal production.

Hydro

There is a community-based mini hydropower development project in upper Tana River basin where there is a construction of 7 mini-hydropower plants. The International Finance Corporation is providing advisory services on small/mini-hydropower development as well as risk mitigation schemes to commercial banks investing in small hydropower plants.

Geothermal

Kenya's Energy Policy, 2012 estimates geothermal potential within the Great Rift Valley at between 7,000 MW and 10,000 MW. The Geothermal Development Company (GDC), a state-owned special purpose vehicle (SPV) established for the development of geothermal resources in Kenya is in the process of developing 90 MW of geothermal power in the Menengai field within the Rift Valley. In addition to supporting the GDC, the GoK is also expected to create a directorate to oversee renewable energy policy and a renewable energy lead agency to undertake the promotion of this resource, with a target 5,000 MW of geothermal power expected by 2030. There is also support by various stakeholders for the Olkaria I, II, III and IV expansion projects. The UNEP is providing technical assistance for surface exploration of geothermal energy through African Rift Geothermal Development.

Like all energy projects, renewable energy projects under a capacity of 1 MW do not need a licence or permit, those over 1 MW and under 3 MW need a streamlined Electricity Permit from ERC. Only renewable energy projects with a capacity above 3 MW must be licensed by ERC. Those licensing requirements are quite technical and a long list of data and documents must be submitted as listed in the Annexes of the Energy (Electricity Licensing) Regulations, 2010.

A total of twenty two (22) clearances are applicable to investors in the renewable energy sector. Six (6) of these clearances are sector-specific, three (3) are general environment related clearances, seven (7) are general clearances necessary to establish a company, and six (6) must be obtained to own/lease the land and construct the power plant. The clearances vary in nature and in scope. Some clearances have to be obtained by all investors under the FiT, others only by those investing in specific energy resources. For example, the investors in wind energy must obtain a clearance from the Kenya Civil Aviation Authority to ensure that the high structures do not interfere with air traffic.

Recent developments

Key to the continued growth of the renewable energy sector is the creation of a conducive regulatory environment. Kenya has proposed to create such a framework through the Energy Bill, 2015 (the Energy Bill). The Energy Bill recognizes the growth of the renewable energy sector in Kenya through the regulation of power production through clean energy sources, which previously was not specific under the Energy Act. It creates individual licensing regimes and regulatory agencies. One of these includes the Rural Electrification and Renewable Energy Corporation.

With the introduction of Kenya's devolved system of government, project sponsors must now engage with county governments in seeking approval for projects. This will significantly increase the period between project inception and project implementation. In addition, project sponsors must engage local communities for the purposes of fulfilling the State's requirements on local content. To this end, the draft Energy Local Content Regulations, 2014 aim to give preference to Kenyan citizens skilled in operations to be licensed under the Energy Bill.

The Energy Bill also proposes creation of an Energy Regulatory Authority (ERA) which will require that foreign project sponsors have an office located within the Republic of Kenya, where project management and implementation as well as procurement are to take place under the regulatory supervision of ERA. In respect of local content, licensed applicants are also required to have a local content plan which details the project sponsors,' strategy for training and succession, employment, technology transfer, research and development and insurance, financial and legal services. "Local content" has been defined as "the use of Kenyan local expertise, goods and services, people, business and financing before the systematic development of national capacity and capabilities for the enhancement of the Kenyan economy".

It can be seen from the various strides made in Kenya that renewable energy development is an integral part of the country's energy policy with a broad objective to ensure adequate, quality, cost effective and affordable supply of energy through use of indigenous energy resources in order to meet development needs, while protecting and conserving the environment. Renewable energy can contribute to several dimensions of these energy sector challenges, including enhancing the energy security, making energy affordable, improving people's access to energy services, and protecting the environment. This implies that there are co-benefits by scaling-up renewable energy resources.

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ON THE RISE:

HOW REITS ARE CHANGING THE REAL ESTATE LANDSCAPE

Introduction

Real Estate Investment Trusts or REITs as they are commonly referred to, have become the new frontier in the investment sector in Kenya. This is despite the fact that they have always been available as an investment option but for one reason or another, REITs have become more popular and increasingly attractive, even to the average investor who had always seen REITs as a niche investment for a select few. For most people, the possibility of owning property as expansive as Garden City Mall in Nairobi for instance, was next to impossible. This has been bolstered by a growing real estate market and advancement of earning power and net worth of individuals in Kenya. These changes, coupled with the access to information and the increasing interest in other forms of investment have resulted in the attractive allure of REITs today.

What is a REIT?

REITs are regulated investment vehicles that enable collective investment in real estate. Investors pool their funds and invest in a trust that is divided into units with the intention of earning profits or income from real estate, as beneficiaries of the trust. A REIT is an entity that owns and typically operates income-producing real estate or related assets which may include among others, office buildings, shopping malls, apartments, hotels, resorts and warehouses.

A REIT is a vehicle through which investors earn a share of the income produced through commercial real estate ownership without actually having to go out and acquire commercial real estate. REITs also allow the investor the opportunity to have its properties managed by a professional real estate team that knows the industry, understands the business and can take advantage of opportunities. Most importantly REITs are excellent for the investor who wants to avoid capital risk as much as possible while enjoying a decent dividend or interest yield.

The Legal Framework governing REITs in Kenya

REITs are regulated by the Capital Markets Authority (CMA) under the Capital Markets (Real Estate Investment Trusts) (Collective Investment Schemes) Regulations, 2013.

The high interest rates associated with real estate development and the undersupply of housing especially for the lower segment of the market have proven to be a challenge towards the further advancement of this sector. To remedy this, the Government seeks to encourage investment in real estate through REITs.

How do REITs Operate?

The Trustee acquires the Property and holds it on behalf of the beneficiaries (the Investors). The Trustee is responsible for the appointment and supervision of the Manager. It is also the Trustee's responsibility to ensure that the assets of the scheme are invested in accordance with the Trust Deed and the Offering Memorandum and ensures that distributions from the assets of the REIT are made in accordance to the Offering Memorandum.

The Scheme is managed by a Professional Manager who is answerable to the Trustee. The Manager's duty is to oversee the investment of the assets of the scheme and maintain proper accounting records and other records of the scheme. The Manager also collects rent and other income on behalf of the Trustee. The income is distributed to the Investors at the rate agreed upon in the Memorandum or at any other rate as may be agreed between the Trustee, the Manager and the Investors.

Prior to issuance of the Memorandum by the Trustee, the Scheme as well as the Offering Memorandum should be approved by the CMA. On invitation by the Trustee, the Investors pump capital in form of units with a view of having a return on investment within a specified duration.

Types of REITs

There are three types of REITs namely: Income REITs (also referred to as I-REITs), Development REITs (also referred to as D-REITs) and Islamic REITs.

I-REIT is a form of REIT in which investors pool their resources for purposes of acquiring long-term income-generating real estate including housing, commercial and other real estate. Investors gain through capital appreciation and rental income, with the latter being distributed to unitholders at the agreed duration.

D-REIT is a type of REIT in which resources are pooled together for purposes of acquiring eligible real estate for development and construction projects which may include among others housing or commercial projects. It should be noted that a D-REIT can be converted to an I-REIT once the development is complete where the investors in a D-REIT can choose to sell, reinvest or lease their shares or convert their shares into an I-REIT. An offer or issue in a D-REIT may only be made as a restricted offer to professional investors.

An Islamic REIT is a unique type of REIT that invests primarily in income-producing, Shari'ah-compliant real estate. A fund manager is required to conduct a compliance test before investing in real estate to ensure it is Shari'ah compliant and that non-permissible activities are not conducted in the estate and if so, then on a minimal basis.

Benefits to Investors

Investing in REITs offers the following benefits to investors:-

a) REITs offer investors especially the middle income class, easier access and ownership in the growing real estate sector in a manner which is not as capital intensive as a direct purchase of property.

b) More often than not, the value of the property appreciates thus minimizing the risk of capital loss.

c) Unlike direct investments in property which are generally illiquid, investments in I-REITs may easily be converted into liquid cash by selling the units in the market or offering them for redemption in the case of open-ended funds.

d) Investors in REITs have the advantage of investing in a variety of real estate e.g shopping malls, residential projects industrial projects e.t.c.

e) REITs provide investors with access to professionals such as property managers and fund managers who understand the industry and the business and can take advantage of opportunities.

f) REITs offer predictable income streams because of long-term lease agreements with tenants thus rental income and management expenses are predictable in both long and short time frames.

g) REITs are considered to be efficient from a tax perspective. This is discussed in detail below.

Taxation of REITs

One of the key advantages of investing in a REIT is the tax regime that governs REITs both from the REIT's perspective and also from the investors' perspective. The Kenyan government in an effort to encourage investments in real estate has put in place a tax regime that favours REITs. A REIT is generally exempt from taxation if it complies with REIT Regulations and remains registered with the Capital Markets Authority and the Commissioner of Taxes.

However, REITs are not exempt from withholding tax on interest income and dividends. These are taxed at the rates shown in the table below:

Type of income	Resident(%)	Non-resident(%)	Exempt(%)
Dividends	5	10	0
Interest	15	15	0

When a REIT distributes its income to its unitholders, the same will be deemed to have already been taxed. The unitholders will therefore not be required to account for further taxation. This is also the case with payments for redemption or sale of units received by investors.

In the event that a unitholder transfers its share in a REIT or redeems its units from the REIT, they will be obliged to account for capital gains tax on the gain made. However it will be exempt from Stamp Duty.

Shortcomings of investing in REITs

a) Economic and political situations that could lead to depreciation in the value of the property. However, gauging from the trend in the Kenyan property market in the past few years, the values of properties have been escalating.

b) Decrease of rental income as a result of termination of lease agreements or non-renewal of lease agreements and failure to secure replacement tenants in good time.

c) For close-ended REITs, the Investor is not able to access their investment before the end of the investment period. In a close-ended REITs, the Investor cannot seek to redeem his investment before expiry of the investment period unless there is an arrangement with the Trustee's consent for the sale of the Investor's units.

The trend of REITs in Kenya

REITs in developed capital markets have been in existence in their present format since the 1960s, but they were actually introduced in the 1800s. The US has the most advanced REIT in the world. In Africa, growth in this market has been limited by the absence of enabling legislation. With the opening of the Stanlib Fahari I-REIT public offer, Kenya became the fourth African country to launch REITs. South Africa has traded in REITs for the last 10 years, while Ghana has had access to REITs since 1994 and Nigeria 2007.

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THE "CASE" OF UNQUALIFIED PERSONS

RECENT COURT DECISIONS ON "DEFECTIVE" SECURITY DOCUMENTS

Introduction

The Supreme Court has overturned a legal principle that has plagued the banking industry and lenders in general, for over a decade and which made it impossible for lenders to recover loans from borrowers on the basis that the underlying security documents were defective. The banks' waterloo can be traced back to a case pitting the National Bank of Kenya against a borrower, Mr. Wilson Ndolo Ayah. On 23rd July, 1990 and 17th October 1990, Mr. Ayah, executed a Charge and a Deed of Guarantee respectively, in favour of National Bank of Kenya (the Bank), to secure the repayment of a loan in the sum of KES 10 million. On 17th July, 1997, the borrower filed a suit in the High Court seeking among other reliefs, a declaration that the charge and the Guarantee were null and void *ab inito* and consequently, the sum advanced to him which had since grown to KES 57,308,137.50 was irrecoverable. After finding that on the respective dates the Charge and the

According to the Advocates Act, A person is qualified to act as an advocate when: (a) they have been admitted as an advocate; and (b) their name is for the time being on the Roll; and (c) they have, in force, a practising certificate.

Guarantee were drawn, Mrs. V. A. Nyamodi, the Advocate who drew up the two documents, had not renewed her practising certificate for the year, a prerequisite under Section 34 of the Advocates Act, the High Court held that the Charge and the Guarantee were null and void, with the result that the monies secured thereunder were irrecoverable. Thus was born the jurisprudence dubbed the Ndolo Ayah case that bedevilled lenders for years to come, with the monies lent under the invalid securities converted, in effect, into "freebies".

The aforesaid decision of the High Court culminated into an Appeal-National Bank of Kenya Limited v Wilson Ndolo Ayah, Civil Appeal No. 119 of 2002 where the Court of Appeal was faced with the question as to whether Section 34 of the Advocates Act was intended to protect the unsuspecting public from unqualified persons or whether it was meant to punish a client who engages the services of an unqualified person. Section 34 (1) of the Advocates Act provides that,

"(1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument–

a) relating to the conveyancing of property; or

b) for which a fee is prescribed by an Order made by the Chief Justice under Section 44; …

nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:"

(2) Any person who contravenes subsection (1) shall be guilty of an offence.

The Court of Appeal upheld the High Court decision that the Charge and Guarantee were invalid holding that, "it is public policy that courts should not aid in the perpetuation of illegalities. Invalidating documents drawn by such advocates … will discourage excuses being given for … the illegality." This decision, of the then apex Court, set the precedent that the drawing of certain documents of conveyance and security by an Advocate who had not taken out a valid practising certificate at the time of drawing invalidated the documents. It is beyond doubt that this has greatly impeded lenders, mostly banking institutions, from recovering loans from borrowers. It is however important to highlight that before arriving at its decision in the Ndolo Ayah case, the Court of Appeal observed that Section 34 as worded seemed to be concerned with prohibiting the offering of legal services at a fee when one is not qualified as an Advocate. The Court of Appeal considered the decisions by the English Courts which have distinguished the act by the unqualified advocate, and the position of the innocent party who would stand to suffer if and when the act by that Advocate for his benefit is invalidated. The gravamen of reasoning by the English Courts is that the client is innocent and should not be made to suffer for acts done [by the Advocate] contrary to the law without prior notice to him.

The Establishment of the Supreme Court of Kenya

27th August, 2010 marked the promulgation of the new Constitution of Kenya, 2010. This New Constitution restructured the judicial system by creating the Supreme Court as the Apex Court. Consequently, appeals now lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution, and in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved. This therefore replaced the old order where the Court of Appeal held the last word in jurisprudential matters. The establishment of the Supreme Court was ushered in as well-intended, as it would reinforce the application of the doctrine of *stare decisis* by bringing certainty in areas where there were conflicting Court of Appeal decisions or correct an "error" committed by the Court of Appeal.

The Anaj Warehousing Case

Ten years after the institution of the Ndolo Ayah case, National Bank of Kenya again found itself in court essentially in the same type of dispute. This time, the Plaintiff in Mombasa High Court Civil case No. 311 of 2000, Anaj Warehousing Limited v. National Bank of Kenya Limited & Registrar of Titles, filed suit on 10th July, 2000 which sought a discharge from all liabilities and obligations arising from a contract of guarantee dated 29th June, 1994. The Plaintiff also sought a declaration that the Charge which gave rise to the Guarantee be set aside, as being void. The Plaintiff had guaranteed to the Bank indebtedness of a third party to the tune of KES 122.5 million. At the time of filing suit, the third party still owed a large sum of money to the Bank. However, the Bank had already sold the property in an auction and the purchaser was not a party to the suit.

The main issue for determination by the High Court was whether the Charge was void and unenforceable, as it was drafted, prepared, attested and registered by an unqualified person contrary to Section 34(1) of the Advocates Act. The Trial Court presided over by Justice Ibrahim (as he then was) found that it was bound by the principle set in the Ndolo Ayah case and declared the charge null, void and invalid. This decision was upheld by the Court of Appeal in its Judgment delivered on 27th February, 2014 stating that the High Court could not be faulted for following and applying the principle in the Ndolo Ayah Case. It was this decision of the Court of Appeal that prompted a further appeal to the Supreme Court in Petition No. 36 of 2004, National Bank of Kenya Limited v Anaj Warehousing Limited (Anaj Warehousing Case) thus presenting the Supreme Court with the opportunity to lay down the law with finality, for once and for all.

On 2nd December, 2015 the Supreme Court delivered its judgment on the issue of whether Section 34 of the Advocates Act actually invalidates all instruments of conveyance prepared by advocates who do not have a current practicing certificate. After analyzing the finding in the Ndolo Ayah case, the Court established the main objective of Section 34 of the Advocates Act was to prohibit unqualified persons from preparing certain documents. According to the Supreme Court, the section is directed at "unqualified persons". It prescribes clear sanctions (both civil and criminal in nature) against those who transgress the prohibition. However, the Supreme Court noted that the law is silent as to the effect of documents prepared by Advocates not holding current practising certificates. The Supreme Court further went on to find that only an Advocate, and not the client, could breach said provision thus the specter of illegality should lie squarely upon the Advocate and not the client. Accordingly, Section 34 of the Advocates Act does not invalidate documents prepared by an Advocate who lacks a current practising certificate.

The Supreme Court was ultimately of the view that the facts of the case, and it's clear merits, lead to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1) (a) of the Advocates Act, only by dint of its having been prepared by an Advocate who at the time was not holding a current practicing certificate. However, the contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates shall be void for all purposes.

Critique of the Supreme Court decision in the Anaj Warehousing case

In reaching its finding, the Supreme Court relied on Article 159(2)(d) of the Constitution holding that it cannot be right in law, to defeat the clear intention of parties to enter into a binding agreement, merely on the technical consideration that the Advocate who drew the formal document lacked a current practising certificate. The Supreme Court went further to state that invalidating an otherwise binding contractual obligation on the basis of a precedent, or rule of common law even if such course of action would subvert fundamental rights and freedoms of individuals, would run contrary to the values of the Constitution as enshrined under Articles 40, 20 (3) (1) and (b) and 10. The reliance on the provisions of the Constitution which come into force after the High Court suit had been heard and determined raises question as to whether the Supreme Court ignored the well established rule against the retrospective application of the law.

Also, glaringly evident from the Supreme Court judgment is the fact that Honourable Justice Ibrahim was one of the judges who presided in the case. This is contrary to the clear provision of Section 8 (2) of the Supreme Court which prohibits a Judge of the Supreme Court from sitting at the hearing of an appeal against a judgment or order given in a case previously heard before the Judge.

The Supreme Court decision also failed to appreciate the provisions of the Land Act, 2012 which came into force on 2nd May, 2012. Section 79 thereof provides for the creation of an informal charge where a lender accepts a written and witnessed undertaking from a borrower, the clear intention of which is to charge the borrower's land or interest in land, with the repayment of money obtained from the charge; and the borrower deposits any of the title documents. This provision seems to have disregarded formal deficiencies of the instrument of conveyance hence the principle in the Ndolo Ayah case had already been overturned by statute law.

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THE FATE OF CREDITORS IN INSOLVENCY SITUATIONS

THE INSOLVENCY ACT, 2015

Introduction

The Insolvency Act, 2015 (the Act) was enacted with the key objective of amending and consolidating the legislation relating to insolvency. It aims to provide for and regulate the bankruptcy or liquidation of natural persons, incorporated and unincorporated bodies, to enable their affairs to be managed for the benefit of their creditors. The Act was assented on 11th September, 2015 and will come into operation on such date as the Cabinet Secretary may direct by notice in the Kenya Gazette, however, any provision that is not brought into force through gazettement within nine months after the publication of the Act shall automatically come into force on the expiry of that period.

Prior to the enactment of the Insolvency Act, corporate insolvency was dealt with under the Winding-up provisions of the Companies Act (Cap 486 of the Laws of Kenya) (the Companies Act) while the insolvency of natural persons was covered in the Bankruptcy Act of Kenya (Cap 53 of the Laws of Kenya) (the Bankruptcy Act).

Insolvency of Natural Persons

Creditors' Application

A creditor can make a bankruptcy application to the Court under Sections 15 (a) and 17 of the Insolvency Act. Though the effect of such an application on a secured creditor is to convert them to an unsecured creditor upon the debtor being adjudicated bankrupt, it is important to note the changes thereto with respect to the requirements under the Insolvency Act.

Section 200 of the Act provides that a bankruptcy trustee can on its own initiative cancel a charge over any property of a bankrupt if the charge was created within the two (2) years immediately before the bankruptcy commenced and immediately after the charge was given, the bankrupt was unable to pay the bankrupt's due debts. However, a charge may not be cancelled if it either secures money actually advanced or paid, if it secures the actual price or value of property sold or transferred or if any other valuable consideration is given in good faith, by the secured creditor at the time when the charge was created. This means that where a lending institution advances money to a debtor secured by a charge, this will not be subject to cancellation of the charge by the bankruptcy trustee.

Secured Creditor's Options in the Event of Bankruptcy

The Bankruptcy Act provided three options available to secured creditors when proving a debt owed to them. These provisions are mirrored in Sections 226 and 228 of the Insolvency Act. In particular, the secured creditor has the option to:-

a) realize the charge;
b) surrender the charge to the bankruptcy trustee for the benefit of creditors; or
c) have the property valued and prove for the balance due after deducting the amount of the valuation.

The Act now provides a time frame within which these options can be exercised. It states that the bankruptcy trustee may, at any time by notice, require the secured creditor who holds a charge over a bankrupt's property to choose any of the options within thirty (30) days after receipt of the notice.

It is important to note that failure to comply with the notice with respect to selecting an option will be deemed to be a surrender of the charge to the bankruptcy trustee for the general benefit of the creditors, such that the secured creditor will prove the whole debt as an unsecured creditor. It is therefore necessary that a lending institution exercises its option

> *Prior to the enactment of the Insolvency Act, 2015 corporate insolvency was dealt with under the Winding-up provisions of the Companies Act(Cap 486 of the Laws of Kenya), while the insolvency of natural persons was covered in the Bankruptcy Act of Kenya (Cap 53 of the Laws of Kenya).*

to realise its security within the thirty day notice to avoid the above presumption.

Furthermore, a creditor may claim interest on the debt up to the date on which the bankruptcy commences. Where the debt relates to a contract, interest is levied at the rate specified in the contract and where the debt is with respect to a judgment debt, then the interest is at a rate payable on the debt. Post-bankruptcy, the bankruptcy trustee can only pay interest on the allowed creditor's claims if surplus assets remain after the bankruptcy trustee has paid the claims.

Power of the Court to Order Disposal of Charged Property

The power of the Court to order the disposal of charged property as provided in Rule 62 of the Bankruptcy Rules has been retained in Sections 227 (1) and (2) of the Insolvency Act. The Insolvency Act provides that the bankruptcy trustee may make an application to Court and the Court may make an order enabling the bankruptcy trustee to dispose of the property as if it were not subject to the security, but only if the Court is satisfied that the disposal of the property would be likely to provide a better overall outcome for the creditors of the bankrupt.

Section 227 (3) of the Insolvency Act provides that such an order, if granted, is subject to the condition that the bankruptcy trustee apply towards discharging the amounts secured by the security the net proceeds of disposal of the property, and any additional money required to be added to the net proceeds so as to produce the amount determined by the Court as the net amount that would be realised on a sale of the property at market value. In contrast, Rule 64 of the Bankruptcy Rules provided that moneys would in the first place, be applied in payment of the costs, charges and expenses of the trustee occasioned by the application and the sale. It can therefore be deduced that a secured creditor will now rank in priority in receiving the proceeds of the sale over the trustee's costs.

Where a Secured Creditor Realises the Security

Section 228 (3) of the Insolvency Act prescribes that where a secured creditor realises the security, they are required to account to the bankruptcy trustee for any surplus remaining after payment of the debt, interest and any proper payments to the holder of any other charge over the property. It is therefore necessary that a creditor accounts for any surplus to the trustee upon realizing its security.

Insolvency of incorporated and unincorporated bodies

Liquidation by application to the Court

Creditors including any contingent or prospective creditors can make an application to the Court for liquidation of a company where the company is unable to pay its debts. The liquidator in liquidation has numerous functions and one such function is to ensure that the assets of the company are realized and distributed to the company's creditors. However, it is important to note that if the assets of the company available for payment of general creditors are insufficient to meet the expenses of liquidating a company, these expenses have priority over any claims to property subject to any floating charge created by the company and are to be paid out of any such property accordingly.

Where a creditor proves a debt, interest on such debts may also be paid out by the liquidator if surplus permits. However, this interest ranks equally whether or not the debt ranked in priority with other debts.

When a company is in liquidation, the liquidator must make available for the satisfaction of unsecured debts, a portion of the company's net assets as is prescribed by the insolvency regulations and may not distribute that part to the proprietor of a floating charge except to the extent that it exceeds the amount required for the satisfaction of unsecured debts.

Distribution of bankrupt's estate

If a creditor has a floating charge over a company's assets, various claims take precedence over the said creditor's claim to have his debt repaid. This is one of the disadvantages of floating charges. Debts that rank in priority over other debts are known as preferential debts and are payable as provided under the Act. The debts of a person who is adjudged bankrupt, or of a company that is in liquidation, are payable in the following order of priority:

Expenses of Bankruptcy or Liquidation

These expenses have first priority and include the remuneration of the bankruptcy trustee or liquidator, and the fees and expenses properly incurred by that trustee or liquidator in performing their duties. They also include the reasonable costs of the person who applied to the Court for the order adjudging the person bankrupt or placing the company in liquidation. Another expense that falls in this category is the amount received by the bankruptcy trustee or liquidator by the realisation of assets preserved by a creditor on behalf of the creditors through payment of money or on an indemnity basis. The amount of the costs incurred by that creditor in protecting or preserving the value of, or recovering those assets is equally taken into account.

Employees' Salaries

Next in line, once the claims referred to above have been paid, are claims in respect of all wages or salaries payable to employees for services provided to the bankrupt or company during the four months before the commencement of the bankruptcy or liquidation to the extent that they remain unpaid. This extends to any holidays accrued by the employees and any compensation payable as a result of redundancy.

Be that as it may, the total amount to which priority is to be given may not, in the case of any one employee, exceed KES 200,000 as at the commencement of the bankruptcy or liquidation.

Kenya Revenue Authority

Amounts payable to the taxman rank third with respect to order of payment, to the extent that they remain unpaid.

It goes without saying that claims having the same priority rank equally among themselves and, unless capped at a level prescribed by any written law, they are payable in full. This is the general rule for as long as the assets of the bankrupt or company are sufficient to meet the said claims. If not, the claims abate in equal proportions. Interest on preferential debts is also payable, and ranks equally with interest on other debts.

Non-preferential Debts

Debts that are neither preferential debts nor debts owed to a bankrupt's spouse also rank equally between themselves and, after payment of the preferential debts, are payable in full unless the bankrupt's estate is insufficient to satisfy them, in which case they abate in equal proportions among themselves.

Debts owed to Bankrupt's Spouse

Where credit is provided by a person who was the bankrupt's spouse at the commencement of the bankruptcy, even if the person was not the bankrupt's spouse at the time the credit was provided, their claim ranks in priority after the non-preferential debts and interest required to be paid.

Debts owed to Landlords

If a landlord or other person has distrained on goods or effects of the bankrupt during the thirty (30) day period mentioned in the preceding paragraphs, the preferential claims form a first charge on the goods or effects so distrained, or the proceeds from their sale. However, if any money is paid to a claimant under that charge, the landlord or other person has the same rights of priority as that claimant.

It is important to note that where a creditor agrees to accept a lower priority than that of a preferential debt before the commencement of the bankruptcy, he is precluded from placing reliance on the provisions relating to preferential debts and ought to abide by the terms of the agreement.

After the realization of the bankrupt's estate the bankruptcy trustee is required to give notice either of an intention to declare a final dividend, or that no dividend, or further dividend, will be declared. Included in the notice is a statement that requires all claims against the bankrupt's estate to be established by a final specified date, after which the bankruptcy trustee pays any outstanding expenses of the bankruptcy and final dividends. After all payments are made in accordance with the Act, any surplus is paid to the bankrupt.

Conclusion

It is upon the creditor to determine which creditors arrangement is most preferable, and the type of risk and level of exposure they are willing to accept, in view of the various modes of distribution employed in the different asset classes.

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STEP LIGHTLY:

MATTERS TO CONSIDER DURING M&A DEALS IN KENYA

Among the myriad of legal issues that arise in a corporate merger or acquisition, labour and employment law considerations feature quite highly. The issues that arise are of great concern not only to employees but also to management of both the acquiring and acquired company. Typically job losses in mergers occur as a result of restructuring, duplication of roles or a desire to downsize.

The Employment Act (No.11of 2007) and Labour Relations Act (No. 14 of 2007) make no specific reference to the effect of transfer undertakings on employees but the Employment Act does set out the basic conditions of employment and addresses the legal requirements for engagement, termination and specifically termination on account of redundancy which is a common feature in such undertakings.

It is trite law that contracts of employment are not assignable; therefore assignment of such contracts would ordinarily not be included in the assignment of assets and liabilities of a company being dissolved or absorbed into another company. An exception to this arises when the employer company is acquired by merely change of shareholder and not identity, therefore the terms of employment remain unchanged and the employment relationship continues.

Where a merger would result in a new company emerging and the old company being dissolved, the theory of corporate personality lays credence to the fact that the employee's contractual relationship does not pass to the new entity as to create a contractual relationship between the employee and the new company. The contracts of employment are therefore terminated on account of redundancy with procedures and payments to be strictly followed in accordance with Section 40 of the Employment Act by the acquiring company. If the acquiring company adopts the approach of taking up the employment of transferred employees, they must be employed on terms that are on a whole not less favourable. The employees who are taken up on new terms waive their rights to terminal benefits, however if the employees reject this new offer they must be terminated on account of redundancy and compensated in accordance with the Employment Act.

Prior to the transfer undertaking, due diligence should be undertaken requiring a review of the other company's employment agreements and collective bargaining agreement that relate to the conditions of service, as a buyer that steps in the seller's shoes may be bound by them. In situations such as transfer of entity into a new entity, a buyer may assume bargaining obligations with a pre-existing union whose members are contracted by the new entity but it is not bound by the requirement of the collective bargaining agreement. Review of the company's policies, procedures, pending employment claims, share incentive schemes, pension schemes, benefit plans, housing and building loans is also imperative. Appropriate warranties and indemnities are advised in the agreements.

Intellectual Property (IP)

In the event that the company being acquired holds any IP rights either as patents, trade marks, copyrights or industrial design (as is the case in many manufacturing companies), then a due diligence will need to be conducted by the acquiring entity to confirm that the target company is the registered proprietor of such IP rights.

If IP rights are to be transferred to the acquiring company, then the parties will need to consider having a deed of assignment executed to cater for the assignments of such IP rights to the acquiring entity. Such Deeds of Assignment are registerable at the Kenya Industrial Property Institute (KIPI). The details of proprietorship in the case of patents, trade marks and industrial design are then changed to reflect the acquiring entity and respective certificates are subsequently issued.

Immovable Property

For a transfer of immovable property to be effective in Kenya, it must be stamped and registered. Where an entity is acquiring the business and assets of the target company and the acquisition entails immovable property owned by the target company, then instruments of transfer will need to be drawn, executed by both parties and thereafter stamped and registered. It goes without saying that the acquiring entity will need to conduct a search at the Lands Registry to ensure that there are no encumbrances registered against such properties. Any encumbrances in the form of charges securing the payment obligations of the target company to financiers will need to be discharged before they are transferred to the acquiring entity.

In the case of leases held by the target company, the respective landlords will have to be engaged and notified of the target company's proposed acquisition. Confirmation will have to be sought on whether such leases will be assigned to the acquiring entity or whether the existing leases will be terminated and fresh ones entered into between the landlord and the acquiring entity.

> *The new Companies Act, 2015 codifies and gives life to now "globally" accepted principles of corporate governance.*

Where an acquisition entails a mere transfer of shares in the target company and a subsequent change of name, a certificate of change of name will have to be submitted to the relevant Land Registrar who will make an entry to indicate the change of name of the target company against the document of title.

Where a transfer of controlling interest triggers a transfer event in a lease or charge document, then the consent of the relevant landlord or financier or charge will need to be sought.

Major Contracts and Licences

A review of the target company's major contracts and licences will need to be conducted before an acquisition.

In case the contracts or licences are to be assigned as part of the transfer of the business and assets of the target company, then deeds of assignment and novation would need to be prepared and executed by all the relevant parties.

Further, such contracts or licences may contain a clause that precludes the target company from transferring or assigning the contracts or licences. Such clauses may further state that a transfer of controlling interest in the target company would be deemed to be a transfer of the contract or licence and that the consent of the other contracting party to that contract would be required before such transfer of shares.

Conclusion

Finally, various state organs and departments would need to be involved in the case of mergers and acquisitions to properly safeguard the interests of the contracting parties and also in keeping with the provisions of various statues.

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Corporate & Commercial

National Government of Kenya and KenGen (Kenya's largest power producing company): advice on the sale of the former's stock in KenGen through an IPO

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Dispute Resolution

Dufry International AG: representation in a dispute revolving around the award of a contract, to operate duty-free shops at Terminal 1A at the Jomo Kenyatta International Airport

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Employment and Labour

Kenya National Union of Teachers (KNUT) : representation in a historic 2015 pay rise dispute against the teacher's employer, the Teachers Service Commission (TSC)

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Contact: Georgina Ogalo-Omondi
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Energy, Projects and Infrastructure

Kenyan Highway Project: successfully acted for one of the bidders with respect to Lot 6 of a 10, 000 km Kenyan annuity road project, before the PPP Petition Committee (the second matter before the newly formed tribunal)

Contact: Walter Amoko
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Intellectual Property

Agence France Presse: representation in a copyright infringement claim

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Islamic Banking

Kenyan bank: prepared Shari'ah compliant precedents for their security documentation

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Tax

ABSA Bank: advice on the tax implications of an interest rate swap agreement payment involving a Kenyan thermal energy company

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Natural Resources

International Oil & Gas client: advised on an oil and gas contract, revolving around the impact of the outbreak of the Libyan civil war

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Real Estate, Conveyancing and Securities

Leading Kenyan Bank with multinational coverage: preparation and perfection of security documentation (debenture, charges and corporate guarantees), the estimated matter value is USD 5.23 million

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