ORARO & COMPANY ADVOCATES

LEGAL & KENYAN

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

A "mixed-grill" of reading delights

Greetings!

Once again, we are pleased to share with you, our esteemed readers, our firm's quarterly Newsletter, Legal & Kenyan, in what is it's fourth edition (but who's counting!). As is the norm, our Newsletter contains an array of articles dealing with a range of exciting and topical legal issues, for your reading pleasure.

Of particular note in this issue, is our first ever collaboration with external contributors, in this case one of our valued international partners, IFS Mauritius. Welcome aboard IFS, we are pleased to have you.

As always, we have endeavoured to bring you a "mixed-grill" of reading delights:-

Walter Amoko and Lena Onchwari examine the Common Reporting Standards (**CRS**) on the automatic exchange of financial information under the framework created by the Organization for Economic Co-operation and Development (**OECD**). Pamella Ager gives a detailed analysis of the newly operationalised Public Benefit Organizations Act, 2013, which replaces the Non-Governmental Organizations Co-ordination Act, 1990. In the face of growing concern about the Kenyan Banking scene, I examine the duty of care in the Banking industry, highlighting not only the duty owed by a bank to its customers and vice-versa, but also the duty that a bank might owe to non-customers. I also share insights on the seemingly draconian powers of entry and search enjoyed by Kenya's Competition Authority under the Competition Act, 2010 and offer a few helpful tips on how one might handle a "dawn raid". Chacha Odera and Georgina Ogalo-Omondi give an overview of the pilot project for Court mandated mediation which has been recently introduced in the Family and Commercial Divisions of the High Court in Nairobi, and is expected to be rolled out nationwide, in the near future. Juliet C. Mazera and Jackson Awele address common issues in the registration of trade or service marks in a question and answer format, while Walter Amoko and Jill Barasa discuss the extent to which malicious prosecution is available in the civil law context, in light of a recent UK Supreme Court Judgment. Juliet C. Mazera and Beryl Rachier give a "lesson" in corporate governance in terms of the duties and liabilities of directors under the new Companies Act, 2015. Juliet C. Mazera also teams up with Cindy Oraro to examine the efficacy of the road annuity programme in funding road infrastructure projects. All this, under one cover.

We do hope that you will enjoy the read!

Sincerely,

John Mbaluto
Editor

Senior Partner's Note:

"Being one of Kenya's oldest firms, we are always evolving and growing our practice to ensure we not only provide our clients with great legal advice but great service too, which is why our lawyers share their hands on expertise regularly through alerts and this newsletter."

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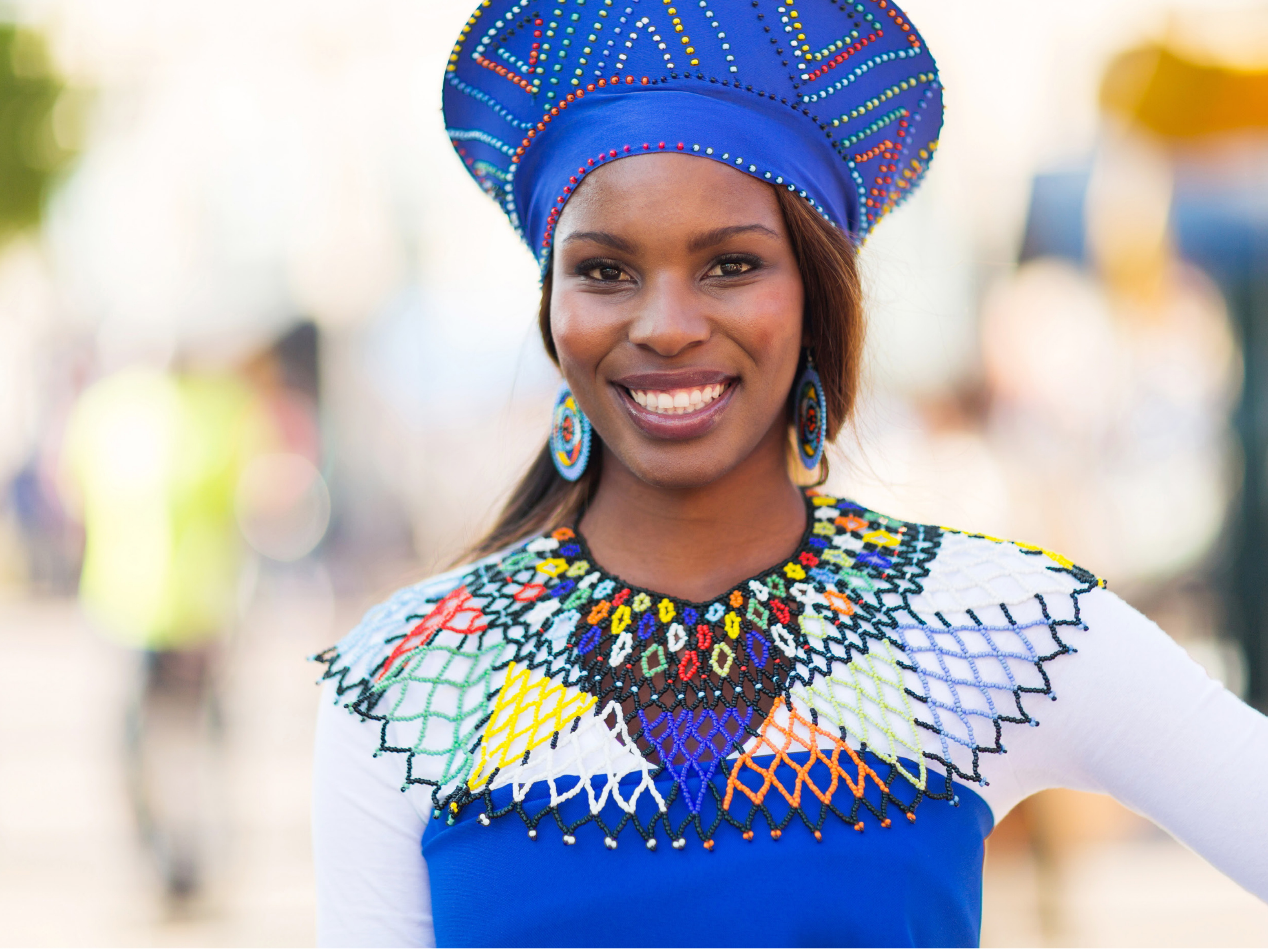
IFLR 1000
FINANCIAL AND CORPORATE
RECOMMENDED FIRM
2017

"Full service firm Oraro & Co. Advocates are a good option on the Kenyan market, and are one of only a handful of outfits in the country to offer representation on both advisory matters and disputes."

IFLR 1000's 2017 Financial and Corporate Guide

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"MARKED"

PROTECTION OF TRADE AND SERVICE MARKS IN KENYA

A trade mark is an identifier. It could be anything from a distinguishing or recognisable sign, logo, design, expression, slogan, device, brand, heading, label, ticket, to a name, signature, word, letter or numeral or any combination thereof, whether rendered in two-dimensional or three-dimensional form. Such marks are used in relation to goods to show a connection between the goods and the owner or licensee and to distinguish those goods from similar goods in the market. A service mark serves essentially the same purpose, save that it is used in relation to services.

In establishing one's presence in an economic hub, protection of trade and service marks is a key consideration and is usually one of the foremost undertakings by any serious organisation looking to engage in trade or business in the region. Trade and service marks often times provide the window through which customers get to know of and subsequently purchase or use actual products or services. Their significance in terms of asset value and market competition cannot be disputed. Consequently, companies and individuals should strive to establish strong and enduring brands and to protect them in equal measure through all available enforcement mechanisms in law.

As the largest economy in East Africa, Kenya presents a key springboard for most businesses looking to establish a presence in the region and beyond. With that comes the need for vigilance to protect the trade and service marks through which those businesses identify themselves in the market. In that regard, various registration regimes, both local and international, exist for achieving protection of marks in Kenya. Indeed, in addition to her local laws, Kenya is a member of the Paris Union and a signatory to the Madrid Agreement and Madrid Protocol, which offer centralised, efficient and cost-effective application processes for persons wishing to obtain trade and service mark protection in multiple jurisdictions.

Below are ten frequently asked questions regarding the registration regime of trade marks in Kenya. These questions and answers are best viewed as guidelines and do not provide an exhaustive list of all possible issues that might arise in the registration process, neither do the answers apply to all situations. Each situation should be considered in its own context.

1. **Do I have to register my trade marks in Kenya to be protected?**
   Not necessarily. You may claim ownership of a trade mark by reason of extensive use in Kenya in relation to specific goods and services. However, it is advisable to register trade marks for certainty of protection. The significance of registration becomes most apparent during a conflict with a competitor as the standard of proof is certainly more cumbersome to meet for an unregistered trade mark owner than for a registered one.

2. **I have registered my trade mark in Kenya. Do I have to register the trade mark in other East African countries in order to be protected in East Africa as a whole?**
   Yes. Registration and protection of trade marks in Kenya and indeed most parts of the world is territorial. This means that in order to claim protection, a trade mark owner must either use or register the mark in the territory of interest. Registration in other countries is not a guarantee of protection in Kenya. A trade mark owner must therefore use or register his mark in Kenya in order to claim any form of protection. There are a few exceptions with respect to reputable marks that are considered "well-known" globally and therefore protected with or without use or registration in Kenya. Examples include the Coca-Cola mark, McDonald's, etc. However, in order to obtain "well known" status, the mark must meet specific prescribed criteria.

3. **What are the official and professional fees for registration of trade marks in Kenya?**
   The fees for registration of trade marks in Kenya are dependent on several factors and are therefore not readily discernible without specific information on what is to be registered. The factors range from nationality of the proposed trade mark owner, to the number of classes of goods and/or services for which the mark is to be registered.

4. **I wish to register several marks in Kenya and overseas using one central process. How can I do this?**
   Kenya is a party to the Madrid Agreement and Protocol concerning the international registration of marks. As such, any person who is a national of a member state of the Paris Union can lodge base applications in Kenya and designate members of the Madrid Agreement and/or Madrid Protocol as countries where protection is sought.

   For purposes of these applications, the Kenya Industrial Property Office acts as the Receiving Office for the International Bureau of the World Intellectual Property Organisation.

   Such applications do not, however, guarantee protection in the designated countries and any country which cannot protect the marks applied for in their country for one reason or another may issue provisional refusals within set timelines, failing which automatic protection is presumed.

The significance of registration becomes most apparent during a conflict with a competitor as the standard of proof is certainly more cumbersome to meet for an unregistered trade mark owner than for a registered one.

5. **How long does protection in a registered trade mark last?**
   A trade mark is valid for ten (10) years from the date of registration but may be renewed for a further period of ten (10) years in infinity subject to payment of the renewal fees.

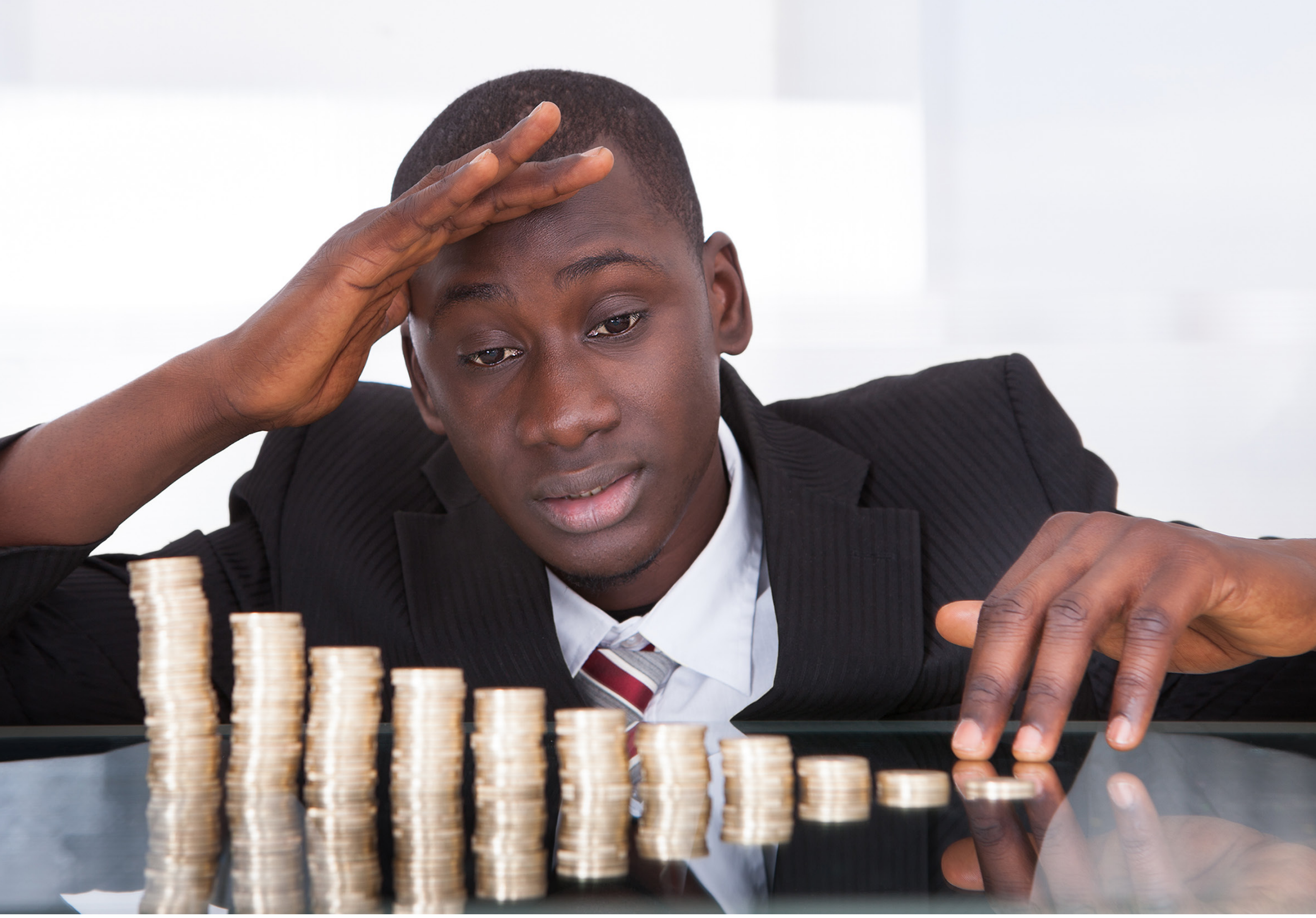
6. **Must I use my trade mark once it is registered?**
   Yes. A trade mark owner must use the trade mark for the services or goods for which it is registered, failing which he or she runs the risk of a removal action on grounds of non-use.

7. **How long does it take to secure a registration certificate?**
   The length of time taken to register a trade mark in Kenya from the time an availability search is conducted, to the time the application is filed at the registry depends on a variety of factors, including the timely delivery of information required by the registry for purposes of examination of the mark, oppositions filed against registration of the mark and the workload of the registry. Ordinarily, registration of a mark up to the point of delivery of the registration certificate may take up to nine (9) months.

8. **Can your law firm handle trade mark registrations in countries other than Kenya?**
   Whilst we are not qualified to act in countries other than Kenya, we have working relationships and strategic networks with a number of reputable law firms in various countries around the world, who offer seamless and professional services in an efficient and cost effective manner that meet our clients' needs, and deliver on the same standards that our clients have become accustomed to.

9. **I have not registered my mark though I have used it for a while in relation to specific goods and services. I have however just discovered that a competitor has registered the same mark. What do I do?**
   Protection of trade marks in Kenya is by law granted to both registered and unregistered marks. The owner of an unregistered trade mark may, within a specified time period from the date of the registration of a similar trade mark, apply for the removal of the said mark from the register of trade marks on grounds that the registered mark was registered unjustly.

10. **Can two similar marks co-exist on the register of trade marks in Kenya**
    Yes. Two similar marks may co-exist on the register with the approval of the Registrar of Trade Marks and subject to specific conditions, key among them being that they will not cause confusion to the public.



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OBLIGATED

EXAMINING THE DUTY OF CARE IN BANKING

"He that thinks he can afford to be negligent is not far from being poor." The foregoing quote attributed to Dr. Samuel Johnson forewarns against the consequence of negligent conduct: that it may well leave one in a precarious economic state. Bankers are no more immune from this warning than the common man, and sufficient care ought therefore to be taken by banks to avoid negligent conduct at all times. This can be achieved by strictly observing and discharging the duty of care.

The common law has established that a duty of care is owed to persons whom one could reasonably have contemplated may be harmed by his action (or inaction in certain cases). However, even though a duty is owed, no liability attaches unless the harm suffered was of a foreseeable kind.

The Neighbour Principle

The duty of care may be succinctly summed up as the duty not to injure your neighbour. In the landmark case of *Donoghue v Stevenson (1932) All ER 1*, the House of Lords enunciated the neighbour principle as follows:-

"The rule that you are to love your neighbour becomes in law: You must not injure your neighbour; and the lawyer's question: who is my neighbor; receives a strict reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

The law lays down the general rules which determine the standard of care to be attained and it is a question of fact whether one has failed to attain the standard of care required in the particular case. The standard of care required is not that of the defendant himself, but that of a person of ordinary prudence or a person using ordinary care and skill, while for professionals, the standard of care is that of an ordinary professional. Consequently, it is not a defence to state that one acted to the best of his own judgment, if his best judgment fell short of that of the ordinary, reasonable man, or the professional man, as the case may be.

Bank's Duty of Care

Arising from the neighbour principle, it may be said that a banker owes a duty of care to any person (customer or otherwise) that he can reasonably foresee as likely to suffer injury by his action, while the standard of care to be applied is that of a reasonable banker. We now turn to consider the duty of care that a bank owes to its customers and non-customers, as well as the duty owed by customers to banks.

Duty of Care to Customers

The bank-customer relationship is contractual in nature and it may therefore be said that a bank has a contractual duty to its customer to exercise reasonable care and skill. In *Karak Brothers Company Ltd v Burden (1972) All ER 1210* the Court had this to say about a bank's contractual duty to its customer:-

"…. a bank has a duty under its contract with its customer to exercise "reasonable care and skill" in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely."

A bank's duty of care to its customers may also arise concurrently in tort. The case of *Hedley Byrne v Heller & Partners Ltd (1963) 2 All ER 575* introduced the idea of "assumption of responsibility" by recognising liability for pure economic loss not arising from a contractual relationship.

A bank's duty of care to its customers is wide and ranges from protecting a customer from fraud by agents such as directors and partners in issuing cheques and other payment instructions, to ensuring that the financial advice it issues is sound and reliable, to explaining the meaning and effect of security documents. The list is not exhaustive and whether a bank owes a duty of care is determined on a case by case basis, the test being whether the customer has suffered injury due to action or inaction of the bank that the bank ought to have reasonably foreseen the action or inaction as likely to injure the customer.

Duty of Care to Non-Customers

A bank may owe a duty of care to non-customers. One of the first cases to find such a duty of care was *J & F Transport Ltd v Markwart (1982) CanLII 2660 (SK QB)*. The facts of the case are that the plaintiff, a trucking company, hired Mr. Markwart as a bookkeeper. About eight months later, Markwart established an account at the Bank of Montreal, fraudulently using his employer's name as the account holder. When the account was opened, the bank failed to obtain the usual information such as evidence concerning the incorporation of the company or the names of the signing officers. Markwart proceeded to fraudulently deposit and cash cheques payable to the employer. The Court held that *"the losses and frauds perpetrated by Markwart were solely the result of the negligence of the defendant in allowing him to set up a bank account into which he could deposit and cash cheques made payable to the plaintiff."* The Bank had failed in its duty of care by not making proper inquiry when the account was opened.

Similarly, in *Vitalaire (A General Partnership) v Bank of Nova Scotia (2002) OJ No. 4902 (SCJ)* the Court held that a bank that has reasonable grounds to suspect fraud by its customers will be liable to a non-customer if it fails to make reasonable inquiries to uncover or

The common law has established that a duty of care is owed to persons whom one could reasonably have contemplated may be harmed by his action (or inaction in certain cases).

prevent the fraud, while in *Dupont Heating & Air Conditioning Limited v Bank of Montreal (2009) CanLII 2906 (ON SC)* it was held that a bank may owe a duty of care to a third party who is defrauded by the bank's customer.

From the foregoing cases, it emerges that the duty of care owed by banks may indeed extend to non-customers and this includes instances where fraud which the bank ought reasonably to have foreseen is perpetrated and causes injury to a non- customer. This demands a high standard of care from banks that requires them to exercise reasonable care, skill and diligence in respect of every transaction undertaken within the bank, and it is not open to a bank to simply state, "he is not my customer".

Customers' Duty of Care to the Bank

The bank-customer relationship is symbiotic and it is only fair that customers should owe a duty of care to the bank. The main duties of care owed by a customer to the bank are those laid out in *London Joint Stock Ltd vs Macmillan (1906) AC 439* and *Greenwood vs Martins Bank Ltd (1918) AC 777*. In the former case it was held that the customer owes his bank a duty to refrain from drawing cheques or other payment orders in such a manner as to facilitate fraud or forgery, while in the latter case the Court held that the customer owes a duty to inform his bank of any forged payment order as soon as he becomes aware of it.

The duties to refrain from facilitating fraud or forgery and the duty to promptly inform the bank of a forgery discovered by the customer have come to be known as the *Macmillan Duty* and the *Greenwood Duty* respectively.

Closer home, the High Court in the case of *Barclays Bank of Kenya vs Jandy (2004) 1EA 8* stated that the customer's duty of care to the bank includes acting in good faith, exercising reasonable care in executing written orders so as not to facilitate fraud or forgery and the duty to inform the bank of any forged payment orders, which includes the duty to notify the bank of unexpected deposits into one's bank account.

Case law also suggests that any wider duty of care on the part of the customer will not be recognised unless the term contended satisfies the strict requirements for the implication of a contractual term.

The circumstanaces in which a duty of care might arise are wide and infinitely varying. It is well near impossible to have an exhaustive list of all such circumstances . In signing off, it is apt to quote John Stuart Mills:

"A person may cause harm to others, not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury."


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DIRECTORS' DUTIES

CORPORATE GOVERNANCE UNDER THE NEW COMPANIES ACT, 2015

The Companies Act, 2015 (**the Act**) was signed into law on 11th September 2015 and is now fully operational after various provisions of the Act came into force at different times. The Act has brought about sweeping changes in the realm of Company law, including new provisions on corporate governance, incorporation of private companies, registration of foreign companies as well as members' meetings and resolutions. The Act also introduces new offences and penalties in a bid to deter errant practices.

Directors' Duties

The functions of directors are normally stipulated in the Articles of Association of the company which are also known as the company's constitution. Normally, directors are charged with the overall power and duties of managing the company, including being the company's signatories. The old Companies Act, (Cap. 486) (Repealed) did not expressly provide for directors' duties and as such, directors were subject to the duties established under common law. However, the new Act has now codified director's duties which are provided for at Division 3 of Part IX of the Act. Though codified, these duties are largely similar to those prescribed under common law and equitable principles.

i) Company's best interests

The first of such duties is the duty to act in accordance with the constitution of the company. Accordingly, a director is under an obligation to act in the best interests of the company during his tenure and should only exercise his or her powers for the purpose for which they were conferred under the company's constitution. Any action outside these parameters would attract penal consequence on the director.

ii) Promotion of success

The second duty is the duty to promote the success of the company. In so doing, a director is expected to have regard to the long term consequences of his or her decision, the interests of the employees, the need to create good working relations with suppliers, customers and others, and the desirability of the company maintaining a reputation of high standards of business conduct amongst others. This duty is subject to any law requiring directors in certain circumstances to consider the interests of the company's creditors.

iii) Exercise of independent judgment

The third duty requires a director to exercise independent judgment. This duty, however, is not infringed by the director acting in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors or acting in a way authorised by the company's constitution. Independent judgment is to be exercised in the interests of the company which may on occasion involve going against the wishes of the shareholders, unless of course such wishes are contained in a shareholders' resolution. This is a provision of particular significance in the context of nominee directors who would naturally act in accordance with the direction of their principal, which would inevitably compromise the duty to exercise independent judgment.

iv) Reasonable diligence

Furthermore, a director has a duty to exercise the same care, skill and diligence that would be exercisable by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions performed by the director in relation to the company and the general knowledge, skill and experience that the director has. Consequently, before accepting to act as director, a person must ensure that he or she possesses the necessary skill set to discharge such a duty.

v) Avoidance of conflicts of interest

A director is also under an obligation to avoid situations in which he or she has, or may have, a direct or indirect interest that conflicts, or may conflict, with the interests of the company. This applies in particular to the exploitation of any property, information or opportunity, and it does not matter whether the company could take advantage of the property, information or opportunity. "Conflict of interest" includes references to a conflict of interest and to a conflict of duties. The duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest or if the matter has been authorised by the other directors provided that nothing in the company's constitution invalidates the giving of such an authorisation.

vi) Third party benefits

A director is under the duty not to accept benefits from third parties if the benefit is attributable to the fact that the person is a director of the company or any act or omission of the person as a director. A "third party" in this case means a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate. Benefits received by a director from a person by whom his or her services (as a director or otherwise) are provided to the company are not regarded as conferred by a third party. A director who accepts a benefit from a third party commits an offence and is liable on conviction to a fine not exceeding KES1,000,000 (USD 10,000). Further, upon conviction, the benefit accepted is forfeited to the company.

The above duty is essentially an anti-bribery provision which appears for the first time in local legislation as a modification of the rule that a director has to account to the company for benefits received as a director. If a benefit is not provided for in the constitution of the company, the directors should not accept it. The key issue here is transparency in the dealings of persons in their capacity as directors of a company.

The Act has brought about sweeping changes in the realm of Company law, including new provisions on corporate governance, incorporation of private companies, registration of foreign companies as well as members' meetings and resolutions.

vii) Declaration of interest

If a director is in any way, directly or indirectly, interested in a proposed or existing transaction or arrangement with the company, the director is required to declare the nature and extent of that interest to the other directors. If the company is a public company, the declaration must also be made to the members of the company. In the case of a public company, where a proposed transaction or arrangement is for an amount, or for goods or services valued at an amount that exceeds 10% of the value of the assets of the company, the declaration shall also be made to the members of the company either at a general meeting of the company or by notice given to the members.

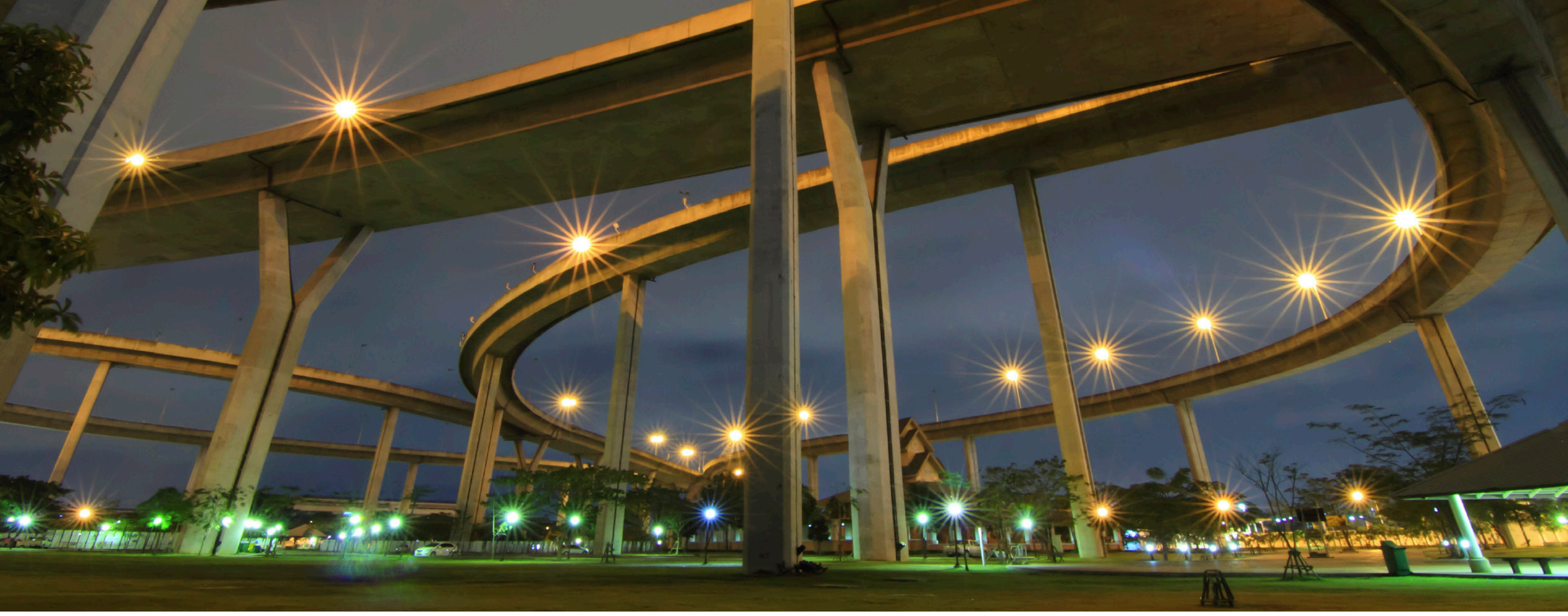
The consequences of breach or threatened breach of the general duties of directors are the same as would apply if the corresponding common law rule or equitable principle applied. Save for the duty to exercise reasonable care, skill and diligence, these duties are enforceable in the same way as any other fiduciary duty owed to a company by its directors.

Directors' Liabilities

The Act also contains provisions on the liabilities of directors, which are found under Division 9 of Part IX. These provisions are aimed at protecting directors from liability when acting or engaging in business for the benefit of or on behalf of the company. The said provisions apply to the company's constitution, a provision of any contract, scheme or arrangement to which the company or a related company is a party and a provision of any other document of a class described by the regulations for the purpose of Section 194 of the Act.

A provision that purports to exempt a director of a company, to any extent, from any liability that would otherwise attach to the director in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void except as permitted by the Act. A company may, however, provide third party indemnity against liabilities incurred by the director to a person other than the company or an associated company. There are new provisions requiring the keeping of the third party indemnity provision. In relation to a director, this is an indemnity against liability incurred by the director to a person other than the company or an associated company. This indemnity shall be deemed void if it deals with the payment of fines for a criminal offence or an amount payable to a regulatory authority, as penalty in respect of non-compliance with a requirement of a regulatory nature. In addition, the indemnity does not cover liability incurred by a director defending criminal proceedings in which the director is convicted or in defending civil proceedings brought by the company or an associated company in which judgment is given against the director.

The indemnity must be made available for inspection at the company's registered office and if the provision is not in writing, a written memorandum setting out its terms should be made available. A company is required to retain a copy or memorandum for at least one (1) year from the date of termination or expiry of the relevant provision and keep it available for inspection during that period.

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ON THE WAY

A LOOK AT KENYA'S NEW ROAD ANNUITY PROGRAMME

Overview of the Kenyan Road Infrastructure Sector

In recent years, the Government of Kenya has expended a large part of its budget on road infrastructure. This effort has been in fulfilment of the country's economic growth strategy under Kenya's Vision 2030 initiative (the country's development blueprint). Currently, the sector relies heavily on the Treasury and proceeds from the Roads Maintenance Levy Fund (**RMLF**) to build new roads and maintain existing road networks. Despite this, huge gaps remain in financing. For instance, in the 2014/2015 financial year, only KES 27.3 billion (USD 273 million) was available for the annual roads programme. This is less than 50% of what was required for road maintenance, rehabilitation and development of new roads.

As a result of these gaps, it is estimated that the Ministry of Transport, Infrastructre, Housing and Urban Development owed contractors KES 25.3 billion (USD 253 million) in outstanding payments for projects that had yet to be completed, as well as for those which had been certified as complete as at 31st December, 2013. Moreover, private road contractors were owed an estimated KES 88.3 billion (USD 883 million) for commitments yet to be billed and certified as at 31st December, 2013. This necessitated government initiatives to plug the funding gap, and key amongst these initiatives was the Road Annuity Programme (**RAP**)

The Road Annuity Programme: Objectives and Expected Outcomes

In June 2014, President Uhuru Kenyatta launched RAP, which was subsequently approved by the Cabinet on 10th March, 2015. Pursuant to RAP, the Government shall:

(a) identify a maximum of 10,000 kilometre (**km**) priority roads distributed across the country;
(b) procure long term contracts for design, finance, construction and maintenance of identified roads under a public private partnership arrangement within the meaning of the Public Private Partnership Act, 2013 (**the PPP Act**), with payments linked to the completion of roads and performance based maintenance; and
(c) pay for the services delivered by the private contractors through the normal budget process.

The Roads Annuity Fund (**the Fund**) was established under the Public Finance Management (Roads Annuity Fund) Regulations, 2015 (**the Annuity Regulations**). The Fund was established for the purposes of providing capital to meet the national Government's annuity payment obligations for the development and maintenance of roads under RAP. The Annuity Regulations provide that withdrawals from the Fund shall only be made for the purpose of payment of approved annuity payment obligations and operational expenditures.

RAP aims to transform the country into a low-cost investment and trading destination and bring Kenya closer to the realisation of Vision 2030 and attainment of middle income economy status. RAP also aspires to build the capacity of local firms with a view to enabling them to take up the development of all infrastructure projects in the country and to generate adequate employment opportunities for graduates, amid high unemployment rates among the growing youth population.

Additionally, the new road network will promote national integration and improve security as a result of connectivity of regions and communities. It is reported that in urban areas such as Nairobi, RAP is expected to reduce pollution and traffic jams, which are estimated to cost KES 57.8 million (USD 578,000) per day in lost productivity. RAP will also create more arteries in and out of cities thus decongesting traffic and reducing travel time.

The Government's initial plan was to complete 2,000 km of small roads within the 2014/2015 financial year, followed by 3,000 km in 2015/2016 made up of 80% small roads and 20% highways and 5,000 km in 2016/2017. Once completed, RAP would have nearly doubled the number of Kenya's asphalt surface roads from the current 14,000 km, equivalent to 8.8% of the 161,451 km of classified roads, to 24,000 km.

However, RAP almost collapsed in late 2015 amid concerns of inflated construction costs, with contractors quoting twice more than the Government's budget for building a km of road. The Government had expected to spend about KES 25 million (USD 250,000) for every km of rural roads and between KES 50 million to KES 80 million (USD 500,000 to USD 800,000) for each km of urban and trunk roads.

Significantly, lenders also differed with the Government on the rate of interest to be charged on loans issued to shortlisted contractors amid a volatile forex environment, soaring lending rates, rising inflation and a high risk of default among borrowers. The Government had proposed a uniform rate of 12% to 13%, which commercial banks rejected arguing that contractors were borrowers like any other and would therefore be assessed based on their respective risk profiles. (Previously , the prevailing commercial bank interest rate was on average approximately 20% but is now capped at 4% above the Central Bank of Kenya's base rate). The stalemate on the interest rates applicable led to widespread perception that the RAP had collapsed.

However, in April 2016, the National Treasury Cabinet Secretary, Henry Rotich, clarified that contrary to earlier statements, RAP had not reached a dead end. Around the same time, it was reported that the Government had negotiated a KES 150 billion (USD 1.5 billion) concessionary loan from the World Bank's private wing, the International Finance Corporation (**IFC**), to revamp RAP by enabling local contractors to access funds at affordable interest rates. These funds would be disbursed by local banks at interest rates of between 5% and 6%.

The Annuity Road Financing Model (**ARFM**) represents a major shift from the traditional road development financing models such as the Engineering, Procurement and Construction (**EPC**) model the Build, Operate and Transfer (**BOT**)-Toll model. Under the EPC model, which had traditionally been used in Kenya, the Government would invite bids for engineering knowledge from private players and meet all procurement costs. The private sector's participation was therefore limited to the provision of engineering expertise while the Government bore the whole risk of the project.

In the BOT-Toll model, the developer has to construct and maintain the road and thereafter recover the construction costs by collecting toll proceeds. There is, however, an additional traffic risk that the developer has to bear.

The Annuity Road Financing Model Explained

The ARFM was introduced in Kenya to help the road sector overcome its financing constraints while ensuring faster turnaround in execution of road construction. The Government is using this model for roads that may not be viable for conventional tolling which is more suitable for heavy traffic roads whose users can generate sufficient revenue to offset construction and maintenance costs. According to the Kenya Private Sector Alliance, the model has been tried in road construction in other countries with success and Kenya will be the first African country to use this model.

Under the ARFM, contractors will design, finance and construct the roads within a stipulated time not exceeding three (3) years and guarantee construction quality. The successful bidders will be required to raise at least 70% of the total cost of a project, before they are awarded a contract. Contractors will also maintain the roads post-construction for a maximum of eight (8) years, based on fixed annual payments by the Government, which will be extended after construction. The role of the Government will involve negotiating loans with banks based on a payment modality to be agreed upon by the Government, the contractor and the bank, giving guarantees to local banks in the form of letters of comfort and certifying the works upon completion. The Government, which would have provided 30% of the funds, will then repay the loans at a uniform rate in equal instalments (annuity) over an agreed period from the time a given road is completed.

The Various Regulators

RAP will be implemented by the Ministry of Transport and Infrastructure, Housing and Urban Development through the Kenya National Highways Authority, Kenya Rural Roads Authority and Kenya Urban Roads Authority.

The Road Annuity Programme aims to transform the country into a low-cost investment and trading destination and bring Kenya closer to realisation of the Vision 2030 and attainment of middle income economy status.

It is hoped that RAP will benefit from a new dispensation and strengthened institutions. Case in point, the Engineer's Act, 2011 established the Engineers Board of Kenya (**EBK**) which is mandated to register engineers to ensure that they carry out their duties in accordance with the EBK's Code of Conduct. In addition, the National Construction Authority is responsible for regulating the construction industry and ensuring contractors provide quality services. Both these bodies can caution, censure, suspend or remove registered persons from the register.

The Public Private Partnership Committee established under the PPP Act is mandated to, among other things, ensure each project agreement is consistent with the provisions of the PPP Act. The Public Private Partnerships Node also established under the PPP Act is mandated to, among other things, identify, screen and prioritise projects, based on guidelines issued by the Public Private Partnerships Committee.

The Indian Perspective

The National Highways Authority of India recently launched a new financing model, which is a mix between the ARFM and the EPC Model. Under this hybrid annuity model, the government contributes 40% of the project cost in the first five (5) years through annual payments (annuity). The remaining 60% is paid as a variable annuity amount based on the value of the assets created and the performance of the developer. This means that during the construction stage, the developer has to raise the remaining 60% in the form of equity or loans. Under this model, revenue collection is the responsibility of the National Highways Authority of India. The National Highways Authority of India will collect toll and refund the developer in equal instalments over a ten (10) to twenty (20) year period. The Indian Government's policy is that this model will only be used in stalled projects where other models are not applicable.

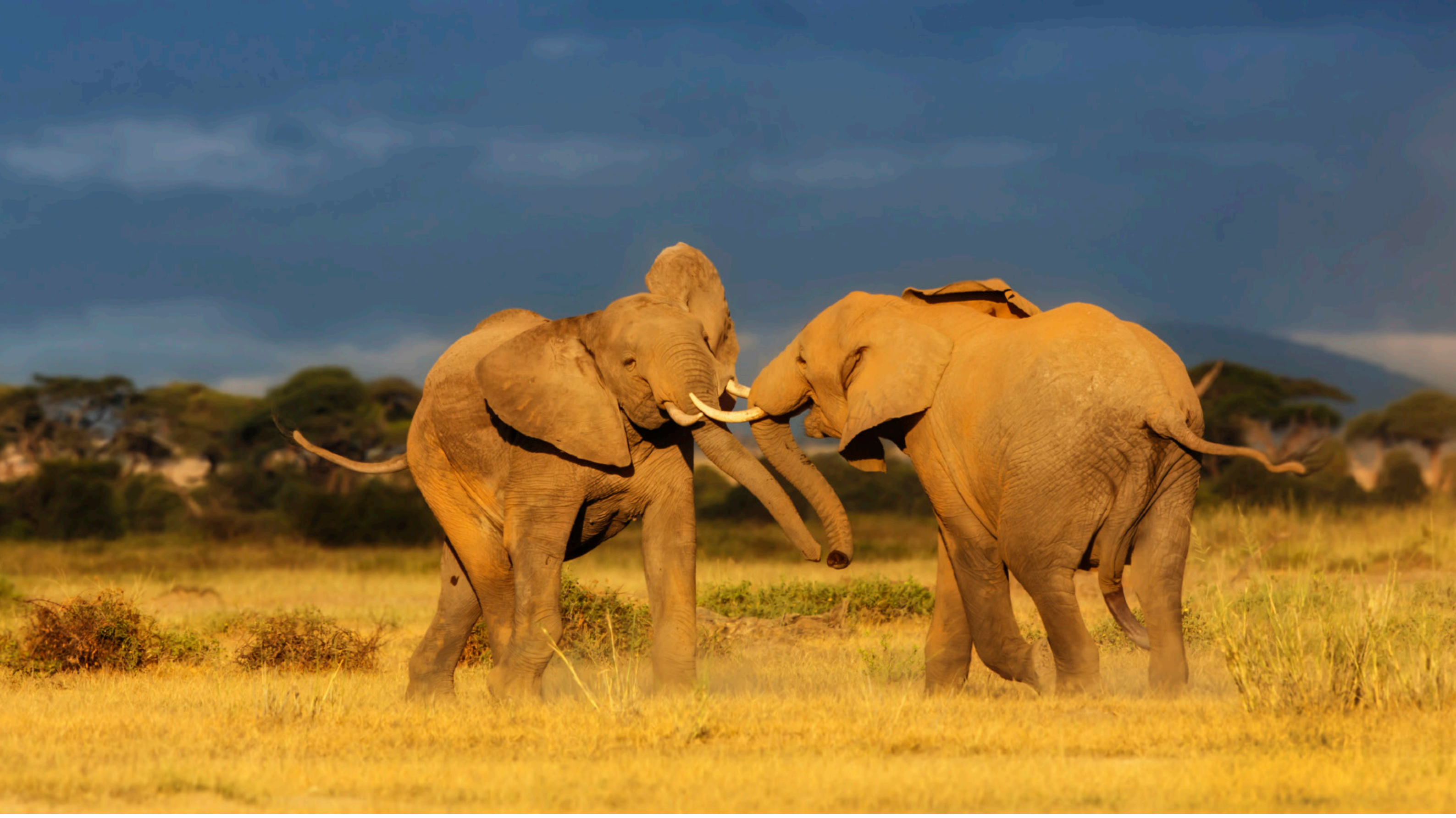
Benefits of the Annuity Road Financing Model

Notably, under RAP, the contractor has the assurance that payment for work done will be made on time in contrast with past experiences of non-payment. The Annuity Regulations provide that the contracting authority shall process and submit a request for payment to the officer administering the Fund within ten (10) days of receipt and that the officer shall settle applications for payment within twenty one (21) days of receipt. The ARFM also gives the Government the opportunity to offload the risk associated with construction of roads to the consortiums which will help reduce the cost of building and maintaining roads.

Paying contractors for roads built and certified as complete will also help eliminate poor workmanship. The Annuity Regulations provide that a contracting authority shall only request for payments from the Fund once an independent engineer has certified that the contractor has met all obligations for which payment is claimed under the project agreement.

Conclusion

There is no doubt that once fully implemented, RAP will improve access to markets and facilitate the uplifting of the socio-economic condition of the entire nation due to increased connectivity across the country. RAP will also help build local capacity, facilitate job creation, improve national integration, boost trade, economic growth and security. In that sense, the RAP addresses a number of the socio-economic development patterns envisioned under the new Constitution and under Vision 2030.

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THE ALTERNATIVE

KENYA'S NEW COURT-ANNEXED MEDIATION APPROACH

In April 2016, the Judiciary of Kenya introduced the pilot project for Court mandated mediation in the Family and Commercial Divisions of the High Court in Nairobi and thereafter the project is expected to be rolled out nationwide. Through this project, the Judiciary aims to reduce the backlog of cases filed in Court and to cut down on the time taken to settle disputes. The project has been hailed as a progressive and innovative manner of dispute resolution following many years of lobbying by the business community for better service delivery by the Commercial Division of the High Court and the outcry of other Court users on delayed justice.

What is mediation?

Mediation is a form of alternative dispute resolution (**ADR**) which is informal and non-adversarial where an impartial mediator encourages and facilitates the resolution of a dispute between two (2) or more parties, but does not include attempts made by a Judge to settle a dispute within the course of judicial proceedings. The role of the mediator is to facilitate the parties to arrive at a mutual agreement by neither applying nor interpreting the law. The mediator ought to listen to the evidence, help the parties come to understand each other's viewpoint regarding the controversy and then facilitate the negotiation of a voluntary resolution to the case. The advantages of mediation are that it is a less expensive and quicker way of resolving disputes as compared to the Court process.

Nearly any type of case can be mediated, but the best cases are those in which the parties are likely to reach a settlement agreement due to a significant prior relationship or when the parties have an interest in continuing a relationship in the future. When settlement is at least a remote possibility, mediation can bring the parties together. Common types of suits that end in mediation include contractual disputes, injury and tort cases, wrongful termination claims and family matters. Cases that are not appropriate for mediation are those of a criminal nature, bankruptcy and any other cases being prosecuted by the Government.

The role of ADR mechanisms in Kenya is anchored by Article 159 (2) (c) of the Constitution of Kenya, 2010, which provides that Courts and Tribunals in exercising judicial authority should be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms should be promoted. Further to this, the Civil Procedure Act, Cap. 21 of the Laws of Kenya (**Civil Procedure Act**) provides for mediation of cases as an aid to streamlining the Court process. In effecting the provisions of Section 59B of the Civil Procedure Act, 2010 on reference of cases to mediation, the Honourable Chief Justice Dr. Willy Mutunga (now retired) gazetted the Mediation (Pilot Project) Rules, 2015 on 9th October, 2015.

Process of Court-annexed mediation

i) Referral to mediation

From 4th April 2016, all cases filed at the Family and Commercial Divisions at the Milimani Law Courts in Nairobi are being subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable are referred to mediation in a pilot project. Cases that were filed prior to the commencement of the pilot project may be screened and referred to mediation and further before a case is set down for hearing the Court may refer it for mediation. Where a case is referred to mediation, the Mediation Deputy Registrar shall notify the parties within seven (7) days of completion of screening that the case has been referred to mediation. Parties shall within seven (7) days of receipt of the notification file a case summary in a prescribed form. A case summary provides a brief summary of the case, issues in dispute that remain unresolved and an address of service.

ii) Appointment of mediator

The mediation shall be conducted by a person registered as a mediator by the Mediation Accreditation Committee, an independent body established under the Civil Procedure Act. The Mediation Deputy Registrar will nominate three (3) qualified mediators from the Register of Mediators maintained by the Mediation Accreditation Committee and notify the parties of the names.

Within seven (7) days of being notified, parties shall state their preference in order of priority in writing to the Mediation Deputy Registrar who shall within seven (7) days of the respective parties' notice appoint a mediator giving due consideration to the parties' preference. Parties may also by consent select any other mediator from the Register of Mediators within seven (7) days of being notified by the Mediation Deputy Registrar of the names of the three (3) nominated mediators. Parties shall not pay the mediators under this pilot project.

iii) Duration of mediation

Mediation proceedings shall take place and be concluded within sixty (60) days from the date of referral to mediation provided that the time may be extended for a further period not exceeding ten (10) days by the Mediation Deputy Registrar having regard to the number of parties or complexity of issues or written consent of the parties.

iv) Commencement of mediation

The appointed mediator shall schedule a date for initial mediation session and notify the parties at least seven (7) days before that date, of the date, time and place of the mediation session. The notice shall also advise parties that the mediation is mandatory. At the commencement of the mediation session, the mediator shall read and explain to the parties the rules of engagement in the prescribed Form 5 and shall require the parties to sign the form.

In summary, the rules of engagement are: the mediator shall serve as a neutral party and will not act as an advocate for any party; the mediation is strictly confidential; no party is bound by anything said or done in mediation except under the settlement reached; the settlement shall be reduced in writing and once signed shall be binding upon all parties to the agreement; each party shall agree not to request the mediator to testify against the other party regarding statements made in mediation.

Parties are required to attend the mediation sessions and may be accompanied by an advocate or a representative. Where the party is a corporation, partnership, government agency or entity other than an individual, an officer duly authorised to represent and bind the party shall attend. The mediator may adjourn a session where a party fails to attend and reschedule the session on notice.

Common types of suits that end in mediation include contractual disputes, injury and tort cases, wrongful termination claims and family matters.

v) Non-compliance

If a party fails to comply with any of the mediator's directions or consistently fails to attend mediation sessions, the mediator shall file a certificate of non-compliance and refer the matter back to Court, based on which the Court may:-

- Order that the parties attend further mediation sessions on such terms as the Court considers appropriate
- Strike out pleadings of the non-complying party
- Order that the defaulting party pay costs
- Make any other orders as the Court deems fit

vi) Confidentiality of the mediation process

All communication during mediation including the mediator's notes shall be deemed to be confidential and shall not be admissible in evidence in any current or subsequent litigation or proceedings. Information obtained orally or in writing from or about the parties in the mediation shall be treated as confidential except as required by law to disclose, relates to child abuse, child neglect, defilement, domestic violence or relates to criminal or illegal purposes.

Neither the mediator nor any person present or appearing at the mediation session may be required to testify or produce records relating to the mediation in any proceedings in Court. No electronic device may be used to record the mediation sessions.

vii) Conclusion of mediation

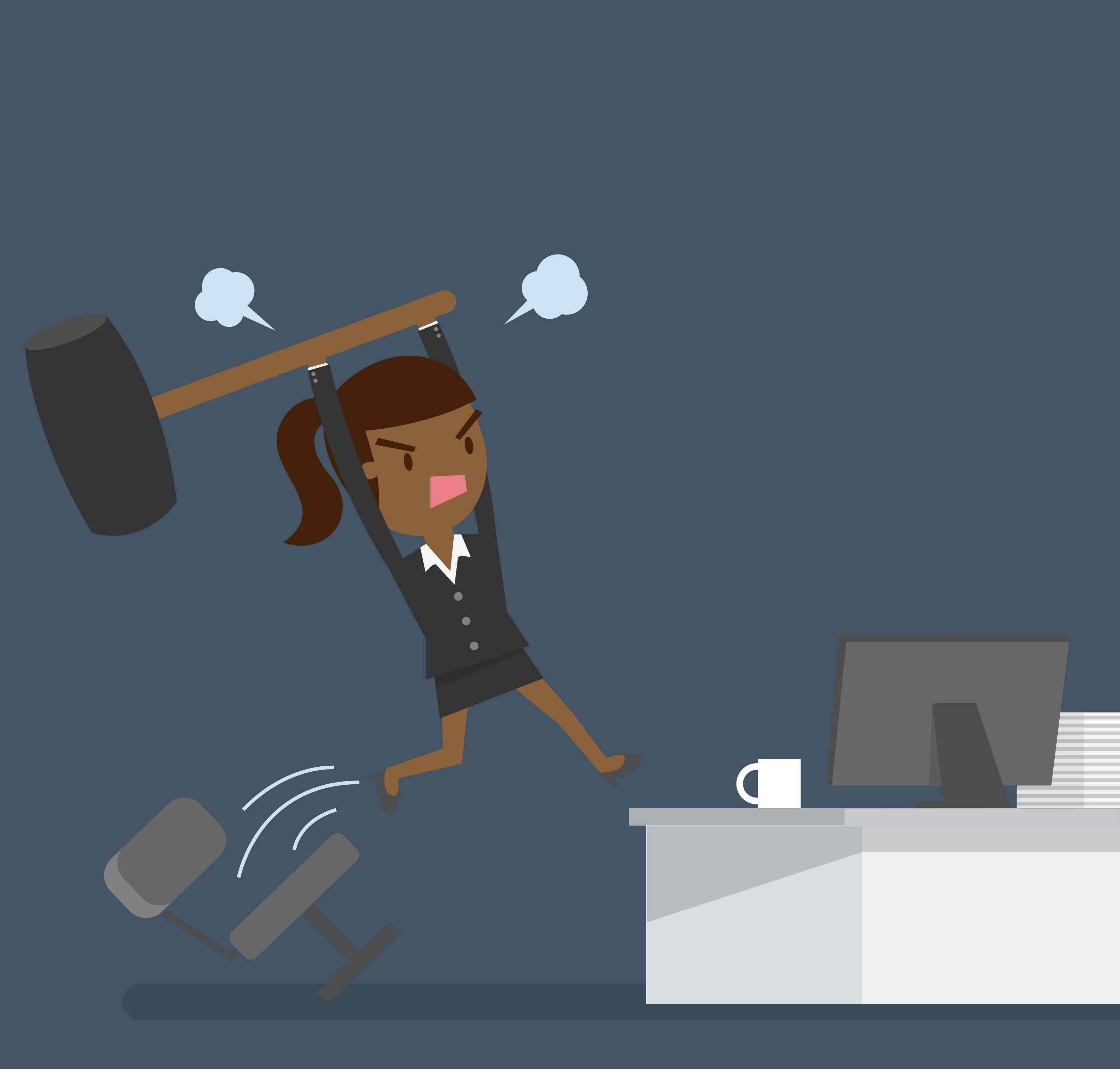
Within ten (10) days of conclusion of the mediation, the mediator shall file a mediation report with the Mediation Deputy Registrar and provide each party with a copy of the report.

If an agreement is reached each party shall sign the mediation agreement and it shall be filed within ten (10) days of the conclusion of the mediation with the Mediation Deputy Registrar. The agreement shall be adopted by the Court and shall be enforceable as a judgment or Court order. No appeal shall lie against the judgment or order of the Court arising from mediation.

If no agreement is reached, the mediator will notify the Mediation Deputy Registrar after which the case will proceed in Court in the normal manner. The Court may at any stage of the Court proceedings, make an order requiring the parties to participate in additional mediation.

"Verdict"

The introduction of the Mediation Pilot Project is no doubt a positive step towards giving effect to the provisions of Article 159 (2) (c) of the Constitution which obligates Courts and Tribunals to promote alternative forms of dispute resolution, including mediation. However, the success of the Pilot Project in achieving its intention of reducing the backlog of cases and facilitating the expeditious and cost effective resolution of disputes remains to be seen. A lot hinges on the goodwill of the parties in having the dispute resolved through mediation, as well as the skill of the appointed mediator in playing King Solomon's role of unlocking the dispute.



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CASTING THE NET WIDE

MALICIOUS PROSECUTION BEYOND CRIMINAL CASES

Frivolous law suits are a bane of the Court system. They clog the courts, divert resources and impose financial and other burdens (stress, time, injury to reputation) on their victims. While summary procedures for termination of cases are in place, by the time they kick in, the costs (both financial and non-financial) incurred by parties have taken their toll. Consistent with the law's promise of there being no wrong without a remedy, there are various forms of relief which are available to a party aggrieved by a frivolous law suit. A claim for malicious prosecution is one such relief. In the context of civil proceedings, it has long been recognised that an action may be instituted for abuse of process but is rarely used. There is also malicious prosecution which though commonly assumed to be restricted to criminal proceedings, has always been available to a limited class of civil cases as well.

A remedy for baseless litigation

The case of *Stephen Gachau Githaiga & Another v Attorney General (2015) eKLR* gives an apt illustration of the common approach to malicious prosecution claims. The Court defined malicious prosecution as an action for damages brought by one against whom a civil suit or criminal proceedings have been unsuccessfully commenced without probable cause and for a purpose other than that of bringing the alleged offender to justice. An action for malicious prosecution is a remedy for baseless and malicious litigation. It may be brought in response to any baseless and malicious litigation or prosecution whether criminal or civil. However, the test for a suit for malicious prosecution seems cast in an unsuccessful criminal prosecution framework featuring requirements such as that the Defendant must have set the prosecution in motion; it was terminated in the Plaintiff's favour; and that there was no probable cause to initiate the proceedings which were lodged with improper motives unrelated to securing a just criminal conviction.

Willers v Joyce

Recently in the case of *Willers v Joyce (2016) UKSC 43 & 44*, the United Kingdom Supreme Court was called upon to decide whether the tort of malicious prosecution includes the prosecution of civil proceedings, in the course of which they had to reconcile the conflicting decisions of the House of Lords (which was of the view that with limited exceptions, malicious prosecution is limited to criminal prosecutions) and the Privy Council (which by a narrow majority was of the view that malicious prosecution covers both criminal prosecution and civil litigation). The case also served as an interesting point of precedent under the English Court hierarchy.

The facts of the case are somewhat convoluted but it is sufficient to note that the Plaintiff instituted a suit for malicious prosecution against the Defendant who it was claimed had instituted a dishonest civil claim against him without any factual basis and which was discontinued before trial. The Defendant successfully applied to have the suit struck out on the basis that the tort of malicious prosecution did not extend to ordinary civil actions with the Court following a House of Lords precedent.

The Plaintiff appealed directly to the Supreme Court and prevailed with a narrow majority five to four (5:4), holding both as a matter of principle that a party injured by a baseless law suit should have a remedy and precedent (which admittedly did not speak as one) which did not forbid such extension and indeed invited it.

Majority Decision

Delivering the leading Judgment on behalf of the majority, Lord Toulson invoked the much vaunted common law combination of principle and pragmatism which would be promoted by such an extension. The Judge considered and dismissed various counterarguments pressed to the Court which included deterrence, finality, duplication of remedies, inconsistency with witness immunity from civil liability, inconsistency with the absence of a duty of care by a litigant towards the opposing party, that the tort should be confined to those exercising the coercive powers of the state, reciprocity, uncertainty as to malice and excessive costs.

Lord Clarke agreed with Lord Toulson and highlighted the incongruity between allowing claims for malicious prosecution in criminal cases while denying them in civil cases despite the similarity in the ingredients of the claim as well as the compensation for injury caused.

Consistent with the law's promise of there being no wrong without a remedy, there are various forms of relief which are available to a party aggrieved by a frivolous law suit. A claim for malicious prosecution is one such relief.

Ultimately, Lord Clarke captured an essential moral dilemma that seems to have driven the majority - why should those who file baseless civil law suits get away with it. In the Judge's own words:-

> *"It is about time that people should not be allowed to reap from bringing malicious suits against others and as malicious suits tend to drag the reputation of the affected person in mud as well as cause them to incur expenses, it is only fair that they be allowed to bring actions for malicious prosecution for civil actions brought without a probable cause."*

Minority View

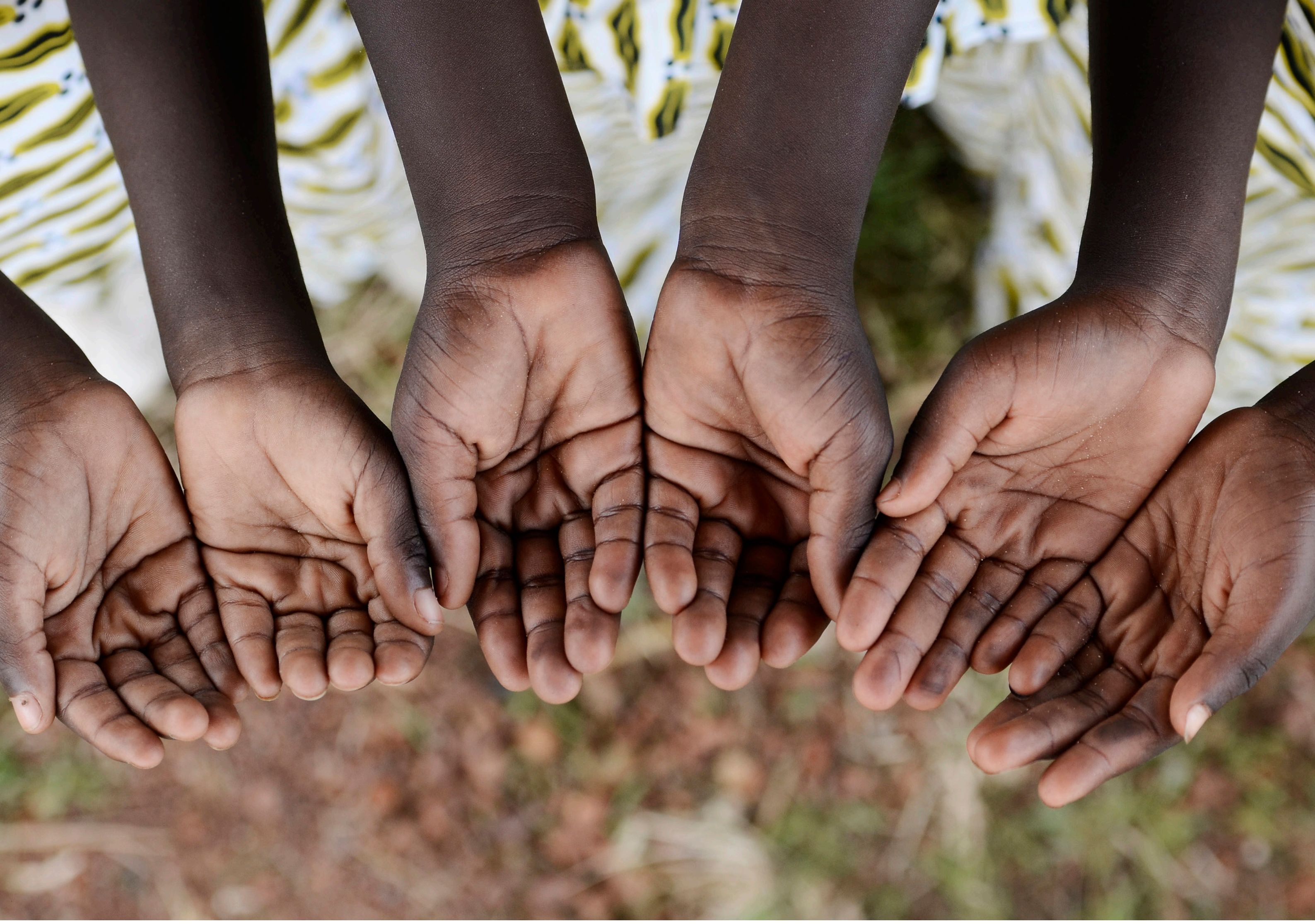
It is impossible on this page to do full justice to the minority Judgments, but essentially the minority fundamentally disagreed that the tort of malicious prosecution, which they considered anachronistic, was available in civil cases. Lord Mance was as dismissive as he was categorical in his decision. Departing with the majority, Lord Mance found nothing in the authorities that supported the application of the tort of malicious prosecution to civil claims.

As a matter of policy, Lord Mance was completely unimpressed by the alleged incongruity between allowing the claim in baseless criminal prosecutions and disallowing it in civil claims for it was really a means of cabining the abuse of private criminal prosecutions which are extinct in England. Such extension was not only unwarranted but treading without any guidance to "unchartered territory." The Judge was also disturbed by the lack of specification of the damages recoverable.

Lords Neuberger and Sumption delivered equally powerful dissents and refused to retreat from their earlier dissents in Privy Council cases. Lord Reed agreed with Lords Mance and Neuberger and gave a short Judgment making three points of which the last bears emphasis where the Judge cautions that the development of the common law should not be taken without careful consideration of the implications. To quote Lord Reed:

> *"Thirdly, major steps in the development of the common law should not be taken without careful consideration of the implications, however much sympathy one may feel for the particular claimant. The confusion resulting from the development of the law in order to afford justice to the victims of mesothelioma, in Fairchild v Glenhaven Funeral Services Ltd [2002] UKHL 22; [2003] 1 AC 32, should have taught us that lesson. In the present case, the basic problem facing the appellant, so far as his claim is based on damage to his reputation caused by allegations made against him in earlier civil proceedings, is the absolute privilege accorded by the modern law of defamation. The solution favoured by the majority results in the circumvention of that problem by the creation or extension of another tort. The question where that leaves the law of defamation, and the other issues identified by Lord Mance, appear to me to require fuller consideration than they have received. Sooner or later, this court will have to address them."*

The late Lord Denning was renowned for his self-serving Manichean view of the world, dividing Judges into bold ones like him and timorous one who stood in the way of progress. The truth was always more nuanced and complicated than that and the case of *Willers v Joyce* illustrates this all too well.



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OUT WITH THE OLD, IN WITH THE NEW

THE PUBLIC BENEFIT ORGANIZATIONS ACT, 2013

9th September, 2016 marked the long-awaited commencement of the Public Benefit Organizations Act, 2013 (**the PBO Act**), which was assented to on 14th January, 2013. The PBO Act repeals the Non-Governmental Organizations Co-ordination Act, 1990, (**the NGO Act**), and is implemented in its current form, despite spirited attempts to amend some of its provisions, prior to its commencement. Indeed, at the time of writing this Article a case has been filed in the High Court challenging the coming into force of the PBO Act.

Public Benefit Organizations

The term Non-Governmental Organization (**NGO**) used to refer to entities governed by the NGO Act and registered by the NGO Co-ordination Board. It was defined in Section 2 of the NGO Act, as a private voluntary grouping of individuals, not operated for profit or for other commercial purposes, but which have organized themselves nationally or internationally for the benefit of the public at large and for the promotion of social welfare, development charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry and the supply of amenities and services.

The PBO Act defines "public benefit organization" (**PBO**) in Section 5(1) as a voluntary membership or non-membership grouping of individuals or organizations, which is autonomous, non-partisan making, non-profit making and which is (i) organised and operated locally, nationally or internationally, (ii) engages in public benefit activities in any of the areas set out in the Sixth Schedule, and (iii) registered as such by the Authority. Membership PBOs are those that recruit members while non-membership PBOs only have a Board and a Secretariat.

"Public benefit activity" is defined in Section 2, as an activity that supports or promotes public benefit by enhancing or promoting economic, environmental, social or cultural development or protecting the environment or lobbying or advocating on issues of general public interest or the interest or well-being of the general public or a category of individuals or organizations.Pursuant to Section 7 of the PBO Act, the Public Benefit Organizations Regulatory Authority (**the Authority**) has the authority to bestow PBO status on organizations that are registered under the Act. So inclusive is the new Act that it also confers on the regulator the authority to bestow PBO status on organizations that are not registered under any other written law in Kenya, including arguably, international organizations already working in Kenya before the commencement date of the new law.

While trade unions, public bodies, religious organizations, societies, co-operative societies, saccos, micro-finance institutions and community based organizations whose objectives include the direct benefit of its members are not considered PBOs, it is important to note that where such entities apply for registration under the PBO Act and are granted a certificate of registration, their previous registration under any other written law is immediately deemed invalid.

The objectives that can be pursued by a PBO are listed under the Sixth Schedule of the PBO Act and include legal aid, agriculture, children, culture, disability, energy, education, environment and conservation, gender, governance, poverty eradication, health, housing and settlement, human rights, HIV/AIDS, information, informal sector, old age, peace building, population and reproductive health, refugees, disaster prevention, relief, pastoralism and marginalized communities, sports, water and sanitation, animal welfare and the youth.

Registration

The NGO Act contained vague grounds for denial of registration and the Government had discretion in setting terms and conditions on NGO registration. In addition, there was no fixed time period for the review of applications and the NGO Board was not legally required to provide reasons for its refusal to register an organization.

Sections 6 to 13 of the PBO Act now provide clear and unambiguous guidelines for registration of PBOs. In particular, Section 8 outlines the documents and information that must accompany an application for registration, including a copy of the PBO's constitution, names and addresses of its founders, the public benefit purpose for which the PBO is organized, the postal and physical address of the PBO's principal place of business and the prescribed fee.

The PBO Act provides that the Authority may refuse to register an organization as a PBO if the application does not comply with the requirements of the Act, the objectives of the proposed PBO contravene any written law, the applicant committed a serious violation of the Act or has given false or misleading information, or if the name of the proposed PBO resembles that of another entity.

Section 8(4) of the PBO Act deals exclusively with the constitution of a PBO and sets out what it must provide, including a statement to the effect that the organization's membership shall be voluntary and that its income and property shall not be distributable to any person except as reimbursement for reasonable expenses or payment of reasonable compensation for services rendered.

The Constitution must also make provision for the organization to be a body corporate with an identity and existence distinct from its members or governing body and must provide for a governing body consisting of not less than five (5) persons, three (3) of whom shall not be related to each other. The advantage of being a corporate body is that no member of the PBO's governing body can be held personally liable for any act done in good faith, on behalf of the organization or by virtue of the office held in the governing body. However, where the liability is incurred outside the duties of the individual as a member of the governing body, the member would be held personally liable to the extent of such liability.

The PBO Act also provides specific timelines for processing of applications for registration. Section 9 states that the Authority shall

The Act stresses organisational integrity and internal self-regulation, and encourages Public Benefits Organizations to maintain high standards of governance and management.

consider applications and register an organization as a PBO within sixty (60) days after receiving the application. Where the Authority is not satisfied that the application complies with the requirements for registration, the Authority shall immediately notify the applicant, giving reasons, and provide the applicant up to thirty (30) days to comply.

If the applicant complies within the notice period, the Authority shall register the organization within fourteen (14) days from receipt of the requested requirements. However, the Act goes on to provide that if the applicant fails to satisfy the requirements after being given an opportunity to comply, the Authority shall refuse to register the organization concerned and shall notify the applicant of its refusal within the number of days remaining in the original period of sixty (60) days.

In the event that the Authority fails to make a decision or to communicate such decision to the applicant within sixty (60) days, the applicant may apply to the Public Benefit Organization Disputes Tribunal (**the Tribunal**) established under Section 50 of the PBO Act, for an order requiring the Authority to issue a certificate of registration or to advise the applicant of its refusal with reasons. An applicant aggrieved by the decision of the Authority can also appeal to the Authority for review of its decision within thirty (30) days from the date the impugned decision is received.

Upon being registered by the Authority, the PBO is issued with a certificate of registration, which is conclusive proof that the organization has authority to operate throughout Kenya as specified in its constitution or in its certificate of registration.

With the repeal of the NGO Act and pursuant to Section 5 of the Fifth Schedule of the PBO Act, every NGO registered under the repealed Act on the commencement date is deemed to be registered as a PBO under the PBO Act and shall have up to one (1) year from the commencement date to confirm its status as such through formal registration under the new Act. In the event that an NGO fails to apply for registration within the grace period, it shall cease to have PBO status thirty (30) days after the expiry of the regulatory notice requiring it to do so. This provision is likely to have a far-reaching effect in the near future and may prompt some organizations to adopt other organizational forms to pursue their objectives.

Regulatory Oversight

The Authority is established under Section 34 of the PBO Act and takes over the roles and powers of the NGO Coordination Board. It is a body corporate with perpetual succession and its functions include registering and deregistering PBOs, maintaining a register of registered PBOs and advising the government on the activities of PBOs and their role in development within Kenya. Section 43 of the PBO Act expressly provides that the Authority shall be independent in the performance of its functions and shall not act under the direction or control of any person.

Section 42 (1) (h) provides that the Authority may institute inquiries to establish whether the activities of PBOs comply with the Act. The Authority can also require any officials of the organization to provide the Authority with an inventory and the whereabouts of assets of the PBO.

The Authority has the power to cancel or suspend a certificate of registration, but this is limited to specific instances, for example, where the PBO has committed a violation of the Act or is carrying out its activities in a manner that is contrary to its constitution. The PBO Act also requires the Authority to notify the organization within twenty-one (21) days if its certificate of registration is suspended or cancelled. While cancellation terminates all of the PBO's benefits, it does not terminate its obligations.

Self-Regulation

The Act stresses organizational integrity and internal self-regulation, and encourages PBOs to maintain high standards of governance and management. In particular, PBOs are required to apply the principles of transparency and accountability to all their affairs and activities, whether with the Government, their beneficiaries, donors, other PBOs or other stakeholders. In furtherance of these objectives, the Act requires PBOs to submit annual reports to the Authority within six (6) months after the end of each financial year and that their activities be open and accessible to scrutiny by their stakeholders.

The Act provides further that the governing body of the PBO must be distinct and separate from the administrative and day-to-day management body of the organization and that every person who serves on the governing body of a PBO must serve on a voluntary basis. The governing body is tasked with establishing clear and unambiguous guidelines relating to the operations of the organization. In our view, this governance structure greatly enhances transparency in the operations of the PBO.

In addition, the PBO Act establishes the National Federation of Public Benefit Organizations (**the National Federation**). This is the umbrella organization for all PBOs registered under the Act and the self-regulation forums recognized by the Authority. The National Federation replaces the Non-Governmental Organizations Council and its main objectives are to provide leadership on matters of interest to the sector for the promotion of the sector generally and enhancement of self-regulation. Every registered PBO is eligible for membership in the National Federation.

Dispute Resolution

The Tribunal is established under Section 50 of the PBO Act and has jurisdiction to hear disputes between members of the National Federation, between Members and between the National Federation and the Authority. The Tribunal is also empowered to hear and determine complaints arising out of a breach of the provisions of the Act and appeals made to it, pursuant to the Act.

The Tribunal's jurisdiction does not, however, extend to criminal matters except contempt of court, disobedience of summons to appear before the Tribunal and refusal or failure to answer or produce records of accounts.

It should also be noted that the Tribunal's decisions are final and binding on the parties except where judicial review is commenced within fourteen (14) days of the Tribunal's decision. Appeals from the Tribunal may be preferred to the High Court and the High Court's decision on the matter is final.

International Non-Governmental Organizations

An international NGO can register as a PBO under the PBO Act by submitting an application form with proof that it is a legal entity in another country and by providing its address in Kenya and a written statement from a representative of its headquarters, stating the purposes of the NGO, a general description of the activities it is planning to carry out in Kenya and the name and contact details of its authorized agent in Kenya. However, the international organization must have at least one third of its directors as Kenyan citizens resident in Kenya and having an office in Kenya.

The Authority may also exempt an organization registered outside the country from registration, particularly where the international organization does not intend to engage in direct implementation of any activity, program or fundraising activities in Kenya.

Conclusion

For many decades, local and international NGOs have played a prominent role in shaping the country and it can generally be said that the legal environment in Kenya has been reasonably supportive. However, there were many concerns that efforts needed to be made to encourage accountability and transparency within the sector, for NGOs to effectively partner with the Government and other stakeholders.

These concerns led to the enactment of the PBO Act, an interesting piece of legislation that is aligned to the Constitution of Kenya, 2010 and also goes a long way in striking a balance between enablement and regulation in the civil society sector. More importantly, the Act imposes an obligation on the Government to respect freedom of association and assembly and to provide an enabling environment in which PBOs can be established and perform their functions. The Government is also enjoined to involve PBOs in policy decision making on issues affecting them, particularly at the local level.

The rules and regulations that will guide the implementation of the Act are still under review and once finalized, will make further provision for the registration, management and operation of PBOs.

It is noteworthy that NGOs in Kenya do not have to be registered under the PBO Act. There are in fact a number of other organizational forms to choose from which are not restricted to public benefit purposes, including companies limited by guarantee under the Companies Act, 2015, trusts under the Trustees (Perpetual Succession) Act, (Cap. 164) Laws of Kenya, societies under the Societies Act, (Cap. 108) Laws of Kenya, co-operative societies under the Co-operative Societies Act, (Cap. 490) Laws of Kenya and grassroots organizations such as *harambee* (self-help groups) and community-based organizations.

Nevertheless, PBO status may be the preferred option, in view of the associated benefits, including indirect government support in the form of various tax exemptions and preferential treatment.

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DAWN RAIDS

THE COMPETITION AUTHORITY OF KENYA'S POWER OF ENTRY AND SEARCH

"Dawn raids" are unannounced inspection exercises carried out by competition authorities for purposes of obtaining information or documents relating to a person or entity suspected of anti-competitive conduct or breach of any provisions of the law relating to Competition. Dawn raids form an essential part of a competition authority's investigatory powers, and no doubt the "surprise" element is seen as key to the success of the inspection exercise.

Statutory Underpinning

In Kenya, dawn raids are provided for under Section 32 of the Competition Act, 2010 (**the Act**). The said section provides that a person or persons authorised in writing by the Competition Authority of Kenya (**the Authority**) may enter any premises in the occupation or under the control of a trader, manufacturer, producer, commission agent, clearing and forwarding agent or transporter and inspect the same and any goods, documents and records situated thereon.

The authorised person must inform the person present or in charge of the intention to conduct an inspection. The authorised person is allowed to use any computer system found on the premises or to require assistance from any person present to search for any data contained therein. The authorised person may also reproduce any record from that data, seize any output from that computer for examination and copying, attach, and if necessary (subject to the issuance of a receipt to that effect), remove from the premises anything that has a bearing on the investigation for examination and safekeeping. The Authority may, in the course of carrying out the inspection, seek the assistance of police officers and other law enforcement agencies.

The Mea Limited Case

On 7th March this year, the Authority conducted a dawn raid at two (2) fertiliser firms, Mea Limited (**Mea**) and Yara East Africa Limited (**Yara**), which reportedly control about 60% of the fertiliser market in

Kenya. The Authority, suspecting that price collusion was taking place between the two firms, went in search of information and documents, including board reports, presentations, pricing data and circulars, in a bid to establish whether there was any contravention of the Act by these two (2) firms in terms of anti-competitive conduct. Prior to the raid, the Authority had obtained a Court Order allowing it to carry out the search.

Aggrieved by the raid, Mea filed a Constitutional Petition in the High Court, *Mea Limited v Competition Authority of Kenya & Another (2016) eKLR* (**the Mea Limited Case**), in which Mea sought, amongst other things, conservatory orders to stop all investigations and/or further proceedings against it. Mea also sought to restrain the Authority from destroying, sharing, disclosing or distributing the documents and information obtained during the raid.

In support of its case, Mea argued that it was never notified that it was under investigation and that it was entitled to notice prior to the investigation being commenced in accordance with Article 47 of the Constitution of Kenya, 2010 (**the Constitution**) which guarantees every person the right to fair administrative action. Mea also contended that the Authority's action was discriminatory and contrary to Article 27 of the Constitution in that no other player in the fertiliser industry (save for Yara) had been raided and treated similarly.

For the Authority, it was contended that the action of investigating Mea had a statutory underpinning and that the Authority was under no obligation to notify Mea of the investigation or its intention to investigate. It was also contended, on behalf of the Authority that the Petition was premature as the investigations were still ongoing, and the Court was ultimately asked not to interfere with the Authority's statutory mandate and powers.

In a Ruling delivered on 19th August 2016, the High Court (Onguto J) emphatically upheld the Authority's power of entry and search and observed thus:

> *"Section 32 of the Act grants the Authority powers of entry and search. The Authority may enter any premises where it is believed information and documents relevant to investigation are domiciled and inspect such goods, documents and record situate thereon. The Authority must however inform the person present or in charge of the premises entered [into] of the intention to inspect the premises. Upon entry the Authority may search, reproduce, seize and remove anything from the premises for examination and safe-keeping. The section also allows the Authority to seek the assistance of law enforcement officers in execution of the right to enter, search and seize."*

The Court further held that the right to fair administrative action under Article 47 of the Constitution was not absolute and that there are instances where it is limited by law, including in this case Section 32 of the Act, which empowers the Authority to enter and search premises. The Court ultimately dismissed Mea's request to stop the investigations and declined to issue any restraining orders against the Authority.

Tips on how to handle a Dawn Raid

In light of the foregoing, all businesses should ensure compliance with the Act and always be prepared for the possibility of a dawn raid as they could come under the Authority's scrutiny at any given time. A business would cope effectively if it knew how to handle a dawn raid in advance. It is therefore prudent to have basic guidelines in place that can be referred to on the fateful day. The following are a few tips on how to handle a dawn raid:

A business would cope effectively if it knew how to handle a dawn raid in advance.

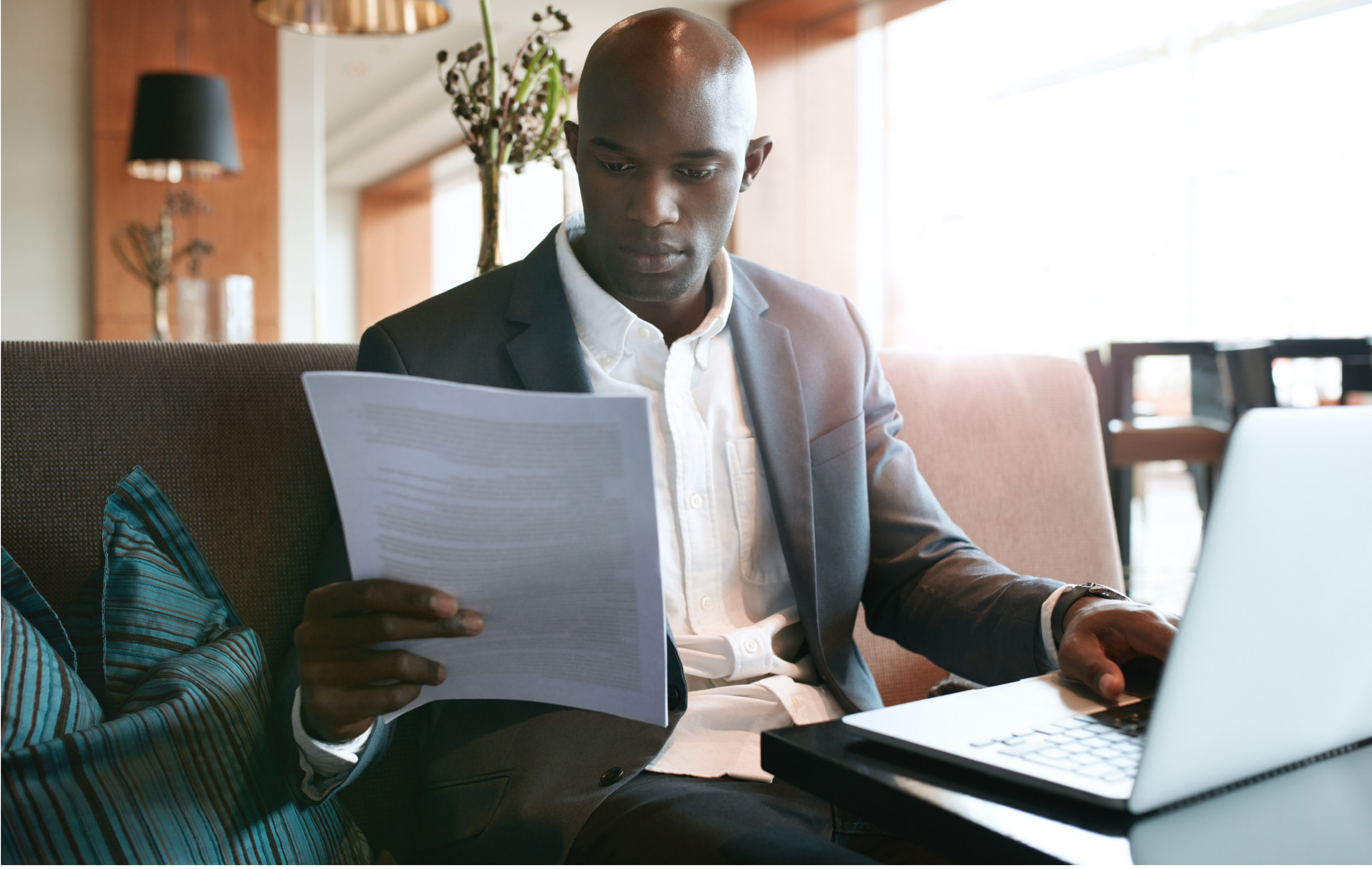
- Ensure that there is someone appointed as being "in charge" of dawn raids. As with all trying situations, having someone to act as the "go to" person reassures staff, prevents panic and averts chaotic scenes
- Verify the authorisation of the persons carrying out the inspection and determine the scope of the investigation. This can be done by checking the identification of the persons carrying out the inspection and calling the Authority to cross-check
- Co-operate with the officials but do not freely give up sensitive information. The line between cooperation and restraint may be blurry at times – in case of doubt, it is safer to err on the side of co-operation
- Contact external lawyers and request the officials to await their arrival, even if they have to wait for thirty (30) minutes. It would be helpful to have a list of people to call in the event of a dawn raid
- Ensure that each official is accompanied by a member of staff at all times
- Keep a record and a copy of all documents copied or seized by the officials. As a general guideline, the officials may make copies of the documents required while the originals should be retained at the premises
- Hold follow-up meetings after the dawn raid, both internally and with the Authority, to decide what further steps (if any) should to taken, and to monitor the progress and/or outcome of the investigation

Legally Privileged Information

One significant issue that is not made entirely clear under the Act is the fate of legally privileged information. In general, confidential communications passing between a client and his or her legal adviser and made for the purpose of obtaining legal advice are privileged from disclosure. This rule was affirmed in *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No 2) (1972) 2 ALL ER 353*. The Court in the said case further stated that the principle applies whether litigation is ongoing or contemplated and that it also applies to communications passing between a client and its external lawyers as well as communications passing between a client and the lawyers in the client's internal legal department.

With the foregoing in mind, it should be noted that the Authority enjoys broad powers to inspect virtually anything that may be relevant to the investigation. Indeed, in the Mea Limited case the Court, while reiterating Section 32 of the Act, stated that: *"Upon entry the Authority may search, reproduce, seize and remove* ***anything*** *from the premises for examination and safe-keeping."*

A plain reading of the Section suggests that legally privileged information is not protected from the Authority's reach. However, Section 137 of the Evidence Act, (Cap. 80) Laws of Kenya, provides that no one shall be compelled to disclose any confidential information which has been exchanged between him and his advocates unless he offers himself as a witness, in which case he may be compelled to disclose such information. Although the said provision applies in the context of Court proceedings, the same may as well be invoked in the course of a dawn raid.

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ON TAXATION

THE COMMON REPORTING STANDARDS AND AUTOMATIC EXCHANGE OF INFORMATION

The integration of national economies alongside an increased appetite for investments by national Governments has brought to the fore a problem that affects all tax authorities; access to financial information of private corporations. This problem tends to affect the less developed countries (**LDCs**) more acutely, as they have to contend with an eroded tax base amidst limited fiscal resources.

There are several aspects to the difficulty in accessing financial information, with LDCs particularly vulnerable. Firstly, aggressive tax planning by multinationals and high net worth individuals as they seek to minimize their tax obligations through schemes which sometimes skirt the limits of legality. Second is the illicit transfer of funds as unscrupulous corporations and individuals seek to hide their wealth "under the table".

Co-ordinated efforts between Governments

In view of the foregoing, the authorities have finally shaped up with the international tax scene experiencing a rapid change owing to co-ordinated efforts between Governments in actively working together and cracking down on various tax avoidance schemes with statutory tax anti-avoidance provisions e.g. the arms, length principle, enacted with the intention of tackling base erosion and profit shifting (**BEPS**) and aggressive tax avoidance schemes of multinational entities. The Organisation for Economic Co-operation and Development (**OECD**) has been the driving force behind the BEPS project, which was published in October 2015. It establishes an international tax framework by which profits of a company are taxed on the basis of where economic value was added.

The "Panama" effect

Another area of concern is offshore accounts which are hidden from view by the veil of bank confidentiality and secrecy. The recent disclosure of the Panama papers has provided us with a peep into the sheer scale of the offshore accounts. As summarised by Edward Luttwak:

> *"It is just a matter of numbers: Mossack Fonseca's 214,000 offshore companies alone (and there are many other such shell companies, formed by many other law firms) handled not millions or billions but trillions of dollars in their totality, thereby wholly subverting the presumptively equalizing effect of taxation. When the less affluent must pay their payroll taxes and income taxes in full and the more affluent with offshore companies do not pay their own taxes, the total effect of the taxation system is regressive, even without adding the inherently regressive effects of sales and value-added taxes. Once we recognise the sheer magnitude of "offshored" income flows, and once we take into account the strongly regressive effects of supposedly progressive taxation systems, the phenomenon of rising inequality in affluent societies may not need much additional explaining – and it hardly matters if those were tax-avoidance or tax-evasion trillions."*

Initial efforts albeit with local/regional benefits

The initial efforts to address this problem by requiring disclosure and exchange of information seemed designed for the benefit of a small group of western tax authorities. For instance, since 2005, the European Union (**EU**) has had the European Union Savings Tax Directive (**EUSTD**) which is an agreement between EU member states that compels the exchange of relevant financial information between them. In the United States (**US**), the Foreign Account Tax Compliance Act (**FATCA**) has recently come into force. The Act ensures that financial institutions all over the world provide relevant financial information on US taxpayers.

Working under the auspices of the OECD, governments started addressing even "bigger evils"; bank secrecy and many other forms of financial opacity. In 2013, finance ministers of the G8 (now G7) and G20 endorsed automatic exchange of information as a new mode of exchange of information. Previously, information was exchanged on either an "upon request" basis or spontaneously. However this did not seem to be effective in preventing illicit financial flows across jurisdictions. OECD was thus tasked to come up with an international standard framework for automatic exchange of information between different jurisdictions.

OECD Framework

The OECD framework is composed of two key components. Firstly, it promulgates the Common Reporting Standards (**CRS**) which detail the scope and procedures of automatic exchange of information and due diligence procedures to be carried out by financial institutions in participating countries. Secondly, while its scope is not geographically limited like EUSTD, or nationality based like FACTA, it is not universal as it still requires individual countries to sign up.

CRS became effective on 1st January 2016 in fifty six (56) countries. A total of more than one hundred (100) jurisdictions have signed up to the new regime. The Kenyan Government has not been left behind having recently been the 94th jurisdiction to sign the multilateral agreement, although like Panama and Bahrain, it has not committed to a date when CRS will take effect.

The main objective of CRS is the sharing of information by financial institutions in all participating countries so as to enable tax authorities of different jurisdictions to obtain information about their tax residents' affairs, that would otherwise have been undisclosed. Unlike FATCA which is based on citizenship, CRS is based on the tax residence of the individual.

A key feature of CRS is that it will result in information exchange between countries on an unsolicited basis. This is a significant departure from the current process of formal requests having to be made on a case by case basis. This includes virtually all major onshore financial centres. It is expected that the first flow of information will take place under CRS in 2017 amongst the so-called "early adopters" group. In addition to this group, there are over thirty (30) countries which have committed to CRS and are targeting the first exchanges of information in 2018.

How does CRS work?

Under CRS, financial institutions located in participating countries will be required to carry out enhanced due diligence procedures to both their existing and new financial account holders. These are aimed at establishing the tax residence of the holders of financial accounts, including individuals who control such accounts through conduit investment entities.

Subsequently, details of these financial accounts are then automatically exchanged annually between tax authorities of participating countries. The result is that any disparity between the information given and the tax resident's declaration raises a red flag that may lead to further investigation by the tax authority.

Another area of concern is offshore accounts which are hidden from view by the veil of bank confidentiality and secrecy.

Scope of CRS

The OECD has designed CRS to cover a broad scope that runs across four key areas namely:-

i. **Reportable income**
One may wonder what income is considered to be reportable income. This includes all types of investment income including interest, dividends, annuities and other similar income, proceeds from sale of financial assets and account balances. It is noteworthy that this list is not exhaustive.

ii. **Reportable accounts**
In the event that a tax resident holds a financial account in a country that has signed up to CRS, such account is referred to as a reportable account. But who is a tax resident individual for CRS purposes? If a person is liable to tax in a certain country by virtue of being domiciled, resident or having its place of management in that country, then that person will be considered to be tax resident in such a jurisdiction. Where a person is tax resident in multiple countries, their account balances and income will be reported to each of the participating countries.

iii. **Financial institutions**
The financial institutions required to report under CRS include banks, brokers, trusts, custodians, certain collective investment vehicles and certain insurance companies.

The term "financial account" under CRS has an even broader meaning than depository accounts. It also refers to any custodial accounts and certain types of insurance policies. "Financial accounts" under CRS also relates to any debt or equity interests that are held in investment vehicles such as trusts. In corresponding fashion, a "financial institution" has a broad definition that goes beyond banks; it also means investment managers and trustees.

Conclusion

Though noble, CRS will probably face a number of challenges. It was developed by the OECD which is perceived to be a pro-developed countries institution. As such, there is a risk that there may be subdued political goodwill from LDCs especially when some of the likely targets are running and/or influential within those very countries expected to sign up. Moreover, there are no incentives for LDCs to sign up and commit the resources required to make CRS work.

As critics have also noted, CRS has some loopholes. For example, CRS only applies to financial institutions located in the participating jurisdictions and therefore does not have universal application. "Clever" individuals may thus escape disclosure by playing around with their residency for example establishing fictitious residences in non–participating jurisdictions. There also seems to be scope for individual countries to limit their co-operation to only those countries they would like to. While financial institutions are broadly defined, there is still room left for manipulation so as to avoid disclosure such as on trusts.

Despite these shortcomings, if CRS is implemented, even to a limited number of countries worldwide, it would represent the best hope yet in piercing the cloak of secrecy that has thus far protected illicit funds transfers globally.

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MAURITIAN PERSPECTIVE

MAURITIAN EXPERTS' TAKE ON THE COMMON REPORTING STANDARDS

The Organisation for Economic Co-operation and Development (**OECD**) has recently introduced the Common Reporting Standards (**CRS**) as the global standard for automatic exchange of tax information. Over one hundred (100) jurisdictions, including Mauritius, have so far committed to participate in CRS and other countries are expected to join nearer to the reporting timeline. Participating jurisdictions are required to bring relevant changes in local legislation to ensure confidential data is protected and transmitted. CRS comes into effect in Mauritius on 1st January, 2017 and the first exchange of information will happen by 30th September, 2018.

Treatment of Trusts under CRS

A trust is considered as an entity under CRS, and a Mauritius tax resident if it is either administered in Mauritius and a majority of the trustees are resident in Mauritius, or the settlor was resident in Mauritius at the time the instrument creating the trust was executed. A tax resident trust is required to assess its classification as either a Financial Institution (**FI**) or Non-Financial Entity (**NFE**) in order to determine the CRS obligation.

Classifications of Trusts: FIs

Investment Entity or IE is the most relevant FI category for trusts and includes entities primarily conducting investment activities on behalf of other persons or managed by other FIs. A trust that is a Mauritius FI (**MFI**) is a Reporting MFI (**RMFI**) if it does not qualify as a Non-Reporting MFI (**NRMFI**). Whilst RMFIs are required to carry out identification procedures for reporting purposes, NRMFIs do not have such obligations. A trust could be a NRMFI where the corporate trustee undertakes its reporting obligations.

Classifications of Trusts: other than FIs

Trusts not classified as FIs, may qualify as either Active NFEs or Passive NFEs depending on their activities. Whilst an entity may qualify as an Active NFE if it is meeting any criteria for such classification, a Passive NFE would mean one that is not an Active NFE. There is a broad list of criteria defining Active NFEs, common ones being earning a majority of passive income or holding stocks in subsidiaries engaged in businesses other than FIs. Passive income generally includes dividends, interest, income equivalent to interest, rents and royalties.

Due Diligence

Once a trust classification is determined as a RMFI or Passive NFE, due diligence has to be carried out on the reportable persons, comprising the settlors, protectors, beneficiaries and any other natural person exercising ultimate effective control over the trust, to determine their identity and tax residence status.

Reporting

Reportable information includes name, address, date and place of birth, taxpayer identification number, reportable jurisdiction and total value of the trust. For a trust qualifying as a Trustee-Documented Trust by virtue of being professionally managed by a corporate trustee, the latter will report all required information with respect to the trust.

CRS comes into effect in Mauritius on 1st January, 2017 and the first exchange of information will happen by 30th September, 2018.

If a trust qualifies as a Passive NFE, the reportable persons need to be identified and reported, if applicable. An Active NFE has no reporting obligations.

It would be helpful to consider the key reporting implications for common trust structures. Under a fixed interest trust, the trustee cannot exercise discretion over distributions, implying that beneficiaries have an enforceable legal claim in trust assets and related income and hence reportable under CRS. This is not the case for discretionary structures where reportable persons other than beneficiaries are required to be identified and reported if applicable.

The CRS offers a list of options to participating countries to provide flexibility in compliance. Mauritius has availed itself to the flexibilities to report discretionary beneficiaries at the time of distribution and not to file nil returns where no reportable persons have been identified.

Confidentiality and Security of Data

Transmission of reportable information on trust principals and values are highly sensitive and concerns relating to data security, retention and use, assume importance. Mauritius has been assessed and has been found to have the requisite standard of confidentiality and data safeguards.

Mauritius will exchange information with participating jurisdictions having in place proper data confidentiality framework. Information obtained and exchanged is confidential and protected, with restricted uses and disclosures.

Conclusion

CRS requirements have to be considered simultaneously when setting up trust structures in order to determine the correct classifications and ensuing obligations. The participation of Mauritius in CRS data exchange affirms its position as a transparent jurisdiction and a country of choice for structuring of businesses.

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