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The 'Green' Edition: Issue Sixteen

Greetings!

"We do not inherit the earth from our ancestors, we borrow it from our children." I couldn't think of better words to pen down that best describe the critical role we as humans have in shaping the future.

As I write this, the COP27 Conference has just ended. Key takeaways of this conference from a private sector perspective, focused on supporting climate change initiatives with discussions targeted towards climate finance, net-zero targets, emission reduction investments, implementation of green supply chain policies and practices, renewable energy access, food security and climate resilience.

From this lens, we are pleased to bring to you the 'Green' edition of our flagship publication, *Legal & Kenyan,* which includes articles centered on *inter alia* responsible investing and carbon trading. The issue comes full circle with highlights of our own social and environmental initiatives.

Diving into the specifics of this issue, Chacha Odera and Meshack Kwaka kick us off with a piece analysing the increasing adoption of arbitration clauses in employment disputes. Cindy Oraro follows with a look at East Africa's first carbon trading exchange while Renee Omondi and Nzioka Wang'ombe present an overview of common domestic tax offences. I come in next alongside Hellen Mutua with an article that highlights a recent Court decision on the Central Bank of Kenya's role in regulating microfinance institutions. Pamella Ager and Anna Kandu team up with an incisive write up that dissects the role of ESG policies in lending activities by banks and other financial institutions. I jump back into the fray and offer insights on the enforceability of restrictive covenants in employment contracts. Next, Renee Omondi and Nzioka Wang'ombe follow suit as they return with an article that breaks down income tax exemptions in Kenya. Claire Mwangi then joins me as we examine the duties of an Advocate to Court. Last but certainly not least, we end with pieces that showcase our very own social and environmental initiatives.

We do hope that you enjoy the read.

Have a Merry Christmas and a Happy New Year!

Sincerely,

John Mbaluto, FCIArb
Editor

Founding Partner's Note

Kenya has for a long time now been experiencing changing weather patterns. Recurring droughts juxtaposed against heavy floods are just some of the examples of the climate crises the country is facing.

With an economy and population highly dependent on its natural resources, it is projected that the capacity of the county's various natural resources to continue providing essential services in the long-term is highly compromised due to human-induced environmental degradation.

It is on this premise that this issue is dotted with articles that highlight climate concerns and sustainability, including our own environmental and social initiatives as a firm. I do hope that you enjoy the read. As I end my note, I take the opportunity to wish you and your loved ones a Merry Christmas and a Happy New Year 2023!

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"The firm operates like a well-oiled machine such that there are no lapses in service provision even when any of them is out of office."

CHAMBERS GLOBAL, 2022

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GLOVES OFF:

THE INCREASING PROMINENCE OF ARBITRATION IN EMPLOYMENT DISPUTES

The inclusion of alternative dispute resolution (**ADR**) mechanisms within employment contracts has gained traction over the past couple of years. This trend follows that which was witnessed in commercial contracts where parties now invariably include arbitration as a means of dispute resolution.

Arbitration as an ADR mechanism is anchored upon Article 159 (2) (c) of the Constitution of Kenya, 2010 (**the Constitution**) which provides that:
"In exercising judicial authority, the Courts and tribunals shall be guided by the following principles...alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted."

It has thus become common practice for employers to include an arbitration clause in the employment contracts offered to employees. The increasing popularity of arbitration is also informed by the various advantages attributed to the arbitration process, including its confidentiality, speed and cost-effectiveness.

In practice however, the jury is still out as to whether arbitration as an ADR process, is really advantageous to the employee especially when one considers the issue of its affordability.

The Employment and Labour Relations Court (**ELRC**) has in recent times received numerous applications filed on behalf of employees challenging the enforcement of arbitration clauses in employment contracts. Most of the arguments against proceeding to arbitration have been centered around the exclusive jurisdiction donated to the ELRC by the Employment and Labour Relations

Court Act, 2011 (**the ELRC Act**) as read together with Article 162 (2) (a) of the Constitution.

It has been argued that the jurisdiction of the ELRC cannot be ousted by the parties' contract. On the other hand, employers who seek to enforce the arbitration agreements, have mounted equally formidable arguments asserting the freedom of contract which entails the parties' right to agree on terms of engagement including the manner in which disputes in employment contracts are to be settled.

Jurisdiction of the ELRC

The establishment and jurisdiction of the ELRC is pursuant to the provisions of Article 162 (2) (a) of the Constitution, as read together with section 12 of the ELRC Act. The ELRC's key mandate in broad terms, is to hear and determine disputes arising out of employment and labour relations.

In addressing the tension between the arguments raised by employees when seeking to oust arbitration clauses in employment contracts and the rival arguments mounted by employers for sustaining arbitration clauses in employment contracts, the ELRC has adopted jurisprudence from the High Court and the Court of Appeal with respect to the approach to be followed in contracts that provide for arbitration as an ADR mechanism.

In cases such as *Kenya Pipeline Company Limited v Kenolkobil Limited (2013) eKLR* and *Nyutu Agrovet Limited v Airtel Networks Limited (2015) eKLR* the Courts have consistently stated that they will not rewrite contracts for parties and where a dispute arises, the Court will uphold the terms of the instrument governing the relationship between the parties. In the case of *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd & Anor (2001) eKLR* the Court expressed itself thus:
"A court cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

As such, Courts have invariably leaned towards holding parties to their bargain with regard to the agreed way of resolving their disputes, in essence upholding the principle of freedom of contract.

As such, Courts have invariably leaned towards holding parties to their bargain with regard to the agreed way of resolving their disputes, in essence upholding the principle of freedom of contract.

Court Intervention in Arbitrable Disputes

Many a time, it is the employees who seek the intervention of the ELRC when employment disputes arise. Where such intervention is sought, the ELRC's consideration has been given to section 6 of the Arbitration Act, 1995 (**the Arbitration Act**) whereby the Court is called upon to stay proceedings in Court and to refer the dispute to arbitration in accordance with the parties' agreement.

In instances where a party files a suit in respect of a dispute which is subject to an arbitration clause, the other party wishing to enforce the arbitration clause is required under section 6 of the Arbitration Act to limit Court intervention by entering appearance and concurrently applying to the Court for an order to stay the proceedings and refer the dispute to arbitration in accordance with the arbitration agreement.

In the case of *Eunice Soko Mlagui v Suresh Parmar & 4 Others (2017) eKLR* the Court stated:
"*After 2009, the provision still requires a party to apply for referral of the dispute to arbitration at the time of entering appearance or before acknowledging the claim in question. In our minds, filing a defence constitutes acknowledgement of a claim within the meaning of the provision.*"

The Court nevertheless retains the jurisdiction to protect or preserve the subject matter of the dispute even as the matter proceeds to arbitration.

Advantages and Disadvantages of Arbitration

Arbitration as an ADR mechanism has some notable benefits. Some of the benefits are that the parties possess greater control over the procedure and can modify the procedural rules to suit their needs and the nature of their dispute more appropriately. For instance, parties to an arbitration are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings such as oral hearing or documents only procedure.

Moreover, the arbitration process limits some of the strict stipulations provided in the rules and procedures of Court and ensures expeditious resolution of disputes. Furthermore, selecting an arbitrator with expertise in a specific field, for instance employment law, is viewed as an added advantage. In certain circumstances, particularly where the dispute involves a niche industry, it may be more sensible to appoint an arbitrator with a particular professional expertise.

Another advantage of choosing arbitration is the simplified rules of evidence. Court litigation is ordinarily subject to the strict rules of evidence, which are oftentimes cumbersome and difficult to surmount. In arbitration, the rules of evidence may be relaxed thus making it easier to produce evidence. Evidential processes such as discovery may be largely reduced in arbitration and many matters, such as who will be called as a witness and what documents must be produced and by whom, do not require the strict formalities that ordinarily apply in litigation.

One major drawback to arbitration in employment disputes is that an unfavorable arbitral award has a limited scope for challenge, as an arbitral award can only be challenged on the grounds set out under section 35 of the Arbitration Act. The arbitration decision is final and no appeal process is available unless parties have agreed on a right of appeal. The Court process on the other hand, offers an unsuccessful litigant the opportunity to appeal a decision to the Court of Appeal or the Supreme Court, where applicable.

The cost of arbitration in some instances may be higher than that of Court litigation. The high costs may further be compounded by a number of preliminary issues to be decided such as the seat of arbitration, appointment issues if the agreement calls for more than one arbitrator, where the dispute is complex or where parties present several applications before the hearing of the main suit, the costs can multiply significantly. These costs may be substantial thus constraining most employees from pursuing their claims through arbitation. In addition, the simplification of the rules of evidence may end up being detrimental to a party by allowing the production of evidence that would ordinarily not be allowed in a Court of law and thereby resulting in an unfair outcome.

Conclusion

Arbitration clauses are becoming commonplace in employment contracts as more and more employers opt to adopt this form of ADR to settle employment disputes. Its growing prominence in employment contracts calls for a more critical interrogation regarding its efficacy, affordability and sustainability. Whereas some may posit that arbitration is advantageous in resolving disputes expeditiously while minimizing the costs, many employees would argue to the contrary and opt to refer their disputes to the ELRC. Either way, it is advisable for employers and employees alike to seek legal advice when incorporating arbitration clauses into employment contracts.

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A BREATH OF FRESH AIR:

A LOOK AT EAST AFRICA'S FIRST CARBON TRADING EXCHANGE

Introduction

Carbon trading – the practice where corporations buy and sell carbon credits – presents a unique opportunity for organisations to meet their citizenship obligations whilst increasing investment in green energy. Carbon trading was enshrined under the Kyoto Protocol of 1997 (**the Protocol**), an internationally binding agreement arising from the United Nations Framework Convention on Climate Change (**UNFCCC**). The Protocol employs the "*polluter pays*" principle by creating mechanisms for signatory industrialised countries to reduce their greenhouse emissions. As a signatory to the Protocol since 2005, Kenya is not required to curb its greenhouse emissions as the country's level of pollution is below the Protocol's established limits. This makes Kenya one of the leading renewable energy generating countries, and perfectly placed to benefit financially from selling carbon credits through the Protocol's carbon trading mechanisms.

Kenya has heeded the global call to reduce greenhouse emissions and as part of Vision 2030, which aims to have one hundred percent (100%) renewable electricity generation by 2030, the country is preparing to launch East Africa's first carbon trading exchange. The exchange will operate as a partnership between global firm Aircarbon Exchange (**ACX**), the Nairobi International Finance Centre (**NIFC**) and the Nairobi Securities Exchange (**NSE**). In launching this exchange, the country aims to leverage existing verification models and brokering networks to regulate and promote carbon trading activities.

Under the 2021 United Nations Climate Change Conference known as COP26 and Article 6 of the Paris Agreement of 2016, party states accepted targets for reducing greenhouse gas emissions in the form of emission quotas. Where these targets cannot be met, the UNFCCC has developed a framework known as the Emissions Trade Mechanism (**ETM**) where countries can trade their greenhouse emission allowances with those that have exceeded their permitted emission levels.

Carbon credit mechanisms in Kenya fall under two categories: the Clean Development Mechanism (**CDM**) and the Voluntary Carbon Market (**VCM**). CDM allows countries to meet their emission reduction targets by investing in emission reduction projects in developing countries such as wind, solar and geothermal power projects. Under VCM, individuals, corporations and any other entity may volunteer to purchase carbon credits generated through carbon reduction projects.

Corporations can become actively involved in carbon trading through VCM. Foreign corporations which have been allocated a specified number of credits by their respective governments, based on the national quota, can offset their carbon greenhouse emissions by buying and selling carbon credits. Carbon trading provides a market-based solution to the global issue of how to reduce greenhouse emissions. It provides a financial incentive to states and corporations to limit their greenhouse emissions and come up with new and innovative ways to limit greenhouse gas production.

Operation of the VCM

The NIFC will create a platform for local and international corporations to trade carbon credits which will finance high impact environmental projects. The framework through which trading will take place is currently under development. However, what is clear is that the NIFC, in collaboration with ACX and NSE will create a carbon trading centre where organisations will trade certified carbon offset credits. These certified carbon offsets will be traded in the form of carbon certificates and carbon credits. Carbon certificates are permits which governments may allocate to corporations based on their greenhouse emissions quota as agreed at COP26. These permits may be given freely or auctioned to corporations setting an agreed limit of greenhouse emissions. Where a corporation curbs its greenhouse emissions significantly, it can then trade its excess permits on the carbon market. Corporations which have exceeded their greenhouse emission allowances may purchase additional allowances through buying additional carbon certificates.

Carbon credits on the other hand, can be earned from the UNFCCC and traded in the voluntary market by reducing, capturing and storing greenhouse emissions. Corporations like the Kenya Electricity Generating Company PLC (**KenGen**) have taken advantage of CDM which allows greenhouse emissions reducing projects to create tradable carbon credits through its renewable energy projects. For example, KenGen's CDM, Olkaria II project, has been issued with 550,981 carbon reduction credits worth approximately USD 3.8 Million.

Tax Incentives

In Kenya, tax incentives have been introduced to boost the uptake of carbon trading. This is primarily through a preferential tax rate offered to corporations operating a carbon market exchange or emissions trading system. The Finance Act, 2022 sets the tax rate for NIFC certified corporations operating a carbon market exchange at fifteen percent (15%) for the first ten (10) years from the year of commencement of its operations. After the lapse of the initial ten (10) year period, these NIFC certified corporations will be subjected to the standard applicable resident corporate tax rate prevailing at the time. The new tax rate for NIFC certified corporations came into effect on 1st July 2022 and is significantly lower than the prevailing corporate tax rate of thirty percent (30%).

Funding Renewable Energy Projects

Kenya's thriving renewable energy sector stands to benefit greatly from an established carbon trading framework. Significantly, the growth and success of carbon trading in Kenya would have the added advantage of making renewable energy generation more profitable and therefore help Kenya move towards its goal of achieving the one hundred percent (100%) clean energy target by the year 2030. Renewable energy projects particularly for geothermal power, require significant equity funding. The reward of certified carbon credits can attract a wider array of equity investors looking to leverage on the same. It is notable that Kenya's largest power generator KenGen, already has certified carbon credits in the excess of USD 3.8 Million available for sale.

International corporations that wish to earn carbon credits or simply obtain certificates that help meet their net-zero goals will also be afforded the opportunity to invest in renewable energy projects in Kenya with the aim of obtaining internationally certified carbon credits in return. Energy generation activities have been identified as some of the greatest contributors to greenhouse emissions, particularly the generation of electricity from non-renewable sources. The opportunity to earn carbon credits by investing in green technology which reduces greenhouse emissions will incentivise corporations to invest more in these technologies.

Carbon trading provides a market-based solution to the global issue of how to reduce greenhouse emissions. It provides a financial incentive to states and corporations to limit their greenhouse emissions and to come up with new and innovative ways to limit greenhouse gas production.

Impact Investment

It is important to note that carbon trading can also incentivise impact investment, particularly in renewable energy projects. Given how impact investment has evolved, it is not difficult to see how it can be used to finance projects and have tangible social and environmental benefits which are in a jurisdiction with an established carbon trading framework.

Impact investing firms can put money into projects within local communities that create employment, address community needs for clean water, sanitation and energy, as well as generate internationally certified carbon credits. These impact investors can leverage on carbon credits as a primary or sole source of return. There have been successful projects in Kenya that have capitalised on blue carbon exchange. For example, through the Vanga Blue Forest project in Kwale County, thousands of native mangrove trees have been planted and this has aided in trapping tonnes of carbon. The carbon credits under this project have been sold in the international carbon markets.

Challenges

Despite the benefits to be drawn from the establishment of a carbon trading exchange in Kenya, it is not clear how effective emissions trading is in the fight against climate change. Moreover, there is significant complexity in running a successful carbon trading exchange. The principle of cap and trade where countries and corporations meet their greenhouse emissions targets by buying and selling carbon credits has arguably created more greenhouse emissions than it has curtailed. This is due to "*free-riding*", where western countries and corporations, which are amongst the largest emitters, seek out greenhouse emissions credits from developing countries which produce less greenhouse emissions, therefore, not reducing developed countries' greenhouse emissions but outsourcing the responsibility. Despite this criticism, the carbon trade is still easier to implement than expensive direct regulations and unpopular carbon taxes.

Critics of carbon trading have noted the complexity of running a carbon trading exchange which includes pricing of carbon credits, falsification of statistics and the difficulty involved in measuring how much a company is polluting in comparison to the amount it claims to have offset.

Looking Forward

Kenya can address some of the challenges by creating a statutory body tasked with monitoring and evaluating carbon projects to certify that the carbon credits claimed are accurate and verifiable. Globally, it is hoped that COP27, which took place in November 2022, will provide further impetus toward establishing a coherent and credible framework for carbon trading. Kenya's carbon exchange can look to Singapore which recently set up a successful carbon exchange through Aircarbon Pte Ltd, which began trading in Singapore in 2021 by targeting corporations and accredited investors. The exchange currently has more than one hundred and twenty (120) active firms, with many more at various stages of joining. In addition to this, since its launch, the Singapore exchange has seen millions of carbon credits exchanged with trading volume expected to grow exponentially as listed firms across Singapore, Hong-Kong and Japan comply with new climate reporting requirements. This is an encouraging example of the success of a carbon trading exchange and offers a practical guide on how Kenya can embark on establishing a successful carbon trading exchange in East Africa.

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BY THE BOOK:

COURT AFFIRMS CENTRAL BANK OF KENYA'S MANDATE IN REGULATING MICROFINANCE INSTITUTIONS

Microfinance institutions (**MFIs**) emerged in Kenya in the 1970s with the aim of providing small or micro loans and saving options to low-income earners who would otherwise be unable to access mainstream financial services. Small and micro borrowing is a rapidly growing industry, more so in the advent of digital lending, mobile money and emerging markets. However, such developments often attract the attention of regulators, specifically the Central Bank of Kenya (**CBK**) in the case of MFIs.

In this article, we consider a recent decision by the High Court of Kenya (Muigai J) in *Kenya Akiba Microfinance Limited v Central Bank of Kenya & 14 Others (2022) eKLR* in which the Court clarified the legal framework for addressing regulatory issues, including the scope of the authority of CBK, that impact the operations of MFIs. It is useful, before proceeding to analyse the decision, to contextualize the regulatory framework of the microfinance industry in Kenya.

Regulating MFIs

There are two types of MFIs under the Microfinance Act, 2006 (**the Act**) i.e., deposit-taking MFIs and credit-only MFIs. Deposit-taking MFIs are regulated by CBK and operate within the stipulations of the Act, which came into effect in 2006 and has been amended from time to time since then. Accordingly, any institution that seeks to engage in deposit-taking microfinance banking business must be duly registered with and licensed by CBK and is bound by the provisions of the Act. According to CBK, as at 31st December 2021, the number of deposit-taking MFIs in Kenya was fourteen (14), with eleven (11) holding nationwide licenses and three (3) holding community microfinance bank licenses.

On the other hand, while the Act recognizes the existence of credit-only MFIs, their regulation is limited. Under the Act, credit-only MFIs are prohibited from using protected words such as *"microfinance bank business"*, *"finance"* and *"bank"*, derivatives of the same or any other word indicating the transaction of financial business, unless licensed under the Act or the Banking Act (Cap. 488) Laws of Kenya (**the Banking Act**). The role of CBK is provided for in section 8 of the Act, which empowers CBK to investigate, under warrant, any person who carries out deposit-taking microfinance business contrary to the provisions of the Act. This therefore means that credit-only MFIs fall under the jurisdiction of CBK once they start acting as deposit-taking MFIs without the requisite licensing.

Other than this, there is not much regulation of credit-only MFIs, at least not by CBK, with the expectation being that they might be regulated by other statutory bodies, including the respective Registrars under the Hire Purchase Act (Cap. 507) Laws of Kenya (**the Hire Purchase Act**) or the Movable Property Securities Rights Act, 2017. This makes for convenient regulation since the registries under the aforesaid Acts are both under the purview of the Business Registry Service. Indeed, with a view to further consolidate these regulatory efforts, the Hire Purchase Amendment Bill, 2021 proposes to make the Registrar of Companies the registrar under the Hire Purchase Act. Even with this proposed amendment, the laws and regulations governing deposit-taking MFIs are much wider and far reaching compared to those governing credit-only MFIs. With such limited regulation, it is quite possible for credit-only MFIs to operate beyond the confines of the law and ending up dipping their proverbial toes into the realm of banking as happened with Kenya Akiba Microfinance Limited (**Kenya Akiba**).

Background to the Case

The suit was instituted by Kenya Akiba which sought *inter alia* a declaration that its business operations never infringed upon any of the provisions of the Banking Act, and that a raid said to have been carried out by the Defendants on its premises on 2nd November 2005 was illegal and unjustified. Kenya Akiba sought damages amounting to KES. 930 Million. Amongst the listed Defendants was CBK, which is mandated to regulate the banking industry. The other Defendants were various police officers working under the Banking Fraud Investigations Unit (**BFIU**) of the Kenya Police Service, who were represented by the Attorney General.

The Parties' Positions

Kenya Akiba claimed that the Banking Act did not apply to it, as it engaged in microfinance and was licensed to carry out hire purchase business under the Hire Purchase Act. Kenya Akiba argued that it did not advertise its operations as a bank but a company offering loans by receiving deposits with the same being recorded in passbooks. It was on this basis that Kenya Akiba sought a declaration that it had the right to operate under the name "*Kenya Akiba Microfinance Limited*". In light of this, Kenya Akiba claimed that a search and seizure of its property said to have been conducted by the Defendants was unlawful, unjustified and infringed upon its right to use its name and conduct its business, which actions consequently led to Kenya Akiba suffering huge financial losses arising from *inter alia* unrecoverable loans, frozen bank accounts and the carting away of goods.

On its part, CBK submitted that Kenya Akiba engaged in financial activities that went beyond the scope of mere hire purchase business and fell within the purview of the Banking Act, which could not lawfully be undertaken without CBK's approval. Such activities included taking deposits without a valid license, advertising the availability of loans and using the word "*finance*" contrary to the Banking Act and without the requisite consent of CBK. Further, CBK had received a significant number of complaints from Kenya Akiba's clients and government agencies, who all made claims that Kenya Akiba was operating as a deposit-taking MFI.

The other Defendants averred that Kenya Akiba did not reveal any legitimate hire purchase business but that of banking instead, which included taking deposits, having savings, giving loans, and taking securities. The other Defendants also argued that Kenya Akiba failed to produce any hire purchase agreements and did not present credit facility documents that would have verified the legitimacy and lawfulness of its operations.

The Decision

In its Judgment, the Court began by noting that Kenya Akiba was incorporated in 2004, at a time when microfinance businesses were

Notably, one must not overlook the mandate of CBK in ensuring that only institutions it has licensed engage in financial business under the Act, the Banking Act and its regulations. Failure to do so empowers CBK to conduct investigations upon suspicion of any breach per its statutory mandate.

not regulated under their own Act. The Court further noted that the Banking Act did not have provisions regulating such institutions prior to 2006, which is when the Act came into force.

The Court referred to a General Notice dated 31st October 2005 issued by CBK which stated *inter alia* that any entity set up as a business through incorporation as a company which bore the names "*finance*" and related derivatives such as "*microfinance*" and issued advertisements, circulars or other documents inviting persons to make a deposit would be in contravention of the Banking Act. CBK accordingly provided a moratorium of up to 31st January 2006 for cessation of any unauthorized use. The Court reasoned that Kenya Akiba, in failing to regularize its actions, could not cure or excuse the violation of section 3 of the Banking Act.

In considering whether the business operations of Kenya Akiba contravened the Banking Act, the Court analysed the meaning of the terms "*bank*", "*banking business*", "*hire purchase business*" and "*financial business*" within the scope of the Banking Act. The purpose of this exercise was to determine whether the activities performed by Kenya Akiba fell within the aforesaid descriptions.

The Court also found that whilst Kenya Akiba operated a current account under the Hire Purchase Act, its actions of advertising to secure loans, receiving deposits, charging interest and giving customers savings passbooks did not amount to hire purchase. Further, Justice Muigai discerned from the Memorandum and Articles of Association of Kenya Akiba, the company profile and various transactions it undertook as firmly holding it out to be a finance institution operating banking services due to its use of the word "*finance*", all of which it was doing without the requisite license under the Banking Act. The Court further noted that no hire purchase agreements were executed, produced or availed by Kenya Akiba as evidence of carrying out hire purchase business.

For the abovementioned reasons, the Court held that Kenya Akiba carried out its business not as specified in the license of a hire purchase business but that of a financial institution and was consequently in breach of various provisions of the Banking Act. As such, it was not entitled to the damages it sought from the Defendants.

The High Court's decision sets an important precedent on the lawful operation and regulation of MFIs in Kenya. The case highlights activities that expressly fall within the definition of a financial institution under the Banking Act and leaves no room for any ambiguity. Emphasis is placed on activities such as deposit-taking and loan-offering amongst others, which trigger the requirement to register with CBK and operate under CBK's mandate.

Notably, one must not overlook the mandate of CBK in ensuring that only institutions it has licensed engage in financial business under the Act, the Banking Act and its regulations. Failure to do so empowers CBK to conduct investigations upon suspicion of any breach per its statutory mandate. As Kenya Akiba has lodged a Notice of Appeal against the Court's decision, it will be interesting to see what the Court of Appeal makes of the matter. For now, Justice Muigai's comments bring it all to full circle when the learned Judge stated:
"*A regulator has a duty to protect the innocent public from unregulated institutions, where intervention is in good faith then it is upheld.*"


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RENDER UNTO CAESAR:

AN OVERVIEW OF COMMON DOMESTIC TAX OFFENCES

Domestic taxes (income tax, value added tax, excise duty and stamp duty) contributed over sixty percent (60%) of the total revenue collected by the Kenya Revenue Authority (**KRA**) in its financial year ended June 2022. KRA has invested significant resources into the investigation of domestic tax offences that negatively impact domestic tax collection. This article provides an overview of common tax offences with a view of providing a better understanding of their essential elements and their repercussions, so that one is better placed to avoid them.

Tax Evasion

The Organization for Economic Cooperation and Development (**OECD**) defines tax evasion as the intentional misrepresentation of tax obligations for instance underreporting of income and/or over-reporting of expenses. Despite being one of the most widely known tax offences, tax evasion is not defined in any Kenyan Act of Parliament. However, the Tax Procedures Act, 2015 (**the TPA**) groups and treats the offence in an identical manner as fraud, wilful neglect, and gross neglect by exempting them from the five (5) years' limitation imposed on KRA for the amendment of tax assessments.

Whereas the TPA limits the KRA's auditing and assessment powers to a maximum of five years (5) prior to the assessment/audit date, this limitation does not apply to cases of evasion, fraud, gross neglect or wilful neglect. In essence, there is no time limitation for the investigation and prosecution of tax evasion.

If KRA finds a taxpayer evaded tax, it may amend the taxpayer's assessment to reflect the tax position the taxpayer would have been in, had it not been for the evasion i.e., the correct amount of tax due. In addition to an assessment of the correct amount of tax due, a person found to have evaded tax is subject to a tax shortfall penalty of seventy five percent (75%) of the amount of tax, in addition to late payment interest on the principal tax amount due.

Tax Avoidance

The Income Tax Act (Cap. 470) Laws of Kenya, the Value Added Tax Act, 2013 and the Excise Duty Act, 2015 define tax avoidance as the act of designing a transaction with the primary objective of reducing one's tax liability. However, tax planning which allows a taxpayer to save on taxes, despite bearing similarities to tax avoidance, is not unlawful.

Generally, tax avoidance cannot be noted from the review of a single transaction in isolation, but from an analysis of the relevance of the transaction in a taxpayer's business operations. When carrying out such an analysis, one must note that whereas structuring a transaction for the primary purpose of avoiding tax is unlawful, carrying out transactions that are not regarded as efficient is not unlawful (freedom to make uneconomic decisions) as long as the transaction was carried out for the purpose of making taxable income.

Tax avoidance schemes range from acts such as issuance of independent contractor agreements to employees with the primary objective of avoiding deducting employment taxes, to deducting withholding tax at a lower rate and wilfully delaying billing a client so as to split the revenue over different financial years with a view to remaining below the KES 5 Million annual turnover threshold.

Avoidance of income tax attracts:

- Assessment (adjustment) of a taxpayer's return to reflect the taxpayer's position had it not employed the scheme
- A penalty equal to double the amount of tax that would have been payable if the scheme had not been employed

Splitting

The Stamp Duty Act (Cap. 480) Laws of Kenya prohibits splitting – which is the act of dividing a transaction into multiple smaller transactions that individually fall below the duty payment threshold with a view to avoiding paying stamp duty on the actual transaction. The fine for this offence is set at KES 50,000 irrespective of the magnitude of the offence. Whereas this penalty seems meagre, it is practical as there are several other factors that discourage splitting including:

a) Charging Methodology

Stamp duty is charged as a percentage of the transaction value and very few transactions are subject to a minimum threshold below which duty is not payable. As a result, the opportunities for splitting are limited.

b) Economic Viability

Splitting is in many instances uneconomical. Reasonable perpetrators compare the cost and time spent in splitting to the total tax avoided. If splitting does not result in significant savings, a party will most likely abandon it on account of it being uneconomical.

c) Effort versus Reward

Transaction splitting is potentially tedious, as it entails the multiplication of documents drafted and transactions effected. Splitting a high value transaction would thus take up a significant amount of time and resources.

d) Oversight

Splitting may raise eyebrows. Whereas one may be able to justify splitting a transaction into two, they may not be able to justify splitting it into many smaller transactions. Splitting a transaction would raise the suspicion of financial institutions that facilitate the transactions who may opt to report or suspend the facilitation of such transactions.

Generally, tax avoidance cannot be noted from the review of a single transaction in isolation, but from an analysis of the relevance of the transaction in a taxpayer's business operations. When carrying out such an analysis, one must note that whereas structuring a transaction for the primary purpose of avoiding tax is unlawful, carrying out transactions that are not regarded as efficient is not unlawful (freedom to make uneconomic decisions) as long as the transaction was carried out for the purpose of making taxable income.

e) Need for Collusion

Splitting may require the consent of the other party to the transaction. If splitting significantly increases the counter-party's administrative responsibilities, such as signing endless documents, or violates their *ethos* there is a low likelihood of their participation.

Rendering a Business Unable to Pay Taxes

This refers to arrangements by senior officers or controlling member(s) of a company that render the company unable to meet an existing or future tax liability. A practical example of this offence is emptying the company's bank accounts or asset stripping resulting in the company being unable to pay taxes as and when the same fall due and rendering KRA incapable of recovering such taxes using an agency notice or auctioning of the company's property.

The primary distinctions between this offence and tax evasion relate to the type of taxpayer and the party liable for the offence.

Type of Taxpayer

Whereas tax evasion can be carried out by individuals, companies, non-governmental organisations and other artificial persons, rendering an entity unable to pay taxes can only be carried out in relation to a company.

Party Liable

In instances of tax evasion, the entity found to have evaded tax is liable for such evasion. In limited circumstances, the corporate veil may be lifted to hold the directors personally liable. However, in instances where a company is rendered unable to pay taxes, the company is not liable and thus cannot be punished for this offence; the senior officers and/or controlling members of the company are liable as they are the ones who put the company in such a position.

Senior officers in the foregoing instance include directors, company secretaries, and/or general managers. Controlling members, on the other hand, are shareholders (or persons with a membership interest in the company) who hold at least fifty percent (50%) of the voting rights, rights to dividends or rights to the company's capital.

Conclusion

Flowing from the above, there is a need for businesses to limit their risk of committing a tax offence which would expose them to penal sanctions and withdrawal of their tax compliance certificates which are vital for various other activities such as tendering of bids. Businesses can limit such risks by putting in place appropriate finance policies and procedures and seeking tax advisory services prior to carrying out transactions. It is also important to note that a person found to have committed any tax offence is entitled to dispute the same in an appropriate manner within thirty (30) days of being informed of the same if KRA carries out the measures in an administrative manner only (assessments, penalties and interest). In the event of criminal prosecution, a taxpayer is also entitled to dispute the same, albeit in Court.

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THE DEVIL'S IN THE DETAIL:
ENFORCEABILITY OF RESTRICTIVE COVENANTS IN EMPLOYMENT CONTRACTS

Background

"*If a man will not work, he shall not eat*", is a Biblical passage found in 2nd Thessalonians 3:10. The policy in Thessalonica of "*no work, no food*", was a rule intended to compel or encourage people to work for their daily bread. According to the Apostle Paul, it was the first commandment given to man by God. The rule espoused that without work, man cannot and could not subdue the earth. Perhaps taking due cognisance of this Biblical teaching, Article 23 (1) of the Universal Declaration of Human Rights provides that "*everyone has the right to work, to free choice of employment, to just and favourable conditions of work, and to protection against unemployment.*" Apart from the economic hardship that unemployment begets, commercial inactivity is also psychologically harmful to an individual. This begs the question, which we endeavour to address in this article, whether there can be a legitimate basis upon which a person may be restricted from seeking gainful employment in certain circumstances.

What are Restrictive Covenants?

A restrictive covenant is a formal agreement that restrains an employee from carrying out any profession, trade, business or occupation, or revealing certain information that may be prejudicial to an employer with the aim of protecting the commercial interests of the employer, post-termination of the employment relationship. Examples of restrictive covenants in an employment contract may include provisions on non-competition, non-solicitation, non-dealing, non-poaching, confidentiality clauses, and garden leave. The rationale behind restrictive covenants is the protection, and no more than that, of legitimate business interests and confidential information of the employer.

Legal Framework

The statutory law relating to restrictive covenants in Kenya is the Contracts in Restraint of Trade Act (Cap. 24) Laws of Kenya (**the Act**). Section 2 of the Act provides as follows:

"*Any agreement or contract which contains a provision or covenant whereby a party thereto is restrained from exercising any lawful profession, trade, business, or occupation shall not be void only on the ground that the provision or covenant is therein contained: Provided that… the High Court shall have power to declare the provision or covenant to be void where the court is satisfied that, having regard to the nature of the profession, trade, business or occupation concerned, and the period of time and the area within which it is expressed to apply, and to all the circumstances of the case, the provision or covenant is not reasonable either in the interests of the parties, inasmuch as it affords more than adequate protection to the party in whose favour it is imposed against something against which he is entitled to be protected, or in the interests of the public, inasmuch as the provision or covenant is injurious to the public interest.*"

According to this section, a restrictive covenant is, in principle, enforceable. As such, the Act recognises that every employment engagement is premised on the sanctity of contracts and can only be interfered with if the person challenging the enforceability of a restrictive covenant can show that it is unjust or unreasonable. This means that whereas the employee must not be unnecessarily restricted from earning a living, on the other hand, the confidential information and trade secrets of the employer should be sufficiently protected.

The Act seemingly pays homage to the principle of freedom of contract - that parties are free to enter into a contract and once a contract is entered into, parties are bound by its terms, unless fraud or duress can be proved. As per Sir George Jessel MR, in *Printing and Numerical Registering Company v Sampson (1875) 19 Eq 462 465*: "*If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by courts of justice.*"

This principle, coupled with the right of an employer to protect its legitimate commercial interests, especially confidential information and trade secrets, informs the position that the Act provides, being that restrictive covenants will generally be regarded as valid, subject to the reasonableness test discussed below.

The Reasonableness Test

The validity of a restrictive covenant is evaluated based on the reasonableness test which entails taking into consideration various factors including the period of restriction; the geographical area of restriction; the scope of restriction; public policy; and other circumstances of the case. For example, in order to successfully challenge the validity of a restrictive covenant, it should be shown that the restriction does not relate to the experience or skills gained during the currency of employment, as public policy supports continuing education, professional development, and acquisition of new skills in so far as they do not prejudice the employer.

Period of Restriction

What is deemed a reasonable time or period within which the employee is to remain bound after termination from employment is a matter of fact and is dependant on the circumstances of each case. In particular, it depends on the employee's level of engagement, the responsibilities of the employee, the employee's access to the employer's strategic business information, and the employee's connection with the employer's clients. That said, Kenyan Courts have tended to find long periods of restraint unacceptable, and in that regard have even found that a period of restraint spanning five (5) months, to be excessive and amounting to an unjustifiable curtailment of an employee's right to earn a living. This was the finding of the Court (Mutava J) (as he then was) in *LG Electronics Africa Logistics FZE v Charles Kimari (2012) eKLR*. A similar finding was made by the Court (Wasilwa J) in the case of *Craft Silicon Limited v Niladri Sekhar Roy (2018) eKLR*.

South Africa, which has a similar legislative position as that prevailing in Kenya, has seen its Courts adopt similar positions. *In Forwarding African Transport Service CC t/a Fats v Monica Africa (Pty) Ltd, (2004) 13 HC 11.1.1* the South African High Court (Pillar J) held that:

"...a clause barring an employee for a period of one year after termination was unreasonably wide, contrary to public policy, and accordingly unenforceable."

It ought to be borne in mind that the overarching purpose of a restriction is to protect the commercial interests of the employer. Hence, if the employer can justify a longer period of restraint such as in the case of *Vodacom (Pty) Ltd v Motsa (2016) 3 SA 116 (LC)* where the South African Court held that a cumulative twelve (12) months' period, comprising of six (6) months of garden leave and further six (6) months of post-termination restraint against the Respondent was reasonable, then the restraint will be upheld. In *Vodacom (Pty) Ltd v Motsa*, the Respondent was a senior employee of the Claimant company and had access to its strategic business plan and information which could benefit a competitor and could thus not work for the competitor within the stipulated duration.

Geographical Area

The employer may impose reasonable territorial restraints post-termination against the employee to protect its legitimate business interests. The geographical area of restraint must however be within the business outreach of the employer and the radius must be justifiable. Depending on the circumstances or the nature of business, the geographical area may be as wide as an entire country or region, it may be as narrow as a city centre or a part of the city. What is important is that it must be shown that the employer has a legitimate interest to protect in the specified areas of restraint. In the aforesaid case of *Vodacom (Pty) Ltd v Motsa,* the Court reduced the territorial restraint imposed by the employer and stated that:

"...the restraint of trade agreement should reasonably have applied only to South Africa, Tanzania, DRC, Mozambique, and Lesotho and not to the greater part of Southern Africa, and some of East and West of Africa since Vodacom did not require protection in these countries."

It ought to be borne in mind that the overarching purpose of a restriction is to protect the commercial interests of the employer.

Similarly, the Supreme Court of Western Australia in *Sear v Invocare Australia Pty Ltd (2007) WASC3* held that a restraint of trade agreement barring an employee from working within a five (5) kilometre radius, minimal as it might seem, was not necessary to protect the interest of the employer and was thus unfair and unreasonable.

Vagueness

Kenyan Courts have construed vague restraint of trade agreements as unfair and unreasonable. In *Craft Silicon Limited v Niladri Sekhar Roy* the Court (Wasilwa J), stated that the intention of the restraint is not to restrain an employee from earning a living but rather to protect the commercial interests of the employer. Therefore, a restraint of trade not capped within any geographical boundaries would be invalid for its vagueness and the employer would not be allowed to benefit from such vagueness.

In essence, any restrictive covenant must be precise in its terms and should not be ambiguous, failing which any ambiguity would be resolved in favour of the employee. Thus, in *Hukmi Chand v Jaipur Ice and Oil Mills Co. (1969) WLN 570*, the Indian High Court struck down a restrictive contract holding that:

"In order to be valid, a contract in restraint of trade must satisfy the following conditions, namely: (1) it must be reasonable, (2) it must be founded on good consideration, and (3) it must not be too vague."

Public Policy

It is worthy of note that each case turns on its own peculiar facts and no single standard or extent of restraint can be said to apply in all situations. Further, the Courts have expressed the view that restrictive covenants that curtail a person from seeking gainful employment are generally construed to be contrary to public policy.

"... as a general rule, it is against public policy for any employee to be restricted from seeking greener pastures. Contracts in restraint of trade are as a general rule against public policy."

The foregoing was stated in *H.F Fire International Incorporated & Another v Sayed Hossam Mohamed Elshebrawi Mohamed Khalifa & Another (2017) eKLR* where the Court's view was informed by the fact that the rate of unemployment is so high in Kenya, such that it calls for protection of employees from losing out on any employment opportunity. Similarly, in the aforesaid case of *LG Electronics Africa Logistics FZE v Charles Kimari*, the Court was emphatic that:

"I think in a country like Kenya where unemployment is soaring every single day, subjecting the Defendant to loss of employment on the basis of the restrictive clause would be unreasonable and not in the interest of either party. Indeed, such actions would be contrary to public policy as courts should not be seen to be unduly impeding upon a person's right to earn a living."

Conclusion

Flowing from the above and perhaps at odds with a plain reading of section 2 of the Act, the position of Kenyan Courts seems to be that contracts in restraint of trade are void unless it can be proven that the restraint is necessary, reasonable and in the interest of both parties. Apropos, as was held by Spry J (as he then was), in the *locus classicus* case of *Giella v Cassman Brown & Company Limited (1973) E.A. 358: "an employer is not entitled to protection from competition from his employees per se… "*

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EARTH MATTERS:

THE ROLE OF ESG POLICIES IN LENDING ACTIVITIES BY BANKS AND FINANCIAL INSTITUTIONS

Responsible investing is not a new concept. The practice can be traced back to the early 1960s when investors started to become increasingly conscious of the social responsibility underlying their investments and business activities, with investors keen to ensure that their investments were directed towards socially conscious endeavours.

Fast forward to the early 2000s and the concept began to be formalized, most notably when the United Nations, through a joint initiative with the Organization for Economic Cooperation and Development, sought to incorporate principles of responsible investment into mainstream investment decision-making and ownership practices through Environmental, Social and Governance (**ESG**) tenets.

ESG, therefore, refers to criteria against which socially conscious investors assess the behaviour of the entities which they are considering for investment. ESG are standards that are set for a company's operations which aim to foster greater environmental consciousness, social responsibility and accountability. Indeed, many banks and other financial institutions use these standards to evaluate the risk of potential investments. Banks that adopt these best ESG practices will be well-positioned to make sound investment decisions and foster sustainability because they play a key role in the global economy and help create a more sustainable future.

With the effects of climate change now considered a global crisis, financial institutions are recognizing the critical role they play in

financing the transition to a low-carbon economy and are now shifting from the traditional sole goal of profit-making. Banks and other financial institutions are now more attentive to environmental concerns, social issues and good governance practices that impact society at large, to ensure that they operate ethically and responsibly. Indeed, banks that score well on ESG measures are often seen as being better managed and more likely to generate long-term shareholder value. Similarly, investors are making investment decisions based on purpose and sustainability. They are therefore more interested in financial institutions that not only have rosy financial statements but also integrate social, environmental and economic concerns into their business model. ESG is therefore becoming increasingly important for banks, financial institutions and their customers/investors for various reasons related to profitability, risk and values.

Now more than ever, financial institutions and banks are considering ways to mitigate against negative environmental and social impact, intending to address the emerging needs of society. Further, these institutions are experiencing internal and external pressures to be vigilant about ESG concerns, with banks now required to build sustainable lending frameworks to address issues such as environmental externalities, employee welfare, social diversity and the establishment of sustainable economies that are beneficial to global citizenship.

Institutions that are unable to integrate ESG into their business models, will face increased pressure to be more responsible and accountable. Such institutions are also likely to encounter challenges including higher credit risks, unfavourable lending terms and weaker profitability, as ESG risks will become more concentrated in their loan books.

In this article, we shall explore the sustainable loan market with a particular focus on ESG lending and the interplay of ESG performance on borrowers. We shall also explore emerging trends in the ESG lending landscape.

ESG Lending

Banks are the primary source of debt financing for companies and individuals around the world. As such, their lending activities are greatly linked to the impact that businesses have on ESG issues and have thus facilitated the growth in ESG lending.

ESG lending generally involves various facilities and instruments that financial institutions offer to facilitate and support environmentally sustainable economic activities. These facilities are now offered in form of ESG loans, which are broadly categorized into ESG-linked loans and green loans.

ESG-Linked Loans

ESG-linked loans are general-purpose facilities whose pricing terms are tied to the ESG adherence and performance of the borrowing entity or individual. These facilities are also referred to as sustainability-linked loans. ESG-linked loans are attractive to borrowers because the use of the loan proceeds is less restrictive and the interest rate is dependent on adherence to ESG practices, contained within the borrowing agreement.

ESG-linked loans are often issued in the form of revolving credit lines and are pegged explicitly on Key Performance Indicators (**KPIs**) incorporating sustainability goals. These KPIs are structured either as an ESG score assigned to the borrower by external rating agencies or specific measures such as greenhouse gas emissions or employee health and safety performance.

The ESG score assigned often informs the interest rate charged on the facility by a lender. For instance, the interest rate can decrease when the ESG rating of a borrower is higher.

That notwithstanding, there is flexibility with sustainability-linked loans in that the proceeds can be used for non-green purposes, thereby broadening the scope for borrowers and lenders concerned with sustainability issues. This means that the loan proceeds can be employed for regular operations, instead of only funding projects that potentially benefit the environment.

Globally, the ESG-linked loan market has grown rapidly since 2017, when Royal Philips NV announced the first revolving credit facility linked to sustainable lending which was the first syndicated loan of this kind worth 1 Billion Euros, with the interest rate pegged on the company's year-on-year sustainability performance.

Closer home, we have seen the growing partnership by financial institutions to provide sustainability-linked financing to both green and non-green projects and businesses.

Green Loans/Green Bonds

Green loans or green bonds are facilities whose proceeds are earmarked to exclusively finance or re-finance, in whole or in part, environmental and climate-friendly projects such as renewable energy, biodiversity conservation, sustainable water, wastewater management and carbon capture.

Unlike ESG-linked loans, green loans fund specific projects with explicit sustainable features. At the core of this are the green loan principles which provide a list of green project categories, that shed light on the eligible green projects and must be adhered to during the advancement of green loans. These principles include the use of the proceeds of the project; the process for project evaluation and selection to be developed by borrowers and lenders; management of the proceeds of a green loan to ensure transparency and to promote the integrity of the project; reporting by making readily available up-to-date information on the use of proceeds of the project.

In Kenya, green loans are viewed as an instrument of raising funds for activities that promote environmental protection in energy, agriculture, waste management, water, transport and urban planning.

There is in place the Green Bond Program, which is coordinated by the Kenya Bankers Association, Nairobi Securities Exchange and Climate Bonds Initiative in conjunction with the Sustainable Finance Initiative.

An example of a financial institution offering green loans in Kenya is KCB Group Ltd. The institution was accredited in 2020 by the United Nations Green Climate Fund for on-lending investments and projects with a positive impact on the environment. It is reported that this year, the lender is set to extend a KES. 5 Billion loan facility to an infrastructural sector firm, which shall be the first company to receive the green loan. Several other financial institutions in the country have dedicated departments that focus on sustainable lending and compliance with ESG reporting.

Green Equity

Green equity is characterized as a direct investment, semi-direct investment and indirect investment in the shares of an entity to promote environmentally sustainable and climate-compatible projects. The capital raised from the said investment is used to pursue this cause, to comply with the mandates under the Paris Agreement of 2015.

Sustainability-Linked Schuldschein

A Schuldschein is a form of private debt placement comprising typically unsecured medium to a long-term debt obligation. It has been used for decades in Germany and Austria. It comprises both the elements of loans and bonds and can be offered in a range of maturities, interest rates, currencies, and lending amounts. However, unlike a traditional bond, a Schuldschein is not registered as a security and does not require a formal rating from a credit rating agency. It can, however, be marketed and traded among investors.

It is now emerging that sustainability-linked Schuldschein can be offered as a sustainable finance facility, within the confines of green financing as they are credible and impactful. This is because sustainability-linked debt encourages issuers to measurably change their business models, in favour of sustainability, regardless of where they currently fall, concerning their environmental effect.

Green Sukuk

Sukuk are Shariah-compliant securities backed by a specific pool of assets. Green Sukuk are Shariah-compliant investments in renewable energy and other environmental assets. They, therefore, address Shariah's concern for protecting the environment. The proceeds of the Green Sukuk are used to finance climate change mitigation, climate change adaptation and environmental projects.

Regulatory Framework

The Central Bank of Kenya Guidance on Climate-Related Risk Management

The Central Bank of Kenya Guidance on Climate-Related Risk Management (**the Guidance**) was issued in October 2021 under section 33 (4) of the Banking Act (Cap. 488) Laws of Kenya, which empowers the Central Bank of Kenya (**CBK**) to guide institutions to maintain a stable and efficient banking and financial system. The main aim of the Guidance is to provide institutions with a roadmap to integrate climate-related risks into their decision-making frameworks.

The rationale behind emphasizing integrating climate-related risks is that climate-related financial risks significantly increase the banking sector credit risk as a result of factors such as severe floods, drought, landslides and wildfires that have the effect of destroying a borrower's assets or impairing supply chains.

The Guidance provides guidelines to the banking industry stakeholders on how to embed considerations of the financial risks from climate change in their governance structures; to incorporate the financial risks from climate change into their existing financial risk management practice; and to develop an approach relating to the disclosure on the financial risks from climate change. Additionally, the responsibility of formulating and implementing these climate-related financial risk management strategies for an institution is placed on the board of directors and the senior management of the institution.

The Guidance also sheds light on the formulation of an effective climate governance structure to enable financial institutions properly assess climate-related risks and opportunities, and to enable them to set the relevant goals and targets.

The Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015

The Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 (**the Code**), was issued under section 11 (3) of the Capital Markets Act (Cap 485A) Laws of Kenya. Its main aim is to provide a roadmap for the principles and specific recommendations on structures and processes which companies should adopt in integrating good corporate governance in their business dealings and culture. In particular, the Code obliges boards of directors to ensure that they have formal strategies in place to promote sustainability and that particular attention is paid to the ESG aspects of the business.

This is done through the "*Apply or Explain*" approach, where boards of directors are required to fully disclose any non-compliance with the Code to the relevant stakeholders, with a firm commitment to move towards full compliance. The Code, therefore, advocates for the adoption of standards that go beyond the minimum prescribed by legislation, for instance taking into account the welfare of the stakeholders.

Nairobi Securities Exchange ESG Disclosures

In November 2021, the Nairobi Securities Exchange alongside the Global Reporting Initiative released the Nairobi Securities Exchange ESG Disclosures (**NSEEDs**). The motivation behind issuing the NSEEDs is that ESG reporting provides a framework through which investors, owners of capital and the public at large, can have a more comprehensive view of the company's activities and performance, beyond its financial numbers. The NSEEDs aim to improve and standardize ESG information reported by listed companies and provide a granular, as well as tactical approach to ESG reporting, that meets international standards such as the United Nations ESG reporting requirements.

The NSEEDs also provide guidelines on how to meet corporate governance reporting requirements contained in the Code, intending to capture significant opportunities for stakeholders while managing critical business risks. The NSEEDs provide key emphasis on the expectations for lenders to ensure business continuity, regulatory compliance, responsible application of credit products and the protection of human rights which should be continuously communicated through financial statements, environmental and social monitoring reports and sustainability reports. It is expected that consistent application of the NSEEDs will help improve the capital markets in Kenya, by providing information that investors are now demanding to facilitate decision-making and capital allocation, which is the key objective of capital markets.

Emerging ESG Trends

Financial Technology

Financial technology such as blockchain and distributed ledgers are emerging in the sustainable finance ecosystem. These new technologies are aiding in overcoming market impediments that would ordinarily hamper sustainable financial instruments and investment vehicles. Additionally, these technologies assist in reducing transaction costs significantly, a key benefit to any borrower. The World Bank has pointed out three (3) major ways that digital innovation can promote sustainable finance practices. These include the provision of transparency and robust rule implementation through smart

> ***In the wake of change to attitudes concerning how financial institutions operate, it is important to understand the concept of ESG, as it continues to take a critical role in corporate reporting.***

contracts; collaborative governance systems that ensure effective monitoring, reporting and verification standards; and leveraging the use of data flows.

Sustainable Finance to the Unbanked

Microfinance institutions (**MFIs**) play a key role in society by providing access to financial services to the unbanked section of the population i.e., those who do not have bank accounts. MFIs are equipped with the rural infrastructure to bring fundamental transformation at the social and environmental levels. For governance, MFIs in Kenya are adequately regulated and have in place strong corporate governance structures which ensure that they are properly structured to provide responsible and sustainable finance. In this regard, MFIs are proving to be a financial institution of choice for a large part of the demographic and with their widespread reach, they are at the epicentre of contributing to the ESG framework in Kenya.

Conclusion

ESG issues are key considerations for banks and other financial institutions, just like any other business. More and more customers, investors and other stakeholders are looking for banks that take ESG seriously. This is not a fleeting trend – it is here to stay and banks and financial institutions that do not pay attention to ESG considerations will find themselves at a disadvantage in the years to come. Banks and financial institutions should develop comprehensive ESG policies and ensure that they have committed teams who understand ESG policies and know how to implement them. Banks and other financial institutions must communicate these policies to their stakeholders and most importantly, live up to their commitments, without focusing only on profits.

By implementing ESG policies, financial institutions create a positive impact on the world, while protecting their bottom line. With time, all banks and financial institutions will have to disclose their ESG practices transparently, so as to build trust with stakeholders and confirm that they genuinely include the implementation of ESG policies in their business strategies. Indeed, banks and financial institutions that adopt effective ESG policies are likely to attract more customers, improve their reputation, generate higher profits and will be well-positioned to make sound investment decisions and foster sustainability.

In today's world, there is simply no excuse for banks and financial institutions not to be responsible and ethical in implementing their ESG policies. There is no doubt that financial institutions are witnessing rapid growth and an emphasis on sustainable finance. As shareholders become increasingly focused on responsible investing, disclosures around ESG performance are likely to continue to increase. With the significant growth being currently experienced in ESG lending and reporting activities, we are keen to monitor the emerging trends relating to ESG-related facilities and the exploration of credit markets, by financial institutions.

In the wake of change to attitudes concerning how financial institutions operate, it is important to understand the concept of ESG, as it continues to take a critical role in corporate reporting. As such, banks and financial institutions are using ESG more frequently to create shared value, rather than merely complying with recognised standards or principles that they are required to accept. Banks and financial institutions must lend responsibly and be accountable as global citizens if they want to remain relevant.

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SET APART:

UNDERSTANDING INCOME TAX EXEMPTIONS IN KENYA

Income tax exemptions are one of the ways in which the Government implements its socio-economic policies. These policies range from protection of vulnerable persons, encouraging persons to save for their retirement, encouraging investments to promoting sports and social activities and the recognition of cultural norms and values. This article seeks to provide an overview of income tax exemptions granted by the Government under the Income Tax Act (Cap. 470) Laws of Kenya (**the Income Tax Act**). Section 3 (2) of the Income Tax Act provides a conclusive list of types of income that are subject to income tax. A person earning income that is subject to income tax is required to declare the same and pay the appropriate taxes on it. However, the Income Tax Act also provides for the exemption from income tax of certain types of income and persons.

Types of Exemptions

There are generally two (2) types of income tax exemptions – statutory exemptions and ministerial exemptions.

Statutory Exemptions: These are exemptions provided for primarily under the Income Tax Act and other Acts of Parliament. They include income of certain entities/persons such as county governments, pension schemes, provident funds, the East African Development Bank, registered trusts, religious organizations and individuals registered under the Ajira Digital Program. Statutory exemptions also cover income from certain transactions such as interest earned on savings accounts held with PostBank, interest from green bonds, sale of a private residence which one occupied for at least three (3) years immediately prior to the transfer and monthly pension granted to a person who is sixty-five (65) years or older.

Ministerial Exemptions: These are exemptions granted by the Cabinet Secretary responsible for matters relating to finance (**the Cabinet Secretary**) and are done through a Legal Notice. Such exemptions can be granted in relation to an entity or a transaction and include management fees, royalty or interest as may be certified as free of tax by terms of an agreement. However, all ministerial exemptions must be presented to the National Assembly which can veto such an exemption.

Given that taxation is necessary to enable the Government raise revenue and enforce certain policies, it is important that tax exemptions are not granted too freely. As such, tax exemptions can be classified as either exemptions as of right or as conditional exemptions.

Exemptions as of Right

Certain exemptions, such as the exemption of a registered pension scheme, are as of right i.e., the Kenya Revenue Authority (**KRA**) is legally required to exempt such a person/income stream and the person's entitlement to such an exemption is not subject to the approval of another person or authority. However, KRA requires such parties to lodge an exemption application for several reasons such as verification of the existence and identity of the applicant and verification of the applicant's income streams.

Conditional Exemptions

Certain exemptions are subject to the approval of KRA or the relevant Cabinet Secretary, or subject to the presentation of evidence of compliance with certain requirements. For example, Non-Governmental Organizations (**NGOs**) set up for the purpose of poverty relief must prove that they have been set up solely for that purpose (or other charitable purposes) and that their activities will benefit Kenyan residents. As such, the conditional exemptions are subject to the taxpayer providing attendant proof of qualification with respect to the exemption sought.

Exemption Applications

A taxpayer seeking exemption of taxable income is required to lodge a written exemption application made up of the constitutive documents of the entity; the objects of the entity and proof of (or intention of) furtherance of the objects; financial statements; and any other information KRA may request.

However, certain exemptions such as income tax exemptions for persons living with disabilities are less stringent in terms of documentation, and require proof of identification, tax registration and registration with the National Council for Persons with Disabilities. All tax exemptions granted provide for the commencement date of the exemption (and the expiration date if time bound).

Exemption Renewals
Persons enjoying a timebound exemption may apply for renewal of the same by a written application supported by an application letter for renewal of exemption; proof of the expiring/expired exemption; financial and bank statements; filed income tax returns; proof of projects carried out within the last three (3) years (in the case of a five-year exemption); and any other document KRA may request.

When an Exemption is not Required
A person should only seek income tax exemption when they accrue or earn income that is ordinarily subject to income tax. A party, such as a religious institution, whose sources of income (e.g. tithe, donations and offerings) are not subject to income tax and as such are not required to seek income tax exemption for that income as the exemption would not have any effect. However, it is important to note that a person earning both taxable and non-taxable income would need to apply for exemption for the taxable income streams. The High Court in *Commissioner of Domestic Taxes vs Thika Road Baptist Church Ministries (2022) eKLR* held that an exemption certificate only covers income that would otherwise be subject to income tax. The presence or absence of a tax exemption certificate does not affect income that is not chargeable to income tax under section 3 of the Income Tax Act.

Unaffected Income Tax Obligations
A party granted an exemption is not required to pay taxes on their exempt income. However, the exemption does not affect the taxpayer's other obligations. Some of the unaffected tax obligations include:

Record Keeping
Exempt persons or persons whose income on certain transactions is exempt are required to maintain proper accounting records and supporting documentation for a period of at least five (5) years. This enables KRA to audit one's books and would form the basis for the review of exemption renewal applications.

Filing Returns
Exempt persons are required to file their income tax returns and maintain all relevant supporting documentation. KRA is empowered to audit such returns and supporting documents. This enables KRA to review all the entity's income to confirm whether it has been fully and properly declared. It also enables KRA to compare the tax treatment of a transaction by both parties to the transaction to ensure that one is not misreporting the same.

Withholding Taxes
Payments relating to the provision of certain kinds of services are subject to withholding tax. These include legal fees, building contractor's fees and accounting fees. An exempt entity remitting payments that are ordinarily subject to withholding tax is still under an obligation to withhold tax as the payment is taxable income to the service provider and not income to the exempt taxpayer. Further, an exempt taxpayer can be subject to interest and penalties for failing to withhold taxes on payments made to non-exempt taxpayers.

Employee Taxes
Entities that are exempt from income tax are required to subject their non-exempt employees' income to Pay As You Earn (PAYE) taxes as well as other statutory deductions.

Exempt persons or persons whose income on certain transactions is exempt are required to maintain proper accounting records and supporting documentation for a period of at least five (5) years.

Limitations to Exemptions

Expiry
Generally, a government will only issue tax exemptions for as long as the exemptions are needed. Kenya is no exception. Where the need for an exemption is perpetual, an exemption granted generally will not be subject to a time limitation. For example, County Governments need to be permanently exempted from income tax to ensure that their revenue can be channelled to efficient provision of devolved services and to prevent the unnecessary returning of cash to the exchequer after disbursement of funds by the National Treasury to County Government accounts.

When an exemption is needed for a specific period or to encourage a taxpayer to carry out a transaction within a specific period, the Government will generally grant a time-bound exemption. For example, previous Cabinet Secretaries granted time-bound exemptions on retirement benefits to certain parastatals with respect to voluntary early retirement of staff members as a way of managing the parastatal's long-term staff costs. It is important to note that any transaction carried out after the expiration of the exemption period will be subject to income tax.

Revocation
Given that the power to impose and alter tax obligations is bestowed upon Parliament, all ministerial exemptions must be tabled before the National Assembly for review within a reasonable period. The National Assembly then has a twenty (20) day window (which is calculated from the later of the assembly sitting or the exemption being tabled) to revoke an exemption.

The Cabinet Secretary may also revoke a ministerial exemption by issuing a Legal Notice specifying the date when the exemption shall cease to have effect. This may be due to achievement of the objective of the exemption, change in Government policy or misuse of the exemption. KRA is empowered to revoke exemptions under certain circumstances such as dissolution of the entity, violation of a mandatory requirement to a conditional exemption or any other reasonable cause.

Scope of Transactions
Whereas an entity may be granted tax exemption on its income, this may be restricted to income relevant to the cause of that entity. For example, the income of NGOs and religious organizations (e.g., churches, mosques, temples, and synagogues) is exempt insofar as it is used in furtherance of charitable activities or religion. Any earnings (from grants or business) that are not channelled to such purposes or earnings that are extracted in a manner similar to profits may be subjected to income tax.

Conclusion
Based on the above, it is important for entities seeking new or renewal of tax exemptions to ensure that their activities and finances present a good case for exemption. Further, one must understand the limits and conditions that apply to the exemption and ensure that their activities remain within such bounds to avoid revocation or cancellation of an exemption.

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A HIGH CALLING:

EXAMINING THE DUTIES OF AN ADVOCATE TO COURT

Every Advocate in Kenya is an officer of the Court, and this is firmly entrenched under section 55 of the Advocates Act (Cap. 16) Laws of Kenya, which stipulates that "*every advocate and every person otherwise entitled to act as an advocate shall be an officer of the Court and shall be subject to the jurisdiction thereof and, subject to this Act, to the jurisdiction of the Disciplinary Tribunal.*"

During their admission to the Bar, lawyers in Kenya take a solemn oath to uphold the rule of law and the administration of justice and to faithfully discharge their duties as Advocates of the High Court of Kenya. In law school, lawyers are trained that an Advocate's duty to the Court is superior to his or her duty to the client. This was aptly explained by Robert Bell and Caroline Abela in their text *A Lawyer's Duty to Court*, where they opine that a lawyer should not act in a way that serves the client's best interests if doing so would put the administration of justice and the community's confidence in the profession at risk.

Duties of an Advocate to Court

It is against the foregoing background that we turn to consider what the duties of an Advocate are to Court. These may be summarised as follows:

a) Duty not to Mislead the Court

An Advocate is under a duty not to mislead the Court, either when presenting facts or addressing the law. This duty requires an Advocate to make full disclosure of all the binding authorities relevant to a case, regardless of whether the same undermine a position being advanced by that party and even if opposing counsel has not cited that authority.

If an Advocate fails to make full and frank disclosure of all the relevant and binding authorities known to him and touching on the matter before Court, an argument can be made that the Advocate is actively misleading the Court by only presenting one legal position, when another binding legal position known to the Advocate exists. As was stated by the Court of Appeal (Sir Kenneth O'Connor P.), in the case of *Lobo v Saleh S. Dhiyebi (1961) EA 223:*

"An Advocate who appears for a client in a contested case is retained to advance or defend his client's case and not his own. This he must do strictly upon instructions and with a scrupulous regard to professional ethics. Remembering that he is an officer of the Court and owes a duty to the Court as well as to his client, he must never mislead the Court as to the facts or the law."

b) Avoiding "*Sharp*" Practice

This is a duty not to misrepresent one's intentions or to take undue advantage of honest slips, difficulties, or mistakes on the part of other Advocates. In the current era of virtual Court attendances, sharp practice may include pressing for *ex parte* Orders and proceedings with the knowledge that opposing counsel is experiencing network challenges or that opposing counsel had requested that the file be momentarily placed aside. Sharp practice is also intended to deter Advocates from taking one position outside the Court confines but later changing or disavowing the same in Court, for instance, agreeing to an adjournment on telephone but turning to oppose the same in Court once the application is made.

c) Avoiding Abuse of Court Process

Abusing the Court process entails the deliberate use of proceedings for frivolous purposes or to delay or frustrate the conclusion of a matter. For instance, where proceedings are instituted by a party with the knowledge that a conclusive Judgment or Ruling has already been rendered in a matter, this is an abuse of the Court process and the new proceedings are *res judicata* i.e., already heard and determined by a Court and therefore settled. Abuse of Court process also includes the pursuit of a claim that an Advocate knows is not merited, but nonetheless prosecutes it to advance the client's ulterior motive, say to harass, annoy or irritate the adversary, and in the process create an obstacle to the efficient administration of justice.

d) Avoiding Delay

Delay is any conduct that tends to unnecessarily slow down or lengthen the Court process, especially through failure to meet deadlines imposed by Court or prescribed by law despite having sufficient time. It can entail late fillings, seeking unnecessary adjournments, attending Court late, and general tardiness in the conduct of matters.

e) Advising Clients of Court Processes

This entails advising clients properly and accurately as to the remedies available in law and those which the judicial process would not entertain in their circumstances. An Advocate should therefore reject suggestions for underhand tactics meant to breach their professional obligation to the law.

f) Client's 'Best Interests'

An Advocate should be wary of taking positions that are supposedly in the 'best interests' of the client if such a position would breach the Advocate's primary duty to the Court. To this end, an Advocate ought not to, among other things:

- File suits or applications in Court that the Advocate knows do not have merit
- Present and/or prosecute cases that are *res judicata* and amount in an abuse of Court process
- Coach or permit the coaching of any witness in relation to the evidence to be given by the witness before Court
- Deliberately suppress authorities and/or arguments on a binding legal position that undermines the client's case

Engaging in such conduct may invite Court sanctions to not only the client, but to the Advocate personally. For instance, the Court in the case *Satya Bhama Gandhi v Director of Public Prosecutions & 3 Others (2018) eKLR* upon finding that there was abuse of Court process, indicated that it has the power to prevent misconduct by Advocates by punishing such abuses:

"It is clear that the issues raised in this application are substantially the same as those determined in the Petition. It is beyond argument that the plea of res judicata succeeds. I am also persuaded that this application is a clear abuse of Court process. This Court has power and duty to protect its processes from being abused. I strongly hold that the applicant and his advocate should not go unpunished for abusing this Court's processes. Such flagrant abuse of Court processes must be brought to a halt.

Courts are not powerless when it comes to dealing with such misconduct. The doctrine of abuse of process, based upon the inherent authority of every Court to control its process and those persons who come before it, is a power incidental and necessary to the exercise of substantive jurisdiction. That power, together with rules of Court and statutory provisions, enables the Court to dismiss or strike claims which are frivolous and vexatious. In addition, it may be exercised to discipline litigants and lawyers guilty of misconduct. It is regrettable that this power has been used only grudgingly, sparingly and in blatant cases."

The Court then went on to impose the costs of the dismissed application that amounted to an abuse of Court process upon the Advocates as below:

"One such consequence is that the lawyer can be ordered to pay costs personally. I find that this is a proper case for such an order. Consequently, I dismiss this Judicial Review application with costs to the first Respondent and the Interested Party and order that the applicant and his advocate shall jointly pay the costs of these proceedings on a 50-50 basis. Such costs to be assessed by the taxing master of this Court."

The legal profession is a noble one and Advocates ought to be held to a higher standard, in that commercial gain would not tempt an Advocate to attempt to breach the statutory duty owed to the Court. At this high level, an Advocate is to be guided by good conscience, ethical beliefs and should at all times abide by the overriding principles and values that govern the legal profession.

Conclusion

The legal profession is a noble one and Advocates ought to be held to a higher standard, in that commercial gain would not tempt an Advocate to attempt to breach the statutory duty owed to the Court.

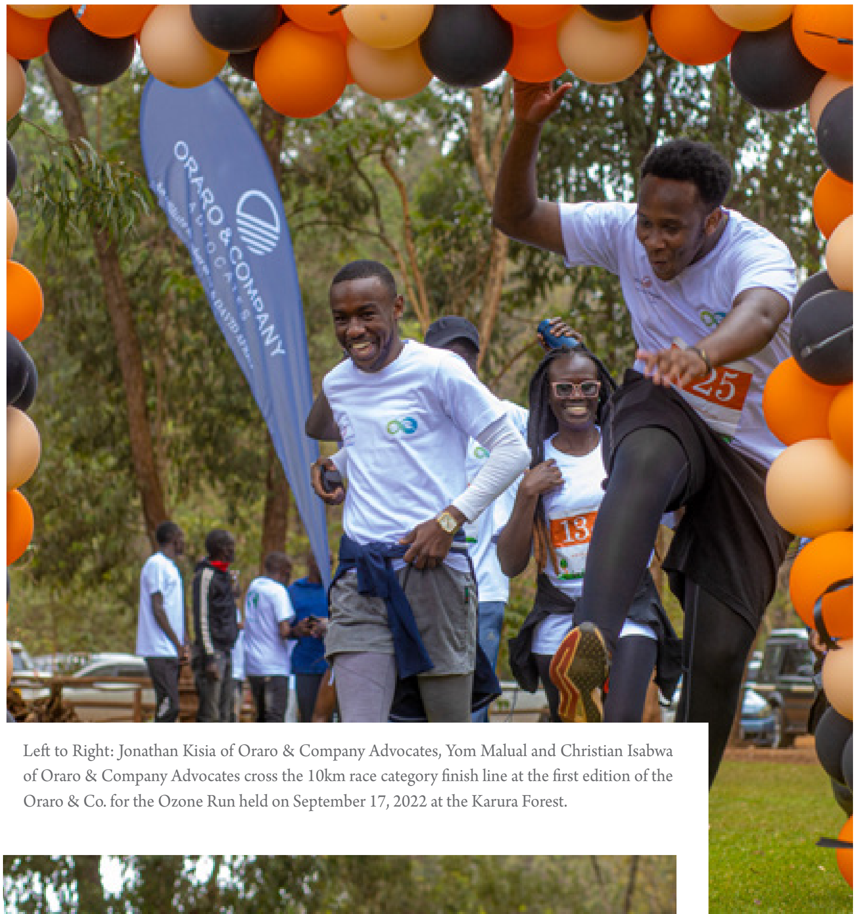
At this high level, an Advocate is to be guided by good conscience, ethical beliefs and should at all times abide by the overriding principles and values that govern the legal profession.

This was concisely stated by Mativo J (as he then was) in the case of *National Water Conservation & Pipeline Corporation v Runji & Partners Consulting Engineers & Planners Limited (2021) eKLR* whereby the learned Judge held as follows:

"The profession of law is called a noble profession. It does not remain noble merely by calling it as such unless there is a continued, corresponding and expected performance of a noble profession. Its nobility has to be preserved, protected and promoted. An individual or an institution cannot survive in his/its name or on his/its past glory alone. The glory and greatness of an institution or an individual depends on his/its continued and meaningful performance with grace and dignity. The profession of law being noble and honourable one, it has to continue its meaningful, useful and purposeful performance inspired by and keeping in view the high and rich traditions consistent with its grace, dignity, utility and prestige."

ORARO & COMPANY ADVOCATES FOR THE OZONE:

GREENING THE FUTURE



Left to Right: Jonathan Kisia of Oraro & Company Advocates, Yom Malual and Christian Isabwa of Oraro & Company Advocates cross the 10km race category finish line at the first edition of the Oraro & Co. for the Ozone Run held on September 17, 2022 at the Karura Forest.

On the 17th of September 2022, a day after the International Day for the Preservation of the Ozone Layer, Oraro & Company Advocates successfully launched its flagship environmental sustainability initiative dubbed 'Oraro & Co. for the Ozone'. Through the initiative, the firm hosted its maiden run at the Karura Forest in Nairobi. The purpose of this initiative is to highlight the threat and effects of climate change.

In Kenya, the negative effects of climate change have manifested in a number of ways: rainfall patterns have changed, with the long rainy season becoming shorter and drier and the short rainy season becoming less reliable. With these changes, there is a rising threat to food security, coupled with increased health risks associated with dwindling water resources, an upsurge in poverty and displacement, as well as reduced biodiversity, among a myriad of other effects.

At Oraro & Company Advocates, we believe that every person has a role to play in contributing to reducing and ultimately eliminating the environmental degradation caused by climate change. To play a part in safeguarding our future, we had the pleasure of partnering with the Ngong Road Forest Sanctuary for this year's edition of the #OCOfortheOzone run to promote the sustainable development and reforestation of the Ngong Road

Judy Ajode (left), Sheila Kiboro (centre) and Jayzelle Kiboro (right), race to finish their 5km run.

Founding Partner of Oraro & Company Advocates, Senior Counsel George Oraro (right) and Chacha Odera, Senior Partner at the firm (left), give speeches after the award ceremony took place.

Participants take off for the 21km race category.

Forest Sanctuary for climate amelioration.

With over 200 runners participating in the event, the #OCOfortheOzone run was flagged off at 7:30 am, starting with the 21km runners. The runners followed a route that went through the larger part of the forest. The 10km and 5km participants left sequentially soon after the 21km participants. The firm, with the support of event sponsors, crafted an event which gathered families and friends from around the country, united by a common purpose - the preservation of our environment.

Speaking during the award ceremony, our Founding Partner, George Oraro SC, said that: "*in a world where natural resources are depleted daily and at record-breaking speeds, we as a firm are pleased to play our part in safeguarding our environment for this and future generations to enjoy*." In Professor Wangari Maathai's words, he added, "*it's the little things citizens do. That's what will make the difference. [Our] little thing is planting trees*."

Also speaking at the event, Diamond Trust Bank Limited's Head of Digital Marketing,Alvin Mokaya, said that climate risk is the biggest risk that the business faces today. He also added that he is proud to take a stand in Sustainable Development Goal 13 (climate action), which he recognizes as being very critical.

At Oraro & Company Advocates, we are passionate about supporting environmental conservation. All proceeds from the #OCOfortheOzone run were donated towards reforestation within the Ngong Road Forest Sanctuary in Nairobi. We are committed to playing our part in addressing environmental degradation and reducing the resultant negative environmental impact.

The initiative culminated in a tree-planting exercise at the Ngong Forest Sanctuary on the 12th of November 2022.

Christine Oraro (left) of Christine Oraro & Company Advocates and Evalyn Onchwari of Oraro & Company Advocates, celebrate as they cross the finish line for the 5km race category.

Left to Right: Yom Malual Majok, Mabor Aloony Kajok, Naisula Ntaiya, Ajak Jok of Oraro & Company Advocates, Becky Kuir Atem and Cyrene Simon Matiop pose for a photo in celebration of their participation in the run.

Participants pose for a group photo after the tree planting exercise was completed at the Ngong Road Forest Sanctuary- Lenana block.

Senior Counsel George Oraro (left), waters a tree alongside an officer from the Kenya Forest Service.

Deputy Managing Partner John Mbaluto, FCIArb (left) and Partner Noella Lubano, both from Oraro & Company Advocates, water a tree.

Simon Nganga (right), the Vice Chairman of Ngong Road Forest Association, demonstrates how to plant a tree during a tree planting exercise at the Ngong Road Forest Sanctuary – Lenana block.

Pamella Ager, Managing Partner at Oraro & Company Advocates, gives a speech before the tree planting exercise took place.

Participants of the tree planting exercise including employees, some of their family members, and a few representatives from sponsoring organizations who had sponsored our maiden run held under the 'Oraro & Co for the Ozone' initiative, plant trees.

The visiting team presents donations to the Langata Women's Prison.

ORARO & COMPANY ADVOCATES TEAMS UP WITH THE NATIONAL COUNCIL FOR LAW REPORTING (KENYA LAW), TO SUPPORT JUSTICE DEFENDERS

Justice Defenders (**JD**), (formerly known as the African Prisons Project), is a charitable movement and organization which was founded by Alexander McLean in 2007, after a visit to Uganda in which he encountered deplorable prison conditions and the indignity that prisoners were subjected to. The African Prisons Project was initially geared towards improving the conditions of prisons in Africa. However, in 2017, the focus shifted to providing access to justice. The Organization realized that no matter what they did to improve the welfare of people in prison, if they did not have justice, they would not have peace. Therefore, in 2020, they rebranded and relaunched as JD.

JD was henceforth geared towards equipping the defenceless communities with legal training to defend themselves and others. JD aims at bridging the justice gap by bringing dignity to those behind bars by equipping its members with the necessary skills to facilitate a just legal process, offering quality legal education to men and women within the prison system, and providing free, high-quality legal clinics and services to those without access to critical legal services within their communities.

In 2021, Oraro & Company Advocates and the National Council for Law Reporting (Kenya Law), entered into a partnership with JD to organize prison visits to various prisons that JD has a presence in, with the aim of enhancing access to justice through the training and sensitization of inmates on resources available to them in their pursuit of justice.

Through this partnership, we were able to visit the Langata Women's Prison, Thika Main Prison and Thika Women's Prison. Our team imparted key skills with respect to court etiquette, legal research, and legal procedure, which are necessary for the inmates to represent themselves in instances where they have no legal representation. This is because the paralegals play a key role in case planning, legal research, drafting pleadings, fact-checking, information retrieval and providing legal assistance and sensitizing the inmates.

By partnering with JD and Kenya Law, we seek to leave an impact on those who lack legal representation and ensure access to justice for all citizens in Kenya.

The visiting team poses for a photo outside one of the prisons.

A team from Oraro and Company Advocates, the National Council for Law Reporting (Kenya Law) and Justice Defenders, have a meeting with the Officer in Charge - Langata Women's Prison, Mrs. Esther Lochoto (centre), and discuss the impact of JD in improving access to justice in the prison system.

ORARO & COMPANY
ADVOCATES

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Established nearly half a century ago by George Oraro SC (one of Kenya's top litigators), Oraro & Company Advocates is a top-tier, full-service Kenyan law firm providing specialist legal services both locally and regionally in Arbitration, Banking & Finance, Conveyancing & Real Estate, Corporate & Commercial, Dispute Resolution, Employment & Labour, FinTech, Infrastructure, Projects & PPP, Restructuring & Insolvency and Tax. The firm has been consistently ranked by leading legal directories such as Chambers Global, IFLR1000 and Legal 500 and its partnership includes well-recognised advocates who are regarded for their expertise in their respective areas as well as their significant contribution to Kenyan jurisprudence.

Additionally, Oraro & Company Advocates is a full Affiliate Member of AB & David Africa, a Pan-African business law network committed to ensuring that businesses and projects succeed in Africa by helping clients minimize the risks associated with doing business in the continent. This enables us to offer cross-jurisdictional legal advice in a seamless manner while maintaining the highest professional standards.

For further information on Oraro & Company Advocates, please visit www.oraro.co.ke