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LEGAL & KENYAN

ORARO & COMPANY ADVOCATES NEWSLETTER | ISSUE 17 | MAY 2023

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The 'Diamond' Edition: Issue Seventeen

Greetings!

We are thrilled to share with you the 17th issue of our flagship publication, *Legal & Kenyan*, which, as per the norm, is packed with insightful articles that explore emerging legal issues in Kenya. This issue contains a special emphasis on Innovation and Entrepreneurship. Kenya's dynamic start-up ecosystem has seen a wave of innovators and entrepreneurs transforming various industries, and this issue highlights the legal landscape that supports their growth.

Our writers have contributed their expertise to bring you thought-provoking pieces that cover a wide range of legal topics. Chacha Odera and Meshack Kwaka start us off with a look at adjudication as an effective alternative dispute resolution mechanism, particularly in the construction industry. Pamella Ager and James Kituku come next with an in-depth analysis of the National Land Information Management System dubbed *Ardhi Sasa*, discussing its legal basis, services, benefits, and challenges, including the need for further public education and awareness campaigns. Natalie Obago and I then share our thoughts on a recent decision by the High Court of Kenya on the twin doctrines of precision in drafting of constitutional petitions and constitutional avoidance, underscoring their importance in ensuring that only legitimate constitutional issues are brought before the court.

Jacob Ochieng, Sheila Nyakundi-Marilu, and Ajak Jok pen our centrefold article, shedding light on the regulations set by the Capital Markets Authority to promote investor confidence and address issues such as liability, consumer protection, and money laundering in the crowdfunding sector. This is followed by Cindy Oraro and Blenda Nyahoro who highlight the bright future that lies ahead for Kenya's electric mobility sector, including the investment opportunities available in the sector and initiatives aimed at developing charging infrastructure and promoting the manufacture of electric vehicles. Hellen Mwongeli Mutua and I then delve into the role of an expert witness, including the circumstances that may require an expert opinion, how courts evaluate expert evidence, and what is expected of expert witnesses. Jacob Ochieng and Sheila Nyakundi-Marilu return with an insightful and informative piece on how companies can distribute their assets, before Nancy Kisangau and I bring down the curtains on the issue by discussing the concept of joint data controllers in the context of data protection.

We hope you find this issue informative and engaging.

Sincerely,

John Mbaluto, FCIArb
Editor

Founding Partner's Note

In Kenya, there is a growing emphasis on innovation and entrepreneurship to drive economic growth and prosperity. The government and private sector have been working together to create an environment that fosters innovation and entrepreneurship, particularly in the technology sector. This has led to the emergence of a vibrant startup ecosystem, with entrepreneurs and innovators creating new businesses and products that are transforming various industries such as agriculture, technology, entrepreneurship and infrastructure.

By embracing these opportunities, Kenya can position itself as a hub for innovation and entrepreneurship, and create a brighter future for all its citizens. It is on this premise that we are pleased to share with you the 17th issue of our flagship publication, *Legal & Kenyan*, where we take stock and analyse emerging legal issues.

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RECENT ACCOLADES

"Teamwork and collaboration. Knowledgeable of the nuances of the transaction."

IFLR1000, 32nd Edition

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SPEEDY RESOLVE:

ADJUDICATION AS AN EFFECTIVE METHOD OF ALTERNATIVE DISPUTE RESOLUTION

Introduction

Disputes are prone to arise in the course of construction projects. It is in the various parties' interests (be it the employer, main contractor, sub-contractor, architect, quantity surveyor etc.) that such disputes are speedily resolved so as to ensure that the construction project does not slow down or fall off the track altogether. Adjudication is one of the foremost alternative dispute resolution (**ADR**) mechanisms used to settle disputes as and when they arise, and whose efficacy is most pronounced in the construction industry.

Article 159 (2) (c) of the Constitution of Kenya, 2010 (**the Constitution**) provides for the use of ADR mechanisms such as reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms. Though not expressly mentioned, adjudication is one of the modes of ADR contemplated under Article 159 (2) (c) of the Constitution, and which the Courts are called upon to promote.

What is Adjudication?

Adjudication refers to a means of dispute resolution where a neutral person to the dispute, known as the adjudicator, considers the dispute between the parties and makes an interim but speedy determination that enables the contractual relationship (invariably of a construction nature) to continue. The Adjudication Rules of the Chartered Institute of Arbitrators, (Kenya Branch) describe adjudication as *"a dispute resolution procedure based on the decision-making power of an impartial, third party neutral natural person known as an adjudicator to reach a fair, rapid and inexpensive decision upon a dispute arising under a construction contract."*

Adjudication can also be termed as a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes through an adjudication process, as an alternative to litigation. Parties by mutual agreement thus forego their lawful right to have their disputes determined by the Courts.

An adjudication clause gives contractual authority to an adjudicator to determine disputes between the parties, which may either be binding or temporary in nature depending on the wording of the adjudication clause. Adjudication is thus viewed as an alternative to the Court process, the latter of which is ordinarily lengthy and costly, and rarely spares the relationship between the parties.

Who are the parties to Adjudication?

The parties to an adjudication process consist of the various professionals in a construction project such as the contractor, sub-contractors, the employer, the architect, the quantity surveyor amongst others. The adjudicator, who is usually an expert in the construction industry, considers and settles the dispute within a short period of time, typically twenty-eight (28) days.

Parties to a contract who wish to refer their dispute to an adjudication process, should include adjudication as the form of dispute resolution in the contract. The most common contracts in the construction industry which adopt adjudication as a form of dispute resolution are the agreements and conditions of contract for building works popularly known as the Joint Building Council (**JBC**) contracts, New Engineering Contracts (**NEC**) and the Fédération Internationale Des Ingénieurs-Conseils (**FIDIC**) contracts. FIDIC is the French language acronym for the International Federation of Consulting Engineers.

When can Adjudication be initiated and by whom?

Adjudication can be initiated by any party to a construction contract which contains an adjudication clause, at any time a dispute arises in the course of the construction contract. The dispute must arise from the construction contract and the contract must contain an adjudication clause.

The inclusion of an adjudication clause in construction contracts, including JBC, NEC and FIDIC contracts, has become commonplace due to the desire by the parties to steer clear of Court process and resolve their disputes expeditiously. The adjudication clauses may differ in content in various contracts, however, despite certain differences, these clauses retain the general form which provide for:

- Possible disputes that may arise between the parties during the construction
- Timeframe for the resolution of the dispute
- Appointment of the adjudicator
- Place of adjudication

What is the process of Adjudication?

When a dispute arises in a construction contract containing an adjudication clause, the aggrieved party commences the adjudication process by notifying the other party in writing of its intention to refer the dispute to adjudication. This notice should typically include details such as:

- The date and details of the contract between the parties
- The issues which the adjudicator is expected to determine
- The nature and extent of the redress sought
- A statement confirming that the dispute referral procedures in the construction contract have been complied with within the period of the notice

Thereafter, the responding party, upon receipt of the notice, may participate in the appointment of the adjudicator within the notice period. Sometimes, parties to a construction contract may include the name of the adjudicator in the construction contract. If an adjudicator's name is provided for under the adjudication clause, the parties may request the adjudicator to initiate the adjudication process. If an adjudicator is not named under the construction contract, the referring party should request the appointing authority or body stated in the contract to appoint an adjudicator within seven (7) days of receipt of the request and proof of payment of the appointment fee.

Adjudication is the preferred method of resolving disputes in the construction industry as it is speedy, cost-effective and allows the construction projects to proceed even as the adjudication goes on.

The appointment of the adjudicator is formalised on the signing of an adjudicator's agreement with the parties. Once the adjudicator is appointed, the party that initiated the adjudication process sends him and the responding party a full statement of the case including a copy of the notice of adjudication, a copy of the contract and copies of the documents in support of the statement of case. Once the responding party receives the statement of the case, the said party is required to submit a response.

Adjudication follows a very strict timetable and therefore parties are subjected to fairly short timelines since the adjudication process is ordinarily meant to be concluded within twenty-eight (28) days or within such other period as might be agreed to by the parties. It is the speedy and cost-effective nature of adjudication that makes it ideal for construction projects, which are themselves time sensitive.

The adjudicator is required to act fairly and within the rules of natural justice, to follow the rules of procedure outlined in the contract, be impartial and give a written decision within twenty-eight (28) days or such other period as might be agreed by the parties. The strict rules of evidence ordinarily do not apply. Where the parties are dissatisfied with the adjudication and depending on the adjudication clause, the matter might be referred to arbitration or Court. It is for this reason that adjudication is sometimes viewed as interim or ephemeral.

The decision made by the adjudicator is legally binding upon the parties, albeit with room to challenge it as indicated above. The adjudication decision can only be challenged or set aside in Court or through arbitration. This will however depend on whether the parties have incorporated an appeal process or a clause to set aside the adjudicator's award. The parties will normally meet the costs of the adjudicator upon conclusion of the adjudication process.

Conclusion

Adjudication is the preferred method of resolving disputes in the construction industry as it is speedy, cost-effective and allows the construction project to proceed even as the adjudication goes on. Adjudication is a markedly expeditious dispute resolution process since disputes are resolved in approximately a month's time, thus translating into reduced costs, as compared to litigation or arbitration, which typically take longer to conclude. Like arbitration, adjudication is a private and confidential process hence the adjudicator's decision will be confidential to the parties. During the adjudication process, the parties enjoy a form of control over the resolution of the dispute since adjudication can be instituted at any time during the construction project. It is an added advantage that an adjudicator is typically selected from a pool of experts, who ordinarily have vast expertise in the subject matter of the dispute.

It is noteworthy that the use of adjudication as a form of ADR has been growing rapidly particularly in the construction industry, where it has increasingly been adopted as the preferred form of resolving disputes. There is thus a need to create greater awareness of adjudication as a method of dispute resolution in other fields beyond the construction industry, for the advantages which it carries. Perhaps it is high time that adjudication was incorporated as a compulsory method of dispute resolution in Kenya, to emulate countries such as the United Kingdom, Australia, New Zealand, Singapore and Hong Kong which have made adjudication a mandatory method for resolving disputes in the construction industry.

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BETTER UNDERSTANDING:

ANALYSIS OF THE NATIONAL LAND INFORMATION MANAGEMENT SYSTEM (*ARDHI SASA*)

The National Land Information Management System, now dubbed "*Ardhi Sasa*", was formally launched by the Ministry of Lands and Physical Planning on 27th April 2021. Its proponents have touted it as being safe and secure, with advanced technology used to encrypt its data. *Ardhi Sasa* was rolled out on a pilot basis for Nairobi property transactions, with the intention being that the system would be extended to other parts of the country in due course.

Whereas *Ardhi Sasa* is almost two (2) years old, we have increasingly noted that users of the system have experienced challenges in navigating it in the course of their transactions. The purpose of this article therefore, is to help the various stakeholders in better understanding the *Ardhi Sasa* system and to provide an assessment of its effectiveness to date.

Legal Basis

Ardhi Sasa is founded on section 9 of the Land Registration Act, 2012 (**the LRA**), which requires the Chief Land Registrar (**the Registrar**) to maintain the Land Register in a secure, accessible and reliable format, which includes maintaining it electronically.

Additionally, under section 10 of the LRA, the Registrar is required to publicise information on the Land Register by use of electronic means, in accordance with the constitutional requirements of the right to access information as provided under Article 35 of the Constitution of Kenya, 2010 (**the Constitution**). Further, section 44 (3A) of the LRA allows the electronic execution of documents. The Land Regulations 2017 were also amended in 2020, to facilitate *inter alia*, electronic inventories of land and natural resources, issuance of licences, processing of orders, conversion of land tenure and change of user.

Services Available on *Ardhi Sasa*

The objective of *Ardhi Sasa* was to digitise land transactions and related services. Presently, the following services are available on the system: Under land registration: official searches, transfers, cautions, charges, leases, replacement of converted titles, rectification of land records. Under land administration: land rent invoices, development control and government leases. Under physical planning: compliance certificates and approvals of development plans. Under survey and mapping: new grants, amalgamations, subdivisions, re-surveys, re-establishment of beacons, requests for survey and mutations and sectional plans for sectional titles. Under land valuation: asset valuations e.g., for stamp duty purposes, government agencies' purchases and estate administration. Under National Land Commission: land administration and land use.

Given the diversity of the available services on *Ardhi Sasa*, the system is useful to property owners, financiers as well as professionals such as registered physical planners, surveyors, lawyers and land valuers. Each user is required to open an *Ardhi Sasa* account in or-

der to transact on the system.

Hits and Misses

Ardhi Sasa was a radical departure from the conventional documents' system, which was predicated on manual records and which at times were unavailable and often inconclusive. This frustrated transactions, which could not proceed until the relevant records were traced or reconstructed as necessary by the relevant land registries.

Secondly, there was also the issue of inadequate safeguards concerning the access of sensitive personal data, as private property records were available to the general public upon request.

Thirdly, there was need to weed out middlemen and cartels, which had been profiteering from the unavailability or inadequacy of documentary records. These disinterested third parties would act as a bridge between the transacting parties and the records, as they would insist on "*facilitating*" tracing of records for the transactions to be finalised. Cartels would capitalise on the inadequate records to defraud bona fide owners by forging parallel titles and other land records.

It was against this backdrop that *Ardhi Sasa* was introduced to revolutionise land transactions, with all the attendant processes from inception to conclusion undertaken online. Thus far, the system has been hailed for the following reasons:

- **Infusion of professionalism into land dealings** - Only concerned persons e.g. proprietors, financiers and registered professionals can undertake transactions on the system.
- **Fostering confidentiality and security of land records** - the system has been designed to ensure that property owners are first notified and must consent to transactions involving their properties, right from official searches to other more complex matters. Furthermore, the system affords various layers of security to account holders, as a user has to input a password to access the account. Moreover, there is a provision for a specimen signature which a user has to upload as part of account setup, which signature will be useful for authenticating future applications.
- **Reduction in corruption** - Noting that the system users interact directly with land records, the necessity of intermediaries has greatly diminished, as users can freely transact online without unsolicited/unwarranted assistance from third parties.
- **Efficient record-keeping** - Digitised records are easily accessible online, hence transactions are not dependent on availability of physical files.
- **Increased accessibility** - Users can freely transact from anywhere, without necessarily having to physically visit land offices to process their applications.

Despite the good intentions behind the introduction of *Ardhi Sasa*, the system has unfortunately also been riddled with some challenges. These include the following:

- **Lack of awareness** - Many Kenyans are not aware of the system and do not understand how it works, which has resulted in low uptake of the services available on *Ardhi Sasa*. There is a need for more public education and awareness campaigns, to educate citizens on the importance of the system and how to access its services.
- **Resistance to change** - Apart from lack of awareness, the prevalent paradigm has been that land transactions should be undertaken through physically signed documents, including transfer instruments. Therefore, given the increasing instances of online fraud e.g., in e-commerce, the system has equally been met with suspicion, as some people are concerned that hackers may access *Ardhi Sasa* accounts and manipulate transactions. Others have had difficulty in understanding how instruments can be prepared and signed online by the concerned parties, without signing them physically on paper. There is a need for effective stakeholder engagement and participation, to address these challenges and ensure the successful implementation of the system.

Given the diversity of the available services on Ardhi Sasa, the system is useful to property owners, financiers as well as professionals such as registered physical planners, surveyors, lawyers and land valuers.

- **Lack of transparency** - Much as the old manual system was fraught with challenges, it was somewhat transparent, as it was possible to ascertain from the available land records, the land officer who has been assigned a transaction for purposes of following up, in the event there was an issue with the registration formalities. A major challenge with the new system is that it is not possible for a user to ascertain from the system, the land official handling the matter. Therefore, it has been difficult to effectively follow up on transactions, as all queries should be channelled through the *Ardhi Sasa* customer care team, for escalation to the concerned personnel. At times, users' concerns have not been addressed with the urgency they deserve. This has unnecessarily complicated the monitoring process by users'. The system should be upgraded to include particulars of land officials allocated the transactions, for transparency and effective follow up by the users.
- **Inaccurate or incomplete data** - There have been concerns about the quality of data collected, including incomplete and inaccurate information, which affects the reliability of the system. An example is that of inaccurate documents that have been scanned as digital records prior to the system launch. Some of these documents do not convey the actual position regarding properties. In such instances, the error has to be rectified with the input and consent of the system's developers. It is important to have prompt rectification of errors by land personnel, whenever such errors are discovered.
- **User limitations** - It has been noted that physically challenged persons may experience some challenges when accessing the system. This may happen in cases where visually impaired persons do not have specialised computers and software that may assist them in navigating *Ardhi Sasa*. As such, there is need for the system's developers to ensure complementarity of features, to ensure that the system is easily accessible and navigable by every person who wishes to access it.

Conclusion

Like the proverbial wheel that keeps turning, continuous innovation in land administration and management is encouraged. It is only through such innovation that the government can ensure that all Kenyans engage in property transactions, in a manner that is secure, accessible and reliable. Effective civic education is equally encouraged, as it will empower the targeted users to optimise their use of the system in their various transactions. While we recognise that that the Ministry of Lands and Physical Planning has had some education for the public and various stakeholders, it is clear that many stakeholders are still struggling to understand the *Ardhi Sasa* system.

Noting the infancy of the system, it is still too early to authoritatively judge its efficacy in terms of addressing all the challenges that existed under the manual system. However, the Ministry of Lands and Physical Planning is encouraged to ensure the system is continuously updated, to address the existing challenges. Equally, the system should be enhanced to facilitate accessibility by all people, irrespective of their physical status. We remain optimistic that once the system is fully operational, all registered proprietors and professionals and other stakeholders using the system will be able to fast track property transactions. The system is still in the preliminary stages of deployment and we hope that its benefits will be enhanced, as challenges diminish over time.

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STANDING THE TEST OF TIME:

HIGH COURT UPHOLDS KEY CONSTITUTIONAL DOCTRINES

Ever since the High Court's pronouncements in *Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272* (**the *Anarita Karimi* Case)** decided two score and four years ago, Courts have been vigilant in examining constitutional petitions with a view to ensuring that they are drafted with a reasonable degree of precision. To quote the Court (Trevelyan & Hancox JJ) in the *Anarita Karimi* Case:
"We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

Additionally, Courts have been keen to ensure that as per the doctrine of constitutional avoidance, where a dispute can be determined through another forum without necessarily raising a constitutional issue, this alternative forum ought to be pursued.

Against this backdrop, the High Court's Constitutional Division recently affirmed these age-old doctrines in a Judgment handed down in *High Court Petition No. 455 of 2018 - Consumer Federation of Kenya v Toyota Motors Corporation & 4 Others* (**the Petition**). This article analyses the said decision, which comes at a time when an increasing number of cases that are styled as constitutional matters are being filed, whereas perhaps upon proper consideration, a good number of them are no more than private claims disguised as constitutional petitions and are capable of determination before other forums.

The Principle in the *Anarita Karimi* Case

The *Anarita Karimi* Case, an over forty (40) years' old case, is considered in Kenya as setting the benchmark for the drafting of constitutional petitions. It therefore comes as no surprise that the decision is an often-cited authority in many constitutional cases. The *Anarita Karimi* Case prescribes that a party seeking a constitutional remedy is required to set out with reasonable precision that which is complained of, noting to stipulate which constitutional provisions have been infringed and how they have been infringed.

This principle essentially calls upon litigants to plead their case with a high degree of specificity, thereby saving on the time required by

the Court to determine the issues upon which the relevant evidence and the law should be considered. Some critics argue that this principle gives constitutional Courts leeway to avoid jurisdiction over matters. However, many in favour of the principle concur that the *Anarita Karimi* Case sets an appropriate standard for the drafting of pleadings filed in constitutional Courts.

By reinforcing the principles of the *Anarita Karimi* Case in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR* (**the *Mumo Matemu* Case**), the Court of Appeal not only maintained its essence, but also applied a contemporary outlook to its enduring legacy. In the *Mumo Matemu* Case, the Court of Appeal observed that the precision requirement in the *Anarita Karimi* Case is not to be mistaken for exactitude. Rather, the doctrine in the *Anarita Karimi* Case is applied to ensure that upon proper definition of the issues in a constitutional petition, the Court can apply its mind to the real issues at hand, thereby saving on judicial resources.

The Principle of Constitutional Avoidance

Kenyan Courts have also relied on the doctrine of constitutional avoidance to strike out claims presented before Court where it is shown that there exist alternative, sufficient and adequate avenues for parties to ventilate their grievances. The Courts have consistently maintained that when a party has an appropriate forum before which to seek redress, it is incumbent upon them to raise their concerns before the said forum as opposed to invoking the constitutional jurisdiction of the Court at the outset.

Bearing in mind the overarching nature of the Constitution of Kenya 2010 (**the Constitution**), it is not uncommon for parties to file constitutional petitions whereas their disputes have civil or contractual features. This notwithstanding, it is well-established under case law that Courts should not entertain such disputes as it would amount to diminishing the safeguards created for parties with legitimate constitutional issues and result in clogging-up of the Court's diary. Scholars have argued that constitutional Courts are enticing to litigants as – (a) these Courts hear disputes expeditiously; and (b) the filing fees charged for these matters are relatively lower than ordinary civil matters.

Background of the Petition

The Petition was filed by the Consumer Federation of Kenya (**COFEK**) on behalf of two (2) of its members. The Petition, which contained glaring traits of a contractual dispute, arose from a contract for the purchase of a motor vehicle between a customer and a loan guarantor on one side and Toyota Kenya Limited (**Toyota**) and Tsusho Capital Limited (**Tsusho**) on the other. The Kenya Bureau of Standards (**KEBS**) was also joined as a party to the Petition.

In summary, the customer paid a deposit to Toyota for the motor vehicle and thereafter took a loan from Tsusho to pay the balance of the purchase price. The loan was secured with by a guarantee from one of COFEK's members. The customer alleged that the motor vehicle developed mechanical problems rendering repayment of the loan difficult, ultimately causing him to default and following which the motor vehicle was repossessed .

Legal Arguments by the Parties

On the constitutional front, COFEK contended that Toyota violated Articles 35 and 46 (1) (b) of the Constitution, as it had failed to disclose that the motor vehicle was in the same category as those subject to recalls in other jurisdictions due to alleged manufacturing defects. Further, COFEK raised several other alleged contractual infractions committed by either Toyota or Tsusho. To this end, COFEK sought for a refund of the deposit, compensation for lost revenue and damages for other consequential losses.

This principle essentially calls upon litigants to plead their case with a high degree of specificity, thereby saving on the time required by the Court to determine the issues upon which the relevant evidence and the law should be considered.

On its part, Toyota argued that the Petition did not disclose a *prima facie* constitutional issue and that there was a pending product liability suit before the Commercial Division of the High Court touching on the same subject matter. Toyota invited the constitutional Court to consider the case of *CNM v WGM (2018) eKLR*, where it was observed that a constitutional matter is one that compels a Court to consider constitutional rights or values, whereas the matters in the current case required the constitutional Court to essentially examine the contractual rights between the parties. On their part, Tsusho and KEBS both concurred with Toyota's submissions with respect to the nature of the Petition in that it was, indeed a contractual dispute disguised as a constitutional petition.

Determination of the Court

In discussing the issue of whether the Petition satisfied the principle in the *Anarita Karimi* Case, the Court (Ong'undi J) expressed that by failing to provide evidence on how the Respondents had violated its members' rights, COFEK had left the Court with no other option but to determine these alleged violations on a hypothetical basis.

The Court further interpreted the principle of the *Anarita Karimi* Case to mean that in order for a constitutional petition to be sustained, a party must provide evidence which demonstrates how their rights have been violated, as merely citing the provisions of the Constitution alleged to have been violated is not enough. In this regard, the Court noted that COFEK consistently made allegations without providing any evidence in support of the claim.

The Court further noted that under the principle of constitutional avoidance, the jurisdiction of the constitutional Court is limited to protecting and enforcing constitutional rights; and not to determine concerns of performance of contractual obligations which can be properly canvassed under civil law without the need to invoke the constitutional Court's jurisdiction.

In relying on this established principle of law, the Court agreed with the submissions of Toyota that the claim by COFEK did not raise any constitutional question ripe for determination by the Court. In this regard, the Court was of the view that the Petition did not qualify as a constitutional matter under the definition of the *Anarita Karimi* Case. Once the Court determined that the Petition was wanting for the reasons listed above, it was unable to proceed with the determination of the substantive issues raised by the parties and proceeded to dismiss the Petition with costs.

Upshot

The twin principles of constitutional avoidance and the need to plead the alleged constitutional grievance with specificity as espoused in the *Anarita Karimi* Case are firmly entrenched in Kenya's constitutional jurisprudence. Accordingly, in order to protect their interests and particularly to avoid a striking out, litigants ought to ensure that the cases they present to Court comply with these principles. As was stated by the Court (Mwita J) in *Petition No. 45 of 2017 - Maya Duty Free Limited v Hon. Attorney General & 3 Others:*

"It is, therefore, inappropriate for parties to rush to institute constitutional petitions alleging violation of rights under Article 47 (1) or any other constitutional rights or fundamental rights when these petitions raise no constitutional issues at all for the Court's determination. It is also the position in law that parties should pursue remedies available to them instead of instituting constitutional petitions."

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PENNY WISE:

CROWDFUNDING GAINS A LEGAL FOOTHOLD IN KENYA

Background

Have you ever been roped into an emergency technology or digital-enabled online fundraiser? The fundraiser could be aimed at raising funds to meet the medical bills of a sick person, or to contribute towards funeral arrangements. It could also be aimed at raising funds to assist a student in paying for their school fees or funding a worthwhile charitable community project. Even if you may have not participated in such fundraisers, you may have come across calls for contributions online. This method of raising funds from a large group of people using an online platform is called "*crowdfunding*". As the term suggests, crowdfunding connotes raising money from a crowd or many individuals or entities to finance a project or business through a website, an internet-based portal, or such other technological application.

Crowdfunding varies depending on the objectives of the project being funded. For instance, investment-based crowdfunding, unlike donation crowdfunding exemplified above, is meant to fund a business idea or a profit-making project. Innovative start-ups have been major beneficiaries of crowdfunding, and as is the case for business associations, the law comes in to address the interests of investors, issuers and project owners; issues of liability; consumer protection; procedural compliance; money-laundering; and data protection measures among others.

Considering the rise of crowdfunding markets in Kenya and the need to promote investor confidence in the crowdfunding sector, the Capital Markets Authority (**the Authority**) together with the Cabinet Secretary for National Treasury and Planning, promulgated the Capital Markets (Investment-Based Crowdfunding) Regulations, 2022 (**the Regulations**). The Regulations clearly set out the definitions, responsibilities and liabilities of various actors or participants in crowdfunding transactions such as crowdfunding platform operators, investors, issuers, and other pertinent issues, for instance, fundraising limits and persons legally prohibited from crowdfunding. In this article, we highlight some of the salient issues outlined in the Regulations.

Important Definitions

The Regulations provide for a "*cooling off period*" within which an investor can withdraw from a crowdfunding transaction without any restrictions. This means that a project owner or issuer cannot provide conditional penalties in its offer documents for cancellation or withdrawal from the transaction within a certain period. However, the cooling off period has been left at the discretion of the project owner or issuer to determine. As a balance of power, the investor may negotiate for a longer cooling off period.

Another key term in the Regulations is "*crowdfunding platform*" which is defined to mean a website, internet-based portal or such other technological application, which facilitates interactions between investors and issuers and other related interactions.

A "*crowdfunding platform operator*" is an entity licensed by the Authority to facilitate a crowdfunding transaction or a transaction involving the offer or sale of investment instruments through a crowdfunding platform. An "*issuer*" on the other hand, is a company which issues the security or investment instrument, which is hosted on the crowdfunding platform for purposes of crowdfunding. Whereas an issuer is, in common parlance, the project owner, most of the responsibilities in a crowdfunding transaction will lie with the platform operator.

The Regulations also define a "*start-up*" as a company incorporated in Kenya that is newly established or has not been in existence for more than ten (10) years and is established for the purpose of developing an innovative and scalable product or service. This definition is important because the Regulations restrict raising funds via crowdfunding platforms to only micro, small, and medium enterprises (**MSMEs**) and start-ups. As such, not all companies are

eligible to use crowdfunding as a means of raising funds under the Regulations.

Crowdfunding Platforms and their Operators

The platform operators, for purposes of investment-based crowdfunding, must be licensed by the Authority, and a person who establishes, maintains or operates an investment-based crowdfunding platform without a licence commits an offence and is liable to the penalties outlined in section 34A of the Capital Markets Act (Cap 485A) Laws of Kenya (**the Act**).

The conditions for the grant of licence are provided under the Regulations and among them include that the applicant should provide: (i) evidence of its financial soundness and capital adequacy confirming the financial position of the company including audited financial statements, management accounts and certified bank statements, where applicable; (ii) detailed information of the crowdfunding website or application to be used including system capacity and security measures and evidence of its functionality; (iii) details of platform outsourcing arrangements, if any; (iv) proposed procedures to verify the completeness, correctness and clarity of the information of the issuer and investment hosted on the platform; and (v) adequate risk management framework that includes details of its fraud detection and prevention measures.

Further, only companies limited by shares with a minimum paid up share capital of KES 5 million and a further minimum liquid capital of KES 10 million or eight percent (8%) of its liabilities, whichever is higher, are eligible to be licensed as platform operators for purposes of investment-based crowdfunding. Nevertheless, the Authority may refuse to grant the licence or revoke an already issued licence, where reasons to do so exist.

On the flipside, a platform operator cannot simply opt-out of crowdfunding business without a smooth and orderly transition. The platform operator is required to notify the Authority at least thirty (30) days prior to ceasing its operation, and the Authority must be satisfied that neither investors nor issuers are disadvantaged by its closure. Additionally, the Authority may impose terms and conditions to ensure orderly cessation of business.

It is important to note that a crowdfunding platform operator is prohibited from raising its own funds through its platform; offering investment advice; handling investor funds; promising a guaranteed return to investors; and promising a guaranteed outcome of the offer to the issuer. On their part, issuers are prohibited from hosting the same offer document concurrently on multiple crowdfunding platforms.

Crowdfunding Participants and the Limits of Raisable Funds

Crowdfunding participants are the relevant issuers and investors. An issuer under the Regulations must be an MSME with a minimum of two (2) years excellent operating track record and good corporate governance. A start-up with a good operating track record and good corporate governance can also be considered as an eligible issuer.

Issuers may only raise a maximum of KES 100 million within a twelve (12) months' period. However, an issuer may apply to the Authority requesting to raise more than the capped limit within a specified duration, and the Authority may issue a notice of no-objection to such request if satisfied. Investors eligible to invest in crowdfunding investments are either sophisticated investors or retail investors, subject to investment limits prescribed by the crowdfunding platform operator but up to a maximum of KES 100,000.

The Act defines a sophisticated investor as (i) a person who is licensed under the Act; (ii) an authorised scheme or a collective investment

Crowdfunding is a quick way to raise funds from many investors, especially for innovative businesses that lack capital to achieve their investment objectives such as start-ups and MSMEs.

scheme; (iii) a bank, a subsidiary of a bank, insurance company, co-operative society, statutory fund, pension or retirement fund; or (iv) an individual, company, partnership, association or a trustee on behalf of a trust which, either alone or with any associates on a joint account, subscribes for securities with an issue price as the Authority may prescribe from time to time.

The Crowdfunding Transaction

Crowdfunding transactions are required to provide for the permitted investment instruments, offering document, requirements for issuers, use of funds, transaction fees, the responsibilities of platform operators and issuers including any restrictions thereof. The investment instruments are limited to shares, debt securities including bonds or debentures or any other instruments approved by the Authority from time to time.

Platform operators are required to develop a standardised offer document which captures the details of the transaction to be used by the issuers to offer securities to the investors in line with the Regulations. An offering document should be made available for approval to the Authority at least forty-eight (48) hours before its publication on the platform. Once published, the offer period should not commence until at least fourteen (14) days have lapsed. The offer document should also clearly state the period of offer and the threshold amount for the offer. In the event the minimum threshold amount is not reached, the offer is to be withdrawn and the monies raised returned to the investors within forty-eight (48) hours, without any deductions. Any costs of such refunds are to be fully borne by the issuer. Where an offer is withdrawn, the issuer may undertake a fresh crowdfunding transaction not earlier than ninety (90) days after the withdrawal.

It is an offence under the Act for a person to make false statements in any form or context in an offering document knowing the same to be false or misleading. The offence, upon conviction, is punishable by a fine not exceeding KES 10 million or imprisonment for a term not exceeding seven (7) years where the offender is an individual, and a fine not exceeding KES 30 million where the offender is a company.

Compliance with Capital Market Regulations

Most of the obligations in the Regulations rest with the crowdfunding platform operators who are required, in addition to the Regulations, to comply with the Capital Markets (Conduct of Business) (Market Intermediaries) Regulations, 2011, the Capital Markets (Corporate Governance) (Market Intermediaries) Regulations, 2011, the Guidelines on the Prevention of Money Laundering and Terrorism Financing in the Capital Markets, and any other existing capital market laws and regulations to the extent applicable except where expressly exempted by the Authority.

Conclusion

Crowdfunding is a quick way to raise funds from many investors, especially for innovative businesses that lack capital to achieve their investment objectives such as start-ups and MSMEs. However, international investors and other sophisticated investors are usually skeptical of unregulated markets due to lack of clear procedures such as client accounts rules, codes of conduct, and investor protection. It is therefore anticipated that the Regulations will enhance investor confidence in Kenya, whilst providing additional means through which start-ups and MSMEs can raise capital.

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CHARGING AHEAD:

THE BRIGHT FUTURE OF ELECTRIC MOBILITY IN KENYA

In the recent past, Kenya has seen increased investment in its electric mobility sector, a growth which is in tandem with the shift towards a greener economy and addressing the challenges posed by climate change. Electric mobility, also known as e-mobility, refers to the use of electric vehicles (**EVs**), as a cleaner and more efficient alternative to traditional internal combustion engine vehicles (**ICEVs**).

The increased use of EVs in Kenya helps the country comply with its international obligations set out under the Paris Agreement. Indeed, Kenya has focused on a shift towards more environmentally sustainable practices, including development of government policy to encourage investment in the same. For example, the National Climate Change Action Policy 2018-2022 includes measures aimed at reducing greenhouse gas (**GHG**) emissions and promoting sustainable development. It is notable, however, that there is no similar policy to encourage investment in the e-mobility sector.

Nonetheless, Kenya recently submitted its Nationally Determined Contribution (**NDC**) to the United Nations Framework Convention on Climate Change (**UNFCCC**) Secretariat on 28th December 2020, where the country committed to reducing GHG emissions by thirty two percent (32%), below business-as-usual levels by 2030.

Industrial Developments

Although the development of policies and regulations surrounding Kenya's electric mobility sector is still in its nascent stages, the production and development of electric buses and motorcycles, charging infrastructure and technical standards has been catalysed by key partnerships in the sector.

One notable partnership is between Kenya Power and Lighting Company (**KPLC**) and Deutsche Gesellschaft fúr Internationale Zusammenarbeit (**GIZ**). In February 2023, the partnership hosted an e-mobility conference with the aim of developing a roadmap and consultative approach for electric motorisation in Kenya. KPLC has also expressed its intention to exploit one thousand one hundred megawatts (1,100 MW) off-peak load to kick-off Kenya's transition to electric mobility.

BasiGo and Associated Vehicle Assemblers (**AVA**) are also in partnership, working together to build modern electric buses in Kenya. As at January 2023, AVA reported the completion of the assembly of fifteen (15) electric buses. The partnership has further set a target of producing over one thousand (1,000) electric buses within the next three (3) years, which target has in turn reportedly created more than three hundred (300) new manufacturing jobs, and additional jobs in charging, maintenance, and financial ecosystems to support the operation of EVs.

Additionally, private sector-led companies are quickly establishing charging points and battery-swapping stations to promote the growth of clean transportation. One such company is Ecobodaa, which is already testing fifty (50) electric motorcycles, with plans to expand to one thousand (1,000) motorcycles by the end of 2023. The motorcycles have a range of up to seventy kilometres (70 km) on a single charge and can be charged using solar power.

With the aim of reducing EV range anxiety, several companies are collaborating to establish charging infrastructure for EVs in Kenya with the aim of ensuring that EV users have reliable and easily accessible charging options. Various charging stations for EVs have been installed in several locations including the KenGen offices in Nairobi, Two Rivers Mall, Garden City Mall, The Hub Karen, the Kenya Ports Authority premises in Mombasa and Kisumu.

The Kenyan government has also taken steps to prioritize the electric mobility sector and introduced incentives to promote domestic production of EVs and their components. Among these incentives are tax exemptions for EV manufacturers and importers, as well as subsidies for the installation of charging infrastructure.

Notably, through Schedule 1 to the Excise Duty Act, 2015, the government has reduced the excise duty imposed on all vehicles which are fully electric powered, from twenty percent (20%) to ten percent (10%). Additionally, KPLC has proposed a special tariff for EV charging, being KES 17 per Kilowatt hour (KWh), which will be lower than the residential tariff.

Investors therefore have a plethora of investment opportunities in Kenya's electric mobility sector, to aid not only in its growth but to also promote sustainable development. These opportunities include EV manufacturing, EV charging infrastructure development and EV battery manufacturing.

Challenges

Electric mobility is a promising solution for Kenya's transportation sector, which is plagued by high fuel costs and air pollution. However, despite the benefits associated with electric mobility, there are significant challenges that must be addressed in order to achieve widespread adoption.

The need to develop a comprehensive legal framework will be indispensable towards the success of electric mobility in Kenya. For instance, in Norway, the comprehensive legal framework has not only made the country a global leader in electric mobility but has also created a predictable and stable environment for EV manufacturers and investors.

In Kenya, lack of a comprehensive legal framework governing the use of EVs creates uncertainty for investors and manufacturers with respect to the legal and regulatory risks involved in such investment, the supply chain for EVs and the regulatory requirements in the sector. Notably, the existing regulations and policies do not adequately address the unique characteristics of EVs, such as their charging infrastructure and battery management.

Limited charging infrastructure is another major barrier to the success of electric mobility in Kenya. Lack of a robust charging infrastructure limits the range, accessibility, and convenience of EVs. As a result, many potential EV consumers are hesitant to make the switch from traditional ICEVs.

Technical standards ensure that EVs are manufactured to a consistent level of quality and safety. The lack of appropriate and adequate technical standards therefore gives rise to the risk of substandard battery quality, which may undermine the safety and performance of EVs and pose a challenge to regulators to enforce and monitor compliance.

Moreover, without sufficient knowledge and understanding of the advantages of EVs, consumers may be hesitant to adopt the technology. As a result, EV manufacturers are finding it challenging to market their products to potential consumers. Limited public awareness may also hinder the government's ability to create policies and initiatives that support the growth of electric mobility.

Additionally, the high import taxes on EVs in Kenya has a direct impact on the success of electric mobility. The twenty-five percent (25%) import duty raises the price of EVs above those of ICEVs. The price disparity hinders the widespread adoption of the EVs since they are more expensive, thereby making them less attractive.

> ***The need to develop a comprehensive legal framework will be indispensable towards the success of electric mobility in Kenya.***

Needless to state, the marked depreciation of the Kenyan Shilling has also affected the implementation of electric mobility as it has raised the cost of importing EVs and their components, including batteries, making them less affordable to Kenyan consumers. Additionally, the high cost of importation might affect the availability of spare parts and maintenance services for the EVs.

Recommendations

As the demand for cleaner and more sustainable transportation options continues to grow in Kenya, there is a pressing need to address the legal, technical, and economic challenges facing the adoption of electric mobility.

To promote the development of a robust electric mobility ecosystem in the country, it is crucial to adopt a range of strategies to help overcome these challenges. For instance, development of a comprehensive legal framework tackling the registration and licensing of EVs as well as the construction and operation of charging infrastructure and battery-swapping stations is encouraged. This is especially so because the construction of charging infrastructure requires the allocation of land for that purpose.

Additionally, to make EVs more affordable and competitive with ICEVs, as well as to encourage the development of charging infrastructure in the country, the government can offer tax incentives such as reduced or waived registration fees for EVs, income tax incentives for individuals who purchase or lease EVs, lowered or waived parking fees for EVs and tax credits or rebates for EV buyers to offset the cost of EVs.

Further, to foster public-private partnerships, the government can work with EV manufacturers, technology providers, and charging stations to accelerate the development of electric mobility infrastructure. This can be made possible by providing incentives such as tax breaks or subsidies for companies that invest in the sector. Additionally, the government can partner with private investors to finance the development of electric mobility infrastructure, with the former providing funding for electric mobility infrastructure projects, and the latter contributing technical expertise and finance.

In order to raise public awareness about the benefits of EVs, the government can also work with media outlets to increase the coverage of EVs and their benefits. This may include interviews with EV owners, feature stories on EVs, and coverage of events related to electric mobility. The government may also use social media outreach to raise awareness.

Conclusion

The implementation of electric mobility in Kenya presents a promising opportunity to reduce the country's carbon footprint and dependence on fossil fuels, while simultaneously promoting economic growth and innovation. It also presents numerous opportunities in various sectors of the economy such as data protection and privacy, intellectual property, financial structuring, and regulatory compliance.

Despite facing several challenges, there is growing momentum towards the adoption of EVs in the country. With the right policies and continued investment, the government and private sector can work together to accelerate the development of electric mobility in Kenya and create a cleaner and more sustainable future.

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THROUGH THE MAGNIFYING GLASS:

A LOOK AT THE ROLE OF AN EXPERT WITNESS IN COURT PROCEEDINGS

There are various ways of proving or disproving alleged matters of fact in legal proceedings. The Evidence Act (Cap. 80) Laws of Kenya (**the Act**) provides that, as a general rule, all facts, except the contents of documents, are to be proved by oral evidence, which must in all cases be direct evidence. This means that one can only give evidence as to what one saw, heard or perceived using one's senses. An exception to this is opinions, which also constitute direct evidence and can thus be given by the person who holds the opinion.

Flowing from this, one of the common ways of proving or disproving alleged matters of fact, is the use of expert evidence. In this article, we consider the circumstances in which an expert opinion may be required, how Courts evaluate expert evidence and, what is expected of expert witnesses. The insights shared in this article draw from the decision of the High Court (Mativo J) (as he then was) in *Christopher Ndaru Kagina v Esther Mbandi Kagina and Tabitha Ikambi Kagina (2016) eKLR*, in which the Court extensively analysed the framework for the admission and review of expert evidence.

When do Courts require an Expert Opinion?

While the Act does not define expert evidence or opinions, section 48 of the Act specifies when the same may be required. This includes instances where a Court is required to form an opinion upon a point of foreign law, science, art, identity or genuineness of handwriting, finger or other impressions. Expert evidence may also be taken in relation to general customs or rights, usages or tenets of any association, body of men or family, the constitution and government of any religious or charitable foundation, or the meaning of words or terms used in particular districts or by particular classes of people. It also applies to circumstances where the Court has to form an opinion as to the nature of the relationship of one person to another.

The Act goes on to provide that opinions upon such points are admissible, if made by persons especially skilled in the aforesaid matters and further states that the persons who give such opinions are experts.

Evaluating Expert Evidence

In the aforementioned *Kagina v Kagina* case, Justice Mativo noted that there were various factors which a Court would consider when presented with expert evidence, which are highlighted below:

Quality of the Data

The quality and extent or depth of the data or material evaluated to inform the expert's opinion will be considered by the Court. It is expected that the expert will set out the data relied upon to form the opinion as well as the methods used to obtain the said data. Such analysis allows the Court to determine whether the conclusions drawn by the expert flow from the data that was analysed. If there appears to be no nexus between the data and the conclusion, then the opinion is considered to be of low probative value.

Limitations

If the expert's opinion relies on an inference from any findings, then the Court will consider whether the opinion properly explains how safe or unsafe the inference is. This therefore requires expert witnesses to set out the limitations of the facts upon which they relied to arrive at their finding. The Court requires the expert witness to also consider whether he took into consideration all relevant information in arriving at his opinion and whether such information is complete. Where the information appears incomplete, the report is compromised and is of little probative value to the Court.

Methodology

An expert's opinion ought to take into account matters such as the margin of uncertainty which would have an impact on the accuracy or reliability of the results which form the basis of the opinion. Additionally, the expert's methods ought to follow established practices in his field and, if not, the Court considers whether the reason for the divergence has been properly explained. This speaks to the validity of the methods used to obtain the data, including the means used to collect or examine the same. If, for example, the methodology is outdated, the expert report would be deemed unreliable. This is why an expert report should contain a section that explains the methodology used in evaluating the information or data that has been availed to the expert.

Rival Opinions

An expert's opinion should consider whether the material upon which the opinion is based has been peer-reviewed. In that regard, recent developments in the field might lead the Court to conclude that an expert opinion is based on a methodology or reasoning that is outdated, rendering the expert opinion unreliable.

When faced with contradicting expert opinions, the Court tests the conflicting opinions against the background of all the other evidence in order to determine which expert evidence is to be preferred. In effect, the expert opinion should not be considered in isolation but within the context of other proven facts or the circumstances of the case.

Qualifications and Expertise

An expert is required to outline his qualifications in the report as well as provide the relevant documentation to prove the said qualifications. This gives the Court and the parties an informed view of whether the expert is indeed qualified to render an expert opinion on the subject matter before the Court. This is an important evaluation of an expert opinion and tends to be the first port of call when evaluating an expert opinion.

This evaluation makes it easier for the Court to determine the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise. Naturally, if an expert witness prepares an opinion based on material falling outside his field of expertise, then he is essentially no longer an expert, rendering his opinion worthless.

> ***As expert evidence has become an increasingly popular device deployed in litigation today, experts have also come to be regarded as hired guns with no fidelity to the law or to the Court.***

Range of Expert Opinion

If there is a range of expert opinion on the matter in question, the Court should consider where the expert's opinion lies within the range and whether the expert's preference has been properly explained. This can be explained by the qualifications, experience or even the school of thought to which the expert subscribes. Such deviations ought to be revealed to the Court and to the parties as they add more information to the basis of the expert opinion.

Entirety of the Evidence

Courts have repeatedly cautioned against relying on expert evidence as the only evidence in a case. After all, primary evidence, outside of opinions, is still considered the golden standard of evidence in Court. As such, Justice Mativo reinforced the position that expert evidence must always be considered together with the rest of the evidence in a case. In addition to the factors outlined above, the Court takes into account the likelihood of the expert having been compromised or the possibility of the expert using his expertise to mislead the Court by placing undue advantage to the party in whose favour the expert tenders the evidence.

What is expected of an Expert?

Expert evidence is to be, and seen to be, independent. That is to say, uninfluenced as to its form or content by the exigencies of litigation. In recent times, the Courts have lamented that expert witnesses tend to be hired guns acting under the direction of their instructing client. As such, the Courts tend to scrutinize the independence (or lack thereof) of such experts. Inevitably, experts tend to be regarded with suspicion when they are appointed by one of the parties to a suit, which can be mitigated by the Court appointing an expert itself.

The expert should always state the facts or assumptions upon which the opinion is based, consider the material facts that could detract from his concluded opinion and reveal them to the parties and to the Court.

An expert witness may, after the exchange of reports, change his mind upon reading the opposing expert report, or for any other reason. In such instances, the change ought to be communicated (through his legal representative) without delay to the opposing party and where appropriate, to the Court.

Lastly, the material referred to by an expert ought to be availed to the opposite party at the same time as the exchange of reports. The material might include photographs, plans, calculations, analyses, measurements survey reports or other similar documents. Such disclosure would allow the parties to understand the expert's report and make its cross-examination more efficient.

Conclusion

As expert evidence has become an increasingly popular device deployed in litigation today, experts have also come to be regarded as hired guns with no fidelity to the law or to the Court. The Courts, even while considering that the best evidence is primary evidence, are enjoined to evaluate the evidence of experts and come to their own conclusion. In conclusion, it is apt to quote Justice Mativo in the case of *Kagina v Kagina*:

"… an expert report is only as good as the assumptions on which it is based."

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BAG OF GOODIES:

VARIETY OF OPTIONS FOR THE DISTRIBUTION OF ASSETS IN A COMPANY

A company may distribute its assets to its shareholders for an array of reasons, including as a return on investments, to support its ongoing operations, or when it ceases operations. In Kenya, distribution of a company's assets is mainly regulated by the Companies Act, 2015 (**the Companies Act**) and the Insolvency Act, 2015 (**the Insolvency Act**) together with the regulations made thereunder. There are also sector specific laws governing distribution of assets in regulated industries like banking, insurance, capital markets, retirement benefits and telecommunications. The existing regulatory framework seeks to protect creditors and minority shareholders and to guarantee the equal treatment of shareholders.

There are various ways of distributing the assets of a company, including via liquidation, dividend *in specie,* distribution *in specie* and share buyback. We discuss these options below.

Distribution upon Liquidation

Liquidation or "*winding up*" is a procedure under which the assets of a company are realised and distributed to creditors in a statutory order of priority pursuant to procedures under the Insolvency Act. In the event of any surplus, distribution is made to the company's shareholders.

Section 381 of the Insolvency Act contemplates two types of liquidation, being voluntary liquidation and liquidation by the Court. Voluntary liquidation may be initiated by the members or creditors of the company in accordance with the provisions of the Insolvency Act.

A members' voluntary liquidation is deemed to have commenced after the passing of the special resolution by the members of the company after which the company ceases to carry on its business, except in so far as may be necessary for its beneficial liquidation.

Where a company is to be liquidated through a members' voluntary liquidation, the directors are required to convene a directors' meeting and make a statutory declaration (commonly known as a declaration of solvency), in the standard form prescribed under the Insolvency Act, to the effect that they have made a full inquiry into the company's affairs, and that having done so, they have formed the opinion that the company will be able to pay its debts in full, together with interest at the official rate, within such period (not exceeding twelve (12) months from the commencement of the liquidation) as may be specified in the declaration.

It is important to note that the statutory declaration by directors has to be made within five (5) weeks before the date of passing the resolution or on the date of the resolution but before the passing of the resolution. The declaration must include the latest statement of the company's assets and liabilities, in the standard form prescribed under the Insolvency Act, as at the latest practicable date before the declaration is made. The declaration is also to be lodged with the

Registrar of Companies within fourteen (14) days after the date of the resolution.

Creditors play no part in a members' voluntary liquidation since the assumption is that their debts will be paid in full. The Registrar of Companies dissolves the company after three (3) months from the date of receipt of the final accounts of the company by removing the company's name from the register of companies.

Section 406 of the Insolvency Act outlines the process of initiating a creditors' voluntary liquidation. A creditors' voluntary liquidation is commenced by the directors convening a general meeting of members to pass a special resolution to wind up an insolvent company and appoint a liquidator. Thereafter, the directors must also convene a meeting of creditors within fourteen (14) days of members passing the resolution to wind up the company.

The Second Schedule to the Insolvency Act sets out the priority of claims in an insolvency as first, second or third priority claims. The claims which take first priority are the expenses of administration or liquidation. Second are the company debts, as listed in the Second Schedule, to the extent that they remain unpaid. The third priority claims relate to the tax obligations incurred by the company under the Income Tax Act (Cap. 470) Laws of Kenya as well as the Excise Duty Act, 2015.

Once priority claims have been settled, secured creditors holding fixed and floating charges will rank ahead of unsecured creditors. Shareholders are the last to be paid to the extent of the capital they contributed to the company.

Dividend *in specie*

A dividend *in specie*, is a dividend which is to be satisfied otherwise than in cash. The dividend can be a transfer of company shares, physical assets, assignment of a debt or the transfer of the benefit of convertible debentures. A company will typically declare a dividend of a specified amount which it will satisfy by transferring a non-cash asset of equivalent value to its shareholders.

A company is generally permitted to undertake a dividend *in specie*, as provided under section 485 (3) of the Companies Act, unless explicitly prohibited by its articles. A company's articles will more often than not authorise a company, subject to approval by its shareholders, to declare a dividend of a specified amount and for such amount to be satisfied by the transfer of non-cash assets of equivalent value to its shareholders.

It is important to note that distributions can only be made out of profits or capital available for this purpose as stipulated in section 486 of the Companies Act.

Distribution *in specie*

Also known as distribution in kind, this involves circumstances where a company identifies a non-cash asset that it wishes to transfer to a shareholder or sister company (for example, as part of an intra-group reorganisation). The transfer is known as a distribution *in specie* but there is no requirement to declare a dividend.

Whereas a dividend is typically described in a company's articles as a "*distribution payable in respect of a share*", a distribution *in specie* is a "*distribution consisting of or including, or treated as arising in consequence of, the sale, transfer or other disposition by a company of a non-cash asset*". Therefore, since the provisions in a company's articles only apply to dividends, shareholder approval is not generally required for a distribution *in specie.*

Although a distribution *in specie* is flexible for the directors of a company since it does not involve shareholder approval, this method of distribution has certain limitations. Specifically, a company may not distribute assets *in specie* if the value of the proposed assets exceeds what it can distribute to its shareholders. Where a company distributes assets of a higher value than it should, this may result in legal issues for the company and the recipient of the asset. It may be viewed as an unlawful return of capital, as the distribution exceeded the distributable value. Where a shareholder knowingly receives assets categorised as an unlawful distribution, they may be expected to either return the asset back to the company or pay the value of the asset.

The existing regulatory framework seeks to protect creditors and minority shareholders and to guarantee the equal treatment of shareholders.

It is important to note that section 486 of the Companies Act provides that distributions can only be made out of profits of a company available for distribution or capital. Therefore, before opting for distribution *in specie* as a mode of asset distribution, the company should ensure that it has sufficient distributable profits.

Share Buyback

A share buyback is a purchase by a company of its own shares from a shareholder. Companies typically repurchase their own shares from the market in instances where they want to consolidate ownership of the company, increase share prices or reduce the cost of capital. Share buybacks by private limited companies are governed by Part XVI of the Companies Act.

A limited company undertaking a share buyback must comply with the provisions of the Companies Act, failing which the transaction would be declared void. Further, the failure constitutes an offence by the company and every officer in default. The officer in default is liable to fines as prescribed in the Companies Act.

A company is permitted to repurchase its own shares, provided that it is not restricted or prohibited from doing so in its articles and subject to complying with the procedural requirements set out in the Companies Act. Under the Companies Act, a limited company may not purchase its own shares unless they are fully paid.

Further, section 449 (2) provides that a limited company may purchase its own shares only out of distributable profits of the company or the proceeds of a fresh issue of shares made for the purpose of financing the purchase. A private limited company may however purchase its own shares out of capital as provided under section 449 (1) of the Companies Act. Under section 484 of the Companies Act, a company that agrees to purchase its own shares is not liable in damages for failing to redeem or purchase any of the shares.

A share buyback is a viable option only where the company's capital or distributable reserves are sufficient to cover the cost of the shares. Payment of the shares may be made through a non-cash asset.

Conclusion

The foregoing is a synopsis of the various ways a company may distribute its assets in order to achieve its desired objective considering the structure, unique needs of the company, prevailing laws and other considerations.

It is important to note that each method of distribution is subject to legal and tax implications, such as payment of income tax, stamp duty and capital gains tax. Therefore, a company should obtain legal and tax advice before embarking on the distribution of its assets.

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MUTUAL RESPONSIBILITY:

THE NOTION OF JOINT DATA CONTROLLERS UNDER THE DATA PROTECTION ACT, 2019

Introduction

The Data Protection (Registration) Regulations 2022 (**the Regulations**) came into force on 14th July 2022, following which organisations geared up to register with the Office of the Data Protection Commissioner (**ODPC**) either as data controllers or data processors, or both. In making their applications for registrations, organisations have been guided by an analysis of their data processing cycles.

However, with the rapid changes in technology, it is potentially difficult to strictly define an organisation's role in processing data and the liabilities arising from such processing. When analysing an organisation's data processing cycles, it is important to identify the instances where personal data is jointly controlled by two different entities. Failure to do so can result in an incomplete registration with the ODPC. Therefore, this article explores the concept of a "*joint controller*" and examines the instances in which an organisation might be considered as one.

The Qualification Guidelines

One of the key matters an organisation should assess before registering with the ODPC is whether it qualifies as a data controller, data processor, or both. To do so, organisations are guided by the provisions of section 2 of the Data Protection Act, 2019 (**the DPA**)

which defines the terms data controller and data processor in turn.

According to section 2 of the DPA, a data controller is defined as a natural or legal person, public authority, agency or other body that, alone or jointly with others determines the purposes and means of processing personal data. On the other hand, a data processor is defined under section 2 of the DPA to mean a natural or legal person, public authority, agency, or other body that processes data on behalf of a data controller.

From the foregoing provisions, a person or entity qualifies as a data controller if they determine the purposes and means of processing personal data. However, Kenyan Courts are yet to interpret the extent to which an organisation would be deemed to determine the purposes and means of processing data. In the absence of such guidance, organisations can refer to the ODPC's Guidance Note on Registration of Data Controllers and Data Processors (**the Guidance Note**).

The Guidance Note sets out a non-exhaustive list of the instances that one may be deemed to be a data controller. These include instances where an organisation decides to collect or process personal data; decides the purpose or outcome of the processing of personal data or; decides which individuals to collect personal data about.

Based on the foregoing, it follows that to determine whether one is a data controller, one should refer to the facts related to the processing of personal data and whether the person or institution processing the personal data wields actual control over the processing. This position is consistent with the findings of the European Union's Working Group (**the EU Working Group**) on the concepts of data controller and data processor. According to the EU Working Group, the concept of a data controller is a functional concept, intended to allocate responsibilities, where factual influence is.

Therefore, to determine whether one qualifies as a data controller, reference must be made to the facts related to the processing of personal data. For instance, if a company requires its employees' bank account details, Kenya Revenue Authority PIN and National Identity Card Numbers for payroll processing, the company would be deemed to be a data controller, as it effectively determines the type of data collected and the purposes for which such data is collected. However, if the company opts to utilise a third-party platform to advertise its jobs, then the company and the third-party platform may be deemed joint controllers.

Joint Controller

The concept of a joint controller is based on the provisions of section 2 of the DPA which defines a data controller as a natural or legal person, public authority, agency or other body which, *alone or jointly* with others, determines the purposes and means of processing personal data. From the foregoing, it is clear that the DPA envisages situations whereby a person may be deemed to be a data controller either as a result of their own processing or through processing personal data jointly with others.

There are two (2) instances in which a person may be deemed to be a joint data controller under the DPA. The first instance is as set out in section 2 of the DPA. This is where a person, in the course of processing personal data, is deemed to be a joint controller with a third party. Given that the DPA is a fairly new statute, Kenyan Courts are yet to determine via case law the criteria that needs to be met for a person to be considered a joint data controller with third parties. In the absence of such guidance, reference is made to the findings of the EU Working Group with respect to joint control.

According to the EU Working Group, the classification of whether two (2) parties are joint controllers is guided by whether each of

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those parties jointly determine the means and purposes for which personal data is processed. For instance, where two (2) subsidiaries of a company jointly determine the means and purposes of processing a user's personal data, both companies will be deemed to be joint controllers. This position is consistent with the finding of the Court of Justice of the European Union (**the CJEU**) in *Holstein v Wirtschaftsakademie C-210/16*, where the CJEU held that Facebook Incorporated and Facebook Ireland both qualified as data controllers under the European Union's General Data Protection Regulation (**EU GDPR**) as they jointly determined the means and purposes for processing personal data belonging to its European users.

It is important to note that the determination of joint control is not limited to instances where two (2) different entities jointly determine the means and purposes of processing personal data as set out above. Two (2) entities may qualify as joint controllers despite processing data at different levels, and despite not determining the means and purposes for which personal data is processed.

For instance, if a website owner includes a social media plug-in, such as a "*like*" button on their website, both the website owner and the social media company, may be considered joint data controllers despite processing different sets of data and for different purposes.

This position accords with the decision of the CJEU in *Fashion ID v Verbraucherzentrale C-40/17*, where it was held that Fashion ID and Facebook Ireland were joint controllers with respect to the collection and disclosure of personal data due to the fact that Fashion ID had incorporated a Facebook "*like*" plug-in on its website.

The CJEU found that by incorporating the social media plug-in, Fashion ID collected personal data pertaining to its visitors and shared that data with Facebook Ireland, which collected personal data through the plug-in, and used it for other purposes. Based on these facts, the CJEU held that Facebook Ireland and Fashion ID both qualified as joint data controllers in respect of the personal data collected from Fashion ID's website.

Another scenario under which an organisation might qualify as a data controller occurs when a data processor exceeds its mandate. Under section 42 (2) (b) of the DPA, data processors are required to only process data in accordance with the instructions issued by a data controller.

If a data processor processes data other than as instructed by the data controller, the data processor qualifies as a data controller with respect to such processing. This principle is guided by the provisions of section 42 (3) of the DPA which provides that where a data processor processes personal data other than as instructed by the data controller, the data processor shall be deemed a data controller with respect to that processing.

Conclusion

In summary, an organisation can qualify as a data controller alone, jointly with others or if it exceeds its mandate as a data processor.

Given the rapidly evolving technological landscape, it is the responsibility of every organisation to constantly evaluate and map out its data processes so as to understand its role in processing personal data.

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