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LEGAL & KENYAN

ORARO & COMPANY ADVOCATES NEWSLETTER | ISSUE 18 | OCTOBER 2023

IN THIS ISSUE

Editorial Page

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Towards a Sustainable Future: Issue Eighteen

Planet Earth has been blessed with natural resources of both renewable and non-renewable nature. Human beings' journey of growth and development is invariably premised on drawing from nature's gifts, as even our man-made materials contain an element of nature in their making. However, human progress has not been without consequence, and our accelerated development has cast ominous shadows on Earth, as we previously lacked an understanding of the deleterious impact our actions wielded on the environment. Whilst development is an inevitable part of our presence on Earth, it is important to keep in mind that our continuous survival on the planet is highly dependent on our ability to embrace sustainability. Sustainable development entails meeting our present needs without compromising the needs of generations yet to come.

With the foregoing in mind, we are pleased to present to you the 18th edition of our flagship publication, *Legal & Kenyan* with a theme on sustainability. Cindy Oraro and Madikizela Otieno take centre stage, unpacking Kenya's strides towards fostering a conducive environment for carbon trading. Pamella Ager and Jonathan Kisia share their thoughts on the new reporting standards on sustainability and climate change (IFRS S1 and IFRS S2), stemming from COP 26. Chacha Odera, Anne Kadima, and Radhika Arora present the flip-side of the narrative by highlighting the difficulty a minority shareholder recently underwent whilst advancing an ESG agenda in a forlorn derivative action brought before an English court. This edition also features a snapshot of the firm's annual run dubbed 'Oraro & Co. for the Ozone Run', which is aimed at raising funds for the good of the environment. Like last year, the run was held at the Karura forest, and entailed a fun-filled day out, in pursuit of a noble environmental cause.

On other interesting legal topics in this edition, Morris Mbugua, Natalie Obago and I highlight the key takeaways in a recent data protection case that saw both the Office of the Data Protection Commissioner and the High Court making pronouncements that will no doubt contribute towards shaping this nascent area of the law. Renee Omondi and Brian Onyango deliver an incisive piece that brings to the fore the superfluous nature of the vetting process for persons with disabilities when applying for tax exemptions. Jacob Ochieng and Blenda Nyahoro team up to look at the impact that new regulations issued by the Central Bank of Kenya will have on digital credit providers, while Pamella Ager gives a detailed analysis of a recent decision by the Court of Appeal on a contentious land dispute relating to the Land Control Board consent. Cindy Oraro and Morris Mbugua look at the vast opportunities that privately initiated proposals offer in financing infrastructure projects, and Noella Lubano and Paul Kamara bring the curtains down with a catchy article on the increasingly compelling case for third-party litigation funding in Kenya.

John Mbaluto, FCIArb
Editor

Founding Partner's Note

Living in the information age means more people are becoming more conscious of their environment and how the small actions we take affect not only our locale but the world as a whole. Addressing climate change has been at the forefront as different people around the globe have experienced excess weather conditions, from excess heat to cold to erratic rains and floods. This awareness is prompting many to be more cautious about how we should treat our environment.

On a national level, Kenya successfully hosted its first ever Africa Climate Summit and Africa Climate Week in September, gathering thousands of delegates, a number of whom were African Heads of States, interested in discussing emerging global climate and development issues.At a firm level, we held the 2nd edition of the 'Oraro & Co. for the Ozone Run' on 16th September 2023, dedicated to beating plastic pollution. More of this can be found here, in the 18th issue of our flagship publication, *Legal & Kenyan*.

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CONTENTS

RECENT ACCOLADES

"The team is courteous, responsive and provides updates and feedback in an efficient manner. They provide solutions and come through when needed, even at short notice."

LEGAL 500, 2023

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ON PRIVACY AND CAPACITY:

KEY TAKEAWAYS FROM RECENT DATA PROTECTION CASE

Since the coming into operation of the Data Protection Act (**the DPA**) on 25th November 2019, and the promulgation of various subsidiary regulations thereunder, effect continues to be given to the provisions of Articles 31 (c) and (d) of the Constitution of Kenya, 2010. In particular, the DPA establishes the Office of the Data Protection Commissioner (**the ODPC**), provides for the processing of personal data, and sets out the rights of data subjects as well as the obligations of data processors and data controllers.

The ODPC's mandate requires it to protect the privacy of individuals and to oversee the enforcement of the DPA. Part of this mandate requires the ODPC to receive and investigate any complaint on infringement of privacy rights under the DPA. This article discusses recent decisions by the ODPC and a Judgement by the High Court (Chigiti, J) relating to the ODPC's mandate, with a focus on some key considerations when filing or defending a complaint relating to unauthorised disclosure of personal or sensitive data.

Background

On 21st July 2022, the law firm of Wamae & Allen Advocates (**the Complainants**) filed a complaint with the ODPC against the firm's former employees (**the Respondents**) in *Complaint No. 677 of 2022 Allen Waiyaki Gichuhi and Charles Wambugu Wamae v Florence Mathenge and Ambrose Waigwa* (**the Complaint**).

The Complainants alleged that, while under the employment of the law firm, the 1st Respondent unlawfully disclosed personal and sensitive data pertaining to the law firm's clients with the 2nd Respondent, who had left the firm at the time of the disclosure. The Complainants alleged that the disclosure was done without their consent nor that of their clients. Upon investigating the Complaint, the ODPC, vide a determination dated 6th January 2023 (**the First ODPC Determination**), dismissed the Complaint.

Dissatisfied with the First ODPC Determination, the Complainants moved to the High Court through an application for judicial review seeking, amongst other things, to quash or set aside the First ODPC Determination.

The High Court, in holding *inter alia* that the ODPC had not determined the Complaint within the timelines set under the DPA, set aside the First ODPC Determination and issued an Order remitting the matter back to the ODPC to readmit the Complaint for a fresh determination within new timelines (**the High Court Judgment**). However, upon readmission and fresh consideration of the Complaint, the ODPC once again dismissed the Complaint (**the Second ODPC Determination**) on grounds similar to the First ODPC Determination.

Key Considerations

In the course of its determination, the ODPC and the High Court considered the following key issues, that are worthy of note:

Jurisdiction and Timelines

The Respondents, in opposing the Complaint, challenged the ODPC's jurisdiction to investigate the Complaint, where they argued that – a) the law firm was not registered as a data controller or data processor at the time of filing the Complaint; and b) there were other ongoing legal proceedings between the parties before various other forums, including the High Court, the Advocates Disciplinary Tribunal and the Directorate of Criminal Investigations.

The ODPC held that the DPA mandated it to be responsible for the enforcement of data protection, including receiving and investigating complaints relating to the unlawful disclosure of personal and sensitive personal data. As such, receiving and determining the Complaint was well within the scope of the ODPC's functions. Furthermore, the ODPC observed that – a) the law firm's registration status did not preclude the ODPC from handling the Complaint; and b) the existence of other legal proceedings did not prevent the ODPC from handling the Complaint. The ODPC also held that its jurisdiction did not extend to the protection of intellectual property rights.

At the High Court, it was the Complainants' turn to contend that the ODPC had no jurisdiction – never mind that they were the initiators of the Complaint, arguing that while section 56 (5) of the DPA prescribes that a complaint should be investigated and determined within ninety (90) days, the First ODPC Determination was delivered six (6) months after the Complaint was filed, well outside the prescribed timelines. Despite attributing the delay to the Complainants' conduct during the investigations, the High Court concurred with the Complainants that the First ODPC Determination was time-barred. As a result, the High Court determined that the ODPC's jurisdiction to handle complaints was strictly time-bound, and once the prescribed ninety (90) days had lapsed, its jurisdiction was extinguished. As such, the Court held that the First ODPC Determination was rendered without jurisdiction and therefore lacked any force of law.

Locus Standi

One of the key issues to be determined was the question of whether the Complainants had locus standi i.e., the legal right or capacity, to bring a claim for breach of privacy and data protection rights on their own behalf and on behalf of their clients. In addressing this issue, the ODPC interpreted the scope of the DPA and noted that the law aims to protect the personal data of an identified or identifiable natural person. Further, the DPA defines a data subject as an identified or identifiable natural person who is the subject of personal data. As such, the DPA exclusively protects the privacy rights of natural persons and consequently, it is only natural persons who have the legal capacity to institute claims for breach of their data protection rights. The ODPC also drew a distinction between legal and juristic persons, who are neither considered as data subjects nor do they hold personal data, as per the definition provided. In the circumstances, the ODPC held that legal persons lack the right or capacity to bring a claim under the DPA.

Following this, the ODPC determined that the Complainants were excluded from filing a claim for breach of their data protection rights since – a) they had not demonstrated how their own data – personal or sensitive – had been disclosed; and b) the documents produced by the Complainants belonged to their clients, most of whom were legal and not natural persons. This position was affirmed by the High Court, which held that the DPA only applies to data subjects, who are defined as "*identified or identifiable natural persons*". As such, it is important to note that corporate persons and other legal entities do not fall under the category of data subjects and therefore they cannot file complaints with the ODPC.

Breach of the DPA

The DPA prohibits the processing of personal data without consent or a lawful reason and purpose. An offence has been imposed under section 72 of the DPA for unauthorised disclosure from a data controller or processor without prior lawful purpose, consent or in a manner contrary to the principles of data protection. To that end, the ODPC considered whether there was any unlawful disclosure of personal and sensitive data, with a view to investigating whether there was an actual breach of the DPA.

> ***...only natural persons identified as "data subjects" under the DPA are afforded protection of their privacy rights. Consequently, only such natural persons have the capacity to present and sustain a claim for breach of their privacy rights under the DPA.***

As discussed above, the right to privacy is exclusive to natural persons. In this regard, the ODPC noted that most of the documents cited by the Complainants were not availed to the ODPC to determine the nature of the information disclosed. Further, the ODPC also noted that most of the Complainants' clients were legal persons, and without examining the documents cited, it was impossible to ascertain whether the disclosure of the documents related to personal or sensitive data. Consequently, the ODPC could not ascertain whether or not there had been any breach as alleged.

In addition, the ODPC further observed that most of the documents provided related to cases that were either publicly available on various websites, including Kenya Law Reports website, the Complainants' law firm's website, or were deemed to be public records. Therefore, the ODPC held that no personal or sensitive data had been unlawfully disclosed and consequently, there had been no breach of personal data.

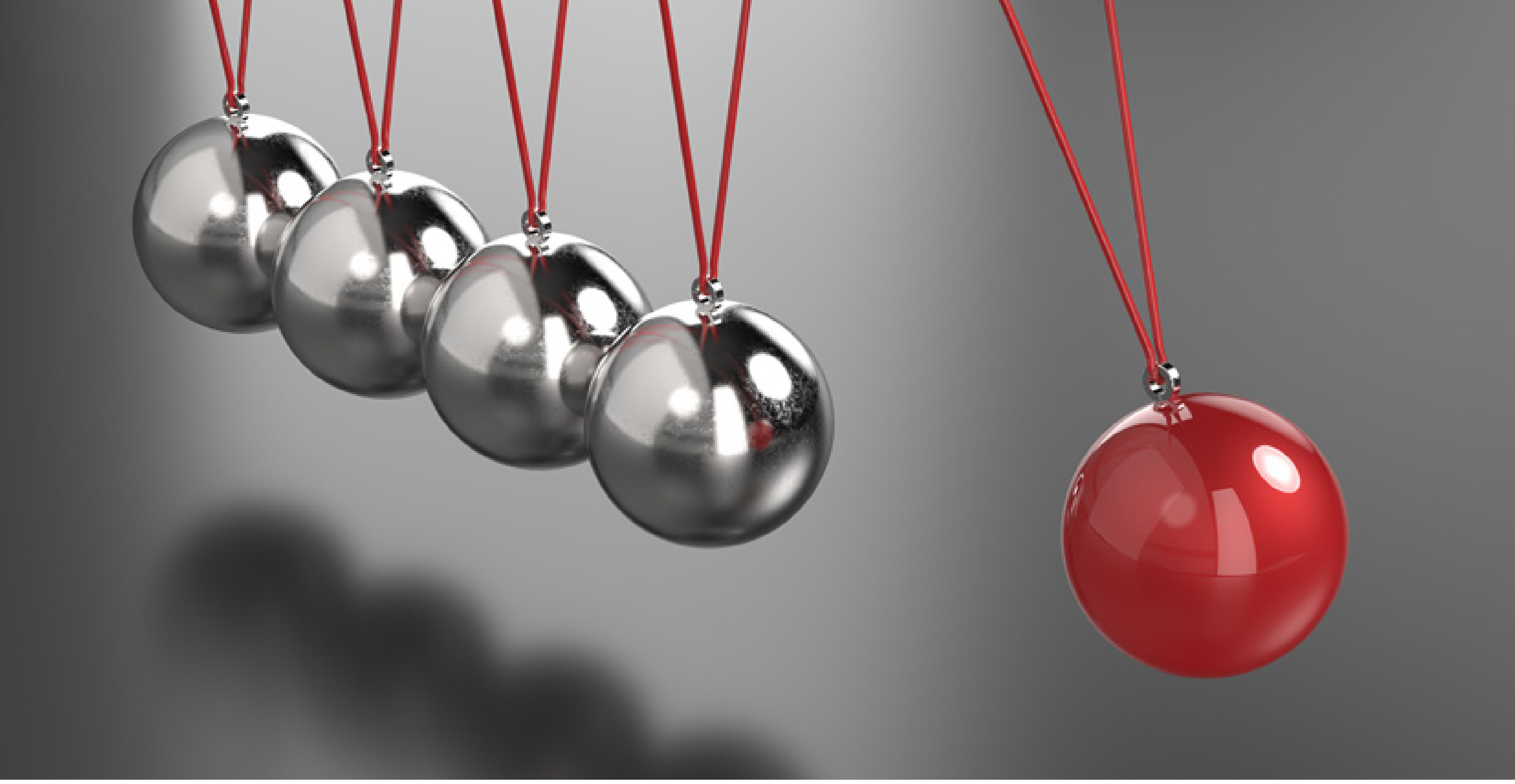
Under section 43 of the DPA, as read together with regulation 37 (1) and the Second Schedule of the Data Protection (General) Regulations, 2021, data controllers and data processors are required to notify their data subjects and the ODPC where there has been unauthorised access of a data subject's personal data. However, whereas the Complainants lodged a complaint for unauthorised access, the ODPC noted, in the Second ODPC Determination, that they had neither informed their clients nor the ODPC of the alleged data breach as required under the DPA.

Takeaway

In exercising its enforcement mandate, the ODPC, as the statutory body tasked with protecting the right to privacy, continues to develop jurisprudence on this area of law. Further, as its decisions are subject to judicial review and/or appeal, the High Court also has an opportunity to determine the soundness of ODPC's decisions, when moved by an aggrieved party, which will serve to further enrich the jurisprudence in the field of data protection. It will therefore be interesting to see what the High Court, the Court of Appeal and possibly the Supreme Court, make of the decisions emanating from the ODPC.

For now, one of the key takeaways to be appreciated from the decisions under review is that only natural persons identified as "*data subjects*" under the DPA, are afforded protection of their privacy rights. Consequently, only such natural persons have the capacity to present and sustain a claim for breach of their privacy rights under the DPA. This was particularly upheld in the Second ODPC Determination which emphasised the importance of ensuring that only natural persons with the requisite capacity and necessary authority may exercise the rights provided under the DPA.

Another takeaway is that any determination by the ODPC rendered beyond the ninety (90) days' period would be outside the jurisdictional timeline of the ODPC's investigative mandate and hence ripe for quashing. As such, the ODPC must henceforth strictly abide by the timelines imposed under the DPA or risk having its decision set aside by the High Court.



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FORLORN CAUSE:

ENGLISH COURT BLOCKS DERIVATIVE ACTION BY MINORITY PUSHING ESG AGENDA

Introduction

In *ClientEarth v Shell Plc & Others (2023) EWHC 1137*, which is a recent decision by the English High Court, the Court declined an application by ClientEarth- a non-profit environmental law organisation and minority shareholder of Shell Plc (**Shell**), to bring a derivative action on behalf of Shell against its directors, arising out of alleged acts and omissions of the said directors relating to the company's climate change risk strategy.

A derivative action is a means through which a shareholder can litigate on behalf of a company against a third party - usually a director or other shareholder - whose action has injured or threatens to injure the company. It is therefore a tool of accountability to obtain redress against wrongdoers, in the form of a representative suit filed by a shareholder on behalf of the company. However, it should be noted that a shareholder must first obtain permission from the Court to commence a derivative action (**the Permission Stage**).

The Permission Stage is necessary since claims of this nature are an exception to the rule that it is a company acting through its proper constitutional organs, and not one of its shareholders, which should determine whether to pursue a cause of action that may be available to the company. The Permission Stage further provides a filter for what may be termed as "*unmeritorious*" or "*clearly undeserving*" cases.

Claims made in *ClientEarth v Shell Plc*

As stated above, ClientEarth sought permission to continue a derivative action against Shell on the basis that Shell's directors had refused to act on ClientEarth's climate change risk strategy, as well as failed to comply with an order made by the Hague District Court on 26th May 2023 in *Milieudefensie v Royal Dutch Shell Plc*, which imposed a forty-five per cent (45%) emissions reduction order on Shell to be achieved by 2030 (**the Dutch Order**).

At the Permission Stage, ClientEarth sought to establish that Shell's directors were in breach of their statutory duties to promote the success of the company, as well as their statutory duty to exercise reasonable care, skill, and diligence in adopting and pursuing an appropriate energy transition strategy so as to manage the numerous risks that climate change presents for Shell. The specific breaches alleged by ClientEarth against Shell's directors fell into three (3) categories, namely – (i) failure to set an appropriate emissions target (ClientEarth claimed that Shell's existing Carbon Intensity Target was inadequate); (ii) failure to have a climate risk strategy which establishes a reasonable basis for reaching the net zero target and which is aligned with the Paris Agreement; and (iii) failure to comply with the Dutch Order.

ClientEarth's central allegation was that by adopting and pursuing an inadequate energy transition strategy, Shell's directors were mismanaging the material and foreseeable financial risk that climate change presents for Shell, which primarily operates in the fossil fuel sector. ClientEarth also alleged that Shell's directors were not adequately preparing Shell to overcome commercial and regulatory risks, such as lower demand and lower margins for oil and gas products, as well as the ever-increasing threat that governments worldwide would in the near-future set regulatory frameworks to restrict further exploration, production and use of hydrocarbons and their products.

Within the underlying derivative claim, the reliefs sought by ClientEarth were a mandatory injunction requiring Shell's directors to – (i) adopt and implement a strategy to manage climate risk in compliance with their statutory duties; and (ii) immediately comply with the Dutch Order.

Shell, on the other hand, argued that the duties which ClientEarth was trying to impose on its directors were misconceived for reasons that – (i) they were inherently vague and incapable of constituting enforceable personal legal duties; (ii) it was for Shell's directors themselves to determine the weight to be attached to the various factors which they considered to promote the success of the company; and (iii) the duties created by ClientEarth amounted to an unnecessary and inappropriate elaboration of the statutory duty of care.

Indeed, while Shell agreed with ClientEarth that the company faces material and foreseeable risks as a result of the impact of climate change, which could or would have a material effect on its operations in the future, this point did not in and of itself demonstrate a *prima facie* case, warranting permission to continue with the derivative claim. The more important question, according to Shell's directors, was the nature of Shell's response to those risks and the extent to which ClientEarth had demonstrated a case of actionable breach of duty by the directors in their management of those risks.

Shell also contended that there was good reason to conclude that the application for permission to continue the derivative action was an attempt by ClientEarth to publicise and advance its own policy agenda, which was a misuse of the derivative claim procedure, and supported the proposition that the application had not been brought in good faith.

The High Court's Decision

The Court agreed with Shell's arguments to the effect that the duties which ClientEarth sought to impose on the directors were an indirect attempt to impose specific obligations on the company's directors as to how to manage and conduct Shell's business and affairs, and that such a directive would go against the well-established principle that it is for directors themselves to determine (acting in good faith) how best to promote the success of a company for the benefit of its members as a whole.

The Court further held that through the derivative action, ClientEarth was seeking to impose absolute duties on Shell's directors, which cut across their general duty to have regard to the many competing considerations as to how best to promote the success of Shell. In particular, the Court found that a business of the size and complexity as that of Shell required its directors to take into account a large range of competing considerations, the proper balancing of which is a classic management decision that the court was ill-equipped to interfere with. As such, the directors were in the best position to weigh the impact of Shell's operations on the community and the environment against the business risks for Shell which are associated with climate change.

In this respect, the Court reiterated the principle in *Howard Smith Limited v Ampol Limited (1974) AC 821,* where it was held that Courts of law will not sit on appeal on a company's management decisions as Courts should not act as a supervisory board over decisions within the powers of the management of a company, which decisions were arrived at honestly.

Notably, the Court held that the need to establish a *prima facie* case at the Permission Stage involves a rigorous test and entails establishing that there is no basis upon which the directors could reasonably have come to the conclusion that the actions that they had taken were in the best interests of Shell. In this respect, the Court found that there were a number of fundamental reasons why ClientEarth's

This decision brings to the spotlight the inherent difficulties of enforcing environmental, social, and governance (ESG) compliance guidelines in circumstances where a company has other competing interests.

allegations did not establish a *prima facie* case for permission to continue, namely:–

- ClientEarth had failed to establish that the directors were managing Shell's business risks in a manner incompatible with a board of directors acting reasonably.
- ClientEarth had failed to establish that there is a universally accepted methodology as to the means by which Shell might be able to achieve the targeted reductions in emissions.
- In principle, the law respects the directors' autonomy in decision-making on commercial issues, and their judgement as to how best to achieve results which are in the best interests of the members.
- ClientEarth had failed to establish how the directors had gone wrong in balancing the factors for their consideration on how to deal with climate risk, and that no reasonable director could have properly adopted the approach that they did.
- The Court applied the principle of *de minimis* shareholding to hold that the fact that ClientEarth, together with the parties supporting it, whilst holding only a small fraction of Shell's shares, was proposing that it should be entitled to seek relief on behalf of Shell in a claim of a considerable size, complexity and importance, which gave rise to an inference that ClientEarth's real interest was not in how best to promote the success of Shell, but an attempt to impose upon Shell its views and those of its supporters as to the right strategy for dealing with climate change risk.

Importance of the Decision

The Court's decision appears to have taken a "*reasonableness*" approach to hold that directors who are applying their best efforts to balance all considerations impacting a company cannot be deemed to have breached their statutory duties to the company for failing to elevate climate-change-related risks above other considerations, be they commercial, societal, or physical. Indeed, the Court found that attempting to bring a derivative action with the sole objective of pushing a climate-change agenda was an abuse of this very special and limited procedure provided for under the Companies Act.

This decision brings to the spotlight the inherent difficulties of enforcing environmental, social, and governance (**ESG**) compliance guidelines in circumstances where a company has other competing interests. Whereas there may be in place ESG guidelines in an organisation or legislation geared towards ESG compliance, ensuring compliance and enforcement of the same might not be as straightforward.

In a world where ESG compliance is headlining the news every day and resulting in corporations implementing vast policy changes, this decision may, at first glance, seem like a step in the wrong direction. However, it is a perfect example of the delicate balance that most corporations will struggle to attain when trying to push the ESG agenda while ensuring that their strategies and actions are in the best interest of their shareholders.

It will also be interesting to watch the Kenyan jurisprudential space to see how our Courts will handle ESG compliance-related claims, especially in light of the various policy changes being effected in our markets, including the introduction of the Nairobi Securities Exchange ESG Disclosures Guidance Manual and the Central Bank of Kenya's Guidance on Climate-Related Risk Management.


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A 'TAXING' PROCESS:

IS THE TAX EXEMPTION PROCESS FOR PERSONS WITH DISABILITIES SUPERFLUOUS?

Disability may present to an individual the challenge of the high cost of independent and sustainable living. For instance, the cost of acquiring or replacing an assistive device, which is integral towards enabling inclusion, is usually expensive beyond a person's capacity to sustain. It is such costs that tax exemption for Persons with Disabilities (**PWDs**) is intended to alleviate. This article focuses on the procedure to be followed by PWDs when seeking an exemption from income tax. In particular, we will review whether vetting PWDs has any significance when applying for such an exemption.

Background

PWDs are amongst the few groups of individuals entitled to exemption from income tax. Provision for this tax relief is found under sections 12 (3) and 35 (1) and (2) of the Persons with Disabilities Act, 2003 (**the PWD Act**).

The grant of this and other exemptions prescribed under the PWD Act is subject to the requirements outlined in section 42 (1) of the PWD Act. In the context of income tax, these requirements include:

- Mandatory recommendation by the National Council for Persons with Disabilities (**the Council**).
- Approval by the Kenya Revenue Authority (**KRA**).
- Satisfying the requirements and conditions set out in the regulations by the Cabinet Secretary responsible for matters relating to finance (**the Cabinet Secretary**).
- Discretion of KRA to refuse exemption on the basis that it has not been provided for in the allocation of public resources.

A reading of these provisions yields the conclusion that the fact of disability alone does not avail an automatic relief to a PWD. It further suggests that exemption from tax on grounds of disability is a legal privilege as opposed to an absolute right, but only to the extent provided for under section 42 of the PWD Act. Pursuant to section 35 (2) of the PWD Act, which enables the Cabinet Secretary to prescribe the procedure for the application and grant of exemptions under the PWD Act, the Persons with Disabilities (Income Tax Deductions and Exemptions) Order, 2010 (**the Order**) was promulgated. Order 4 (3) thereof provides that the Council is required to establish a committee whose members shall include a medical doctor for the purposes of vetting applications for exemption.

In order to apply for an exemption, a PWD must be registered with the Council to facilitate the issuance of a Certificate of Disability in accordance with Regulation 7 (1) of the Persons with Disabilities (Registration) Regulations, 2009 (**the Regulations**). The process leading to the issuance of the Certificate of Disability calls into question the necessity of verifying PWDs before recommending tax exemption. To appreciate this point of view requires an understanding of the process of registering as a PWD.

Registration Process

Registration of PWDs is provided for under section 7 (1) (c) (i) of the PWD Act, as read together with Regulation 5 (2) of the Regulations. Pursuant thereto, an applicant is required to attend an interview, a medical examination, and any other assessment that the Council may consider necessary. In connection with this, the Council has put in place a Service Charter that stipulates, amongst other things, the application guidelines for PWD registration (**the Guidelines**). Based on the Guidelines, an applicant is required to submit to the Council a duly filled application form attaching a Medical Assessment Report (**Medical Report**) signed by the Director of Medical Services and a passport-sized photo.

The Medical Report acts as an advisory as to whether a person has a condition that may qualify as a disability, in which event the Medical Report proposes the necessary recommendations for assistance. Following the presentation of these documents to the Council, the Council conducts a compliance check. If the requirements are met, the person is registered by the Council on the same day and issued a Certificate of Disability, which is valid for a period of five (5) years renewable as provided for. The benefits accrued from such certification include free access to assistive devices; education assistance; economic empowerment projects comprising local purchase/service order financing; provision of tools of trade as well as grants to PWD dominated self-help groups; provision of protective facility e.g., sunscreen for those with albinism; and tax exemption.

Application for Tax Exemption

As stated above, the process of registration as a PWD and the application for tax exemption once such registration is complete, are two (2) different legal processes. Similar to PWD registration, applying for a tax exemption begins with the submission to the Council of a duly filled application tax exemption form, attaching copies of the following documents: medical report signed by the Director of Medical Services; KRA PIN Certificate; National Identification Card; KRA remittance documents (for those in informal and self-employment); latest pay-slip; and a letter from the employer.

To renew an exemption, one is advised to apply three (3) months before the expiry date. The application for renewal is predicated on the same documents, with an addition of the expired exemption certificate. The Persons Living with Disability - KRA Guidelines on Tax Exemption for PWDs (**the KRA Guidelines**) also require an applicant to be in receipt of taxable income under the Income Tax Act and to include a Tax Compliance Certificate in the document attachments. The KRA Guidelines also cite the PWD Act and the Order as the legal basis for PWD income tax exemption.

Upon receipt of the application, the Council establishes a committee that includes, among others, a medical doctor to review the application. The Council then submits a recommendation to the KRA Commissioner (**the Commissioner**) by uploading the application through KRA's iTax system on the applicant's behalf. If the upload is successful, a system-generated acknowledgement number is emailed to both the applicant and the Council. The Commissioner reviews the application so as to determine whether to grant the exemption, and he is required to make a decision within thirty (30) days of receipt of the recommendation.

Where an exemption is granted, the Commissioner issues the applicant with a Tax Exemption Certificate valid for three (3) years. However, it is noteworthy that the KRA Guidelines on exemption for PWD and the Service Charter set the exemption validity period at five (5) years. Where the Commissioner rejects an application, the decision is notified to both the applicant and the Council in writing.

Comparing the Processes

The steps leading to a PWD's exemption from tax or registration with the Council are identical, to the extent that the final application is received by the Council, at which stage the applicant's role becomes dormant. The Council then assumes the role of the initiator. The two (2) processes then diverge, with the Council deciding on registration and also acting as a recommender with respect to the tax exemption application.

The comparability of the methods in both cases makes it challenging to comprehend the rationale for vetting for tax exemption. Given the requirements of the law and the set standards, registration must come before exemption. Vetting, on the other hand, begins as the first step in recommending exemption. Given the Medical Report's aim, which is a consequence of disability assessment (unless fraudulently obtained), and the reality of a valid certificate of disability, requiring an applicant to attend a vetting session appears to be a redundant exercise.

The foregoing analysis of the rationale for vetting of PWDs fails to disclose a strong case for its maintenance. Requiring PWDs to go through vetting for tax exemption is an unnecessary obstacle that calls for an amendment of the Regulations to discard the requirement.

Is Vetting of PWDs for Exemption superfluous?

Various reasons lend merit to the proposition that vetting of PWDs is superfluous.

First, the disability assessment undertaken is intended to get an expert opinion on whether or not one has a condition that qualifies as a disability. There are validity requirements in place to safeguard against fraud, including the limitation of assessment to gazetted government hospitals as well as the execution of the Medical Report by the Director of Medical Services. Besides, the applicant has no access to the Medical Report until it is executed and delivered to the Council for collection by the applicant. Finally, the Council issues a legitimate report to the applicant. As a result, the report provides sufficient evidence of an applicant's disability. This, in effect, dismisses the necessity of vetting.

Second, the objective of vetting is hypothetical in the sense that it is not explicitly stated. As a result, confusion has taken root in the performance of this requirement. A case in point is the misunderstanding that the exercise empowers the Council to redefine disability for purposes of exemption, an issue which was addressed in the case of *Kiramana v National Council for Persons with Disability & Another (2023) eKLR*. In this case, the Court rejected the argument by the Council that the Petitioner was rehabilitated and held that the Petitioner, who had been medically certified as a person with disability, had been denied due protection of the law, dignity and respect as prescribed for persons with disabilities pursuant to Articles 27, 28 and 54 of the Constitution of Kenya, 2010 (**the Constitution**). The Court consequently declared the Petitioner to be a PWD within the meaning of section 2 of the PWD Act and Article 260 of the Constitution, both of which exclude the disability threshold which vetting purports to evaluate.

Third, the *Kiramana v National Council for Persons with Disability* case operates to estop the vetting committee from basing their recommendation on considerations outside of what the Constitution and the law provides. Equally, certification of disability following a medical assessment renders the role of a medical doctor in the vetting committee unnecessary. In any event, the Council lacks the professional competence to determine whether a person's condition qualifies as a disability.

Finally, the Certificate of Disability issued upon registration is *prima facie* evidence of recognition by the Council of a person's disability. To subject a registered PWD to vetting, is in essence, to disregard the validity of the Certificate of Disability. Since the Certificate of Disability originates from the Council, the vetting requirement appears to paint the Council as an institution in perpetual self-doubt, thus inviting PWDs to perceive it as an entity unworthy of public trust.

Conclusion

The foregoing analysis of the rationale for vetting of PWDs fails to disclose a strong case for its maintenance. Requiring PWDs to go through vetting for tax exemption is an unnecessary obstacle that calls for an amendment of the Regulations to discard the requirement. The current system runs contrary to the overriding purpose of the law, in that the PWD population is turned into a servant of the law rather than the latter working to ensure balance among the competing interests in this section of the Kenyan society.

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GREEN GOVERNANCE:

REPORTING ON SUSTAINABILITY AND CLIMATE CHANGE

A climate cataclysm looms over most living things on Earth. If left unchecked, climate change would be completely and utterly devastating to life on the planet as we know it. To forestall this, we must limit global warming to one point five-degrees Celsius (1.5°C) above pre-industrial levels. To achieve this, human beings, who are the chief causative agents of climate change, need to learn, unlearn and relearn the various ways through which they can reduce their carbon emissions and adopt other practices that may slow down or hopefully avert climate change.

Climate mainstreaming has been touted as one of the most effective ways of combating climate change. It requires the systematic integration of climate considerations of individuals', organisations' and governments' strategies and operations.

In today's world, embracing sustainability is no longer a matter of preference, it is a legal imperative. A striking example lies within the Climate Change Act, 2016 (**the Act**), which assigns critical climate change duties to private entities. What is even more eye-opening is that the Act arguably breaks through the corporate veil, leaving no room for individuals like directors, partners or officers to escape accountability. They now shoulder direct accountability for any failure in fulfilling the climate change duties of the entities they oversee. The era of sustainability in governance is here, and it is not just a choice - it is the law.

Further, research has demonstrated the existence of a fundamental scalar quantity that fully defines the concept of "*natural capital stock*" in principle. This principle presupposes that at this point, the equilibrium point, both human and non-human life will thrive. In recognition of this equilibrium point, together with other principles of sustainability, governments around the globe have started introducing a carbon tax and professional accounting bodies have started developing standards for making disclosures relevant to sustainability and climate change.

The Standards

At the twenty-sixth Conference of the Parties (**COP 26**), held in Glasgow, Scotland in 2021, the Trustees of the International Financial Reporting Standards (**IFRS**) announced the formation of the International Sustainability Standards Board (**ISSB**). The ISSB was mandated with developing global sustainability disclosure standards. On 26th June, 2023 the ISSB issued its first two (2) sustainability disclosure standards, namely the General Requirements for Disclosure of Sustainability-related Financial Information (**IFRS S1**) and Climate-related Disclosures (**IFRS S2**) (together, **the Standards**). On 4th September, 2023 the Institute of Chartered Public Accountants of Kenya, in conjunction with the Pan African Federation of Accountants, unveiled and adopted these Standards.

Under these Standards (which Standards may override the disparate standards issued by other entities such as the Task Force on Climate-related Financial Disclosures (**TCFD**), the Global Reporting Initiative and the Sustainability Accounting Standards Board), an entity is required to report its sustainability–related disclosures, as part of its general purpose financial reports.

IFRS S1

IFRS S1 unveils a pivotal shift in financial reporting, beckoning entities to disclose information about their sustainability-related risks and opportunities, that are useful to the primary users of their financial reports. Financial reporting is no longer just about the numbers; it is about transparency, responsibility and foresight. This standard mandates organisations to open their books, not just on profits and losses, but on sustainability-related risks and opportunities. It is a call to arms for businesses to reveal how sustainability-related risks and opportunities might affect their cash flows, financing access or capital costs over the short, medium or long term. IFRS S1 demands that disclosures stay true to the core principles of fairness and materiality. No critical nugget of information should be left unshared, if it could influence stakeholders' decisions. Additionally, from reports and statements that adhere to this standard, one should clearly identify the financial statements to which the sustainability-related financial disclosures relate; and the entity's performance in relation to its sustainability-related risks and opportunities, including progress towards any targets the entity has set, and any targets it is required to meet by law or regulation.

This standard is structured on the TCFD four-pillar approach, which is founded on governance, strategy, risk management, and metrics and targets. From the disclosures under this standard, one should understand; (i) the governance processes, controls and procedures an entity uses to monitor, manage and oversee sustainability-related risks and opportunities; (ii) the entity's strategy for managing sustainability-related risks and opportunities; and (iii) the entity's processes to identify, assess, prioritise and monitor sustainability-related risks and opportunities, including whether and how those processes are integrated into and inform the entity's overall risk management process and its overall risk profile.

The IFRS S1 (which is the general standard that governs a range of sustainability topics, including those which pertain to the environment, society and governance) is more than just another accounting rule; it is a compass which guides financial reporting into the realm of sustainability. The standard illuminates the path to a more responsible and informed financial world.

IFRS S2

The IFRS S2 is a topic-specific standard that focuses on climate change. This standard requires an entity to disclose information about its physical or transitional climate-related risks and opportunities that is useful to the users of their financial reports. Like the IFRS S1, this standard is founded on the pillars of governance, strategy, risk management, metrics and targets. The users of reports and statements that adhere to this report should understand; (i) the governance processes, controls and procedures an entity uses to monitor, manage and oversee climate-related risks and opportunities; (ii) the entity's strategy for managing climate-related risks and opportunities; (iii) the entity's processes to identify, assess, prioritise and monitor climate-related risks and opportunities, including whether and how those processes are integrated into and inform the entity's overall risk management process; and (iv) the entity's performance in relation to its climate-related risks and opportunities, including progress towards any climate-related targets it has set, and any targets it is required to meet by law or regulation.

More specifically, on governance, the standard requires the disclosure of information relating to the governance body responsible for climate-related risks and opportunities within the entity. This information may encompass the body's mandate, how it oversees strategies designed to respond to climate-related risks and opportunities, its decisions on major transactions, its setting and monitoring of targets related to climate-related risks and opportunities, together with the entity's climate-related risk management processes and related policies. Information relating to the entity's management's role in the governance processes, and the controls and procedures used to monitor, manage and oversee climate-related risks and opportunities, should also be disclosed.

On strategy, an entity discloses the current and anticipated effects of those climate-related risks and opportunities on the entity's financial performance and cash flows, business model, value chain, overall strategy and decision-making. The climate resilience of the entity's business model should also be disclosed. The disclosures on climate-related risks may be categorised into climate-related physical risks and climate-related transition risks. They may also be categorised in accordance with their expected occurrence horizons, whether the risk is expected to occur in the short, medium or long term. While disclosing under this pillar, an entity should disclose anticipated changes to its business model, and direct and indirect mitigation and adaptation efforts made in response to climate-related risks and opportunities. The entity's detailed assessment of its climate resilience should also be provided.

With regard to risk management, an entity should disclose information about how the entity uses climate-related scenario analysis to inform its identification of climate-related risks; the nature, likelihood and magnitude of the effects of those risks; and how the risks are prioritised and monitored.

With regard to risk management, an entity should disclose information about how it uses climate-related scenario analysis to inform its identification of climate-related risks; the nature, likelihood and magnitude of the effects of those risks; and how the risks are prioritised and monitored. An entity should also disclose the processes it uses to identify, assess, prioritise and monitor climate-related opportunities, including information about whether and how the entity uses climate-related scenario analysis to inform its identification of climate-related opportunities; and the extent to which and how the processes for identifying, assessing, prioritising and monitoring climate-related risks and opportunities are integrated into and inform the entity's overall risk management process.

On metrics and targets, an entity is required to disclose the cross-industry and intra-industry metric categories, and the targets set by the entity. Specific to metrics, an entity should disclose; (i) their greenhouse gas emissions and the approach used to measure them; (ii) the amount and percentage of assets or business activities vulnerable to climate-related transition risks and climate-related physical risks, aligned with climate-related opportunities and deployed towards climate-related risks and opportunities; and (iii) internal carbon prices; and remuneration. Specific to targets, an entity is required to disclose; (i) the metric used to set the target; (ii) the objective of the target (for example, mitigation, adaptation or conformity with science-based initiatives); (iii) the part of the entity to which the target applies (for example, whether the target applies to the entity in its entirety or only a part of the entity, such as a specific business unit or specific geographical region); (iv) the period over which the target applies; (v) the base period from which progress is measured; (vi) any milestones and interim targets; (vii)if the target is quantitative, whether it is an absolute target or an intensity target; and (viii) how the latest international agreements on climate change including jurisdictional commitments that arise from those agreements, have informed the target. An entity whose sustainability and climate-related disclosures comply with the Standards is required to make an explicit and unreserved statement of compliance with the Standards.

Conclusion

The Standards present a notable advancement in the global establishment of harmonious environmental, social and governance standards. Reports and statements that adhere to the Standards are comparable, verifiable, timely and understandable. While the Standards may pose a formidable challenge for some, prudent entities are advised to embrace innovation and adopt new systems and processes to gather and disclose the required information. Should they do so, they may reap the benefits of improved access to capital, enhanced reputation and reduced exposure to sustainability and climate-related risks. Further, they will not only boost their profile as responsible global citizens, but perhaps our planet might also just be spared!


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BY LEAPS AND BOUNDS:

KENYA TAKES DEFINING STEPS IN THE CLIMATE CHANGE AGENDA

The global effort aimed at addressing the harmful effects of climate change has gained impetus over the last decade. Indeed, countries and organisations across the globe have progressed from making mere pledges to reduce greenhouse gas emissions, to actively creating and implementing policies and legislation aimed at achieving the same. Most notably, institutional frameworks have been established to encourage the achievement of net zero emission targets. The Paris Agreement of 2015 has been instrumental in advancing the role of voluntary cooperation and market-based approaches in this regard. This article focuses on the realisation of Article 6 of the Paris Agreement (**Article 6**) in Kenya. Article 6 creates a mechanism by which countries can voluntarily co-operate to achieve their emission reduction targets.

Article 6 and the Concept of Voluntary Co-operation

Carbon markets are one of the tools used by countries to reduce their greenhouse gas emissions. Carbon markets enable countries and private entities which have net-zero commitments, to buy carbon credits generated from projects which reduce or remove greenhouse gases from the atmosphere. The goal of Article 6 is to provide flexibility in achieving emission reduction targets, while also promoting sustainable development and ensuring environmental integrity.

Article 6 does this by providing various mechanisms through which voluntary co-operation by countries can be achieved. Firstly, Article 6.1 encourages party states to utilise voluntary co-operation to meet their self-defined emission reduction targets known as Nationally Determined Contributions (**NDCs**). Articles 6.2 and 6.3 introduce the concept of Internationally Transferrable Mitigation Outcomes (**ITMOs**), which are carbon dioxide offset units that can be used by party states to achieve their NDCs. The focus on voluntary co-operation and the introduction of ITMOs as a trading unit serves the purpose of facilitating a transition to the Sustainable Development Mechanism (**SDM**) introduced under Article 6.4, which aims to promote sustainable development, alongside efforts to mitigate greenhouse gas emissions. The Article 6.4 mechanism is intended to build on the Clean Development Mechanism (**CDM**) under the Kyoto Protocol of 1998. The process of transitioning CDM activities to the Article 6.4 mechanism is expected to begin in January 2024.

The other mechanism introduced under Articles 6.8 and 6.9 is the non-market-based approach, which aims to promote voluntary co-operation between countries in areas such as technology transfer, capacity building and financial and technical support.

Voluntary co-operation between countries, as envisioned under Article 6, creates a great opportunity for developing countries such as Kenya. The concept recognises the relationship between climate change and sustainable development. Further, it creates a framework that can spur the economies of developing countries by encouraging co-operation that can foster job creation, the development of projects, and the provision of water, food and renewable energy.

Given Kenya's Vision 2030 agenda, as well as her status as a leading renewable energy producer globally, the country is a well-placed partner in the realisation of Article 6. Kenya is a signatory to virtually all major international treaties and conventions on the mitigation of climate change.

Accounting and Reporting

Article 6 calls for robust accounting to ensure the integrity of ITMOs. A major concern for investors and buyers of carbon credits is the gaps in accounting for how carbon credits are sold and thereafter retired to avoid double counting. Article 6 requires that ITMOs be subject to a rigorous accounting framework which ensures that emissions reductions are real, measurable and permanent, thereby entrenching integrity.

Within Kenya's Ministry of Environment, Climate Change and Forestry's (**the Ministry**) draft strategic plan for 2023 – 2027, strategies to enable the country to meet its climate change obligations are set out. The strategic plan envisages the development of carbon market frameworks. This is intended to accelerate climate change adaptation and mitigation programs. It also intends to provide an incentivising framework for investment in carbon markets, as well as establish and support institutions to oversee carbon market activities in Kenya. To achieve this, a national carbon registry will be established and maintained. There will also be a deliberate effort to support carbon market sector players to effectively engage in carbon markets.

The Climate Change (Amendment) Act 2023

Currently, the guiding statute on carbon trading in Kenya is the recently passed Climate Change (Amendment) Act, 2023 (**the Amendment Act**). The Amendment Act builds on the Climate Change Act, 2016 which provided measures to achieve lower carbon emissions but fell short of creating an institutional framework for carbon trading. This gap precipitated the need to bolster existing legislation, thereby ushering in the Amendment Act.

The Amendment Act is the first major policy step Kenya has taken to operationalize Article 6. The Amendment Act introduces a national carbon registry, which is a central database with up-to-date information on all carbon credit projects in Kenya, authorisations granted to project developers, Kenya's carbon budget and the greenhouse gas units available to trade, as well as the amount of carbon credits issued and transferred in Kenya and the cancellation and retirement of all carbon credits issued within the country.

The Amendment Act regulates the trading of carbon credits and ITMOs, whether they occur through private equity transactions, the voluntary carbon market or bilateral and multilateral trade agreements. It is anticipated that the national carbon registry will be part of a raft of measures that will bolster investor confidence in carbon offset projects in Kenya, as well as encourage Kenyan firms to participate in carbon trading. These measures are intended to create transparency in the generation and transfer of carbon credits.

The Amendment Act also envisions the creation of a national authority which will be the custodian of the national register. This body will authorise and approve participation in carbon offset projects that fall under the Paris Agreement. Furthermore, it will monitor and report on carbon offset projects. This will assist in meeting the requirements of Article 6 on robust reporting.

Further Policy Initiatives on Reporting

The Ministry's draft strategic plan for 2023 – 2027 proposes the creation of a Climate Change Mitigation and Knowledge Management Directorate (**the Directorate**). The Directorate will be tasked with co-ordinating the creation and application of guidelines for the processes and regulations governing the carbon market. It will also co-ordinate a national climate change knowledge and information system and evaluate and report on Kenya's compliance with international responsibilities. This system will facilitate voluntary co-operation between Kenya and other countries. This will be achieved by improving the institutional framework for carbon trading and creating transparency in the transfer of carbon credits and ITMOs.

> ***Given Kenya's Vision 2030 agenda, as well as her status as a leading renewable energy producer globally, the country is a well-placed partner in the realisation of Article 6. Kenya is a signatory to virtually all major international treaties and conventions on the mitigation of climate change.***

Benefit Sharing

The Paris Agreement is conscious of the nuances between climate change mitigation, equitable access to sustainable development and the eradication of poverty. Parties engaging in carbon trading are encouraged to make provisions for benefit sharing with local communities and ensure environmental integrity.

Following the enactment of the Amendment Act, a project developer hoping to commence a carbon offset project in Kenya will be required to do so through a Community Development Agreement (**CDA**), which outlines the connections and responsibilities of the project's proponents to the public and community and where the project is being developed. This provision works to cushion the impacted communities and to ensure environmental protection and the equitable distribution of funds generated from carbon offset activities. For land-based projects, the Amendment Act requires a provision in the CDA for annual social contributions of at least forty percent (40%) of the project's aggregate earnings, while for non-land-based projects, the requirement is that at least twenty-five percent (25%) of the project's aggregate earnings should count towards the annual social contribution to the community.

Under the Amendment Act, the CDA should contain information relating to the stakeholders of the project, the annual social contribution of the aggregate earnings of the previous year of the community to be disbursed and managed for the benefit of the community, how the project developers will engage local stakeholders, how the benefits from carbon markets and carbon credits will be shared between the project proponents and impacted communities and the proposed socio-economic development around community priorities, among other things.

Environmental Integrity

Article 6 provides that all voluntary co-operation projects must ensure environmental integrity, particularly because developing countries are vulnerable to resource exploitation.

Kenya's commitment to environmental protection is established in the preamble of the Constitution of Kenya, 2010, which explicitly provides that the environment is the country's heritage, which it is determined to sustain for the benefit of future generations. Further, the Amendment Act requires all carbon offset projects to undertake an Environmental Impact Assessment before obtaining approval.

Conclusion

Kenya has made great strides in enacting and proposing legislation to facilitate a conducive environment for carbon trading. Once instituted, this regulatory environment is expected to encourage stakeholders across the carbon trading value chain to leverage the opportunities offered by Article 6 in carbon trading projects within the country. By recognising and harnessing the potential of carbon trading as a means of voluntary co-operation, Kenya is a step closer to meeting its sustainable development and emission reduction goals. Carbon trading is a useful tool in mitigating climate change and its growth ought to be encouraged.

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CHANGING TIMES:

THE IMPACT OF THE DIGITAL CREDIT PROVIDERS REGULATIONS 2022 ON FINTECH COMPANIES

Introduction

In recent years, the financial services landscape has undergone a remarkable transformation, driven by the convergence of technology and finance. Fintech companies, at the forefront of this evolution, have harnessed digital innovation to revolutionise access to financial resources, particularly in regions with limited traditional banking infrastructure.

Digital credit providers (**DCPs**) leverage technology and data analytics to assess borrowers' creditworthiness and provide quick and convenient access to short-term loans or credit facilities. Notable examples of DCPs include Inventure Mobile Limited (trading as Tala), M-Kopa Loan Kenya Limited, and Ngao Credit Limited. As of April 2023, the Central Bank of Kenya (**the CBK**) had licensed thirty-two (32) DCPs to operate in Kenya. While the growth of fintech companies has brought about significant benefits, it has also raised concerns regarding consumer protection and data privacy. For instance, many borrowers who access loans through online platforms often lack a comprehensive understanding of how these companies operate, or even their official identities.

To address these concerns and align the industry's operations with the Constitution of Kenya 2010, the CBK - exercising its powers under section 57 of the CBK Act - formulated the Digital Credit Providers Regulations 2022 (**the Regulations**). These Regulations are designed to govern the licensing, operations, and compliance requirements of DCPs in the country. Notably, the Regulations do not apply to banks, financial institutions, microfinance institutions, Sacco societies, or any entity whose digital credit business is regulated under any other written law, or any other entity regulated by the CBK.

Compliance Requirements

The Regulations introduce a framework to ensure that DCPs operate responsibly, protect consumers, and maintain the integrity of the financial system, an overview of which is as follows:

a)Licensing

Rule 4(1) of the Regulations prohibits a person from carrying on a digital credit business in the country without licensing from the CBK. Contravention of this provision constitutes an offence that attracts a penalty, upon conviction, of imprisonment for a term not exceeding three (3) years or a fine not exceeding KES 5,000,000. An application for a licence is submitted in a prescribed form (CBK DCP 1), which contains information such as the name and address of the applicant and the source of funds for the proposed business. Rule 4 (3) further requires the application to be accompanied by documents such as the applicant's data protection policies and procedures and the applicant's Anti-Money laundering and combating the financing of terrorism policies and procedures (which shows their commitment towards combating anti-money laundering and terrorism financing).

If satisfied that the applicant meets the requirements of the Regulations, a licence is issued within sixty (60) days of submission of a complete application, and it remains valid unless suspended or revoked by the CBK. The CBK is also obliged to publish the name of every licensed DCP in the Kenya Gazette and on its website within thirty (30) days of issuing the licence. The CBK is further required to publish the names and addresses of all licensed DCPs in the Kenya Gazette and on its website before the 31st day of March of every year.

Once licensed, DCPs are required to pay annual fees and submit a return to the CBK, certifying their compliance with the Regulations by the 31st day of December of every year. However, it is worth noting that the CBK retains the authority to suspend or revoke a licence, as per Rule 9 (1) of the Regulations. This can occur if the licencee fails to pay annual fees or a monetary penalty imposed by the CBK, provides false information during the licence application process, or ceases to carry on the business of a DCP. Before such revocation or cancellation, the CBK is required to notify the DCP and allow it to be heard.

b) Credit Information Sharing and Data Protection

The Regulations allow DCPs to disclose both positive and negative credit information regarding their customers to licensed credit reference bureaus (**CRBs**). This disclosure is only permitted when such information is reasonably required for the performance of the functions of either the DCP or the licensed CRBs.

However, the Regulations impose restrictions on submitting negative credit information in relation to a customer where the outstanding amount does not exceed KES 1,000. Before submitting negative information, DCPs are mandated to notify the concerned customer at least thirty (30) days in advance.

After submitting credit information to a CRB, DCPs are required to notify the customer within thirty (30) days from the date the information was submitted. This ensures that customers are informed about any changes to their credit history. Moreover, the information submitted must be timely, complete and accurate.

Most importantly, information derived from CRBs is to be used by DCPs in making decisions on customer transactions or for purposes authorised under the Regulations. DCPs are therefore required to implement measures to ensure the security of the information submitted or provided to CRBs. Accordingly, sharing of information with third-parties is only permitted under the Regulations or relevant laws. This is because the security of shared information is crucial for confidentiality and integrity.

c)Conduct of Digital Credit Business

To further protect consumers, DCPs are prohibited from introducing a new digital credit product to the market or varying the features of an existing product without prior approval from the CBK. Additionally, DCPs are obliged to notify the customers at least thirty (30) days in advance before effecting such variations. The Regulations stipulate a maximum limit on the amount DCPs can recover from a non-performing loan, which prevents them from continuously accruing interest beyond the principal amount. To this end, the *in duplum* rule is applicable to DCPs, as affirmed in the case of *Mugure & 2 others v Higher Education Loans Board (Petition E002 of 2021) [2022] KEHC 11951 (KLR).*

Moreover, Rule 20 of the Regulations prohibits DCPs from engaging in any of the listed actions against a borrower or any other person during debt collection. Some of the prohibited actions includes the use of threats, violence, or other means to harm the borrower, their reputation, or property if they fail to settle their loans; use of obscene or profane language sent to the borrower or the borrower's references or contacts for purposes of shaming them or accessing the customer's phone book or contacts list and other phone records for purposes of sending them messages in the event of untimely payment or non-payment.

d)Consumer Protection

DCPs are required to issue transaction receipts or acknowledgements of customer transactions, whether conducted electronically or through other acceptable means. To address customer concerns, a complaints redress mechanism should be established with dedicated communication channels. Complaints should be promptly resolved within thirty (30) days and records of such complaints and resolutions maintained.

DCPs are also obliged to implement secure and reliable information systems that uphold information confidentiality, integrity, and availability to minimise disruptions. Further, DCPs must provide detailed terms and conditions of loan agreements to customers prior to granting the loan. Some of the information contained in the terms includes: the loan amount, the interest rate to be charged and whether on a reducing balance, the date on which the amount of credit and all interest are due and payable and how the same may be calculated and the annual percentage rate of interest.

> ***To further protect the consumers, DCPs are prohibited from introducing a new digital credit product to the market or varying the features of an existing product without approval from the CBK***

Challenges

While the Regulations aim to foster a safer and more transparent financial ecosystem, they also present formidable hurdles that fintech companies must navigate. Some of these challenges include the following:

a)Delayed Approval Process

Since the implementation of the Regulations, numerous DCPs have submitted their licensing applications to the CBK. However, prevailing reports indicate that many DCPs are still awaiting approval. These delays are attributed to the comprehensive documentation required for each application, coupled with increased industry scrutiny. Consequently, this situation has disrupted the operational continuity of the DCPs and has made potential investors hesitant to provide funding without the CBK's certification.

b)Compliance Costs and Administrative Burden

To ensure compliance with the Regulations, DCPs are forced to allocate resources and invest in compliance measures. This includes the establishment of mechanisms for tracking and reporting various operational aspects, such as transaction receipts, customer complaints and credit information sharing. These compliance efforts impose financial burdens and administrative complexities, particularly for start-up DCPs.

c)Risk Assessment and Responsible Lending

The Regulations underscore the importance of responsible lending practices. DCPs are required to implement effective risk assessment models that accurately evaluate a customer's creditworthiness. This requirement can be challenging, particularly when dealing with customers who lack traditional credit histories. Additionally, limitations on debt collection procedures and techniques have contributed to a rise in loan repayment defaults, forcing fintech companies to write off some debts as bad debts.

d)Product Innovation and Regulatory Approval

Introducing new digital credit products or modifying existing ones requires obtaining regulatory approval. This can slow down the pace of innovation for DCPs, potentially hindering their ability to respond quickly to market demands and adapt to changing customer needs.

Conclusion

As fintech companies endeavour to adapt to the evolving regulatory landscape, the intricate web of compliance obligations, data privacy concerns and consumer protection mandates demand a strategic recalibration of their operations. These challenges, while formidable, also present opportunities for fintech companies to cultivate a culture of responsible innovation and customer-centricity.

By embracing the challenges as catalysts for progress, fintech companies have the chance to shape financial services, bolster customer trust and drive inclusive economic growth in a technologically empowered era. Collaborative efforts between industry stakeholders and regulatory authorities are therefore pivotal in the pursuit of a cohesive financial services ecosystem.

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NO CONSENT?:

COURT OF APPEAL INVOKES EQUITABLE PRINCIPLES IN RESOLVING A DISPUTE PERTAINING TO LAND CONTROL BOARD CONSENT

Introduction

To combat the creeping transformation of our country's breadbasket into a concrete jungle, the Land Control Act (Cap. 302) Laws of Kenya (**the Act**) regulates all agricultural land transactions within any area gazetted as a land control area. As such, any sale, transfer, lease, mortgage, exchange, partition or other dealing in agricultural land within a land control area is void under the Act, unless the Land Control Board (**LCB)** has granted its consent to the transaction.

An application for LCB consent should be made within six (6) months of the making of an agreement for the controlled transaction. The LCB consent must also be obtained before issuing, selling, transferring, mortgaging, or otherwise disposing of or dealing with any share in a private company or co-operative society, that owns agricultural land within a land control area. Any money or other valuable consideration paid during the course of a voided controlled transaction, is recoverable as a debt.

Under the Act, agricultural land has been characterised as land that does not fall within a municipality, township, urban centre, trading centre, or market. For land to qualify as agricultural land, it must neither be land that is not restricted from being used for agriculture nor land that is required to be utilised for non-agricultural uses. It is important to note that inherited land, that is not eligible for partitioning, is exempted from the requirement to obtain LCB consent. The issue pertaining to the potential nullification of a transaction involving agricultural land due to the absence of LCB consent came to the fore in a recent decision handed down by the Court of Appeal (M'Inoti, Ngugi & Kiage, JJA) in the case of *Aliaza v Saul (2022) KECA 583 (KLR)* on appeal from a decision of the Environment and Land Court (**ELC**).

ELC Case

In this case, the respondent was the registered owner of a piece of land located in Kakamega measuring three decimal one one hectares (3.11 ha). On 16 September, 2002, the respondent and the appellant entered into an agreement for the sale of one (1) acre of land for a sum of KES 160,000. Approximately two (2) years later, the parties entered into a second agreement for the sale of an additional zero point three (0.3) acres of land for a sum of KES 57,000. In accordance with the terms of the agreements, the appellant paid the total purchase price, which amounted to KES 217,000.

After a dispute arose as to the width of an access road to the land, the appellant successfully filed a claim for the expansion of the access road before the Land Disputes Tribunal, which ruled in his favour, and the District Surveyor was ordered to correct the width of the access road in contention.

Aggrieved by this turn of events, the respondent filed suit before the ELC and sought eviction orders against the appellant, on the grounds inter alia that the transaction between the parties was null and void, for want of LCB consent. The appellant, in response, filed a defence and raised a counterclaim. In the counterclaim, the appellant sought the specific performance of the agreements, or in the alternative, a refund of the sum of KES 217,000, being the purchase price as per the agreements, together with interest thereon, costs of improvements on the land, which amounted to KES 3,400,000, and general damages for breach of contract.

The ELC, as the Court of first instance, held that the entry of the appellant into possession of the suit property was indubitable, as was his purchase of the land in question. However, the trial court ordered that the sale transactions be voided for lack of the LCB consent. On this basis, the ELC issued eviction orders against the appellant and directed the respondent to refund the purchase price, together with interest thereon.

Court of Appeal Decision

At the Court of Appeal, the appeal largely turned on whether the ELC was correct in finding that the sale transactions were void due to lack of LCB consent.

In its determination, the Court of Appeal recognised that jurisprudence on this question was unsettled. In *Macharia Mwangi Maina and 87 others v Davidson Mwangi Kagiri (2014) eKLR*, it was held that where the LCB had not consented to a sale of agricultural land, an implied and constructive trust is automatically created, in favour of those persons who have paid the purchase price in respect of the land. The cases of *Mwangi and another v Mwangi (1986) KLR 328, Mutsonga v Nyati (1984) KLR 425* and *Kanyi v Muthiora (1984) KLR 712* were also cited, in which cases the Courts held that the equitable doctrines of implied, constructive and resulting trusts could be invoked in applicable circumstances.

In essence, an implied trust is created based on the intentions of the parties involved, often inferred from their actions, conduct, or circumstances. No formal agreement is necessary, and the trust arises to fulfil the presumed intentions of the parties. On the other hand, a constructive trust is imposed by a court to prevent unjust enrichment or unfair conduct. It arises when someone acquires or holds property under circumstances that make it unconscionable for them to retain the property's beneficial interest. While a resulting trust occurs when the legal owner of a property holds the property for the benefit of another party, due to the circumstances of how the property was acquired. This typically arises when someone contributes money or property to acquire an asset, but the legal title is held by another person.

The Court of Appeal also noted that in *David Ole Tukai v Francis Arap Muge and 2 others (2014) eKLR*, it was held that the substance of common law and doctrines of equity only apply in so far as statutes do not apply. Hence, doctrines of equity cannot override clear provisions of statutes. However, the Court qualified this position, relying on the case of *Willy Kimutai Kitilit v Michael Kibet (2018) eKLR*, where it declared that the decisions of Courts of law in the exercise of their equitable jurisdiction, cannot be subordinated to the LCB.

In the appeal, the Court distinguished applications for LCB consent that have been refused by the LCB on the basis of good public policy reasons, from circumstances where a seller mischievously or deliberately refuses to apply for LCB consent. The Court of Appeal, relying on the principle of equity enshrined in Article 10 of the Constitution

It seems ill that the respondent, having freely sold his land to the appellant, and having received full payment therefor, and put the appellant in possession where the latter proceeded to carry out developments, should now argue before a Court of law and, emboldened by a statutory provision, confidently assert a right to resile from his contractual obligations on the spurious reason that no consent to the transaction was given by the Land Control Board.

of Kenya 2010, asserted that the Act must be read and interpreted in a manner that does not aid a wrongdoer, but rather renders substantive justice to an aggrieved party. On this basis, and because there was no dipsute that the appellant had purchased land from the respondent, the Court ruled that the respondent held the suit land in trust for the appellant, notwithstanding the lack of LCB consent. Overtunning the decision of the ELC, the Court of Appeal found it unconscionable that the respondent should stand to benefit for his own failure to procure the LCB consent. As per Kiage, JA:

"It is time, I think, that this Court spoke in unmistakable terms that it would not, in this day and age, rubber-stamp fraud and dishonesty by holding as null and void agreements freely entered into by sellers of agricultural land, and which have been fully acted upon by the parties thereto, when those sellers, often impelled by no higher motives than greed and impunity, seek umbrage under the Land Control Act, an old statute of dubious utility in current times.

It seems ill that the respondent, having freely sold his land to the appellant, and having received full payment therefor, and put the appellant in possession where the latter proceeded to carry out developments, should now argue before a Court of law and, emboldened by a statutory provision, confidently assert a right to resile from his contractual obligations on the spurious reason that no consent to the transaction was given by the Land Control Board. Under that statute, it is required that both the vendor and the purchaser must sign the relevant application for consent. The appellant made no effort to obtain that consent. He basically tries to benefit from his own default to defeat the appellant's rights and escape from his contractual obligations. And that is how a once well-intentioned provision of law … now gets twisted, taken advantage of, and abused to divest a seller of his duty under contract. That is using the statute as a cloak and an alibi for fraud and dishonesty. It flies in the face of all that is right and just and honourable. And Courts which are just and honourable, should put the matter right by requiring him to meet his just obligations and denying him the benefits of default and deceit.

Thus, whether on the basis of constructive trust or to avoid unjust enrichment as an equitable estoppel, the respondent's attempt to hide under the Land Control Act in the circumstances of this case must be named for what they are and rebuffed..."

Upshot

Through this case, the Court of Appeal has accentuated the nuanced application of legal doctrines to uphold justice, within the context of the Act. The Court of Appeal has acknowledged the unsettled nature of its jurisprudence on the question of whether a vendor can benefit from failure to obtain the LCB consent in a transaction affecting agricultural land.

Emphasising the importance of justice over wrongful actions, the Court of Appeal has interpreted the Act in a manner that safeguards the rights of the parties involved, while ensuring compliance with the Act's intent. The case exemplifies the delicate balance between the requirement of LCB consent, equitable principles and the pursuit of fairness in agricultural land transactions under the Act.

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DIGGING DEEPER:

TAPPING INTO PRIVATE SECTOR FINANCE THROUGH PRIVATELY INITIATED PROPOSALS IN PUBLIC PRIVATE PARTNERSHIPS

To finance infrastructure projects, developing countries like Kenya are increasingly looking towards public-private partnerships (**PPPs**). PPPs do indeed present an opportunity for governments to receive private sector funding for infrastructure projects, whilst keeping such funding off sovereign balance sheets. PPPs allow the private sector to significantly contribute to the development, operation, and maintenance of public infrastructure projects by providing innovation and efficiency. Globally, private-sector participation in infrastructure development has proven to be effective in both emerging and mature markets. In Kenya, the Public-Private Partnerships Directorate (**the Directorate**) reports that ten (10) PPPs, cumulatively worth USD 450,000,000, are presently in the post-procurement stage.

The country has recently introduced a new PPP regulatory framework through the Public Private Partnerships Act, 2021 (**the PPP Act**). The PPP Act was intended to address many of the pitfalls of its predecessor, including in the procedure required for Privately Initiated Proposals (**PIPs**).

This article explores the regulatory framework for PIPs under the PPP Act, the challenges that may arise and how such challenges can be mitigated against.

Essence of PIPs

The PPP Act now enables private parties to propose projects to contracting authorities for implementation, aside from the standard direct procurement method where the government or contracting authority issues a tender for a proposed project. Generally, PIPs involve a private sector entity reaching out to the government with a proposal to develop an infrastructure project that may not have been budgeted or planned for. For this reason, PIPs are required to be in line with government policies and development objectives.

Accepting PIPs allows governments to benefit from the knowledge and ideas of the private sector on how to provide services people need. This is a significant advantage where limited government capacity means that the private sector is better placed to identify infrastructure bottlenecks and to devise innovative solutions. PIPs also provide the government with information about where commercial opportunities and market interests lie.

A PIP, as defined by the PPP Act, is a proposal that is originated by a private party without the involvement of a contracting authority and may include information that enables the complete evaluation of the proposal as if it were a bid. Such a proposal should justify why open competitive bidding would not be a suitable method of procuring the project. A review fee, capped at the lower of zero-point-five percent (0.5%) of the estimated project cost or USD 50,000, is then paid to the contracting authority.

The receiving contracting authority then evaluates the proposal, including its alignment with national priorities, social necessity, value for money, fiscal affordability, contingent liabilities, fair market pricing, the sufficiency of supporting documentation and risk transfer efficiency. If satisfied, the authority submits the proposal to the Directorate. Thereafter, the Directorate is expected to assess the private party's compliance with set criteria within ninety (90) days, where such criteria may include public interest, project feasibility, partnership suitability and affordability. Following its assessment, the Directorate then submits an assessment report to the Public Private Partnership Committee (**the Committee**), which decides whether the project should proceed to the project development phase and what procurement method should be applied to the project.

Once approved, the proposal then enters the project development phase, where the private party undertakes essential activities like scoping, feasibility studies, impact assessments, partnership suitability evaluation, risk analysis and creating a comprehensive risk matrix. This phase is usually concluded within six (6) months of the Committee's acceptance but may be extended for legitimate reasons.

Benefits of PIPs

PIPs provide governments with a unique opportunity to leverage the private sector's ideas and expertise regarding the provision of essential services and other public goods. They utilise the unique knowledge the private sector has as a result of being in close contact with people at the grassroots level, which knowledge is crucial in the provision of services that are relevant to the people. Through PIPs, the government may benefit from proprietary information, trade secrets and intellectual property that is owned by private parties. In addition, PIPs provide foreign investors with the opportunity to pick sectors to contribute to, thereby participating in Kenya's ongoing development.

PIPs are particularly advantageous in situations where governmental resources are constrained, since the private parties would play the lead role in identifying an opportunity for development and subsequently bear the cost of developing, building, operating and maintaining the project. The government, on its part, ensures that there is value addition to the public through these projects as it looks to improve and enrich the lives of its people. In addition, by giving private parties a leading role in building public infrastructure, PIPs allow for private parties to present joint proposals where they may undertake the proposed infrastructure project with a suitable partner who may best add significant value. This allows them to share risk, thereby presenting a more attractive opportunity for private sector players keen on getting involved in infrastructure and development.

PIPs can also expedite project development if used properly by allowing private entities to lead the fact-finding phase of PPP projects, minimising bureaucratic delays and enhancing the contracting authority's approval speed. Likewise, the expertise and experience of private entities, either jointly or individually, would allow for increased efficiency at all stages of the project.

Ultimately, PIPs aid in creating an enabling environment for the growth of PPPs and, consequently, overall economic development as a result of increased PPP activity.

Challenges and Mitigation

Although PIPs encourage increased PPP activity, such proposed projects are still required to be undertaken for the benefit of the public at large and as such, should be in line with government development plans and priorities.

PIPs may be a significant tool to unlock Kenya's growth potential by filling gaps in development and infrastructure in the economy. PIPs provide further opportunities for the government and the private sector to join forces to finance and implement projects that benefit the public sector.

A key concern relating to the use of the PIP method is that it may deny projects the benefit of a competitive procurement process. It is arguable that PIPs limit transparency, competition, and ultimately the value for money on the overall project due to how the procurement process is undertaken.

In a PIP method, a single bidder puts forward a proposal for consideration by the government agency based on the assessment of the proposed project. Had open competitive tendering been used, different private companies would have submitted bids to participate in the PPP project, where such competition generally aids in determining fair prices and quality, ultimately securing the government's best deal. Generally, competition in a project helps boost value for money for the project by ensuring that the public receives the optimum balance between delivery of the project and price. With the reduced competition seen in PIPs proposals, concerns may be raised about the value for money of the proposed project.

To counter these concerns, the government can proactively work to enhance transparency by furnishing clear guidelines and practices pertaining to PIP submissions. An example of this may be through encouraging an additional round of bidding for projects that have already received submissions, to give an opportunity for price discovery. Another option that may be considered is the use of incentives, such as a "*bid bonus system*", where the government grants an advantage to the original project proponent in the form of a premium used in the bidding procedure. This acts as an incentive to encourage private-sector involvement in PPPs through PIPs.

Further, PIP proposals may foster corruption due to the lack of transparency and competition that is inherent to their procedures. It is therefore important for contracting authorities to ensure that the assessment and approval of PIP proposals are free from external influences. In addition, it is important to put in place proper measures and procedures to ensure proper scrutiny and a competitive edge for each PIP. For instance, the *"Swiss challenge"* system may be of use where the PIP proposer is granted the right to counter-match the best offer from the competitive process and if they manage to do this, they are awarded the contract.

Lastly, the existing shortcomings of government agencies entrusted with various aspects of PPP execution may be dealt with by providing regular training to boost their knowledge and competencies in the respective procedures and processes of PPPs and PIPs. This will significantly strengthen their proficiency in overseeing PIPs.

Conclusion

PIPs may be a significant tool to unlock Kenya's growth potential by filling gaps in development and infrastructure in the economy. PIPs provide further opportunities for the government and the private sector to join forces to finance and implement projects that benefit the public sector. By embracing PIPs and providing additional initiatives to address its existing concerns, Kenya can unlock new opportunities for private sector engagement, stimulating economic growth and ultimately improving the quality of life for its citizens through the successful implementation of PPP projects. In moving towards a more sustainable and inclusive future, these proposals can play a vital role in shaping our nation's development landscape.

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SPLITTING IT THREE WAYS:

THE CASE FOR THIRD-PARTY LITIGATION FUNDING IN KENYA

Francois-Marie d'Arouet, better known by his pen name Voltaire, consistently repulsed efforts by his father nudging him towards the pursuit of law as a profession. As if Voltaire's rebuffs of his father's (himself a lawyer) career advice was not enough, Voltaire went on to famously criticise the very notion of a lawsuit when he lamented thus: "*I was never ruined but twice: once when I lost a lawsuit, and once when I won one.*"

In his brooding, perhaps Voltaire was merely speaking to the ugly side of litigation, where both the winner and loser of a lawsuit are prone to incur significant costs. Perhaps, looking through the lens of Voltaire's eyes, lawsuits were too time-consuming and acrimonious for him. Or perhaps he was just disillusioned with the process of trying a lawsuit, which sometimes bears no resemblance to the notion of justice as sought by the aggrieved party. Whatever informed Voltaire's view, it is generally accepted that a litigant would be 'less ruined' if the legal costs payable are contingent on the outcome of the dispute, or are borne by a third-party. Such considerations have enkindled and spurred the concept of third-party funding in dispute resolution.

Definition of Third-Party Funding

Despite the existence of various definitions, third-party funding may be aptly described as *"an arrangement between a litigant and a third-party with no prior interest to the legal dispute in which the third-party agrees to fund the litigant's costs in consideration of a percentage of the damages awarded to the litigant"*.

In some jurisdictions, such arrangements may be likened to contingency fee agreements known as champerty, where lawyers charge fees based on the outcome of the case and agree to split or share the award recovered by their clients in a certain ratio or percentage. Ardent proponents of these arrangements insist that they enhance access to justice, reduce the risk of loss by the litigant, and rule out frivolous suits given that the third-party is likely to fund only claims with a reasonable chance of success. On the flip side, the third-party funder would be the party to bear the financial brunt of the lawsuit, as the litigant does not have to repay the funding, should the suit be unsuccessful.

Historical Perception and Global Trends

Historically, litigation financing arrangements i.e., champerty and maintenance, were unenforceable under common law, as they were considered to be against public policy. For instance, in *British Cash & Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] 1 K.B. 1006*, it was held that *"maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce… the law of maintenance as I understand it is confined to cases where a man improperly, and for the purposes of stirring up litigation and strife, encourages others either to bring actions or make defences which they have no right to make."*

In view of the global economic uncertainty and the upsurge of international commercial litigation, common law jurisdictions have over the years grown receptive to the notion of litigation financing, and a number of countries have legislated on the legality and enforceability of such arrangements. Equally, some arbitral institutions have recognised third-party financing as an essential feature of modern dispute resolution process in the international arbitration landscape. For instance, the International Chamber of Commerce Arbitration Rules 2021, under Article 11(7), encourage non-party or third-party financing, subject to certain requirements on disclosure and transparency.

These notable gains notwithstanding, it may be argued that the recent majority decision of the Supreme Court of the United Kingdom has eroded the bright outlook of litigation financing in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others [2023] EWCA Civ 299* by holding that arrangements which entitle a third-party funder to recover a percentage of the damages awarded constitute "*damage-based agreements*" and are thus unenforceable if they fail to meet the statutory requirements for such agreements. The import of this decision is that most funders in the United Kingdom will have to review and interrogate the extent to which their current litigation financing arrangements are statutorily compliant and enforceable.

Moreover, going forward, litigants seeking litigation financing should undertake a rigorous due diligence exercise on the third-party funder just as the funder would, to ensure the arrangements comply with relevant statutory schemes of regulation as far as damages-based agreements are concerned.

The Position in Kenya

Despite the progress made in various jurisdictions, such as the United Kingdom, Australia, Nigeria, and Singapore, in recognising third-party financing both as an investment opportunity and a catalyst for access to justice, Kenya, just like many common law jurisdictions, prohibits these arrangements, including contingent fee agreements.

Section 46 of the Advocates Act (Cap. 16) Laws of Kenya and the Law Society of Kenya Code of Standard of Professional Practice and Ethical Conduct 2016 regard such agreements as invalid and unenforceable. Kenyan litigants must therefore fund their legal costs or seek legal aid from non-profit organisations who not only offer legal services but also procure Advocates to render services for litigants ordinarily on a pro bono basis.

Given the current trends where costs for commencing and sustaining international commercial arbitration or litigation are on the rise,

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it is arguable that Kenya is ready for the recognition of third-party financing. It is probable that to catch up with comparative jurisdictions such as the United Kingdom, Australia, and Nigeria, Kenya may soon loosen the grip on the unenforceability of litigation financing, marking a new dawn in the country's litigation history, particularly in the arbitration space. Such a bold step would certainly spearhead the realisation of Article 48 of the Constitution of Kenya, 2010 which mandates the state to ensure access to justice to all persons despite the constraints of legal fees and associated costs.

Kenya cannot, however, clamour for the recognition of litigation financing without critically looking into its overstated fears. Critics believe that litigation financing would erode the very foundation of the practice of law, which maintains that legal practice is a profession and not a business.

Some maintain that dampening the grip on the invalidity of litigation financing would prioritise the monetization of legal claims at the expense of justice. It is also believed that litigation financing might lead to an increase in unmeritorious or frivolous claims as well as an undisclosed conflict of interest between the parties involved. Party autonomy over the course of the litigation would also be ceded to the third-party funder, who would naturally want to have a say on the course that litigation would follow, the strategy deployed and even the choice of Advocate to be engaged.

Whatever the concerns, it is possible to allay or mitigate against the risks or downsides through regulation. For instance, in the aforementioned decision by the United Kingdom Supreme Court in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal*, it was held that for litigation funding arrangements to be enforceable, they must meet the mandatory requirements prescribed in law, being *inter alia*:

- The agreement must be in writing.
- The funder must be a person of a description prescribed by the Secretary of State.
- The sum to be paid by the litigant must consist of any costs payable to him in respect of the proceedings which the agreement relates together with an amount calculated by reference to the funder's anticipated expenditure in funding the provision of the services.
- The amount must not exceed such percentage of that anticipated expenditure as may be prescribed by the Secretary of State in relation to proceedings of the description to which the agreement related.

It would also be prudent to encourage self-regulation by the third-party funder through developing a code of conduct to be observed by them, and by the same token, establishing an association for the said funders to regulate and ensure compliance with the code of conduct.

Conclusion

Third-party funding in both arbitration and litigation is poised to inhere itself within the international commercial disputes landscape. Kenya should thus take cognizance of the changing tides and perhaps borrow a leaf from other common law jurisdictions, such as Nigeria, which have adapted to the times and now allow for third-party funding.

A RACE WORTH RUNNING:

THE ORARO & CO. FOR THE OZONE RUN 2023 EDITION

Introduction

In the ever-evolving landscape of environmental consciousness, the fight against plastic pollution is more important than ever before. Since last year, the Oraro & Co. for the Ozone Run brings together a community of like-minded individuals, organisations, and visionaries to champion environmental causes. In its 2023 edition, the run not only delivered a remarkable event but also reinforced the significance of collective action in addressing global environmental challenges.

Beating Plastic Pollution

The journey of the Oraro & Co. for the Ozone Run began with a vision - one that envisioned a cleaner, healthier planet while infusing the spirit of fun and togetherness. Aligned with the World Environment Day 2023 theme, 'Beat Plastic Pollution,' this event aimed to shed light on the detrimental consequences of plastic pollution on our environment and, most importantly, ignite the spark of change.

The Heartwarming Participation

Our run experienced an overwhelming response, evident in the impressive ticket sales and the diverse group of participants it attracted. This event successfully brought together individuals from various backgrounds and fitness levels, with three (3) distinct race categories – 5km, 10km, and 21km – ensuring it appealed to a wide range of abilities and interests. Beyond the realm of athletic competition, the atmosphere was characterised by a strong sense of camaraderie and a collective concern for the well-being of our planet. It instilled in all participants a profound sense of shared responsibility towards environmental conservation.

Adding a unique and meaningful dimension to this memorable occasion, we introduced medals made from recycled plastic for the top three (3) finishers in their respective categories, including children, males, females, and persons with disabilities. These medals, meticulously crafted by Plastiki Rafiki, transcend the ordinary concept of athletic achievement tokens. They serve as powerful symbols of our unwavering commitment to sustainability. These medals embody the transformative potential of innovation and determination in our ongoing battle against plastic pollution.

Showcasing Environmental Champions

While the Oraro & Co. for the Ozone Run 2023 Edition was undoubtedly a race to remember, it was also an opportunity to shine a spotlight on some remarkable organisations dedicated to fighting plastic pollution and promoting sustainability.

Our showcase partners - Gjenge Makers LTD (Gjenge), Taka Taka Solutions, and Tai Frontier - are shining examples of the innovative and impactful work being done to combat plastic waste and environmental degradation.

a)Gjenge; true to their name, Gjenge is a community-driven organisation that excels in crafting ingenious solutions from recycled plastics, transforming them into valuable construction materials. Their plastic paving blocks, paving tiles, and manhole covers are not merely innovative products; they represent a paradigm shift in how we perceive plastic waste, recognising it as a valuable resource with immense potential.

b)Taka Taka Solutions; on the other hand, excels at turning plastic containers and packaging into valuable plastic flakes and pellets at their state-of-the-art recycling facilities. Their remarkable ninety five percent (95%) recycling rate is a testament to their dedication to waste management and environmental sustainability.

c)Tai Frontier; inspired by the majestic eagle ('Tai' in Swahili), approaches waste management with a powerful vision. They see waste not as a problem but as a resource in need of responsible management. Their mission is clear - minimise environmental harm and

create a cleaner, healthier environment for all.

These organisations, along with our generous sponsors, Diamond Trust Bank, Superior Homes Kenya, and Hotpoint Appliances Limited, played a pivotal role in making the run and its underlying message a reality.

Empowering Gjenge

One of the standout achievements of this year's Oraro & Co. for the Ozone Run was our collaborative partnership with Gjenge, a remarkable organisation founded in 2019. Gjenge has been on a mission to revolutionise the construction industry while addressing plastic pollution head-on. Their impact is not just seen in the innovative products they create but also in the lives they touch.

As of now, Gjenge provides direct employment to numerous young individuals and indirectly supports the livelihoods of many others, thereby positively impacting hundreds of lives. This ripple effect extends across communities, illustrating the significant change a grassroots initiative can bring.

Gjenge's process begins with obtaining plastic waste from post-industrial and post-consumer sources. They take this waste, crush it, mix it with sand, apply heat, and skilfully mould it into bricks. These bricks are strong, durable, and visually appealing construction materials, offering a sustainable alternative for Kenya and the broader African continent.

Beyond their impressive products, Gjenge is driven by a vision to foster a recycling and upcycling culture. They aspire to provide affordable building alternatives to communities, particularly benefiting the youth and women. At the core of their mission is their commitment to building sustainably and affordably, promoting economic empowerment and environmental stewardship.

Our collaboration with Gjenge was not just about financial support; it was a shared commitment to a cause we deeply believe in. All the funds raised during this year's run were channelled directly to Gjenge to amplify their impact. Specifically, these funds are earmarked to support the expansion of their production capacity, empowering them to make an even more substantial difference in the fight against plastic pollution.

Additionally, the partnership with Gjenge underscores our dedication to practical, community-centred environmental solutions. It highlights the transformative power of collective action and collaboration, emphasising that by working together, we can achieve remarkable change.

A Look Forward

The Oraro & Co. for the Ozone Run 2023 Edition reinforced our commitment to environmental sustainability, recognising the importance of grassroots efforts in addressing global challenges. We acknowledge that our role is not to be heroes but to serve as catalysts, supporting local initiatives and collective action.

As we reflect on this year's edition of the run, we understand that our journey has just begun. Together, we have taken a significant step towards a greener, more sustainable future. The path ahead may be challenging, but it is a path we are committed to walking with unwavering resolve.

'Beating Plastic Pollution' is not just a theme; it is a call to action. It is a testament to our collective power to enact change and make a difference. The 2023 run was a resounding success, but it is only the beginning.

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Established over 44 years 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, IFLR 1000 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.

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