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It Matters to Us: Issue 19

Greetings!

As we embarked on this edition of *Legal & Kenyan*, I couldn't help but reflect on the journey of this publication thus far. It is a journey, much like that of the firm, marked by humble beginnings, but which, through the years, has grown to become an icon for excellence and experience – qualities that resonate with the values and ethos of the firm. From baby steps, to a steady jog, and then on to a full-blown sprint, each issue of *Legal & Kenyan* has evolved qualitatively, nurtured by our passion for the law and our commitment to delivering insightful content. Our aspiration is for this publication to stand as a testament to our expertise and excellence as a firm.

In this edition, we are especially pleased to have the contribution by Rupert Lipton, a British barrister based in Kenya, specializing in commercial dispute resolution and mediation. He is accredited by Kenya's Mediation Accreditation Committee and actively engages in court-annexed mediation. Rupert's legal consultancy, Indisputable, deals with a wide range of matters, especially those involving English law and/or jurisdiction, international private law and cross-border disputes. Having lived in Nairobi with his family for the past couple of years, Rupert brings a unique blend of international expertise and local experience to his practice, and this blend comes to bear in his witty yet insightful article on the Mozambiquan Tuna Bonds case.

From the home stable, Jessica Detho and I kick things off with considerations on the intersection between data protection and competition law in the digital age. This is followed by Chacha Odera and Jonathan Kisia who enlighten us on recent judicial review proceedings, offering useful insights into the Courts' perspectives on the perennial debate on substance versus procedure. We then change gear to hear from James Kituku, Claire Mwangi and Stacie Manani who offer their critique of a recent decision of the Supreme Court of Kenya relating to the doctrine of the *bona fide* purchaser of land.

The issue continues with a piece by Noella Lubano on bifurcation in arbitral proceedings, followed on its heels by Renee Omondi and Elly Obegi who share their insights on the importance of clear explanations by the Kenya Revenue Authority when issuing tax assessments. Noella Lubano, Paul Kamara and Zahra Omar team up to provide insights into the efficacy of performance bonds, while Claire Mwangi, Stacie Manani and I discuss the sombre yet important topic of the right to bury a loved one in the Kenya legal context.

We trust that you'll find this edition both enlightening and enriching.

Sincerely,

John Mbaluto, FCIArb
Editor

Founding Partner's Note

Dispute resolution is a crucial aspect of the legal field. While many associate it solely with court processes, Alternative Dispute Resolution (**ADR**) methods offer various avenues for resolving conflicts. These ADR methods, such as arbitration, mediation, conciliation, and negotiation, provide alternatives that are often faster and offer parties more control over the process and outcome than traditional litigation. It's crucial for individuals to carefully consider which method best suits their needs when addressing conflicts or disagreements. For further insights into dispute resolution processes and other legal matters, delve into the 19th edition of our flagship publication, *Legal & Kenyan*.

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"Oraro & Company exhibit expertise, wisdom and a great willingness to listen to and incorporate the inputs from the client."

CHAMBERS, 2024

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CROSSROADS:

THE LEGAL INTERSECTION BETWEEN PRIVACY AND COMPETITION LAWS

Introduction

Living in the digital age has seen a surge in the monetisation of data, especially in the platform economy, where personal data relating to human behaviour is especially valuable. Personal data now forms an integral part of business models particularly for businesses in zero price markets. As such, businesses compete to acquire and access as much personal data as possible so as to gain a competitive advantage over their rivals. The increased use of personal data brings the intersection of the laws relating to data protection and competition into sharper focus.

Regulatory Framework

Data Protection is regulated by the Data Protection Act, 2019 (**the DPA**). Sections 25, 26 and 32 of the DPA provide for the principles of data protection, the rights of a data subject as well as the conditions of consent for processing data. These sections mirror articles 5, 7 and 13 to 23 of the European Union General Data Protection Regulation (**EU GDPR**). These provisions work towards ensuring, inter alia, that personal data is *"collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes"*. They also accord a data subject the right "*to object to the processing of all or part of their personal data and withdraw their consent at any time*". Notably, when assessing whether consent is given freely, the Office of the Data Protection Commissioner (**the ODPC**) takes into consideration, among other things, whether "*provision of a service is conditional to consent being given*".

On the other hand, the Competition Act, 2010 (**the Competition Act**) regulates competition in the market, with the Competition Authority of Kenya (**CAK**) established as the regulator. Focal to this article are the restrictive trade practices prohibited by sections 21 to 24 of the Competition Act. Sections 23 and 24, in particular regulate dominant undertakings and prohibit conduct which amounts to an abuse of their dominance. These sections adopt the interpretation of Article 102 of the European Union Treaty on the Functioning of the European Union (**TFEU**).

Abuse of Dominance

In *Hoffmann-La Roche & Co. AG v Commission of the European Communities (1979) I-00461*, abuse of dominance was defined as the practice of an undertaking in a dominant position to influence the structure of the market, whose result is that of hindering competition, through methods that depart from those which condition normal competition.

The Competition Act and the TFEU have consolidated the following trade practices that are deemed an abuse of dominance:
i) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
ii) limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices;
iii) applying dissimilar conditions to equivalent transactions with other trading parties;
iv) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of the contracts; and
v) abuse of an intellectual property right.

In *Lietuvos geležinkeliai AB v Commission (2020) EU:C:2023:12*

the Court opined that *"the list of abusive practices contained in Article 102 does not exhaust the methods of abusing a dominant position prohibited by EU law"*. However, the abuses are largely classified as either exclusionary or exploitative in nature. Examples of exclusionary abuses are those in which a dominant undertaking enters into exclusive dealing agreements or offers conditional rebates, whereas examples of exploitative abuses include excessive pricing, price discrimination or unfair trading practices.

The Intersection

As mentioned above, the platform economy commercialises the use of personal data which brings about the interplay between data protection law and competition law. Data subjects who consent to the use of their data, are also consumers in the same respect. Whereas the ODPC is concerned with harmful privacy practices by platforms, the CAK looks out for restricted trade practices that harm the consumer or distort competition. Recently, these regulatory obligations have overlapped one another, as can be seen in the following cases:

Amazon Marketplace

Amazon plays dual roles on its platform: being a marketplace as well as an online retailer. Amazon provides a space for online retailers to sell their products while also selling its own-branded products, in competition with those online retailers. By virtue of its role as a marketplace, naturally, Amazon has access to the data of the retailers. Such data includes statistics on order and shipment numbers, the retailers' turnover as well as their growth over the years. This data can show different strategies employed by sellers to achieve financial growth or otherwise.

Amazon is said to have used this data without the retailers' (freely given) consent to gain a competitive advantage over the retailers as the data formed a basis for Amazon's own business strategies. As such, in July 2019, the European Union Commission (**EU Commission**) launched investigations into Amazon's conduct of using retailers' non-public seller data. In 2022, the EU Commission issued a Statement of Objection. It held a preliminary view that Amazon abused its dominant position and circumvented the usual risks of competition exclusively as a result of its access to its competitors' non-public data.

In this case however, the EU Commission did not make a final determination on whether the conduct was anti-competitive. Amazon offered commitments to stop using the retailers' data prior to the completion of investigations, which the EU Commission accepted. Nevertheless, it is evident that the EU Commission is likely to deem the data breaches by Amazon as anti-competitive upon conclusion of the investigations.

Meta: Facebook Social Network

Meta Platforms, the company that houses social networks: Facebook, WhatsApp, Instagram and more recently Threads, has come under fire for data privacy breaches which have been deemed anti-competitive. Following several years of investigations, the Federal Cartel Office (**FCO**) in Germany found that Meta had made the use of Facebook accounts by German citizens conditional on Meta's processing of their third-party data (which they term *"off-Facebook data"*). Thereafter, the FCO prohibited Meta from doing so and further ordered Meta to make it clear that the said personal data would neither be collected nor used without the consent of a Facebook user, nor will the use of the network be made conditional on consent.

Dissatisfied with this decision, Meta filed a case against the decision to the Düsseldorf Higher Regional Court. The Regional Court in turn raised concerns and saw it fit to stay further proceedings and refer a number of questions to the Court of Justice of the European Union (**CJEU**) for a preliminary ruling. The crux of the matter was whether a national competition authority could find that the EU GDPR had been infringed, whilst investigating an undertaking's abuse of dominance.

With respect to privacy breaches, it has been observed that the App fails to seek users' consent to track, collect and process sensitive personal data such as the users' health conditions. The purpose of these activities is to sell that personal data to vendors, who would then advertise to the users medication related to their health issues.

On 4th July 2023, the CJEU delivered its Judgment in *Meta Platforms and Others v Bundeskartellamt (2023) EU:C:2023:537* and held *inter alia* as follows:

"It follows that, in the context of the examination of an abuse of a dominant position by an undertaking on a particular market, it may be necessary for the competition authority of the Member State concerned also to examine whether that undertaking's conduct complies with rules other than those relating to competition law, such as the rules on the protection of personal data laid down by the GDPR.

… access to personal data and the fact that it is possible to process such data have become a significant parameter of competition between undertakings in the digital economy. Therefore, excluding the rules on the protection of personal data from the legal framework to be taken into consideration by the competition authorities when examining an abuse of a dominant position would disregard the reality of this economic development and would be liable to undermine the effectiveness of competition law within the European Union."

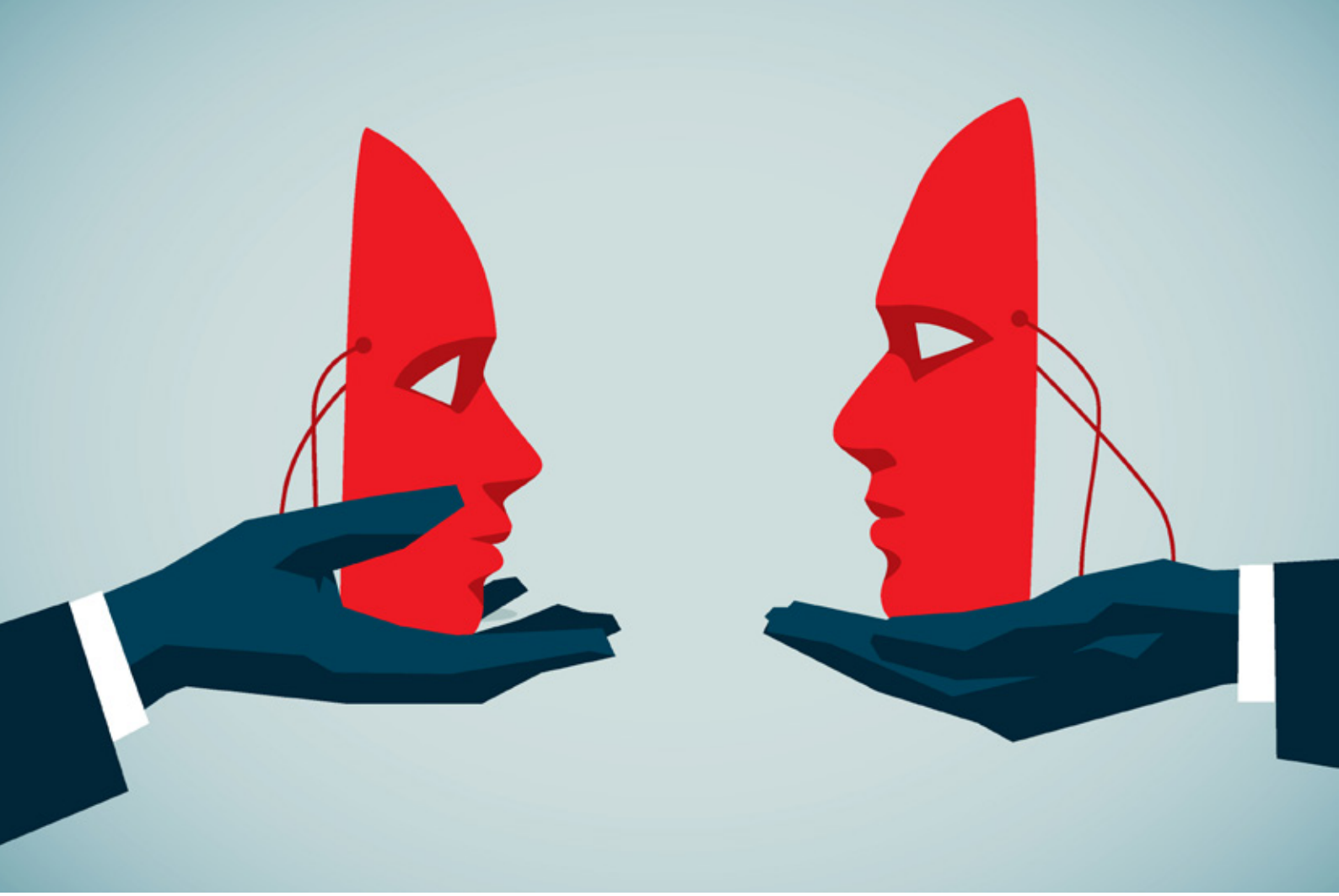
Meta: Threads Social Network

July 2023 proved a busy month for Meta. Notwithstanding the unfavourable Judgment received in *Meta v Bundeskartellamt*, on 6th July, Meta launched a new social media network, Threads (**the App**) which has already received widespread scrutiny and criticism and is potentially under investigation by the US Federal Trade Commission (**FTC**). It is reported that sources within Meta have disclosed that they are delaying the App's launch within the European Union due to *"legal uncertainty"*. This can be attributed especially to the recently released EU Digital Markets Act, which has seen Meta classified as a *"gatekeeper"* giving the tech giant additional regulatory obligations.

The App's criticism is attached to privacy as well as antitrust concerns. To begin with, the App mandates that new users ought to have an Instagram account and users who intend to delete the App, would have their associated Instagram account deleted as well. This is an overt attempt at tying the App to Instagram, an abuse of dominance contrary to the Competition Act, TFEU and Antitrust laws globally.

With respect to privacy breaches, it has been observed that the App fails to seek users' consent to track, collect and process sensitive personal data such as the users' health conditions. The purpose of these activities is to sell that personal data to vendors, who would then advertise to the users medication related to their health issues. Meta has relied on legitimate interest as a reason for collecting the said sensitive personal data. However, it can be contended that explicit consent is a requirement prior to the processing of sensitive personal data, especially when the purpose for collecting the data is targeted advertising. Anything contrary to the foregoing may be deemed to be a privacy breach as well as an abuse of dominance.

The App, having been launched recently, is still under scrutiny by the global antitrust watchdogs and if the recent trend is anything to go by, sanctions from the said watchdogs would not come as a surprise.



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OF EQUAL IMPORTANCE:

HOW THE COURTS HAVE APPROACHED SUBSTANCE AND PROCEDURE CONSIDERATIONS IN RECENT JUDICIAL REVIEW PROCEEDINGS

Following its promulgation, the Constitution of Kenya, 2010 (**the Constitution**) has been hailed as being transformative and progressive. In this regard, one of the notable transformations that the Constitution has brought about is the guarantee of access to justice as provided for under Article 48.

The Constitution also clearly sets out judicial authority and outlines its limits under Article 159, and further lays out the guiding principles for the Courts to adhere to in exercising this authority – that justice is to be administered to all irrespective of status; justice is not to be delayed; alternative forms of dispute resolution are to be encouraged; and justice is to be administered without undue regard to procedural technicalities.

This latter edict, that justice is to be administered without undue regard to procedural technicalities, has sparked significant debate and controversy given that there have been numerous instances where litigants have seemingly thrown procedural rules and constraints to the wind and nonetheless expected favourable outcomes on the substance of the dispute. This issue was addressed in *Raila Odinga & 5 Others v IEBC & Others (2013) eKLR* in which the Court had this to say on the effect of Article 159 of the Constitution:

"Our attention has repeatedly been drawn to the provisions of Article 159(2) (d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The Article simply means that a Court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Courts of law …"

The Courts have continued to demonstrate that a fallback on Article 159 is not always the legal panacea one might expect. On the forefront of upholding this position is the Judicial Review Division of the High Court which in recent decisions has come to be the shielding grace to litigants who may have been shortchanged as a result of an administrative decision or action taken by a body in authority on account of substantive justice where procedure has not been accorded much regard.

Judicial Review

Judicial Review is the authority vested in the Courts in appro-

priate proceedings before it, to declare a decision or action by an authoritative body either contrary to, or in accordance with, the Constitution or other governing law with the effect of rendering the decision invalid or vindicating its validity. Put simply, it gives effect to the Constitutional principle of checks and balances.

Judicial Review is primarily concerned with the decision-making process and as such, when Courts conduct Judicial Review proceedings, they are in essence ensuring that the decisions made by the relevant bodies in authority are lawful. Consequently, should the Courts find that a decision made by a body is unlawful (be it for reasons such as disregarding procedural technicalities), then the Courts can set aside that decision. The role of the Court is therefore supervisory, and the Court is refrained from delving into a merit review or adopting an appellate approach – which is ordinarily not the function of Judicial Review.

Consolidated Cases

In recently decided consolidated Judicial Review cases, the Court has upheld and enhanced the position that adherence to statutory procedural requirements is not a mere suggestion, notwithstanding the provisions of Article 159 of the Constitution. The backdrop against which these Judicial Review proceedings were filed were historical land injustices alleged to have been suffered by the applicants.

In *ELC JR No. 3 of 2020* (*R v National Land Commission & 3 Others ex parte James Finlay's Kenya Ltd & Others*) it was the Kenya Tea Growers Association's (**KTGA**) case that the National Land Commission (**the NLC**) in seeking to address the historical land injustice claims lodged on behalf of the communities in the area by the County Governments of Kericho and Bomet, had not adhered to the procedural dictates outlined in section 15 of the National Land Commission Act (**NLC Act**), and further that the NLC had not granted KTGA an opportunity to be heard.

In *ELC JR No. 4 of 2020 (R v National Land Commission & 2 Others ex parte Kakuzi PLC)* Kakuzi PLC (**Kakuzi**) sought Judicial Review relief on the grounds that it carries out intense agricultural activities on the suit properties in question and that the NLC sometime in 2018 served them with a hearing notice in respect of the historical land injustice claims relating to the said parcels of land. Kakuzi sought and was granted interim conservatory orders staying the historical land injustice proceedings which the NLC was conducting. The NLC nonetheless proceeded with the hearings and gazetted recommendations arising therefrom.

In *ELC JR No. 5 of 2020 (R v National Land Commission & 2 Others ex parte Eastern Produce Kenya Limited)* Eastern Produce Kenya Limited (**Eastern Produce**), sought Judicial Review Orders on the grounds that the NLC gazetted recommendations arising from a historical land injustice complaint by Kimasas Farmers Co-operative Society against Eastern Produce (**Kimasas**).

According to Eastern Produce, the effect of the recommendations by the NLC was that various sub-divisions done by Eastern Produce were done illegally and should be cancelled with the land parcel in question being allocated to Kimasas. These recommendations were to be implemented by the Chief Lands Registrar and the Ministry of Lands.

The common thread arising in these consolidated cases was the historical land injustices meted upon the residents living within the respective areas, which the NLC sought to remedy. The Court found that the NLC indeed had the mandate to adjudicate upon historical land injustices as per section 15 of the NLC Act. However, what was in dispute was the manner and procedure through which NLC conducted these proceedings.

It was contended by the applicants in all three (3) cases that the NLC carried out the respective historical land injustice proceedings without issuing them with *due notice to attend and participate* in the proceedings and without affording them an opportunity to appear before the NLC and as such, the proceedings were devoid of procedural soundness with respect to guaranteeing fair administrative action. The applicants therefore approached the Court seeking Judicial Review remedies as against the recommendations gazetted by the NLC premised on the fact that in conducting the proceedings, it failed to adhere to procedural dictates outlined in the NLC Act.

In recently decided consolidated Judicial Review cases, the Court has upheld and enhanced the position that adherence to statutory procedural requirements is not a mere suggestion, notwithstanding the provisions of Article 159 of the Constitution.

In determining the degree of procedural fairness required, the Court assessed the nature of the decision being made, and the process followed in making it. The NLC in conducting the historical land injustice proceedings notwithstanding their recommendations, sought to remedy long-standing land injustices affecting the residents in the areas. What therefore arises is a substantive justice aspect in remedying historical land injustices being pitted against procedural requisites.

The Court thus assessed the procedure followed and whether it met the standard for procedural fairness and found that in all the proceedings conducted, the NLC did not adhere to the dictates of procedural fairness. As such, the Court proceeded to grant the Judicial Review orders sought, including quashing the decisions of the NLC.

In so doing, the Court stated that from the onset, there was no evidence of notification to the applicant to attend the hearings which the Court held to be contrary to the NLC Act, Article 47 of the Constitution and section 4(3) of the Fair Administrative Action Act, 2015. It stated that whereas the nature of the NLC's mandate with respect to historical land injustices was more investigative than adversarial, it did not take away the need to notify any party to the proceedings and allow it an opportunity to be heard. Failure to do so amounted to a grave procedural violation of the right to fair administrative action and rendered the decision arising out of the proceedings a nullity.

The preceding discussion highlights that Courts are not shy to find in favour of a litigant who has been subjected to proceedings in which procedural fairness has seemingly been sacrificed at the altar of substantive justice. While empathy may be extended to those who have experienced historical land injustices, the NLC holds a paramount obligation to uphold procedural fairness when addressing such matters.

Upshot

As was stated by the Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 6 Others (2013) eKLR*, Article 159 of the Constitution, which commands Courts to seek to render substantive justice, was not meant to aid in the destruction of rules of procedure and create an anarchial free-for-all in the administration of justice. The rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain, and even-handed.

Litigants are therefore dutybound to pay attention and adhere to procedural dictates in the course of their respective cases and ought to beware that a reliance on Article 159 of the Constitution can only come to assist litigants who have themselves adhered to the rules and procedures set to aid in the administration of justice.

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UPENDED:

THE SUPREME COURT EXTINGUISHES THE DOCTRINE OF THE *BONA FIDE* PURCHASER OF LAND

Background

On 21st April 2023, the Supreme Court delivered its Judgment in *Dina Management Limited v County Government of Mombasa & 5 Others (2022) KESC 24 (KLR)* wherein it dismissed the Appellant's Petition of Appeal. The decision sent seismic shock waves across the Kenyan legal terrain the reverberations of which arguably upended an entire system of land law. The history of the case dates back to September 2017, when it is claimed by the Appellant (**Dina Management Limited**) that the 1st Respondent (**the County Government of Mombasa**), without prior notice, forcefully entered the property known as MN/1/6053 situated in Nyali Beach, Mombasa County (**the Suit Property**), which was registered to the Appellant, and demolished the entire perimeter wall facing the beachfront and also proceeded to flatten the developments on the suit property.

Prior to filing of the Petition of Appeal, the Appellant and the 1st Respondent had filed Petitions before the Environment and Land Court (**the ELC**), which were consolidated to be heard as one (1) case. Among the issues for determination before the ELC was whether the Appellant should suffer the faults (if any) of the third parties in the matter. On this issue, the ELC found that the Appellant could not be protected as a *bona fide* purchaser without notice as it failed to demonstrate that it had conducted due diligence before purchasing the Suit Property.

Aggrieved by the decision of the ELC, the Appellant moved the Court of Appeal, which, in delivering its Judgment on the issue, agreed with the ELC that the Appellant cannot enjoy protection under the doctrine of the *bona fide* purchaser. The Court of Appeal's rationale was that because the Suit Property was originally acquired unlawfully, the title in the property could not qualify for indefeasibility. It is against this background that the Appellant filed the present Petition of Appeal in the Supreme Court.

The Supreme Court's determination

In its Judgment, the Supreme Court indicated that to establish whether the Appellant is a *bona fide* purchaser, there was need to go to the root of the title, right from the first allotment.

It was not in contention that the Suit Property was first allocated to the former President, H. E. Daniel arap Moi, in 1989, and that the applicable law at the time relating to physical planning was the Land Planning Act (Cap. 303) Laws of Kenya, which was later repealed by Physical Planning Act (Cap. 286) Laws of Kenya, which has since been repealed by the Physical and Land Use Planning Act, No. 13 of 2019.

Under the Development and Use of Land (Planning) Regulations, 1961 made under the Land Planning Act, public open spaces were classified as land designated for public purposes. At the time, the Suit Property was designated as an open space. It is on this premise that the Supreme Court held that the Suit Property was a public utility and could not be described as unalienated land that was available for allotment as urged by the Appellant.

Nonetheless, the Supreme Court, in giving the Appellant the benefit of the doubt, discussed the procedure for allocating unalienated land. In its analysis, the Supreme Court pointed out that a Letter of Allotment, being one of the primary documents used in the allocation of land, should be accompanied by a Part Development Plan, which document was not produced in Court as evidence of the allocation of the Suit Property to the seller. As such, the Supreme Court found that the said allocation would have been irregular in any event.

Consequently, it was held that because the first allocation of the Suit Property had been irregularly obtained, there was no valid legal interest which could pass to the seller, who in turn could pass to the Appellant. The Supreme Court's rationale was that the Appellant ought to have been more cautious in undertaking its due diligence, when purchasing the Suit Property.

While the Petition of Appeal raised various issues for determination, the crux of this article is the Supreme Court's interpretation of the doctrine of the *bona fide* purchaser in light of the Curtain Principle.

The Curtain Principle

The Curtain Principle is one of the foundational principles of the Torrens system of registration of land. The Torrens system, which finds its roots in Australia, is a system of land registration under which the Certificate of Title is sufficient evidence of good title. There are three (3) principles underpinning this system, that is: the Mirror Principle, the Curtain Principle, and the Insurance Principle. More specifically, the Curtain Principle stipulates that there is no need to look beyond the register, as the Certificate of Title contains all information about the title. In essence, a purchaser need not make enquiries or search previous titles as the current Certificate of Title serves as proof of ownership.

The Curtain Principle is enshrined under section 26 of the Land Registration Act, No. 3 of 2012 (**the LRA**) under which a Certificate of Title issued by the Registrar is deemed to be conclusive evidence of ownership of land. However, the Supreme Court, in its Judgment, departed from the Curtain Principle on the basis that for a purchaser to seek refuge behind it, he must demonstrate that he is a *bona fide* purchaser, and should be able to go to the root of the title which he holds.

The Doctrine of the *Bona Fide* Purchaser

The Curtain Principle may be interpreted alongside the doctrine of the *bona fide* purchaser as the two are both founded on the same rationale. *Black's Law Dictionary* (8th Edition) at page 1271 defines a *bona fide* purchaser as follows:

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims. Generally, a bona fide purchaser for value is not affected by the transferor's fraud against a third party and has a superior right to the transferred property..."

Until recently, the Courts took the position that purchasers could seek refuge under section 26 of the LRA. The rationale behind this is that the responsibility to ensure the accuracy of the register and the authenticity of titles lies with the Government, and not individuals, which is by law required to pay compensation for any fraud or other errors committed during registration.

The Court of Appeal in *Tarabana Company Limited v Sehmi & 7 Others (2021) KECA 76 (KLR)* aligned itself with this position in stating that:

> ***Under this school of thought, it is posited that the doctrine of the bona fide purchaser should not allow a purchaser free rein to throw caution to the wind, and a purchaser is required to undertake sufficient due diligence at all stages, including satisfying himself on the propriety of the origin and history of the title.***

"With due respect to the learned trial Judge, the means of determining whether the Appellant's title was indefeasible and not subject to challenge is spelt out under section 26 of the LRA. What was required was to determine whether the Appellant was in any way involved in the process through which the 4th Respondent obtained title, which the learned Judge found was irregular and with which we agree. There was no evidence adduced before the trial court to show that the Appellant played any role, or was involved in any way in the said process. If title was acquired by fraud, or misrepresentation, illegal, unprocedural or corrupt scheme, the same was before the Appellant came into the picture. We therefore find that the appellant was a bona fide innocent purchaser for value for these reasons, and its title could not and cannot be challenged."

However, the foregoing is tempered by an alternative school of thought, which is what was followed by the Supreme Court. Under this school of thought, it is posited that the doctrine of the *bona fide* purchaser should not allow a purchaser free rein to throw caution to the wind, and a purchaser is required to undertake sufficient due diligence at all stages, including satisfying himself on the propriety of the origin and history of the title. In this regard, the Court of Appeal in the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others (2015) eKLR* was succinct in stating that:

"For a purchaser who claims that due diligence was carried out at all stages, we find it difficult to believe that there was no explanation sought from the Registrar of Titles about the mysterious disappearance of the original Deed file from the strong room of the land registry. It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market."

In reiterating this position, the Supreme Court in its Judgment pronounced itself as follows:

"... where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register."

Conclusion

The Judgment of the Supreme Court in *Dina Management Limited v County Government of Mombasa & 5 Others* is a clear departure from the Curtain Principle that underpins the Torrens system. In essence, it is the Supreme Court's position that a purchaser cannot claim to be a *bona fide* purchaser if he cannot go to the root of the title and, in effect, cannot seek refuge under the Curtain Principle. It is therefore advisable for a purchaser to investigate all titles preceding the current one, and it is no longer enough to rely on a Certificate of Title as conclusive proof of ownership.

The Supreme Court's Judgment, in our view, is a double-edged sword. While it may discourage fraud in land transactions, which is a growing menace, departing from the Curtain Principle may prove to be problematic in the sense that it defeats the purpose of section 26 of the LRA, and altogether discourage the buying and selling of land in this country.

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A TWO-WAY APPROACH:

BIFURCATION AS AN EFFECTIVE TOOL IN DETERMINING ISSUES ARISING IN ARBITRAL PROCEEDINGS

Bifurcation is a process by which complex legal disputes can be separated into distinct issues, which can then be resolved separately in the arbitral proceedings. It is the separation of the arbitral proceedings into different phases that helps in addressing distinct issues. Most often, bifurcation refers to the separation of jurisdictional issues from the merits of the dispute, or the separation of the issue of liability from that of damages. Bifurcation can potentially reduce the time and costs attendant to arbitral proceedings, as it allows the parties to focus on the most important issues, thereby avoiding expending time and costs over less significant issues.

Through bifurcation, arbitrators can identify the key issues in dispute and separate them into distinct phases or tracts. For example, in a construction dispute, the parties may agree to bifurcate the issues of liability and damages, allowing the parties to first determine liability before proceeding to the question of damages. This approach can be particularly useful in cases where the parties disagree over the extent of damages, as bifurcation allows the parties to focus on establishing liability first, which can often lead to the settlement of the entire dispute.

Bifurcation under various Rules of Arbitration

Rules of each arbitration institution may differ and the availability and procedure for bifurcation may depend on the specific terms of the arbitration agreement and the facts of the case. Under the majority of arbitration rules, bifurcation may be allowed, subject to the discretion of the arbitral tribunal. In general, arbitration rules do not contain any specifically laid out procedure pertaining to bifurcation. However, some rules empower the tribunal to order bifurcation, circumstances permitting. The power of arbitrators to order bifurcation is grounded on the principle that arbitral tribunals have discretionary powers to conduct arbitral proceedings as they deem appropriate.

For instance, the International Chamber of Commerce (**ICC**) Arbitration Rules, for example, provide that the arbitral tribunal may, after consulting with the parties, decide to bifurcate the proceedings if it considers it appropriate, taking into account the complexity of the case, the cost and efficiency of the proceedings, and the possibility of resolving certain issues separately.

On the other hand, the United Nations Commission on International Trade Law (**UNCITRAL**) Arbitration Rules do not expressly provide for bifurcation. Instead, parties are at liberty to agree to bifurcate the proceedings, or the tribunal may order it if it considers it appropriate and the parties are agreeable.

Under the London Court of International Arbitration Rules (**LCIA**), a party may apply for bifurcation after the constitution of the tribunal but before the final award is issued. The tribunal may grant the request if it considers it appropriate and may make a procedural order setting out the issues to be bifurcated and the procedure to be followed.

Similarly, the International Centre for Settlement of Investment Disputes Rules (**ICSID**) provides that the tribunal may bifurcate the proceedings if it considers it appropriate, after consulting with the parties. The tribunal may also issue separate procedural orders for each issue before the final award.

Factors to take into account when considering Bifurcation

There are various factors to be taken into consideration when deciding whether or not to bifurcate. First, the complexity of the case should be considered. Where there are multiple issues to be ad-

dressed, bifurcation can help break down the case into smaller, more manageable parts, making it easier for the parties to focus on the key issues in the dispute.

Secondly, the resources of the parties to the arbitration should be factored in since bifurcation may not be appropriate in cases where the parties have limited resources.

Thirdly, the parties need to contemplate the likelihood of settlement. It is worth noting that bifurcation may not be appropriate in cases where parties are unlikely to settle, as it can add additional phases or tracks to the arbitration process, thereby defeating its intended purpose.

Lastly, the preference of the parties ought to be considered, as party autonomy is a pillar of any arbitration. The decision to bifurcate or not to bifurcate should reflect the preference and needs of the parties involved. If the parties agree that bifurcation is the most suitable approach, then it may be a useful tool for resolving the dispute. However, if one party is opposed to bifurcation or prefers a different approach, then it may not be effective in the proceedings.

Pros and Cons of Bifurcation

The decision to bifurcate or not to bifurcate in arbitration proceedings ultimately depends on the specific circumstances of the case, and above all, the preference of the parties involved. There is no one-size-fits-all approach, and the benefits and drawbacks of bifurcation should be carefully weighed against the specific needs and objectives of the parties.

In Kenya, some concerns have been raised about the issue of bifurcation. One such concern is that parties may use bifurcation as a delay tactic or as a way to increase the length and the costs of the arbitral process. Another concern is that bifurcation may unfairly prejudice one party over the other, especially if the issues are interdependent.

Pros

Bifurcation fosters efficiency by helping to streamline the arbitral process and allows the parties to focus on the key issues in the dispute, potentially saving time and costs. By breaking down the complex issues into smaller, more manageable issues, it can help the parties who may be overwhelmed by the complexity of the dispute.Furthermore, it can create opportunities for settlement by allowing parties to address the key issues in dispute separately. For example, if liability is established in the first phase of bifurcation, the parties may be more willing to settle the matter before proceeding to the damages phase.

Bifurcation also promotes flexibility since it can be tailored to the specific needs of the parties and the dispute, allowing greater flexibility in the arbitration process.

Cons

On the downside, bifurcation can unwittingly add complexity to the arbitral process by requiring the parties to navigate multiple phases or tracks of the case. This can be especially challenging for the parties who are not familiar with arbitration or who lack the resources to effectively navigate the bifurcated process.

Moreover, bifurcation can at times increase the cost of the arbitration by requiring additional hearings and discovery of each phase or track of the case.

Additionally, it can also delay the resolution of the case by adding additional phases or tracks to the arbitration process. Bifurcation can also create the risk of inconsistent results if the same issues are addressed differently in each phase or track of the case. This can cause confusion and undermine the credibility of the arbitration process.

Bifurcation fosters efficiency by helping to streamline the arbitral process and allows the parties to focus on the key issues in the dispute potentially saving time and costs. By breaking down the complex issues into smaller, more manageable issues, it can help the parties who may be overwhelmed by the complexity of the dispute.

Procedure to be followed when requesting for Bifurcation

Once a party to an arbitration has decided that they want to bifurcate the proceedings, they can proceed to request for bifurcation. In the vast majority of cases, the request for bifurcation of jurisdictional issues is filed by the respondents and to a lesser extent by the claimants or by both parties as per their agreement.

Firstly, the party that seeks to bifurcate the arbitral proceedings makes a request for bifurcation in accordance with the rules of the arbitration agreement or the arbitration institution administering the proceedings.

Secondly, the other party has the opportunity to respond to the request typically within a specified time period. After the response by the other party, the tribunal may hold a preliminary hearing to determine whether bifurcation is appropriate, taking into account factors such as complexity of the issues, the potential for cost savings, and the impact on the overall duration of the arbitration.

If the tribunal decides that bifurcation is appropriate, it will issue a procedural order setting out the issues to be heard separately and the schedule for the separate hearings. After hearing the separate issues, the tribunal will provide its decision on those issues before proceeding to the main dispute.

Assessment by the Arbitral Tribunal

Although the power to bifurcate proceedings is an exercise of the arbitral tribunals' discretion, case law has generated a number of conditions to be met for tribunals to consider whether bifurcation is warranted. Some arbitral tribunals have relied on the following conditions set out in the *Glamis Gold vs. USA case (Glamis Gold Ltd. v The United States of America, Procedural Order No. 2 (Revised), 31 May 2005:*

- whether the objection is substantial in as much as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding
- whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase
- whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost

Other tribunals, however, have ruled that they should not be placed in the "*strait-jacket*" of considering the issue of bifurcation solely through the lens of the *Glamis Goldcriteria* as they do not form a "*stand-alone test*".

Conclusion

In light of the above discussion, the most important factor to be considered by a tribunal in determining whether to bifurcate or not, is the likelihood of success on the merits of the bifurcated issue. Unless a party can demonstrate to the satisfaction of the tribunal that it has a significant likelihood of success on the merits of the bifurcated issue, then bifurcation should not be ordered. In summary, while bifurcation can offer certain benefits in arbitration proceedings, it also carries potential drawbacks and risks, which the parties should equally consider. Parties should also consider the potential costs and benefits of bifurcation before agreeing to it as a strategy for resolving their dispute.

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EXPLAIN THIS:

A LOOK AT THE DUTY TO GIVE REASONS IN TAX DECISIONS

Article 47 of the Constitution of Kenya, 2010 (**the Constitution**) guarantees that every person shall enjoy the right to fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. An inherent aspect of this right is the obligation placed on the government to provide written reasons for administrative action that is likely to adversely affect any person. This is what is referred to as the duty to give reasons for administrative actions or decisions.

In the arena of taxation, the duty to give reasons for tax-related decisions made by the Kenya Revenue Authority (**KRA**) is crucial if the Government of Kenya is to establish a public finance system that promotes an equitable society where the tax burden is shared equally as required by Article 201 of the Constitution.

However, in practice, this duty to give reasons is not always adhered to. Frequently, taxpayers find themselves at a loss when faced with KRA's decisions that fail to elaborate the reasons upon which tax assessments or other decisions have been made.

Fortunately, the High Court has considered and made its determination on KRA's duty to provide reasons in a recent tax decision. In this article, we analyse a recent Judgment of the High Court (Majanja J) delivered *in Joseph Muriithi Ndirangu t/a Ndirangu Hardware v Commissioner of Domestic Taxes (2023) KEHC 19357 (KLR).*

Background to the Case

In this instance, the appeal to the Court arose from a Judgment of the Tax Appeals Tribunal (**the Tribunal**) in *Joseph Muriithi Ndirangu t/a Ndirangu Hardware v Commissioner of Domestic Taxes (Tax Appeals Tribunal, Tax Appeal No. 202 of 2018)* setting aside an assessment on the grounds that KRA failed to give written reasons for its decision to issue a Value Added Tax (**VAT**) assessment of KES 8,576,321 to Ndirangu Hardware (**the Appellant**).

Ordinarily, when a taxpayer lodges an objection from a tax assessment with KRA, KRA is obligated to consider the objection and respond in writing with an objection decision detailing the reasons for either accepting or rejecting the objection. This was the Tribunal's previous finding in *Local Productions Kenya Limited v Commissioner of Domestic Taxes (Tax Appeals Tribunal, Tax Appeal No. 50 of 2017).*

By providing a detailed and reasoned decision as required by the Constitution and the law, a taxpayer is better equipped to challenge such a decision whether through an appeal to the Tribunal or by way of an application to the High Court for judicial review of the decision. However, these statutory avenues to challenge KRA's decisions are meaningless in circumstances where taxpayers do not understand the basis or reasoning for tax assessments or other decisions taken by KRA and therefore cannot easily ascertain whether such assessments or decisions are inaccurate or unlawful.

The genesis of this dispute was KRA's selection of the Appellant's case as part of its Revenue Enhancement Initiatives (**REI**) flowing from data collected under the Government's Integrated Financial Management Information System (**IFMIS**) in the year 2015.

KRA issued additional assessments on the taxpayer for the years 2015 and 2016 based on a verification exercise of the Appellant's VAT declarations, which exercise elicited a finding that the Appellant had not declared VAT charged on taxable supplies to the Kenya Forest Service (**KFS**).

The Appellant objected to the additional assessments, following which KRA issued an objection decision affirming the assessments on 14th August 2018 (**the Objection Decision**).

Aggrieved by the Objection Decision, the Appellant lodged an appeal to the Tribunal against the Objection Decision on the grounds that KRA rendered the Objection Decision without giving reasons. In response, KRA contended that the Appellant had made taxable supplies to the KFS in the year 2015 for which VAT was not declared. KRA further contended that the Appellant did not discharge its burden of proof by availing evidence to support its claim of having remitted VAT for the taxable supplies to KFS.

Having heard all the parties, the Tribunal found that the Appellant's claim of having remitted VAT for the taxable supplies to KFS was not supported by evidence. Consequently, the Tribunal held that KRA was well within the law to raise the additional assessments.

High Court Decision

At the High Court, it was found that the issues raised on appeal were similar to those raised at the Tribunal. The Court reconsidered KRA's Objection Decision and found that KRA did not provide adequate reasons for rejecting the Appellant's objection as required by the Constitution and statute.

The Court opined that the requirement to give reasons for an Objection Decision under the Constitution and section 51(10) of the Tax Procedures Act, 2015 (**TP Act**) was couched in mandatory terms. Consequently, the Court agreed with the Appellant's contention that the purported Objection Decision was inadequate for failure to give reasons and did not amount to a valid Objection Decision as contemplated by law.

In the Court's view, the duty to give reasons was not a trifling requirement as it is a Constitutional mandate embedded in the right to fair administrative action guaranteed by Article 47 of the Constitution. Further, the Court held that the right to fair administrative action as protected by the Fair Administrative Action Act, 2015 (**the FAA Act**) requires administrative bodies to provide reasons for an administrative action as a matter of course where a right under the Bill of Rights has been or is likely to be adversely affected by administrative action.

The Court's conclusion was that the Objection Decision was inadequate for not providing adequate written reasons for the decision. As such, the Objection Decision was null and void ab initio. The Tribunal's Judgment was set aside with the Appellant's objection to the tax assessment being consequently allowed.

The High Court's decision in *Joseph Muriithi Ndirangu t/a Ndirangu Hardware v Commissioner of Domestic Taxes* largely affirms the earlier decision by the Tribunal in *Local Productions Kenya Limited v Commissioner of Domestic Taxes (Tax Appeals Tribunal, Tax Appeal No. 50 of 2017)*. In this case, the Tribunal also held that taxpayers have a constitutioal right to be given reasons for tax decisions made by KRA in line with the Constitution, the TP Act and the FAA Act. The

By providing a detailed and reasoned decision as required by the Constitution and the law, a taxpayer is better equipped to challenge such a decision whether through an appeal to the Tribunal or by way of an application to the High Court for judicial review of the decision. However, these statutory avenues to challenge KRA's decisions are meaningless in circumstances where taxpayers do not understand the basis or reasoning for tax assessments...

case concerned an appeal lodged by Local Production Kenya Limited (**LPK**) against a tax decision by the KRA. LPK was engaged in the business of producing and commissioning production of television content as well as provision of quality review and control services for television content and sought input VAT refunds based on its supply of zero-rated exported services to its non-resident customers. Following negotiations between LPK and KRA, it was agreed that KRA would disallow a portion of the refund claims.

However, KRA disallowed the entirety of the refund claim through a notice uploaded on LPK's account on KRA's iTax web portal, which notice did not give reasons for the tax decision rejecting LPK's refund claim. Following this notice, LPK was aggrieved and filed an objection, providing supplementary information which KRA had failed to consider in arriving at its tax decision. LPK thereafter appealed to the Tribunal.

LPK's position was that KRA acted in complete disregard of section 49 of the TP Act as well as section 4 of the FAA Act by failing to give reasons for its decision to reject LPK's tax refund claim. The law requires KRA to provide written reasons where it refuses a taxpayer's application under any tax law.

KRA's position was that there were no procedural lapses in rejecting the LPK's input VAT refund. KRA claimed that the refund was rejected because LPK failed to separate its own export services from those performed on behalf of its clients.

The Tribunal held that section 49 of the TP Act imposes a mandatory duty on KRA to provide a statement of reasons for tax decisions. The Tribunal further observed that the duty to give reasons for tax decisions is interpreted through the lens of the right to fair administrative action as enshrined under Article 47 of the Constitution.

In light of the above reasoning, the Tribunal found that KRA acted in violation of LPK's right to fair administrative action contrary to section 4 of the FAA Act which requires written reasons be given for administrative actions taken by public authorities that negatively affect individuals.

Key Takeaway

From the foregoing cases, it clearly emerges that KRA is under a duty to provide reasons for tax assessments and its other tax decisions. This is a crucial aspect of maintaining a fair, just and transparent tax dispute resolution regime. The provision of reasons for tax decisions ensures that taxpayers understand and have access to the rationale behind tax assessments and other KRA decisions, facilitating their right to challenge any inaccurate tax assessments or unlawful decisions made by KRA. This can only promote the fundamental constitutional values of justice, fairness, transparency, and accountability.

At any rate, as the maker of the decision, KRA should have no difficulty explaining the reasoning behind the decision, failure to which it may be inferred that the decision lacked any reasoning in the first place. Giving reasons for the decision is thus beneficial for both KRA and the taxpayer.

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CAST IN STONE:

THE LONG-HELD LEGAL POSITION ON THE EFFICACY OF PERFORMANCE BONDS

A long-held legal position on performance bonds in Kenya is that the terms of an underlying construction contract are irrelevant to a Court when deciding interdict proceedings arising from payments under an on-demand guarantee. The position is anchored upon the principle that liability under an on-demand guarantee is primary and payment by the guarantor is to be made in response to a demand, irrespective of any default under the principal contract.

Performance Bonds Defined

A performance bond is defined as a financial guarantee to one party in a contract against the failure of another party to meet its obligations. It is ordinarily issued by a bank or other financier, to ensure that a contractor fulfils its contractual obligations under a contract. Important to performance bonds are the parties involved. The *principal* is the party who requests the surety to issue the bond and whose obligations are guaranteed. The *obligee* is the party who requires the principal to obtain the bond and who receives the benefit of the guarantee. The *surety* is the party who issues the bond that guarantees the obligations of the principal, such as a banking institution.

A performance bond is ordinarily triggered by the principal's default in the performance of the bonded contract. At times, the contract specifies certain events which would constitute a *"default"*. More often than not however, a default is determined simply by the principal's failure to meet a contractual obligation.

In this article, we consider a recent decision by the High Court of Kenya (Mongare J) in *HCCCOMM No. E359 of 2022: Civicon Limited v Fuji Electric Co. Limited & 2 Others* (**the Suit**) in which the Court dismissed two (2) applications seeking to restrain Equity Bank (Kenya) Limited (**the Bank**) from paying Fuji Electric Co. Limited (**Fuji**) the proceeds of a USD 2.3 million performance bond issued in Fuji's favour (**the Performance Bond**).

Background to the Case

Sometime in 2018, Kenya Electricity Generating Company PLC (**KenGen**) and Marubeni Corporation (**Marubeni**) entered into a contract for the construction of a Geothermal Power Plant Project. Marubeni subcontracted its scope of works to Civicon Limited (**Civicon**) and Fuji who formed a consortium and entered into various agreements detailing their respective scope of works. It was also agreed by the parties that Civicon would provide and maintain with Fuji, the Performance Bond to secure its due performance under the

contracts. Accordingly, Equity Bank issued the Performance Bond to Fuji in the sum of USD 2.3 million on behalf of Civicon.

In 2022, a dispute between the parties arose from Fuji's decision to call up the said Performance Bond which Civicon alleged, *inter alia*, to have been done in breach of the relevant agreements signed by the parties. Civicon therefore filed a suit accompanied by an application in which it sought and obtained an interim order restraining the Bank from effecting any payment to Fuji arising out of the Performance Bond (**the Status Quo Order**).

The Stay Application

By a Notice of Motion application dated 30th September 2022 (**the Stay Application**), Fuji applied to stay the Suit and the proceedings filed by Civicon. The Stay Application was based on grounds that, they concerned a dispute regarding Fuji's right to call up the Performance Bond, which was subject to an arbitration clause under the various agreements entered into between the parties. Fuji submitted that the parties expressly ousted the jurisdiction of the High Court in electing to resolve any dispute arising between them by way of arbitration.

Civicon opposed the Stay Application on grounds that the issue of calling up or not of the Performance Bond is not an arbitrable matter within the framework of the arbitration clause contained under the various agreements. Further, Civicon argued that the dispute in the matter involves the Bank which is not privy to the agreements whose arbitral clause Fuji purported to invoke.

The High Court Decision

By way of a Ruling delivered on 12th June 2023 (**the Ruling**) Hon. Lady Justice Mongare (**the Judge**) allowed Fuji's Stay Application on grounds, amongst others, that it was expressly intended that all disputes between the parties, including a dispute concerning the Performance Bond, be resolved by way of arbitration. The Judge considered the fact that Civicon's Suit and its application was hinged upon whether or not Fuji had a right to call up the Performance Bond on account of the various claims it had against Civicon and found that the Performance Bond was a creation of the agreements from which the arbitral clause emanated.

For the said reasons, the Judge stayed the proceedings in the Suit pending reference of the matters raised therein to arbitration and also set aside the Status Quo Order restraining the Bank from effecting any payment to Fuji arising out of the Performance Bond.

The Section 7 Application

Notwithstanding the stay order and the Ruling, Civicon proceeded to file another application before the High Court under section 7 of the Arbitration Act, 1995 (**the Arbitration Act**) in which it sought and was granted, an interim measure of protection restraining the Bank from effecting any payments arising out of the Performance Bond to Fuji, pending conclusion of the arbitration proceedings (**the Section 7 Application**).

Civicon anchored the Section 7 Application on grounds amongst others, that if the Bank were to honour the Performance Bond, the substratum of the arbitral proceedings would be eroded.

In response thereto, Fuji raised a preliminary jurisdictional issue that the Court, having stayed the proceedings and directed the parties to submit their dispute to arbitration, was now *functus officio* and could not make any further orders in the matter.

The Judge delivered a Ruling on the Section 7 Application on 15th August 2023 (**the Section 7 Ruling**), the upshot of which was that the Court agreed with the arguments proffered by Fuji, specifically that the Court, having already rendered its decision in the matter, is now bereft of jurisdiction and could not make any further orders therein. Accordingly, the Judge dismissed the Section 7 Application and once again, vacated the interim Orders restraining the Bank from effecting any payment to Fuji arising out of the Performance Bond.

A performance bond is ordinarily triggered by the principal's default in the performance of the bonded contract. At times, the contract specifies certain events which would constitute a "default". More often than not however, a default is determined simply by the principal's failure to meet a contractual obligation.

Upshot

The High Court's decision sets an important precedent in two (2) respects. Firstly, where parties have expressly ousted the jurisdiction of the Court in deciding that any dispute arising between them be settled through arbitration, the Court is duty bound to uphold the arbitration agreement between them. This is notwithstanding the fact that the dispute arose from a decision to call up a performance bond in which the principal is not privy to. The fact that the Performance Bond was a creation of the agreement between the parties in which the arbitral clause emanated from is sufficient for the Court to hold parties to the terms of their agreement.

Secondly, a Court will be reluctant to grant interim measures of protection where it has already stayed the matter and referred the proceedings to arbitration. This principle is anchored upon the basis that the Court is *functus officio* i.e. it has already rendered its decision in the matter and therefore lacks the power or jurisdiction to make any further orders until the arbitration process is finalized.

The Sanctity of Performance Bonds

In rendering its decisions, the High Court has affirmed the sanctity and commercial importance of on-demand guarantees. The very nature of an on-demand-guarantee means that it is payable unconditionally upon demand. By agreeing to provide a bond which is payable on demand, a principal agrees that the bond may be called pending resolution of any dispute with the counterparty beneficiary. It therefore requires strict compliance and its enforcement is neither dependent nor affected by any underlying dispute between the parties. As was aptly put by the High Court in *Eli Holdings Ltd v Kenya Commercial Bank (2020) eKLR:*

"A bank guarantee is an autonomous contract which requires strict compliance to its terms. The Bank has no obligation to question the performance or otherwise of the obligations of the parties in the underlying contract… As a general proposition, a demand guarantee is independent of the primary contract and will not be affected by a dispute between the parties to the underlying transaction."

As Civicon has lodged an Appeal against the initial Ruling, it will be interesting to see what the Court of Appeal makes of the matter. For now, we align ourselves with Lord Denning in the case *Edward Owen Engineering Ltd. v Barclays Bank International Ltd. and Another (1978) 1 All ER 976* where the learned Judge opined that:

"The performance bond given by the bank is a binding international obligation payable on demand. If an interim injunction were granted in a case of this sort it would affect the pattern of international trading. There is no reason why the bank should be involved in disputes between buyer and seller."

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DEARLY DEPARTED:

UNDERSTANDING THE RIGHT TO BURY A DECEASED PERSON IN THE KENYAN LEGAL CONTEXT

Once the journey of life comes to its inevitable end, the task of laying one's dearly departed to rest becomes an essential and sacred responsibility. The right to bury loved ones, grounded in a rich tapestry of cultural, religious, social and legal traditions, is a fundamental aspect of human dignity and compassion. It is a right that transcends borders, beliefs, and backgrounds, underscoring a shared value across humanity. In this article, we delve into the right to bury the deceased, exploring the legal dimensions through the precedent set by Courts in Kenya.

The Right to Bury

The right to bury is an inalienable right as human dignity demands as much - harking back to the great Greek playwright Sophocles' play, *Antigone*, when in stark disobedience of Creon's rules, Antigone insists on giving her brother, Polyneices, a decent burial, rather than have his corpse lie in the open, to be devoured by dogs and vultures. In Kenya, what has been the subject of numerous litigious proceedings is the priority given to the bearers of this inalienable right. At the heart of these type of proceedings has invariably been the spouses and kin of the deceased, each asserting their precedence over the other.

Most recently, the decision of the High Court at Nairobi (Ogola J) in *Zipporah Masese Onderi v Joseph Ontweka & 3 Others (Civil Appeal No. E048 of 2023)* reignited the controversy once more. Typically, the circumstances of the matter pitted the deceased's widow, who was the Appellant, against the deceased's brothers in a legal battle to determine the deceased's final resting place.

In tipping the scales towards the widow, the Court held that the nuclear family of a deceased person has the priority right to bury their loved ones unless exceptional circumstances arise to render them undeserving of doing so.

Given that the likeness of the applicable customs, the Court's decision in *Zipporah Masese Onderi v Joseph Ontweka & 3 Others,* was

persuaded by an earlier decision rendered by the High Court in Nakuru (Maraga J – as he then was) in *Oliver Bonareri Omoi & 5 Others v Joseph Baweti Orogo (2010) eKLR*. The Court was once again forced to play umpire in a push-and-pull between the widower and children of the deceased and ultimately decided that the children had the priority right over the deceased's estranged husband, who was the Respondent in the matter, to bury their late mother. In reaching its determination, the Court in *Oliver Bonareri Omoi & 5 Others v Joseph Baweti Orogo* was guided by the deceased's final wishes and the nature of her relationship with her estranged husband, both of which extinguished his right as a widower to bury her.

Such has become the principle that has been pronounced by Kenyan Courts, thus putting to question the right of the kin to bury the deceased, who was also their loved one in equal measure. The precedent set by Kenyan Courts on this matter is that whereas the deceased's kin are indeed deserving of this right, it is however subject to an order of priority that was set out succinctly by the Court of Appeal in *SAN v GW (2020) eKLR* being: the spouse, children, parents and siblings of the deceased, in that order.

As demonstrated above it is pertinent to note, nonetheless, that the right to bury is not absolute. It may be extinguished by numerous factors among them being the deceased's wishes which, though not legally binding, the Courts have refrained from overlooking, and a person's conduct towards the deceased.

Generally, the Court has to consider all the circumstances of the case before rendering its decision on the right to bury. This was demonstrated in *Samuel Onindo Wambi v COO & Another (2015) eKLR* where the Court of Appeal found that although Luo customary law dictates that a wife should be buried in her husband's home, the deceased was buried in Kakamega in line with her wishes given the ill treatment she had been subjected to by her husband's family during and after the subsistence of their marriage.

Similarly, in *SAN v GW* while the Court of Appeal set out the order of priority with respect to the right to bury, it further clarified that this order of priority ought to be considered in light of the relationships maintained between the deceased and the persons claiming the right. In so doing, the Court held that while Luo customary law dictates that the first wife has the priority right to bury, the second wife's right in this case superseded the first wife's, given the strained relationship the first wife had with the deceased.

The Role of Customary Law

The loss of a loved one is an emotionally delicate matter that can easily lead to conflict among surviving family members. The catalyst in the ensuing conflict, at least as far as African societies are concerned, is usually the customs at play. More often than not, the surviving spouse tries to assert a position contrary to what the deceased's customs provide for, leading to fierce opposition from the deceased's kin.

Such was the case in the *locus classicus* case of *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another (1987) eKLR*, concerning a burial dispute over renown lawyer S. M. Otieno, and is thus commonly referred to as the "*S. M. Otieno case*". Here, the kin's reverence for Luo customary law was met on the battlefield by the widow's complete disdain for it. In making arguments that Luo customary law did not apply and that the deceased should not be buried in Nyalgunga, his ancestral home, his widow, Wamboi Otieno, stated that; their marriage was governed by the Marriage Act, (Cap. 150) Laws of Kenya and not customary law, that no dowry was paid by the deceased, and that in fact, none was demanded by her parents, and that since marrying her, the deceased had practised Christianity and the Luo customs and traditions were therefore irrelevant. It was her case that the deceased had expressed the wish to be buried either in Nairobi or Matasia and that only she, and her sons, had any say in how to dispose of the remains of the deceased.

Ironically, an individual's right to bury their loved ones is one that has to be balanced with the very same right borne by other loved ones of the very same deceased person. It is not an absolute right as it may be overridden by other factors such as the deceased's final wishes.

After careful consideration of the facts brought before him, Bosire J (as he then was) ordered that the deceased be buried in his ancestral home. In his disposition, Justice Bosire found that Luo customary law applied and dictates that the deceased's final place of rest is determined by his or her family members and that this custom does not exclude women from being involved in the decision making. Accordingly, both the widow and the deceased's kin in this case had equal right to make that call. However, because they could not reach a consensus, the Court was guided by the deceased's wishes which stipulated that he desired to be buried next to his father in his ancestral home.

The facts of the S. M. Otieno case are strikingly similar to those in *Zipporah Masese Onderi v Joseph Onwteka & 3 Others*, save for the fact that Kisii customary law applied to the latter and the deceased therein had not made clear pronouncements on where he wished to be buried. In further developing the principles underpinning the right to bury, the Court found that Kisii customary law and Article 45 of the Constitution mirror each other, in the sense that they are highly protective of the basic unit of the family, which is the nuclear family.

In the same breath, Kisii customary law demands that the widow/widower of the deceased has the priority right to bury their spouse. Given that the deceased in this case had not made his burial wishes known clearly, the Court was guided not only by Kisii customary law but also the Constitution in reaching the determination that the deceased would be buried in his matrimonial home.

It may therefore be said that the role of customary law is akin to that of a tiebreaker where the loved ones of the deceased are at loggerheads, and there being no clear line of priority being drawn. In this regard, customary law plays a persuasive role, to be weighed against other equally applicable factors such as the deceased's final wishes and the relationship of the kin to the deceased during the deceased's lifetime.

The Takeaway

Ironically, an individual's right to bury their loved ones is one that has to be balanced with the very same right borne by other loved ones of the very same deceased person. It is not an absolute right as it may be overridden by other factors such as the deceased's final wishes.

As death is sometimes sudden and untimely, it is not always possible for pertinent discussions on final wishes to be held. In such instances, the Court will, where family members are torn, decide the final resting place of the deceased under the guidance of the customary law applicable to them.

At the end of the day, the loss of a loved one remains an intensely painful experience, affecting all who are touched by its melancholic embrace. Amidst the disputes and conflicting emotions that arise, it becomes clear that the ultimate goal should transcend the battles and strife. The paramount objective lies in ensuring that our dearly departed find solace in their final resting place. In the depths of grief, it is crucial to find common ground, and embrace compassion and empathy for one another.

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NO LAUGHING MATTER:

THE MOZAMBIQUAN TUNA BONDS CASE

Facts of the Matter

You are a sovereign state and you enter into a contract with a supplier, in which disputes arising, or in connection with the contract, are agreed to be resolved by arbitration.

You fund the contractual costs through an international bank loan, offering a sovereign guarantee to help secure the loan on favourable terms.

Later, you have reason to believe that the contract was tainted by the bribery of some of your employees or officials. You also believe that the bribery extended to both employees of the bank and your finance minister who, unilaterally and secretly, granted the sovereign guarantee. It seems that at the least, the corruption has resulted in you paying an inflated price, and perhaps, that the contract was little more than a sham and a vehicle for grand corruption.

You sue for damages under the guarantee contract and for declaration that you do not need to repay the loan (or at least part of it), nor honour the sovereign guarantee in relation to the loan. The defendants apply to Court for a stay of legal proceedings, under legislation that seeks to ensure that parties can enforce agreements to arbitrate.

A Fishy Matter

The foregoing is a very simplified summary of the notorious "*Tuna Bonds*" or "*Hidden Debt*" scandal that broke in Mozambique in 2016, blowing a USD 2 billion hole in the country's economy. Former finance minister Manuel Chang has been extradited to the United States (**the US**) to face criminal charges; former Credit Suisse bankers prosecuted in the US; and the ex-president's son jailed in Mozambique. Why Tuna Bonds? Alongside, maritime security and oil and gas ships and infrastructure, the contracts were for the supply of a new Mozambiquan tuna fishing fleet.

The actual case involves three (3) supply contracts, each with its own arbitration agreement, under Swiss law; various sub-contracts and loan agreements; and associated loan guarantee agreements, without arbitration clauses, under English law and jurisdiction. The Republic of Mozambique brought its proceedings in the High Court in London and the preliminary question of whether a stay should be granted to allow arbitration in Switzerland, went all way on appeal to the Supreme Court. The Supreme Court's unanimous Judgment was given in September of 2023 *(Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) & others (2023) UKSC 32).*

The application for a stay was made under section 9 of the Arbitration Act 1996 of the United Kingdom (**the UK**). Under the relevant parts of the section a party to an arbitration agreement against whom legal proceedings are brought in respect of a matter which under the agreement is to be referred to arbitration, may apply to

the Court in which the proceedings have been brought to stay the proceedings so far as they concern that matter and on an such application being made the Court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

An International Matter

The interpretation of the word *"matter"* was fundamental to the Court's analysis. Were the contracts and supporting loans, the *"matter"* before the Court, or was it the alleged bribes, unlawful means conspiracy, dishonest assistance, knowing receipt of monies and proprietary claims, that constituted the *"matter"*? If it were the latter, were those *"matters" "disputes arising in connection with the project" or a "dispute, controversy or claim arising out of, or in relation to"* the contracts, to use the similar, but different words in the various arbitration agreements?

The Court observed that more than 160 states have signed the 1958 New York Convention (on Recognition and Enforcement of Foreign Arbitral Awards) (**the New York Convention**) and referenced that the essential aim of the New York Convention was to establish a single uniform set of international legal standards for the recognition and enforcement of arbitration agreements and awards and noted that the New York Convention has been implemented through national legislation in virtually all contracting states.

Further, the New York Convention refers to *"… a matter in respect of which the parties have made an agreement [to arbitrate]…"* and the UNCITRAL Model Law on International Commercial Arbitration to *"… a matter which is the subject of an arbitration agreement…"*

Given that *"matter"* has been used in similar contexts in many jurisdictions around the world, (including in the Kenyan Arbitration Act, 1995), the Court declared it *"appropriate therefore to consider the jurisprudence of several countries as guides to the interpretation of section 9 of the 1996 Act in so far as they have statutory provisions which are worded in a similar way and to adopt broad and generally accepted principles in conducting the exercise of statutory interpretation."*

The Court considered the jurisprudence on the issue in British, Hong Kong, Singaporean and Australian Courts relying in particular on *Tomolugen Holdings Ltd v Silica Investors Ltd* (2015) SGCA 57; [2016] 1 SLR 373 from the Singaporean Court of Appeal and *Lombard North Central plc v GATX Corpn (2012)* EWHC 1067 (Comm) in the English High Court.

A Matter of Opinion

The Court opined that the approach to an application to stay, involves two steps. First, the consideration of what the "*matter*" or "*matters*" before the Court actually are. This is to be discerned from the overall view of the dispute and not with over reliance on how the case has been structured in the pleadings, and should include consideration of both raised and reasonably foreseeable defences. Secondly, with regard to each matter defined, as a question of contractual construction, whether it falls within the scope of the arbitration agreement.

The Court also found that legislation implementing the New York Convention has generally mandated the granting of stays *"so far as they concern the matter"* and that therefore, the "*matter*" need not encompass the whole of the dispute before the Court.

Next, the Court found a *"matter"* must be a substantial issue that is legally relevant to a claim or a defence and not an issue that is peripheral or tangential. It must be essential to the claim or defence. Finally, the assessment of the matter should not be mechanistic but should entail the exercise of common sense, and, common sense would suggest that when considering whether a "*matter*" is in the scope of an arbitration agreement, the court should have regard to the wider context of the "matter" in the legal proceedings.

It is trite law that one of the key roles of statutory and judicial support for arbitration around the world, is to protect contractual parties' autonomy in deciding for themselves their desired forum for dispute resolution. If the "matter" in dispute is an alleged criminal fraud or an application for a winding-up order or some other remedy which affects third parties, one can see how the bar over which party autonomy must pass, may be too high.

Why Does it Matter?

On the application of the law to the facts, the Court rejected the defendants' application for a stay, allowing the substantive issues to be dealt with by the Court of first instance. We currently await the decision of the High Court on Tuna Bonds, but what might be the significance of the *"matter"* point for commercial parties and their arbitration agreements, particularly in the African context?

Clearly, the UK Supreme Court's opinion is no more than persuasive (rather than binding) in an African or Kenyan Court but given the international nature of the analysis and of arbitration practice generally, it is hard to imagine that African Courts would not at least be highly influenced by it.

It is trite law that one of the key roles of statutory and judicial support for arbitration around the world, is to protect contractual parties' autonomy in deciding for themselves their desired forum for dispute resolution. If the *"matter"* in dispute is an alleged criminal fraud or an application for a winding-up order or some other remedy which affects third parties, one can see how the bar over which party autonomy must pass, may be too high. Although the Court intimated that, theoretically at least, the fact-finding and decision-making of such a case could be dealt with by an arbitral tribunal, with the Court stepping in to superintend and make any necessary statutory orders.

But the Supreme Court clearly set the bar somewhere beneath arbitrability – it conceived of cases, including the instant one, in which there may be other reasons that parties will not be held to an arbitration agreement. One has to wonder if the Court would have come to the same conclusion had the application for a stay come from rather more virtuous looking defendants.

What might have happened in the case, or in an altogether different one in the future, if the arbitration clauses referred to *"any matter whatsoever, however loosely or tangentially arising from or connected to this contract"*? Is the answer to the question affected when eye-watering sums of public money are at stake? In time-honoured common law tradition, the Court left some wiggle room for judges following them. Necessarily subjective Judgments about peripherality and tangentiality and the deployment of common sense to reasonable substantiality and to the relevance of a matter to outcome, add up to a fair amount of judicial discretion.

Concluding the Matter

To date, it seems that the Kenyan Courts have never directly addressed the meaning of the word *"matter"*, despite the Kenyan Arbitration Act of 1995 using very similar wording to the UK Act i.e. *"a matter which is the subject of an arbitration agreement"*. However, an alleged fraud, or some other controversy associated with a contract that contains an arbitration clause, seems likely to crop up at any time. If nothing else, the UK Supreme Court in *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) & others,* has ensured that a fair amount of discretion remains in common law Judges' toolboxes.

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