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IN THIS ISSUE

LEGAL & KENYAN

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Editorial Page

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Turning the Page: Issue Twenty-One

When *Legal & Kenyan* was first published nearly a decade ago, it was done with the aim of highlighting the latest developments in Kenya's evolving legal landscape through thought-provoking and impactful articles. That vision, so ably stewarded by my predecessor as Editor, John Mbaluto, remains the cornerstone of this publication. It is therefore with great appreciation and humility that I take on the role of Editor in this 21st Issue.

In this Issue, we begin with the dynamic trio of Sandra Kavagi, Wellington Nyabundi, and Brian Onyango, who tackle the nuanced subject of indirect discrimination in the workplace, urging a deeper examination of inequalities that often go unnoticed but are deeply felt. Noella Lubano and Kateline Mangich then grapple with the challenges that lie in enforcing international arbitral awards against asset-diverting and insolvent entities, offering practical insights on turning legal victories into tangible results.

Next, Jacob Ochieng and Venessa Sifunjo explore cross-border data flows under the AfCFTA, raising critical questions about data governance in an increasingly interconnected continent. This is followed by John Mbaluto, Claire Mwangi, and Wambui Mwariri who shift our focus to the arts with a look at the intersection of intellectual property law and music, and the legal protections that underpin creative expression.

Sustainability is in the spotlight in the next article, where Cindy Oraro and Jonathan Kisia discuss climate risk disclosure, sustainable finance, and the role of Kenya's banking sector in advancing green growth. This is the duo's third featured article on the fast developing green governance space.

Zahra Omar and I then examine the compliance requirements for foreign employers operating in Kenya, offering guidance for navigating the regulatory landscape. We then turn to the emotive topic of land ownership in Kenya where John Mbaluto and Claire Mwangi team up once again to assess the Supreme Court's recent pronouncement on the need for legality in the processes leading up to the acquisition of land.

Rounding off the Issue, Renee Omondi, William Ochieng, and Melanie Mwenda offer a timely piece on judicial review in tax disputes, in which they look into the exceptional cases where one can institute judicial review proceedings in tax disputes.

Happy reading!

Anne Kadima
Editor

Founding Partner's Note

Welcome to the 21st Issue of *Legal & Kenyan*, our flagship publication. This Issue marks a moment of reinvention with a new Editor, Anne Kadima, at the helm. As we begin a new chapter, we honour our rich heritage and deep expertise while simultaneously embracing innovation through fresh ideas and perspectives.

We are excited to unveil a redesigned look and fresh feel that signals this new era while staying true to our signature thought leadership style. In this Issue, you'll find insightful articles on tax, arbitration, construction disputes, cross-border data transfers, green governance, and employment and labour relations and a host of other interesting topics. We hope you enjoy reading it as much as we enjoyed creating it.

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CONTENTS

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CHAMBERS GLOBAL, 2025

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BEYOND THE SURFACE:

UNPACKING INDIRECT DISCRIMINATION IN THE MODERN WORKPLACE

Introduction

Some workplace policies may seem fair on the surface but can unintentionally disadvantage certain groups. For instance, requiring all employees to work late may disproportionately affect those with caregiving responsibilities, such as parents or those caring for elderly relatives. This is an example of indirect discrimination, where seemingly neutral rules create unequal impacts.

Definition of Indirect Discrimination

Indirect discrimination in the workplace arises when the application of neutral policies or rules unintentionally results in unequal treatment of particular groups. Often, employers may be unaware that such policies could disadvantage certain segments of their workforce. The discriminatory impact becomes apparent when these policies affect individuals disproportionately, based on shared characteristics.

Direct vs. Indirect Discrimination

The key distinction between direct discrimination and indirect discrimination lies in the evidence required to establish unfair treatment. Direct discrimination requires a clear causal link between the less favourable treatment and a protected characteristic, such as race or gender. Conversely, indirect discrimination examines whether a policy, criterion, or practice (**PCP**) disadvantages a group and, by extension, an individual, regardless of the original intent. Understanding the nuances of indirect discrimination in the workplace requires a careful examination of legal frameworks and the core characteristics of discrimination.

Legal Framework on Discrimination in Kenya

Article 27 of the Constitution of Kenya, 2010 (**the Constitution**) guarantees every person equality before the law, including equal protection and equal benefit of the law. It affirms the right to fully enjoy all fundamental freedoms and ensures equal participation for both men and women in all aspects of life.

The provision also mandates the state to take legislative and policy measures, such as affirmative action, to address historical injustices and protect against all forms of discrimination.

The enactment of the Employment Act (Cap. 226) Laws of Kenya (**the Act**) fulfils the state's constitutional mandate to protect employees against employment discrimination. Section 5 of the Act places upon the employer the responsibility to foster equal opportunities and eliminate discriminatory practices in their employment policies. In reiterating the constitutional grounds for prohibiting discrimination against employees or prospective employees, the Act covers all aspects of employment, including recruitment, training, promotion, and termination.

To address employment inequality, the Act specifies that certain actions by employers are not considered discriminatory. These include affirmative action measures, job requirements based on inherent needs, employment in accordance with national policies, and restrictions necessary for state security. In legal proceedings, employers must prove that alleged discrimination did not occur and was not based on prohibited grounds.

Case Study

The key characteristics of indirect discrimination were articulated by the Supreme Court in the case of *Simon Gitau Gichuru v Package Insurance Brokers Ltd [2021] KESC 12 (KLR)* as follows:

"a. In none of the various definitions of indirect discrimination was

there any express requirement for an explanation of the reasons why a particular provision, criterion or practice put one group at a disadvantage when compared with others.

b. The contrast between the definitions of direct and indirect discrimination. Direct discrimination expressly required a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination did not. Instead, it required a causal link between the provision criterion or practice and the particular disadvantage suffered by the group and the individual."

Consider, for instance, the earlier example of an organisation implementing a late-shift policy. While such a policy may appear neutral and non-discriminatory at first glance, a closer analysis reveals its potential for indirect discrimination. This is because the organisation may not have adequately considered the differing societal expectations and realities, particularly those affecting women or other individuals who may be uniquely impacted, as previously discussed.

One of the key issues is safety concerns. Women often face heightened safety risks when travelling at night, including an increased risk of harassment, assault, or general insecurity. This disparity creates an additional layer of vulnerability for female employees compared to their male colleagues.

In addition to safety, cultural norms and domestic responsibilities play a significant role. In many societies, particularly in Africa, women are traditionally expected to take on primary caregiving and household duties. A policy that mandates late-night shifts could, therefore potentially create a conflict between professional and domestic obligations.

Moreover, some cultures impose implicit curfews on women, with societal expectations dictating that they should be home by a certain time. A work policy that disregards these deeply ingrained norms could expose female employees to significant societal pressure or even direct familial conflict. This is not to say that these are the only societal expectations that should be considered, nor that they apply universally to all women. However, these factors illustrate how a seemingly neutral policy could potentially create unintended but significant disadvantages for a specific group, warranting deeper scrutiny.

The Supreme Court in *Simon Gitau Gichuru v Package Insurance Brokers Ltd (supra)* outlined key principles for identifying and addressing indirect discrimination as follows:

- **No explanation requirement:** It is enough to show that a PCP results in a disadvantage for a particular group without needing to explain the underlying reasons for this disadvantage.
- **Type of discrimination:** Direct discrimination involves explicit bias, while indirect discrimination arises from neutral PCPs that disproportionately affect certain groups.
- **Diverse causes of disadvantage:** Factors like culture, socio-economic status, physical abilities, or education can make it harder for some groups to comply with a PCP.
- **Group impact:** Not all group members need to be affected. It is sufficient if the PCP disadvantages a significant portion of the group.
- **Statistical evidence:** Discrimination can be shown through data, such as employment or education statistics.
- **Justification:** Employers can defend a PCP if it serves a legitimate aim and is proportionate.

Safeguards Against Indirect Discrimination

There are various ways of safeguarding against indirect discrimination as detailed below:

The key distinction between direct discrimination and indirect discrimination lies in the evidence required to establish unfair treatment. Direct discrimination requires a clear causal link between the less favourable treatment and a protected characteristic, such as race or gender. Conversely, indirect discrimination examines whether a policy, criterion, or practice (PCP) disadvantages a group and, by extension, an individual, regardless of the original intent.

i. Neutral and Fair Policies

As established, a policy's apparent fairness on paper does not guarantee its equitable application to employees. Employers can address this by conducting impact assessments, or by offering training and gathering feedback from affected employees to ensure policies are applied equitably.

ii. Reasonable Accommodation

If a policy is found to have discriminatory effects, employers should mitigate the impact by offering reasonable accommodations, such as providing transport for late shifts. However, these accommodations should not cause undue hardship or excessive burden to employers.

In the case of *Simon Gitau Gichuru v Package Insurance Brokers (supra)*, the Court held that an employer must provide reasonable accommodation to a sick or incapacitated employee, or demonstrate that providing such accommodation would cause undue hardship.

Additionally, in *Kenya Plantation and Agricultural Workers Union v Rea Vipingo Plantations Limited & Another [2015] eKLR*, the court clarified that reasonable accommodation goes beyond the grant and exhaustion of sick leave. It may entail temporarily modifying the job to suit the employee's medical restrictions, limiting working hours, physical modifications and reassignment of an employee to a different job within the same enterprise. The Court further affirmed that the duty to provide reasonable accommodation to employees is predicated on the right to equal opportunity.

iii. Anti-Discrimination Training and Awareness

Indirect discrimination can manifest in various forms in the workplace, even among employees, which could spell trouble for the employer. As such, imparting the knowledge of such discriminatory instances in the employees is a great first step to mitigating the frequency of complaints for discrimination purposes.

For instance, the line between casual workplace banter and indirect discrimination can be subtle. Employers must evaluate the context and history of interactions to determine whether a comment is discriminatory or simply a friendly exchange among colleagues.

iv. Clear Complaint and Redress Mechanisms

Employers should implement a clear anti-discrimination policy that outlines reporting procedures and how complaints will be handled.

Additionally, regular audits are necessary to ensure these policies are effectively applied and positively impact the workplace.

Conclusion

Employers have a critical duty to protect staff from all forms of discrimination. This involves creating comprehensive policies that define and address various forms of discrimination. While the article outlines how indirect discrimination can occur and suggests safeguards, it emphasises the need for broader awareness among both employers and employees to fully understand its impact in everyday workplace interaction.

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FROM AWARD TO ACTION:

ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS AGAINST ASSET - DIVERTING AND INSOLVENT ENTITIES

It is bad business for an Award Creditor (one in whose favour an award has been issued) to find itself faced with a pyrrhic victory i.e., an Award that cannot be satisfied on account of an absence of assets belonging to the Award Debtor (the party against whom the Award has been issued). No one wants to throw good money after bad money, not to mention the wasted time and resources that would be involved in what would be a futile exercise.

As such, prior to commencing arbitral proceedings, it is expected that a diligent litigant will have engaged an inquiry agent to establish the existence and adequacy of assets that can be realised to satisfy an arbitral Award obtained in its favour.

Where assets have been identified, monitored and/or preserved during the pendency of arbitral proceedings, enforcement is generally straightforward. Unless there is a setting aside application or other serious legal challenge to enforcement, the process simply involves applying for recognition and enforcement of the arbitral Award in the jurisdiction where the Award Debtor holds assets, followed by the realisation of those assets to satisfy the Award. In some cases, the Award Debtor has assets and realisation of those assets to satisfy the arbitral Award is not difficult. This is the ideal enforcement scenario.However, for a number of reasons, most arbitrations do not necessarily commence in that neat and tidy fashion.

In most cases, diversion of assets or insolvency of the Award Debtor will be discovered at the tail end of the arbitration when an Award has been issued. The reasons for the late discovery of diversion or the insolvency of an Award Debtor could be because there is some sort of urgency in commencing the arbitration and no time to undertake the preliminary steps discussed above; a looming limitations period or time bar; the cost of undertaking an asset inquiry may be prohibitive; or the diversion of assets and in-

solvency occurs in the course of the arbitration or after the issuance of an Award, amongst many other reasons.

In such a scenario, there are a number of options that may be available to the Award Creditor as discussed below:

i. Insolvency Proceedings

Insolvency proceedings in Kenya include liquidation, administration, receiverships, Company Voluntary Arrangements (**CVA**) and Scheme of Arrangement (**SOA**). On the face of it, insolvency proceedings do not seem ideal as an Award enforcement tool in view of the ranking of creditors, given that the debt arising from an arbitral Award is always considered an unsecured debt and can only be settled after priority debts such as taxes, insolvency costs and secured creditor debts have been settled.

However, insolvency proceedings can prove to be a useful and effective enforcement tool for the disclosure and access to accurate information as to the Award Debtor's assets and liabilities, including their location. It also allows for discovery of the existence of voidable transactions in the case of fraud or dissipation of assets by the directors of the Award Debtor, which may allow the insolvency practitioner (**IP**) to pursue the directors personally for the Award or unwind (or claw back) fraudulent or asset-diverting transactions.

However, when considering using insolvency proceedings as an enforcement tool, the following factors should be taken into account:

- The existence of priority or competing creditors vis-à-vis the availability of sufficient assets within the jurisdiction to settle the collective liability of all creditors.
- Whether the country that the award is to be enforced in is a signatory of the New York Convention or the United Nations Trade Commission on International Trade Model Law on Cross-Border Insolvency, which allows for the recognition of foreign insolvency practitioners.
- The type of insolvency proceedings is also a key consideration. For instance in Kenya, unsecured creditors have a better chance of recovery in an administration and CVA process rather than a liquidation or receivership. This is because in administrations, twenty percent (20%) of the assets of the Award Debtor have to be reserved for the unsecured creditors and in CVAs, the priority and ranking of creditors does not necessarily apply.
- The type or the nature of the asset available for realization in satisfaction of an arbitral Award is also an important consideration. If the assets are in the form of proceeds or receivables and unique assets that cannot be sold in whole but may need to be cannibalised, receivership or administration rather than liquidation may be the preferred enforcement mechanism.
- The amount of control that the Award Creditor has over the preferred insolvency process. The more control the Award Creditor has in the insolvency process the more likely it is to achieve its objective to enforce its arbitral award. There is less control over CVA proceedings in comparison to administrations, receiverships and liquidations, as this process is controlled entirely by the Award Debtor's directors.
- There may be some benefit in first mover advantage i.e., where the Award Creditor is involved in the selection and appointment of the IP rather than relying on another creditor to appoint the IP. This will ensure that the appointed IP is experienced, professional and has a clear understanding of his or her role and obligations and the objectives of the Award Creditor.

One may also consider selecting IPs from the same firm across various jurisdictions to allow for a coordinated approach where the assets of the insolvent Award Debtor are scattered across various jurisdictions.

Other than the foregoing, some other important considerations include: the requirement for leave of the court to commence or continue enforcement proceedings against an insolvent Award Debtor; whether one can commence insolvency proceedings prior to recognition of the award i.e., will it be considered a proven unsecured debt for purposes of ranking; whether the settlement of an arbitral award by an insolvent Award Debtor can be considered an unfair preference; and whether shadow directorships have been created.

One of the ways in which one can attempt to enforce an arbitral award against the assets of a related third party, such as a subsidiary of the Award Debtor, is by placing the parent holding company in liquidation, administration or receivership, which allows the IP to take control of the board of the parent company, which in turn controls the board and assets of the asset or receivable-rich subsidiary.

ii. Enforcement Against Related Third-Parties

Enforcement against a related third-party can be considered in circumstances where the Award Debtor is a holding company of an asset-rich or receivable-rich subsidiary. However, separate corporate personality is the biggest obstacle to an attempt to enforce an arbitral award against a third-party entity as opposed to an insolvent Award Debtor. Most Commonwealth jurisdictions still uphold the sanctity of the separate corporate personality of a company save in very limited exceptional scenarios.

One of the ways in which one can attempt to enforce an arbitral Award against the assets of a related third-party, such as a subsidiary of the Award Debtor, is by placing the parent holding company in liquidation, administration or receivership, which allows the IP to take control of the board of the parent company, which in turn controls the board and assets of the asset or receivable rich subsidiary.

Courts may also issue tracing, preservation and vesting orders against the assets of subsidiaries or special purpose vehicles (**SPVs**) of an insolvent holding company that is an Award Debtor on grounds that the funds that were paid by creditors to the Award Debtor were fraudulently invested in the subsidiaries and SPVs and the Award Debtor was merely a shell.

Courts may also pierce the corporate veil of an Award Debtor and its subsidiaries in the case where it can be demonstrated that an Award Debtor fraudulently diverted or transferred its assets to related third party entities just before or in the course of the arbitral proceedings with a view to defeating or frustrating the enforcement of a valid arbitral Award against the Award Debtor.

iii. The Appointment of an Equitable Receiver

The Civil Procedure Rules of most Commonwealth countries allow for the appointment of an equitable receiver over any property of the Award Debtor (assuming that recognition of the Award has been granted and it is now a Decree of the Court) where it is just and equitable to do so. In this case, one may apply for attachment or a charge and collection of dividends of the shares held by the Award Debtor in an asset or receivable rich subsidiary.

Upshot

Based on the foregoing, it is plausible for an Award Creditor to enforce an arbitral Award by instituting insolvency proceedings against the Award Debtor or its asset or receivable-rich related third - parties; and through the appointment of an equitable receiver.

Whatever means of enforcement are eventually resorted to, an Award Creditor is better placed when it has various viable options available to it, as it through the exercise of such options that the fruits of the Award might ultimately be realised.

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UNLOCKING DATA:

CROSS-BORDER DATA FLOWS UNDER THE AFRICAN CONTINENTAL FREE TRADE AREA AGREEMENT

The African Continental Free Trade Area Agreement (**the AfCFTA**) is a framework that aims to facilitate African industrialisation and development by shifting the continent's global trade patterns. It represents a landmark effort to redefine Africa's trade landscape by creating a unified market for goods and services across the continent. It came into force on 30th May 2019, after the required a number of ratifications were deposited with the African Union (**AU**) Commission. It currently has fifty four (54) signatories, boasting the largest free trade area globally by membership.

The AfCFTA was introduced to foster a symbiotic relationship among African countries, with the overarching goal of reducing barriers to trade. It endeavours to boost intra-African trade by addressing non-tariff barriers to trade and progressively reducing tariffs. However, in an era increasingly driven by digital commerce, the success of this ambition depends not only on the flow of goods and services but also on the free and secure movement of data.

Data Protection and Cross Border Trade

As trade becomes increasingly digital, cross-border data flows and harmonised data protection frameworks become essential for e-commerce to function securely and seamlessly across jurisdictions. The United Nations Economic Commission for Africa recognised the AfCFTA as the world's largest free trade area since the formation of the World Trade Organization (**WTO**). Additionally, in 2016, the United Nations Conference on Trade and Development (**UNCTAD**) affirmed that data protection is critical to digital trade, citing that poor data governance diminishes customer trust and distorts market dynamics.

However, it is important to recognize that no country is willing to grant another unfettered or unregulated access to its data. Increasingly, data governance has become a source of tension and dispute among sovereign states. While the AfCFTA has enabled the free flow of services and information across borders, critical questions remain as to the safeguards in place to protect that information. For member states to fully harness the benefits of the digital economy in international trade, they must acknowledge that data is a strategic asset and establish robust and effective data protection regimes.

As such, there is a need for continental or regional data protection harmonisation to secure digital trade. By focusing on streamlining trade, including services, investment, intellectual property and digital trade, the AfCFTA aims to facilitate free movement of persons, goods and services crucial for deepening economic

integration. This free movement is largely fuelled by data and the cross-border movement of the same. Data protection therefore becomes a key concern.

The Heads of State and Government of the AU in their decisions (Assembly/AU/4(XXXIII) of 10th February 2020 and Ext/Assembly/AU/Decl.1(XII) of 5th January 2021) mandated negotiations for the Protocol, emphasising the importance of safeguarding national data integrity and security. This directive aligns with the broader objective of upholding citizens' rights to retain control of their personal data. Against this backdrop, the 37th AU Heads of States Summit held in February 2024, adopted the much-anticipated Protocol to the Agreement Establishing the AfCFTA on Digital Trade (**the Protocol**). The Protocol seeks to facilitate cross-border data flows while addressing privacy concerns and will come into force once the required number of ratifications is deposited in accordance with Article 23 of the AfCFTA. Part IV of the Protocol on data governance encompasses cross-border data transfers, protection of personal data, location of computing facilities (data localisation), and data innovation.

Additionally, under Article 20 of the Protocol, on cross-border data transfers, parties to the Protocol, subject to the relevant Annex, can only allow cross-border transfer of data, including personal data by electronic means, provided the activity is for the conduct of digital trade by a person of a state party. The exception to this is where a state party intends to achieve a legitimate public policy objective or protect essential security interests provided that the measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on digital trade, and do not impose restrictions on transfers of data greater than are necessary to achieve the objective.

Article 21 also requires state parties to adopt legal frameworks at the national level providing for the protection of personal data of natural persons engaged in digital trade. Article 46 further provides that after the adoption of the Protocol, state parties shall adopt annexes including the Annex on Cross-Border Data Transfers. On 16th February 2025, the Assembly of Heads of State and Government of the AU formally adopted eight (8)annexes to the Protocol-including the Annex on Cross-Border Data Transfers, which sets out regulations aimed at facilitating secure and efficient data flows across member states.

Advancing Data Governance

McKinsey, in its report on Africa business growth noted that Africa has over 400 million internet users, with the implication that e-commerce is largely propelled on the continent. One of the projected outcomes of the growth of intra-African trade spurred by the AfCFTA is increased data transfers across member countries.

Data protection harmonisation across member states can propel AfCFTA forward, in turn building consumer and business trust as well as fostering the digital economy. Following the integration of digital technology in trade, the African Heads of State recognized the need to provide data protection and privacy for the parties involved. This move was especially motivated by the fact that while the AfCFTA aimed to facilitate seamless trade across the continent and the free flow of goods, services and information, it failed to address questions as to how the data involved is protected.

Furthermore, the regulatory fragmentation across member states was a major concern, as some member states to the AfCFTA lack data protection laws at the national level to help govern and control how data flows, its security and usage in the region. This left data exchanged across jurisdictions open to misuse, hacks and threats. These issues underscored the imperative for the AfCFTA to include robust data protection measures, either within its core framework or through an annexure, to ensure its effective implementation.

It is important to recognise that no country is willing to grant another unfettered or unregulated access to its data. Increasingly, data governance has become a source of tension and dispute among sovereign states. While the AfCFTA has enabled the free flow of services and information across borders, critical questions remain as to the safeguards in place to protect that information.

In light of the above, the recent adoption of the Annex on Cross-Border Data Transfers within the Protocol marked a transformative step in aligning Africa's digital economy with modern data governance standards. Recognising the essential role of cross-border data flows in intra-African trade, this development demonstrates the visionary leadership of the AU Heads of State in enabling secure, seamless, and trusted data exchanges across the continent.

This Annex not only complements the AfCFTA's mission of boosting intra-African trade but also provides a regulatory framework to safeguard personal data and digital trust in the e-commerce ecosystem, in turn standardising cross-border data transfer conditions among member states. It provides for exceptions grounded in legitimate public policy objectives and essential security interests. The Protocol mandates the inclusion of provisions in the Annex addressing acceptable use of data, restrictions on third-party sharing, and applicable regulatory limitations, including data protection safeguards. The Annex now introduces a harmonised set of rules that serve as a common baseline, particularly benefiting jurisdictions that are yet to enact domestic data protection laws, as the Protocol emphasises for member states to establish regulatory frameworks that focus on improving trust in digital transactions.

Recommendations

While the adoption of the Cross-Border Data Transfers Annex is a significant milestone, the effectiveness of its implementation will hinge on a few strategic actions:

i. Benchmarking with European Legal Architecture

The European Free Trade Agrrement (**EFTA**) provides a robust precedent on integrating data protection frameworks within trade agreements. Annexure XI of the EFTA outlines regulatory approaches to data protection in areas such as electronic communications and information services. The Protocol and its Annexes can draw insights from this model, and borrow useful provisions.

ii. Standardising Cross-border Data Transfer Conditions

The Annex must prescribe detailed safeguards that promote accountability and risk management in data flows. These safeguards include providing proof of availability and effectiveness of appropriate safeguards with respect to security and protection of personal data subject to the transfer. Additionally, data transfers must be grounded on lawful bases such as consent, contractual performance, data subject's benefit and public interest, among others.

Key Take Away

Data is the backbone of Africa's evolving digital economy. The adoption of the Cross-Border Data Transfers Annex under the Protocol is more than a regulatory milestone, it is a bold affirmation of Africa's readiness to lead in the digital trade era. By laying down clear, harmonised standards for data governance, the Agreement addresses one of the most critical enablers of modern commerce: trust.

As implementation unfolds, this Annex could become the backbone of a secure and thriving continental digital market, eventually evolving into a blueprint for global south-led data governance models.

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FEEL THE BEAT:

THE CONNECTION BETWEEN INTELLECTUAL PROPERTY AND MUSIC

The world observes World Intellectual Property Day on the 26th of April each year. This year's theme, "*Intellectual Property and Music: Feel the Beat of IP*", highlights the interrelation of legal protection and creativity. Strong and effective intellectual property (**IP**) laws are crucial as streaming platforms grow, and artificial intelligence joins human artists in music creation. These laws not only support a thriving creative economy but also preserve cultural heritage and ensure fair compensation for artists.

Copyright in Musical Works

Copyright finds its foundational protection in law under the Constitution of Kenya, 2010 as follows:
i) Article 260 - which includes IP in the definition of property.
ii) Article 40 (5) - where the State is obligated to support, promote and protect the intellectual property rights of the people of Kenya.
iii) Article 11 (2) (a) and (c) - where the State is called upon to promote all forms of national and cultural expression through inter alia, literature, the arts and promote the intellectual property rights of the people.

With constitutional underpinning as set out above, IP is further entrenched into Kenyan law under the Copyright Act, 2001 (**the Copyright Act**), under which any musical composition and its lyrics are protected automatically from the moment the lyrics are written down, recorded or otherwise reduced to material form. This protection comprises two sets of rights.

Firstly, economic rights allow creators to control the reproduction, distribution, public performance, and digital streaming of their work, ensuring they can earn from broadcasts, downloads, or live performances.

Secondly, moral rights guarantee that the creator's name remains attached to the work and protects it from distortions or derogatory treatment.

Together, these rights acknowledge that music has both a commercial value and a deeply personal dimension. The Court's award of KES 4 Million to the well-known artist Nonini for the unauthorised use of his song "*We Kamu*", as reported in the Business Today on 6th September 2024, underscores that copyright infringement carries real financial consequences.

Related Rights

Beyond composers and lyricists, Kenyan law also protects the contributions of performers, producers, and broadcasters. Performers i.e., vocalists, instrumentalists, or dancers, can authorise or refuse recordings and broadcasts of their live acts, securing payment whenever those performances are captured. Producers of sound recordings own rights in the resulting phonograms, whether on compact discs or in digital file form. Broadcasters hold rights in their transmission signals, preventing unauthorised retransmission.

By way of example, in Beyoncé's widely acclaimed 2018 Coachella performance, later streamed globally on Netflix in 2020, her related rights as a performer were fully engaged. She held the exclusive right to authorise the recording and communication of her stage act, so no lawful recording or streaming could occur without her consent and a royalty arrangement. Netflix, as producer and broadcaster, would have secured licences for both the phonogram rights in the audiovisual work and the rebroadcast rights in the transmission signal.

In the Kenyan context, such licences can be administered through Collective Management Organisations (**CMOs**) such as the Performers' Rights Society of Kenya (**PRISK**), which is licenced by the Kenya Copyright Board (**KECOBO**) established under the Copyright Act, and similar organisations which would collect the agreed fees and disburse them to the artist and any accompanying musicians, dancers or supporting artists.

However, as was recently highlighted by the African Union's Goodwill Ambassador Nikita Kering at the Africa Creative meeting held in Addis Ababa, performers often struggle with opaque payment systems from CMOs, highlighting the urgent need for greater transparency and accountability within these bodies.

Economic Rationale

IP law seeks to balance two goals: it incentivises artists by granting them exclusive rights for a limited term, typically the author's life plus fifty (50) years as per section 23 (2) of the Copyright Act, while eventually enriching the public domain once those rights lapse. This approach rewards creativity and encourages further innovation and, at the proper time, makes cultural treasures freely accessible. International Agreements such as the Berne Convention for the Protection of Literary and Artistic Works (**the Berne Convention**), to which Kenya is a signatory, and Article 40 (5) of the Kenyan Constitution embrace this balance, recognising IP protection as both a private right and a public benefit.

Creating Value

Owning copyright is just the first step; real value lies in how rights are commercialised. Artists must manage their works strategically by releasing recordings through official channels to prevent piracy, negotiating licences for royalties, and using cross-licensing to expand into new markets. These arrangements, including performance fees, mechanical royalties, and synchronisation licences, help turn musical ideas into sustainable income.

Forms of Exploitation

Musical IP is most commonly monetised through licensing or assignment. A licence allows a rights owner to authorise another party to use the work, such as for streaming, public performance or synchronisation, in exchange for royalties. Exclusive licences give rights to one licensee and exclude others. Sole licences give rights to the licensee while allowing the owner to use the work. Non-exclusive licences allow multiple users at the same time.

Key contractual elements of licenses include precise definitions, clear scope and territorial limits, sub-licensing terms, consideration structures (fixed fees, running royalties or hybrids), confidentiality, and provisions on term, termination, warranties, indemnities, and dispute resolution.

By contrast, an assignment transfers full ownership of IP rights, extinguishing the original owner's title in return for upfront or ongoing compensation. Cross-licensing, where parties exchange reciprocal rights to each other's catalogues, enables broader distribution and collaborative ventures.

In all cases, well-drafted agreements help creators and rights holders navigate digital markets, secure sustainable income, and adapt to new distribution models and regulations. CMOs negotiate licences with radio stations, venues, and digital platforms, and allocate royalties based on usage data. Streaming services increasingly use automated systems to track plays and make payments, often through CMOs or direct contracts with rights holders.

Case Law

Recent court decisions have clarified how Kenyan IP law applies in practice. In *Music Copyright Society of Kenya v Kenya Copyright Board & Others [2024] KECA 1172 (KLR)*, the Court considered whether the Music Copyright Society of Kenya (**MCSK**) was a

In the Kenyan context, such licences can be administered through Collective Management Organisations (CMOs) such as the Performers' Rights Society of Kenya (PRISK), which is licenced by the Kenya Copyright Board (KECOBO) established under the Copyright Act, and similar organisations which would collect the agreed fees and disburse them to the artist and any accompanying musicians, dancers or supporting artists.

CMO. MCSK argued that it was not, while KECOBO maintained that licensing as a CMO was necessary for MCSK to administer its members' rights. The Court ruled in favour of KECOBO, finding that MCSK fits the definition of a CMO under the Copyright Act. It also held that the collective management framework is a reasonable limit to the freedom of association and the right to property.

The decision highlights the importance of CMOs for the effective management and licensing of copyright works, especially where individual enforcement is impractical. In contrast to rights relating to other creative areas like books and other literary works, musical works are used by many users at different times and places, making individual monitoring and remuneration collection unfeasible. Direct enforcement of their rights would be beyond the individual right holders, as it would be a logistical horror. The collective management thus provides a practical solution by enabling rights holders to exercise their rights indirectly through CMOs.

In *Kimani v Safaricom Ltd & Others [2023] KEHC 20085 (KLR)* (**the Bamboo Case**), the plaintiff, a popular Kenyan artist known as Bamboo, sued over the unauthorised use of his songs "*Mama Africa*", "*Yes Indeed*", and "*Move On*". The High Court held that digital platforms cannot rely on indemnity clauses to shield themselves when distributing unlicensed music. The Court found the defendants had infringed Bamboo's copyright and awarded him KES 1.5 Million per song as general damages.

The case underscores the need for musicians to secure proper contracts before their works are used, and for distributors to conduct due diligence on licensing. It also affirms that artists whose rights are infringed are entitled to seek legal redress and compensation.

In *Omare v Safaricom Limited & another [2024] KEHC 875 (KLR)* (**the Omare Case**), the High Court dismissed gospel musician Moffat Achoki Omare's copyright infringement claim against Safaricom and Liberty Afrika Technologies. The claim concerned the alleged unauthorised distribution of his songs on the Skiza platform. The Court found that Omare had assigned his performing and mechanical rights to MCSK. MCSK then licensed Liberty Afrika, which licensed Safaricom. This chain of authorisation insulated both companies from liability.

Unlike in the Bamboo case, where the defendants were found liable for distributing works without proof of licence or assignment, the Court found no infringement because the entire authorisation process chain of authorisation was properly documented. Omare did not challenge MCSK's royalty distribution or prove any unauthorised by MCSK nor proved any unauthorised use of his works. The Court dismissed the suit with costs and reaffirmed the legal importance of formal intellectual property assignments.

Outro

Effective protection and strategic exploitation of musical IP underpin both creative vitality and economic success. Through structured licensing, assignments, collective management, and enforcement, rights holders can turn artistry into sustainable income.

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GREEN GOVERNANCE 3.0:

PIONEERING CLIMATE RISK DISCLOSURE AND SUSTAINABLE FINANCE IN KENYA'S BANKING SECTOR

Introduction

In the 20th Issue of *Legal & Kenyan*, we featured an article titled "Advancing Green Governance: Standards, Finance and Sustainability in Africa's Corporate Sector 2.0", in which we discussed the manner that adoption of the International Financial Reporting Standards Disclosure of Sustainability-related Financial Information (**IFRS S1**) and Climate-related Disclosures Standards (**IFRS S2**) collectively (**the Standards**) that were issued by the International Sustainability Standards Board (**ISSB**) were being adopted by corporations in Africa in the absence of clear frameworks and/or guidelines. In the abovementioned article, we discussed green financing as an effective tool for uptake of the Standards reportable under IFRS S1 and made a case for streamlining of internal operational procedures in an environmental friendly manner as a good metric reportable under IFRS S2.

It is against this backdrop of the absence of clear frameworks and guidelines that Kenyan corporations (especially those in the banking sector) undertook to ensure compliance with the Standards in the best manner they could mirroring international best practice standards. However, from April 2025, with the issuance of Kenya's Green Finance Taxonomy (**KGFT**) and the Climate Risk Disclosure Framework for the Banking Sector (**the Framework**)by the Central Bank of Kenya (**CBK**), our jurisdiction now has a clear way forward in respect of compliance with the Standards.

KGFT has been developed initially for the banking sector. However, it is intended to serve as an entry point to the larger financial sector in Kenya. KGFT a standardised classification system that identifies and categorises the investment options which are environmentally sustainable and, by extension, those that are not. KGFT defines a minimum set of assets, projects and activities that are eligible to be defined as "green" in line with international best practices and Kenya's national priorities. The users of the KGFT may utilise it to track, monitor and demonstrate their credentials of their green activities (popularly termed as **ESG**) in a more confident and efficient manner.

The framework was issued in furtherance of the CBK's Guidance on Climate–Related Risk Management, which it issued in 2021, and the issuance of IFRS S2 by the ISSB in 2023. Section 33(4) of the Banking Act, (Cap. 488)Laws of Kenya, empowers the CBK to guide institutions to maintain a stable and efficient banking and financial system. As such, CBK, in exercise of its statutory power, has formulated the framework to act as the guide through which the banking sector in Kenya shall identify, classify and disclose relevant, decision useful climate–related information consistently and comparably. The framework is fully aligned with the Institute of Certified Public Accountants of Kenya (**ICPAK**) recommendations on the IFRS S2, which it did designate as the official standard for climate risk reporting in November 2024.

Kenya's Green Finance Taxonomy

KGFT has adopted the green European Union Taxonomy for Sustainable Activities as a reference framework, specifically in assessing the substantial contribution criteria for climate change mitigation and adaptation. KGFT seeks to align with Kenya's National Policy on Climate Finance with regards to climate investment. KGFT is

comprised of five (5) parts being: introductory breakdown about the KGFT, User Guidance, Catalogue of Sectors and Activities, Technical Screening and concludes with appendices. At the heart of its formulation is its alignment with international best practice in respect of green finance. This guarantees the users of the taxonomy of its adaptability and alignment with international standards.

Indeed, KGFT's objective is to first serve as a reference for sustainable progress of the Kenyan economy without social or environmental trade-offs in a bid to increase the consistency of green finance flows and foreign investments. Second, KGFT users can be confident that taxonomically aligned economic activities meet a high threshold of commitment to climate change mitigation and the Kenyan trajectory towards a sustainable economy. Finally, the taxonomy establishes a uniform and transparent performance tracking and reporting mechanism.

There is process for determining taxonomy alignment under KGFT which offer guidance that will help users determine the alignment of their economic activity with KGFT. The expected result is a binary one either taxonomy–aligned or not. Once alignment is assessed based on the details of this screening criteria, taxonomy-aligned financial flows can be calculated and determined. Under KGFT, this determination of taxonomy alignment can be done at an economic activity level. However, taxonomy–aligned finance can only be disclosed at an asset/activity, project, entity, and/or portfolio level.

Ultimately, at the heart of KGFT is its role in contributing to multifaceted sustainable development within the financial sector in Kenya. It is anticipated to provide useful information for measuring, monitoring and reporting on ESG performance and impact of taxonomy–aligned activities.

Kenya's Climate Risk Disclosure Framework for the Banking Sector

The Framework issued by CBK was issued against the backdrop of its earlier issued Guidance on Climate–Related Risk Management, and it is complementary to the Green Finance Taxonomy. With this issuance, banks can improve risk management, leading to more informed lending decisions and increased resilience. Transparent disclosures also attract investors seeking sustainable investments, while strategic planning that considers climate risks fosters long-term sustainability.

For investors, the Framework provides the information needed to assess the financial implications of climate change on potential investments. Through the issuance of the Framework, the banking sector in Kenya is well poised to play a pivotal role in fostering a more resilient and sustainable future. The Framework has adopted sophisticated methodologies for risk assessment and management, and has broader reporting requirements such as those set out in the Taskforce on Climate Disclosures (**TCFD**).

The Framework highlights the exposures of the banking sector's credit portfolios to "inherent" climate–related risks. These risks can materialise in the short–term, medium–term and/or in the long–term and are largely classified into either physical or transitional risks. With respect to climate governance, CBK has adopted an expectation that is "fit for purpose". That is ensuring that proper governance structures are in place to properly assess climate–related risks and opportunities, take appropriate strategic decisions to manage them, and determine relevant goals and targets along with progress monitoring mechanisms.

Under the Framework, banks are required to have in place robust governance arrangements that enable them to effectively identify, manage, monitor, and report the risks they are, or might be, exposed to both on an individual and consolidated basis. Whereas this can take several forms depending on the relevant institution's business model and other factors, there is a requirement on them to demonstrate how their governance body, which can be materialised in the form of a board, committee within the board structure or equivalent body charged with the responsibility of governance and oversight of climate–related risks and opportunities. In doing so, the nexus between the board involvement and management involvement set out in the Framework is achieved.

For investors, the Framework provides the information needed to assess the financial implications of climate change on potential investments. Through the issuance of this Framework, the banking sector in Kenya is well poised to play a pivotal role in fostering climate resilience and sustainability, contributing to both national and global efforts towards a more resilient and sustainable future.

In formulating their business strategies, institutions are expected to understand the impact of climate–related risks on the business environment in which they operate. The rationale behind climate–related financial disclosures on strategy is to provide a comprehensive understanding of how an entity manages climate–related risks and opportunities.

Ultimately, the Framework presents various opportunities which may be beneficial to Kenya's financial sector. It presents an opportunity for market discipline and the sustainable strengthening of financial stability of the markets; the broader reporting requirements help in proactive identification and management of risks which impacts decision-making, and the integration of sustainability–related considerations in operational structures.

Upshot

In our previous article on this topic, published in the 20th Issue of this publication, we made a case for the formation of an African sustainable investment alliance in a bid to chart an African way forward as regards the formulation of a harmonised standard on corporate reporting of sustainability within corporate institutions, green finance and climate–related disclosures. This was against the backdrop of the absence of a framework.

Now that KGFT and the Framework have been issued, their integration is important considering that it shall ensure the inflow of finances in the form of investments, and it shall strengthen the alignment with Kenya's sustainable agenda, all in a bid to ensure Kenya's financial system is more resilient.

Kenya now has leaped forward within Africa, joining ranks with South Africa and Nigeria; and has taken the bold step to formulate its own standards and frameworks which it shall rely on to guide its financial sector regarding this issue. The implementation of these Frameworks issued by CBK follow a phased approach which ensures institutions have adequate time to transition and adopt robust internal processes. It additionally aligns with ICPAK's Roadmap for Adoption of Sustainability Disclosure Standards.

Beginning with a voluntary reporting period, which is currently done by the majority of the Tier–1 banking institutions in Kenya, the ultimate goal is to have mandatory reporting and disclosure beginning on or after January 2028. The successful implementation will require collaborative efforts from various stakeholders such as government, regulators, financial institutions and investors.

This is a major development in the sustainable corporate reporting space in Kenya. This now places Kenya on the forefront and trailblazer against fellow African countries in respect of corporate sustainability.

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UNTETHERED:

REGULATORY COMPLIANCE FOR FOREIGN EMPLOYERS IN KENYA

In an increasingly global and environment, many companies are exploring how best to engage workers across borders. For foreign companies looking to employ Kenyan residents, the legal and regulatory framework may seem both complex and far fetched. This article explores whether foreign entities can directly employ Kenyan residents, the legal compliance requirements of such arrangements, and the legal risks associated with bypassing local registration of the foreign entity.

Can Foreign Entities Employ Kenyan Residents?

Yes, but with qualifications. The Employment Act (Cap. 226) Laws of Kenya (**the Employment Act**) does not expressly require an employer to be a Kenyan-registered entity. Any person or company that enters a contract of service with person in Kenya qualifies as an employer under the law, regardless of where they are based or registered. This means a foreign company may legally employ a Kenyan resident, even without a physical presence such as a branch office, or subsidiary in the country. However, such employers must comply with all Kenyan laws on employment and labour, tax, social security and other regulatory obligations.

The Hidden Compliance Burden

While Kenyan law does not preclude a foreign entity from employing persons who are resident in Kenya, there are several obligations bestowed upon an employer under Kenyan law. These include:

- Remitting Pay-As-You-Earn (**PAYE**) taxes and other statutory deductions to the Kenya Revenue Authority (**KRA**).
- Contributing to the National Social Security Fund (**NSSF**) as required under the National Social Security Fund Act, Cap. 258.
- Contributing to the Social Health Insurance Fund (**SHIF**) as required under the Social Health Insurance Act, Act No. 16 of 2023 and the Social Health Insurance Regulations.
- Remitting the Affordable Housing Levy (**Housing Levy**), and matching employee contributions at one point five percent (1.5%) of gross salary as provided under the Affordable Housing Act, 2024.
- Ensuring the employment contracts are compliant with the Employment Act.
- Meeting obligations under the Industrial Training Act (Cap. 237) Laws of Kenya, including registering as a training levy payer and submitting contributions.

Without a local legal presence, most foreign companies face substantial logistical barriers to fulfilling these legal obligations, particularly where local presence is a prerequisite of registration with KRA and other regulatory bodies to enable the remittance of tax and other statutory deductions. It should be noted that, even inadvertent failures to comply can result in penalties, reputational damage, or potential employee disputes. For this reason, proper structuring and access to reliable local support are essential when employing individuals based in Kenya.

The Role of an Employer on Record

To bridge this gap, many foreign companies who do not wish to have a local presence in Kenya often opt to appoint a local Employer on Record (**EOR**). An EOR is a third-party company that acts as the legal employer for a company's workforce in a specific location or country. An EOR arrangement can take the following two (2) models:

- Agent Model – The employment contract is between the foreign company and the employee, but the EOR manages compliance on behalf of the employer.

- Legal Employer Model – The EOR becomes the formal employer on record, contracting directly with the employee and managing all legal responsibilities.

A foreign entity can enter into a services agreement with an EOR, under which the EOR assists with employer obligations such as payroll processing, tax remittances (PAYE), statutory contributions (NSSF, SHIF, Housing Levy), and overall employment law compliance. However, the foreign entity remains the legal employer, with the EOR acting solely as an agent rather than assuming full employer responsibilities.

It is important to note that even if a foreign entity decides to have an EOR arrangement, the employer obligations will still apply to the former as they will be deemed to be the employer. In the case of *Samuel Wambugu Ndirangu vs 2NK Sacco Society Limited [2019] eKLR*, the Court had this to say in regard to the ingredients that are necessary to determine the existence of an employer-employee relationship:

"A review of the elements above reveals that in order for a positive determination of the existence of the employer-employee relationship there must be the selection and engagement of the employee (the hire after either a restricted or open interview process), proof of payment of wages, the power of dismissal and finally, the power to control the employee's conduct (this is what gives the test the nom de guerre – control test)."

Further, the Court in the case of *Christine Adot Lopeyio vs Wycliffe Mwathi Pere [2013] eKLR*, spelt out various tests to determine the nature of an employer-employee relationship in a contract of service as follows:

"In most cited authorities in this regard from various jurisdictions, several tests have been applied to distinguish between what comprise 'employment' as against what constitutes 'service' in case of contracts of service as contrasted with contracts for service. They include the following:

a. The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work.

b. The integration test in which the worker is subjected to the rules and procedures of the employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business.

c. The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.

d. Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers."

It is therefore evident the determination of the existence of an employer-employee relationship is primarily guided by the manner in which the work is performed and the remuneration of the employee, and not necessarily the EOR. In this regard, the employer would still be held responsible for the employer obligations if the EOR fails to comply with such obligations.

The Risk of Creating a Permanent Establishment

In addition to employment compliance, engaging an EOR may have broader implications. When foreign companies engage Kenyan residents to provide services locally, particularly over extended periods, they risk inadvertently creating a permanent establishment (**PE**) in Kenya.

Without a local legal presence, most foreign companies face substantial logistical barriers to fulfilling these legal obligations, particularly with remitting taxes and other statutory deductions, or registering with Kenyan authorities to facilitate such compliance. Moreover, even inadvertent failures to comply can result in penalties, reputational damage, or potential employee disputes. For this reason, proper structuring and access to reliable local support are essential when employing individuals based in Kenya.

The definition of a PE has largely been borrowed from the Organization for Economic Co-operation and Development (**OECD**) guidelines. Kenyan law sets out broad parameters for determining a PE. For instance, a fixed place of business in Kenya through which business is wholly or partly carried out, including a place of management, a branch, an office, a factory, a workshop, or a place of extraction of natural resources for a period of six (6) months or more, would constitute a PE. In addition, the provision of services, including consultancy services, by a person through employees or other personnel engaged for that purpose, for a period exceeding the aggregate of ninety-one (91) days in any twelve-month period, or the presence of a dependent agent who acts on behalf of the non-resident person in respect of that person's activities in Kenya, would constitute a PE.

Where a non-resident person is deemed to have created a PE in Kenya, the non-resident person would be considered to have created a taxable presence in Kenya and would therefore be subject to tax on the proportionate income that will be accrued in or derived from the business activities carried on in Kenya. Such tax implications would include payment of corporate income tax for the income derived or accrued in Kenya. A PE may also give rise to transfer pricing implications.

Mitigating Risk

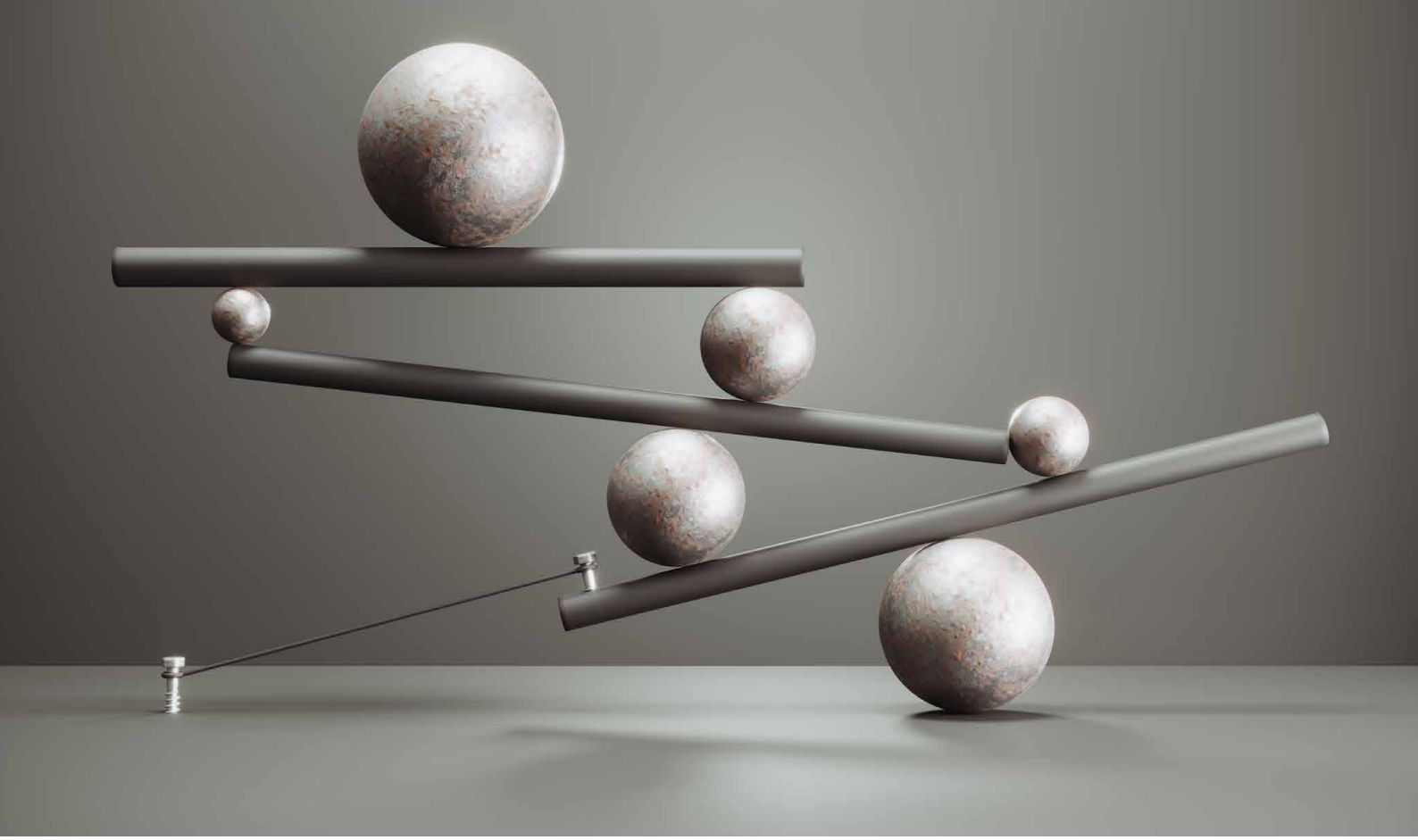
To mitigate the risk of creating a PE in Kenya, foreign entities may consider establishing a Kenyan presence for employment purposes. It may do so by:

- Registering a subsidiary in Kenya – incorporating a wholly owned Kenyan company to directly employ individuals and comply with all statutory obligations locally.
- Registering a branch in Kenya – registering as a foreign company under the Kenyan Companies Act, which can hire employees and comply with local employment regulations.

Notably, a subsidiary or a branch will be required to comply with all the applicable Kenyan laws relating to the operation of its activities in Kenya, including corporate governance, regulatory and tax laws.

Final Word

While foreign entities can employ individuals residing in Kenya without the necessity of registering a Kenyan entity, the operational hurdles, from registration as a taxpayer to enable remittance of PAYE and other statutory deductions to compliance which other obligations of an employer under Kenyan law require careful navigation. Failure to comply could result in penalties, labour disputes, or unintended tax liabilities. For most foreign companies seeking to engage Kenyan residents, having an EOR arrangement or in the alternative establishing a Kenyan presence for employment purposes may be necessary. In either case, seeking legal and tax advice is necessary to avoid any unintended legal consequences.



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LEGITIMACY BATTLES:

SUPREME COURT UNDERSCORES THE NEED FOR LEGALITY IN THE PROCESS LEADING TO ACQUISITION OF LAND

Background

"Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass." This finding was affirmed by the Supreme Court in the instant case, being *Sehmi & another v Tarabana Company Limited & 5 others [2025] KESC 21 (KLR)* (**the Tarabana Case**) having been borrowed from the Supreme Court's earlier decision in *Dina Management Limited vs. County Government of Mombasa & 5 Others [2023] KESC 30 (KLR)* (**the Dina Management Case**).

The observations of the Supreme Court gave authoritative clarity on the doctrine of an innocent purchaser for value without notice. In doing so, the Supreme Court conclusively resolved any lingering uncertainty surrounding the application of the doctrine which has frequently been used as a defense by unscrupulous land grabbers who are intent on circumventing the provisions of Article 40 of the Constitution of Kenya, 2010.

It is now settled that no valid title can pass and no legal estate is acquired if the process leading up to the said acquisition is marred with procedural illegalities. The defence of an innocent purchaser for value without notice thus falls by the wayside.

Exploring the Limits and Applicability of the Innocent Purchaser Doctrine

In the Tarabana Case, the Supreme Court undertook a comprehensive analysis of the legal doctrine of the *bona fide/innocent purchaser for value without notice.* The Court was invited to consider whether, and under what circumstances, a purchaser may be deemed to have acquired a valid and indefeasible interest in land notwithstanding underlying irregularities or illegality in the allocation process.

In its determination, the Supreme Court laid out the test made up of three (3) ingredients that a person claiming to be a *bona fide* purchaser must meet. These ingredients entail the following:-

i. Element of Innocence

This means that the purchaser must act in good faith. His conduct must not raise any doubt as to whether indeed, he did not have any notice or knowledge as to the existence of a rival interest in the suit land. The element of innocence also connotes the exercise of due diligence expected of any reasonable purchaser. The claimant must demonstrate that he acted diligently and conducted a reasonable inquiry into the status of the estate or land that he sought to purchase.

ii. Purchase for Value

This means that consideration in money or money's worth was paid by the claimant in return for the land. The purchaser must actual-

ly pay all the money due before receiving notice of the existence of the equitable interest over the suit land. Mere execution of the instrument of conveyance of the legal estate before notice is received without payment of the money due, will not avail to the claimant the defence of innocent purchaser.

iii. Legal Estate

An innocent purchaser of a legal estate in land without notice of an equitable interest in the said land, takes it free from the encumbrance of the latter interest. This is because legal rights are good against all the world; equitable rights are good against all persons except a *bona fide* purchaser of a legal estate for value without notice.

Having outlined the ingredients that must be met, the Supreme Court then proceeded to interrogate whether these ingredients were met in the Tarabana Case as detailed below.

Analysis of Legitimacy

The Supreme Court was confronted with a dispute involving two (2) sides, the Appellants on the one hand, and the 1st and 2nd Respondents on the other. Each of these sites claimed to be holding title to the suit property they deemed legitimate. At the centre of the matter was the question of competing claims to land ownership, where legality and equity seemed to be at odds.

In finding that the Appellants neither had a legal nor equitable interest in the suit property, the Supreme Court found as follows:

"By the time the suit land was allocated to the 2nd Respondent, the Appellants' lease had long expired. We are therefore in agreement with the Court of Appeal's conclusion that the lease having expired, the land had reverted to the Government. It was no longer a leasehold estate, but government land within the meaning of the Government Lands Act (now repealed). Where did this cruel reality leave the Appellants? What rights, if any did the Appellants have over the suit land? It was submitted without contestation at the trial court, that after the expiry of the lease, the Appellants continued in possession of the land, while paying the applicable land rates and rent. What then was the legal status of the appellants with regard to the land? Can the appellants be considered as having acquired an equitable interest in the land by virtue of their continued stay upon the same? We think not, since through effluxion of time, and reversion to the Government, the lease had become extinguished for all purposes. No equitable interest over the land could survive such extinction. Whatever remained in favour of the appellants over the land, could at worst be regarded as "a tenancy at will" or at best "a mere equity".

The Supreme Court then proceeded to address the illegality of the 1st and 2nd Respondents' title as below:

" … it is our finding that the allotment of the suit land to the 2nd Respondent can neither be regarded as legal nor regular. The allocation was made by a person other than the holder of the office of Commissioner of Lands. Neither was the allotment preceded by the requisite advertisements and biddings assuming that it was being allotted for a public purpose. Consequently, the 2nd Respondent could not pass valid title to the 1st Respondent given the incurable procedural irregularities that had characterized the allotment."

Consequently, the Supreme Court proceeded to nullify the allotment of the suit property to the 2nd Respondent, and found that the 1st Respondent was not a bonafide purchaser of the suit property without notice on account of failing to meet the three (3) ingredients as follows:

- The element of innocence: The allotment to the 1st Respondent was unprocedural as it was not done by the Commissioner of Lands. The allotment was also not preceded by the requisite advertisements and biddings. There was nothing on record to show how, and for what purpose the suit land came to be allocated to the 2nd Respondent who promptly sold it to the 1st Respondent.
- Purchase for value: No explanation was given for the discrepancy in the purchase price which was KES 12.5 Million in the transfer documents despite the sale agreement indicating KES 24 Million. This was interpreted as a deliberate attempt to evade paying the higher stamp duty applicable to the transfer.
- A legal estate: The 2nd Respondent was incapable of passing a valid title to the 1st Respondent as it had acquired the same unprocedurally.

The observations of the Supreme Court gave authoritative clarity on the doctrine of an innocent purchaser for value without notice. In doing so, the Court conclusively resolved the lingering uncertainty surrounding the application of the doctrine which has frequently been used as a defense by unscrupulous land grabbers who are intent on circumventing the provisions of Article 40 of the Constitution of Kenya, 2010.

The Appellants' Saving Grace - Legitimate Expectation

It was on record that three (3) months before the expiry of the lease, the Appellants had made an application for its extension. The Commissioner of Lands, the Director of Physical Planning, and the Director of Survey all acknowledged receipt of the application for extension of lease by the Appellants and indicated that there were no objections to the renewal. This was never communicated to the Appellants. However, inexplicably, the application for extension of lease remained pending and unacted upon for eight (8) years, when the suit land was allocated to the 2nd Respondent. The Supreme Court observed that the application for renewal gave rise to the legitimate expectation for the renewal of the Appellants' lease and stated thus:

"More often than not, public leases contain an option for renewal. However, such renewal must be activated by an application by the lessee to the government agency having authority to renew the lease. It follows therefore that where the lessee makes an application for renewal of his/her lease, his/her application would be considered either way and that, the applicant would be furnished with reasons should the application be declined. It would also be expected that the application would be clear and unambiguous. It is the application for renewal that ignites the legitimate expectation, given the fact that it is addressed to an authority that has the competence to renew the lease."

The Supreme Court found it logical to conclude that the Appellants had a legitimate expectation that their lease would be extended. Such an expectation was not only reasonable, but was expressed to a competent authority, who at different times, had exercised the powers conferred upon him by the law, to extend the leases of other applicants in a similar position as the appellants. To this end, it was the Supreme Court's final order that the Appellants were entitled to an extension of lease over the suit property.

Disposition

The clarity provided by this decision settles an issue that has been bedevilling the question of acquisition of titles in Kenya and it is now hoped that moving forward, alleged 'innocent purchasers' have been put on notice that their alleged innocence may not meet the requisite legal threshold for granting them titles to land. In essence, the Supreme Court has emphatically underscored the need for absolute propriety and regularity in every step of the process leading up to the acquisition of land, signifying a clear position that Courts will hencefourth not shy away from stricking down as illegitimate any tittle acquired through a flawed process.

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A WALL TO HIGH?

NAVIGATING JUDICIAL REVIEW IN TAX DISPUTES

Introduction

According to Lord Hailsham in *Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155*, judicial review is not intended to deprive or deny relevant authorities of the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is meant to ensure that the relevant authorities use their powers properly. Nowhere is this principle more crucial than in the realm of tax administration. In Kenya, the interface between the Kenya Revenue Authority's (**KRA**) duty to collect and administer revenue and the taxpayer's right to fair administrative action is a delicate one. Judicial review stands as a critical safeguard which ensures that KRA exercises its powers within the bounds of expeditious, efficient, lawful, reasonable and procedurally fairness.

However, the accessibility and practical efficacy of judicial review in the context of tax disputes remain highly contested. With recent Court decisions interpreting section 3 of the Tax Procedures Act (Cap. 469B) Laws of Kenya (**TPA**), as granting the Tax Appeals Tribunal (**the Tribunal**) the jurisdiction to resolve disputes arising from any other decision made under a tax law, there is now a narrow window for tax disputes to find their way to the judicial review Courts. As a result, this article therefore cautions taxpayers of the tendency to institute judicial review cases against KRA unless it is in the exceptional circumstances.

The State of Play

In Kenya, Courts approach judicial review in tax disputes with a nuanced, case-by-case analysis. The current jurisprudence from the judicial review Courts indicates that Courts are reluctant to hear tax disputes unless all statutorily available avenues for resolving such disputes have been exhausted or are inapplicable (see section 9(2) of the Fair Administrative Action Act, 2015 (**FAAA**)). Tax disputes will only be heard and determined by a judicial review Court in exceptional circumstances, where an applicant seeks and is granted an exemption from the obligation to exhaust available remedies, if the

Court considers such an exemption to be in the interest of justice (see Section 9(4) of the FAAA). Put simply, current jurisprudence from judicial review Courts shows that disputes will only be heard and decided in those Courts if:

- There is no redress avenue available in the tax statutes and where there is, the applicant has exhausted those available avenues.
- The applicant has made a case for exemption from the doctrine of exhaustion.

The Court at paragraphs 89 of the decision in *Republic v Insurance Regulatory Authority; Old Mutual General Insurance Kenya Limited (Exparte Applicant)* and in *Tropic Air Limited [2025] KEHC 4570 (KLR)* determined that judicial review can only be considered if the party has complied with the above set parameters.

A critical question is what factors do Courts consider when determining whether a tax dispute can be heard and determined in judicial review Courts?

Key Considerations for Judicial Review

i. Jurisdiction

The first and most fundamental consideration is jurisdiction. Without it, the Court has no choice but to down its tools. Accordingly, a Court faced with an application for judicial review in tax disputes must first determine whether the applicant has exhausted the statutory avenues for redress before assuming jurisdiction.

The resolution of disputes is provided for in the TPA as read together with the Tax Appeals Tribunal Act (Cap. 469A) Laws of Kenya (**TATA**). More specifically, sections 51 to 54 of the TPA provide a comprehensive procedure that ought to be followed by a taxpayer in the resolution of tax disputes. It begins with an assessment and ends with an appeal to the Court of Appeal with a provision for out-of-Court settlement.

Section 3 of the TPA also defines an appealable decision to include an objection decision and any other decision made under a tax law other than— (a) a tax decision; or (b) a decision made in the course of making a tax decision. The phrase any other decision under tax law has been used by courts to clothe the Tax Appeals Tribunal with jurisdiction to hear a taxpayer aggrieved by any decision of the KRA, including those relating to exemption certificates, issuance of KRA PIN, and various other administrative action. A recent example of the interpretation of section 3 of the TPA is in *Saleh Mohammed Trust v Commissioner of Domestic Taxes [2025] KEHC 2169 (KLR)* where declining an application for renewal of a tax exemption certificate was considered an appealable decision.

Exception to the general rule

The doctrine of exhaustion is subject to several exceptions. Courts have developed guiding principles for determining when an applicant may be permitted to institute judicial review proceedings without exhausting the available remedies. In such circumstances, the applicant must seek the Court's exemption from pursuing other available remedies. To succeed in this request, the applicant must establish two (2) fundamental elements, as set out in *Havi v Kenya Revenue Authority [2024] KEHC 3006 (KLR)*. The exemption may be granted if the following conditions are met:

- An applicant's case presents what, in the eyes of the law, constitutes exceptional circumstances.
- It is in the interest of justice that the applicant need not exhaust the available alternative remedies.

What are the exceptional circumstances?

The Court in *Krystalline Salt Limited v Kenya Revenue Authority [2019] KEHC 6939 (KLR)*, stated that what constitutes exceptional circumstances depends on the facts of each case and it is not possible to have a closed list.

The requirement for the circumstances to be exceptional means they must go well beyond the normal run of circumstances typically found in most cases. The circumstances do not have to be unique or very rare, but they must genuinely be the exception rather than the rule. Judicial review Courts have interpreted exceptional circumstances to mean situations that are out of the ordinary and render it inappropriate for the Court to require an applicant to first pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the Court rather than to resort to the applicable internal remedy.

In addition to the issue of jurisdiction and exemption, parties must also carefully consider the nature of the cause of action and whether the issue for review is a merit based or a procedural review issue. This determination is central, as it not only shapes the pleadings and the procedural route a party should take but also governs the scope of reliefs that may be granted.

ii. Cause of Action and Remedies

In addition to the issue of jurisdiction and exemption, parties must also carefully consider the nature of the cause of action and whether the issue for review is a merit based or a procedural review issue. This determination is central as it not only shapes the pleadings and the procedural route a party should take but also governs the scope of reliefs that may be granted.

The Supreme Court in *Dande & 3 others v Inspector General, National Police Service & 5 others [2023] KESC 40 (KLR)* affirmed that while judicial review may be pursued through a dual approach being the merit review and procedural review, the applicable approach must be ascertained from the pleadings and procedure made at the outset of the proceedings.

Another instance of this principle at play was observed in *Mutiso v Commissioner of Domestic Taxes [2023] KEHC 22421 (KLR)* where the High Court distinguished the taxpayer's claim as one alleging a violation of constitutional rights, rather than a request to review a tax refund decision. It is therefore apparent that some of the prayers sought can only be granted by the High Court. Redress such as the declaration of unconstitutionality of a provision in law and remedies towards violation of human rights cannot be obtained at the Tribunal. Therefore, the taxpayer has the option to directly address such disputes in the High Court.

Conclusion

Judicial review remains a critical tool for upholding legality and procedural fairness in tax administration. Its applicability in tax disputes is influenced by the courts' discretion in deciding whether or not to intervene. For it to serve its intended purpose, Courts must strike a careful balance of protecting taxpayers' rights without undermining the integrity of the tax system.

As such, a case-by-case analysis, taking into consideration the factors discussed above, is essential in determining whether judicial review remains an effective remedy or an exceptional recourse. Ultimately, the onus lies with the courts to exercise their discretion judiciously, ensuring that taxpayers have access to justice in an expeditious and efficient manner.

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