



ORARO & COMPANY
ADVOCATES

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LEGAL & KENYAN

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Shaping Tomorrow's Legal Landscape: Issue Twenty-Two

As we unveil the 22nd Edition of *Legal & Kenyan*, we do so at a time when Kenya, and the broader African continent, is experiencing a profound shift in how law responds to economic transformation, technological disruption, regional integration, and climate realities. This edition brings together eight thoughtfully crafted articles that illuminate some of the most consequential developments shaping today's legal environment.

We begin with John Mbaluto, FCI Arb, Claire Mwangi and Wambui Mwariri, who provide a practical and insightful guide on selecting strong, enforceable trademarks. Their article moves beyond theory to illuminate the crucial importance of distinctiveness, the traps of overly descriptive marks, and the jurisprudence shaping Kenya's trademark landscape.

Construction, a cornerstone of Kenya's development agenda, features strongly in this edition. Two articles examine the shifting landscape of dispute resolution within the sector. Sheila Nyakundi-Marilu and Venessa Sifunjo team up to explore the emerging adjudication framework under the Construction Payments Adjudication Bill, poised to introduce speed, predictability, and cash-flow stability in the industry, while Noella Lubano and Venessa Sifunjo offer a comparative lens on dispute mechanisms under JBC and FIDIC contracts.

Economic transformation also takes centre stage in our sustainability feature by Cindy Oraro and Anna Kandu, who unpack Kenya's evolving climate finance landscape, from blended financing models to regulatory frameworks that support green investment.

In a landmark advancement for disability rights, Claire Mwangi, Sandra Kavagi and Brian Onyango analyse the Persons with Disabilities Act, 2025, legislation that introduces far-reaching protections across education, employment, accessibility, and civic participation.

Our focus then shifts to data governance. Pamella Ager and Natalie Obago deliver a timely review of the High Court's Worldcoin decision, while John Mbaluto, FCI Arb and Natalie Obago provide practical guidance on compliant direct marketing practices under the Data Protection Act (Cap. 411C).

At the regional level, our guest authors Crispin Mwebesa and Monalisa Mushobozi provide a thought-provoking examination of the contradictions between the East African Community established Customs Union and the AfCFTA's broader liberalisation framework.

I extend my gratitude to all our authors for their exceptional insights, and to you, our readers, for your continued engagement.

Anne Kadima
Editor

Founding Partner's Note

As we move further into the new year, the first quarter offers a meaningful opportunity to pause, settle into the rhythm of 2026, and reflect on how far we have already come. While January is often marked by fresh goals and renewed enthusiasm, this season invites us to look inward with a calmer and more thoughtful perspective on the resolutions we set.

These early months present the perfect opportunity to embrace the journey ahead, to honour the intentions we have made, celebrate the small but significant wins, and face emerging challenges with courage and determination.

This quarter, let us choose gratitude for the path we are on. Gratitude brings clarity, and with clarity comes the focus, resilience, and renewed purpose we need to move confidently through the months ahead.

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Oraro & Company Advocates

"The law firm has a very long and solid history and is composed of very experienced lawyers. They are very clear as to what needs to be done to achieve results which are acceptable to both parties".

CHAMBERS GLOBAL, 2026



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SEEN AND PROTECTED:

A BUSINESS OWNER'S GUIDE TO SELECTING A SUITABLE TRADEMARK

Introduction

Running a business in Kenya today involves more than meeting sales' targets or offering great products. With competition increasing across every sector, building a distinct identity is more important than ever before. A trademark plays a crucial role in defining a business' identity and building its brand. It tells your customers who you are and what you stand for, even before they walk through your door or click on your website.

A strong trademark protects more than a name or a logo. It safeguards the trust and goodwill you have built with your customers. It also helps you grow into new markets, attract investment, and stand out in a crowded field.

Unfortunately, many business owners overlook the numerous benefits offered by pre-emptive trademark protection and only appreciate trademark protection after problems arise. They may choose names that are difficult to defend or, worse, already belong to someone else and are therefore not available for registration.

Understanding what makes a trademark strong and enforceable can help you make better choices early and avoid a painful, costly and taxing rebranding effort later.

Understanding Distinctiveness and Why It Matters

At the heart of a strong trademark lies one essential quality: distinctiveness. Trademark law in Kenya, like in many other jurisdictions, protects marks that set your brand apart from others. Distinctive marks are easier to register and much easier to defend.

The High Court, in the case of *Sony Holdings Limited v Sony Corporation [2018] eKLR*, held that the respondent had failed to prove that "SONY" was a well-known trademark in Kenya. Upholding the Registrar's decision, the Court stressed that perception cannot be relied upon without evidence, affirming the principle that he who alleges must prove. Global reputation must be demonstrated with evidence of local market evidence.

There are five (5) general categories of distinctiveness, each with different legal and commercial implications.

The strongest marks fall under the fanciful category. These are invented words that serve no purpose other than to identify your brand. Examples such as Kodak or Xerox have no meaning outside their trademark context. Because they are entirely original, fanciful marks enjoy the highest level of protection.

Next are arbitrary marks. These are real words that have no connection to the products or services they represent. For example, using the word "Safari" for a web browser or "Apple" for electronics adds uniqueness by placing familiar terms in unrelated categories. These marks are also highly protectable.

Suggestive marks sit somewhere in the middle. They hint at what a product or service does, without describing it directly. Netflix, for instance, suggests entertainment content delivered online but does not explain it in literal terms. Suggestive marks often pass the registrability test without too much difficulty and enjoy a fair de-

gree of protection.

Descriptive marks fall into a weaker category. They explain what the product or service does. Think of a grocery shop called “*Fresh Groceries*”, or a food business named “*Healthy Snacks*”. These marks usually face hurdles during registration unless the applicant proves that the public now associates the term specifically with their business. That kind of recognition takes time and consistent branding.

Finally, generic terms do not receive protection at all. Words such as “*bread*” for a bakery or “*shoes*” for a footwear store are too common to belong to any one business. Using generic terms as trademarks is not only risky but also wasteful.

Choosing a Trademark That Works for the Long Term

When choosing a trademark, aim to strike a balance between creativity, clarity, and legal strength. The process should be deliberate. You are not just naming a product or service. You are defining how your audience will remember you and how the law will safeguard you.

Start by focusing on marks that fall under the fanciful, arbitrary, or suggestive categories. These offer the strongest foundation for brand protection. Avoid marks that simply describe what you do. Although they may seem appealing from a marketing standpoint, they rarely hold up under legal scrutiny.

Before settling on a name, carry out a proper search. Check the trademark register at the Kenya Industrial Property Institute (KIPI), which is the body tasked with administering and implementing intellectual property rights in Kenya. Look through domain name registries, social media handles, and existing business name listings. This helps prevent conflicts and reduces the risk of investing in a name that is already taken.

A simple, brief, preliminary search can uncover potential pitfalls that may not be immediately obvious when considering the mark. For instance, the search may uncover prior common-law use of the mark or unregistered marks with established goodwill. This seemingly small investment in a preliminary search could save you years of brand confusion, litigation and forced rebranding.

Think also about the future of your business. Avoid names that tie you too closely to your initial product or service. For example, a name like Nairobi Car Hire may limit your options if you decide to branch into logistics, courier services, or real estate. Broader or more abstract names allow room for expansion.

Lastly, be mindful of Kenya’s legal and cultural landscape. Section 12 of the Trade Marks Act prohibits the registration of marks that are offensive, misleading, or culturally inappropriate. Kenya’s diversity means that something acceptable in one context may raise objections in another. Take the time to test your mark across different communities or customer groups.

The Value of a Well-Chosen Trademark

The fortitude of a trademark is considered not only by its conceptual distinctiveness, but also by how the mark performs under judicial analysis on the possibility of occurrence of consumer confusion in the market. A multitude of jurisprudence, both internationally and locally, illustrate the practical implications of choosing and registering a strong versus a weak mark.

From a common law perspective, the United Kingdom case of *Morning Star Cooperative Society v. Express Newspapers Ltd.* [1979] FSR 113 (the **Morning Star Case**), considered whether an applicant socialist newspaper registered as a proprietor of the registered mark “*Morning Star*” could successfully object to the use of the same name by a commercial tabloid. The Court ultimately rejected

From an enforcement perspective, distinct trademarks are easier to defend. If a competitor tries to copy a unique mark, the legal path to stopping them is clearer. Generic or descriptive marks, on the other hand, leave you exposed. Even if a rival creates confusion, it may be difficult to assert your right to the mark if the mark is not distinctive.

the claim, finding, inter alia, that the target audience for the publications were so fundamentally different that no confusion was likely to arise.

The Morning Star Case highlights that similarity of marks alone is insufficient to establish the risk of confusion in the marketplace. The Court in the Morning Star Case determined that likelihood of confusion must be evaluated in light of the goods or services offered and the target market. It is therefore imperative to note that even if a mark seems unique, its enforceability is tested against real-world perceptions and associations with the mark.

In contrast to the foregoing decision, the Court in the case of *Strategic Industries Limited v. Strategic Industries (K) Ltd.* [2020] eKLR found that the use of a nearly identical name by the Defendant was likely to mislead the public and dilute the value of the Claimant’s brand. In reaching their determination, the Court emphasised the importance of the “*first-to-register*” principles and highlighted the commercial prejudice that would be borne by proprietors of registered trademarks if business owners failed to conduct the relevant searches of the Trademarks Register ahead of pursuing the registration of their trademark.

The foregoing decisions also serve to underscore the message that a strong, registered trademark is not merely a badge of origin, but a critical defence against commercial impersonation.

A strong trademark offers benefits that go beyond registration. It builds confidence in your brand and adds value to your business. Investors and partners often view registered trademarks as indicators of professionalism and long-term thinking.

From an enforcement perspective, distinct trademarks are easier to defend. If a competitor tries to copy a unique mark, the legal path to stopping them is clearer. Generic or descriptive marks, on the other hand, leave you exposed. Even if a rival creates confusion, it may be difficult to assert your right to the mark if the mark is not distinctive.

Trademarks also influence how customers perceive your business. A strong, consistent brand identity fosters trust and encourages loyalty. Customers are more likely to return to a brand that appears stable and well-established. A good trademark signals that your business is serious, credible, and here for the long haul.

Final Thoughts

Selecting a trademark may not feel like a high-stakes decision at first. But in reality, it shapes how your business will grow, protect its interests, and position itself in the market. The right mark creates a foundation for future success. The wrong one could lead to costly disputes and missed opportunities in an increasingly competitive world.

Take the time to learn what works. Choose marks that offer both creative appeal and legal strength. Think long term, and whenever possible, seek professional guidance.

Your trademark is not just a name. It is your business’ promise, brand, identity, and most valuable intangible asset. Make it count.



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TURNING THE PAGE:

A NEW APPROACH TO RESOLVING PAYMENT DISPUTES IN CONSTRUCTION CONTRACTS

Introduction

As a cornerstone of Kenya's economy, the construction industry is characterised by complex and multi-phased contractual processes involving numerous sectoral players and significant sums of money. Inevitably, disputes in the construction industry arise and perennial issues such as payment disputes, cash flow bottlenecks, project delays and protracted litigation plague the industry. Persistent inefficiencies in payment systems underscore the urgent need for dispute resolution mechanisms that are fast, cost-effective, and readily enforceable.

Article 159(2)(c) of the Constitution of Kenya, 2010, provides for the use of Alternative Dispute Resolution (**ADR**) mechanisms, such as reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms.

Although adjudication is not expressly mentioned as an ADR mechanism, it is still contemplated under Article 159(2)(c) of the Constitution. Therefore, it can be argued that Kenyan courts are called upon to promote all ADR mechanisms, including adjudication.

The Adjudication Rules of the Chartered Institute of Arbitrators (Kenya Branch) define adjudication as “a dispute resolution procedure based on the decision-making power of an impartial, third party neutral natural person known as an adjudicator to reach a fair, rapid and inexpensive decision upon a dispute arising under a construction contract.”

The Construction Payments Adjudication Bill (**the Bill**), introduced through Sessional Paper No. 4 of 2024, on the National Alternative Dispute Resolution Policy, seeks to officially recognise adjudication as a dispute resolution mechanism in Kenya, for

payment disputes in construction projects. The Bill was recently subjected to public participation, as required under Article 10 of the Constitution.

This article examines the resolution of payment disputes both historically and prospectively, with regard to the Bill.

A Walk Down Memory Lane

Payment disputes in construction projects often involve clients, contractors, subcontractors, manufacturers, and/or suppliers, among other stakeholders. Such disputes typically arise from delays in works, time extensions, cash flow shortages, cost overruns, tendering and quality of works, among others. If left unresolved, these disputes can derail the progress of the project and strain the relationship between the parties.

Such disputes have for a long time been subjected to arbitration, as the main ADR method in the construction contracts. This has been undertaken pursuant to the provisions of the Arbitration Act (Cap. 49) Laws of Kenya.

In rare instances where parties have sought to undertake adjudication, they have relied on standard form contracts, such as the International Federation of Consulting Engineers (**FIDIC**), with the necessary amendments to suit their individual needs.

Such clauses have included the use of Dispute Boards in construction projects as envisaged under FIDIC. Specifically, in its 2017 Red Book, FIDIC allows the use of Dispute Avoidance and Adjudication Boards (**DAAB**) in managing and avoiding disputes arising from construction projects. In this regard, parties have adopted ad hoc dispute adjudication boards or appointed the boards within timelines stipulated in the contract.

Ad hoc boards are set up at the onset of the project and remain in place throughout its duration, to assist the parties in resolving disputes arising in the course of the project. The DAABs further assist parties to avoid disputes by facilitating and improving communication, thereby encouraging resolution of contentious issues before their escalation into full-blown disputes (**conflict avoidance**). While DAAB decisions are binding, they remain subject to review in arbitration if challenged.

A New Legal Dispensation

The Bill seeks to promote timely payments and equitable remedies for disputes in Kenya's construction sector by strengthening the adjudication practice with greater efficiency and accountability. It introduces statutory adjudication as a fast, cost-effective mechanism for resolving payment disputes. Statutory adjudication enables cash flow continuity in ongoing projects while preserving the parties' rights to later pursue arbitration or litigation. If implemented effectively, the Bill has the potential to transform dispute resolution in the construction industry.

The following are key highlights of the Bill:

a) The Bill applies to all construction contracts that either expressly provide for adjudication or where the parties, with mutual consent, submit disputes for adjudication. Conversely, the Bill shall not apply where the construction contracts prescribe a different procedure for the resolution of payment disputes or does provide for adjudication but under a different framework.

b) Construction contracts must contain an agreement in writing to adjudicate payment disputes. The agreement shall be deemed to be in writing if the parties sign a contract to this effect or have an exchange of correspondence between themselves in relation to the works being undertaken and adjudication as the payment disputes resolution mechanism.

c) Once enacted, the Bill shall apply to construction contracts regardless of whether the works are undertaken wholly or partly within Kenya, thereby extending its scope to cross-border projects.

d) The Bill covers a wide range of construction works, including building and engineering works, procurement, surveying, design, landscaping, and material supply, thereby ensuring comprehensive inclusion of all stakeholders.

e) The adjudication process involves:

- Issuance of a payment claim by the contractor.
- Issuance of either a payment schedule or a schedule to pay less by the employer (this schedule must contain reasons and alternative amounts if contesting the claims).
- Issuance of a notice of reference to adjudication by an aggrieved party.
- Filing of a reference to the adjudication body, which then appoints the adjudicator. The adjudicators will be appointed from a panel maintained by a designated adjudication authority. Provisions on their appointment, independence, remuneration and code of conduct aim to uphold professionalism and impartiality. The National Dispute Resolution Council has the mandate of accrediting adjudication bodies, issuing codes of practice, and regulating the sectoral standards. Parties will be jointly and severally liable for adjudicator fees and expenses. The adjudicators will be entitled to lien over the decision until payment is made.
- Adjudicators must render decisions within fourteen (14) days after the date when the adjudicator receives the response to the reference or the date when a responding party should have submitted a response to the reference (extendable with consent). The adjudicators can use flexible procedures, including calling conferences, written submissions, and site visits. The process excludes strict application of the Evidence Act, allow-

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ing informality and speed.

- Decisions of adjudicators are binding and enforceable on an interim basis unless set aside in an arbitral or litigation process. The decision must outline the amount payable, interest, and due date and be accompanied by an adjudication certificate.
- Adjudication decisions/certificates can be adopted in the High Court and enforced as judgments for debts. The Application to set aside the decision must be filed within seven (7) days on the following limited grounds: statutory non-compliance, fraud/corruption, or excess of jurisdiction. However, the Applicant must deposit the adjudicated sum as security for costs.
- The binding nature of the decision ensures immediate enforcement (if not challenged), safeguarding project cash flow and maintaining project progress. Adjudicated amounts must be paid within seven (7) days from the date of the certificate, or as may be prescribed by the adjudicators.

Conclusion

For Kenya's construction sector to achieve timely and effective project delivery, it is essential to adopt flexible and fast-track dispute resolution mechanisms such as adjudication. As extensively discussed above, this mechanism makes it both costly and risky for the parties to stall payments, thereby curbing project delays and avoiding potential claims for liquidated damages.

If enacted, implementation of the statute will require widespread training and accreditation of adjudicators, as well as sensitisation of industry stakeholders. Contracts previously negotiated that lack adjudication clauses, may require transitioning through amendments, to facilitate the use of this mechanism. This is owing to the fact that adjudication under the Bill is not a matter of right but must be agreed upon in writing. In any event, jurisdictional issues as preliminary points when challenging an adjudication decision, may arise where the dispute is not covered by an adjudication agreement.

By contrast, in the United Kingdom, parties to a construction contract have an automatic right to adjudicate at any time, even if the contract does not expressly include the mechanism. This right to adjudicate cannot be taken away contractually.

Nevertheless, the effectiveness of the adjudication process will demand a multi-sectoral approach. Specifically, swift enforcement of the adjudication decision by the High Court will be critical, requiring a strong buy-in from the judiciary.

Therefore, the proposed Bill is a step in the right direction, as it provides a governing legal framework that secures statutory access to adjudication, while defining its procedural and substantive elements. Such legislation will strengthen the viability of adjudication as an efficient tool for safeguarding cash flow, preserving business relationships, and ensuring project completion within agreed timelines.



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FUTURE SCOPE:

STRATEGIES FOR SUSTAINABILITY AND CLIMATE INVESTMENT

Introduction

Climate finance lies at the intersection of two critical global challenges – climate change and sustainable development. While the urgency for climate action continues to grow, the financial systems meant to support this transition are evolving but remain far from adequate.

The Nationally Determined Contributions (**NDCs**) under the Paris Agreement, climate risk assessments and national development plans, have increasingly become a priority to States and entities. As such, they are now driving sustainable and green infrastructure finance to meet national climate objectives. That notwithstanding, this approach faces its fair share of challenges.

This gap highlights not only inadequate capital allocation to climate finance, but also the institutional and structural barriers such as regulatory shortcomings, limited project readiness, insufficient data and the general perception of high risk by investors. For private investors and lenders, recognising these constraints is imperative to mitigating risks and exploring innovative financing structures that can unlock value in green projects.

For instance, blended finance, which combines public, philanthropic, or concessional capital with private investment, has shown promise in reducing risk and attracting commercial investors. Instruments such as green bonds, sustainability-linked loans, and carbon credit mechanisms are increasingly being deployed to mobilise capital toward climate-related initiatives.

Evolving Landscape of Green Finance

Green finance has advanced significantly in recent years, moving from a fringe interest to a core element of global financial markets. Institutional investors are increasingly integrating environmental,

social, and governance (**ESG**) factors into their investment decisions, to meet the sustainability and regulatory quota.

Key instruments, including green bonds, which finance projects with clear environmental benefits; sustainability-linked loans, where interest rates are tied to achieving sustainability performance targets; blue finance, which targets marine conservation and sustainable use of ocean resources; and resilience bonds, designed to fund climate adaptation and disaster risk reduction, have introduced new facets to green finance.

Technological innovations such as blockchain and fintech platforms are also beginning to revolutionise the accessibility, traceability and transparency of green finance, especially for small-scale or community-led projects.

Additionally, taxonomies and verification frameworks have increasingly become standard practice, with frameworks such as the EU Green Taxonomy, the International Capital Market Association (**ICMA**) principles, and, closer home, the Kenya Green Finance Taxonomy are growing investor confidence and mainstreaming green finance.

Policy Frameworks and the Role of Climate Finance

Various factors impact the success of a climate finance project. However, one of the key hallmarks of an effective climate finance structure rests on the foundation of clear and comprehensive legal, regulatory and policy frameworks. Kenya has established fundamental regulatory frameworks and policies to support climate project finance. These include:

- i. **The Constitution of Kenya, 2010**, which guarantees every citizen the right to a clean and healthy environment, the foundation

for environmental sustainability and climate action. Furthermore, it enshrines key principles such as transparency, accountability, prudent use and equitable distribution of resources, which are essential for participatory resource management, financing of green projects and sustainable infrastructure;

ii. **The Public Private Partnerships Act, (Cap. 430), Laws of Kenya**, which provides the framework for the financing, construction, development, operation, and maintenance of infrastructure or development projects where projects require the structured collaboration of government and private investors. It also establishes a structured process for risk allocation and financing mechanisms, all of which are crucial for infrastructure and green projects;

iii. **The Movable Property Security Rights Act, (Cap. 499A), Laws of Kenya (the MPSRA)**, which establishes the legal framework for securing financing through movable assets, offering an alternative to immovable property-backed financing. The MPSRA also prescribes a comprehensive mechanism for the enforcement of security rights in favour of a creditor, thereby strengthening access to finance; and

iv. **The Insolvency Act, (Cap. 53), Laws of Kenya**, which outlines processes for efficient and equitable administration of entities or natural persons in financial distress, aiming to secure better outcomes for lenders and investors. In the context of climate finance, investors and stakeholders in sustainable finance ventures, are more confident about their long-term commitments, noting that risks and losses can be mitigated through insolvency procedures.

Collectively, these statutes create a solid foundation for secure and transparent project financing in Kenya.

Regional and Continental Trends in Climate Finance

Regionally, the African Continental Free Trade Area (**AfCFTA**), together with Africa's broader climate objectives, is promoting cross-border climate investment and facilitating new opportunities. However, this development has also introduced multi-jurisdictional regulatory complexities that require particular expertise to navigate disparate national policies effectively.

Within sub-Saharan Africa, and particularly in Kenya, climate finance is evolving in response to localised needs and emerging regional frameworks. Kenya has made significant strides, with strong legal and political commitment embodied in legislation such as the Climate Change Act, Cap. 387A, Laws of Kenya, which has provided an overarching statutory framework for the development, regulation and implementation of mechanisms geared towards enhancing the country's climate resilience and carbon market development.

To complement this, Kenya also developed the Kenya National Adaptation Plan (**2015-2030**) and the broader strategic frameworks aligned with the Vision 2030 blueprint. Collectively, these frameworks have embedded climate change mitigation and adaptation within the national development agenda, fostering an enabling environment to mobilise climate finance resources targeting Kenya's unique vulnerabilities and enhancing climate resilience for sustainable economic growth.

Further, the launch of the Kenya Green Finance Taxonomy (**KGFT**) and climate risk disclosure frameworks marks a major milestone in Kenya's green finance architecture. The KGFT has provided a comprehensive classification system designed to standardise and define the financial activities in alignment with Kenya's environmental and development objectives. It classifies environmentally sustainable economic activities to guide investment decisions, combat greenwashing by ensuring transparency and accountability, and align the financial flows with Kenya's NDCs. In doing so, it boosts investor

confidence and attracts both domestic and international capital to-

In many developing countries, including Kenya, challenges such as underdeveloped capital markets and limited institutional capacity can hinder the flow of private capital. However, through the ongoing alignment of legislation and policy, Kenya is creating an environment that supports both conventional and green project finance, which will unlock funding streams that advance sustainable priorities.

wards the achievement of a climate-resilient economy.

The KGFT has exemplified the efforts to standardise definitions and reporting, thereby enhancing transparency and boosting investor confidence; trends we believe, shall influence risk profiles and structuring considerations in future green deals.

Strategic Imperatives to Navigate Climate Finance

Stakeholders engaged in climate finance transactions must adopt a holistic approach to mitigate the risks commonly associated with such investments. First, rigorous due diligence must be undertaken at the outset to identify potential regulatory, environmental and technical risks. These may include issues such as uncertain land tenure, weak institutional governance, or technological feasibility.

Contracts and supporting documentation must be precisely structured to account for the allocation of risk and liability among stakeholders, especially in cases of project failure, cost overruns, or force majeure events. Moreover, the covenants, obligations of the respective parties, and remedies available in the event of default should be clearly highlighted. The incorporation of binding ESG performance covenants relating to the project should also be carefully considered and critically outlined.

Parties seeking to engage local or international actors in financing and implementation of green projects should effectively negotiate and evaluate co-investment strategies, including guarantees, to mitigate risk perception and enhance project bankability.

Overall, embedding integrated strategic measures and regulatory parameters into green project financing will safeguard investor confidence, unlock climate capital, and create long-term value for communities and stakeholders.

Conclusion

The challenge of climate finance is multidimensional, involving regulatory gaps, capital markets, policy design, institutional capacity, and social equity concerns. Yet, in the midst of these challenges lies a profound opportunity to reimagine development in a way that is sustainable, inclusive, and resilient.

In many developing countries, including Kenya, challenges such as underdeveloped capital markets and limited institutional capacity can hinder the flow of private capital. However, through the ongoing alignment of legislation and policy, Kenya is creating an environment that supports both conventional and green project finance, which will unlock funding streams that advance sustainable priorities.

Addressing these challenges requires coherence across institutions, innovation in financial structures, and trust among stakeholders. A robust ecosystem – comprising national governments, development finance institutions (**DFIs**), financial institutions, public benefit organisations, and academia – is essential to designing, funding, and implementing impactful climate projects.

With the right strategies, tools, and partnerships in place, climate finance can become a powerful engine for transformation – driving the world not only toward net-zero emissions but also toward a future that is just, prosperous, and resilient for all.



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JOIN THE TABLE:

ADVANCING RIGHTS AND INCLUSION OF PWDS IN KENYA

Introduction

Kenya has made significant progress in protecting and promoting the rights of Persons with Disabilities (**PWDs**) by enacting the Persons with Disabilities Act No. 4 of 2025 (**the New Act**), which replaces the Persons with Disabilities Act, 2003 (**the Repealed Act**). Although the Repealed Act was viewed as a milestone at the time, the Act failed to ensure complete inclusion for PWDs, effective enforcement and conformity with the Constitution of Kenya, 2010 (**the Constitution**), as well as relevant International Human Rights standards like the United Nations Convention on the Rights of Persons with Disabilities (**UNCRPD**).

Therefore, the New Act represents a shift from a *welfare-driven, charity-focused model* to a *rights-based* approach that empowers PWDs and emphasises dignity, equality and participation.

Background and Justification for the New Act

The Repealed Act was Kenya's initial attempt at establishing a legal framework for PWDs' rights. The Repealed Act was based, however, on the medical and charity models of disability, in which disability was addressed as an individual's tragedy or a medical issue that needed to be cured, and PWDs as passive recipients of state assistance.

Such matters as effective legal remedies and enforcement were lacking under the Repealed Act. Discrimination in areas like education, employment and public services went unpunished, allowing institutions to disregard inclusion without consequences. For instance, employers were merely encouraged, not obligated, to hire PWDs. Public facilities remained inaccessible, and segregated schools were favoured over inclusive education systems, which perpetuated marginalisation.

Symbolic compliance in relation to matters touching on PWDs was common: laws existed, yet they were not enforced or put into action. Public buildings sometimes erected ramps or signals but

did not go further to make fundamental alterations, like offering tactile routes, lifts, or accessible lavatories. Civic participation was also limited, as many PWDs could not vote independently due to a lack of accessible voting materials. These shortcomings, together with the civil society and PWDs' lobbying efforts, gave the impetus for a new, enforceable, and participatory piece of law.

Key Reforms in the New Act

Introduced in 2023 and enacted in May 2025, the New Act aligns with Kenya's constitutional values and international commitments.

At its core, the New Act promotes a rights-based approach to disability. It guarantees legal capacity, prohibits discrimination and demands reasonable accommodation across areas such as education, employment, healthcare, public services and civic participation. Additionally, the New Act establishes penalties and accountability measures for enforcement.

In education, the law mandates inclusive learning instead of segregated special schools. Children with disabilities must be admitted to mainstream schools with suitable support systems, like individual learning plans, trained teachers and assistive devices. This inclusion helps children grow up in a diverse environment and prepares them for full participation in society in the future.

Employers are legally required to provide reasonable accommodation and take proactive steps to ensure equal opportunities for PWDs. Additionally, vocational training and financial grants are available to support economic empowerment.

The Act requires all public buildings, transport systems, and digital platforms to comply with accessibility standards. Institutions that do not comply face penalties, while the National Council for Persons with Disabilities is authorised to conduct audits and issue sanctions.

In a notable enhancement, Section 22 of the New Act specifically prohibits an employee's dismissal or demotion for having or acquiring a disability. Employers must thus implement suitable accommodation for employees who acquire disability during their tenure, which may include considering redeployment to an alternative role that suits their needs. This provision should be read alongside the provisions of Sections 41 and 45 of the Employment Act, (Cap. 226) of the Laws of Kenya (**the Employment Act**), which set out the requirements for procedural and substantive fairness in all employment terminations.

While the Employment Act allows termination on medical grounds if due process is followed and the employee is proven medically unfit, the New Act introduces an additional requirement: that employers must consider reasonable accommodation and possible redeployment when determining substantive fairness. It places a greater burden on employers to demonstrate that all possible accommodations were considered and exhausted before termination can be justified on grounds of disability. This marks a significant shift from the previous Act, as employers must now proactively work to retain an employee with disabilities rather than simply proving their medical incapacity. In aligning with these new requirements, employers can foster a more inclusive and supportive workplace for all.

Further, the New Act focuses on the Medical, Social and Human Rights models. **The Medical Model** within the New Act manifests itself in the provisions relating to health and rehabilitation. The New Act recognises that some individuals with disabilities need specialised medical care and support. Therefore, the New Act mandates access to healthcare services, assistive devices and rehabilitation programs, acknowledging that these are crucial for enhancing a person's functional capacity. While not the only focus, this aspect of the New Act ensures the physical and mental well-being of PWDs remains a central consideration, providing a foundation for their independence and quality of life.

On the other hand, the **Social Model** in the New Act moves focus from an individual's impairment to the societal barriers that contribute to disability. The Act imposes concrete legal obligations to eliminate these barriers. For instance, Section 30 of the New Act requires all public infrastructure, including buildings and transportation, to be accessible to all persons, including PWDs. It also requires inclusive education systems that provide reasonable accommodation for PWDs.

Finally, the **Human Rights Model** in the New Act views PWDs as rights-holders with inherent human dignity, equality and autonomy, as opposed to objects of charity or medical treatment. The New Act provides legal remedies and penalties for violations of PWDs' rights. The New Act also safeguards PWDs' rights to independent living and legal capacity.

The New Act, anchoring on the three (3) models already discussed, defines a broad range of rights that impact various aspects of life for PWDs. Some of these rights include the Right to Equality and Non-Discrimination; Right to Inclusive Education; Right to Health; Right to Work and Employment; Right to Family Life and Privacy; Protection from Abuse and Exploitation (abuse is criminalized and institutions must implement safeguarding policies); Right to Accessibility and Right to Participate in Public and Political Life (PWDs have the right to vote, run for office and take part in public decision-making).

Special Rights for Children with Disabilities

The New Act includes vital protections and services for children with disabilities summarised as follows:

- **Early Identification and Intervention:** Requires early screening and diagnosis to ensure timely support.
- **Family Support Services:** Offers counselling, respite care and

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training for parents.

- **Inclusive Play and Recreation:** Public play areas and recreation facilities must accommodate children with disabilities.
- **Protection from Institutionalisation:** Children should grow up in family settings unless institutional care is absolutely necessary.
- **Participation in Decision-making:** Children with disabilities have the right to be heard on matters affecting their lives.

Potential Challenges to Parents, Caregivers and Society in General

A successful implementation of the New Act will require overcoming several key challenges, which include:

- **Limited Awareness:** Many parents and caregivers do not know about the rights and services available under the New Act, particularly in rural areas.
- **Bureaucratic Hurdles:** Accessing services may involve complex paperwork and unclear procedures, which can dissuade families from seeking help.
- **Infrastructure Gaps:** Schools, health facilities and transport systems may not yet be fully accessible or properly resourced.
- **Cultural Stigma:** Deep-rooted social attitudes may continue to marginalise PWDs and discourage families from seeking assistance.
- **Weak Enforcement:** Despite strong provisions, there are concerns about the capacity of enforcement bodies.
- **Confusion during Transition:** The shift from the Repealed Act to the New Act may create uncertainty for institutions and caregivers.

Recommendations for Overcoming Challenges

To assist parents, caregivers, and the wider society to address these challenges, we consider the following key steps essential for the effective and comprehensive implementation of the New Act:

- **Awareness Campaigns:** Use mass media and public forums to educate the general public on the New Act.
- **Investment in Inclusive Infrastructure:** The Government should allocate a budget for accessible schools, hospitals and transport.
- **Combating stigma:** Promote positive portrayal of PWDs in the media and incorporate disability rights in school curricula.
- **Strengthen Enforcement:** Empower the National Council for Persons with Disabilities to audit, monitor and penalise non-compliance.
- **Guide the Transition:** Provide training and clear instructions to caregivers, service providers, and institutions.

Conclusion

The New Act signifies a major step in Kenya's dedication to the rights and dignity of PWDs. In shifting from a welfare model to a strong, enforceable and rights-based framework, the New Act creates groundwork for a more inclusive society.

With respect to parents and caregivers of PWDs, the New Act brings with it new hope and tools for securing a better future for their children. The success of the New Act is, however, anchored on mutual responsibility, creating awareness, government action and ongoing advocacy by and on behalf of PWDs.



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PRIVACY COMPLIANCE OR BREACH?:

HIGH COURT WEIGHS IN ON THE IMPORTANCE OF PROPER CONSENT MECHANISMS AND DATA PROTECTION IMPACT ASSESSMENTS

Introduction

The Data Protection Act, (Cap. 411C), Laws of Kenya (**the Data Protection Act**), under Section 41, requires data controllers and processors (**data handlers**) to implement appropriate organisational and technical safeguards to protect the right to privacy. This obligation is known as data protection by design and by default. “By design” connotes that data protection principles should be considered from the outset when developing any data processing activity, while “by default” means the highest privacy standards apply automatically to all such activities.

Data protection by design and by default may involve conducting a Data Protection Impact Assessment (**DPIA**) to identify and mitigate risks associated with a processing activity. It may also entail assessing whether appropriate measures exist before transferring personal data to another jurisdiction, or whether consent obtained from data subjects meets the threshold under the Data Protection Act. Overall, data protection by design and by default ensures that data handlers achieve their objectives in the least privacy-intrusive way possible.

Enter the now infamous Worldcoin Project fiasco, which propelled concerns about data protection in Kenya into a frenzy. The Applicants in *Republic v. Tools for Humanity Corporation (US) & 8 others; Katiba Institute & 4 others (Ex parte Applicants); Data Pri-*

vacy & Governance Society of Kenya (Interested Party) [2025] eKLR applied for judicial review Orders to prohibit the data handlers therein from processing biometric personal data collected from Kenyan citizens without conducting a DPIA or from obtaining consent through financial inducement.

In its Judgment, the High Court considered the place of DPIAs in the data processing activities and the effect of offering financial incentives to obtain consent from data subjects.

In seeking to persuade the Court, the Applicants argued, first, that the 1st – 5th Respondents had processed biometric personal data without conducting an adequate DPIA. Second, they contended that although the said Respondents had obtained consent from data subjects, such consent was induced through financial incentives in the form of cryptocurrency tokens. Finally, they argued that the cross-border data transfers by 1st – 5th Respondents were contrary to the procedures prescribed under the Data Protection Act and its subsidiary legislation.

Implications of the Judgment to Data Handlers

i. When should a data handler conduct a DPIA?

The Court was tasked with determining whether the 1st – 5th Respondents were required to conduct a DPIA under Section 31 of

the Data Protection Act, following their decision to process the biometric details of data subjects, that is, their iris and facial scans, which constitute sensitive personal data requiring a higher degree of protection due to their very nature. The Court found that the 1st – 5th Respondents had not carried out a DPIA prior to processing the biometric personal data, in contravention of the Data Protection Act. Consequently, the Court, inter alia, prohibited any further processing of biometric personal data collected in Kenya for the Worldcoin Project without first undertaking a DPIA.

It is noteworthy that the Office of the Data Protection Commissioner (ODPC), in its Guidance Note on DPIAs (**the DPIA Guidance Note**), describes a DPIA as an accountability tool that enables data handlers to identify, assess and, mitigate risks to the rights and freedoms of data subjects during data processing activities. This begs the question, what constitutes an adequate DPIA, and when should a data handler carry out one?

Section 31 of the Data Protection Act and regulation 49 of the Data Protection (General) Regulations provide a checklist that data handlers should consider when assessing whether to carry out a DPIA. For any data processing exercise that is likely to pose high risk to the rights and freedoms of data subjects, a data handler is required to conduct a DPIA and submit a DPIA report sixty (60) days before processing personal data.

Additionally, regulation 49 of the Data Protection (General) Regulations exhaustively enumerates high-risk instances in which a data handler is required to conduct a DPIA. Some of these high-risk instances include where – a) personal data collected on a large-scale is used for a purpose different from the original purpose; b) biometric or genetic data is processed; and c) there is large scale processing of personal data.

DPIAs, therefore, enable data handlers to assess whether a data processing activity poses high-level risks to data subjects and to determine the safeguards necessary to mitigate such risks.

In delving deeper into what constitutes an adequate DPIA, we refer to the DPIA Guidance Note for further direction. The DPIA Guidance Note provides that, for a DPIA to meet the minimum requirements of the Data Protection Act and its subsidiary legislation, it must address the amount of personal data processed; the extent of processing; the storage and accessibility of the personal data; the state of technological development available for processing; the specific risks attendant to the processing of personal data; a systematic description of the intended processing operations; the purpose of processing; the necessity and proportionality of the processing operations; the risks to the rights and freedoms of data subjects; the measures envisaged to address the identified risks; and the safeguards implemented to ensure the protection of personal data.

ii. Can a data handler incentivise a data subject to give their consent?

The Court determined that offering cryptocurrency tokens in exchange for biometric personal data cast an aspersion on whether the consent obtained from the data subjects was valid. The Court observed that, *“The use of cryptocurrency tokens to gather personal data is, in my humble view, an attempt to bypass the spirit of data protection laws by using incentives to sidestep the true essence of informed consent by luring desperate and poor Kenyans with cryptocurrency tokens.”*

Regarded as the cornerstone of data protection, consent must be express, unequivocal, freely given, specific, and an informed indication of the data subject’s wishes. It should be expressed through a statement or a clear affirmative action, signifying agreement to the processing of personal data relating to that data subject.

In examining the Worldcoin Project case, we are of the considered

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view that the consent sought by the 1st – 5th Respondents was invalid, not only for the reason cited by the Court, that is, that the data subjects were not informed of the data processing activity, but also because the data subjects were not given a free choice to agree to the processing. In its Guidance Note on Consent, the ODPC stipulates that, for a data handler to satisfy the element of “free” choice, a data subject must have real choice and control over their personal data, with the liberty to withdraw consent at any time. The Guidance Note on Consent provides that a data subject must not feel compelled to give consent or fear negative consequences should they exercise their right of withdrawal. In the Worldcoin Project case, it is arguable that, since the data subjects were offered a financial incentive of approximately KES 7,000 (USD 50) in cryptocurrency for their personal data, they may have felt constrained from withdrawing their consent for fear of being asked to refund the cryptocurrency.

iii. What must a data handler comply with prior to transferring personal data to another jurisdiction?

This decision reinforces the need for data handlers to ensure that cross-border transfers of personal data comply with the provisions of the Data Protection Act and its subsidiary legislations. The Court determined that the 1st – 5th Respondents transferred personal data outside Kenya without adhering to the requirements under Section 48 of the Data Protection Act and Part VII of the Data Protection (General) Regulations, which outline the conditions under which personal data may be transferred outside Kenya.

Before effecting a cross-border transfer of personal data, the transfer must be based on –

- **Appropriate safeguards, i.e.**, a binding legal instrument with the recipient or upon an assessment of the transfer exercise.
- **Adequate decision from the ODPC**, which has been afforded wide latitude to determine whether the recipient country has adequate data protection measures.
- **Necessity** – that the cross-border transfer is necessary to achieve the purposes outlined under Section 48 of the Data Protection Act, including the performance of a contract between the data subject and the data handler.
- **Consent** – in the absence of appropriate safeguards adopted by the recipient, an adequacy decision, or necessity, the Data Protection (General) Regulations prescribe that a data subject may give their consent to the transfer upon being duly informed of the risks associated with such a transfer to their personal data.

Conclusion

This Judgment rings true to the growing need to create a privacy-centric culture, one where data protection is by design and by default. While the Judgment underscored key areas of data protection compliance, particularly the importance of carrying out a DPIA where necessary, what amounts to valid consent and the lawful bases for cross-border transfers, it ultimately serves as a clarion call to entities engaged in data processing activities to build with privacy compliance, not breach, in mind.



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SYSTEM REBOOT?:

RECOVERY STRATEGIES OF DISPUTE RESOLUTION UNDER THE JBC & FIDIC CONTRACTS

Introduction

The Agreement and Conditions of Contract for Building Works (**the JBC Contract**) is Kenya's predominant form of contract for private construction projects. It was published by the Joint Building Council in Kenya with the sanction of the Architectural Association of Kenya and the Kenya Association of Building and Civil Engineering Contractors.

Conversely, the International Federation of Consulting Engineers (**FIDIC**) Contracts have been developed as the international standard for the construction industry. They are recognised globally as a suite of standard form contracts for international construction and engineering projects.

Both regimes provide structured dispute resolution mechanisms aimed at ensuring efficiency, fairness, and continuity of project delivery. This article critically examines those mechanisms, contrasts their practical application, and highlights strategic approaches contractors may employ to recover outstanding sums and protect contractual rights.

Administration and Structure

JBC Contracts are administered by the Architect and Quantity Surveyor, who are appointed by the Employer. The contract clearly outlines their roles, powers, and duties. FIDIC Contracts, on the other hand, are administered by the Engineer, who is appointed by the Employer (under the Red and Yellow Books).

Under FIDIC Contracts, the Red Book provides the conditions of

contract for the construction of buildings and engineering works where the detailed design is done by the Employer (or his representative). It is not suitable if most of the works are Contractor-designed. The Yellow Book, on the other hand, lays out the conditions of contract for plant and design build for electrical and mechanical plant and for building and engineering works where the design is done by, or on behalf of, the Contractor.

In contrast, the Silver Book is only suitable for use with experienced Contractors who are familiar with sophisticated risk management techniques. It is thus suitable for the provision on a turnkey basis of a process or power plant, of a factory or similar facility, or of an infrastructure project, or of other development where:

- A high degree of certainty of final price and time is required; and
- the Contractor takes total responsibility for the design and execution of the project with little involvement of the Employer.

Under the usual arrangements for turnkey projects, the Contractor carries out all the Engineering, Procurement and Construction (**EPC**), providing a fully equipped facility, ready for operation (**at the turn of the key**). In terms of administration of the Contract, there is no Engineer under the Silver Book, and the Employer directly administers the Contract. Both FIDIC and JBC Contracts can be amended to meet the tailored needs of the project.

Settlement of Disputes Under JBC

Settlement of disputes under the JBC is regulated under Clause 45 (the notice requirement). Where a dispute arises between the Employer or the Architect on his behalf and the Contractor, either during the progress of Works or after the completion of the Works, such dispute shall be notified in writing by either party with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty (30) days of the notice.

The dispute shall be referred to the arbitration, and the final decision on the appointment of the Arbitrator is to be made by the parties. If parties fail to agree on an Arbitrator, one shall be appointed by the Chair or Vice-Chair of the Architectural Association of Kenya or the Chartered Institute of Arbitrators (**Kenya Branch**). Arbitration proceedings must be preceded by a notice issued within ninety (90) days of the occurrence or discovery of the matter or issue giving rise to the dispute.

Matters that can be referred to arbitration before practical completion include the appointment of a replacement Architect, Quantity Surveyor or Engineer upon the said persons ceasing to act. Other matters can only be referred to arbitration after practical completion/abandonment of works/termination unless the Employer and Contractor agree otherwise in writing.

Arbitration provides a viable alternative to litigation, as an arbitral award is final and binding. Notwithstanding the foregoing, Clause 45.4 compels parties to first attempt to settle the matter amicably before referring it to arbitration. Disputing parties may attempt to resolve issues amicably, either independently or with the aid of third parties. Negotiation involves direct, informal, and flexible dialogue between parties, aimed at reaching a mutually acceptable solution.

Mediation, by contrast, engages a neutral third-party mediator to facilitate communication and guide parties toward a voluntary settlement. While the mediator does not impose a decision, an executed mediation agreement presented to the Court for adoption becomes legally enforceable. Alternative Dispute Resolution (**ADR**) is increasingly favored over litigation for being cost-effective, private, and less adversarial, fostering long-term relationships between parties.

Settlement of Disputes Under FIDIC

Under FIDIC Contracts, the dispute resolution process is substantially the same under the Red, Yellow and Silver Books. The only difference arises from the fact that:

- The Red Book provides for a standing Dispute Adjudication Board (DAB), whereas under the Yellow and Silver Books, it is an ad hoc DAB (on a need basis); and
- There is no Engineer's determination under the Silver Book because this contract is administered by the Employer directly. What we have is the Employer's determinations under Clause 3.5.

Clause 20.4 onwards provides for a multi-tiered dispute resolution process which comprises of:

i. Procedure before the DAB

Members of the DAB must be mutually agreed upon by the parties within twenty eight (28) days from the date the Contract comes into force. This also includes provision for appointing DAB members where parties fail to agree on their initial appointment, replacing DAB members, terminating the appointment of DAB members and remunerating DAB members.

- Either party may refer a dispute to the DAB for its decision, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer (or Employer

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under the Silver Book).

- The notice of dispute must be in writing and provided to the other Party and the Engineer.
- The DAB (acting as experts and not Arbitrators) is required to give notice of its decision to the parties, including reasons supporting the decision, no later than the 56th day after it received such reference.
- Following the DAB decision, if either Party is dissatisfied with the decision, it may give a notice of dissatisfaction (**NOD**) within twenty eight (28) days of its receipt.
- Similarly, if the DAB fails to give a decision within the 56-day period, either Party (on or before the 28th day after the day of receipt of the notice of the decision) may give a NOD. The notice shall set out the matters in dispute and reasons for dissatisfaction.
- The parties may then refer the dispute to amicable settlement and ultimately to arbitration for "final" determination.
- Parties may contractually incorporate expert determination during this period to resolve technical, financial or valuation disputes before escalating to formal arbitration.
- If DAB gives a notice of its decision and no NOD has been given by either Party during the 28-day period, then the DAB's decision shall become final and binding upon the Employer and Contractor.

ii. Enforcing a DAB decision (Clause 20.7)

- Where a party fails to comply with a DAB decision that is final and binding, clause 20.7 expressly allows the other Party to refer this failure directly to arbitration. It does not have to go back to the DAB or through an amicable settlement process.

iii. Amicable Settlement (Clause 20.5)

- Parties are required to attempt an amicable settlement of any dispute prior to commencing arbitration.
- This, however, only applies where the dispute has been referred to the DAB and/or where either party has given a NOD.
- Unless parties otherwise agree, arbitration may be commenced on or after the 56th day after the day on which the NOD was given – even if no attempt of an amicable settlement was made.

iv. Arbitration

- All 3 books provide that the disputes will be finally determined by arbitration.
- Clause 20.6 provides that disputes will be finally settled under the Rules, institution, and language set out in the Appendix to the Tender.
- Such disputes include ones in respect of which the decision (if any) of the DAB has not become final or binding, settlement has not been reached and/or where the DAB's appointment expires.

Conclusion

Incorporating ADR clauses in contracts, leveraging expert reconciliation for technical disputes, and engaging with government entities through structured alternative dispute resolution mechanisms protects Contractors' financial interests and secures recoveries for work done while maintaining long-term relationships with the Employer.



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BEYOND THE TEXT OF THE LAW:

ADOPTING BEST PRACTICES FOR DIRECT MARKETING IN KENYA

Introduction

The protections afforded to data subjects under the Data Protection Act (Cap. 411C) Laws of Kenya (**the Act**) empower them to dictate and control how their personal data is processed. To promote the right to privacy, the Act dictates how personal data is used for direct marketing. Despite extensive provisions under the Act, Determinations from the Office of the Data Protection (**ODPC**), reveal compliance gaps where a data controller or processor (**collectively data handlers**) opts to market directly to data subjects.

Under Section 37(3) of the Act, the Cabinet Secretary together with the ODPC are to issue guidelines on the commercial use of personal data including direct marketing. Given that the ODPC is yet to publish these guidelines and in addition to the Act, this article proposes safeguards that a data handler can employ when marketing directly to their customers.

Commercial Use of Personal Data

For starters, data handlers have to be cognisant of the provisions governing this commercial use of personal data.

Under Section 37(1) of the Act, a data handler can only use personal data for commercial purposes where – a) it obtains consent from the data subject; or b) authorised under a written law and the data subject is informed of such use during collection. Section 37

(2) of the Act requires data handlers to, where possible, anonymise personal data to ensure that the data subject cannot be identified. Under regulation 14(2) of the Data Protection (General) Regulations (**the General Regulations**), direct marketing is identified as a commercial use of personal data where – a) a catalogue is addressed to a data subject; b) an advertisement is displayed on an online site where a data subject’s personal data has been captured; or c) an electronic message is sent to a data subject using their personal data. Per regulation 14(3) of the General Regulations, marketing is only direct when personal data is used to identify an individual.

Regulations 8(4) and (5) of the General Regulations recognise a data subject’s absolute right to object to processing in direct marketing. The Information Commissioner’s Office (**ICO**) – the data protection authority in the United Kingdom – describes this right to object as “*stronger than any other objection*”. Due to its absolute nature, once a data subject exercises this right, a data handler must stop all processing for direct marketing purposes.

Profiling is defined under Section 2 of the Act as “*automated processing of personal data*” to evaluate and predict a data subject’s aspects i.e., interests, preferences and/or behaviour; in this case, to ensure targeted marketing. Regulation 13(2)(b) of the General Regulations expressly prohibits the use of a child’s profile for direct marketing.

Regulation 15 of the General Regulations prescribes instances where use of personal data, other than sensitive personal data, is permitted i.e., where – a) the personal data was collected directly from the data subject; b) the data subject is informed that direct marketing is among the purposes for collection; c) the data subject has given consent for direct marketing; d) there is a simplified opt-out mechanism; or e) the data subject has not exercised his/her right to opt-out of the direct marketing.

Regulation 16 of the General Regulations dictates that the opt-out mechanism should be free of charge, clear, require minimal time and effort to effect, provide a direct and accessible communication channel, and accommodate persons with disabilities.

Regulation 17(2) of the General Regulations requires that for a direct marketing opt-out mechanism to be compliant, it should have a clear and accessible means for a data subject to exercise this right i.e., by replying with a single word instruction, using a prominent link to a subscription control centre, verbally during a phone call or by following instructions in each message. Further, under regulation 17(3) and (4) of the General Regulations, a data handler may allow the data subject to dictate his/her direct marketing preferences, including by opting out of all future direct marketing communications.

Under regulation 18 of the General Regulations, requests by a data subject to restrict disclosure to third parties must be complied with within seven (7) days.

Direct Marketing Infractions by Data Handlers

In *ODPC Complaint 1994 of 2023 as consolidated with ODPC Complaint 1998 of 2023 and ODPC Complaint 2298 of 2023 – David Owuor & 2 Others v. Ceres Tech Limited t/a Rocketpesa*, three (3) data subjects were awarded a cumulative sum of KES. 2,600,000 as compensation against Rocketpesa. The ODPC found that the data handler in inducing the data subjects to take loans, sent unsolicited promotional messages and calls without providing opt-out mechanisms and without obtaining consent from the data subjects. For two (2) of the data subjects, the ODPC determined that Rocketpesa had disregarded their objection to processing requests. The ODPC further noted that as a repeat offender, Rocketpesa had not complied with a previous Enforcement Notice issued against it in *ODPC Complaint 869 of 2023 – John Otieno v. Ceres Tech Limited t/a Rocketpesa*.

In August 2024, the ODPC in *ODPC Complaint 762 of 2024 – Dennis Gathara v. Goodtimes Africa ordered Goodtimes Africa* to pay a data subject KES. 700,000 as compensation for the data handler's failure to provide an opt-out mechanism, honour the data subject's objection to processing – despite this being an absolute right – and honour a request for erasure of personal data. The ODPC made its determination after investigations revealed that Goodtimes Africa had sent promotional messages to the data subject without his consent and in spite of his objection to processing.

Recommendations

While the Act stipulates minimum standards when marketing directly to data subjects, good practice requires more than just compliance with the Act and General Regulations but also calls for adoption of the best practice standards.

a. Direct Marketing Suppression/Do Not Contact Lists

At a minimum, data handlers have to respect their data subjects' preferences i.e., the data subject's right to object to processing, opt-out of direct marketing activities, and the erasure of their personal data. In respect of these preferences, other jurisdictions maintain direct marketing suppression/do-not-contact lists. This data protection practice is considered better when compared against wholesale deletion of a data subject's details upon receipt of a request.

The determinations by the ODPC referenced above depict blatant non-compliance with the provisions governing direct marketing under the Act. While the Act stipulates minimum standards when marketing directly to data subjects, as alluded to above, this article seeks to give recommendations to ensure data handlers create a robust privacy centric culture within their organisations. In our assessment, this requires more than just compliance with the Act and General Regulations but calls for adoption of the best practice standards that should permeate across the organisation's data processing operations.

A suppression/do-not-contact list contains a list of people who have communicated their decision not to have their personal data used for direct marketing purposes. In using a do not contact list, a data handler retains minimal contact information for the sole purpose of ensuring that they do not inadvertently contact people who opt out of direct marketing. Thereafter, prior to carrying out any direct marketing initiatives, the data handler can cross check its records to determine who not to market to.

While it may seem counterintuitive when the Act requires a data handler to accede to an opt-out request, this practice ensures stricter compliance with the direct marketing provisions under the Act; as only minimal contact details are maintained to ensure personal data is not used for direct marketing purposes.

b. Granular Consent Options

The Act requires a data handler to obtain a data subject's consent prior to processing personal data for commercial use. While this is an irreducible minimum when handling personal data, we suggest that data handlers should go a step further and provide their data subjects with multiple consent options.

Regularly seeking consent for specific direct marketing activities, creates transparency with the data subject while ensuring that the data handler can definitively demonstrate that it obtained consent for each direct marketing activities.

In essence, granular consent options allow data subject to communicate their preferences when it comes to handling their personal data. Consequently, the data handler is able to align its marketing initiatives with a data subject's preference; thereby giving the data subject control over his or her personal data and ultimately fostering trust in the relationship.

c. Sensitisation and Training of Employees

Quite apart from training employees on the salient features of the Act, the data handlers would do well to develop customised training programmes aimed at addressing privacy challenges in their business. Such trainings ensure that there is constant messaging to employees of their obligations, which in turn creates a privacy centric culture within the business.

Upshot

Determinations from the ODPC reveal just how critical it is to create a privacy centric culture within an organisation. In conducting a cost-benefit analysis, it is clear that having data protection as a key consideration of a business' operations is prudent. As ICO puts it, data protection must be "baked into" the company's activities.

Furthermore, while these recommendations ensure that data protection is a key consideration, their application should not stifle a business' ability to directly market to its customers. The idea is for the direct marketing to be undertaken with due regard to the data subject's privacy rights.



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BROKEN CORRIDORS?:

CONTRADICTIONS BETWEEN THE MOVEMENT OF GOODS UNDER THE EAST AFRICAN COMMUNITY AND THE AFRICAN CONTINENTAL FREE TRADE AREA (AfCFTA)

Introduction

The landscape of global trade is undergoing profound transformation, and Africa is steadily positioning itself as a decisive player in shaping the future of economic integration. Central to this shift is the African Continental Free Trade Area (**AfCFTA**), an unprecedented project to forge a unified market of 55 member states. By aspiring to dismantle tariff and non-tariff barriers, harmonise customs procedures, and establish a rules-based trading system, the AfCFTA promises to catalyse industrialisation, boost intra-African trade, and build critical resilience against global economic shocks. However, this pursuit of pan-African integration does not begin on a blank slate. It is layered upon a complex mosaic of pre-existing regional blocs, among which the East African Community (**EAC**) stands as a particularly advanced and relevant example, boasting a functional Customs Union and a Common Market Protocol.

The parallel existence of these two frameworks, the continental ambition of the AfCFTA and the deeply integrated regional regime of the EAC, creates a critical juncture in trade governance. While founded on similar aspirations, they are not always perfectly congruent. For nations like Kenya and Tanzania, which are members of both agreements, this duality generates a complex web of overlapping and sometimes contradictory obligations.

This article examines the specific tensions that arise from this interplay, analysing the legal and practical dissonance between the two systems and the challenges these conflicts pose.

The EAC Customs Union versus AfCFTA Tariff Liberalisation

The EAC Customs Union Protocol of 2005 established the cornerstone of regional trade by creating a regime of duty-free movement for originating goods among partner states and instituting a Common External Tariff (**CET**) applied uniformly to imports from outside the bloc. This is not a voluntary guideline but a firm legal obligation; as Article 2(4)(c) of the Protocol expressly states, within member states “a common external tariff in respect of all goods imported into the Partner States from foreign countries shall be established and maintained.” This commitment is further reinforced by Article 12, which obliges partner states to implement this common tariff on goods from third parties. The current CET, revised in 2022, operationalises this through a structured system of four tariff bands: 0%, 10%, 25%, and 35% on sensitive items.

The AfCFTA Agreement, in contrast, creates a fundamentally different framework. Under Article 2 of the Protocol on Trade in Goods, it mandates the “progressive elimination of tariffs and non-tariff barriers” among all state parties, with a commitment to progressively liberalise at least 90% of tariff lines.

The contradiction is that the EAC requires its members to apply a uniform CET to all non-EAC imports, whereas the AfCFTA promotes the elimination of such tariffs between African nations. This creates an impossible compliance dilemma for a member state. If Kenya agrees under an AfCFTA arrangement to reduce tariffs on certain textile imports from West Africa, it simultaneously violates the EAC mandate. In practice, this leaves traders in a state of profound uncertainty.

Rules of Origin: Complementarity in Principle, Contradiction in Practice

Rules of Origin are the critical laws, regulations, and administrative procedures that determine a product's country of origin, thereby governing its eligibility for preferential trade terms. The East African Rules of Origin (**EARoO**), which are detailed in Annex III of the Protocol, function as the gatekeeper for the customs union, with their strict nature designed to prevent trade deflection. This is clearly articulated in Rule 4, which provides that “Goods shall be accepted as originating in a Partner State where the goods are- (a) wholly produced in the Partner State as provided for in Rule 5; or (b) produced in the Partner State incorporating materials which have not been wholly obtained there, provided that such materials have undergone sufficient working or processing in the Partner State as provided for in Rule 6.”

In contrast, the AfCFTA Annex ii on Rules of Origin permits full continental cumulation. This allows inputs sourced from any state party to be combined with value added in another member state to qualify the final good as “African”. This creates a direct contradiction for EAC members. For instance, cotton imported into Tanzania from Egypt and spun into fabric in Kenya qualifies under AfCFTA. However, under the stricter EAC RoO, that same product might fail to meet the originating criteria. This divergence may force businesses into a significant compliance dilemma.

Non-Tariff Barriers (NTB): Parallel Mechanisms, Uneven Enforcement

While both frameworks explicitly recognise Non-Tariff Barriers (**NTBs**) as a critical impediment to trade and have established sophisticated mechanisms to address them, a closer analysis reveals a system plagued by institutional duplication and a critical deficit in enforcement, ultimately rendering both frameworks susceptible to political intransigence. The EAC's approach, as codified in Article 13 of its Customs Union Protocol, obliges partner states to “remove, with immediate effect, all the existing non-tariff barriers to the importation into their respective territories of goods originating in the other Partner States and, thereafter, not to impose any new non-tariff barriers”.

Theoretical alignment, however, gives way to practical contradiction. Rather than creating a cohesive, multi-level governance structure, the coexistence of these two frameworks fosters institutional redundancy. This parallelism does not enhance efficacy but instead creates a risk of forum shopping, where member states can strategically choose, or ignore, the mechanism that best suits their political or economic interests at a given time, thereby undermining the authority of both.

The persistent trade disputes between Kenya and Tanzania demonstrate that the core challenge is not a lack of legal instruments but a profound absence of political will to comply. The existence of a second mechanism under the AfCFTA does not resolve this enforcement gap; it merely provides an alternate venue for the same disputes to languish.

Customs and Trade Facilitation: The problem of Double Commitments

The EAC has pioneered innovations such as the Single Customs Territory (**SCT**), the use of electronic cargo tracking systems, and One-

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Stop Border Posts (**OSBPs**). These measures, grounded in the EAC Customs Management Act, 2004, streamline clearance procedures and reduce costs. AfCFTA introduces similar commitments under its Annexes on Customs Cooperation and Mutual Administrative Assistance and Trade Facilitation.

The contradiction is that AfCFTA obliges member states to adopt reforms many EAC states have already operationalised. For Kenya and Tanzania, the result is dual reporting obligations, new administrative structures, and uncertainty as to which framework takes precedence. Without explicit harmonisation, customs officials may apply conflicting procedures, increasing transaction costs rather than lowering them.

Dispute Settlement: Judicial Authority versus Political Practice

The EAC Treaty vests judicial authority in the East African Court of Justice (**EACJ**). However, in practice, most disputes are settled politically at the ministerial level. AfCFTA introduces a more robust Dispute Settlement Body (**DSB**) modelled on the WTO system. This overlap creates jurisdictional uncertainty: should a dispute between Kenya and Tanzania be heard before the EACJ or the AfCFTA DSB? Conflicting rulings from different bodies could undermine predictability and the rule of law. Until African states clarify the hierarchy between REC courts and AfCFTA institutions, legal fragmentation will persist.

Way Forward

Resolving these contradictions requires deliberate legal, institutional, and policy alignment. First, EAC partner states should invoke Article 19(2) of the AfCFTA Agreement to clarify the hierarchy of obligations. This requires harmonisation of the EAC CET with AfCFTA schedules. Second, the Rules of Origin must be reconciled to allow for continental cumulation without undermining the customs union. Third, duplication in NTB monitoring should be eliminated through integration of the EAC platform into the AfCFTA system. Fourth, dispute resolution frameworks must be clarified by establishing rules on jurisdictional priority. Finally, political will is indispensable. States must refrain from arbitrary trade restrictions and respect binding decisions. If implemented, these measures would transform contradiction into complementarity, enabling East Africa to act as a leader in realising the AfCFTA's vision.

Conclusion

The AfCFTA and the EAC are designed to be complementary. The EAC's innovations provide a foundation on which AfCFTA can build, while AfCFTA offers businesses opportunities to integrate into continental value chains. Yet complementarity should not be assumed. Overlapping commitments and recurring NTBs risk turning synergy into confusion. The task for policymakers is to ensure that alignment is deliberate through legal harmonisation, administrative coordination, and political will to respect rules. If effectively managed, the coexistence of the EAC and AfCFTA can unlock unprecedented opportunities for East Africa. But, if mismanaged, the dual systems may entrench the very fragmentation AfCFTA was created to overcome.



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