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LEGAL & KENYAN

ORARO & COMPANY ADVOCATES NEWSLETTER | ISSUE 23 | SEPTEMBER 2026

Editorial Page



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Protecting What Counts: Issue Twenty-Three

Every asset meets a moment of truth, the point at which the law asks what it really is, who it belongs to, and what is owed on it. This Issue of *Legal & Kenyan* follows that question from the property market to the courtroom, the arbitral tribunal, the family estate, the bookshelf and the running track.

We open with Renee Omondi, James Chepkwony and William Ochieng, who unpack the badges of trade that decide whether a property disposal is taxed as a capital gain at 15 percent or as trading income at 30 percent; a characterisation best settled before the deal is structured, not after the assessment lands.

Claire Mwangi turns to a pattern every lender will recognise: the borrower who defaults, then litigates. Her guide to injunction abuse sets out what a bank can do about a stale injunction, from the automatic twelve-month lapse under Order 40 to a vexatious litigant declaration.

Noella Lubano and Melanie Mwenda make the case for compulsory gender-inclusive selection in arbitration, drawing on appointment data from the ICC, ICSID and the Nairobi Centre for International Arbitration to show that parity will not arrive on goodwill alone.

Anne Cheloti, James Chepkwony and I then weigh wills against trusts, and ask how far a well-drafted trust really shields an estate from probate litigation. From what we own to what we create, John Mbaluto, Claire Mwangi and Blenda Nyahoro mark World Book and Copyright Day 2026 with practical guidance for Kenyan authors on protecting their work.

Inclusion anchors the next two pieces. Wellington Nyabundi, Brian Onyango and I examine how technology and the Persons with Disabilities Act, 2025 can widen economic participation for PWDs, while John Mbaluto, Claire Mwangi and Wambui Mwariri show how patent protection turns adaptive sports innovation into a protected asset.

Rounding off the Issue, Roy Sudhanshu of Foley Hoag gives us the last word from Washington, tracing the fall of Chevron deference in *Loper Bright Enterprises v. Raimondo* and what independent review of agency action now means in practice.

Happy reading!

Anne Kadima
Editor

Founding Partner's Note

The pain of losing a loved one goes beyond grief, and this is often worsened when family members and relatives have competing claims, prolonged court proceedings, and assets tied up in probate, leaving some in dire circumstances. Estate planning is one of the best ways to avoid such challenges and minimise, if not completely prevent, these disputes.

In our latest issue of *Legal & Kenyan*, we take a look at the various ways one can plan their estate in the unfortunate event of their demise, alongside other legal matters, including the tax implications of property sales in Kenya and how patent protection can enhance accessibility in sports. Delve into the 23rd issue for more insightful topics covering property taxation, lending, patent protection, gender inclusion in arbitration, and the role of technology as a tool for economic inclusion.

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LEGAL 500, 2026



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BADGES OF TRADE:

UNDERSTANDING CAPITAL GAINS TAX AND CORPORATE TAX ON PROPERTY TRANSACTIONS IN KENYA

Introduction

When a company sells property in Kenya, the key question is whether the resulting gain is subject to Capital Gains Tax (**CGT**) or Corporate Income Tax (**CIT**). The answer affects the applicable tax rate, available deductions, compliance obligations, and ultimately the transaction's financial outcome.

Although both taxes can apply to gains from property disposals, determining the correct tax depends on the nature of the transaction.

This article examines the legal framework, the principles applied by courts and the Kenya Revenue Authority, and the practical implications for companies disposing of real estate in Kenya.

Why the Difference Matters

Under Paragraph 3(1) of the Eighth Schedule of the Income Tax Act (Cap. 470), CGT is not chargeable on income that is already chargeable to tax under any other provision of the Act. The practical consequence is clear: where CIT applies, CGT does not, and vice versa.

The Legal Test

The pivotal question is therefore whether the gain from a property sale constitutes business income taxable as CIT or a capital gain, taxable under CGT. Kenyan courts, the International Accounting Standards (**IASs**), and international tax practice have converged on a single analytical test to resolve this question.

The test is whether the sale of the property was a result of trade or not. Therefore, if the seller is found to be in the business of trading in properties, CIT will apply; if not, then CGT will apply.

What constitutes being “in the business of trading in properties” varies from case to case. Recognising this complexity, courts have developed a structured analytical framework known as **Badges of Trade**, to bring consistency and predictability to the inquiry.

The “Badges of Trade”: How Courts Determine the Nature of a Property Sale

The Badges of Trade originated in UK case law and have been expressly adopted by Kenyan courts and the Tax Appeals Tribunal (**TAT**). They were applied in *ECP Kenya Limited v Commissioner of Domestic Taxes* (Appeal 335 of 2022) [2023] KETAT 969 (KLR), following the foundational articulation in *Marson v Morton* [1986] STC 463. Kenyan courts have applied the following nine badges as guiding indicators:

a. Length of Ownership

A short period between acquisition and sale of the property is a strong indicator of trade. In *Ruaraka Diversified Investments Limited v The Commissioner of Domestic Taxes* [2022] KEHC 14627 (KLR), the High Court held that a resale within three years of acquisition was an adventure in trade, attracting CIT. Similarly, in *Wisdom v Chamberlain* CA 1968, 45 TC 92, a sale shortly after acquisition was treated as a trading transaction. Conversely, a long holding period may point towards a capital investment rather than a trading activity.

b. Frequency of Similar Transactions

A seller who has previously been involved in multiple similar transactions is more likely to be characterised as a trader. The TAT applied this principle in *Zulekha Samji v The Commissioner of Domestic Taxes*, TAT No. 5 of 2017 [2020] eKLR, where prior involvement in several property sales for profit was decisive in the finding that CIT was payable. An isolated transaction is more consistent

with a capital disposal.

c. Connection to the Seller's Existing Business

Where the sale is consistent with the seller's stated business objectives, courts are likely to treat it as a trading transaction. In *Space Investments Limited v Commissioner of Investigation & Enforcement* [2021] KEHC 266 (KLR), the court held that CIT was payable because the company's Memorandum and Articles of Association identified real estate as its principal business objective. The gain from the land sale was therefore trading profit, not a capital gain.

d. Profit-Seeking Motive

Evidence that the primary purpose of acquiring an asset was to resell it at a profit, rather than to hold it as an asset, points towards trade. The stronger the indication that the intention was to make profit, the more compelling the indicator of trade; however, profit alone is not sufficient. It must be considered alongside the other badges. The tribunal in *Zulekha Samji*, for instance, treated the scale of the profit as evidence of a trading motive.

e. Circumstances of the Sale

The circumstances in which the sale is initiated are also relevant. A property that is actively marketed through ordinary commercial channels is more likely to be viewed as a trading asset. By contrast, a sale triggered by an unsolicited offer, rather than a pre-existing intention to sell, may indicate that the transaction is not part of a trading activity, as the court held in *Marson v Morton*.

f. Nature of the Asset

Assets held for personal enjoyment or prestige are unlikely to be treated as trading stock. Commercial property held as a revenue-generating commodity, and recorded as such in the company's books, is more readily characterised as a trading asset. High-value commercial assets are generally more consistent with a trading characterisation than low-value personal-use items.

g. Method and Reasons for Acquisition

Assets received by gift or inheritance are not ordinarily treated as trading stock. Assets acquired at market value with a view to resale, particularly where board resolutions or internal documents support a trading intention, are more readily characterised as such. A change of intention after acquisition may also be relevant. In *Taylor v Good* CA 1974, 49 TC 277, CIT was applied where a seller abandoned his original plan to use property as a family home and quickly sold it for profit.

h. Source of Finance

Acquisition financed through loan facilities, particularly where the property itself serves as security, is indicative of a trading transaction. Courts have reasoned that acquisitions funded by loans create pressure to realise a profit on resale and are therefore more consistent with trade than with long-term investment. In *Zulekha Samji*, evidence of a bank facility used to finance the acquisition was a contributing factor in the CIT determination.

i. Modification to Enhance Saleability

The extent of improvements made to an asset can also indicate a trading motive. Significant renovations undertaken to enhance its value or marketability are characteristic of a trading operation. In *Zulekha Samji*, the engagement of an architect and substantial repairs to secure a higher sale price were treated as evidence of trade, a principle similarly applied in *CIR v Livingston & Others* (1926) 11 TC 538.

Application of the Badges in Practice

Courts do not require all nine badges to be satisfied before making a finding of trade. A single, compelling indicator may suffice, and courts focus on the most relevant badges given the specific facts. The analysis requires an assessment of the circumstances as a whole.

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Certain combinations of badges carry particular weight. A company whose principal business is real estate, and that has recently acquired property, financed through bank debt, before carrying out renovation works, will face significant difficulty arguing that the subsequent sale is a capital disposal rather than a trading transaction.

Sellers who cannot demonstrate, through documentation, that their acquisition was made for investment rather than trading purposes are likely to find themselves assessed for CIT. The burden of establishing the correct treatment rests on the taxpayer.

CGT or CIT: Which is More Advantageous?

From a rate perspective, CGT is generally more advantageous for sellers. The current CGT rate in Kenya is 15% of the capital gain on the disposal of property. CIT, by contrast, applies at the standard corporate rate of 30% of income, subject to allowable deductions.

Sellers should therefore not assume that CGT is the preferred outcome. A careful computation of both tax positions, considering allowable deductions under each tax regime, is necessary before reaching a conclusion.

Key Takeaways for Property Sellers

The following practical steps are recommended for any person contemplating a property disposal:

- Conduct a Badges of Trade analysis at the outset, before the transaction is structured or completed, in order to determine the likely tax treatment of the disposal.
- Maintain contemporaneous records, including board resolutions, acquisition documents, financing agreements, and professional advice, to demonstrate the original intention behind the acquisition of the property.
- Seek professional tax advice early in the transaction process, particularly where the factual circumstances are complex or where the taxpayer has a history of acquiring, developing, or disposing of properties.
- Where the transaction is likely to be characterised as trading income and subject to CIT, ensure that all deductible expenses are properly documented and claimed to optimise the company's tax position.

The characterisation of property sale gains as either capital or income is one of the more nuanced areas of Kenyan tax law. It is not a question that lends itself to a simple answer, and the consequences of mischaracterisation, whether by overpaying CGT when CIT applies, or by underestimating a CIT liability, can be material.

Conclusion

Kenya's tax framework draws a fine distinction between capital gains and trading income on property disposals. The Badges of Trade provide the guiding framework applied by the courts, the TAT, and the KRA. For companies, particularly those in the real estate sector, the presence of multiple badges will often support a finding of trade and liability to CIT, underscoring the importance of careful, evidence-based tax planning.



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SECURED BUT STUCK:

A LENDER'S GUIDE TO INJUNCTION ABUSE AND SHARP PRACTICE

Introduction to the Pattern of Abuse

Lending money on the security of land is one of the most common commercial transactions in Kenya. Where a borrower requires capital, they approach a bank for a loan, and the bank provides the loan secured by a charge over the borrower's property. The borrower defaults, and the bank moves to recover its money by invoking its statutory power of sale. In turn, the borrower decides to use the Courts to indefinitely prevent the bank from selling the charged property by filing an application for an injunction and obtains an interim injunction order that subsists for at least a year. After a year of enjoying the injunctive relief, the Court delivers a ruling dismissing the application.

Following the ruling lifting the injunctive order and allowing the sale, the bank advertises the charged property for sale, and the borrower, with record speed, proceeds to the relevant appellate Court to file an application for stay pending appeal. A status quo order is given, and subsequently, the Court of Appeal dismisses the application for stay for want of merit.

Unrelenting, the borrower sponsors a party to file suit and an application for injunction over the charged property, strategically defeating the doctrines of *sub judice* and *res judicata*, and secures an ex parte injunction order pending the determination of the application. The application is dismissed, and by this time, at least three (3) years, or even a decade, have lapsed, leaving the bank

unable to sell the charged property, and the cycle continues to the Court of Appeal.

In *Kivanga Estates Ltd v National Bank of Kenya Ltd* [2017] eKLR, the Court of Appeal was confronted with precisely this scenario. The debtor had filed four separate suits over a period of 27 years, moving from Embu to Meru to Nairobi, each time resurrecting the same challenge to prevent the bank from realising its security. Each suit sought, in one form or another, the same injunctive relief. The Court of Appeal was unsparing in its description of what had occurred, stating –

"There is no greater duty for the court than to ensure that it maintains the integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by, amongst other measures, stopping litigations brought for ulterior and extraneous considerations."

The Statutory Power of Sale as a Self-Executing Right

The statutory power of sale is conferred on a chargee by the Land Act (Cap. 280). When a borrower defaults on a secured loan and fails to remedy that default after the requisite notices are given, the bank is entitled by law to sell the charged property and apply the proceeds toward the settlement of the outstanding debt. Despite strict compliance with the substance and procedure governing the statutory power of sale, banks routinely find their right

to sell restrained by injunctions obtained by borrowers who have no genuine defence to the enforcement proceedings.

As the Court of Appeal observed bluntly in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR), if Courts allow debtors to avoid paying their just debts through tactical litigation, banks will be crippled, and no serious investors will bring their capital into a country whose Courts are a haven for defaulters.

Why Does This Constitute an Abuse?

The courts have defined the concept with precision. In *Trust Bank Ltd v Amin Company Ltd & Another* (2000) KLR 164, the Court described a vexatious proceeding as one that lacks bona fides and is hopeless or offensive, tending to cause the opposite party unnecessary anxiety, trouble, and expense. An abuse of process is, in brief, a misuse of the Court's own machinery.

The Court of Appeal in *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others* [2009] KECA 453 (KLR) captured this precisely: a person who abuses process is interested only in accomplishing some improper purpose collateral to the proper object of the process. The action is not brought in good faith and unfairly burdens the other party.

When a colluding third party enters the picture, filing a fresh suit in their own name over the same charged property, the abuse deepens. The third party has no genuine independent interest in the charged property. Instead, it acts as a proxy, deployed to provide a fresh face for a claim that has already been exhausted. The Courts have been alive to this stratagem and have tools to address it.

a. The Lapse of Injunctions

One of the most practical and underappreciated tools available to a bank confronted with a stale injunction is Order 40, Rule 6 of the Civil Procedure Rules. The rule provides that an interlocutory injunction lapses automatically if the suit in which it was granted is not determined within twelve months from the date of grant, unless the Court orders otherwise for sufficient cause.

The rule was designed precisely to address the mischief of a party who goes to slumber on a suit after obtaining an injunction, deliberately failing to prosecute the case while the injunction does its work of frustrating the opponent.

The Court of Appeal confirmed this in *Erick Kimingichi Wapang'ana & another v Equity Bank Limited & another* [2015] eKLR, stating that the rule applies regardless of how the injunction order is worded. Even if an injunction says it will last "until the case is heard and determined," it will still automatically expire after twelve months if the case is not concluded and no extension is sought. The wording of the order cannot override the law.

b. The Undertaking as to Damages

Every time a Court grants an interlocutory injunction, it typically requires the applicant to give an undertaking as to damages. This is the applicant's formal commitment to the Court, not to the bank, that if the injunction is later found to have been wrongly granted, the applicant will pay compensation for the prejudice caused by the grant of the interlocutory injunction.

The Court of Appeal settled this in *Chatur Radio Service v Pronogram Ltd* [1994] eKLR, holding that the object of insisting upon an undertaking as to damages is to protect the defendant against loss occasioned by the wrongful grant of an injunction. The Court was also clear on a point of significant practical importance: the damages recoverable under the undertaking are not capped at the KES 2,000 ceiling imposed by Section 64 of the Civil Procedure Act (Cap. 21) The undertaking operates entirely independently of Section 64. It is uncapped, enforced through the Court's equitable

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jurisdiction, and may be pursued by way of attachment or commitment.

c. Security for Costs

Where a Plaintiff or its proxy is a shell company with no substantial assets or a nominal party with no genuine independent interest in the charged property, the Court may, on application by the Defendant, order the Plaintiff to furnish security for costs as a condition for continuing the proceedings. Failure to provide the security results in the suit being dismissed pursuant to Order 26 of the Civil Procedure Rules.

d. The Court's Inherent Jurisdiction

Beyond the specific procedural remedies described above, Courts retain a broad inherent jurisdiction to make whatever orders are necessary to protect the administration of justice. The Court of Appeal affirmed this in *Kemboi v Chepkwony & 3 others* [2026] KECA 398 (KLR).

e. The Vexatious Litigant Declaration

For the most persistent cases, where conventional remedies have failed to halt the cycle of abusive litigation, Kenya has enacted specific legislation designed to address the problem. The Vexatious Proceedings Act, most recently amended in December 2023, empowers the High Court to declare a person to be a vexatious litigant.

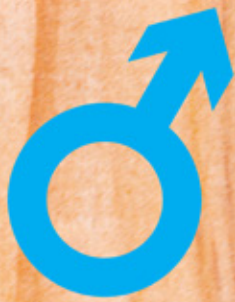
Once that declaration is made, no suit may be filed by or on behalf of that person in any Court without the prior leave of the High Court. Leave will not be granted unless the Court is satisfied that the proposed suit is not an abuse of its process and that there exists a prima facie basis for bringing it. Any suit filed in breach of that requirement is automatically void, and any attempt to continue such proceedings constitutes contempt of Court.

In *Attorney General v David Oscar Owako* [2023] KEHC 19858 (KLR), the High Court made such a declaration against a litigant who had filed eight suits, five miscellaneous applications, and a Court of Appeal proceeding, most of them still pending, and who had demonstrated a pattern of filing applications seeking the recusal of judicial officers across multiple Courts. The Court found that although every person has the right to access justice under Article 48 of the Constitution, that right is not absolute and may be justifiably limited under Article 24 in cases involving vexatious litigants.

There is one critical practical limitation: the application must be brought by the Attorney-General. A bank cannot apply directly in its own name. The correct course of action is to compile a comprehensive dossier containing every suit filed, every injunction obtained, every undertaking given, the outcome of each proceeding, and to make a formal referral to the Attorney General's office, inviting it to exercise its statutory power. The decision to proceed rests with the Attorney-General, but the quality and organisation of the material presented will significantly influence that decision.

Final Thoughts

What banks need is to remain alert, well-prepared, and proactive in pursuing all available legal remedies, rather than passively waiting for each frivolous application and suit to run its full course only to end up in dismissal in the bank's favour.



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A SEAT AT THE TABLE:

THE CASE FOR COMPULSORY GENDER-INCLUSIVE SELECTION IN ARBITRATION

Introduction

When former Canadian Prime Minister Justin Trudeau was asked in 2015 why he appointed a Cabinet comprising 50% women, his response was strikingly simple: “*Because it’s 2015.*” This quip may have amused the press, but it underscored a powerful principle now resonating in the legal world: that equality in representation is not a novelty or concession, but an overdue necessity.

In recent years, international arbitral institutions and commentators have echoed this sentiment, emphasising that true diversity is essential to the legitimacy of arbitration. Despite the growing calls for inclusivity from bodies like the International Chamber of Commerce and the United Nations, women remain significantly under-represented in appointments to arbitral tribunals. Against this backdrop, there is a global recognition that it is time to move beyond good intentions and adopt enforceable measures to ensure gender-inclusive selection.

This article therefore posits that, just as Trudeau made gender parity the default in his cabinet, arbitration should embrace mandatory rules, practices, and quotas to secure true equality on its tribunals.

The State of Play

Over the years, the arbitration community has launched numerous diversity initiatives. Landmark efforts such as the 2015 Equal Representation in Arbitration (**ERA**) Pledge have galvanised practitioners, with thousands signing on to improve gender parity. Despite these initiatives, actual progress has been slow. Recent data from major arbitral institutions paint a stark picture of the gap. Consider some of these statistics.

a) International Chamber of Commerce

As of 2019, women comprised only about 21% of all arbitrator appointments worldwide. By 2023, there had been only a slight increase, with women constituting about 30% of all arbitral appointments.

b) London Court of International Arbitration

In 2023, about 33% of all LCIA-appointed arbitrators were women. However, this statistic masks a significant disparity. While the LCIA Court appointed women in approximately 48% of its appointments, women accounted for only 21% of arbitrators appointed directly by the parties.

c) International Centre for Settlement of Investment Disputes

In investor-state arbitration, the gap is even wider. By 2023, women comprised only about 15% of all arbitrator appointments in ICSID cases.

d) Nairobi Centre for International Arbitration

According to the 2022/2023 Annual Casework Report, only 22% of arbitral appointments were women.

In sum, these figures confirm that women are still far from achieving parity in tribunal appointments. Moreover, a deeper analysis of the data reveals a troubling concentration, whereby only a handful of women are repeatedly appointed. In the *Journal of World Investment & Trade* (Vol. 21), the authors present a case showing that two prominent women arbitrators accounted for more than 57% of all female appointments in investor-state disputes up to 2018.

Taken together, the figures indicate that reliance on goodwill and voluntary efforts has been insufficient to close or eliminate the gender gap.

Practical Best Practices and Actions

In view of the foregoing challenges, concrete and measurable practices should be adopted to broaden the pool of arbitrators and ensure that women are considered equally. Some of these practices include:

a) Anonymisation of Curricula Vitae (CVs)

Arbitral institutions and party counsel should adopt the practice of blindly vetting arbitral candidates. This would entail omitting

gender-identifying details from arbitrators' CVs so that selections focus solely on skills and experience. Applying blind recruitment practices in arbitration would help mitigate unconscious bias and ensure that qualified women arbitrators are not overlooked.

b) Institutional Diversity Commitments

Arbitral institutions should adopt policies that explicitly require balanced appointments. A good example is ICSID's new "Electronic Arbitrator Roster", which asks candidates to commit to diversity goals. Similarly, arbitration rules and guidelines, such as the draft UNCITRAL Statute, mandate that tribunal appointments take gender balance into consideration.

c) Diversity Directories and Databases

The Unicorn story behind the *Compendium of Unicorns: A Global Guide to Women Arbitrators* stems from the persistent myth that qualified women arbitrators are as rare as unicorns, a sentiment once captured by a man who said he would appoint women "if only he could find some". To dismantle this misconception, the Mute Off Thursdays network, in partnership with the Global Arbitration Review (GAR) and Burford Capital, compiled the Compendium, profiling 176 highly qualified women arbitrators from across the globe. By offering detailed, searchable information on their expertise, backgrounds, and contact details, the Compendium enhances visibility, accessibility, and confidence in appointing women.

Following this approach, various local and international institutions should expand and promote directories that would make it easier to identify qualified female candidates.

d) Mentoring and Sponsorship

Professional mentorship programmes help prepare and advance women for arbitrator roles. Senior arbitrators and counsel should commit to sponsoring promising female candidates. Over time, this will develop a larger cohort of experienced female arbitrators.

e) Institutional Appointments and Training

Arbitration rules could also empower institutions to appoint co-arbitrators or presiding arbitrators while giving due consideration to gender. Training programmes and speaking opportunities can likewise be targeted at under-represented groups to increase their visibility.

f) Monitoring and Accountability

Requiring disclosure of the gender breakdown of arbitrator panels, or even making funding or acceptance of arbitration cases contingent on demonstrable diversity efforts, would pressure parties to consider women. Conversely, this would also facilitate the tracking of gender diversity performance within institutions.

g) Creating Awareness

Enhancing training and education on both implicit and explicit gender biases can significantly strengthen methodologies in dispute resolution. Improved awareness helps stakeholders recognise and counteract biased assumptions about women's availability, expertise, or suitability, thereby ultimately fostering a more equitable environment in which qualified female arbitrators are assessed on merit rather than perception.

Addressing Counterarguments: Meritocracy and Autonomy

Critics of this mandatory approach argue that requirements such as quotas or preset outcomes clash with arbitration's core principle of party autonomy and merit-based selection. In theory, parties are free to pick whoever they believe is most qualified for their case. However, data suggest that this purely meritocratic model has not worked equitably in practice. In reality, excluding 70–85 percent of qualified arbitrators simply because of gender cannot be justified by skill considerations. The limited representation of women in arbitral appointments is not attributable to a lack of merit, but rather to a lack of opportunity.

Critics of this mandatory approach argue that requirements such as quotas or preset outcomes clashes with arbitration's core principle of party autonomy and merit-based selection. In theory, parties are free to pick whoever they believe is most qualified for their case. However, data suggest that this purely meritocratic model has not worked equitably in practice. In reality, excluding 70–85 percent of qualified arbitrators simply because of gender cannot be justified by skill considerations.

Additionally, diverse panels have been shown to enrich deliberations and enhance institutional credibility. Accordingly, gender diversity in and of itself can enhance the legitimacy and credibility of decisions. Such measures do not lower the bar; they simply require that we look beyond habit. This does not mean choosing a less-qualified person based on gender; rather, it means ensuring that women who are qualified receive equal consideration.

Notably, mandatory measures already exist in other contexts. National laws often impose gender quotas for elected and appointed positions. For example, Kenya's Constitution mandates that *no more than two-thirds* of the members of any public body be of the same gender. This two-thirds gender rule, which is a legally binding quota, is seen as necessary to correct historical imbalances. In corporate law, several countries have imposed board diversity quotas to ensure women's representation. These precedents show that requiring gender balance can coexist with the core functions of an institution and, in practice, can be crafted to respect autonomy while advancing equality.

Therefore, while preserving party autonomy in arbitrator selection is important, it should not override the need for inclusivity. Targeted measures such as CV anonymisation, requiring shortlists to include at least one qualified woman, or requiring appointing bodies to certify that proposed arbitral panels do not comprise exclusively male arbitrators could strike a balance. The key point is that insisting on blind meritocracy ignores systemic bias and the value of diverse perspectives. Well-designed rules and practices can both respect competence and prompt parties to broaden their choices.

Conclusion

Accelerating women's advancement in arbitration requires more than goodwill; it demands deliberate, sustained action. The persistent gender imbalance on arbitral tribunals shows that voluntary pledges, while important, are insufficient to drive real change. As arbitral institutions and national leaders increasingly acknowledge the extent of these challenges, proactive reform is essential. Measures such as anonymised selection processes, structured mentoring programmes, robust diversity directories, and enforceable diversity guidelines can meaningfully expand the pipeline of qualified women and ensure they are fairly considered for appointments.

Championing diversity does not detract from arbitration's core values. On the contrary, it reinforces them. A field that prides itself on impartiality, legitimacy, and excellence must draw from the full spectrum of available talent. If we heed Trudeau's call and recognise that promoting diversity is "*the smart thing to do*", arbitration can move toward a future where tribunal appointments truly reflect the talents of all practitioners.

As Mairée Uran Bidegain concludes in her recent symposium, the field must transition from aspirational targets toward enforceable commitments, making gender diversity the norm rather than the exception.



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TO WILL OR NOT TO WILL?

WHICH ESTATE PLANNING TOOL IS RIGHT FOR YOU?

Introduction

Death is one of life's few certainties, yet many Kenyans pass away without a formal estate plan. The consequences are often borne by surviving family members through competing claims, prolonged court proceedings, and assets tied up in probate. The question is not whether to plan, but how best to do so.

Kenyan law recognises two principal estate planning tools: wills and trusts. While both facilitate the transfer and management of assets, they serve different purposes and offer distinct legal and practical advantages. The appropriate instrument depends on an individual's circumstances and estate planning objectives.

This article examines the legal framework governing wills and trusts in Kenya, compares their key features, and considers whether trusts can provide greater protection against probate disputes.

The Legal Landscape: Wills and Trusts Under Kenyan Law

Wills in Kenya are primarily governed by the Law of Succession Act (Cap. 160), Laws of Kenya (**the LSA**), and the Probate and Administration Rules (LN 104/1980) (**the P&A Rules**). Under Section 5 of the LSA, any person aged eighteen years or older and of sound mind is capable of making a will. Section 11 requires a will to be in writing, signed by the testator (or another person at the testator's direction and in their presence), and witnessed by at least two competent witnesses.

The LSA governs both testate and intestate estates. It applies to immovable property in Kenya regardless of the deceased's domicile, while movable property is governed by the law of the deceased's domicile at death. Muslim estates are distributed in accordance with Islamic law, subject to the administrative provisions of the LSA where they do not conflict with Islamic principles.

Trusts are principally governed by the Trustees Act (Cap. 167) (**the TA**), the Trustee (Perpetual Succession) Act (Cap. 164) (**the TPSA**), and equitable principles of common law. A trust is a legal arrangement in which a settlor or founder (the person who creates a trust) transfers property to trustees to hold and manage for the benefit of beneficiaries or another lawful purpose. It is created by a trust deed, which defines the trust property, beneficiaries, and the trustees' powers and duties.

A will takes effect only upon the testator's death and remains revocable during their lifetime. By contrast, a trust may be created during the settlor's lifetime (an *inter vivos* or living trust) or by will (a testamentary trust).

The key distinction is that a living trust takes effect immediately and generally avoids probate. In contrast, a will must be admitted to probate by the Court before it can be implemented. This affects the speed and efficacy of asset distribution and management, the confidentiality of wealth arrangements, and the estate's exposure

to litigation.

Trusts vs Wills

The choice between a will and a trust is not binary. Many sophisticated estate plans in Kenya use both instruments: a trust to hold principal assets during the settlor's lifetime, and a will to dispose of residual assets, appoint guardians for minor children, and transfer after-acquired property into the trust upon death. That said, several considerations guide the choice of which instrument should anchor a particular estate plan.

Efficiency & Continuity: A will takes effect only after the court issues a grant of representation under the LSA and P&A Rules. Probate proceedings in Kenya can be lengthy, especially where there are disputes amongst the beneficiaries. Illustratively, *In the Matter of the Estate of Mbiyu Koinange (Deceased), Succession Cause No. 527 of 1981*, demonstrates how succession disputes may remain before the court for decades. In contrast, a living trust, having vested legal ownership in trustees before the death of the settlor, can begin or continue distribution to beneficiaries without reference to the court.

Privacy: A will admitted to probate becomes a public court record. The estate, beneficiaries, and specific bequests are disclosed in proceedings accessible to third parties. Under Rules 50-52 of the P&A Rules, each registry must maintain a Wills Register recording key details of every will, including the testator's name, cause number, serial number of the will, date of filing and grant, and date of confirmation where applicable. Original wills lodged in support of probate or letters of administration with the will annexed are retained as part of the court record in accordance with the P&A Rules.

By contrast, a trust deed is a private agreement between the settlor and the trustee. Where trustees are incorporated under the TPSA, the terms of the trust are not publicly disclosed. Accordingly, trust deeds generally remain confidential except where disclosure is required by litigation, tax regimes, or other regulatory obligations.

Vulnerability Planning: A will has no legal effect during the testator's lifetime and therefore provides no mechanism for managing assets in the event of incapacity, increasing the risk that they may be dissipated, disputed, or mismanaged. By contrast, a living trust may provide for successor trustees to assume control upon the settlor's incapacity, ensuring continuity in the management of trust assets without court intervention. Trusts are also well suited for protecting vulnerable beneficiaries, including minors, the elderly, and persons with disabilities, making them particularly valuable for long-term estate planning.

Cost and Complexity: A will is generally simpler and less expensive to establish than a trust. A trust requires a professionally drafted trust deed, the appointment of trustees, the transfer of assets into the trust (which may include conveyancing of real property, execution of share transfer forms, and endorsement of insurance and investment policies), and ongoing trust administration costs. While these upfront costs may be substantial, they must be balanced against the expense, delay, and litigation risks associated with probate proceedings. For high-value or complex estates, the long-term benefits of a trust often outweigh its initial costs.

Flexibility and Control: Under sections 12 and 17-21 of the LSA, a will may be revoked, amended by a codicil, or revived during the testator's lifetime. Similarly, a revocable living trust allows the settlor to amend or revoke its terms. However, irrevocable trusts commonly used for asset protection or tax planning limit the settlor's ability to reclaim transferred properties. Although this enhances asset protection, it requires the settlor to relinquish a degree of control.

Type of Asset: Finally, the nature of an individual's assets may determine the most appropriate planning instrument. Land may only form part of a trust if transferred to the trust during the settlor's

Trusts are increasingly used in Kenya for estate planning because assets validly transferred during the settlor's lifetime generally do not form part of the settlor's estate for probate purposes. Consequently, such assets are not subject to probate or letters of administration and are less susceptible to succession disputes. Trustees must administer such assets in accordance with the TA, the trust deed, and the fiduciary duties owed to beneficiaries.

lifetime, while company shares require appropriate structuring to ensure an effective transfer into the trust. Certain assets, however, pass outside the estate altogether and are therefore not governed by either a will or a trust. These include jointly owned property that passes by survivorship, life insurance proceeds payable to nominated beneficiaries, and pension or retirement benefits payable under registered retirement schemes. Such assets are transferred in accordance with the applicable beneficiary nominations or statutory provisions and should therefore be considered separately as part of a comprehensive estate planning strategy.

Trusts as a Shield Against Probate Litigation: Myth or Reality?

Trusts are increasingly used in Kenya for estate planning because assets validly transferred during the settlor's lifetime generally do not form part of the settlor's estate for probate purposes. Consequently, such assets are not subject to probate or letters of administration and are less susceptible to succession disputes. Trustees must administer such assets in accordance with the TA, the trust deed, and the fiduciary duties owed to beneficiaries.

This protection, however, is not absolute. Courts may invalidate sham trusts or those created to defeat legitimate dependant claims, or where the trust deed is unlawful or improperly administered. Accordingly, a trust's effectiveness depends on proper drafting, genuine asset transfers, independent administration, and sound governance.

One of Kenya's leading authorities on trusts and estate planning is *Albert Kigera Karume & 2 others v George Ngugi Waireri & 12 others [2017] KEHC 7794 (KLR)*. The High Court upheld the validity of the Njenga Karume Trust, affirming that properly constituted trusts are effective estate planning vehicles outside the probate process. The dispute also highlights the importance of appointing competent trustees, as disputes may undermine the administration of an otherwise valid trust.

The case illustrates a key principle of Kenyan estate planning: while a properly constituted trust can reduce probate risks, its effectiveness ultimately depends on sound governance and competent trustees.

Conclusion

The absence of an estate plan often results in intestacy under the LSA, where statutory distribution may not reflect the deceased's wishes and can lead to succession disputes. Wills and trusts are complementary estate planning tools: a will gives effect to testamentary wishes, while a trust offers benefits such as probate avoidance, confidentiality, continuity during incapacity, and long-term wealth preservation.

The question that every individual with assets should therefore be asking is not simply, "Have I made a will?" but rather:

"Does my estate plan, taken as a whole, reflect my intentions, protect my beneficiaries, minimise the risk of dispute, and operate with the speed and certainty that my family will need after I am gone?"

The answer to that question determines whether a will alone suffices, or whether a trust, or a combination of both, is the appropriate vehicle.



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WRITE, OWN, PROTECT:

WHY WORLD BOOK AND COPYRIGHT DAY 2026 MATTERS FOR KENYAN AUTHORS

Introduction

World Book and Copyright Day, celebrated every year on 23rd April, honours the power of books as vehicles of knowledge, culture, entertainment and creative expression. Established by the United Nations Educational, Scientific and Cultural Organization (**UNESCO**), the day is a reminder of the essential role copyright plays in sustaining creativity and ensuring that authors can derive recognition and economic benefit from their works.

The day highlights how books can connect people across cultures and generations. Beyond celebration, however, there is an important reality that is often overlooked: that books are not merely stories or sources of knowledge, but the product of someone's time, effort, and creativity i.e., the sweat of the author's brow.

As the literary world becomes increasingly digital, the risks to authors have evolved: manuscripts are now created, shared and distributed in digital form within seconds, often before adequate legal safeguards are in place.

For Kenyan authors, this raises an important question: how can one truly own and protect a work in an environment where duplication and unauthorized circulation are so easily achieved?

The World Book Capital Initiative

Beyond the annual celebration, UNESCO advances its mission through initiatives that promote reading and publishing at a city

level. One such initiative is the designation of a World Book Capital.

The initiative recognizes cities that demonstrate a strong commitment to books, reading and the wider publishing ecosystem. Once designated, a city is expected to showcase its leadership in supporting creativity, promoting linguistic diversity and encouraging knowledge-sharing through books and storytelling.

Over the course of the year, the designated city implements a range of impactful activities aimed at strengthening the role of books in society, including promoting literacy, supporting authors and publishers, and expanding access to reading. These efforts are closely aligned with UNESCO's broader mandate of using culture and education as tools for sustainable and inclusive development.

To be eligible for designation, a city must submit an application to UNESCO for review by its advisory committee, comprising one representative each from UNESCO, the International Authors Forum, the International Federation of Library Associations and Institutions, the International Publishers Association, and the European and International Booksellers Federation. The final designation is made by the Director-General of UNESCO, ensuring geographic balance across regions over time.

For 2026, the designated World Book Capital is Rabat, Morocco, reflecting the city's commitment to literary development, the

empowerment of women and youth through reading and the fight against illiteracy.

How Kenyan Authors Can Protect Their Works

While global initiatives like the World Book Capital underscore the importance of books and reading, they remind us that behind every book is an author, whose work deserves legal protection. For many Kenyan authors, the joy of finishing a manuscript is often followed by a quiet fear: *will this work still be mine once it is published?*

Protecting creative works requires not only an understanding of the legal rights available to authors but also the adoption of practical measures to safeguard those rights, particularly in today's digital environment, where content can be copied and shared with ease.

Some practical steps Kenyan authors can take to protect their works include:

a) Register Your Work and Keep Clear Evidence of Creation

Although copyright protection in Kenya arises automatically once a literary work is created and fixed in a tangible form, authors are encouraged to document their ownership through registration on the National Rights Registry Portal (**Registry**) managed by the Kenya Copyright Board (**KECOBO**) and available at nrr.copyright.go.ke.

This option is provided under section 22D of the Copyright Act (Cap. 130) Laws of Kenya, which allows authors or owners of copyright works to register their works on the Registry. Registration strengthens proof of ownership and simplifies enforcement if infringement occurs.

The Registry is user-friendly and allows individuals or corporate entities to create accounts, submit their works, and search the copyright database.

Once an application is submitted and reviewed, a copyright certificate is issued for the registered work. The certificate can then be downloaded using the email address provided at the time of creating the account. The certificate serves as evidence of copyright ownership in the work and may be useful in the event of a dispute.

In addition to registration, authors are encouraged to keep clear supporting evidence of the creation of their works, including:

- (i) dated drafts and revisions;
- (ii) notes, outlines and earlier versions;
- (iii) email trails or submissions showing timelines; and
- (iv) secure storage with version history.

Such evidence often provides practical proof of authorship and the date of creation and may be relied upon in resolving copyright disputes. It helps establish who created the work first, how it evolved over time, and whether unauthorised copying occurred.

b) Control How Your Work is Shared

Authors lose control over their work through the way it is shared. When circulating digital copies of their works, authors should be intentional not only about who receives the work, but also how the work is accessed and distributed.

Some practical approaches that can be used when sharing digital copies include:

- (i) limiting distribution to sample chapters before full release;
- (ii) controlling access to works shared in soft copy; and
- (iii) tracking who receives each version of a work.

In commercial contexts, authors may also:

- (i) offer paid digital downloads instead of free distribution;
- (ii) restrict the number of devices on which an eBook can be accessed; and (iii) use platform controls that limit copying, printing

While global initiatives like the World Book Capital underscore the importance of books and reading, they remind us that behind every book is an author, whose work deserves legal protection. For many Kenyan authors, the joy of finishing a manuscript is often followed by a quiet fear: will this work still be mine once it is published?

or forwarding.

These measures help authors retain both control and value over their digital works.

c) Use Digital Safeguards and Clear Licensing Terms

Authors should rely on both technological measures and legal terms to protect their work. With the rise of self-publishing, online literary platforms, and widespread sharing of PDF books, Kenyan authors face an increased risk of unauthorized copying and circulation of their works.

Some examples of digital safeguards include:

- (i) using passwords or encrypting works – this involves converting the files into unreadable formats that can only be accessed with a decryption key or password, thereby preventing unauthorized access;
- (ii) watermarking works – this involves embedding a visible or invisible identifier that helps identify ownership or track distribution;
- (iii) providing restricted access links to the works with expiry controls; and
- (iv) disabling downloads and the “copy-paste” function, preventing printing or sharing where platforms allow it.

An additional measure is setting clear licensing terms or usage conditions when sharing a work. These need not always take the form of formal legal agreements. Even simple written instructions can define how a work may be used, including whether the recipient may reproduce, distribute or adapt the work, and whether the use is limited to review purposes or extends to commercial use.

d) Recognize the Limits of Digital Protection and Act Quickly When Needed

Even where digital protection is in place, no system is fully secure. Encrypted files may be bypassed, and once accessed, content can still be copied, forwarded or shared.

For this reason, protection is ultimately about deterrence, control and enforceability. If unauthorized sharing occurs, authors should act quickly by preserving evidence, identifying the source, issuing takedown notices where appropriate, and taking steps to stop further distribution, including filing suits and obtaining injunctive orders if necessary.

Conclusion

Books are more than just an aggregation of written words. Books carry thought, memory, imagination, style, wit, humour, language and identity, and in doing so, they connect us across time and experience.

As Alberto Manguel notes, *“Maybe this is why we read, and why in moments of darkness we return to books: to find words for what we already know.”*

As we mark World Book and Copyright Day 2026, the message is clear. Celebrating books is not enough. Protecting the creative people behind them is just as important. In a digital age where ideas travel faster than ever, safeguarding creative work through copyright protection is part of preserving the value of literature itself.



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CLOSING THE GAP:

THE ROLE OF TECHNOLOGY IN ADVANCING ECONOMIC INCLUSION FOR PERSONS WITH DISABILITIES IN KENYA

Economic inclusion is central to Kenya's sustainable development agenda. Persons with Disabilities (**PWDs**), who account for approximately 2.2% of Kenya's population according to the 2019 Population and Housing Census, remain excluded from economic opportunities due to systemic barriers. These barriers perpetuate a cycle of poverty, unemployment, and social exclusion.

Technology presents an unprecedented opportunity to transform this reality. Digital platforms, assistive technologies and remote working arrangements are reshaping the labour market and creating new pathways for participation. However, the benefits of technology can only be fully realised through effective legal implementation, investment in accessibility and deliberate inclusion policies.

This article examines Kenya's legal framework, the role of technology in promoting disability inclusion, the existing challenges and opportunities to foster meaningful economic inclusion for PWDs.

The Socio-Economic Landscape for PWDs in Kenya

The socio-economic challenges confronting PWDs in Kenya are pronounced and multifaceted. A recent report by the United Nations Development Programme (**UNDP**) reveals that 38% of PWDs in the country live in poverty, a rate significantly higher than the 30% national average. This profound economic vulner-

ability is not merely a consequence of unemployment; it is also a foundational barrier that prevents access to essential resources.

Economic participation for PWDs faces significant barriers, including inaccessible workplaces, discriminatory hiring practices, inadequate skills development and limited mobility. Kenya's expanding digital economy presents an opportunity to overcome many of these obstacles through technology-enabled employment and entrepreneurship.

Kenya's Legal Framework

Kenya boasts a progressive legal framework aimed at promoting disability inclusion and employment. Article 27 of the Constitution of Kenya, 2010 (**the Constitution**) guarantees equality and freedom from discrimination on various grounds, including disability.

Replacing the repealed 2003 Act, the Persons with Disabilities Act, 2025 (**the PWD Act**), now serves as the primary legal instrument for this framework. It introduces a landmark provision - a requirement for all public and private employers with more than 20 employees to reserve at least 5% of direct job opportunities for PWDs.

Section 21 of the PWD Act prohibits employers from discrimi-

nating against individuals with disabilities in all aspects of employment, including recruitment, hiring, promotion, remuneration and training. Employers must also submit annual compliance reports to the National Council for Persons with Disabilities (NCPWD) on the status of PWD employment within their establishments, and provide reasonable accommodation to enable PWDs to perform their jobs effectively, including modifying the workplace, providing assistive devices, or adjusting work schedules. Disability inclusion is therefore no longer merely a CSR initiative but a statutory obligation, with penalties for non-compliance.

The courts have played a crucial role in reinforcing these rights. In the case of *Wilson Macharia v Safaricom Plc* (Petition 434 of 2019) [2021] KEHC 462 (KLR) (Constitutional and Human Rights) (8 July 2021) (Judgment), the High Court found that Safaricom had failed to provide the Petitioner, a visually impaired person, reasonable accommodation during a job application process. The court concluded that this failure was a violation of the petitioner's constitutional rights to human dignity and fair administrative action. Consequently, the court awarded the petitioner Kshs. 6,000,000 in compensation for the infringement of his rights, a ruling that firmly established an employer's legal obligation to create an inclusive environment for PWDs.

Similarly, in *Simon Gitau Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment), the Supreme Court, though not ruling substantively on disability discrimination, made a significant obiter that employers must subject an employee to a conclusive medical assessment before terminating on grounds of medical incapacity. This established that termination cannot rest on a unilateral determination of an employee's disability, requiring employers to take reasonable steps to ascertain fitness for work before dismissal.

These decisions demonstrate an increasingly progressive approach to disability rights within Kenya's employment law.

Technology's Role in Disability Inclusion

i. Remote Work and Digital Platforms

Internet and digital tools have enabled a significant shift towards remote work, thereby expanding employment opportunities for PWDs by reducing barriers associated with inaccessible transport and workplaces.

Technology enables individuals to work from home using digital collaboration platforms, cloud-based systems, and virtual communication tools. This flexibility is particularly valuable for persons with mobility impairments and chronic health conditions.

Kenyan organisations are already leveraging this potential: Riziki Source utilises a tech-enabled job-matching platform, accessible via a mobile app and USSD, to connect PWDs with job opportunities and entrepreneurship programmes. The Association for the Physically Disabled of Kenya (APDK) has established e-Hubs with accessible computers to enable users to search and apply for jobs online.

ii. Accessible and Assistive Technologies

Beyond remote work, assistive technologies continue to transform workplace accessibility for PWDs.

The development of specialized tools directly addresses specific impairments. A portable braille device like the Orbit Reader 20 eliminates the need for expensive braille paper for visually impaired learners, while Safaricom's launch of a braille smartwatch enables visually impaired users to independently access M-Pesa services, a crucial step toward economic autonomy. These innovations, alongside screen readers, speech-to-text software, adaptive keyboards, braille displays and voice-controlled applications enable PWDs to perform tasks that would otherwise be difficult or impossible.

The socio-economic challenges confronting PWDs in Kenya are pronounced and multifaceted. A recent report by the United Nations Development Program (UNDP) reveals that 38% of PWDs in the country live in poverty, a rate significantly higher than the 30% national average. This profound economic vulnerability is not merely a consequence of unemployment; it is also a foundational barrier that prevents access to essential resources.

Beyond specialised devices, universal design principles, such as adjustable workstations and ergonomic furniture, provide a broad range of benefits for PWDs or persons with chronic health conditions while creating more inclusive workspaces.

iii. Entrepreneurship and Self-Employment

Technology has also opened new avenues for entrepreneurship and self-employment.

Digital marketplaces, social media and e-commerce platforms enable PWDs to establish and operate businesses directly from their homes, hence transcending geographical limits and the need for physical storefronts.

Initiatives such as the 'In Business program' demonstrate this potential, as highlighted by a 2022 report showing that participating businesses experienced a 27 per cent average increase in monthly profits.

The Current Landscape in Kenya: Challenges and Opportunities

Despite Kenya's progressive legal framework and the transformative potential of technology, a gap remains between policy and practice. PWDs continue to face significant barriers, including limited digital skills and access to tailored training, inaccessible buildings, transportation and digital platforms, and the high cost of assistive technologies such as wheelchairs, hearing aids, screen readers and mobility devices. Policy implementation is also inconsistent. Although the PWD Act prescribes a 5% employment quota, recent NCPWD data indicates that only 4% of public institutions comply, while PWDs constitute approximately 1.32% of the public service workforce. These challenges are compounded by persistent stigma and misconceptions that influence recruitment, workplace culture and career progression.

Nevertheless, Kenya is well positioned to accelerate progress. High mobile and internet penetration provides opportunities for accessible job platforms, remote work and digital training, while the country's growing technology ecosystem can support the development of affordable assistive technologies and inclusive digital solutions. Government initiatives, including the National ICT Policy 2019 and the PWD Act, 2025, provide an enabling policy framework, while advocacy campaigns and educational programmes can help shift societal attitudes and reduce stigma and discrimination against PWDs.

Conclusion

Technology is a powerful tool that can foster the economic inclusion of PWDs in Kenya. Through remote work, assistive technologies and digital entrepreneurship, it has the potential to eliminate many of the barriers that have historically excluded PWDs from meaningful economic participation.

However, technology alone cannot achieve inclusion. Real progress will depend on effective enforcement of Kenya's progressive legal framework, affordable access to assistive technologies, investment in digital skills, and collaboration across government, employers, technology innovators and disability organisations. This can help Kenya build a more inclusive labour market.



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READY, SET, INNOVATE:

HOW PATENT PROTECTION CAN ENHANCE ACCESSIBILITY IN SPORTS IN KENYA

Observed on 26th April each year, the World Intellectual Property Day invites us to reflect on how the legal protection of intellectual property encourages the progress of human innovation. The 2026 theme, “IP and Sports: Ready, Set, Innovate,” highlights a growing reality: modern sports are no longer defined by talent alone, but by technology, data, and design.

This year’s theme is particularly apt in today’s world. The world of sports is becoming increasingly shaped by technology, connectivity, equipment design, data and innovation. Through this year’s theme, the World Intellectual Property Organization (**WIPO**) encourages the recognition of the importance of protecting and promoting inventions, designs, and brands that keep the sporting world dynamic, competitive and accessible.

Recent Technological Innovation in Sports

One illustration of the transformative power of modern technology in sports is the recent account of Mr. Clarke Reynolds, a blind runner and braille artist, who successfully completed the Brighton Marathon using Ray-Ban Meta Smart Glasses operated via the “Be My Eyes” application.

This feat of human ingenuity was accomplished with the help of remote volunteers who were able to view Mr. Reynolds’ surroundings through the glasses and offer real-time guidance in landscape navigation. This achievement serves as a compelling demonstration of how a combination of technology, innovation, connectivity and human support can redefine the boundaries of participation for Persons

with Disabilities (**PWDs**), fostering greater inclusion in society.

Such a significant accomplishment reflects not only the effort of one athlete but also the dedication of inventors to advancing inclusivity in sports. If properly protected and responsibly commercialized, assistive technologies such as these can play a crucial part in being not only exceptional individual stories, but also provide scalable solutions for schools, sports clubs, para-athletes and community programmes at large.

Although the precise patent status of the particular features used by Mr. Reynolds would require a dedicated patent search, the wider smart glasses sector is already the subject of active patent protection and enforcement.

In January 2026, for example, Solos Technology filed patent infringement proceedings against Meta Platforms and EssilorLuxottica in relation to smart glasses technology, alleging infringement of patents concerning audio, sensing and processing features used in smart eyewear.

This underscores the commercial and legal significance of protecting the technical systems that make such assistive sporting applications possible. While this example is global, it raises an important question: how can similar innovations be developed, protected, and scaled within Kenya?

The Kenyan context already offers a local parallel from an innova-

tion perspective. In 2024, KCA University students were reported to have developed Artificial Intelligence (AI)-powered smart glasses for visually impaired users, integrating Google Maps, computer vision and generative AI to support navigation, object recognition and audio description of surroundings. Although such technology is not confined to sports, its potential application in inclusive sports is evident.

The Role of Patent Protection in Encouraging Technological Innovation

Kenya is internationally recognised for its sporting talent, particularly in athletics. However, Kenya must move beyond producing exceptional talent to also developing technologies, devices and systems that make sports safer and more accessible.

At its core, patent protection encourages inventors to develop, disclose, and commercialise new technological solutions. Where the inventions are new, involve an inventive step, and are industrially applicable, inventors may access legally recognised protections over their creations. It is from this position of security that inventors can rest assured that the fruits of their creativity are protected from unauthorized exploitation.

Kenya's patent system should therefore be viewed as part of the country's broader sports development infrastructure. If inventors believe their ideas can be protected, they are more likely to build, test, disclose, improve and commercialise them. However, challenges remain. Limited patent awareness, high registration costs, and weak industry-academia linkages continue to hinder the growth of sports innovation in Kenya.

Patent literacy should become part of Kenya's sports innovation ecosystem. Coaches, athletes, sports federations, universities, technical training institutions, manufacturers, start-ups and investors should be encouraged to identify patentable inventions early.

If universities, technical institutes and start-ups understand the value of patent registration, they are more likely to invest in sports science and sports technology. If local manufacturers appreciate the commercial value of patented inventions, they are more likely to partner with inventors rather than merely import finished products.

Protection under the Industrial Property Act (Cap. 509), Laws of Kenya

Under section 30 of the Industrial Property Act, (Cap. 509), Laws of Kenya (IPA), a patent once granted provides its registered proprietor with enforceable protective rights over the invention.

However, patent protection must also be pursued carefully. Not every idea is patentable. A general concept, business method, abstract aspiration or untested proposal will not ordinarily suffice. The invention must meet the legal requirements of novelty, inventive step and industrial applicability. Prior disclosure may also affect novelty, which means that inventors should obtain legal advice before publishing, pitching, demonstrating or publicly testing an invention.

According to section 21 of the IPA, an "invention" means a solution to a specific problem in the field of technology. Section 22 of the IPA goes further to expressly specify that an invention is patentable if it is new, involves an inventive step and, is industrially applicable.

When these legal pre-conditions are met, patent registration transforms an idea into a protectable asset that can be licensed, assigned, used to attract investment, commercialised through local manufacturing, or deployed through partnerships with schools, sports federations, corporate sponsors and disability inclusion programmes.

At its core, patent protection encourages inventors to develop, disclose, and commercialise new technological solutions. Where the inventions are new, involve an inventive step, and are industrially applicable, inventors may access legally recognised protections over their creations. It is from this position of security that inventors can rest assured that the fruits of their creativity are protected from unauthorized exploitation.

Additionally, sections 23 and 24 of the IPA provide that an invention is new if it is not anticipated by prior art and shall be considered as involving an inventive step if, having regard to the prior art relevant to the application claiming the invention, it would not have been obvious to a person skilled in the art to which the invention pertains.

This protection is vital because the process of the invention of technology requires several rounds of repeated prototyping, testing in real sporting conditions, collaboration with athletes and input from engineers, coaches, physiotherapists, software developers or medical professionals. Without adequate protection, an inventor may fear that once the invention is disclosed, demonstrated or tested publicly, it may be copied by a better-funded competitor.

In *Apex Creative Ltd & another v Kartasi Industries Ltd* [2011] KEHC 720 (KLR), the High Court (Ogola J) underscored the significance of registered industrial property rights in enforcement proceedings, holding that only a registered patent owner can institute infringement proceedings under the IPA.

The importance of this legal framework becomes especially clear when one considers sports accessibility as not limited to elite athletes or high-end performance equipment, but also including assistive devices that can determine who is able to participate in sports in the first place, for instance, adaptive wheelchairs, prosthetic sports equipment, safer protective gear, affordable training aids, injury prevention devices, rehabilitation technologies, wearable monitoring tools and locally designed sports equipment can all contribute to a more inclusive sporting environment.

Patent protection and public access should therefore not be treated as opposing goals. Properly managed, patent rights can encourage both commercialisation and access. An inventor may license technology to local manufacturers, permit preferential use by schools or disability sports programmes, enter sponsorship-supported distribution arrangements, or collaborate with public institutions to scale the invention responsibly. In this way, patent protection can serve both private reward and public benefit.

Conclusion

The future of sports in Kenya will be built by both athletic talent and shaped by the inventors who design better equipment, safer systems, adaptive devices, smarter training tools and technologies that allow more people to participate. Patent protection gives those inventors the confidence to innovate.

If properly utilised, patent protection can help transform sports innovation from isolated ideas into protected assets and commercial opportunities, for the benefit of the public at large.

If Kenya is to remain a global sporting powerhouse, it must invest not only in athletes, but in the ideas that support them. Patent protection is not merely a legal tool, but a catalyst for inclusive, home-grown innovation that can redefine who gets to participate in sports.



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THE LAST WORD?:

THE JUDICIAL REVIEW IN THE UNITED STATES AFTER *LOPER BRIGHT ENTERPRISES V. RAIMONDO*

Introduction

Judicial review has been a cornerstone of the American legal system for more than two centuries. Since the U.S. Supreme Court decided *Marbury v. Madison* in 1803, courts have exercised the duty to say what the law is and, in the modern administrative state, to test executive action for compliance with such law. In 1946, Congress passed the Administrative Procedure Act (**APA**), establishing procedures for how government agencies make rules and decisions while empowering courts to invalidate agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

For nearly four decades, courts applied what became known as “*Chevron deference*”—a legal doctrine requiring courts to defer to a government agency’s interpretation of an ambiguous statute so long as that interpretation was reasonable. The Supreme Court’s June 2024 decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) fundamentally changed this approach by overruling *Chevron* and restoring independent judicial judgment in statutory interpretation. This article examines the rise and fall of the *Chevron* doctrine, the reasoning and limits of *Loper Bright*, and the practical consequences for judicial review in the United States going forward.

I. The Historical Framework Behind the APA

The New Deal era (1930s–1940s) saw the creation of numerous federal agencies to combat the Great Depression. These were often called “alphabet agencies” because of their acronyms (such as the SEC, FTC, and EPA). With the growth of this “administrative state,” Congress passed the APA in 1946 to establish guidelines for agency rulemaking. The APA also sought to limit agency power by allowing courts to invalidate agency action that was arbitrary, capricious, un-

constitutional, beyond the agency’s legal authority, or procedurally flawed. The APA distinguished between factual and legal determinations: courts generally deferred to agency findings of fact unless “unsupported by substantial evidence.” Legal determinations, however, were more open to judicial challenge.

Even before the APA, the Supreme Court had developed a framework for how courts should treat agency legal interpretations. In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), employees sued their employer under the Fair Labor Standards Act (**FLSA**) and argued that they should be compensated for the time spent at the workplace while not actively working. The Court gave weight to the FLSA Administrator’s interpretation, holding that while agency interpretations were “not controlling upon the courts by reason of their authority,” they nonetheless represented “a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” Under this approach (now called “*Skidmore deference*”), courts would consider “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”

II. The Chevron Doctrine

The landscape changed significantly in 1984 with *Chevron U.S.A. v. Natural Resources Defense Council*. The case involved the Environmental Protection Agency’s (**EPA**) regulation of industrial facilities under the Clean Air Act. The EPA treated all equipment at a single facility as one “stationary source” of pollution, as if the entire facility were enclosed under a bubble with one vent at the top. The Supreme Court upheld the EPA’s approach and established the *Chev-*

ron two-step framework: where a statute was “silent or ambiguous with respect to the specific issue,” courts were required to defer to the agency’s interpretation so long as it was “reasonable,” even if the court itself would have interpreted the law differently.

The *Chevron* Court offered practical justifications for this deference. It reasoned that the EPA’s regulatory scheme was “technical and complex,” and that the agency had considered the matter in a “detailed and reasoned fashion” by “reconciling conflicting policies.” Moreover, judges were not “experts in the field,” federal agencies possessed technical expertise and were politically accountable to the public through the executive branch (headed by the President). Where Congress had not clearly spoken, agencies were better positioned than courts to resolve “manifestly competing interests” and “strike the balance” among them. The *Chevron* doctrine became a cornerstone of U.S. administrative law for nearly four decades. The Supreme Court decided approximately 77 cases that turned on the doctrine between 1984 and 2024, and thousands of other federal and state court decisions cited *Chevron*.

III. The Loper Bright Decision

In 2013, a group of commercial fishermen challenged a rule by the National Marine Fisheries Service (**NOAA Fisheries**) that required them to pay for onboard government monitors. The fishermen argued that NOAA Fisheries had exceeded its legal authority in imposing this requirement. The lower courts upheld the rule under *Chevron*, deferring to the agency’s interpretation because the underlying statute was ambiguous. When the case reached the Supreme Court, however, the Court overruled the *Chevron* doctrine entirely.

The Supreme Court held that the APA required courts to “decide all relevant questions of law” when reviewing agency actions. Courts must therefore exercise their own independent judgment in deciding whether an agency has acted within its legal authority. This duty, the majority concluded, “cannot be squared with” *Chevron*’s command that courts accept any permissible agency interpretation of ambiguous statutory language. Even when a statute is ambiguous, “there is a best reading all the same,” and the court, not the agency, must determine what that reading is after “applying all relevant interpretive tools.”

The majority rejected *Chevron*’s premise that resolving statutory ambiguities involves policy expertise rather than legal analysis. For the *Loper Bright* Court, statutory interpretation is a “purely textual art” in which courts have “special competence.” The opinion invoked *Marbury v. Madison*’s famous declaration that it is “emphatically the province and duty of the judicial department to say what the law is,” treating the APA as consistent with that foundational principle.

IV. Life After Chevron: Practical Effects

Loper Bright did not emerge in isolation. Conservative legal groups in the United States had long sought to limit agency power by curtailing *Chevron* deference. In *West Virginia v. EPA* (2022), the Supreme Court ruled that Congress had not granted the EPA authority to regulate carbon dioxide emissions related to climate change. The Court reasoned that, under the “major questions doctrine,” regulatory matters of significant “economic and political significance” require clear authorization from Congress before an agency may act.

In *SEC v. Jarkesy*, 144 S.Ct. 2117 (2024), the Court limited the authority of the Securities and Exchange Commission to impose civil penalties for securities fraud through its own proceedings, holding that such action violated the constitutional right to a jury trial. Similarly, in *Axon Enterprise v. FTC*, 598 U.S. 175, the Court allowed constitutional challenges to agency proceedings to proceed directly in federal court, rather than requiring parties to exhaust agency processes first.

For nearly four decades, courts applied what became known as “Chevron deference”—a legal doctrine requiring courts to defer to a government agency’s interpretation of an ambiguous statute so long as that interpretation was reasonable. The Supreme Court’s June 2024 decision in Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024) fundamentally changed this approach by overruling Chevron and restoring independent judicial judgment in statutory interpretation. This article examines the rise and fall of the Chevron doctrine, the reasoning and limits of Loper Bright, and the practical consequences for judicial review in the United States going forward.

The practical impact of *Loper Bright* is still unfolding. But one thing is clear: rules and agency positions once protected by *Chevron* are now more vulnerable to legal challenge. Empirical data from the first six months after *Loper Bright* shows that lower federal courts invalidated new agency rules at strikingly high rates, approximately 84% of the time in direct challenges, while still upholding most agency orders and longstanding interpretations. Challenges are already proceeding against Department of Labor guidance on ESG investing, the SEC’s climate disclosure rules, the Federal Trade Commission’s ban on non-compete agreements, and other regulations. U.S. courts will now independently assess whether a rule complies with the statute from which the agency derives its authority.

Litigants will test when settled decisions can be disturbed, and courts will refine how the principle of following precedent (*stare decisis*) limits the fallout. State courts are also grappling with whether to follow *Loper Bright* when interpreting their own administrative procedure laws, with some states, like Hawaii, explicitly declining to abandon deference to agency expertise. To withstand legal challenges, agencies will likely draft rules more conservatively and explain their statutory reasoning more thoroughly to persuade courts on the merits. They may also seek clearer grants of authority from Congress, which have become more valuable after *Chevron*’s demise.

Despite its headline impact, *Loper Bright* leaves several important foundations intact. Courts can still find agency interpretations persuasive. Judges must determine the “best” reading of a statute, but they should give “due respect” to executive interpretations, especially longstanding, consistent ones backed by solid reasoning. Moreover, deference to agency findings on questions of fact remains; the APA’s “substantial evidence” standard still governs. Where a statute clearly empowers agencies to make policy judgments within defined bounds, courts are unlikely to substitute their own preferences for choices Congress left to federal agencies.

Finally, *stare decisis*, still matters. In *Loper Bright* itself, the Court cautioned that “mere reliance on *Chevron* cannot constitute a special justification” for overruling a prior holding. The thousands of cases decided under *Chevron* remain good law and are “still subject to statutory *stare decisis*” despite the change in interpretive approach.

Conclusion

U.S. courts appear to have reclaimed the power of judicial review over questions of law after *Loper Bright*. Federal agencies will no longer prevail because their reading of an unclear statute is “reasonable.” Yet *Loper Bright* is unlikely to be the death knell for the administrative state. Agencies still receive respect for well-reasoned, consistent interpretations and retain discretion over factual findings and policy choices delegated by Congress. Going forward, the statutory text will be paramount: agencies must justify their rules by the best reading of the statute, while courts will have the final word on ambiguous legal questions.



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