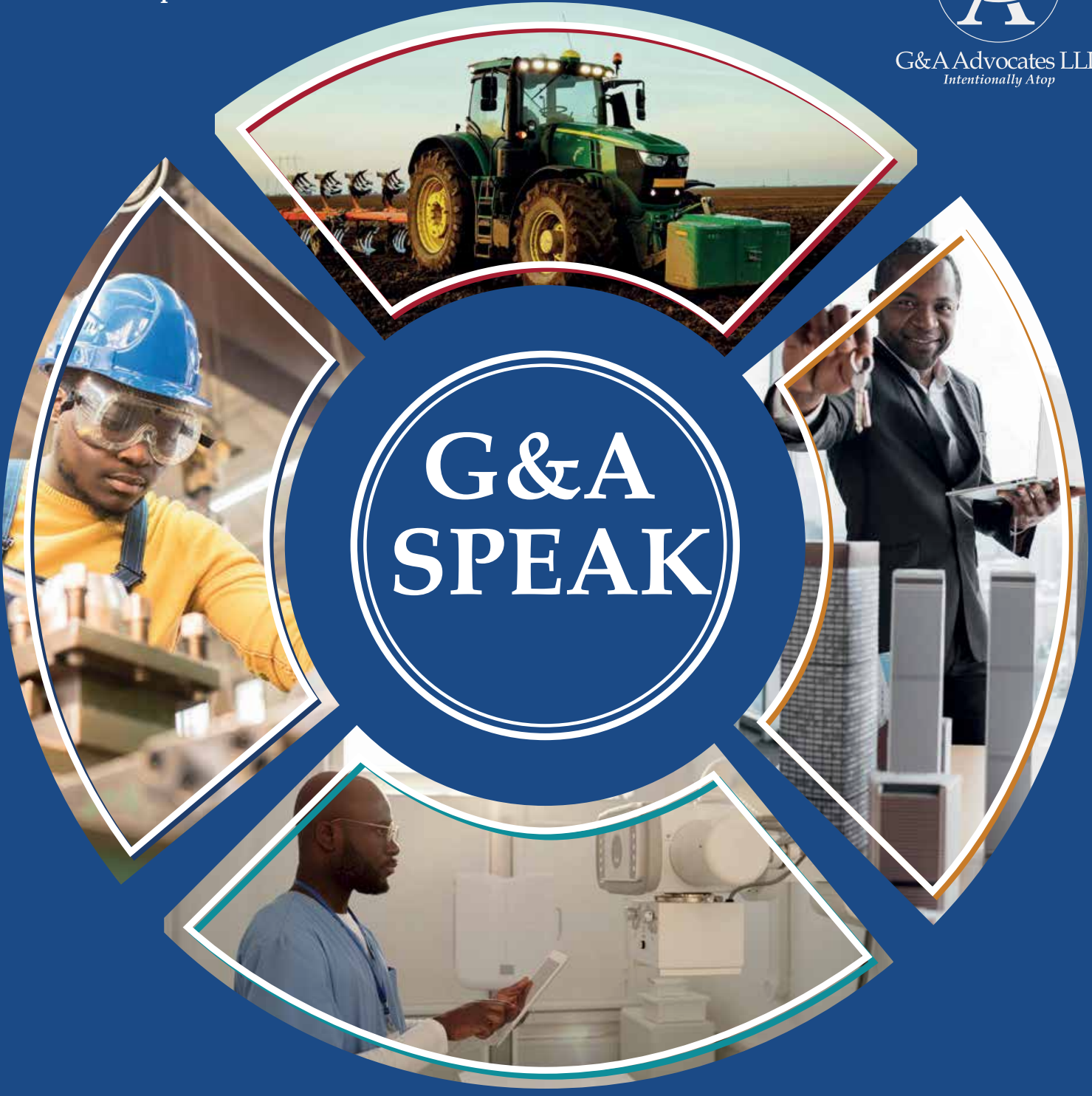


Issue 2 September 2024



G&A Advocates LLP
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G&A SPEAK

KENYA'S VISION 2030: THE 4TH MEDIUM TERM PLAN

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FOREWORD

Kenya's Vision 2030: The Fourth Medium Term Plan



MOSES KIPKOGETI

WE ARE EXCITED TO PRESENT the second edition of *G&A Speak* whose theme is “Kenya’s Vision 2030: The Fourth Medium Term Plan”. Kenya’s Vision 2030 is the long-term development blueprint for the country and is motivated by a collective aspiration for a better society by the year 2030. Its aim is to create “a globally competitive and prosperous country with a high quality of life by 2030” and to transform Kenya into “a newly-industrialising, middle income country providing a high quality of life to all its citizens in a clean and secure environment”.

The Vision is implemented through a series of successive five-year Medium-Term Plans. The First MTP was simultaneously launched with the Vision covering the period 2008-2012. On the other hand, the Second MTP covered the period 2013-2017 while the Third MTP, covered the period 2018-2022 and prioritized the implementation of the “Big Four” initiatives namely: Manufacturing; Affordable housing; Food and Nutrition Security; and Universal Health Coverage.

Contextually, the theme comes at a time when the Kenya Kwanza administration has been sworn into office ushering the Fourth Medium Term Plan. As such, this edition presents various articles which examine the impact of the Kenya Kwanza development plan which identifies five key areas of national development and

intends to transform Kenya through the Bottom-Up Economy model vis-à-vis Kenya’s Vision 2030 which is geared towards transforming Kenya into a globally competitive and prosperous nation.

In this Edition, under the Micro, Small and Medium Enterprise economy sector, Ruth Achitsa Kisiah begins by offering a Critique of the Privatisation Act, 2023. Next, Mwangi Kangú and Too Amos go on to discuss the EAC Rules of origin as it pertains to promoting “Brand Kenya”. In Healthcare, Seth Olweya discusses plausible ways of strengthening the Kenyan healthcare system through Public Private Partnerships (PPPs) and in particular, he discusses opportunities for county governments. This is followed by Sharon Moraa who puts forward a commentary on Universal Health Coverage (UHC) and answers the question: Is UHC a panacea or a mirage? On her part, Loice Thiong’o, sheds light on the path to successful settlements and dispute resolution in health PPPs. Lastly, Karen Koech gives a snapshot of PPPs in healthcare in Kenya.

As for the Housing and Settlement sector, Robert Mwangi starts us off by shedding light on navigating construction projects in Kenya quipping that “The Devil is in the details”. Brenda Kirimi comes next and shares her thoughts on the place of Real Estate Investment Trusts (REITs) in financing affordable housing in Kenya. Lastly, Kevin Amaasa delves into the right to housing and the legal mechanics of its implementation.

In Agriculture, we have one contribution from Charles Mayiga who highlights the role Kenya’s forest cover can play to obtain a stable macro-economic environment. Finally, in the Digital superhighway and creative economy sector, Alex Mbaya pens an article on balancing data protection and intellectual property in photography. He highlights the ensuing implications

for Kenya's national development agenda. Joan Omalla then closes this section by discussing the place of artificial intelligence in the legal profession.

We also have several contributions in our Corporate, Commercial, Tax and Intellectual Property practice area of the firm. For starters, Ruth Achitsa Kisiah gives an insightful piece on unclaimed financial assets and the procedure in handing over assets to the Unclaimed Financial Assets Authority. The duo, Eric Gumbo and Whitney Mwenje then deliver an informative piece on administration as a debt recovery option for non-performing loans. Next, Delbert Ochola critiques the issue of intellectual property ownership in the era of ChatGPT and related AI software.

In our Technology and Innovation practice area, Eric Gumbo and Whitney Mwenje return with an

illuminating piece on regulatory compliance under the Data Protection Act. Duncan Kiprotich joins the fray and addresses the matter of electronic wills in Kenya. In bringing the curtains down, we have contributions in the section known as Jurisprudentially Speaking with Charles Mayiga reflecting on our neighbor Uganda's decision on the duty of care of financial institutions offering digital banking services followed by Kennedy Kyalo who critiques a Kenyan Court of Appeal case on the scope of merit review under the Constitution of Kenya.

We truly hope that you will enjoy the Read!

Moses Kipkoge,
Partner

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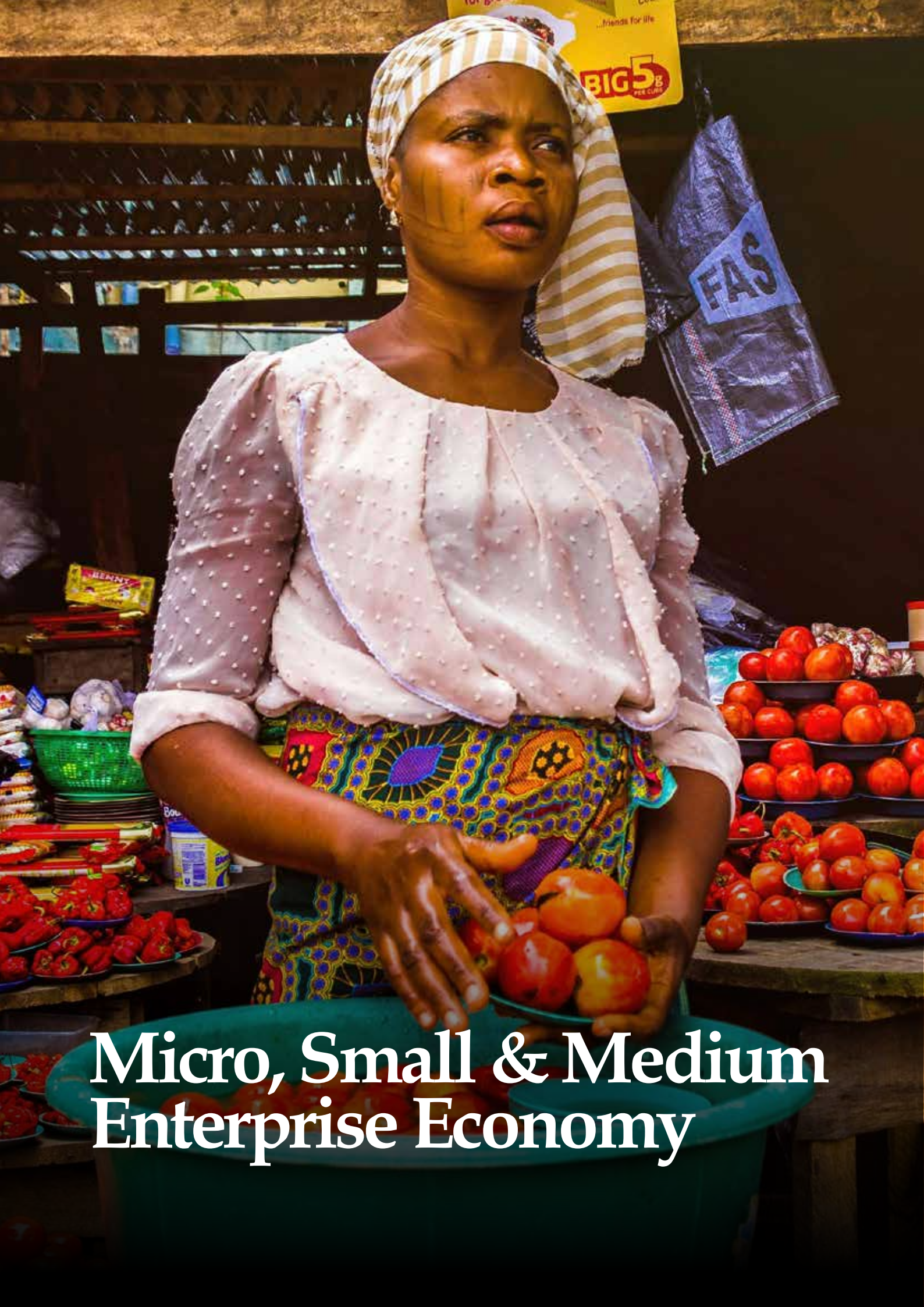
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Micro, Small & Medium Enterprise Economy

Economy Recovery Strategies: A critique of the Privatisation Act, 2023



**RUTH ACHITSA
KISIAH**

FROM 1963, WHEN KENYA ACHIEVED political independence, up to 1979, when a comprehensive review of the State Corporation sub-sector was carried out, the Government's participation in commercial activities grew rapidly and broadly resulting in state dominance in various forms (including monopolies) in many commercial activities.

The establishment of the state-owned enterprises was driven by a national desire to: accelerate economic social development; redress regional economic imbalances; increase Kenyan citizens' participation in the economy, promote indigenous entrepreneurship; and promote foreign investment through joint ventures. This desire was expressed in the Sessional Paper No. 10 of 1965 on African Socialism and its application to planning in Kenya.

However, over the next two decades, neo-liberal economic reforms swept across the emerging market economies world, marking a distinct reversal of ideology and policy and giving way to economic liberalization, addressing the difficulties created by state expansion while bringing the promise of smaller, more fiscally disciplined, and more efficient states. This trend became pervasive with an increasing number of governments discarding their state-led development policies, increasingly engaged with the international community, and tried their hand in the global game seeking growth through market reforms.

In Kenya, a comprehensive review of the Public Enterprises Performance was carried out in 1979 (the

Report on the Review of Statutory Boards) and in 1982 (the Report of the Working Party on Government Expenditures). Both reports indicated that the growth in the parastatal sector had not been accompanied by development of efficient systems to ensure that the sector plays its role in an efficient manner.

Moreover, there was clear evidence of prolonged inefficiency, financial mismanagement, waste and malpractices in many parastatals. It was established that some of the resources diverted to the government to finance the state corporations' activities could have contributed more to national development if these state corporations were left in the private sector.

Therefore, following the two reviews a number of measures were put in place including the enactment of the State Corporations Act- a major attempt to streamline the management of the state corporations. However, the performance of most of the corporations continued to deteriorate due to continued reliance on limited public sector financing; increased dependence on financing through loans borrowed by the government and/or channelled as government equity among other factors.

To support the pursuit of these goals, therefore, Kenya sought to promote privatisation of key public assets, entities and state corporations. A "privatisation transaction" is one in which ownership or control of a public body (state, government, ministry, department, enterprise or corporation) or its major assets or shares held by a public body in a company representing a controlling interest are to be transferred from the government or a government-controlled entity to the private sector.

Privatisation sought to improve the efficiency and competitiveness of Kenya's productive resources by subjecting more of Kenya's production to market forces; mobilize investment resources for rehabilitation; expand and modernize key infrastructure facilities; develop the capital markets; and support the budget through privatisation proceeds and increased taxes.

The Privatisation Act, 2005

The Privatisation Act was enacted in 2005 to provide for the privatisation of public assets and operations, including State corporations, by requiring the formulation and implementation of a privatisation programme by a Privatisation Commission.

The Act establishes a Privatisation Commission authorised to formulate with the approval of Cabinet, privatisation programmes; review assets and operations of a public entity to determine whether to include it in the said programme; and implement specific proposals for privatization in accordance with the privatization programme.

Under that Act, the process of privatisation was as follows:

- Commission to make specific proposals for privatisation to the Cabinet Secretary in charge of Finance;
- Cabinet Secretary presents the proposals to the Cabinet for approval;
- Cabinet Secretary presents report on privatisation proposal as approved by the Cabinet to the National Assembly for consideration; and
- Upon laying before the National Assembly, a report shall stand to the relevant Committee for implementation.

The methods of privatisation under the Act included public offering of shares; negotiated sales resulting from the exercise of pre-emptive rights; sale of assets, including liquidation; and any other method approved by the Cabinet in the approval of a specific privatization proposal.

Finally, there was established a Steering Committee to implement privatisation programmes on behalf of the Commission and the Privatisation Appeals Tribunal for resolution of disputes under the Act.

The Privatisation Act, 2023

The government sought to help financially struggling state-owned enterprises raise funds and stay afloat recognizing that the 2005 Act stalled the privatisation agenda in Kenya. A bureaucratic legal framework guiding the sale of inefficient State enterprises was cited among the hindrances to the privatisation process.

In so doing, the Kenyan administration seeks to speed up the much-awaited privatisation of state owned enterprises to improve their performance and to fill its coffers amid high levels of public debt. Thus, the Privatisation Act, 2005 has been repealed and replaced by the Privatisation Act, 2023. The Act has majorly introduced administrative changes to cut through a thicket of outdated regulations and give the government tighter control of its ambitious privatisation drive.

Privatisation Authority

The Act has established the Privatisation Authority to advise the government on all aspects of privatisation of public entities, implement the programme and guide on the Act. The board shall receive any grants, gifts, donations or endowments on behalf of the Authority.

The Authority has replaced the Privatisation Commission and is empowered to implement the privatisation programme and implement specific privatisation proposals in accordance with the privatisation programme. The Authority shall be managed by a Board which shall ensure the proper and effective performance of the functions of the Authority.

“The Privatisation Act was enacted in 2005 to provide for the privatisation of public assets and operations, including State corporations, by requiring the formulation and implementation of a privatisation programme by a Privatisation Commission.”

“Where the National Assembly does not make a decision within ninety days, the privatisation programme shall be deemed to have been ratified.”

Privatisation process

The Cabinet Secretary, National Treasury shall identify and determine entities to be included in the privatisation agenda then formulate a privatisation programme. Upon approval of the privatisation programme by Cabinet, the Cabinet Secretary shall submit the approved privatisation programme to the National Assembly for ratification before implementation of the programme.

Within sixty days, the National Assembly shall, after receipt of the privatisation programme, consider the programme guided by principles of good governance, the criteria for identification of entities and other relevant consideration. The National Assembly shall then make a decision to either (i) ratify part or all of the programme for implementation; or (ii) refuse to ratify part or all the programme and notify the Cabinet Secretary for reconsideration stating the reasons for the refusal; and (c) notify the Cabinet Secretary of its decision.

Where the National Assembly does not make a decision within ninety days, the privatisation programme shall be deemed to have been ratified.

Privatisation Review Board

The Act establishes the Privatisation Review Board to replace the Privatisation Appeals Tribunal with respect to dispute resolution under the Act including objections, appeals and review of privatisation processes.

Methods of privatisation

The Act does away with previous methods of privatisation such as liquidation and leasing. The methods of privatisation include: initial public offering of shares; sale of shares by public tendering; sale resulting from the exercise of pre-emptive rights; and such other method as the Authority shall, with the approval of the Cabinet Secretary, determine.

Privatisation proceeds

The Act provides that any proceeds from the sale of a direct government equity holding shall be paid into the Consolidated Fund. On the other hand, gains from the sale of a public entity's shareholding shall be deposited in a special interest-bearing account established for that public entity's privatisation in order to protect the erosion of the balance sheet of the public entity and the proceeds shall be credited into the Consolidated Fund Account within ninety days.

Conclusion

Revising the law surrounding privatization in Kenya has the potential to lead to exponential economic growth and national productivity. The Act shall potentially impact various stakeholders as the promise of an efficient process of privatization is especially enticing for investors. The Act will enable the government to obtain funds and generate revenue without collecting external debt. Further, the Act will reduce conflicts between the public sector's regulatory and commercial functions and develop Kenya's capital markets. All in all, it is important to consider potential risks.

EAC Rules of Origin:

Harnessing the power of community preferential tariff treatment in promoting “Brand Kenya”



MWANGI KANG'U



TOO AMOS

KENYA IS A MEMBER OF THE East African Community. The state ratified the Treaty Establishing the East African Community on 30 November 1999. This is the legal framework governing engagements among partner states in all areas including inter-state trade. As an operational principle, the partner states agreed to establish an export oriented economy for the partner states to facilitate among others: free movement of goods, persons, labour, services, and capital. At the center of this pathway is a promise among partner states to utilize community preferential tariff treatment, limit common external tariffs and ultimately establish a common market.

One of Kenya's Vision 2030 goal is to transform the country into a newly industrializing, upper middle-income country. Regional trade therefore is a key pillar in which Kenya can capitalize to improve its total trade balance. The campaign awareness on building and promoting the made in Kenya brand has been raging for

years. The brand mark is a strong visual symbol affixed on Kenyan export products that meet the guidelines set out in the East African Community Customs Union (Rules of Origin). Such wholly produced goods or products that have undergone sufficient processing in Kenya receive an EAC certificate of origin thus qualify for community preferential tariff treatment.

This article examines how Kenya can enhance regional trade and improve its trade balance by utilizing the EAC Rules of Origin to its advantage. Further, the article examines the current EAC intra-trade volumes, the regulatory framework, necessary procedural steps in origin determination, administrative procedures on rules of origin (for exporting and importing partner states) and the place of EAC Rules of Origin in advancing Brand Kenya within the EAC trade regime.

The Current Intra-Trade Volumes among EAC Partner Trades

The intra-regional trade within the East African Community (EAC) has recently recorded an upward trajectory. It is reported that as at September, 2022 the intra-EAC trade stood at 10.17 Billion United States Dollars (USD). Moreover, volumes of imports and exports in the seven (7) EAC Partner States, grew from 13% in 2019 at a value of 7.1 billion USD to 15 % in 2021 at a value of 9.5 billion USD. The growth is attributed to the political good will among partner states wherein the Heads of State resolved to eliminate many Non-Tariff Barriers (NTBs) hampering intra-regional trade. This is in tandem with the bloc's goal to increase the volumes of intra-regional trade.

Insights on EAC Rules of Origin

The regulatory framework

The substantive rules of origin are provided for under the East African Community Customs Union (Rules of Origin) Rules, 2015 as revised in 2022 (“EAC Rules of Origin”). In addition, the implementer procedures are provided under the Manual on the Application of the East African Community Customs Union (Rules of Origin) Rules, 2015 (“the Rules of Origin Manual”). The two legislations provide the framework, administrative procedures and criteria for determining origin of goods.

Steps for origin determination

Goods shall be accepted as originating in a Partner State where the goods are:

wholly produced in the Partner State; or

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.

Goods wholly considered to be wholly produced in a partner state include; mineral products, vegetable products, live animals and products from slaughtered animals and products of aquaculture etc. For goods produced using materials not wholly obtained from a Partner State, the EAC Rules of Origin has set out a schedule of lists of origin criterion to which such goods must meet. They are considered as non-originating goods.

Further, the EAC Rules of Origin excludes goods that have undergone processes not conferring origin from getting EAC tariffs preferential treatment. The rule on “simplicity,” is applied to determine processes not conferring origin. To this end, simple means a process where special skills, machines, apparatus or tools are not required for the process.

In determining the origin of a finished product, the principle of cumulation of origin is applied. It provides that a finished product is deemed to have originated in the Partner State where the final working or processing takes place.

Administrative procedures on rules of origin

Exporting companies

Under the Rules of Origin Manual, a company that wishes to export under the EAC preferential tariff regime should be registered with the relevant competent authority in the Partner State. Such company desirous of exporting within the EAC trade regime must also obtain a certificate of from the designated authority in his State. The certificate serves as evidence to enable the goods to be accorded the EAC preferential tariff treatment being sought. The rules of origin also require exporting companies to apply in writing to the competent authority for grant of the “Approved Exporter” status. Further, exporters are required to issue origin declarations for goods that qualify as originating in the Partner States.

For approved exporter Kenyan companies trading goods wholly produced in Kenya and products derived from processes sufficiently worked in Kenya, such will also bear the KEBS and brand Kenya logos respectively. As such, once an exporter has acquired the approved status, declared origin of goods and has obtained a certificate of origin, their eligibility for preferential treatment is guaranteed.

Importing companies

Equally, for goods to be admitted as originating from a partner state, an importer must submit proof of origin to the Customs Authorities. The Authority will conduct confirmatory checks, on-the-spot investigations, pre-entry clearance and post-clearance verification.

The Customs authorities in the exporting and importing Partner States are also required to retain copies of certificates of origin submitted by an applicant. This relates to goods traded under the EAC tariff treatment arrangements for a minimum period of five (5) years.

As opposed to community preferential tariff treatment, goods produced outside the bloc, attract import duties specified in the Common External Tariff (CET).

The downside of EAC Rules of Origin

In as much as the rules are beneficial to the bloc, partner states have complained that the current rules deny edible oil, cement and newly introduced fruits duty-free access. These products are cumulatively referred to as whole produced products. Despite whole products extracted from plant products derived from partner states, processing is mostly completed overseas. Such products therefore attract duties specified in the CET.

In the past, traders under the East African Business Council (EABC) have called for a review of the rules. Successively, on 1st July, 2022, the rules were revised and a communique issued to that effect. However, traders implore the community to review the rules further to cater for new developments in the region. The most important development is the coming into effect of the African Continental Free Trade Area (AfCFTA) in January, 2020. However, so far, the EAC is yet to begin trading substantially as bloc under the AfCFTA agreement.

The Place EAC Rules of Origin in Advancing Brand Kenya within the EAC Trade Regime

Since the inception of the rules of origin in 2015 and subsequent revision last year, Kenya as a partner state has benefited from EAC Rules of Origin. As the partner states seek to bolster intra-regional trade, community preferential tariff treatment system has grown under the EAC Rules of Origin. It is argued that small scale cross-border trade has improved especially between Kenya and its close door neighbors.

The rules provide a leeway over CETs and NTBs

In as much as Common External Tariffs imposed on goods produced outside the bloc are punitive in nature, for regional integration, it is considered as a protective mechanism by partner states. We note that the EAC Treaty provides for community preferential tariff treatment as a measure to enhance intra-regional trade and towards facilitating a common market. Hence, it is in the best interest of Kenya as a partner state to ensure compliance with EAC Rules of Origin so as to fully benefit from the preferential tariff treatment regime.

On the other hand, several non-tariff barriers that exist within the bloc impede trade. Although, most partner states have embarked on elimination of non-tariff barriers and other trade barriers, the status of NTBs is still significant. To mitigate on the challenges arising from CETs and NTBs, Kenya has successfully utilized the EAC Rules of Origin to promote its brand in the East African region.

In summary, the sound application of EAC Rules of Origin has greatly benefited Kenya's regional trade. Despite the challenges arising from the application of the rules especially on whole products, building brand Kenya regionally supports wholesome economic transformation.

“We note that the EAC Treaty provides for community preferential tariff treatment as a measure to enhance intra-regional trade and towards facilitating a common market.”



Healthcare

Universal Health Coverage in Kenya: Panacea or mirage?



SHARON MORAA

ARTICLE 43 OF THE KENYAN CONSTITUTION AND THE Kenya Vision 2030 development blueprint requires the country to provide the highest attainable standards of healthcare to all her population. When access to health is guaranteed, it promotes other rights including right to life, right to dignity, and freedom of movement among others.

As such, its deprivation infringes upon the enjoyment of many other rights and may potentially affect the rate of productivity in the country. Under the 4th Schedule of the Constitution, provision of healthcare services is an obligation placed upon both levels of government with the National Government performing regulatory functions and the county governments performing service delivery functions.

The Kenya Vision 2030 is implemented through a series of successive five-year Medium-Term Plans. To that extent therefore, the Third Medium Term Plan covering the period 2018-2022 prioritized the implementation of the “Big Four” initiatives including Universal Health Coverage (“UHC”). This is a form of coverage that ensures that all persons have access to the full range of quality health services they need, when they need them and where they need them without financial hardship.

It is against this backdrop and owing to the Big Four Initiatives that the Ministry of Health prioritized the need to develop and operationalize a Universal Health Coverage Policy 2020-2030 that clearly outlines the strategic direction for the sector. It demonstrates the

health sector’s commitment under the Government’s stewardship to ensure that the country implements health plans in a manner responsive to the needs of the population. Further, it recognizes that the biggest challenge in ensuring UHC is financial restraint as the government lacks enough funds to operationalize.

In that regard, the National Hospital Insurance Fund (NHIF) established by the NHIF Act is set to play a major role in social health protection through offering subsidiary programs to ensure the attainment of UHC.

Subsequently, the Fourth Medium Term Plan covering the period 2022-2027 and dubbed “Bottom Up” proposes to deliver the UHC system built on three pillars, key being fully publicly financed primary healthcare (preventive, promotive, outpatient & basic diagnostic services), that gives patients choice between public, faith based and private providers, based on a regulated tariff.

Owing to the foregoing, this article is aimed specially to discuss the successes and failures of the government in their quest to ensure access to the highest attainable standard of health care. It argues that UHC is a panacea. However, to think that it will be fully operational by 2030 is a mirage. Therefore, the article offers possible solutions to the government of the day for steady implementation of the UHC.

So far so good? So far so bad?

The Kenya Vision 2030 flagship report of 2008-2017 noted that UHC would be propelled by the Big Four Initiatives. Further, it noted successes in healthcare including reduced maternal mortality rates as well as increased immunization of children. However, the shortcoming at the time was that the monthly contribution per person was increased from Kshs. 300 to Kshs. 500. Moreover, there were inadequate funds and where there were funds there were delays in their disbursements.

In 2018-2019, the Health Insurance Subsidy Programme benefited several vulnerable groups including the poor, the elderly and persons living with severe disabilities who could easily access health services. In addition, secondary school children were also registered to access health services under Eduafya. However, this scheme was only available to students in public schools fully registered under the National Education Information Systems.

UHC in Kenya was officially initiated in 2018 through pilot programmes in Isiolo, Kisumu, Machakos and Nyeri counties to cater for emergency services, maternal care, HIV/ AIDS services, mental health care, infectious and non-communicable disease management, inpatient and outpatient services. However, only two of the four pilot projects that had been initiated were successful. In Kisumu County, the pilot project never hit the ground while in Machakos, financial constraints limited implementation.

In 2019, the then Cabinet Secretary in the Ministry of Health, Sicily Kariuki highlighted the intention of the government to explore private entities to ensure the success of the UHC project. This is yet to be seen. In 2021-2022, the flagship report recorded an increase in registration of mothers to prenatal and postnatal services, and an increase in registration of the poor, aged and persons living with severe disabilities. This resulted from the increased awareness in regards to the services offered as well as increased funding.

“UHC in Kenya was officially piloted in Isiolo, Kisumu, Machakos and Nyeri counties to cater for emergency services, maternal care, HIV/ AIDS services, mental health care, infectious and NCDs management, inpatient and outpatient services.”

In addition, there was increased infrastructure in Kenyatta National Hospital and the Moi Teaching and Referral Hospital that saw the construction of a cancer and renal centre respectively.

In 2022, the progressive realization of UHC surpassed expectations. Previously, contributions were only made by private persons and the National and County government on behalf of civil servants as their employer. However, with the amendment of the NHIF Act, Section 1A now provides for a legal basis for collection of contributions. What is more, Section 1B has made it possible for vulnerable members of the society that include; poor, aged and persons with severe disabilities to now access NHIF services. The contributor to the fund on behalf of the vulnerable, with a special obligation is the National Government.

As of now, despite financial constraints, the 2022-2027 government has increased budgetary allocations in the health sector as compared to the allocations in previous years. In 2022 only 126.4 billion was allocated. Currently, the National Treasury has budgeted about 154 billion to be utilized and has increased budgetary allocations between the years 2024 and 2026.

From the above it is worth noting that the government has taken strides in continued fulfilment of their obligation. It is also worth noting that the change of governance does not in any way tamper with the provision of health services.

Shortcomings encountered in the stride towards UHC

UHC is based on the following principles; Access to all persons; Access to full range quality services; Access when needed; Access where it is needed; and Access without financial hardship. Various shortcomings have been sighted in relation to the principles as follows:

Access to all persons.

Various institutions report that most of the individuals that have access to healthcare services under NHIF are those that have been formally employed. These include civil servants, special groups, private entity employees and voluntary contributors who are self-employed.

As earlier explained, only registered individuals can access the services. As such, if a member is not registered, they cannot access health services unless they pay out of pocket. Furthermore, the NHIF handbook restricts

the number of beneficiaries a policy holder can register; it is only upon an increment of contribution that the list can be expanded. In 2022, police officers were unable to access health services from accredited institutions and this forced them to only access services out of pocket and to further contract other insurance agencies to cover their health expenses.

Safe to say that this UHC principle is yet to be operationalized. UHC is not yet available to all persons.

Access to full range services

As per the NHIF hand book, not all persons access full range services. NHIF contributors are subdivided into Alphabetic job groups. As far as outpatient services are concerned, only individuals in sub group A-K have unlimited access to services while the rest only access services limited to the list provided by NHIF. For inpatient services, some members enjoy the privilege of private rooms while others have to share rooms. The latter exposes them to other forms of illnesses contrary to expectation of health services in both private and public hospitals. This has affected equity in service production as well off individuals access a wider range of health in comparison to the poor and vulnerable.

Additionally, the services rendered are limited to the amount of contributions an individual makes and where the medical limit lapses within a financial year, it cannot be extended unless authorized. As far as emergency services are concerned, the only individuals that access the air rescue services are civil servants and disciplined officers. In essence, individuals under voluntary cover may not access such services.

As if that is not enough, there are private institutions that refuse to take up covers by individuals that are not civil servants or members of disciplined officers. A good example is Sinai Hospital in Kajiado county which does not accommodate individual covers..

Access to health services when and where needed.

When one registers for NHIF, they are required to select a specific health institution that is within their locality. This is normally done in the months of June and December. The same also applies when one needs to change their institution. Nonetheless, in the event one changes their institution outside the prescribed time, the change is only effected upon the stipulated

time, which in most instances takes a minimum of one month.

This is to mean that unless it is an emergency, in which case any NHIF accredited institution can attend to them, someone cannot receive medical services if they are not sought at their registered institution. For instance, if one resides in Eldoret and is registered in a hospital in Nairobi, they can only seek services in that specific Nairobi hospital. Unless of course, they have been referred by the Nairobi hospital or are in an emergency state.

Access without financial hardship.

Currently, as has been noted earlier, NHIF has the mandate to ensure realization of UHC. However, many Kenyans cannot contribute to the fund. To that extent therefore, NHIF has most recently dropped some members due to defaulting in their contributions.

In 2015, the premiums payable for self-employed individuals rose from Kenya Shillings 300 to 500 while for employees, the same was raised depending on the amount of salary they earn. This may cause individuals to flee from NHIF as the amount of money they pay may not equal the quality of services provided.

Additionally, it is reported that NHIF makes losses amounting to at least 16 billion in a year from fraudulent claims. This amounts to waste of funds and resources contributed by the public. This induces a lack of trust in NHIF as not only natural persons but also institutions are moving away from NHIF services to seeking services from other health insurance agencies.

Lastly, the country places reliance on donors. It was recently reported that Kenya is on the verge of seeking grants from other avenues as donors are withdrawing from funding health operations like child vaccination. Kenya is now in the search for sourcing other donors to finance such services. This essentially means that Kenyans might as well prepare themselves to go deep into their pockets to finance the services they are meant to freely enjoy.

The way forward

Notably, insurance agencies are usually able to insure their customers against risks through pooling of funds. The more the contributors the more the amount of contributions to be made. As such the government ought to ensure that all individuals have access to all

“The country places reliance on donors. It was recently reported that Kenya is on the verge of seeking grants from other avenues as donors are withdrawing from funding health operations like child vaccination.”

details relating to the access of health services and how they can be accessed. This may result in an increment in the number of individuals as those made aware of the reason for insurance may well register.

The aim of the government is to reduce out of pocket payments by individuals. As this is done, they should also consider reducing the amount of contribution that they collect from individuals. This is because individuals may be quick to deregister themselves from NHIF services and seek service from other insurance agencies.

In the alternative, the government should ensure the quality of services rendered match the required standard and additionally, the amount contributed by an individual. Additionally, it should widen the scope with which the services are covered in order to retain and attract more customers.

Aside from the above, it should ensure development in the ICT sector to ease access to services. By doing so, it may ensure accessibility of health services wherever and whenever and may lift the restriction of registration based in one health institution.

To deepen their relationship with private hospitals. As noted above, certain private hospitals have limited their NHIF services to only be accessed by civil servants. The government should make arrangements to ensure the voluntary contributors can also access services in whichever accredited institutions. This can also be

guaranteed by early and quick disbursement of funds to the institutions as and when required.

Additionally, the government should focus on complete free service of primary health care facilities before implementing long term projects.

The access to services has been heightened due to increased budgetary allocations. This should be ensured to avail services to all Kenyans thereby implementing the pillar of ‘leave no one behind’. As at now, being that NHIF standing alone cannot lift the UHC burden, the government should ensure initialization of the UHC Fund.

Finally, being that county governments have the mandate to provide Free Primary Health Care in their respective counties, the National Government should ensure that they increase counties’ budgetary allocations and while doing so, disburse the allocations in good time.

This article has by and large articulated the strength and weaknesses of the government when it comes to ensuring the realization of Universal Health Coverage. It has noted the achievements so far made and commends the government for a job well done. It has noted that the realization of the right to health is done progressively as is required and gives hope that indeed, despite the challenge of full realization by 2030, the same can still be achieved.

Kindly note that with the passing of the Social Health Insurance Fund, NHIF has since transitioned to SHIF. The NHIF Fund has since ceased to operate.

Navigating dispute resolution in health Public Private Partnerships:

The path to successful settlements



LOICE THIONGÓ

THE HEALTHCARE SECTOR has witnessed a surge in the use of Public-Private Partnerships (PPPs) to address the shortage of healthcare infrastructure and improve accessibility to healthcare services, in order to achieve Universal Health Coverage (UHC). These collaborations enable the government to leverage the private sector's expertise and resources in order to enhance healthcare service delivery, promote innovation and improve healthcare outcomes.

Despite their benefits, PPPs are susceptible to disputes that can hinder the achievement of their objectives. These disputes can range from minor disagreements to complex legal battles and resolving them can be a daunting task. Accordingly, this article explores the mechanisms for resolving disputes in PPPs within the health sector, highlights the types of disputes that may arise and recommends strategies that can facilitate their successful resolution.

Understanding Public Private Partnerships

The Public-Private Partnership Act of 2021 describes a PPP as a type of collaborative arrangement between a public agency and a private sector entity in which both parties work towards achieving a common goal.

In this model, the government provides permits, regulatory frameworks, and sometimes funding, while the private sector entity contributes expertise, technology, and financing. The private entity recovers its investment through compensation from the public fund or charging fees from users of a service and in some cases both. Further, the private sector entity is expected to transfer back the facility to the contracting authority in accordance with the agreement entered into by the parties.

The government of Kenya has recognized and embraced the significance of PPPs in realization of UHC. The country has relied on PPPs to build hospitals, clinics and provide specialized healthcare equipment. Although PPPs have numerous benefits, they are not immune to disputes just like any other partnership. Disputes may arise at any stage during the lifetime of the project.

An example of a dispute that arose in a Kenyan PPP in the healthcare sector was with respect to the Managed Equipment Services (MES) project. The project was between the Kenyan government and several private healthcare providers, and it was aimed at providing specialized medical equipment to public hospitals across the country. The project was expected to improve the quality of healthcare services and reduce the burden of disease in Kenya.

However, the project was plagued by disputes, with the private providers accusing the government of non-payment and breach of contract, and the government accusing the private providers of overcharging and underperformance. The dispute resulted in a

protracted legal battle, which not only delayed the implementation of the project but also affected the quality of healthcare services in public hospitals.

Types of disputes in PPPS

Below are some of the disputes that are prevalent in PPPs:

- 1. Payment disputes**– where parties disagree on the amount or timing of payments. This type of dispute can arise due to inadequate cash flow, changes in the project scope or costs overruns.
- 1. Performance disputes**– which relate to non-performance or inadequate performance by one or more parties. They can arise from issues such as delays, substandard work, or failure to meet project milestones.
- 1. Termination disputes**– which occur when one or both parties seek to terminate the agreement before its expiration date, often due to breach of the contract, force majeure events or insolvency.
- 1. Design and construction disputes**– which arise from the quality of work done, changes to the designs, construction defects or delays in completion.

These disputes highlight the importance of setting up clear and effective mechanisms for resolving conflicts from the outset, to ensure prompt, equitable and fair resolution. Well defined dispute resolution procedures can help minimize legal battles, project delays and financial losses, ultimately contributing to achieving Universal Health Coverage for as many citizens as possible.

Approaches to effective dispute resolution in health PPPS

The PPPs Act 2021 establishes a Petition Committee whose mandate is to determine disputes arising from any decision of the Committee, Directorate or a contracting authority regarding a tender process or project agreement. The Committee is headed by a chairperson qualified to be appointed as a High Court Judge and six other members possessing the requisite

knowledge and experience.

A petition for review should be done within seven days from the date of the decision complained of. Thereafter, the Petition's Committee is required to make a determination on the complaint within twenty-eight days from the date the petition is lodged.

If any person is aggrieved by the decision of the Committee, they can apply for a review of the said decision by the Committee within seven days from the date the decision of the Committee is made. The Act further provides for an appeal to the High Court against the decision of the Committee within fourteen days from the date of the Committee's decision.

suffice to say, the Petition Committee qualifies as a specialized tribunal established by an Act of Parliament in conformity with the provisions of Article 169(1)(d) of the Constitution. Parties have an obligation to exhaust available remedies before a formal dispute arising out a PPPS is filed in a court of law. This was affirmed in the case of Consortium of Toyota Tsusho Corporation; Kyuden International Corporation and DI Koisagat Tea Estate v Kenya Electricity Generating Company PLC [KENGEN] [2020] eKLR

Further, the Petition Committee, as a successor of the Petition Committee under the Public Private Partnership Act of 2013 has powers to consider any questions of law including an award of costs

“The government of Kenya has recognized and embraced the significance of PPPs in realization of UHC. The country has relied on PPPs to build hospitals, clinics and provide specialized healthcare equipment.”

to the successful litigant as was set out in the case of Kenya National Highways Authority v PPP Petition Committee & 2 others [2018] eKLR.

It is important to note that the Petition Committee comprises of members from the public and private sectors with a clear mandate, rules of procedure, and terms of reference to ensure that disputes are resolved in a timely and fair manner. The is required to be independent and impartial, and it should consist of members who have the necessary skills and expertise to resolve disputes.

In addition to the framework for dispute resolution under the PPPs Act, some of other approaches that could be used in resolving the highlighted disputes include:

- **Prevention:** The best way to resolve disputes is to avoid them in the first place. Effective dispute prevention strategies include developing clear, concise, and detailed contracts that outline the roles, responsibilities, and expectations of the parties. Additionally, developing detailed project plans and timelines, monitoring, and reporting mechanisms, as well as regular communication between the parties can help prevent disputes from arising.
- **Informal Resolution:** In some cases, disputes can be resolved informally through negotiation, mediation, or conciliation. Informal resolution is often faster, less expensive, and more amicable than formal dispute resolution mechanisms.
- **Formal Resolution:** If informal resolution fails, parties can resort to formal dispute resolution mechanisms such as arbitration or litigation. These mechanisms provide a formal process for resolving disputes and they often result in legally binding decisions. Arbitration, in particular, is often favored in PPPs due to its confidentiality, expertise of arbitrators, and enforceability of awards in multiple jurisdictions.
- **Hybrid Mechanisms:** Hybrid dispute resolution mechanisms combine elements of informal and formal dispute resolution mechanisms. They offer parties the flexibility to tailor dispute resolution processes to their specific needs and circumstances. Examples of hybrid mechanisms include dispute review boards and expert determination. The Petitions Committee discussed above is a good example of a hybrid mechanism.

“The Petition Committee comprises of members from the public and private sectors with a clear mandate, rules of procedure, and terms of reference to ensure that disputes are resolved in a timely and fair manner.”

Another strategy is establishing clear contract provisions that outline the dispute resolution process, specifies the types of disputes that can be referred to arbitration or mediation and the procedures to be followed in such cases. These provisions should also specify the role of the arbitrator or mediator, the timeline for resolving disputes, and the consequences of non-compliance.

Effective communication between public and private partners is also essential for navigating disputes in PPPs. Regular meetings and consultations can help identify potential disputes early and prevent them from escalating. Further, clear lines of communication can help resolve disputes in a timely and collaborative manner.

Finally, it is essential to ensure that the dispute settlement mechanisms are enforceable. This can be achieved through incorporating dispute settlement provisions into the contract and specifying the consequences of non-compliance with the decision made.

In conclusion, PPPs in the health sector are complex undertakings which require careful planning, management, and dispute resolution mechanisms to achieve their objectives of providing high-quality healthcare services. This further promotes the integrity of the partnership, improve service delivery, and ensure sustainability. Approaches such as prevention, informal resolution, clear contract provisions, regular communications, establishing a dispute resolution committee and having in place enforceability mechanisms are all effective strategies that health PPPs stakeholders should embrace to develop clear, detailed, and effective dispute resolution mechanisms.

A snapshot of Public Private Partnerships in healthcare in Kenya



KAREN KOECH

PUBLIC-PRIVATE PARTNERSHIPS (PPPs) are one of the modern development strategies employed by governments to support their initiatives. Historically, such collaborations concentrated on transport infrastructure projects but a shift has materialised in recent years. The emergence of global health security threats, incorporation of technology in healthcare as well as the increased strain in the government's budget has motivated the government to explore alternative strategies in advancing healthcare needs in Kenya. As such, PPPs in the healthcare sector are a means to ensure that the constitutional guarantee of universal access to the highest attainable standards of healthcare is realized.

It is under this backdrop that this article seeks to critically assess the emergence of PPPs in the healthcare sector, motivations for the same and how they are currently working towards the achievement of the government's healthcare goals. Further, the article seeks to look into the future of PPPs in the health sector, specifically on the risks and opportunities available.

The emergence of the need for PPPs in healthcare financing in Kenya

The government's consistent goal in the healthcare since independence has been to offer accessible and affordable healthcare for all Kenyans. Immediately after

independence, the Sessional Paper No.10 on African Socialism and its Application to Planning in Kenya was the policy in place guiding the government's healthcare strategy. The Policy provided for the administration of free healthcare for all Kenyans which would be funded by the taxpayers' money as well as donor funds.

However, due to budgetary constraints, the mode of Kenya's healthcare financing changed significantly thereby leading to the introduction of user fee and the involvement of the private sector in healthcare in 1989. User fee was that which an individual was charged in order to access medical services. It was however scrapped off in 1990 but later reintroduced, as it was not financially feasible for the government. Thereafter, the most notable change in healthcare financing was the launch of Kenya's National Social Health Insurance Fund known as the National Health Insurance Fund (NHIF).

However, in the recent past, the government has sought to explore other avenues of improving access and quality of healthcare service provision in the country. The formulation of Vision 2030 as well as the Big 4 Agenda by previous governments also brought the development of healthcare to the fore. For instance, healthcare is an element under the social pillar of the Vision 2030 and one of the goals include the rehabilitation of health facilities. Similarly, universal health coverage forms one of the pillars of the Big 4 Agenda. Such initiatives led to several multi stakeholder engagements between the public and private sector geared towards delivering public good, leading to the birth of substantive public private collaborations in healthcare such as the Public Private Partnership for Health – Kenya Initiative (PPP-HK) of 2009.

The workings of PPPs in Kenya's healthcare agenda

The Public Private Partnerships Act, 2021, primarily governs PPPs in Kenya. PPPs denote the contractual cooperation between a government authority and a private entity where the latter undertakes to provide a public function temporarily and later transfer ownership to the government through an elaborate payback plan. The introduction of PPPs in health care financing appeared in a number of government policy documents as a solution to the gaps in the healthcare sector over time as discussed above.

However, the most elaborate blueprint published by the government towards the incorporation of PPPs as a means to achieve its goals in the sector is the Kenya Health Public Private Collaboration Strategy (2020) and is now one of the current government's projected means of attaining its resolutions in the health sector. The Strategy was a fruit of the engagement between the private sector through the Kenya Private Sector Alliance (KEPSA) and the government.

“PPPs have provided an avenue for the development of above-standard medical facilities in rural areas through private partnerships with county governments.”

The incorporation of PPPs in Kenya's healthcare financing has seen great growth since its inception. The earlier impossible high-budget projects such as the improved access to expensive radiology treatment equipment and staff training on the same, availability of certain diagnostic tools that were previously out of reach of the government's budget, the construction of state of the art medical centres, modernized hospitals and medical training institutions.

Additionally, PPPs have provided an avenue for the development of above-standard medical facilities in rural areas through private partnerships with county governments. For instance, in 2014, the County Government of Kiambu in collaboration with Philips Africa Innovation Centre launched the Githurai 45 Life Community Center (CLC) project, which apart from healthcare, provided lighting and safe living facilities to the residents.

Generally, the impact of the introduction of PPPs in healthcare financing in Kenya cannot be gainsaid. Principally, the benefits include the local availability of a number of healthcare facilities that previously necessitated patients to travel out of the country to get a hold over and the speed of medical service delivery attributed to the digitisation of medical examination and treatment generally. Additionally, partnerships with private entities has lessened the financial burden of the government as the payment plan involved in PPPs could span up to ten years as compared the out of pocket and tax-reliant payments.

PPPs as an opportunity for the achievement of the healthcare constitutional guarantees

The overarching goal of the Ministry of Health is the attainment of the constitutional health guarantee of the highest attainable standard of health under Article 43 of the Constitution. The fruits of PPPs in the provision of finance in the health sector has shown great potential towards the achievement of the said constitutional promises as it shoulders the greatest impediment to the provision of quality and accessible healthcare – financial constraints. It has greatly assisted government budgeting which then allows the government to commit to capital intensive projects in the long term and use available resources for more urgent needs.

Despite the strides made in the healthcare sector in Kenya since the inception of the incorporation of PPPs in healthcare financing, the prospects are still vast. The formulation of the Kenya Health Public Private Collaboration Strategy (2020) coupled with the current administration focus on the expansion of avenues for the financing of healthcare evident in its manifesto is a great affirmation of this position. The government seeks to leverage on private sector proficiencies gained over the years to fast track the growth of the public health service provision as well as to promote trust and accountability between public and private sectors.

The shift towards innovative governance over the years has prompted governments all over the world to expand their methods of operation, including in the raising of government revenue. Additionally, the advent of sophistry in technology has jolted the need to keep up with the advancements to avoid obsolescence. The health sector is one of the most affected areas with regards to the uptake of modern technology which is financially burdensome. The uptake of PPPs in healthcare service delivery was therefore necessary to ensure that public healthcare is not outpaced completely by technology and that the government is able to deliver on its healthcare guarantees to the people of Kenya.

Overall, it is evident that the central focus of government health policy has been to ensure access to quality and affordable healthcare for all. Primarily, to achieve this goal, the government has predominantly attempted several methods of healthcare financing spanning: government collections through taxes, donor funding, insurance member contributions among other initiatives.

Therefore, the exponential budget involved in the day-to-day provision of healthcare service and the cost of maintaining medical personal and equipment is a significant budget constraint on the government. The development of medical infrastructure has become secondary need thus driving the impetus towards PPPs as a means of healthcare financing to bolster the effort of government towards the achievement of the country's health guarantees under the Constitution.

“Overall, it is evident that the central focus of government health policy has been to ensure access to quality and affordable healthcare for all. “



Housing and Settlement

The devil is in the details: Navigating construction projects in Kenya



ROBERT MWANGI

THE CONSTRUCTION INDUSTRY is a vital part of the country's economy. It provides employment and contributes to the growth of the nation's infrastructure. In a Report by the Kenya Association of Manufacturers, in 2019, the construction industry contributed 5.6% to Kenya's GDP and employed 334,600 persons both in the public and private sector.

There however is a growing concern due to collapsed buildings. Time and again Kenyans has woken up to headlines such as these;

"Seven storey building under construction collapses in Kasarani, Nairobi County"

"Another 5-storey building collapses in Kenya after mass evacuation"

"Two killed in second deadly Kenya building collapse in three days"

"Architects Blame Corruption and Lack of Regulation for Building Collapse"

On the one hand, lack of stringent regulations and enforcement has been blamed for the rampant construction of substandard buildings that pose a significant risk to the safety and lives of the citizens. On the other hand, building owners have fallen prey to unscrupulous "construction professionals" masquerading as architects, contractors, engineers et al.

By shedding light on this critical issue, this article aims to encourage dialogue and action towards creating safer and more sustainable building practices in Kenya.

Cost paid for in Human Lives, Blood and Money

In 2019, the National Construction Authority (NCA) conducted a study on the failure and collapse of buildings in Kenya. The study revealed that the cases of collapsed buildings either under construction or completed, rose from 1 collapse case in 1996 to 20 cases in 2015. A later audit in 2022 by NCA revealed that in the last five years Kenya had recorded 87 building collapses, resulting to an estimated 200 deaths, and over 1,000 injured persons.

Equally, in an audit done in 2018 by the National Building Inspectorate (NBI), the said audit revealed that out of 14,895 buildings, 723 were very dangerous, 10,791 were unsafe, 1217 were fair and a meagre 2194 were safe. Eventually, it goes without saying that these unsafe and dangerous buildings eventually collapse. Of note is that majority of the buildings that collapse are residential. This is a costly affair paid for in human lives, blood and sunken billions of money in the rubble and debris of a collapsed building.

Besides loss of environmental integrity, and loss of lives and property, collapsed buildings damage the corporate image of the Kenyan Construction Industry. An innocent observer gets the impression of a highly defective system of policies, laws and institutions; or highly incompetent managers and operatives in the whole regulatory system; or both- a defective system and incompetent system players.

The causes of collapsed buildings are myriad. However, they all boil down to poor workmanship, substandard materials, non-compliance with building standards and regulations, inadequate structural design, overloading of the structure and inadequate maintenance and control.

The contributory factors to failure of building projects in Kenya include inadequate concrete and reinforcement specifications, lack of professional input during construction, lack of individual accountability in design and construction teams, collusion between development control officers and project teams, none prosecution of those involved in contravening the building regulations, ill-advised cost cutting measures, uncontrolled physical planning, corruption and easy entry by unqualified people into the construction business.

The Legal Handicap for an Antidote to the Malaise

A robust legal framework consists of laws, policies and regulations that are the mainstay to a safe built environment. They delineate the operating environment and standards for compliance.

The Construction industry in Kenya lacks a comprehensive unified policy and as such the sector is regulated by a multiplicity of laws and policies that have left it exposed. The relevant policies include the; National Urban Development Policy (NUDP) No. 2 of 2016, National Housing Policy of 2004, National Environment Policy of 2013 and National Building Maintenance Policy, Sessional Paper No. 2 of 2015

Other laws in this regulatory framework geared at ensuring safety, quality, and compliance with standards include;

National Construction Authority Act 2011: It establishes the National Construction Authority (NCA). Its shortcomings include; failure to recognize other actors in the Construction industry, including County Governments; addressing limited a limited scope of building and construction processes that lead to building failure; failure to explicitly control building materials; and NCA lacks investigative and prosecutorial powers to enforce their own regulations.

Physical and Land Use Planning Act 2019: It provides for planning, use, regulation and development of land. It requires building plans to be subjected to development control processes to ensure that they meet parameters of user, siting, elevations, design, among others. Its deficiencies include: It's not explicit on building control processes that entails overseeing construction related processes and activities; and failure to make reference to the building code whose provisions the County Government use to effect building control activities.

“An NCA study revealed that the cases of collapsed buildings either under construction or completed, rose from 1 collapse case in 1996 to 20 cases in 2015.”

Public Health Act, Cap 242: It mandates every health authority to take all lawful action to prevent or remedy danger to health from unsuitable dwellings including demolition of unfit buildings. Its shortfalls are; Public health officers who are to ensure safety of dwellings have no technical capacity in buildings to identify structural defects; and the act is not aligned to the new constitution and development control laws.

Environmental Management and Coordination Act, 1999: It establishes the National Environment Management Authority (NEMA). It further provides for issuance of Environmental Impact Assessment (EIA) licenses for proposed building projects as well as inspection of ongoing or completed buildings. The prescribed standards are largely on environmental protection, and do not directly relate to the building processes.

Building Code, 1968: This is a set of rules and laws which govern and specify the minimum agreed levels of safety for the structures and buildings. The code was enacted in 1968 under the Local Governments Act. Its main handicap is; it's currently not anchored in a substantive law since the Local Government Act was repealed; it's outdated in terms of new building materials and techniques; and it's prescriptive in nature and not performance based.

Occupational Safety and Health Act, 2007: It provides for the safety, health and welfare of workers and all persons lawfully present at workplaces including construction sites. Its weaknesses are in: not prescribing the requisite standards for measuring safety at a construction site; It lacks a mechanism for

quality control especially on the qualifications, training and experience of “competent persons” involved in operating construction equipment.

Engineers Act 2011: It establishes the Engineers Board of Kenya which has the powers to enter and inspect construction sites, ensure professional engineering services and works are undertaken by registered persons and standards and professional ethics and relevant health and safety aspects are observed. The Act does not outline which standards the board is supposed to be enforcing and the Board does not have the capacity to carry meaningful and effective inspections.

Agreement and Conditions of Contract for Building Works: These outlines the contractual relationships of the parties in a construction building project. These include forms of contract and levels of engagement of various professionals (Architect, Engineers and Quantity Surveyors). However, this document is not legally anchored in law although it is the only one that establishes contractual relationships for a project team. This makes it optional among the parties to use.

A Case of Too many Cooks?

As a consequence of the numerous laws that regulate the construction industry in Kenya, and the lack of a unified approach to construction projects from a policy perspective, we end up with many regulatory authorities that sometimes end up working at cross-purposes. This also creates many opportunities for interferences by corrupt individuals and a ripe stage for blame games when a disaster strikes.

Below are the regulatory bodies in the construction sector and their shortfalls;

National Construction Authority (NCA): It oversees the construction industry and coordinates its development. NCA has wide ranging powers including accreditation, registration and certification of contractors, skilled construction workers and construction site supervisors and encouraging standardization and improvement of construction techniques and materials.

NCA is yet to operationalize through regulations its mandate to oversee the construction industry and coordinate its development. It lacks prosecutorial powers to enforce its regulations or investigative mandate to enable it recommend action on collapsed

buildings. Its mandate particularly in inspection of buildings and their role in building control overlaps with that of the County Governments. It lacks the full mandate to standardize and improve construction techniques and materials.

National Building Inspectorate (NBI): It is under the State Department of Public Works in the Ministry of Transport, Infrastructure, Housing and Urban Development. Its mandate is to audit buildings for conformity with land registration, planning, zoning, building standards and structural soundness. This mandate overlaps with that of the County Governments, Ministry of Lands and the National Land Commission. The Inspectorate does not have legal status since it was established under an Executive Order and further lacks the requisite technical capacity and appropriate legal framework.

County Governments: They are established under the Constitution of Kenya 2010, and have the responsibility of controlling development and to a large extent, building control since they approve buildings during various stages of construction processes, Planning and development, including; statistics; land survey and mapping; boundaries and fencing; housing; electricity and gas reticulation and energy regulation.

They have inadequate technical capacity particularly in enforcement and compliance departments, are prone to political interference in the discharge of their mandates, rely on an outdated building code that is not anchored on a substantive law and often than not do not recognize multiplicity of other actors and their role in the industry.

National Environment Management Authority (NEMA): It exercises general supervision and coordination over all matters relating to the environment. NEMA's role in building control is inclined towards environmental protection. Its decision is subject to approval by other authorities and lacks capacity to review critical components of a building.

Directorate of Occupational Safety and Health (DOSH):

it ensures compliance with safety and health requirements at work place including construction sites. It does not have the requisite technical capacity to check building safety as far as construction processes are concerned.

Joint Building and Construction Council (JBCC):

This is a registered Company founded by The Architectural Association of Kenya and Kenya Association of Building and Civil Engineering Contractors in 1980. Its objectives include the advancement of the science and art of planning and building, promotion of excellence in the construction of buildings, just and honorable practice in the conduct of business, and the suppression of malpractices in the construction industries. Despite the fact that they publish several policy guidelines for construction industry including Agreement and Conditions of Contract for Building Works, it is not anchored in any legislations

Kenya Bureau of Standards (KEBS):

It is responsible for developing, promoting and enforcing standards related to products, measurements, materials and processes; providing testing services; and, providing training. It is also mandated to develop construction standards. It lacks adequate technical personnel and equipment to carry out material testing for construction projects.

Energy and Petroleum Regulatory Authority (EPRA): is mandated to Regulate Petroleum, Electricity and Renewable Energy Sectors in Kenya. With regards to electricity, EPRA formulates, enforces and reviews environmental, health, safety and quality standards and prescribes the requirements for accreditation of persons with appropriate skills to check accuracy of energy meters installed in residential, commercial or industrial premises.

EPRA has a weak regulatory regime in the electrical sector and as such most of the buildings do not have electrical designs prepared by registered electrical engineers. Where designs exist and electrical works are carried out, the same are not compliant with the requirements of the building code. In addition, there is a high proliferation of unskilled/uncertified personnel undertaking connection of electricity with faulty designs, and use of substandard electrical materials.

Water Resources Authority (WRA): It formulates and enforces standards, procedures and regulations for the management and use of water resources and flood mitigation. It also protects riparian areas against encroachment by construction of buildings or any other structures. It has inadequate control mechanisms of riparian zones and its role overlaps that of NEMA, the Land Act and the Survey Act.

Engineers Board of Kenya (EBK): It has the powers to enter and inspect sites where construction, installation, erection, alteration, renovation, maintenance, processing or manufacturing works are in progress. The Engineers Act does not outline which standards the board is supposed to be enforcing. Further, the Board does not have the capacity to carry out meaningful and effective inspections of construction sites and buildings.

Tell me, "What Shall we Do?"

If you do not possess legal qualifications of a lawyer or the technical qualifications of an architect, engineer or quantity surveyor et al, you definitely need help. Your help can be found below;

Before commencing any construction project within Kenya and the region, your first point of call is the office of a qualified and competent lawyer's office. A qualified lawyer on matters construction with help you navigate the legal land mines to ensure that you know what is expected of you by the law; help to procure the necessary approvals, permits and licenses; prepare waterproof agreements to safeguard your investment; monitor the implementation of a contract; and to give you comfort that when disputes arise during the construction process or when the authorities come calling, you can always say, "Talk to my Lawyer."

Always utilise the services of qualified, competent and registered professionals such as architects, engineers (structural, civil, electrical), or quantity surveyors. Do not skim on professional services. As the saying goes, cheap is expensive.

Make use of accredited and certified skilled labour. The contractors must be registered with NCA including the site supervisor. Avoid those who say, "I know someone cheaper."

Avoid the use of substandard construction material ensuring that the material used are approved and sourced from genuine and reputable suppliers. This is where the experience and expertise of qualified and competent professionals ensure that you get value for your money.

Last but not the least, whenever in doubt refer to (a) above, consult a lawyer.

The place of Real Estate Investment Trusts in financing affordable housing in Kenya



BRENDA KIRIMI

AS PREDICTED BY THE CRAFTERS of the Kenya Vision 2030, in the face of rapid population growth the country has witnessed a steady growth of its urban population over the years. This has led to a rise in demand for affordable accommodation and low supply of the same resulting in high costs of housing. Notably, the cost of housing has grown faster than the incomes of the citizenry. This milieu has exacerbated the global housing crisis often attributed to low purchasing power, high financing costs for construction, poor financing models and high cost of credit.

The United Nation's Sustainable Development Goal (UNSDG) 11 envisions a world where we all have access to adequate, safe and affordable housing by 2030. The Kenyan Government's Economic Transformation Agenda 2022-2027 targets to increase supply of new housing to 250,000 per annum and percentage of affordable housing supply from 2 per cent to 50 per cent. To achieve this, the government intends to amongst other initiatives afford property developers incentives to build affordable housing.

The conventional source of funding towards acquisition of property in the country is mortgage finance. This has resulted in overreliance on personal savings, banks and financial institutions for funding. However, there is a less explored vehicle for funding known as Real

Estate Investments Trusts (REITs) which provides an avenue for rolling out adequate, safe and affordable housing to Kenyans. REITs fashion an alternative with the potential of resolving the quagmire surrounding financing real estate development projects. They facilitate access to capital through the capital markets.

Real Estate Investment Trusts (REITs) in a nutshell

A REIT is an entity that sources funds and applies them towards the acquisition and development of real estate assets which it then sells or rents to generate income. Investors contribute funds to the entity and in return they acquire the right to receive a share of the income generated from the sale or lease of the properties owned by the entity. A REIT can raise the funds either through equity financing which basically involves the issuance of units or debt financing which entails bank loans.

In the year 2013, the REITs Regulations were enacted to govern the establishment, authorization, offers and all aspects with regards to the operation of REITs in Kenya. REITs ought to be structured as unincorporated common law trusts and are governed by the Capital Markets Authority (CMA).

While the capital in a company is divided into shares, REITs are divided into units held by the investors who are referred to as unit holders as opposed to shareholders. REITs allow ordinary Kenyans like you and I to own units (shares) in the high-end investments in property in the country.

REITs sell their units on a securities exchange where anyone can trade just as they trade their shares in a listed company. In Kenya REITs are listed on the Nairobi Securities Exchange (NSE). Listing provides access to information on the performance of the investment

attracting more investors in the sector. Listing further affords investors an opportunity to assess associated risks and the performance of the REIT thus informed decision making.

In Kenya, the REITs Regulations recognize the following three categories of REITs:

Development Real Estate Investment Trust (D-REIT): their objective is to acquire and develop eligible real estate. The investor derives income when the property is sold upon completion or begins to earn rental income.

The Income Real Estate Investment Trust (I-REIT): they acquire long-term income-generating real estate, manage, market, sell and/or rent them out with the sole objective being to earn income.

The Islamic Real Estate Investment Trust: this type of REIT undertakes real estate activities that are compliant to the Sharia principles.

REITs can be further identified as either focused or diversified. REITs that invest in different types of real estate including shopping malls, office buildings, and residential premises etc. are termed as diversified while a focused REIT generally focuses on a single type of real estate project.

Ten years after the REITs regulatory framework was put in place, the uptake of the product in the Kenyan market remains relatively low. As at the date of this Article, there are four authorized REITs in Kenya. For a long time, ILAM Fahari I-REIT was the only listed REIT trading on the NSE Main Investment Market Segment (MIMS). Recently, LAPTRUST Imara I-REIT was listed on 22nd March 2023 on the NSE's MIMS. The listing gave the I-REIT more exposure and avails to investors a diversified portfolio of income generating real estate assets. Though unlisted, Acorn I-REIT and Acorn D-REIT continue trading on Unquoted Securities Platform (USP) which is an over the counter market segment of the NSE.

A Case for Affordable Housing

According to the U.S. Department of Housing and Urban Development (HUD) a house is affordable if its cost in mortgage or rent is less than 30% of the household gross income. Although available for purchase, affordable housing is most commonly available for rent. To be held affordable, low to

moderate income households should be able to meet other basic needs such as food, clothing, health care and education in addition to paying for housing.

For REITs to contribute to the realization of affordable housing for Kenyans, the approach should be double-pronged. The first approach should focus on the general public while the second should focus on developers. The low uptake by developers in the REITs market can be attributed to the prohibitive requirements for a developer to register a REIT.

A key component of a REIT is the requirement that REITs must have a Trustee. The Trustee acquires the Property and holds it on behalf of beneficiaries, usually the Investor. The Trustee is responsible for the appointment and supervision of the Manager and also ensuring that the assets of the REIT are invested in accordance with the Trust Deed and the Offering Memorandum. The law requires that a trustee must be a bank or its subsidiary. Further, there is the financial requirement that a trustee ought to have a minimum paid-up share capital and reserves of not less than one hundred million throughout the licence period. The restrictions have often locked out non-bank trustees who do not meet the one hundred million cap. No wonder there are only three licensed REITs trustees in Kenya currently. There is need to accommodate non-bank trustees and allow for reasonable limits with regard to the minimum paid-up share capital. Given the role of a trustee, diversifying the options for REITs will enhance compliance during authorization thus increasing investments.

I-REITs are prohibited from engaging in mortgage finance or any other form of debt finance to potential investors. They however allow D-REITs to provide debt finance to tenants or purchasers acquiring properties developed by the D-REIT. Upon conversion to an I-REIT, a D-REIT is prohibited from engaging in further lending activities. In this regard, the regulations block low-income earners from accessing affordable credit to enable them acquire houses in the projects developed by the REITs. Therefore, there is need for reforms in the framework to allow a REIT to be both income and development-minded without having to convert. This will allow low-income earners access to credit to acquire the affordable housing REITs have to offer.

The available REITs have shied away from developing affordable housing. Instead, they have been diversifying into office buildings, industrial and commercial properties. REITs should be encouraged to focus on residential projects and if diversified, its portfolio should incorporate affordable housing. The Acorn I-REIT, popular for its investments in Qwetu and launched on 8th February 2021 is an example of a residential REIT. It focuses on the acquisition and development of eligible real estate, marketing and letting stabilization of income-generating rental housing for student accommodation. We need similar projects focusing on providing affordable housing for the population as a whole.

The low uptake by the public is often attributed to lack of awareness by the investing public on the working of REITs. The scenario leads to low subscription rates thus frustrating the developers and causing apathy in potential investors. A case in point is Fusion Capital D-REIT which was launched in 2016 but collapsed due to low subscription. Sensitization of the investing public and other key stakeholders on the operations of REITs would therefore be a good starting point. We must appreciate the efforts by the REITs Association of Kenya(RAK) in sensitizing the general public by way of publishing articles and creating forums for potential issuers, investors and regulators to engage. However, other stakeholders including the CMA have a lot to do in this regard.

Other asset classes like the government securities also pose competition to REITs. Investors often prefer the government securities which they perceive to be the safer choice. In this regard, there is need for introduction of a hybrid form of REIT to reduce the high risks associated with investing in D-REITs. A hybrid form would neutralize the high risks associated with D-REITs by bringing in the frequent incomes associated with I-REITs.

Initiatives by the Government Towards Promoting REITs

The Government has come up with initiatives towards the growth of the REITs market including:

Tax Exemptions

The legal regime on taxation has advanced the following tax incentives:

Income Tax: REITs registered by the Commissioner of Income Tax are exempt from paying income tax. They must however pay withholding tax on interest income and dividends as the unit holders are not exempt from the same under the Act.

Stamp Duty: REITs are exempt from payment of stamp duty with respect to transfers of beneficial interests in property from one trustee to another trustee or additional trustee and transfers of units in REITs. However, the exemptions only apply to instruments executed before the 31st December 2022.

Value Added Tax: Supply of services with respect to transfer of assets and other transactions related to the transfer of assets into REITs are exempt from V.A.T.

The CMA came up with the draft Income Tax (Real Estate Investment Trusts) Rules, 2020. The rules require REITs and REITs' investee companies to apply to the Commissioner for exemption of income tax at the time of registration. The requirement to register with the Commissioner amounts to bringing in too many regulators in a sector that is so small. It is therefore likely to be a hurdle prolonging the process of establishing the REITs.

“Other asset classes like the government securities also pose competition to REITs. Investors often prefer the government securities which they perceive to be the safer choice.”

Establishment of Kenya National REIT (KNR)

The Kenya National REIT was registered in May 2023 as a company limited by guarantee. In addition to pooling investments into real estate through REITs, KNR also targets infrastructure like transport, energy, water, and information technology through Infrastructure Investment Trusts (INVTs). KNR will amongst other roles spearhead engagement with policymakers, regulators, investors and other stakeholders in the industry to ensure appropriate regulations govern the sector. KNR targets to have pension funds, insurance firms and co-operatives invest in REITs. In addition to the three aforementioned investors, once in place, KNR should call for reforms making it easy for ordinary Kenyans to invest in REITs. Regard should be had to championing for lowering of the minimum investment amounts.

The move is a stride in the right direction considering the milestones achieved by similar bodies in South Africa, the USA and Europe i.e. South African Real Estate Investment Trust Association (SAREIT), National Association of Real Estate Investment Trusts (NAREIT) and European Public Real Estate Association (EPRA).

So much more still needs to be done if the potential for REITs in resolving the national housing crisis is to be unlocked. The REITs regulations are substantively seen to fashion REITs as an alternative investment vehicle for investors. However, in order to promote access to affordable housing there is need for reforms tailoring REITs as an option for funding affordable housing in Kenya.

The right to housing and the legal mechanics of its implementation



KEVIN AMAASA

THIS ARTICLE SEEKS TO UNRAVEL the nature of the Right to Housing in Kenya and legal frameworks put in place towards its realization together with the shortcomings. It also gives a brief background of how the law on housing has evolved over the years in addressing the issue of housing especially among the poor people in our society.

Nature of the right to housing

The nature of the right to housing was well delineated in the case of South African Constitutional Court in the oft-quoted case of *The Government of the Republic of South Africa and Others vs Irene Grootboom and others*. The court had the opportunity to expound the meaning of adequate housing and stated as follows; “The Right to housing encompasses more than just brick and mortar, but it also requires availability of land, provision of appropriate services such as water, electricity, removal of sewage as well as financing the aforementioned.”

The United Nations Committee on the Economic and Cultural Rights define the right to housing as “the right of every man, woman, youth, and child to gain and sustain a safe and secure home and community in which to live in peace and dignity.”

In the true sense of the fact, the right to housing does not in itself require the state to build a house for every citizen in Kenya, however, it only requires the state to undertake measures that would enable people to be adequately housed.

The law on housing

The Right to Housing in Kenya was not provided for under the Independence Constitution. It was basically implicitly provided for under section 75 on the protection of the right to property. This was despite the fact that the Kenyan government had ratified various international instruments on the right to housing. These instruments included the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). The instruments emphasize on the need of State parties to make necessary steps to ensure realization of the right to housing.

Fast forward to 2010, Kenyans witnessed a new dawn in the form of a major constitutional overhaul. The promulgation of the Constitution 2010 brought in robust changes including the entrenchment of the bill of rights which contained various rights and freedoms to be enjoyed by the Kenyan citizenry. This was a major departure from its predecessor, the Independence Constitution.

One of the notable changes is the right to Housing as enshrined under Article 43 of the transformative Constitution 2010. It expressly provides that every person has a right to accessible and adequate housing. In coming up with this provision, the drafters of the Constitution 2010 envisaged a country and society where majority of the Kenyan people would be living in decent houses with all the available housing services.

Government policies on housing

Policies in relation to right to housing have been subjected to various improvements over the years in the form of Sessional papers to supplement legislation. In 1966 the government of Kenya came up with sessional paper no. 5 of 1966. The main accomplishments of this policy was that it established the National Housing Corporation under the Housing Act.

Then came in the sessional paper No. 3 of 2004 which recognised the right to housing as a progressive right and popularized the sectional properties Act to encourage shared ownership of property.

The sessional paper No. 3 of 2009 was later established and was deemed as much more transformative as it was deemed as all encompassing. This sessional paper accommodated the poor and less fortunate in society including customary land rights for the Kenyan indigenous communities.

Further, the National slums upgrading and Prevention Policy 2013 was also brought in to cushion the poor who experienced challenges as far as the right to housing is concerned. It provided for setting aside of land for development of houses for the poor to be offered at an affordable rate. Unfortunately, it proved to be a massive failure as it basically lacked the proper framework for implementation of right to housing for the less fortunate in the Kenyan Society.

Implementation of the right to housing

Implementation of the Right to Housing is well encapsulated and captured in Article 21 (2) of the Constitution of Kenya. It provides that the state is obligated to make legislative, policy and other measures including setting standards to achieve progressive realization of social economic rights.

Further, it provides that it is a fundamental duty for the State and every state organ to observe, respect and fulfil the rights and fundamental freedoms in the Bill of Rights."

The upshot of the above provision being that all legislations in respect to the right to housing ought to be tailored together with the three aforementioned obligations all instrumental in the implementation of the right to housing as enshrined under Article 43 in the Constitution of Kenya 2010.

Despite the dramatic progress witnessed in light of the 2010 Constitution, 10 years down the line, realization and implementation of the right to housing remains more of a mirage. Millions of Kenyans are still unable to realize their right to adequate housing. As beautifully depicted by the Supreme Court of Kenya in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR)

"From the foregoing, the question as to when the right to housing accrues, in our view, is not dependent upon its progressive realization. The right accrues to every individual or family, by virtue of being a citizen of this Country. It is an entitlement guaranteed by the Constitution under the Bill of rights. The persistent problem is that its realization depends on the availability of land and other material resources. Given the fact that our society is incredulously unequal, with the majority of the population condemned to grinding poverty, the right to accessible and adequate housing remains but a pipe-dream for many."

Duty to Respect

This duty requires the state to refrain from interfering with the enjoyment of the right to housing in Kenya. To respect the efforts and achievements of individuals by respecting their homes and where they have erected shelters.

The Kenyan government in most instances has not lived up to the fulfilment of this obligation. For instance, the evictions of people from Kibera slums for the purposes of road construction can be viewed as demeaning of the lower class in society in order to promote the interests of the dominant groups/elites. In the grand scheme, this can be deemed as a violation of the Right to Housing of the Kenyan people primarily because those affected are never consulted and are never consulted and are given inadequate notices.

Many of cases of unlawful evictions have found their way in Courts for instance; the case of *Satrose Ayuma & 11 Others vs Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others*.

In the case the Petitioners filed a Petition claiming violation of their right to housing. This was due to the fact that the Registered Trustees of the Kenya Railways

Staff Retirement Benefits Scheme had published notices requiring all residents of Muthurwa Estate to vacate the premises within 90 days and subsequently published notices inviting buyers. That allegedly, even before expiry of the 90 days, demolitions in the suit property began.

The Court found that there was a clear violation of the Petitioners Rights to adequate housing by the Respondents as the forced evictions were carried out in a reckless manner and without adhering to the United Nations Guidelines on forced evictions at the very minimum. In that the evictions were carried out without a proper plan and time and the Petitioners in the end were left homeless and vulnerable. In addition the evictees were not involved in the decision-making process because the notices were issued with did not detail any sort of justification for their eviction.

Compulsory acquisition is also one of the instances in which government through its entities has often failed to respect housing rights of Kenyans. The constitution supported by statute provides for prompt and just compensation to accompany compulsory acquisition of land. The problem arises when land with housing property is compulsorily acquired and compensation is significantly delayed or if given does not in any way reflect the market value. This mainly occurs when the government officials flaunt the laws that have been put in place while acquiring the land for their own personal gain.

As a result, victims are left to languish on their own and therefore have to seek solace from the courts. At the end of the day, their cases drag in courts for years and they are not able to get the justice they had desired.

Duty to Protect

The obligation to protect citizens against 3rd parties who have the intention to violate their right to housing. This has been entrenched through legislation i.e. the Rent Restrictions Act which protects tenants against unlawful and illegal eviction by landlords.

Although the aforementioned legislation has been instrumental towards protection of the right to housing there are still inadequate laws and frameworks to protect individuals against 3rd parties.

The Solai dam tragedy is one of the notable examples where more than 40 people were killed as a result of a ruptured private dam. Close to 5 years on, justice has

remained elusive to the survivors of the devastating dam tragedy. The incident has since been dragging in court albeit most of the witnesses having testified. This has been occasioned by unnecessary adjournments in an attempt to slow down the wheels of Justice.

Duty to facilitate and fulfil

This encompasses the need for state actors to get rid of obstacles that make it difficult for Kenyan people to access right to housing. For instance countering factors such poverty, reduction of costs of building materials especially through imposition of lower taxes.

Kenya also lacks a proper legislation to cap prices on the amount in which land can be sold. This makes it difficult for the lower class citizens to realize their right to housing.

Recommendations

There ought to be proper and adequate legislation that provides for clear eviction processes, setting the minimum threshold that ought to be adhered to by government and other private entities.

There is also great need in the lowering prices of construction materials in Kenya to ensure that poor Kenyans can easily afford to set up decent housing structures at affordable rates.

Further, the government of Kenya should endeavour to compensate those affected by compulsory acquisition by ensuring that they receive a price equal to their pecuniary detriment and not less

We are also in dire need of a proper pricing policy on land to enable the poor to achieve their right to housing in Kenya.

It would be remiss not to recognise the fact that as a country we have indeed made remarkable strides towards realization of the right to housing. However, we are still in great need of law reform especially on evictions. Fundamentally, it should be noted that implementation of the available laws still poses as a great challenge.

It is therefore incumbent upon the duty bearers to ensure that measures and laws are put in place to promote housing rights for all the Kenyan people.

Note: The Affordable Housing Programme has been launched as a priority initiative to facilitate decent safe & affordable housing.



Agriculture

The role Kenya's forest cover can play to obtain a stable macro-economic environment



CHARLES MAYIGA

MACRO-ECONOMIC STABILITY is an abstract term which occurs when there is low volatility in key indicators such as prices, jobs, economic growth, interest rates, investment and trade. The World Bank in its June, 2022 Kenya Economic Update labelled Kenya's economic outlook "uncertain" in light of the effects of the Ukraine war; the adverse weather conditions expected given Kenya's reliance on the agricultural sector; and withdrawal of global policy accommodation to combat inflation which Kenya benefitted from as a tourist-hub. Given that the concerns of the World Bank are largely global effects out of the control of Kenya, achieving a stable macro-economic environment requires self-sustaining solutions.

One self-sustaining solution that has been seen to be viable in other jurisdictions such as New Zealand, Japan, Mexico and South Korea is the trading of carbon offsets. In a nutshell, carbon offsets are compensations, often monetary, for the emission of carbon or other greenhouse gasses as a result of human or industrial activity. The same would fall within Kenya's existing environmental legal framework that is the polluter-pays principle.

With Kenya's 2021 total carbon emissions reported to be roughly 22.4 million metric tons against global carbon emissions which stand at 37.12 billion metric tons, Kenya contributes a paltry 0.06% to the world's

carbon emissions. The relevance of the statistics is seen with Kenya's existing forest cover which according to the National Forest Resources Assessment Report 2021 stands at 8.8% representing about 12,914,202 acres of forest. The World Resources Unit in a study conducted in 2021 found that on average, an acre of forest cover consumes about 40 metric tons of carbon per year. With Kenya's emissions standing at 22.4 million metric tons and a forest cover of 12,914,202 acres, it can be argued that Kenya's emissions are fully consumed by 560,000 acres leaving an untapped balance of 12,354,202 acres.

How Kenya can benefit from untapped forest cover to stabilise its macro-economic environment

At the Sharm el-Sheikh Climate Change Conference popularly known as COP 27, it was resolved between the largest developed countries and developing countries that, a Loss and Damage Fund would be established to enable the latter adapt to the impacts of climate change. This came with the realisation that developing countries were the least emitters of carbon and it was therefore unfair to limit their options to fossil fuels, industrialisation and other human activity yet the same enabled the growth of the larger developed countries. It also came with the realisation that for net zero emissions to be actualised by 2050, it would take more input from the larger developed countries. Such resolutions are the basis upon which Kenya can conceptualise carbon credits and offer them for sale as witnessed in many jurisdictions including the European Union, New Zealand, Australia and the US.

A carbon credit is a permit that allows an entity to emit a specific amount of carbon for a particular period of time. The Climate Change (Amendment) Act defines a carbon credit as a credit created when the equivalent of one metric tonne of carbon dioxide is prevented from entering the atmosphere and is equal to one tonne of

carbon dioxide or the equivalent amount of a different greenhouse gas reduced, sequestered, or avoided. The adoption of such a model allows players that are more hesitant to alter their operations to a more eco-friendly system, as seen with factories and airlines, to pay for their carbon emissions. According to the Wall-Street Journal, a carbon credit for the emission of 1 metric tonne of carbon retails for about U.S \$ 50.

As earlier stated, Kenya's carbon emission is consumed by 560,000 acres of forest out of an available total 12,914,202 acreage. With Article 69 of the Constitution mandating the State to ensure sustainable exploitation of the environment and the Climate Change Act providing for low carbon climate development, the Climate Change (Amendment) Act, through legislation of Section 6 (fa), has expanded the role of the National Climate Change Council to issue guidance on carbon markets.

Given its laid out functions and international best practice, the National Climate Change Council would allow entities, whether local, regional or international, in collaboration with Kenyan authorities to take advantage of the untapped balance of 12,354,202 acres which has the capacity to consume close to 500 million metric tons of carbon. With each metric ton of carbon retailing at U.S \$ 50 and an acre of forest consuming 40 metric tons of carbon, each acre of forest could cost about U.S. \$ 2,000. With 12,345,202 acres untapped, Kenya could sell carbon credits worth U.S \$ 24,690,404,000.00 which translates to KES 3,184,481,361,126.00 every year.

As it stands, Kenya's national debt is at Kshs. 8.7 trillion. With the sale of carbon credit using the existing forest cover, the national debt would, at least theoretically, be wiped out within 3 years which would in turn stabilise Kenya's macro-economic environment.

Contemporaneously, the National Climate Change Council could arguably lead to growth in forest cover given the demand that would grow for carbon credits. This was seen in the US wherein JP Morgan invested over U.S \$ 500,000,000 in a 250,000 acre forest not for timber but rather for carbon credit trade. If climate change and its effects were not enough to facilitate an afforestation campaign, the sale of carbon credits with

such profitability just might.

The Down-Side of Carbon Credits

Despite such potential, all is not rosy in the world of carbon credits. They can be grouped with other non-physical commodities that have proven to be a challenge in their regulation. Case in point are financial markets such as Non-Fungible Tokens and other cryptocurrencies. As such, due to the lack of understanding and the immaturity in regulation coupled with the amounts of money involved in the practice, carbon credits are at risk of exploitation by criminal enterprise. Broadly speaking, carbon credits are susceptible to;

- Fraudulent manipulation by enterprises that under-report their emissions thus purchase less credits;
- Weak, immature or non-existent regulation;
- Computer manipulation in a bid to either steal or create non-existent carbon-credits;
- Money laundering;
- Global inconsistencies.

These have been central to many of the jurisdictions where carbon credits have been legitimised. In the United Kingdom, for instance, a Combined Heat and Power Operations corporation was fined up to £608,500 for misleading the Carbon Credit Registry on the amount of carbon emissions emanating from the Corporation. Such a fine, however, is considered inadequate compared to the amounts of money that are transacted in the realm of Carbon Credits.

The same is seen in the East-African region in Tanzania with the enactment of the Environmental Management (Control and Management of Carbon Trading) Regulations Government Notice Number 636 of 2022 (the Regulations). The Regulations apply to all carbon trading projects in Mainland Tanzania and are novel legislation on carbon trading in the country. The Regulations in showing their immaturity, provide for a blanket punitive measure for violation of the Regulations either by way of manipulation, misrepresentation or any other offence. Said measure is that any person that violates the provisions of the Regulations commits an offence and upon conviction

shall be liable to a fine of not less than TZS 10,000,000 (approximately KES 600,000) but not exceeding TZS 10,000,000,000 (approximately KES 600,000,000) or imprisonment for a term not exceeding twelve years or to both fine and imprisonment. In addition, a person convicted of any of the above offences shall be prohibited from engaging in any carbon trading project.

Evidently, for a market that is potentially worth billions of dollars, the regulation applied to the Carbon Credit industry is a little wanting.

Further, antagonists of Carbon-credit trading such as those from the London School of Economics argue that the concept of carbon credits is self-defeating. The idea behind carbon credits is to place punitive financial obligations on persons that emit greenhouse gases with the aim of transitioning to clean energy. The same would be operational if carbon credits were limited. However, with afforestation comes an increase in carbon credits that can be issued which in turn would be bought up to allow persons to indefinitely emit greenhouse gases.

They also argue that it alienates responsibilities that ought to be performed individually. Corporations that are central to the emission of greenhouse gases have a duty to keep their emissions below a government-issued prescribed limit. Carbon credits, however, take that duty away from such corporations and prescribe a financial obligation; payment of which ought not to be considered discharge of a burden.

Finally, they argue that it converts what is ordinarily or ought to be a fine into a fee. Analogy is drawn from traffic offences wherein legislation prescribes various fines as punitive measures in a bid to regulate road users' behavioural patterns for the benefit of other road users. If a fee was payable beforehand that allowed road users to act willy-nilly with no regard to other road users and no subsequent repercussion, the same could be argued to be absurd. It is therefore the antagonists' philosophy that the introduction of a premium to be paid by corporations looking to engage and even grow their carbon emissions turns what ought to discourage greenhouse emissions into a free pass in committing the act.

Carbon credits and their implementation ought to be handled with the utmost diligence and understanding. There is a lot of economic benefit and promise that could be gained given their demand that would foster an even greener environment. However, on the other side of the divide, steps taken to cleaner energy that is for the benefit of the larger global village could be undermined. More so, if new age financial instruments are proving next to impossible to regulate or even acquire accreditation, one wonders how well carbon credits would perform. What remains to be seen is the direction that Kenya as a market leader in the East African region shall take in regards to carbon credits following Tanzania's enactment of Environmental Management (Control and Management of Carbon Trading) Regulations.

At G&A, we shall continue to monitor the developments around the carbon credit space to best advice stakeholders on the impacts they pose.



Digital superhighway
and creative economy

Balancing data protection and Intellectual Property in photography: Implications for Kenya's national development agenda



ALEX MBAYI

IN TODAY'S WORLD, PHOTOGRAPHY has become a ubiquitous art form that has found its way into virtually every aspect of human life.

In the digital age, data protection and intellectual property rights have become crucial issues in various sectors of the economy, including the photography industry. From social media to advertising, news reporting to entertainment, photography is an essential component of modern society.

However, with the increased use of technology and the internet, the protection of data and intellectual property rights in photography has become a crucial issue that cannot be overlooked. The thin line between data protection and intellectual property in photography has created legal, ethical, and practical dilemmas that require a critical analysis.

Defining data protection and Intellectual Property

Data protection refers to the safeguarding of personal data, which includes photographs and any other data that can be used to identify an individual from being misused, mishandled, or otherwise exploited. On the other hand, intellectual property refers to creations of the mind, including literary and artistic works, inventions, symbols, and designs, among others.

Legal framework in Kenya

The legal framework regulating data protection and intellectual property in Kenya has evolved significantly over the years. Kenya's Parliament enacted the Data Protection Act 2019 and Data Protection (General) Regulations, which laws govern the collection, use, and disclosure of personal data. These laws require data controllers and processors to obtain the consent of the data subject before processing their personal data and mandates that personal data must be processed in a secure and confidential manner. Data protection laws are critical in ensuring that individuals' personal data, including images in photographs, are not unlawfully collected, used, or shared. These laws are crucial in promoting trust and confidence in the digital economy and ensuring that individuals' privacy rights are upheld.

The Copyright Act 2001, the Trade Marks Act 2002, and the Industrial Property Act 2001 are the primary legal frameworks governing intellectual property in Kenya. These legal frameworks establish a registration system for intellectual property rights, allowing creators to have legal protection for their intellectual property. The registration system helps to prevent infringement by others and ensures that the creators have legal backing to take action against any unauthorized use of their intellectual property. This legal protection for intellectual property rights is essential for promoting innovation and creativity of creators in Kenya.

The thin line between data protection and Intellectual Property

The thin line between data protection and intellectual property in photography arises from the fact that photographs can contain both personal data and

intellectual property. Personal data in photographs can include images of individuals, their faces, and other identifying characteristics. Intellectual property, on the other hand, can include photographs that are protected by copyright, trademarks, or other forms of intellectual property.

Therefore, the use of photographs in various contexts, such as advertising, news reporting, or social media, can potentially infringe on both data protection and intellectual property rights. For instance, using a photograph of an individual without their consent can violate their data protection rights as the high court found in its recent decision in *Petition no. E002 of 2022 Shilmon Mwangi Kuria v University of Kabianga* where it held that by using the Petitioner's image in its advertisement without the Petitioner's express consent, the University of Kabianga violated his right to privacy. Similarly, in *Wanjiru v Machakos University* (Petition E021 of 2021) [2022] KEHC 10599 (KLR) the High Court held that the Respondent violated the Petitioner's fundamental right to privacy and human dignity under Article 28 and 31 of the Constitution by publishing the Petitioner's image for purpose of commercial advertisement without the Petitioner's consent.

On the other hand, using a photograph that is protected by copyright without permission can lead to infringement on the creator's intellectual property rights. In *Jessica Clarise Wanjiru vs Davinci Aesthetics & Reconstruction Centre & 2 Others* [2017] eKLR the High Court found that "Every individual has an exclusive right to market, for financial gain, their personality, image and name and that the law entitles an individual to protect that right, if it is invaded". Thus, copyright laws give creators exclusive rights to their works, which means they have the right to control how their works are used, copied, distributed, or displayed. If someone uses a photograph that is protected by copyright without the creator's permission, they could be infringing on the creator's exclusive rights.

"On the other hand, using a photograph that is protected by copyright without permission can lead to infringement on the creator's intellectual property rights."

In Kenya, the photography industry is growing at a rapid pace, with the rise of social media and advancements in digital technology. However, the issue of balancing data protection and intellectual property in photography can be complex, **but there are several legal measures that can be taken to address this challenge:**

- 1. Clear guidelines on data protection:** Establishing clear guidelines on data protection will help to ensure that photographers understand their responsibilities when collecting and processing personal data. This will help to protect individuals' privacy rights while allowing photographers to continue creating and sharing their works.
- 2. Consent forms:** Photographers can use consent forms to obtain permission from individuals before taking their photographs. These forms can include details on how the photographs will be used, the duration of use, and the type of compensation offered. Consent forms will help to protect the privacy rights of individuals and provide legal protection to the photographer.
- 1. Copyright registration:** Registering copyright for photographs can help to protect the photographer's intellectual property rights. This will enable them to take legal action against any unauthorized use of their works and seek compensation for any losses incurred as a result of infringement.
- 1. Watermarking:** Photographers can add watermarks to their images to make it clear that they own the copyright. This will help to prevent unauthorized use of their works and make it easier to track down any infringers.
- 1. Education and awareness campaigns:** Finally, education and awareness campaigns can help to raise awareness about the importance of data protection and intellectual property in photography. This can help photographers and the public to understand their rights and responsibilities and promote a culture of respect for personal data and intellectual property.

The place of Artificial Intelligence in the legal profession



JOAN OMALLA

WHEN CHATGPT WAS LAUNCHED in November, 2022, the internet was awash with information and misinformation about the Artificial Intelligence (AI) enabled application.

Critics claimed that the Application was here to take over human jobs. What then is ChatGPT and what does it mean for the legal profession?

ChatGPT is an AI chatbot developed by OpenAI (an American AI research laboratory). It is trained on a large corpus of text data and is said to be capable of carrying on natural sounding conversations with humans. Consequently, it can generate responses to questions, compose emails, solve complex math problems, summarize long texts, write books among other things. It is also able to think fast and can collect up to 40GB of information at a go.

ChatGPT was rolled out for three months with free access as a pilot program for the experts involved in its creation, to know its strengths and weaknesses. As experimentation with it continues, articles have started to abound suggesting that an AI replacement for lawyers is much closer than many might think. Some lawyers in Kenya have even claimed to have used the chatbot to draft submissions which turned out nearly perfect! This Article therefore attempts to deconstruct the implications of AI in the legal profession and to ponder whether AI may one day be used to replace human lawyers and legal professionals.

What is Artificial Intelligence (AI)?

Artificial intelligence (AI) refers to the simulation of human intelligence in machines that are programmed to think like humans and mimic their actions. In general, AI systems work by ingesting large amounts of labeled training data, analyzing the data for correlations and patterns and using these patterns to make predictions about future states. In this way for instance, a chatbot that is fed examples of text chats can learn to produce lifelike exchanges with people, or an image recognition tool can learn to identify and describe objects in images by reviewing millions of examples.

For example, in the case of a phone call reminder, supposing you have not set a weekly reminder to call someone. However, you have called this person every Thursday at 3.00pm for the past two months. A machine-learning smartphone would recognize this pattern. In the event that you do not call the person the coming Thursday, it could automatically send you a reminder, having learnt the pattern.

Researchers and developers in the field are making surprisingly rapid strides in mimicking activities such as learning, reasoning and perception, to the extent that these can be defined concretely. Some believe that innovators may soon be able to develop systems that exceed the capacity of humans to learn or reason out any subject. However, others still remain skeptical because all cognitive activity is laced with value judgments that are subject to human experience.

What AI offers lawyers

Despite the legal industry's long-standing hesitancy to adopt new technology, AI is beginning to make its mark in the legal profession. Although it may not be explicitly noticeable, it helps lawyers and paralegals do their jobs better. Specifically, AI in law firms helps legal professionals transform their practice in the following ways, just to mention a few:

Document storage

Many law firms continue to move away from paper documents to electronic document storage because the latter take less physical space and offers less challenges in sorting and finding documents. Using tagging and profiling functionality, AI-driven document management software stores and organizes legal files such as contracts, case files, research notes and emails. This therefore makes documents a lot easier to find.

Other functions that have been made easier by the AI-driven document management software include enabling document ID and check-in/check-out privileges to maintain version control and security; connecting to other systems like Microsoft Office to easily share files with others; creation of documents using intelligent templates thus enabling legal professionals to automatically fill form fields directly from case records into the templates hence saving time and effort. Consequently, legal document automation has provided lawyers with a centralized and efficient process for producing letters, agreements, motions, pleading, bills, invoices, and other legal documents.

Legal research

Conducting legal research online is a central and important task to most lawyers' everyday lives. The average lawyer spends somewhere between 16% to 35% of his or her time at work doing legal research (American Bar Association, 2017). Today, most lawyers use keyword-driven search to conduct online search for relevant case law and other authorities. However, the limitation of this type of legal research is well-known to lawyers who have spent hours trying to find cases that are most relevant to the specific litigation at hand.

“Many law firms continue to move away from paper documents to electronic document storage because the latter take less physical space and offers less challenges in sorting and finding documents.”

With the emergence of AI-based legal research software, it is now possible to search for and rank information in dramatically different ways. Instead of using only keywords to find results, computer systems can now read entire documents from a litigation record, such as a Complaint, and take into account the information therein to create a more targeted search. The results of such searches are also not ranked by “wisdom of the crowd,” but instead by the “wisdom of your matter” - information extracted from the Complaint is used to rank search results by similarity to the facts, legal issues, and jurisdiction of the specific matter a lawyer is working on.

Review of documents

As with other document-related challenges, AI can help legal professionals review documents more quickly. For instance, there are AI systems that are capable of automatically absorbing documents such as proposed contracts, examine them properly by adopting Natural Language Processing (NLP) technology, and decide which aspects of the contract are agreeable and which of them pose an issue. Further, there are those that are able to spot variations or changes in documents within seconds.

While it is recommended to still have a human review the data, lawyers can benefit from drastically reducing the manual effort of reviewing documents. However, this can definitely change in the future as technologies advance further with AI programs being involved in the full process of review of documents, from start to finish. Various extensive businesses such as eBay and Home Depot have started employing contract review services that are powered by AI.

Increase productivity

Using AI to automate routine manual tasks such as searching for a contract, conducting due diligence, or creating an invoice, helps improve efficiency across the firm. AI-driven processes help to eliminate such labour-intensive and time-consuming activities in order to boost productivity. When lawyers become more efficient, they can focus more time on their clients, while increasing the time spent on billable work.

Using AI in law firms therefore augments the abilities of legal professionals to do their jobs and frees up more time to devote to relationship-building and client-focused activities. Therefore, lawyers are able to create

time beyond helping clients solve their legal challenges to getting to know their clients better and truly understand how and why they need legal assistance with more time at hand. By becoming a trusted advisor who takes the time to get to know your clients and deliver an efficient and timely service, your reputation will precede you. By increasing clients' confidence and trust in you, a lawyer is able to generate more referrals and better online reviews. This approach can ultimately lead to more clients and revenue for the law firm.

Predict Results

Lawyers are often called upon to predict the future. For instance, clients may require that they predict the probability of success of a suit; how much a suit may cost; whether the client should settle a case out of Court; or take their chances at trial.

More experienced lawyers are often better at making accurate predictions, because they have more years of data to work with. However, no lawyer has complete knowledge of all the relevant data. Because AI can access more relevant data, it can be better than lawyers at predicting the outcomes of legal disputes and proceedings, and thus helping clients make decisions.

Efficient due diligence

An integral part of a lawyer's work is to perform exhaustive and extensive background checks for their clients. These facts need to be evaluated for better decision-making and to support their cases. In law firms, AI can replace this tedious job to a large extent, and it can perform due diligence efficiently and accurately.

Further, one can use tools for studying legal documents powered by AI to examine documents in detail. This means that you may rest assured that the contract or pleading you are submitting is flawless and that you have not overlooked anything; you have credibility; and your sources and quotations have been checked.

Apart from enabling you to examine your own documents, AI systems can enable you verify your opposing counsel's work with the same level of care. Did they misquote a case? Did they cite a case that was later overturned? They may not have noticed, but you did. And it's all because of AI, which has become the gold standard in law and legal research.

Remote work facility

Since the COVID-19 pandemic struck our lives, and at the height of lockdown, almost every organization started working remotely. Law firms were no exception. The pandemic forced the legal industry to change court practices and run fully digital, and AI helped lawyers perform their jobs remotely. Today, lawyers in a firm can access documents from their homes, attend courts virtually and conduct virtual meetings with colleagues or clients.

Due to the pandemic, the most popular remote-working tools firms invested in were video conferencing tools, e-signature, law practice management software, time and billing software, and communication software. Law firms have continued and will continue to use these tools and strategies to get their job done.

Challenges AI poses for lawyers

Integrating AI into the legal industry raises many ethical and legal questions. The following are some of the challenges that need to be addressed to ensure the reliability and accuracy of AI in the legal profession:

Unemployment

When it comes to discussions about the impact of AI on the legal profession, the media often portrays a bleak future where they forecast that machines will take over jobs traditionally done by lawyers. Some experts argue that AI could displace many legal jobs, particularly those in the lower-skilled categories. Moreover, as AI technology advances and becomes more accessible, the fear of job loss may increase among legal professionals.

However, many experts still believe AI will not replace human lawyers despite these concerns. Instead, they claim that AI will change the way legal jobs are performed rather than eliminate them altogether. Lawyers will still be needed to provide legal advice, interpret the law, and represent clients in court. AI will simply help them perform their jobs more efficiently and effectively.

Cost of implementation

Implementing AI technology can be a very costly affair. It may include the cost of software licenses, hardware upgrades, and consulting fees for integrating the technology into the existing infrastructure. In addition, firms may incur ongoing expenses for data storage, maintenance, and support.

Another consideration is the cost of hiring or training employees with AI expertise. This may include hiring specialized IT personnel, data scientists, or legal technologists.

Authenticity and reliability

One of the inherent risks in AI authenticity and reliability is its implicit bias. Humans build machines, and no matter how objective we try to be, humans are inherently biased. If the data we provide to AI software is biased or if the system's methods of analyzing data are flawed, then the output will be biased too.

Another critical factor is the transparency of AI systems. The complexity of AI algorithms makes it harder to comprehend the basis for their decisions. This lack of transparency raises concerns about the reliability of AI systems and the accountability of legal professionals who use them.

Final thoughts

While the full potential of AI has yet to be fully realized in the legal industry, the possibilities are promising. However, to ensure that the benefits are realized and the risks are managed, it is essential for law firms to invest in the right AI tools and to work closely with legal technology experts. As businesses everywhere scramble to understand AI, its potential and how it might impact their business, the legal profession is no different. As AI continues to evolve and grow, lawyers will have to learn how to use it to their advantage.

Will AI replace lawyers? Only time will tell what role AI may—or may not—play for the legal profession. I see the likely path as a middle road. Human lawyers do far too many varied tasks for their clients, in various contexts, requiring different types of judgment and experience, to be fully replaced by an AI product, without generations of improvement from what is available today.

“Integrating AI into the legal industry raises many ethical and legal questions. These challenges need to be addressed to ensure the reliability and accuracy of AI in the legal profession.”

A photograph of a modern conference room. A long, dark wood conference table runs diagonally across the frame. Several black leather executive chairs are lined up along one side of the table. On the left wall, there is a large, circular, metallic logo with the letters 'AU'. In the background, a round clock is mounted on the wall. The room has large windows with blue and white striped blinds. The ceiling is white with recessed lighting. The overall atmosphere is professional and contemporary.

Corporate, Commercial,
Tax & IP

Unclaimed Financial Assets



**RUTH ACHITSA
KISIAH**

THE FINANCIAL SECTOR PLAYS a critical part in a country's development

and it is therefore vital to progressively devise policies that support the sector in executing this role. In Kenya, the financial sector largely comprises of the Banking, Insurance and Fintech companies. Banks are intermediaries between depositors (who lend liquidated and non-liquidated assets to the bank) and borrowers (to whom the bank lends liquidated assets).

On the other hand, insurance companies are instrumental for the stability of financial systems mainly because they safeguard the financial stability of households and firms by insuring their risks. With the advent of Fintech, new banking-related technology continues to revolutionize the industry. This is particularly evident in the surge in investments in Fintech businesses and the emergence of mobile money and digital banking.

The Banking, Insurance and Fintech sectors in Kenya are holders of various financial assets ranging from money deposits, life and insurance policies, cheques, ownership interests in form of dividends among others. At the gist of it, these assets may become abandoned over time with no owner laying claim over them.

Prior to the enactment of the Unclaimed Financial Assets Act No.40 of 2011 (the "Act"), Kenya lacked a legislative and institutional framework to facilitate reunification of unclaimed financial assets to owners. Consequently, the Act was enacted to administer unclaimed financial

assets and provide a legislative framework for dealing with the said assets in the aforementioned sectors. Further, the Act establishes the Unclaimed Financial Assets Authority (the "Authority") whose primary mandate is to receive unclaimed financial assets from the holders of such assets, safeguard and re-unite the assets with their rightful owners.

The Act provides that all holders of unclaimed financial assets are to report, trace and deposit any unclaimed financial assets with the Unclaimed Financial Assets Authority (the "Authority").

Procedure in handing over assets to the Authority

When a rightful owner fails to claim an asset over a specified number of years known as the abandonment period, the holders of such assets are required by law to transfer custody to an unclaimed property trust account in a process known as escheat.

Thereafter, the holder of such assets shall make all reasonable efforts to locate the owner and to notify the owner about those assets. This should be done within a period not less than sixty days and not more than one year before filing a Report of Presumed abandoned assets to the Authority.

The holder in possession of the assets presumed abandoned is required to send written notice to the apparent owner at his last known address informing him that the holder is in possession of assets subject to this Act where the holder has in its records an address of the apparent owner.

If the apparent owner fails to lay claim to the assets, the holder of the assets presumed abandoned and subject to the custody of the Authority as unclaimed assets under this Act shall make a report concerning the assets to the Authority as provided for under Section 20 of the Act.

Such report shall be certified by the Chief Executive Officer of the holder and shall include all of the following –

1. the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of assets presumed abandoned under the Act;
2. in the case of unclaimed assets held or owing under any life or endowment insurance policy or annuity contract, the full name and last known address of the insured or annuitant and of the beneficiary according to the records of the insurance company holding or owing the assets;
3. in the case of the contents of a safe deposit box or other safekeeping repository or of other tangible assets, a description of the assets and the place where they are held and may be inspected by the Authority and any amounts owing to the holder;
4. the nature and identifying number, if any, or description of the assets and the amount appearing from the records to be due;
5. the date the assets became payable, demandable, or returnable, and the date of the last transaction with the apparent owner with respect to the assets; and
6. other information the Authority may lawfully require.

The report shall be filed on or before the first day of November of each year for the twelve-month period ending on the immediately preceding thirtieth day of June.

Consequently, if satisfied that the assets are unclaimed and if unable to locate the owner, the holder is required to vest and deliver these assets to the Authority.

Procedure of claiming assets under the Unclaimed Financial Assets Act

The following is the procedure of claiming assets as prescribed under the Unclaimed Financial Assets Act.

Where the original owner is claiming the assets, they are to submit to the Authority the following documents:

- Duly completed and commissioned Original Owner Claim form (Form 4A) duly commissioned.
- Duly completed and commissioned Indemnity Agreement (Form 5).

- An official letter received from the holder confirming remittance of unclaimed financial assets to the Authority.
- Certified copy of the claimant's national identity card or passport.
- Copy of claimant's KRA PIN certificate.
- Claimant's bank details indicated on claimant bank details form.
- Provide Bank Statement of an active account, current deposit slip, or withdrawal slip - clearly showing account name and number to confirm bank account details provided in item 6 above. (if more than one claimant, provide a statement of a joint bank account).

Where one is claiming on behalf of the owner that is to say, where the claimant is not the owner but has or asserts a legal right to an unclaimed asset, the claimant shall submit to the Authority the following documents to facilitate the return of the unclaimed financial asset:

- Duly completed and commissioned Beneficiary Claim Form (Form 4B).
- Duly completed and commissioned Indemnity agreement (Form 5).
- An official letter received from the holder confirming remittance of unclaimed financial assets to the Authority.
- Certified copy of the claimant's national identity card or passport.
- Copy of claimant's KRA PIN certificate.
- Copy of certificate of death.
- Certificate of Confirmation of Grant/ Certificate of Summary Administration.
- Claimant's bank details indicated on claimant bank details form- Provide Bank Statement of an active account, current deposit slip or withdrawal slip - clearly showing account name and number to confirm bank account details provided in item 8 above. (if more than one claimant, provide a statement of a joint bank account).

Consequences of non-compliance

The Authority may institute criminal proceedings or civil proceedings in court for non-compliance by holders of unclaimed financial assets. To this end, an officer of the Authority authorised by the Board may prosecute or conduct the proceedings.

The Act stipulates punitive measures as follows:

To begin with, a holder who fails to pay or deliver assets within the time prescribed by the Act shall pay to the Authority interest at the current monthly rate of one percentage point above the adjusted prime rate per annum per month on the assets or value of the assets from the date the assets should have been paid or delivered;

A person who wilfully fails to render any report or perform other duties required under this Act shall be liable to pay penalty of seven thousand shillings but not more than fifty thousand shillings for each day the report is withheld or the duty is not performed;

A person who wilfully fails to pay or deliver assets to the Authority as required under this Act shall be liable to pay a penalty equal to twenty-five percent of the value of the assets that should have been paid or delivered;

A holder who-

1. Fails to maintain a record required under this Act or the Regulations; or
2. In a record required or submitted, or in information provided, under this Act or the Regulations, makes a statement that - is false or misleading with respect to a material particular; or omits to state a material fact, the omission of which makes the statement false or misleading, commits an offence.

3. A person who wilfully refuses after written demand by the Authority to pay or deliver assets to the Authority as required under this Act commits an offence.

The Act stipulates that all penalties payable under the Act shall be recoverable as civil debt summarily. On the other hand, a person convicted of an offence is liable to a fine of not less than fifty thousand shillings and not more than one million shillings or to imprisonment for not more than one year, or to both.

Where a body corporate commits an offence stipulated above, an employee, officer, director or agent of the corporation who authorises, permits or acquiesces in the commission of the offence commits an offence. This shall apply whether or not the body corporate is prosecuted for the offence.

As part of its mandate to receive unclaimed financial assets, it is suffice to note that the Authority carries out compliance audits to assess the level of compliance by various holders. The Auditor-General in the Report on the Unclaimed Financial Assets Trust Fund (2020) started flagging non-compliance among government entities. Having undergone this audit in 2021, Private sector companies have been found to be sitting on tremendous amounts of wealth in unclaimed assets adding to the over Sh241 billion being held by about 490,000 institutions.

Banking, Insurance and Fintech companies are bound to comply with the law and may be subjected to various punitive measures prescribed by law. Besides, there has been a growing concern by Kenyans on the failure by various holders to remit unclaimed financial assets to the Authority. It is clear that there is market concern over what would be seen as complacency by holders of unclaimed financial assets to remit. Therefore, it is necessary for these holders to conduct internal audits to ensure compliance and to enhance the reunification of various assets to their owners. Would you want to talk about the need for an internal compliance audit by us? This provides the plug in point for you.

Administration as a debt recovery option for non-performing loans



ERIC GUMBO



WHITNEY MWENJE

WHILE THE GLOBAL ECONOMY is steadily recovering from the impacts of Covid-19, other shocks such as the war in Ukraine, inflation and the climate crisis have not only left individuals but also companies and other forms of business entities struggling to meet their financial needs as and when they fall due. The volatile global environment, high cost of living and domestic challenges have exacerbated the situation thus the high levels of private and public debt in Africa. The increased credit risk can also be attributed to among other things, the elevated cost of borrowing relative to the low income earned by individuals and depressed performance in businesses. The inability to settle the outstanding amounts translates to bad and doubtful debts thus losses for the lenders.

Often lenders encounter challenges in exacting the available debt recovery options which inter alia include exercising statutory power of sale, leasing the charged land, appointing a receiver and instituting recovery proceedings. A case in point is when levying the statutory power of sale and the potential purchasers fail to meet the reserve price even after several attempts. This constrains the lender to re-examine the most appropriate debt recovery means.

This paper explores administration as a practical debt recovery option to lenders for non-performing loans. It examines the possibility of salvaging corporate borrowers without driving them to liquidation and subsequent auction of its business assets. The highlight for lenders in choosing administration as a recovery option entails accruing maximum financial benefits while ensuring client retention which would not happen when the company is pushed to liquidation.

Administration in a nutshell

It is worth noting that prior to the enactment of the Insolvency Act No. 18 of 2015, the Companies Act Cap 486(repealed) afforded companies under financial distress only two options i.e. liquidation or reconstruction through amalgamation effectively transferring the liabilities. The introduction of administration by the Insolvency Act as an alternative to liquidation effectively offers struggling businesses breathing space for balance sheet restructure by allowing them to continue as a going concern but under the management of an experienced third party manager with a view to improving the performance of the business and eventual recovery of outstanding obligations.

The appointment of an administrator is tailored to ensure that the company is returned to profitable trading as opposed to engaging in the sale and realization of its assets as a primary option.

Section 522 of the Insolvency Act appreciates this by underscoring the following objectives of administration:

- maintaining the company as a going concern;
- achieving a better outcome for the company's creditors than liquidation would offer; and
- realizing the property of the company in order to make distributions to secured or preferential creditors.

There is also need to appreciate the 12 months' moratorium under Sections 559 and 560 of the Insolvency Act, 2015 which comes with the administration order, as a mechanism of protecting the company from aggressive creditors who could cause a run for the company's assets to the detriment of the other creditors.

“The appointment of an administrator is tailored to ensure that the company is returned to profitable trading as opposed to engaging in the sale and realization of its assets as a primary option.”

Administration as a Debt Recovery Option for Non-Performing Loans

Lenders can opt for administration as a debt recovery option for non-performing loans in the following instances;

- Where the lender holds a qualifying floating charge they can appoint an administrator without court's sanction; or
- In any other instance a creditor can apply to the court for an administration order.

In the two instances once appointed, the administrator takes control of the Company from its directors and is obligated to work in the best interests of all the creditors.

A company may best be suited and considered for administration, in the following circumstances:

1. Where the value of the company's total assets exceeds its total liabilities;
2. Where the company needs a restructure to the extent that it is experiencing operational distress and requires an insolvency practitioner to assist in the restructure;
3. Where the company has not previously had a history of financial default; and
4. Where the company is experiencing mere financial distress but is yet to fulfil its objectives and therefore, it is necessary to keep the company as a going concern.

Appointment of Administrator by Holders of Qualifying Floating Charges

A floating charge is qualifying if the security document expressly either states that Section 534 of the Insolvency Act is applicable or it empowers the holder of the floating charge to appoint an administrator of the company. The section empowers holders of floating charge to appoint an administrator of company. Section 534 (3) of the Insolvency Act 2015 provides that one becomes a qualifying floating charge holder if they either hold one or more debentures of the company secured by a qualifying floating charge, a number of qualifying charges or charges and other forms of security that together relate to the whole or substantially the whole of the company's property.

Unlike other classes of creditors who must apply to the court for a liquidation order, save for the requirement

to notify the Court on appointing an administrator, the holders of qualifying floating charges do not require the intervention of the court in the appointment of an administrator. Being a qualifying floating charge holder is therefore advantageous with regards to the ease of appointing an administrator.

The Process of Appointment of an Administrator by a Holder of a Floating Charge

In this instance, administration takes effect upon filing of the notice of appointment of the administration in the appropriate form. The holder of the floating charge is required to notify the administrator, the official receiver, the Registrar of Companies, the Company, the directors of the company and the creditors of compliance with the requirements of the law with regards to the administrator's appointment. This process culminates with an announcement of the Administrators' appointment published in the Kenya Gazette and one or more newspapers that are widely circulated within Kenya.

Unless a liquidation order is already in place, appointing an administrator in this case is an out of court procedure. The appointment is usually triggered by some event such as the chargor's failure to honour a demand requiring the repayment of the outstanding amounts.

Upon the lapse of the notice period, the holder of the floating charge is required to give at least three days' notice to the holders of any prior qualifying floating charge of their intention to appoint an administrator. The priority of floating charges is determined in accordance with Section 38 of the Movable Property Security Rights Act, 2017 which provides that priority among competing security rights created by the same

grantor in the same collateral is determined according to the time of registration. It is therefore germane to ensure registration of the security documents at the collateral registry is done.

Upon receipt of consent or in the absence of objection from the prior ranking charge holders, the appointer is required to lodge a Notice of Appointment with the Court. The Notice of Appointment must be accompanied by a statutory declaration by or on behalf of the appointer and a statement by the administrator consenting to the appointment.

It is worth noting that most lenders now incorporate the administration clause in their security documents such as charges and debentures.

The Appointment of an Administrator by a Creditor

Apart from holders of floating charges, an administrator can also be appointed by a creditor. In the latter instance, the creditor is required to apply to the High Court for an order placing the company under administration.

The Process of Appointment of an Administrator by a Creditor

The charge must be enforceable and this is achieved by the issuance of a demand for the repayment of the outstanding balance. The Application for an administration order must be in Form 36 set out in the First Schedule of the Insolvency Regulations, 2017. The Applicant should annex an Affidavit setting out grounds in support of the Application.

The Applicant's Affidavit has to disclose details demonstrating the company's inability to pay its debts. The threshold for proving the inability of a company to pay its debts is a minimum debt of Kshs. 100,000

“Best practice requires that creditors conduct thorough viability surveys in order to determine the most effective debt recovery method on a case by case basis.”

that has gone unpaid for a minimum of 21 days. Additionally, the court has to be satisfied that the administration order is reasonably likely to achieve the objectives of administration under Section 522 of the Insolvency Act, 2015. In practice, courts decline to issue the administration order where they are not satisfied on the two aspects. Where the Application is allowed, the appointment of an administrator takes effect from the time specified in the order or from the date of the order if no time is specified therein.

As soon as is reasonably practicable after filing the application for an administration order, the Applicant is required to notify the holders of qualifying floating charge and such other persons prescribed by the Insolvency Regulations.

Arguments for and against Administration as a Debt Recovery Option

Best practice requires that creditors conduct thorough viability surveys in order to determine the most effective debt recovery method on a case by case basis. For instance, the creditor has to assess the level of indebtedness noting that in some cases they may be beyond salvage thus the bank may fail to recover the loan amounts in the long run. Therefore, there is need for creditors to have an appreciation of the pros and cons associated with administration as a debt recovery tool to establish its suitability to their circumstances.

In the interests of preserving longstanding business relationships, a creditor would wish to go for an option that does not kick their customers out of trade. Administration offers this as it protects the relationship between creditors and borrowers noting that the borrower's business continues operations as a going concern. Administration offers struggling businesses

breathing space for balance sheet restructure by allowing the distressed company to continue with operations with a view to recover monies for repayment of outstanding obligations as opposed to winding up. Additionally, administration offers a better deal for all the creditors as compared to other debt recovery methods which focus on a sole creditor sometimes leaving the rest without recourse. We must also appreciate that in case the creditor is a fixed charge holder, it ranks above all other creditors in the priority of payments and will be prioritized when the proceeds of administration are being distributed.

Whereas the costs of administration are considered high in comparison to the other debt recovery tools, it offers a more practical solution as the company continues to trade with a view to recover monies for settlement of outstanding obligations. The success of administration is catalyzed by collaborative efforts amongst the creditors and between the creditors and administrator. We must be alive to the fact that tensions between the creditors of a company under administration can frustrate the process. Further, where the assets are disposed, fixed charge holders, costs of administration and preferential creditors all rank above the qualifying floating charge holders in the priority of payments under the Insolvency Act 2015 while unsecured creditors come last.

In view of its objects, administration is a viable option for companies in financial crisis as it allows distressed companies to operate as a going concern while still meeting their obligations to their creditors. The fact that administration offers a better deal for all creditors as a whole as compared to other debt recovery methods which focus on sole creditors is to be applauded. Most importantly, administration seeks to maintain the good relationship between creditors and borrowers.

Intellectual Property ownership in the era of ChatGPT and related Artificial Intelligence software



DELBERT OCHOLA

IT IS WITHOUT A DOUBT THAT chatbot ChatGPT, which is an Artificial Software developed by OpenAI Inc. and launched in November 2022, and other related software such as Google's Bard, which is also a Chat AI, are becoming increasingly popular thus raising the issue of ownership of the IP rights created by those AIs. The big question that remains to be resolved is "How can an invention be created by a machine/software? Who owns that invention?" This is more so because the Kenyan patent office has possibly never come across a scenario where AI systems are cited as inventors. This brings a lot of confusion and uncertainty regarding the future of AI and the evolution of IP law that is required to navigate ownership of these inventions.

This is a bit similar to the situation that arose in the case surrounding ownership of copyright in the case of "monkey selfies." That particular case involved a macaque monkey in Indonesia that took a series of selfies with equipment belonging to British nature

photographer David Slater. While some claimed that the monkey was the rightful owner of the copyright in the photographs, a US Court in *Naruto v. Slater*, ruled that the monkey could not be considered the copyright owner as copyright law only extends to works produced by human authors and does not extend to non-human actors.

Who then owns the copyright in ChatGPT responses?

When asked who owns the copyright in the work produced by ChatGPT, the AI software responds as follows:

"As an AI language model developed by OpenAI, the copyright in the works produced by ChatGPT would be owned by OpenAI. However, it is worth nothing that the output generated by ChatGPT is not intended to be copyrightable as it is generated using artificial intelligence and does not necessarily reflect the creative expression of an individual human author."

This response suggests that ChatGPT contemplates issues in claiming copyright, its infringement thereof, but certainly intends to claim the rights should they be deemed to exist. Interestingly, although ChatGPT claims the original copyright ownership, in terms of OpenAI terms of use, it instantly goes on to assign the rights to the user:

"as between the parties and to the extent permitted by applicable law, you own all Input, and subject to your compliance with these Terms, OpenAI hereby assigns to you all its right, title and interest in and to Output."

It is thus imperative to note that the rights can only be assigned if they exist in the first place. Thus, the thriving argument is that OpenAI owns the copyright in the works because it is the software that generates the work, based on complex algorithms which have been trained to process and analyze large amounts of data/information.

Another argument that has been advanced is that the human user who engages the software to generate the works requested owns the copyright in those said works because it is the human user who takes the initiative to create the work through their interactions with ChatGPT. The generation of the works cannot be done without the initiative of the human user. Take for instance a writer or a draughtsman who creates a work using word processor or drawing software. Unless they write or draw, there is no work worthy of copyrighting. However, it is imperative to note that ChatGPT's output does not merely result from the human user's inputs, but also from complex algorithms that have been trained to process and synthesize large amounts of data.

This, however, brings forth another big argument that no copyright work is created when content is generated using a language model such as ChatGPT, because the resulting work is the product of algorithms processing and synthesizing large amounts of data as opposed to being a product of human creativity.

What does Kenyan Copyright Law Suggest?

Copyright in Kenya is governed by the Copyright Act, Cap 130 Laws of Kenya. For a Copyright to subsist in terms of the Kenyan Copyright Act, the work in question must be original. This however, does not mean that the said works have to be new/novel, or have any technical or artistic merit, or be unique – instead, it simply means that the work in question must be a result of the author's labour and must not be copied or plagiarized from any other source.

The Kenyan Copyright Act further defines an author as in the case of a literary, dramatic, musical or artistic work or computer program which is computer generated, to mean the person by whom the

arrangements necessary for the creation of the work were undertaken and further to include a computer programmer who exercised control over the making of the program.

The Kenyan Copyright Act thus envisages a situation where the author of a work can be a human being or a juristic person. Therefore, OpenAI Inc. could theoretically be deemed to be the author, or, at least, a co-author of a resulting work for the simple reason that it expended significant effort in developing the AI software that enabled ChatGPT to create the works under the initiative of a human being

It is very important to note that the works generated by ChatGPT could also be derived from other original works, as the AI software analyzes various compilations of data which are used to train the language mode. There is therefore widespread belief that the owner of the data should also own the derived work. The question which begs to be answered is, if a human being who writes a paper based on conclusions drawn from their investigation of all available information owns the copyright in the paper, why should the ownership of copyright in a work generated by ChatGPT from its assessment of information (albeit artificial) of available data be affected by the ownership of rights in the data?

Additionally, if the resulting work is considered to be a derivative work, ChatGPT has been programmed using a large amount of data which can be sourced widely, so it would be practically impossible to determine specifically which specific data source contributed to the derivative work and therefore, who owns the rights in the data, and as a consequence thereof, in the derivative work.

The ownership of intellectual property generated by anything other than mankind remains to be a complex question which the Kenyan Copyright Act may not fully answer. At this stage, with the regulatory framework as currently is, it is unclear whether copyright subsists in works generated by non-human actors, which is without a doubt, a premise that must first be evident before the question of ownership is answered. This uncertainty will remain until the Copyright Act and related IP law evolves to address these issues.

A detailed, close-up photograph of a computer motherboard. The image shows the intricate circuitry, including a central processing unit (CPU) socket with its gold-plated pins, various capacitors, and integrated circuits. The motherboard is populated with several RAM modules and other components. The lighting is dramatic, highlighting the metallic surfaces and the complex layout of the board. The text "Technology & Innovation" is overlaid in a large, white, serif font at the bottom right.

Technology & Innovation

Sanctions imposed against unauthorized use of personal data for commercial purposes under Data Protection Act, 2019



ERIC GUMBO



WHITNEY MWENJE

MARKETING AND ADVERTISING provide a competitive advantage for organisations, and the usage of personal data provides a human touch.

Personal data means any information relating to an identified or identifiable natural person (data subject). Such information includes a person's name, age, photograph, personal address, national identification card number, bank account details, and phone numbers. However, the use of a person's personal data without a data subject's express consent would be a violation of their privacy.

On 21st December 2022, Kenya's Data Commissioner fined Oppo Kshs. 5,000,000.00 for using a person's photo on their Instagram account without the person's express consent. According to the public statement issued by the Office of the Data Commissioner ("ODPC"), the action was taken after Oppo refused/neglected/failed to comply with certain compliance

requirements imposed through an enforcement notice. In particular, the Data Commissioner cited that Oppo had: -

Refused to adduce or develop a policy for compliance with section 37 of the Data Protection Act, 2019 ("the Act"). This section prohibits the commercial use of personal data unless express consent is obtained from the data subject or unless the use is authorised under a written law and the data subject has been informed of such use when collecting the data from the data subject; and

Failed to adduce a data protection policy as proof that it (Oppo) had developed an internal complaints mechanism to address data subject complaints.

On 11th April 2023, the ODPC issued a penalty notice against Whitepath Company Limited for contravening data protection laws. The ODPC received close to 150 complaints against the company alleging that their applications have accessed their mobile phone contacts and are sending unwarranted and unsolicited text messages to the said contacts. Additionally, the company's staff were accused of harassing the complainants and their contacts irregularly obtained from the complainant's phone books. The company failed to comply with an ODPC's enforcement notice dated 10th January, 2023. The ODPC fined the company a penalty of Kshs. 5,000,000 pursuant to Section 63 of the Data Protection Act, and Regulation 20 of the Data Protection (Complaints Handling Procedure and Enforcement).

On the same date, 11th April 2023, the ODPC issued a penalty notice against Regus Kenya. The complaint against Regus alleged frequent spamming of automated improper information to the complainant despite attempts to make the respondent stop. The company was non-cooperative and failed to comply with the enforcement notice dated 16th February 2023. Consequently, the Company is required to pay the ODPC a penalty of Kshs. 5,000,000.

On 26th September 2023, the ODPC issued a penalty notice against Mulla Pride Limited, a Digital Credit Provider for using names and contact information of the complainants which were obtained from third parties, and subsequently used to send threatening messages and phone calls. The company was fined Kshs. 2,975,000. On the same date, the ODPC issued a penalty notice against Casa Vera Lounge which was fined Kshs. 1,850,000 for posting a reveler's image on their social media platform without the data subject's consent. Lastly, on the same 26th September 2023, the ODPC fined Kshs. 4,550,000 to Roma School for posting pictures of minors without parental consent.

An enforcement notice is issued to the party in breach under section 58 of the Act. The notice is issued where the Data Commissioner is satisfied that a person has failed, or is failing, to comply with any provision of this Act. The notice requires that person to take such steps and within such period as may be specified in the notice. In the event that the person in breach does not rectify the default as stipulated in the enforcement notice, the Data Commissioner issues a penalty notice under section 62 of the Act requiring the person to pay the ODPC a specified amount of money as penalty for breach.

What are the legal requirements for using personal data for commercial purposes?

The commercial use of personal data is prohibited under section 37 of the Act, unless prior express consent of the data subject is obtained or unless the proposed/purported use is authorised under written law. The section further requires data controllers or data processors that uses personal data for commercial purposes to, where possible, anonymise the data in such a manner as to ensure that the data subject is no longer identifiable.

Regulation 14 (1) of the Data Protection (General) Regulations 2021 defines commercial purpose as *"the use of personal data of a data subject to advance commercial or economic interests, including inducing another person to buy, rent, lease, join, subscribe to, provide or exchange products, property, information or services, or enabling or effecting, directly or indirectly, a commercial transaction."*

The term "commercial purpose" encompasses various activities that aim to promote or advance commercial interests. Examples of such activities include using someone's personal data to send catalogues, displaying advertisements on an online media site they are logged in using their personal data, and sending electronic messages to them about a sale or other advertising material related to a sale.

How is consent sought under the Act?

Section 2 of the Act defines consent as "any manifestation of express, unequivocal, free, specific and informed indication of the data subject's wishes by a statement or by a clear affirmative action, signifying agreement to the processing of personal data relating to the data subject." In simpler terms, this means that consent can only be considered valid if it is given freely and clearly, with an explicit affirmative action such as a signature or ticking a box.

To seek consent under the Act, one must follow the guidelines set out in the law. When using personal data it is mandatory to: -

- Inform the data subject about how and why you intend to process their personal data, providing specific information as required by Regulation 4(1) of the Data Protection (General) Regulation 2021. This includes disclosing your identity as a controller or processor, explaining how and why you will use their personal data, identifying any third parties that may receive the data, and informing them of their right to withdraw consent and the implications of doing so. This information can be communicated through various ways, including written, oral, audio or video message.
- Ensure that the data subject has the capacity to give consent. For example, a person under 18 years old may not have the legal capacity to give consent.

The data controller must do their due diligence to ascertain that the data subject is of legal age and the right mental state to consent to processing of their personal data.

- Develop and provide a suitable consent mechanism. Consent can be given physically or electronically, such as through a physical or paper form, audio-visual recording, a mobile app, SMS, or online.
- Ensure that the consent is freely and voluntarily given, meaning that the person has not raised an objection to the proposed processing, can refuse or withdraw consent without detriment, give specific consent for disclosed processing purposes, and understands that without their consent, the processing cannot proceed.
- Ensure that the consent is tied to a specific processing purpose. For example, if the images are for social media promotions, the consent should specify that purpose. If there are multiple proposed purposes for processing, each purpose must have specific consent tied to it.

What action can a person take for unauthorised use of their image or consent?

Using someone's image without their consent in Kenya is a violation of their privacy and data protection rights, and it can result in legal action. The affected data subject may take legal action by filing a complaint with the Data Commissioner or seeking redress in court. If the court finds the offender guilty of unauthorised use of the image, they may be ordered to pay damages for breach of privacy.

The High Court of Kenya have found two distinct universities guilty of violating their students' right to privacy, dignity, and property through the non-consensual release of their images. In High Court Petition no. E002 of 2022 Shilmon Mwangi Kuria v University of Kabianga the Petitioner was pictured at a graduation ceremony of the University of Nairobi on 20 December 2019. A year later, the University of Kabianga published the same image on its website inviting stakeholders to a Webinar that was to be held on July 2021 to validate a proposal for a pipeline project in partnership with the African Development Bank on how universities cope/mitigate the challenge of COVID-19. The Court ordered University of Kabianga to pay the Petitioner Kshs. 500, 000.00 plus costs.

Similarly in High Court Petition E021 of 2021 Catherine Njeri Wanjiru v Machakos University the Petitioner sued Machakos University for using her photograph for purposes of advertising and marketing computer packages courses offered at the university. The photograph was taken without the Petitioner's knowledge and consent. The University admitted to the use of the photograph since it was the practice of the university to publish pictures of its graduands on its website. The Court awarded the Petitioner Kshs. 700,000.00 in damages.

In addition, the Data Commissioner has the authority to impose fines and award compensation for violations of data protection laws. In the instant cases, the Data Commissioner fined Oppo Kenya, Whitepath, Rugus, Mulla Pride Limited, Casa Vera Lounge and Roma School for using personal data without the data subjects' express consent.

To conclude, although the Office of the Data Commissioner has been in place for merely two years, it has made significant steps towards ensuring that the provisions of the Act are adhered to. In light of the increased regulatory action by the ODPC and the imminent risk of privacy related complaints being escalated to the ODPC, data controllers and processors must take immediate steps to develop and implement a data protection compliance strategy, especially when it comes to obtaining consent before using personal data.

We advise that when using personal data for commercial purposes, it is crucial to obtain the data subject's express consent. The request for consent should be clear, distinguishable and be provided in a clear, easily accessible manner, using clear and plain language. The data controller and processor must take a step further and do their due diligence to ascertain that the data subject has the legal capacity to issue consent. This includes ascertaining the age and mental state of the data subject. This can be achieved through developing a checklist on all the factors to be established while obtaining consent. Lastly, the collection and storage of any personal data must be kept at a minimal; collecting only what is adequate and relevant for the intended purpose.

Gearing towards electronic wills



DUNCAN KIPROTICH

A WILL IS THE SIMPLEST expression of the wishes of a property owner as to the mode and beneficiaries of transmission their estate upon demise. In that regard, most jurisdictional laws governing the execution of this posthumous document are keen to regulate and safeguard the sanctity of execution and interpretation of the will.

This article analyses the concept of electronic execution of wills in the Washington state and seeks to borrow from its legislative milestones. We emphasize the need for the Kenyan government to engage sectoral players to come up with simplistic but safe models of recognition and enforcement of electronic wills in line with its agenda to enhance digital infrastructure for efficient public service delivery. This is the road to electronic wills in Kenya.

Contemporary legal landscape for wills in Kenya

The Law of Succession Act, CAP 160 of the laws of Kenya ("Act"), governs the execution and interpretation of wills in Kenya. The Act recognizes only two types of wills being: oral wills, and written wills. According to the Act, an oral will is considered valid if it is made three months or less before the demise of the testator; and is made before two or more competent witnesses. The Act exempts oral wills made by marines who die

in active service more than three months after making the will from invalidity as mentioned above.

On the other hand, written wills are considered valid under the Act if the testator has physically appended their signature or affixed his mark on the will as to demonstrate that the signature had intended to give effect to the will. The Act requires written wills, just like oral wills, to be attested by at least two or more competent witnesses in the presence of the testator.

The concept of electronic wills is not provided for in the Act and is therefore foreign to Kenya. However, the High Court decision in *The Estate of Kevin John Ombajo (Deceased)* (Succession Cause 555 of 2018) has sparked conversations on the adoption of electronic wills in Kenya. Coupled with the restrictive effects of the COVID-19 pandemic, it is time Kenya puts in place policy measures to transition the succession regime to an almost paperless and digital regime.

Analysis of High Court Succession Cause 555 of 2018: *The Estate of Kevin John Ombajo (Deceased)*

The Petitioner in the cause was the widow of the deceased who sought to be granted letters of probate of the estate of her late husband in accordance with his will executed in 2015. The deceased's sister filed a cross-petition citing that her deceased brother had, vide an audio-visual recording made on 23rd December, 2016, effectively revoked his last will and made his last wishes in the recording.

Upon the deceased's demise, the contents of the written will executed in 2015 and the audio-visual recording of 2016 were shared with the deceased's wife and his sister. However, they could not agree on which of the two wills was valid leading to the dispute in the matter. With bias on the Court's interpretation of the audio-visual recording, the Court was constrained by the provision of the Act together with judicial precedence

that limited classification of wills into two forms only. The Court finally ruled that the audio-visual recording could only be construed as an oral will.

The Honourable Lady Justice Lydia Achode however made the following commentary in her judgment :-

“Although not formally recognised in many jurisdictions including Kenya, electronic wills and the use of technology as a medium of documenting evidence is on the rise. As a result of the COVID-19 pandemic they are more relevant than ever. Just like conducting of court sessions virtually, there is need to have policies and regulations in place to ensure that these processes are guarded against the challenges that are already there such as cyber security, obligations to assess capacity, understanding, undue influence and duress.”

The judgment is an eye-opener on the prospects of the use of electronic wills and their formal recognition in Kenya.

Comparative analysis

Foreign jurisdictions have embraced the use of electronic wills. Washington DC in the United States of America has recently enacted legislation on electronic execution of wills. The state of New Jersey also recognizes the use of online wills albeit with a requirement for a physical copy with physical signatures. We shall discuss the use of electronic wills in foreign jurisdictions and then highlight the areas where Kenya can make reforms for the adoption of electronic wills.

The Washington Uniform Electronic Transactions Act

The Washington State legislature-passed Washington Uniform Electronic Transactions Act (“Washington Act”) came into force on the 1st of January, 2022. It provides for the use of electronic wills and the manner in which they can be safely stored for future use. Some of the salient requirements for validity of an electronic will under the Washington Act include that:-

1. it must be a record that is readable, attested by at least two competent witnesses and signed by the testator or a person under the direction of the testator;
2. a witness can either be in the presence of the testator either physically or electronically;

3. the will can only be kept by authorized persons (qualified custodians) after its execution; and
4. certified copies of the electronic will may be created by affirming that a paper copy of the will is the true copy of the will.

Reforms and way forward

As stated earlier, the Kenyan Act does not provide for the use of electronic wills in Kenya. We attribute this to Section 83B of the Kenya Information and Communications Act No. 2 of 1998 (“KICA”) which bars the use of electronic records in making wills. This however can be amended to include electronic wills.

With the adoption of virtual meetings under Section 283 of the Companies Act (2015), it is important to legislatively accommodate electronic presence of witnesses during the making of wills. From practice in comparative jurisdictions, adoption of electronic execution and attestation of wills would be practical if included in the Act.

The Kenyan regime can borrow from the Washington-Uniform Electronic Transactions Act which largely covers the use of electronic records in transactions and has encompassed the Washington Wills Act leaving no ambiguity with regard to the manner and procedure under which an electronic record can be used. The table below briefly summarizes the differences with the two regimes on the matter:

One of the major differences between the two is the procedure of obtaining the electronic record and verifying an electronic signature. In Kenya; for one to verify an electronic signature, it has to be accompanied by an e-signature certificate issued by an accredited certification service provider (CSP). The certificate is a record issued by the CSP that confirms the identity of a signatory, identifies the CSP issuing it, and is signed by an officer of the issuing CSP.

Further, Kenyan law on Evidence limits admissible electronic records to those obtained from a computer. However, with the increased advancement in technology many electronic gadgets can now be used to submit evidence in Court. It would therefore be trite that we amend our law of evidence Act to accommodate the adoption of electronic Wills in their recorded formats as evidence.

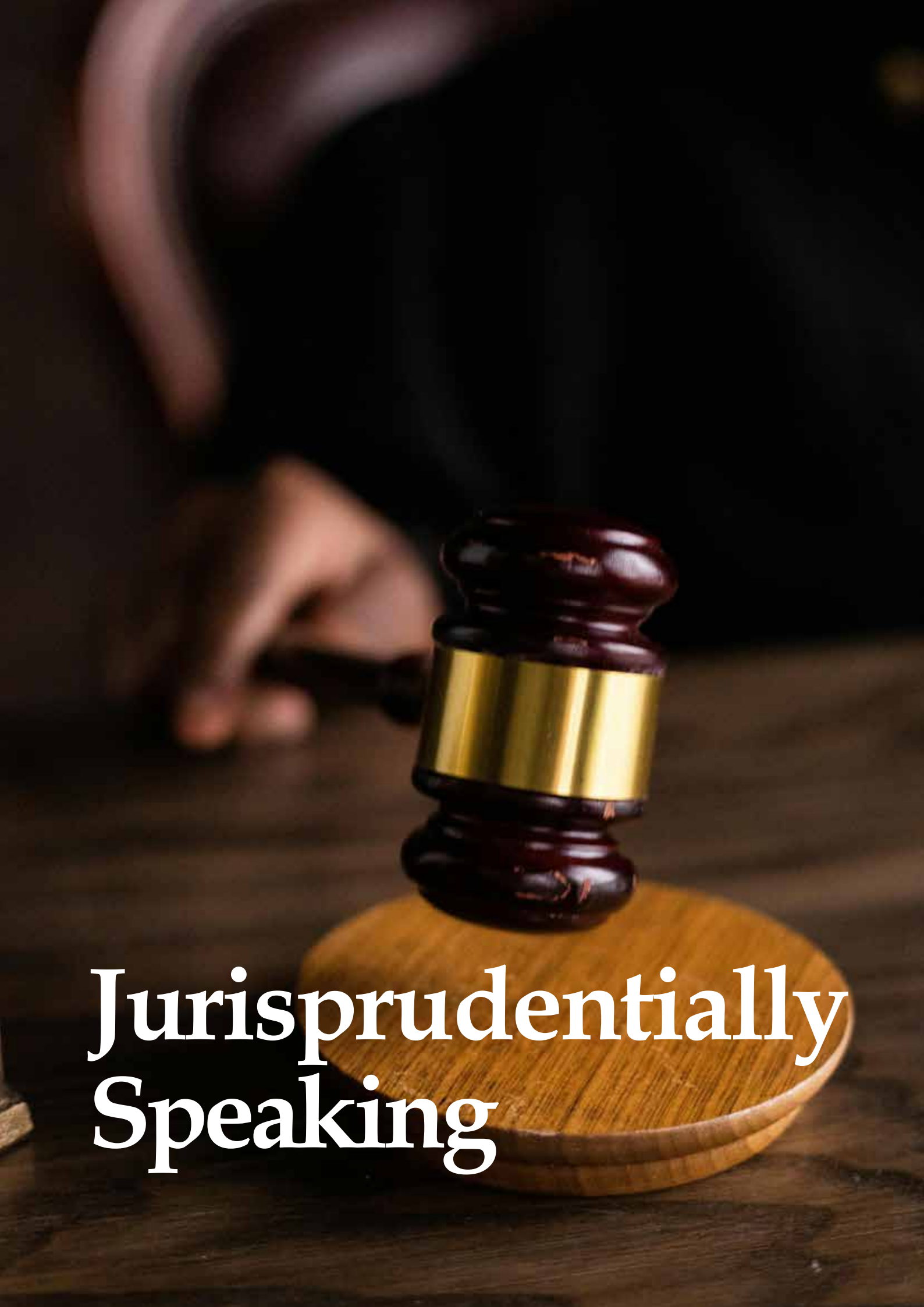
Item	The Washington Uniform Electronic Transactions Act (2022)	Kenya Information and Communications Act (2015)
1.	Defines an electronic record as a record created and stored by electronic means.	Defines an electronic record generated in digital form by an information system, which can be transmitted within an information system.
2.	The Act is not limited as to which device electronic information may be obtained from.	The Act limits electronic information as one being obtained from an information system or other medium.
3.	The Act states that any electronic evidence is admissible in court and satisfies the law.	The court will adopt any electronic record provided it is in the form required and it is produced from its proper custody.

Section 16 of The Law of Succession Act, formally recognizes the use of other wills executed in other states as per the law and provisions governing each respective state and jurisdiction. In that regard, the coming into force of The Kenya Information and Communications Act (2015) offers a good platform for the use of electronic wills in Kenya as the provision, subject to amendment will cause adoption of the same. Therefore, it is high time that Kenya adopts the use of electronic-wills through:

- public education as to the benefits of having wills;
- creation of policies and guidelines that govern the use of electronic records in Kenya and

- adoption of electronic wills into our Law of Succession Act with elaborate procedures that will safe-guard the use of the same

With that, Kenya can become first among many countries within the region and in Africa at large to join the global space in use of electronic wills. This would be unlock many business opportunities for beneficiaries and executors of an estate at minimal costs and to the benefit of the government.

A close-up photograph of a wooden gavel with a brass band, resting on a wooden sound block. The gavel is positioned diagonally, with the head pointing towards the upper right. The background is dark and out of focus, showing a hand holding a pen or pencil. The text "Jurisprudentially Speaking" is overlaid in white serif font at the bottom left.

Jurisprudentially
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Financial institution's duty of care in today's digital world:

A case study of Uganda Commercial Court Case No. 754 of 2020- Aida Atiku Vs. Centenary Rural Development Bank



CHARLES MAYIGA

WITH THE ADVENT OF TECHNOLOGY advancement, multiple players in various fields have since leveraged digital infrastructure and products to provide seamless services to their consumers. Financial Institutions are no different and are in fact some of the market leaders in the use of digital infrastructure to not only enable their customers access their accounts but go as far as enabling them access credit. It is no wonder that the Kenya Bankers Association, through a Customer Satisfaction Survey carried out in 2022, found that mobile banking was the more preferred channel of accessing banking services at 58.4%.

However, as a result of the adoption of digital banking services, the media in the recent past has been awash with accusations and counter-accusations of customers falling victim of scams perpetrated by the very financial institutions that have a fiduciary duty to safeguard their money. Equity Bank Kenya Limited has been front and centre with accusations along the lines of unsanctioned access to accounts and withdrawals. The accusations were so rampant that Senator Tabitha Mutinda sought accountability from the Senate Standing Committee on

Finance and Budget on the impugned transactions. In response, Equity Bank often reiterated that they have safeguards in place such as PINS, passwords, biometric and multi-factor authentication to ensure that only authorised persons access particular accounts. They have, further, re-echoed that such safeguards ought not to be shared with any person.

This, however, does not change the fact that money is lost and as such begs the question as to how the money was accessed despite existing safeguards in place. The Commercial Court of Uganda in Aida Atiku vs Centenary Rural Development Bank (HCT-00-CC-CS-0754-2020) [2022] (18th July, 2022) was faced with similar circumstances and had the occasion of outlining the different responsibilities that both financial institutions and the customer have with relation to digital banking services.

In the said case, the Plaintiff opened a personal savings account with the Bank and deposited a sum of UGX 56,320,000 in January, 2020. The Plaintiff averred that she accessed the account only once and that was to withdraw a sum of UGX 700,000. She was, therefore, left dumb-founded when she returned to the Bank in August, 2020 to withdraw her money only to find that her account was depleted.

In response, the Bank conceded that the Plaintiff deposited UGX 56,320,000 in January, 2020 but averred that the same was accessed on multiple occasions through its digital banking service. In doing so, the Bank demonstrated that at the account-opening stage,

the Plaintiff registered for its digital banking service. The Bank further demonstrated that its digital banking service was linked to the Plaintiff's mobile number and each transaction originated from, was authenticated by and notified through said mobile number.

The Plaintiff rebutted the aforementioned claims averring that she did not register for the Bank's digital banking service and was only aware of one notification-her withdrawal of UGX 700,000.

The Court in determining the dispute was tasked with deciphering whether the Plaintiff's account had been fraudulently debited and if so, whether the Bank had breached its fiduciary duty owed to the Plaintiff as a customer and as such liable for the losses she incurred.

The Court relied heavily on the tenets of the law of contract and opined that the Plaintiff in fact registered for the Bank's digital banking services. This was so because the Bank exhibited an account opening form which bore the Plaintiff's consent to the Bank's digital banking service. The Court further opined that in absence of evidence of coercion, misrepresentation, fraud and/or undue influence in obtaining the consent, it was inclined to believe that the Plaintiff registered for the Bank's digital banking service.

With regards the fiduciary duty owed by the Bank to the Plaintiff, the Court opined that the former had put in place security features for the benefit of the latter that is linking the account to her registered mobile number. It was established that it was only through said mobile number that the account could be accessed, transactions sanctioned by way of inputting of a PIN and notification of transactions confirmed.

The Court also relied on the Plaintiff's message logs which showed that she received notifications of every transaction in question and it was, therefore, untrue that she only received the one notification of her withdrawal of UGX 700,000. Despite this, the Plaintiff's Achilles heel was that during cross-examination, she confirmed that her daughter had access to her mobile phone and her digital banking service credentials. It was on this basis that the Court found that the Plaintiff had compromised the security features put in place by the Bank and as such the latter could not be held responsible for the former's negligence.

Despite making such finding, the Court went ahead and pronounced itself on the obligations of both financial institutions and customers with regards to digital banking services:

Obligations of the Bank to the customer

- Regular education and updates on how to access and safeguard accounts such as selection of suitable PINs and passwords; encouragement and emphasis on multi-factor authentication.
- Special, targeted and intentional focus on vulnerable groups such as the elderly and non-tech savvy individuals.
- Ensure availability of channels to be utilised by the customer in the event of disputed transactions.

Obligations of the customer

- Maintain confidentiality of personal identifiers such as user names, passwords, PINs and answers to security questions.

The judgment is of interest to both financial institutions and their customers. This is so because it places obligations on the part of financial institutions to proactively engage their customers on how best they can secure their accounts. It also extends financial institutions' duty of care as they would be expected to demonstrate that they put in place multiple security checks that can only reasonably be bypassed with the consent of the account holder and even places a burden on the financial institution when dealing with vulnerable customers. It is no wonder that certain financial institutions, Equity Bank Kenya Limited to be precise as it is in the spotlight of the highlighted accusations, are relying on the use of biometric authentication which is that much more difficult to bypass.

Contemporaneously, the judgment assures financial institutions of limited liability where they can prove that they put in place functional security features to prevent unsanctioned access to accounts and further places the burden on the customers to proactively prevent access of their accounts with third parties.

The scope of merit review under the Constitution of Kenya:

A critique of the Court of Appeal decision in Judicial Service Commission & Anor. Vs. Lucy Njora Muthoni, Civil Appeal No. 486 of 2019



KENNEDY KYALO

ON 7TH MAY 2021, The Court of Appeal (JJA Kiage, Gatembu and Sichale) pronounced itself on an appeal, filed by the Judicial Service Commission (the Commission) which sought to challenge the Judgement of the Employment and Labour Relations Court on its finding that the decision of the Commission in dismissing the Respondent was unfair. At the heart of the appeal was inter alia the question, whether the learned Judge improperly embarked on a merit review of the Commission's action.

This article seeks to critically analyse the said judgement with a view to highlighting the judicial misses as deployed by the Court in arriving at its decision. The contribution of this article to the existing literature on the subject of judicial review, is a noble one intended to highlight the judicial misdirection of the Court of Appeal through the decision.

This article has at its core two arguments: First, the Court misapplied itself on the application of its previous decisions, the principles of merit review

under the COK, 2010 and the FAA; and Secondly, the Court dis-applied itself to the provisions of 11(1)(e) of the FAA on the scope of merit review under the Act.

The Scope of the Merit Review under the Constitution of Kenya, 2010 and the Fair Administrative Action Act, No. 4 of 2015

The COK 2010 radically altered the manner in which our democratic society is governed. Key among the changes introduced by the constitution was inter alia the elevation of judicial review to a constitutional pedestal and the expansion of the scope of remedies the High Court can grant a litigant in addition to the traditional judicial review remedies of certiorari, mandamus and prohibition. Traditionally, judicial review was not concerned with merit review, however through section 7(2)(h) of the FAA, which anchors proportionality as a ground for review, the concept of merit review was ultimately given the legal impetus it deserves in Kenya.

A number of formulae are used to characterize judicial review and merit review. For instance, it is often said that judicial review concerns itself with the legality of administrative decisions and not their merits. Another frequently invoked distinction between judicial review and merit review is that a court exercising judicial review powers has no power to substitute its decision for that of the administrator. Another attempt at distinguishing the two terms is limiting the role of a court in judicial review proceedings to matters of law.

According to this school of thought, judicial review should restrict itself to matters of law or legality of administrative decisions while merit review should concern itself with matters of fact and in particular, whether the administrator was right or wrong.

In a nutshell, what constitutes merit review varies from jurisdiction to jurisdiction as provided by statute depending on the contours afforded to the term by the law, primarily based on three factors, namely; the power of a court to substitute an administrative decision with its own decision; the power of a court to examine whether an administrative decision in making the impugned decision was right or wrong; and finally the power of a court to remit a matter to the administrator for reconsideration after setting the same aside. The Fair Administrative Action Act (FAAA), 2015 heavily borrows from the above analysis of merit review. To this end, Section 11(1) (e) of the FAAA provides the scope of the doctrine in Kenya. Flowing from section 11(1)(e) of the FAAA, a court that sets aside an administrative decision based on a heightened scrutiny of the facts should as a matter of course remit the said decision to the administrator for reconsideration.

Criticism of the Judgement

This article takes issue with the pronouncements of the Court at pages 27 of the Judgement. The Paragraph thus states: "The superior courts of this country have spoken with near-unanimity that the current constitutional and statutory landscape calls for a more robust application of the relief of judicial review to include, in appropriate cases, a merit review of the impugned decision." In arriving at this conclusion, the court cited the following decisions of the Supreme Court, Court of Appeal and High Court respectively, namely, *Communication Commission Of Kenya Vs. Royal Media Services & 5 Others* [2014] eKLR (The CCK Authority), *Suchan Investment Ltd Vs. Ministry Of Natural Heritage & Culture & 3 Others* [2016] eKLR (The Suchan Authority), and *Republic Vs. Commissioner Of Customs Services Exparte Imperial Bank Ltd* [2015] eKLR (the CCS Authority). Although the above-cited authorities by Superior Courts in Kenya speak to the subject of judicial review, the Court misapplied itself on the import of the authorities. For effect, the decisions will be analysed in the succeeding paragraphs below.

The issue in the Supreme Court CCK Authority was whether a party could approach the High Court for judicial review by way of a constitutional Petition and not the scope of merit review under the FAA. This is deciphered from paragraph 355, its judgement where the Court thus held: "By clothing their grievance as a constitutional question, theRespondents were seeking the intervention of the High Court in the firm belief that, their fundamental rights had been violated by a state organ. Indeed, this is what must have informed the Court of Appeal's view to the effect that the Appellants (Respondents herein) were entitled to approach the Court and have their grievances resolved on the basis of Articles 22 and 23 of the Constitution."

On the Suchan Authority, the issue for consideration by the Court was the scope of merit review under the COK, 2010 and FAAA. The Court glossed over the issues in this case, by failing to analyse the authority in relation to the case at hand. Had the Court properly directed itself to the authority, it would in upholding the judgement of the Employment and Labour Relations Court remitted the same to the Commission for reconsideration. The Court of Appeal at 57 paragraph thus held: "...the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act." Further, the High Court case of the CCS Authority relied upon by the Court is inimical to merit based review. The holding of the court at paragraph 49 of the judgement is diametrically opposed to merit review. To this end, the High Court thus held: "...judicial review..... is therefore concerned not with private rights or the merits of the decision being challenged..."

Additionally, in arriving at the said decision, the Court disappplied itself to the provisions of Section 11(1)(e) of FAAA on the applicable remedy after setting aside an administrative decision based on a merit review of the case. For effect section 11(1)(e) of the FAAA provides as follows:

"In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order –

Setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions"

A proper reading and analysis of the above-cited provision, demonstrates that once a court sets aside an administrative decision by engaging in merit review, it follows that it must remit the impugned decision to the administrator for reconsideration with or without recommendations. To this extend, the Court of Appeal's decision is therefore per incuriam for disregarding the provisions of the FAAA. Further, the decision also defies the principle of judicial comity by ignoring previous decision of the same court on the merit review. The Court of Appeal in previous cases set aside administrative decisions and remitted the same to the administrators for reconsideration. Such decisions including the Suchan Authority and Judicial Service Commission Vs. Beatrice Nyambune Mosiria [2020] eKLR which breathed life to the provisions of Section 11(1)(e) of FAAA and remitted the impugned decision to the administrator for reconsideration.

This article has demonstrated that the Court of Appeal in the Judgement under review grossly misapplied and dis-applied itself to the scope of merit review with the resultant unintended consequence of rocking the existing jurisprudence on the subject. Such a judicial misdirection although not claimed to have occasioned a miscarriage of justice, robs the fundamental tool of judicial review of its wide scope and purposeful substructure under the FAAA.

Whereas opinion is divided on the scope of merit review, even at the apex court in Kenya, the Supreme Court in a pronouncement made after the decision under review has somewhat settled the debate. The apex court in Supreme Court Petitions No. 39 and 40 of 2019 Praxidis Namoni Saisi & 7 others Vs. DPP & 2 Others by and large defined the contours of merit review under the Constitution of Kenya 2010 and the FAA. The Court while admitting that the very nature of judicial review limits merit review, since evidence before a judicial review court is by way of affidavit evidence, opined at paragraph 75 of its judgement that the jurisdiction of merit review should be limited to uncontroverted material evidence.



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