Q3 -2020

NR&CoQuarterly ...Legal Briefs

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KARIBU!

Editor's Note

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Amit Ray in his book 'Nonviolence: The Transforming Power' said; "In every crisis, doubt or confusion, take the higher path - the path of compassion, courage, understanding and love."

We believe that the staff at the firm shape the course of Njoroge Regeru and Company Advocates and it is with pleasure that we begin the third edition of our Quarterly Newsletter by interviewing the graceful Ruth Regero, an Associate in the Corporate, Commercial, Conveyancing Department. Ruth Regero embodies the Firm's profile, she is razor-sharp, industrious and charismatic. This interview assesses her experience working in the Firm; her passion, calmness and commitment even during this unprecedented time.

The editorial team has put together quite the literary spread for our readers in this quarter's edition and hope to keep you well informed even as we continue to fight the ravaging effects of the COVID 19 Pandemic.

There has been a number of legislation and policy documents passed this quarter. Notably, the Petition to County Assemblies (Procedure) Act, 2020, the National Information, Communications, and Technology (ICT) Policy Gazette No.5472, the Land Registration (Electronic Transactions) Regulations, 2020 and finally, the Banking Circular No. 11 of 2020.

Over to the Case Highlights and this Quarter we focus on the case of BPA v Directors Brookhouse Schools & 3 Others where Online/ virtual classes and continued levying of full fees, with a paltry/ nominal discount of 10% was challenged by the Petitioners.

Our team of lawyers has also taken time to address various topics which would be informative to our clients. At the Contributor's Platform, my colleague, Rodney Wesonga analyses the new Double Taxation Agreement (DTA) which was ratified between Kenya and Mauritius. Nashon Odhiambo, in his article discusses the Future of Equity Financing for Startups in Kenya. Finally, Sandra Bucha discusses the issue of form in relation to Controlled Tenancy as governed by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301.

Enjoy!

THE INTERVIEW

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1. Please describe yourself in three adjectives?

Three adjectives is quite restrictive as I am a lot of things…I suppose; one re-discovers themselves as life goes on and you experience it BUT if I had to pin three of my core characteristics as I have to now, I would say: intuitive, sociable and diligent.

2. What do you look forward to in the remaining months of the year?

I look forward to life returning to normalcy to some extent, that is, people being able to associate with one another, people experiencing life without the restrictions, businesses recovering from the COVID 19 impact and so on. I should add that I also look forward to a larger uptake of technology and technological solutions by individuals and corporates- a need highlighted by the pandemic.

3. How do you maintain a work-life balance?

Well, it is genuinely a hard balance to strike let alone maintain but I ensure that, as much as I can, I do not carry any work home and I do not work over the weekends.

I however sometimes break the former especially when I have set a deadline for myself and I have to maintain that deadline; to do otherwise would be akin to betraying myself…something I would not risk as I am answerable to myself… my self is a difficult person to reckon with…

4. What would you say are some of the vital traits in your profession?

Character, Competence and Community.

Funny enough, these were the core values of my alma mater. They did not resonate with me then as they do now but I have learnt over my few years that good character, being competent or working towards brilliance in what one does and being of service to others speaks volumes not only in this noble profession but in self-excellence as well.

5. What do you love about working for Njoroge Regeru & Company Advocates?

The Firm's unending strive for excellence in achieving its clients' objectives/ being of service as well as the Firm's support for its employees in reaching their full potential.

What struck me most during my first encounter with the Firm is the value it attributes to good character and being of service to others. One learns that there is absolutely nothing special in being a lawyer; what is of importance is the role you play in being of service to others through utilisation of your knowledge and God-given gifts.

6. What can you say are words that you live by?

Live and let live

LEGISLATIVE UPDATES

Notable amendments, novel Acts, Regulations, Policies and Legal Notices introduced in the third quarter of 2020 are as follows:

PETITION TO COUNTY ASSEMBLIES (PROCEDURE) ACT, 2020

The Act was recently assented to and gives effect to Article 37 of the Constitution on the right to petition a County Assembly. It further sets out the procedures for the exercise of that right.

A petition to a County Assembly shall be in the form set out in the schedule of the Act. The petition shall be submitted to the respective Clerk of a County Assembly by the petitioner or presented by a member of the County Assembly on behalf of a petitioner, with the consent of the Speaker. It is important to note that a County Assembly member is not eligible to present a petition on his or her own behalf.

The Clerk is required to, within seven days of receipt of the petition, review the petition to ascertain whether the petition meets all the requirements.

Once the Clerk is satisfied that the petition has met the requirements, the petition should be forwarded to the Speaker for reporting in the County Assembly. The petition is then considered in accordance with the Standing Orders of the County Assembly.

The relevant County Assembly Committee is required to respond to the petitioner by way of a report tabled in the County Assembly. The Clerk shall then, within fourteen days of the decision of the relevant committee or the County Assembly, notify the petitioner of the decision of the County Assembly in writing.
The Clerk of the National Assembly is also required to maintain a register of all recorded petitions, supporting documents and decisions of the County Assembly on the petitions. The register of petitions is, on the other hand, accessible to all members of the public during working hours.

THE LAND REGISTRATION (ELECTRONIC TRANSACTIONS) REGULATIONS, 2020. LEGAL NOTICE 130 OF 2020

The Land Registration (Electronic Transactions) Regulations, 2020 took effect on July, 2020 with a view of effecting the Land Registration Act in respect of development and implementation of a National Land Information System, maintenance of a land register and land documents in a secure manner as well as operationalization of electronic transactions in land matters.

Some of the changes brought about by the regulations include:

1. Electronic Land Registry

The regulations provide that the Chief Land Registrar shall maintain an electronic land registry and that all registries are required to maintain an electronic land register. The regulations further provide that the Registrar through the system may issue notices, certificates or any other document required to be issued by the Registrar.

Additionally, the Registrar may certify documents through the electronic system. The regulations further require that a cadastral map be kept in electronic form and that users register their particulars in order to access the system.

2. Pre-contract Stages

The regulations provide that searches will now be carried out electronically for both a current status search and a historical search. Moreover, pre- contract processes such as filling of e-forms, e-signatures, uploading supporting documents and e-payment will be done electronically. Evidence of pre-registration will be the issuance of an e-generated notice of electronic filing with a tracking number. The purpose of the tracking number will be to determine the priority of registration. Importantly the effect of e-registration is that e-registered documents will have same legal effect as paper documents.

Valuation of stamp duty will also be carried out on the electronic system where the authorized user submits the instrument or document for valuation in electronic form. Upon submission, the authorized user shall receive an electronic notification indicating the date and time when the request was received. The authorized user shall then be notified of the assessed duty payable through SMS notification, email notification or any other form of electronic transmission to the contacts of a user provided during signing up. Upon receipt, the authorized user is required to pay stamp duty through the Kenya Revenue Authority payment platform.

3. Registration Process

The regulations also provide for the issuance of electronic Certificates of Title or Certificates of Lease. The registration of an instrument or document shall be deemed completed upon the approval of the transaction and the making of corresponding entries into the register by the Registrar. Upon registration, there shall be an electronically generated notice to the effect that the document has been registered.

The regulations also consider data protection and privacy through the disclaimer given in the Data Privacy Statement which sets out the ways and means the Ministry will take to protect the personal information of anyone who accesses the National Land Information System.

In our opinion, the new changes brought about by the regulations were in line with systemic change brought by the COVID 19 pandemic. It will however take time before the intent of the regulations is actualized even as we embrace technology in Land transactions.

THE LAND (AMENDMENT) REGULATIONS, 2020

The Land (Amendment) Regulations, 2020 was passed with a view of amending the Land Regulations, 2017.

Some of the salient features of the new amendment regulations include: -
All transactions can now be done electronically as stipulated in detail in the Land Registration (electronic transactions) Regulations, 2020, Legal Notice 130 of 2020.

LEGISLATIVE UPDATES

Further, in the Special conditions for leases, a lessee shall within six (6) calendar months of the actual registration of the lease submit in triplicate to the County Government building plans (including block plans showing the positions of the buildings and system of drainage for the disposal of the sewage, surface and sullage water), drawings, elevations and specifications of the buildings that the lessee proposes to erect on the land and shall further within 48 months of actual registrations of the lease complete the erection of such buildings and the construction of the drainage system in conformity with such plans, drawings, elevations and specifications as amended (if *such be* the case) by the County Government.

BANKING CIRCULAR No. 11 of 2020

The Banking Sector has played a critical role in supporting the Kenyan Economy during the coronavirus (COVID-19) pandemic. The sector has ensured continuity of operations as well as provision of credit and relief to borrowers by restructuring their loans.

With the economy of the country deteriorating, commercial banks and mortgage finance companies have been forced to re-strategize and put up measures that would ensure the institutions maintain their financial position. These measures are aimed at strengthening the balance sheets of these institutions in order to mitigate the adverse effects on profitability primarily through increasing provision for non-performing loans.

The Internal Capital Adequacy Assessment Process (ICAAP) is an important framework as well to help build the resilience of the banking sector. The ICAAP institution assess and maintain, on an ongoing basis, capital that they consider adequate to cover the risks to which they are or might be exposed.

It's on this basis that Central Bank of Kenya (CBK) is requiring all commercial banks and mortgage finance companies to:

i. Resubmit by October 31, 2020 their board approved ICAAP documents for 2020.

These documents should consider:

a. The impact of the pandemic and mitigating measures taken by the institutions.
b. Measures taken and proposed to be taken to strengthen the balance sheet and maintain adequate capital liquidity.
c. Any proposed distribution of 2020 profits.

and

ii. Discuss the resubmitted ICAAP documents for 2020 with CBK prior to making decisions on distribution of 2020 profits.

ALTERNATIVE JUSTICE SYSTEMS POLICY

The Alternative Justice Systems Policy was launched by Chief Justice David Maraga at the Supreme Court after a four-year period of research, field visits and consultation conducted by a task force appointed by former Chief Justice Willy Mutunga in 2016. The system, which gives councils of elders and religious leaders a bigger role to play in the justice system is primarily aimed at making justice more easily accessible to Kenyans as well as reducing the number of people being incarcerated for petty crimes.

Attaining the vision of Article 159 of the Constitution of Kenya, 2010

Article 159 of the Constitution of Kenya 2010 recognizes that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established. Being alive to the fact that the practice of Alternative Justice Systems (AJS) has been documented as a preferred mode of accessing justice in Kenya, the Judiciary taskforce was appointed to actualize the use of Alternative Dispute Resolution. The AJS taskforce, chaired by the Hon. Mr. Justice (Prof.) Joel Ngugi; was tasked to develop a policy to mainstream AJS with a view to enhancing access to and expeditious delivery of justice providing for court-annexed cultural alternatives.

"…This policy is an appreciative note to the everyday justice work that community leaders do every day. It is a recognition and legitimization of their work within the Constitution…" noted Alternative Justice Systems Chair Justice Joel Ngugi.

NATIONAL INFORMATION, COMMUNICATIONS, AND TECHNOLOGY (ICT) POLICY

The National Information, Communications, and Technology (ICT) Policy was first presented in 2019. Its formulation was motivated by the need to facilitate universal access to ICT infrastructure and services in Kenya and has since been gazetted in August 7th 2020 vide Gazette No.5472.

Following unprecedented growth in the ICT space in Kenya, its entire agenda is to realize the potential of Kenya's digital economy by creating an enabling environment for all citizens and stakeholders.

Holistically, the policy looks to defining forward-thinking positions of the government and various aspects of the robust ICT sector in Kenya. The policy targets to meet the following goals:

- Facilitate the creation of infrastructure and frameworks that support the growth of data centres, pervasive instrumentation, machine learning and local manufacturing while fostering a secure and innovative ecosystem.

- Grow the contribution of ICT to increase the overall size of the digital and traditional economy to 10% of GDP by 2030. Use of ICT as a foundation for the creation of a more robust economy and providing secure income and livelihoods to the citizenry, will in turn leverage regional and international cooperation and engagements to ensure that Kenya is able to harness global opportunities.

- Create the infrastructure conditions that enable the use of always-on, high speed, wireless, internet across the country.

- Put the country in a position to take advantage of emerging trends, by enhancing our education institutions and the skills of our people and by fostering an innovation and start-up ecosystem that is able to lead in the adoption of emerging trends on a global scale.

LEGISLATIVE UPDATES

- Gain global recognition for innovation, efficiency, and quality in public service delivery; government services will be delivered in a manner that ensures we have a prosperous, free, open, and stable society.

The policy will also focus on the following:

A. Mobile-first approach by investing in infrastructure required for works such as data centres and telecoms;

B. Public service delivery by enforcing activities such as collaborations between the national and county governments to ensure that all digital services are availed;

C. Market by seeking to increase the size of ICT contributions in the economy; and

D. Harnessing skills and innovations by supporting and enabling the development of a solid technology entrepreneurship ecosystem in Kenya via an ICT Co-Fund that will support the adoption and use of local innovations.

CENTRAL BANK OF KENYA (AMENDMENT) BILL 2020

The Central Bank of Kenya (Amendment) Bill, 2020 was published on 19th June 2020 (the Bill) with the main objective of amending the Central Bank of Kenya, Act (the "CBK Act") and introducing regulatory mechanisms for digital and mobile lender (micro-lenders). Digital lending was first introduced to the country in 2012 when mobile money service M-Pesa began a saving and credit facility known as M-shwari. Since then there has been an outburst of the non-deposit taking lending Applications. Micro-lenders do not take deposits therefore they do not fit into the category of financial institutions as provided by the Banking Act and Microfinance Act.

Lack of legal framework to govern the micro-lenders has led to the said institutions to impose excessive interest rates on the quick loans issued to the borrowers. The micro-lenders have also been accused of utilizing aggressive and embarrassing debt collection mechanisms which include accessing and contacting persons in the call logs of the borrower, and in the process disclosing their financial information, a practice that is a violation of privacy to the borrower.

The Bill therefore proposes amendments to the CBK Act to avoid malpractice in issuance of credit by micro-lenders.

The proposed amendments include: -

a) Amendment of the objects of CBK to include regulation and supervision of: -

- the conduct of providers of digital financial products and services.
- the conduct of digital credit providers and digital credit service providers;
- the conduct of providers of financial products and services.

b) Insertion of the following definitions:

"Digital financial product" means a digital facility or an arrangement through which, or through the acquisition of which, a person makes a digital financial investment, manages digital financial risk, or makes non-cash payment.

"**Digital financial service**" means the provision in relation to a digital financial product, financial product advice, market, administrative or management services or credit under a regulated credit contract.

"**Financial product**" means a facility or an arrangement through which, or through the acquisition of which, a person— (a) makes a financial investment; (b) manages financial risk; or (c) makes non-cash payment.

"**Financial service**" means the provision in relation to a financial product— (a) of a credit service; (b) financial product advice; (c) dealing in a financial product; (d) market for a financial product; or (e) administration or management.

Conclusion

The Bill is still in its early stages and further stakeholder consultation is required to encompass all requisite aspects such as the involvement of the telecommunications regulator etc. Upon such consultation and passing of the Bill, a solution will have been created in curbing any malpractice which may be perpetrated by a micro-lender.

CASE HIGHLIGHTS

Despite this tough COVID 19 times, the Courts have been vigilant in handling the various disputes brought before them. We focus on the following case in this quarter:

BPA V DIRECTORS, BROOKHOUSE SCHOOLS & 3 OTHERS; DPGT (PROPOSED INTERESTED PARTY) [2020] EKLR

The Petition in this case was premised on the petitioners' contention that upon the closure of schools, the 1st and 2nd Respondents continued with a format of online or virtual classes and continued to levy full fees, with a paltry or nominal discount of 10%. The Petitioners further contended that the acts of the 1st and 2nd Respondents of offering online classes or virtual classes at a rate almost similar to what the School offered when in session contravened their consumer rights and was unfair, unconscionable and unlawful hence violated Article 46 of the Constitution that provides for consumer rights.

Furthermore, the Petitioners argued that the 1st and 2nd Respondents failed to provide the information required to make an informed decision and that it was their contention that the School made the unilateral decision to provide online classes at a cost similar to the physical presence of their children at school, with a paltry and nominal discount of 10%. By implementing these decisions, the school failed to take consideration of the best interest of the children.

Consequently, the Petitioners requested the Court to order the 1st and 2nd Respondents to only charge for the equivalent of the services rendered, being the virtual class.

The 1st and 2nd Respondents argued that the agreements entered into between the School and the parents at the point of their children's enrolment were private contracts and the parties were bound by their terms unless they proved that they were procured through fraud, misrepresentation or undue influence. The 1st and 2nd Respondents hence argued that the School, supported by the fundamental principle of party autonomy underlying negotiation of private contracts, enjoyed the right and prerogative to set its fees as it deems fit.

The 1st and 2nd Respondent further argued that the petitioners' complaint was commercial in nature, raising contractual disputes and did not disclose any violation or threatened infringement of constitutional rights. It further argued that the matter was a purely contractual matter and not a constitutional matter. Finally the Respondents averred that the Court had no power to arbitrarily cap school fees for a private institution as urged by the Petitioners.

The Honourable Court held that the prayer by the Petitioners on reduction of school fees failed for two reasons: One, the petitioners had not established that there was a violation of their consumer rights by the 1st and 2nd respondents. Secondly, the Petitioners failed to show that the Court had the authority of the law to determine the terms of a contract for parties to the contract. The Honourable Court went further to state that the Court cannot determine the prices of goods and services in the market. In any case, the Court is ill-equipped to find that a reduction of schools fees by a particular percentage is appropriate and fair to all the parties. Were the Court to take on the responsibility of determining the discount that should have been offered by Brookhouse, it would be required to conduct extensive research outside the evidence placed before the Court by the parties. The Court has no such authority neither is that its mandate.

The Court further stated that the product or service in the market belongs to the 1st and 2nd Respondents and as such they are at liberty to charge whatever fees they desire to charge. The market dictates the cost of a product or service and the consumer purchases the product he or she can afford. It would be unjust for parents who willingly and voluntarily enroll their children in private schools to demand a reduction of school fees on the ground that the fees charged violates the constitutional right to free and basic education.

The Honourable Court noted that since the Petitioners had failed to establish that their rights as consumers had been infringed, it followed that the right to free and basic education and the principle of the best interest of the child had subsequently not been infringed.

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Kenya and Mauritius Sign a New Double Taxation Agreement (DTA)

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Following a tumultuous start, a new Double Taxation Agreement (DTA) between Kenya and Mauritius has been ratified by Kenya through Legal Notice No.114 of 2020.

What are the Salient Features of the DTA?

The Agreement applies to persons who are residents of one or both of the Contracting States (Kenya and Mauritius). For purposes of the Agreement, income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State shall be considered to be income of a resident of a Contracting State but only to the extent that the income is treated, for purposes of taxation by that State, as the income of a resident of that State.

• Associated Enterprises

Under paragraph 2 of Article 9, where a Contracting State includes in the profits of an enterprise and taxes profits on which an enterprise of the other Contracting State has been charged to tax, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be made to the other provisions of the Agreement and the competent authorities of the Contracting States shall, if necessary, consult each other.

• Government Services

Under Article 18 of the Agreement:

a) "Salaries, wages, and other similar remuneration, other than a pension, paid by a Contracting State or a political subdivision, local authority or statutory body thereof to an individual in respect of services rendered to that State or subdivision, authority or body shall be taxable only in that State.

b) However, such salaries, wages and other similar remuneration shall be taxable only in the other Contracting State if the services are rendered in that State and the individual is a resident of that State who:

i. is a national of that State; or

ii. did not become a resident of that State solely for the purpose of rendering the services.

a) Any pension paid by, or out of funds created by, a Contracting State or a political subdivision, local authority or statutory body thereof to an individual in respect of services rendered to that State or subdivision, authority or body shall be taxable only in that State.

b) However, such pension shall be taxable only in the other Contracting State if the individual is a resident of, and a national of, that State."

• Students and Business Apprentices (Article 20)

A student or business apprentice who is present in a Contracting State solely for the purpose of his education or training and who is, or immediately before being so present was, a resident of the other Contracting State, shall be exempt from tax in the first-mentioned State on payments received from outside that first-mentioned State for the purposes of his maintenance, education or training.

In respect of grants, scholarships and remuneration for employment not covered by paragraph 1, a student or business trainee or apprentice described in paragraph 1, shall in addition, be entitled during such education or training to the same exemptions, reliefs or reductions in respect of taxes available to residents of the Contracting State which he is visiting.

• Elimination of Double Taxation

On the elimination of Double Taxation, Article 22 states:-

"…Double taxation shall be eliminated as follows:

1. In the case of Mauritius:

i. Where a resident of Mauritius derives income from Kenya the amount of tax on that income payable in Kenya in accordance with the provisions of this Agreement may be credited against the Mauritius tax imposed on that resident.

ii. Where a company which is a resident of Kenya pays a dividend to a resident of Mauritius who controls, directly or indirectly, at least 5% of the capital of the company paying the dividend, the credit shall take into account (in addition to any Kenyan tax for which credit may be allowed under the provisions of subparagraph (a) of this paragraph) the Kenyan tax payable by the first-mentioned company in respect of the profits out of which such dividend is paid.

Provided that any credit allowed under this subparagraph shall not exceed the Mauritius tax (as computed before allowing any such credit), which is appropriate to the profits or income derived from sources within Kenya.

CONTRIBUTORS' PLATFORM

For the purposes of allowance as a credit the tax payable in Kenya shall be deemed to include the tax which is otherwise payable in Kenya but has been reduced or waived by Kenya in order to promote its economic development.

2. In the case of Kenya:

a) Where a resident of Kenya derives income which in accordance with the provisions of this Agreement, may be taxed in the Republic of Mauritius, Kenya shall allow as credit against the tax on the income of that resident an amount equal to the tax paid in the Republic of Mauritius. Such credit, however, shall not exceed that portion of the tax as computed before the credit is given, which is attributable, to the income, which may be taxed in the Republic of Mauritius;

b) Where, in accordance with the provisions of this Agreement, income derived by a resident of Kenya is exempt from tax in Kenya, Kenya may nevertheless, in calculating the amount of tax on the remaining income of such resident, take into account the exempted income…"

• **Exchange of Information**

The agreement provides for exchange of information under Article 25 and it states:

1. "…The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment for collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

a. to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

b. to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

c. to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

Conclusion

The DTA potrays Kenya as a safe, trusted and well-established international financial centre for investors looking at doing business and investing in Africa. The DTA will benefit this network of African states in several ways, including promoting trade and investment between African countries

Future of Equity Financing for Startups in Kenya

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For any market economy, companies need funding whether its debt or equity. Going concerns have an advantage because they can raise funds through multiple ways such as takeovers and mergers. The same cannot be said for startups. Startups are companies still in their infancy that are in the process of value creation and therefore are limited in their modes of sourcing funding. Startups are locked away from the reach of Private Equity firms that mainly focus on mature companies that are already in the market as opposed to the startups that are still developing their go-to- market strategy.

Debt financing provides a reasonably assured cash flow for the lender, whether the company becomes profitable or not. Equity financing on the other hand, provides a share of the profits to the investor only if the company earns profits. For startups, equity financing through Venture Capital firms remains the best option as it enables the young developing startups to raise equity capital that will allow them to go through the cycles of development with a quiet mind, especially since they are not required to pay back the money if the business venture becomes unsuccessful.

Equity financing for startups is different from normal trading by public companies in the stock markets. The varying factors include:

- The startups are still undergoing value creation hence are unable to establish the share price as opposed to already established companies that have little room for growth hence easy to calculate their share price.
- The startups are often private companies with a need to operate in stealth mode as they establish traction and gain notoriety in the market.
  It is for these reasons that startups make private offers and offer securities in terms of convertible notes.

Whilst opening the markets and setting up private markets would be beneficial for startups, a major concern is fraud that may take the form of money laundering.

Legal realm for equity financing in Kenya

The Finance Act, 2020, Capital Markets Act, Companies Act, 2015, Investment Promotion Act, 2004 and the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002 are all Acts and Legislations that relate to equity financing in Kenya .

The Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002

As per Regulation 21(e) (iii) the following conditions make an offer be considered as private offer. They include: "the securities are offered to a restricted circle of persons whom the offeror reasonably believes to be sufficiently knowledgeable to understand the risks involved in accepting the offer"
Further Regulation 21(g) states that

"The securities result from the conversion of convertible securities and a prospectus relating to the convertible securities which was approved by the (Capital Markets) Authority and published in accordance with these Regulations".

Finance Act, 2020

Section 30 amends section 11 of the Capital Markets Act (Chapter 485A, Laws of Kenya) (the CMA Act) by inserting paragraph (ga) after paragraph (g). The amendment gives Capital Markets Authority (CMA) the mandate to "license, approve and regulate private equity and venture capital companies that have access to public funds." (Emphasis is ours). It is noteworthy that prior to enactment of the Act, "registered venture capital companies" were regulated under the CMA Act.

Investment Promotion Act

Section 3 of the Investment Promotion Act provides that both foreign investors and local investors may obtain an Investment Certificate. Local investors who do not obtain the investment certificate are required to register the investment with the authority.

As per the above-mentioned legislations, it is clear that there is ample regulation of the local and foreign investors. The legislations make it even easier for the startups to conduct due diligence when dealing with 'local to local' investors.

Equity financing is apparent through equity crowd funding platforms such as SeedInvest and Microventures which are available in other jurisdictions such as United States of America. Platforms available in Africa such as Homestrings , VC4 Africa, Rainfin and 1% club offer debt financing.

Equity financing is advantageous as it enables startups forge strong relationships at an early stage and ensures startups are building their brand and increasing outward visibility. It also helps in subjecting ideas for testing at little up-front cost.

CONTRIBUTORS' PLATFORM

Equity financing keep startups afloat and prevent them from collapsing or stalling due to lack of funds to drive operations especially when the startups have not yet stabilized and become profitable.

Conclusion

The last IPO by a Kenyan company on the Nairobi Securities Exchange was Deacons East Africa PLC back in 2016. Since then companies have planned to go public but with no success. Cabinet Secretary Joseph Mucheru has even launched a mobile and online shares trading app to enable remote access and investment in the stock market. If companies are unable to comply with the requirements to trade online, then private markets should be embraced and allowed to prosper in order to enable young startups to raise equity capital at their seed stage before they can establish any traction. As a further step, infusing technology in equity financing for startups by embracing the legitimate equity crowd funding platforms would bolster the private markets and open up the young startups to broader markets

Would a Controlled Tenancy by any Other Form still be a Controlled Tenancy?

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The history of Controlled Tenancy in Kenya predates the country's independence, with the entry into law of the Rent Restriction Act in 1959. This Act sought to restrict the increase of rent, the right to possession and the execution of premiums in addition to fixing standard rents. This Act has since undergone various amendments and serves as one of the statutory delineations of the one of two regimes of Controlled Tenancy in the country, to wit residential property. The other regime of Controlled Tenancy pertains to commercial property and is regulated by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. It is this second regime that will be the focus of this article.

The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Chapter 301 of the Laws of Kenya came into operation on 1st November, 1965. As per its preamble, the Act makes provision in respect to certain premises for the protection of tenants of such premises from eviction or from exploitation. The phrase 'certain premises' as used in the preamble applies to shops, hotels and catering establishments as defined under Section 2 of the Act.

Section 2 of the Act also contains crucial definitions. Notably, the Section defines a controlled tenancy to mean "a tenancy of a shop, hotel or catering establishment which has not been reduced to writing or one which has been reduced to writing and is for a period not exceeding 5 years; or contains provisions for termination, other than for breach of covenant, within 5 years from the commencement date; or is in relation to the premises specified under the same Section". Excluded in this definition are tenancies to which the Government, the Community or a local authority is a party, whether as landlord or as tenant.

Further defined in the Act is the term 'tenancy' to mean one created by a lease or underlease, by an agreement for a lease or underlease by a tenancy agreement or by operation of law. This definition includes sub-tenancies but excludes any relationship between a mortgagor and mortgagee (borrower and lender).

Unlike other tenancies, the termination of a controlled tenancy by a landlord must be preceded by a termination notice to the tenant. The termination notice must be of a period of not less than 2 months from the date of receipt of the notice by the tenant. Whereas this provision protects tenants, it serves as an annoyance to landlords, who have sought to circumvent it by issuing licences in place of tenancy agreements. Now, a licence differs fundamentally to a lease and the nature of the relationship a licence creates between a licensor and licensee is nearly on the opposite side of the spectrum of that between a lessor and lessee, or landlord and tenant.

The cardinal difference between a lease and a licence is that while a lease grants exclusive possession to the lessor/tenant, a licence merely allows the licensee to use the property for a specified period of time and does not confer on the licensee the right to possession of the same, to the exclusion of others. In sum, a lease creates and transfers interest in property but a licence does not.

The question then begs – would a licensee in relation to property that substantively meets the criteria in the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act be protected under the Act? Courts have held that the wording of an agreement is not conclusive of the nature of the legal relationship between the parties - the whole transaction and the conduct of the parties must be examined. Thus, an agreement termed as a licence could be found to be a lease upon closer examination of the entirety of the transaction and the conduct of the parties.

This is in-keeping with the landmark finding of Lord Denning in Shell-Mex and B.P Limited v Manchester Garages Limited [1971] 1 All ER 841, as has been adopted in numerous local cases such as Kileleshwa Service Station Ltd v Kenya Shell Ltd [2012] eKLR, where it was observed that:-
"I turn therefore to the point, was this transaction a licence or a tenancy? This does not depend on the label which is put on it. It depends on the nature of the transaction itself. Broadly speaking, we have to see whether it is a personal privilege given to a person, in which case it is a license, or whether it grants an interest in land, in which case it is a tenancy. At one time it used to be thought that exclusive possession was a decisive factor, but that is not so. It depends on broader considerations all together.".

However, a licence subsequently deemed to be a lease does not trigger the operation of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The Environment and Land Court in Transallied Limited v Sakai Trading Limited [2016] eKLR, in interpreting the provisions of Section 2 of the Act, found that whether a tenancy amounts to a controlled tenancy or not is determined by 2 factors – the nature and length of the tenancy; and the undertaking being carried out in the premises. A court would therefore need to further interrogate the contents of the lease before bringing it into the purview of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

Thus, attempting to circumvent the application of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act by issuing licences is a potentially detrimental path. The court will examine the contents of the agreement before making a finding on whether or not the agreement is a tenancy and subsequently whether the same can be brought into the ambit of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

As a rose by any other name would smell as sweet, a controlled tenancy in a different form could substantively still be found to be a controlled tenancy.

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