Q2-2016

NR&Co Quarterly ...Legal Briefs

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KARIBU!

Editor's Note

Mwangi Karume, Partner (Head of the Corporate, Commercial and Conveyancing Department)

Welcome all to our 2nd Quarter Newsletter.

In the last fairly busy quarter, the Kenyan economy has continued to improve in spite of heightened political activity and the shock in the
banking sector.

Inflation has reduced way below the target ceiling of 7.5% to 5.3% as at April this year. The shilling has also gained against the dollar in the past five months owing to tighter monetary policies and higher earnings.

There has also been an introduction of derivatives through the Capital Markets Act (Derivatives Market) Regulations, 2015. Accordingly, both local and foreign investors can now tap into the future and options market segment in which they can transfer risks, lower their transaction costs, stabilize market prices and speculate the value of their assets in future. We hope that the introduction of the derivatives will lead to the deepening of the financial market.

The continued use of public private partnerships in infrastructural developments will, in the mid-term, result in the diversification of the Kenyan economy and it will propel Kenya towards achieving Vision 2030.

In this Newsletter, we once again highlight the various laws and court decisions that have had a significant effect in various sectors in our *Legislative Updates*' and *Case Highlights*' segments.

In our endeavor to keep you informed, we have also included articles on: Foreigners owning property in Kenya, Mediation as an alternative to litigation and arbitration, protection of the freedom of expression and regulations as to offshore accounts.

Finally, we feature an interview with a long-standing member of the firm who has vast knowledge in the principles that underpin the running of a law firm.

We trust that this Newsletter will be both informative and enjoyable.

Grace Wainaina - Administrator
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1. **How long have you worked for Njoroge Regeru & Company Advocates?**
   A total of 12 years

2. **Having served in the firm for that long, what major changes have you witnessed in the Firm?**
   - *Growth of staff members from 17 in January 2003 to 28 in December, 2015.*
   - *The introduction of the Medical Cover, the Group Life Cover & the Pension Scheme.*
   - *The Growth of the Dispute Resolution Department from 3 Advocates to 5 Advocates & 2 Legal Assistants*
   - *The growth of the Corporate, Commercial and Conveyancing Department from one Advocate to 5 advocates and 2 Legal Assistants.*
   - *Occupying offices with over 10,000 square feet.*

3. **How would you describe the Firm in 3 words?**
   Professional, Efficient, Effective

4. **How do you handle difficult situations, as an administrator of the Firm?**
   - *Listening first in order to make informed decisions*
   - *Thinking through before acting*
   - *Handling each situation on its own without generalization*

5. **What are some of the lessons you have learnt from working in the Firm?**
   - *Success can only be achieved through Team spirit and every member of the team is equally important.*
   - *Every organization has its unique challenges and opportunities.*
   - *Without integrity there cannot be job satisfaction.*

6. **Closing remarks?**
   Be the change that you wish to see in others. It starts with you!

"Professional, Efficient, Effective"

Interview by Rosemary Kamau
Editorial Team

Mission and Vision of the Firm

- The Firm aspires to be a premier law firm in this country and beyond, recognized and acknowledged as a provider of competent, efficient, prompt and cost-effective legal services on the widest possible spectrum of client needs.
- The Firm acknowledges the niche that it occupies in the market place and will strive to continue to be identified with the delivery of a first class legal service to its valued clientele.
- The Firm aims at retaining and expanding its clientele through the continued provision of sterling legal services and at maintaining and strengthening its work force through motivation, challenge and reward.
- The Firm will always be cognizant and supportive of the needs and aspirations of the community within which it operates.

LEGISLATIVE UPDATES

This Quarter has seen a number of Bills being signed into law, such as the Anti-doping Act, the Small Claims Court Act and the Public Procurement and Assets Disposal Act. In this Legislative Update Section, we highlight various aspects of the Acts as well as the Capital Markets Act (Derivatives Market) Regulations, 2015.

1. THE ANTI-DOPING ACT

The Act was signed into law on 22nd April, 2016. It seeks to provide for the implementation of the United Nations Educational, Scientific and Cultural Organization Convention (UNESCO) against doping in Sport; the regulation of sporting activities free from the use of prohibited substances and methods in order to protect the health of athletes. The Act also establishes the Anti-doping Agency and provides for the Agency's powers, functions and management.

Interestingly, the Act provides that possession of a prohibited substance does not constitute an anti-doping violation if prior to receiving notification of any kind that the person committed an anti-doping violation, the person took concrete action demonstrating that he never intended to have possession and has renounced possession by explicitly declaring it to an Anti-Doping Organization. *(http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Anti-Doping_Act__No_5_of_2016_.pdf for more information)*

2. CAPITAL MARKETS ACT (DERIVATIVES MARKET) REGULATION, 2015

A derivative is a contract that derives its value from the performance of an underlying entity which can be an asset, index or interest rate. There are two main types of derivatives namely; Forwards and Futures. Futures, the most common form of derivatives, are standardized agreements for the sale of an asset at an agreed future date and at a given price. They are normally used to hedge against risk during a particular period of time because the parties involved are locked in and they have to execute the Future regardless of prevailing market conditions. Forwards, on the other hand, are customized contracts between two parties to sell or buy an asset in future at an agreed future time and at a given price. Unlike Futures, Forwards do not trade on a centralized exchange and instead, they are traded over-the-counter which make them easier to customize. Due to their unregulated nature, Forwards have a very high risk compared to Futures.

The Futures and Options Market Segment (the Derivatives Market) of the Nairobi Securities Exchange was underdeveloped due to low-level awareness, inadequate risk management and lack of proper legislative regulations.

In this regard, the Capital Markets Authority has finally published the Regulations on the establishment of a Derivatives Market Exchange. Under these regulations, there will be three main players: a derivatives exchange, a clearing house and derivatives brokers. The requirements and duties of the market players have been outlined under the Regulations as well as market offences and penalties. Accordingly, market offences include: false trading, bucketing, price manipulation and employment of fraudulent or deceptive devices.

The Regulations also require that a person who intends to establish a derivative exchange must apply to the Authority for a license in the Form prescribed in the First Schedule. The application must be accompanied by:

a) The copies of memorandum and articles of association and rules governing the operations of the exchange, which are in a form satisfactory to the Authority and restrict the applicant to the business of operating a derivatives market and services incidental thereto;
b) Details of trading, clearing and settlement systems proposed to be adopted by the applicant;
c) The prescribed licensing fees set out in the Second Schedule;
d) Satisfactory bank references;
e) A business feasibility plan evaluated by an entity with a proven track record and expertise in derivatives or derivatives market development, establishment or management; and
f) Such additional documents as the Authority may require.

However, only companies limited by shares; are demutualized; and have a minimum authorized, issued and paid up equity share capital of one Billion Kenya Shillings are entitled to apply for a license. *(http://kenyalaw.org/kl/fileadmin/pdfdownloads/LegalNotices/37-Capital_Markets_Act__Derivatives_Markets__Regulations__2015.pdf for more information)*

3.SMALL CLAIMS COURT ACT, 2016

The Small Claims Court Act seeks to ensure that there is simplicity of court procedure, fairness of court process, equal opportunity to access judicial services and the timely disposal of all proceedings before the Court using the least expensive method. The Act provides that a party to the proceedings shall appear in person or where he or she is unable to appear in person, be represented by a duly authorized representative. The representative shall not be a legal practitioner. Additionally, the Court is not bound by the strict rules of evidence.

The Court's pecuniary jurisdiction is Two Hundred Thousand Kenya Shillings and it has jurisdiction to determine any civil claim relating to-

a) a contract for sale and supply of goods and services;
b) a contract relating to money held and received;
c) liability in tort in respect of loss or damage caused to any property or for the delivery of recovery of movable property;
d) compensation for personal injuries; and
e) set-off and counterclaim under any contract.

However, the Small Claims Court does not have jurisdiction to determine claims founded upon defamation, libel, slander, malicious prosecution or disputes over a title to or possession of land, as well

as disputes over employment and labour relations.

Please note that the commencement date was 21st April, 2016. *(http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheSmallClaimsCourtNo2of2016.pdf for more information)*

4. THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015

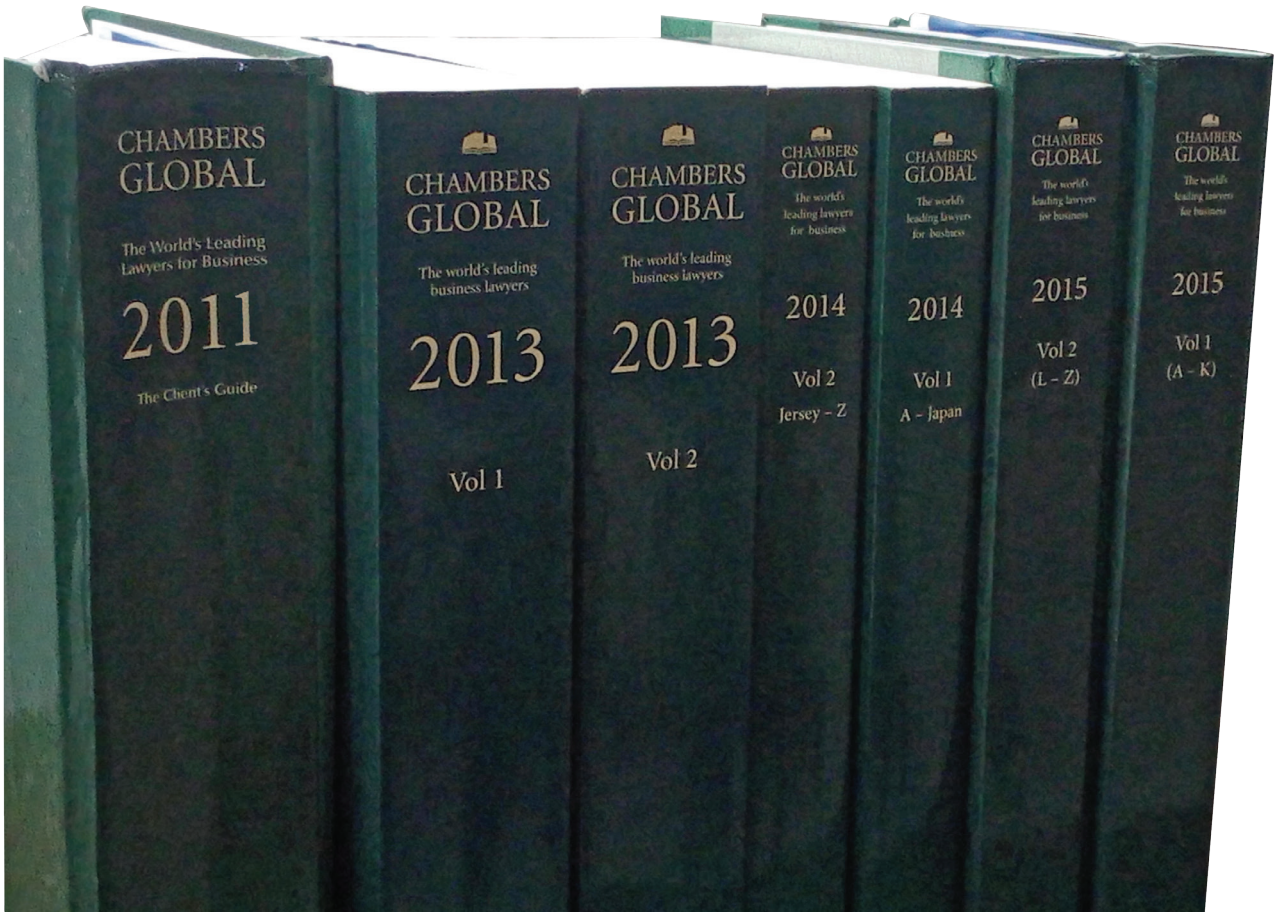
The Public Procurement and Asset Disposal Act, No. 33 of 2015 was assented to on 18th December 2015 and came into force on 7th January, 2016. The Act repeals the Public Procurement and Disposal Act of 2015, Cap 412C. It applies in respect of matters of procurement planning; procurement processing; inventory and asset management; disposal of assets; and contract management.

It aims to follow through on the Constitutional mandate that all State organs and public entities when contracting for goods or services must do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective as enshrined in Article 227 of the Constitution. It is designed to address challenges that existed in the repealed law, enhance devolution of the procurement process, incorporate emerging issues, embrace new procurement methods, establish new procuring entities and harmonize procurement procedures.

Additionally, the Act seeks to regulate public entities such as: the national government and its organs or departments, the county government and its organs and departments, the Judiciary, Commissions and Independent Offices established under the Constitution, State Corporations, the Central Bank of Kenya, public schools and universities, a company owned by a public entity, a county service delivery co-ordination unit under the National Government Co-ordination Act, constituencies, Kenyan diplomatic missions, among others.

The new Act features a role for the National Treasury in public procurement and asset disposal, creates a Public Procurement Regulatory Authority and maintains the Public Procurement Administrative Review Board with new procedures for review. The County Treasury bears the responsibility of public procurement and asset disposal within the county. On the internal organization of procuring entities, the Act replaces the functions of the tender committee under the repealed Act and places the accounting officer of a public entity as the person primarily responsible for ensuring that the organization complies with the Act. The accounting officer also ensures the establishment of an ad hoc evaluation committee and a disposal committee for the disposal of assets.

The Act also sets out a succinct review process for dispute resolution arising from procurement and asset disposal matters. *(http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/*



CASE HIGHLIGHTS

Any evolving society requires an equally evolving judiciary. The jurisprudence of each generation is a reflection of the growth and changes that a society experiences. This Quarter has seen an evolution of court jurisprudence where the court, particularly the Court of Appeal has had the occasion to grapple with the issue of its jurisdiction and whether or not there is an implied right of appeal created by Article 164 (3) of the Constitution of Kenya, 2010. Here is a summary of this Quarter's cases.

1. GEORGE LALLA ODUOR VERSUS CANNON ASSSURANCE (K) LTD, HCCC NO 174 OF 2007

The case involved a repayment of a loan advanced by the Defendant Company. The Plaintiff contested the repayment of the loan on the basis that the Defendant Company was not a Bank or an institution licensed by the Central Bank of Kenya.

The Defendant Company on the other hand, counterclaimed the suit and claimed a sum of Kshs. 4,088,259/- being arrears on loan repayment, interest, penalty and placement fees as provided for under the letter of offer and charge. The Court held that pursuant to the Insurance Act section 50, insurance companies were permitted to invest by way of advancement and to take security. Additionally, the court held that "to grant the counterclaim in the manner sought before the security is realized at an amount known to Court may well amount to unjust enrichment".
(http://kenyalaw.org/caselaw/cases/view/121599/ for more information)

2. NAQVI SYED QMAR VERSUS PARAMOUNT BANK LIMITED & ANOTHER CAUSE NUMBER 346 OF 2014

The Claimant in this case sued the 1st Respondent on the basis of unfair termination, malicious prosecution and defamation. The basis of the suit was that the 1st Respondent terminated the services of the Claimant based on a report prepared by an auditor, the 2nd Respondent. The said report was published in the Daily Nation Newspaper and reported on the Nation TV News. A criminal case ensued against the Claimant where he was charged with the offence of stealing by servant.

The Employment and Labour Relations Court sitting at Mombasa found that in Employment Law defamation takes place when the employer publicizes or causes to be publicized statements which stigmatize the employee. The Court held that the 1st Respondent's action had potentially damaged the Claimant's employability. Secondly, the Court found that the criminal charge against the Claimant was on behalf of the 1st Respondent's wish to have somebody charged in order to process an insurance claim. Accordingly, the Respondents were found liable for this reason. *(http://kenyalaw.org/caselaw/cases/view/116915/ for more information)*

3. JUDICIAL SERVICE COMMISSION & SECRETARY, JUDICIAL SERVICE COMMISSION VERSUS KALPANA H. RAWAL [2015]

The issue before the Court of Appeal was whether or not there is an implied right of appeal created by Article 164 (3) of the Constitution of Kenya, 2010 in addition to the court's jurisdiction to hear all appeals from the High Court. The 5-Judge Bench unanimously held that the Court of Appeal has jurisdiction to hear and determine appeals from the High Court as well as an appeal on the enforcement of the Bill of Rights.

The Honourable Justice GBM Kariuki particularly stated that "It being clear that the Constitution intended to confer the right of appeal in Article 164(3), and as the failure to expressly mention the words "right of appeal" in the Article was merely "a faultiness of expression," the court should read the obviously donated right of appeal as being incorporated in the conferment of jurisdiction in Article 163 (3). In construing Article 164(3) as conferring both jurisdiction and right of appeal, one is giving an intelligible interpretation to the Constitution and avoiding a construction that will result in absurdity and meaninglessness to the Bill of Rights". *(http://www.kenyalaw.org/kl/index.php?id=6095 for more information)*

INTERLUDE.....

Court Clerk: Which language do you understand? English or Kiswahili?

Immigrant: Broken English

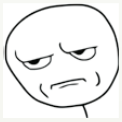
Whenever they ask if anyone has any reason these two should not wed, I always object just to preserve the record for appeal.

Lawyer: Who sat next to you at the floor seats?

Witness: Nobody

Lawyer: Did you not reserve that seat?

Witness: I did reserve it for my wife but she had passed on by the time of the match, and well at the time... everyone else I knew was at her funeral.



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Foreigners and Property Ownership in Kenya

By Mwangi Karume
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Kenya is a prime real estate investment location for foreigners. Key investments for foreign investors are usually holiday homes, hotels, farms, ranches and conservation centres, houses and office parks. Foreigners employed in Kenya often wish to own homes and office space.

When engaging in these investments, familiarity with basic legal provisions in respect of foreigners and property ownership in Kenya is imperative. This helps avoid unnecessary legal battles, partnerships and worries.

Can foreigners own property in Kenya?

Foreigners can own property in Kenya in their name. The Constitution (2010), the Lands Act (6/2012) and the Land Registration Act (3/2012), subject to certain limitations, grant the right to any person, either individually or in association with others, to acquire and own land in Kenya. This is important as many foreign investors have been duped into believing that they cannot own land in their own name in Kenya.

In Hartmann v Mbogo (Civil Case 222/2007), Grounstra v Wanje (Civil Case 284/2007) and many similar cases involving coastal properties, foreigner investors have entered into agreements and arrangements with locals with a view to the locals purchasing properties on their behalf. This is usually based on the alleged representation that a foreigner cannot own land in their own name. Such unnecessary partnerships between locals and foreigners often turn sour and should be avoided.

Before a foreigner purchases property, proper research should be undertaken and qualified professionals should be engaged.

Limitation of property ownership

The limitations of property ownership in Kenya by foreigners can be found in the Constitution and the Land Control Act (Cap 302).

As per Article 65(1) of the Constitution, a "person who is not a citizen may hold land on basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety nine years". However, on expiry of the leasehold term a renewal of the lease may be sought. Article 65 further provides that any document which purports to confer on a foreign investor an interest in land with a lease of more than 99 years is deemed and regarded as conferring on that foreigner a 99-year lease and no more. This means that foreign investors can purchase leasehold properties for more than 99 years. However, the constitution implies that it will be deemed as conferring only a 99-year leasehold interest on the foreigner.

A company, as per the Constitution and for purposes of property ownership, is regarded as a Kenyan company only if it is wholly owned by one or more Kenyan citizens. Therefore, a company with foreign shareholders is regarded as a foreign company and cannot own freehold land. Moreover, a trust cannot be formed to obviate this requirement. The Constitution was promulgated on August 28 2010. Under Article 8(1) in the Sixth Schedule to the Constitution, any freehold interest in land in Kenya held by a person who is not a Kenyan citizen shall revert to the Republic of Kenya to be held on behalf of the people of Kenya, and the state will grant a peppercorn rent for 99 years to that individual. This means that from the effective date, any freehold land or absolute proprietorship held by a foreigner is truncated to a 99-year lease with a peppercorn rent. The government has been forced to call for these titles and issue foreigners with leasehold titles with a commencement date of August 28 2010.

Agricultural land

Under the Land Control Act transactions affecting agricultural land and other land which may be gazetted by the minister of lands are defined as 'controlled transactions'. Controlled transactions are void in law for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of the transaction.

As per the Act, the land control board cannot grant consent to a transaction in which the land is to be disposed of by way of sale, transfer, lease or exchange or partition to a person who is not:

- a Kenyan citizen;
- a private company or cooperative society, all of whose members are Kenyan citizens;
- a group representative incorporated under the Land (Group Representatives) Act; or
- a state corporation as per the State Corporation Act.

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The effect of this is that foreign investors and private companies owned by foreigners cannot hold agricultural land in Kenya. However, through a notice in the Kenya Gazette, the president may exempt any person from all or any of the Act's provisions. Therefore, foreign investors wishing to acquire agricultural land may apply for such exemption. Further, public companies in which foreigners are members may acquire agricultural land.

Dummy companies and nominees

One of the ways in which foreign investors attempt to circumvent limitations to property ownership is by incorporation of companies whose shareholders are indicated as local in the Companies Registry. The Kenyan shareholders then enter into a declaration of trust with the foreign investors. The declaration of trust will usually state that local shareholders are the legal but not beneficial owners of the shares in the company.

Another approach is to use nominees to enter into property transactions and own property on behalf of foreign investors.

These approaches are void and unenforceable as they go against the Constitution and the law. The Constitution provides that any property held in trust shall be regarded as being held by a Kenyan citizen only if all of the beneficial interests of the trust are held by persons who are Kenyan citizens. The use of dummy companies and nominees therefore puts investments at risk.

Comment

It is possible for foreigners to own property in Kenya. Whatever the investment, foreign investors are advised to seek legal advice from qualified advocates.

Mediation, an Alternative to Litigation and Arbitration

By Elizabeth Ngonde
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On 5th May, 2016, the Chief Justice of Kenya launched Court Annexed Mediation program. Under the said program, all matters filed in the Commercial & Admiralty and the Family Divisions of the High Court of Kenya will be screened to ascertain their suitability for Mediation. The Mediators appointed under this program are required to file a report of the settlement of the dispute within sixty (60) days of taking up the case.

Whereas Mediation within our judicial system may be a new mode of dispute resolution, it has been practised informally since ancient times to resolve all kinds of disputes from family disputes, religious and commercial disputes. Mediation is a form of Alternative Dispute Resolution whereby an independent party, referred to as the Mediator, facilitates resolution of dispute between parties by way of guiding the discussion so that the parties can lay out their respective grievances and interests leading to the dispute in such a way that the parties come up with their own decision which is mutually beneficial. Mediation is voluntary and the most successful mediation is interest-focused rather than rights/obligation oriented. In mediation, the Mediator separates the disputants from the problem, focusing on their interests rather than their positions. In facilitating resolution of the dispute, the Mediator will also focus on the reason for the request and the need sought to be satisfied by the disputants. Mediation takes into account the feelings of the parties and the Mediator guides the discussion by employing negotiation skills and re-stating each parties' expression of grievances and interests in such a way that the disputing parties feel heard and understood in order to freely discuss the issues in dispute.

The basic requirement on the part of the Mediator is neutrality and confidentiality so that the parties can trust him/her and skills such as active listening and negotiation. On the part of the disputants, the Mediator needs to establish whether the parties have voluntarily submitted to the process and that they have the authority to settle the dispute.

Once the parties have settled on Mediation as the preferred mode of dispute resolution, the Mediator easies tension between the parties and guides their discussion /communication. The Mediator's role is to help the parties have a difficult conversation with the future in mind especially in circumstances where parties would rather avoid the dispute or conversation/discussion and the said avoidance would lead to strife in the relationship.

Mediation is suitable in resolving family disputes (including divorce, succession and inheritance, children and family property issues), employment issues, landlord and tenant disputes, personal injury claims and commercial disputes.

The Mediator's role is limited to guiding the parties to reach a mutually beneficial

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settlement of the dispute. In the course of Mediation, the Mediator can make inquisitive statements or ask questions so that there is a clear understanding of each party's interest, not only by the Mediator but by the parties.

The Mediator always meets the parties together. However, when allowed by the parties, he/she can meet the parties separately (caucusing) to hear out the underlying fears and needs of the parties. Discussions held outside the joint meeting cannot be divulged by the Mediator except with express consent of the party. However, the matters divulged in the private secession may be used to assist parties out of a deadlock created by misperception of interests.

The Mediator's role is not to offer a solution, advice or recommendation but is limited to enhancing communication so that the parties agree to resolve their dispute. Once the parties agree on the way forward, their agreement is reduced into writing by the Mediator (with the consent of the parties) and the said agreement then becomes binding upon them. The agreement can be filed in Court for adoption as an Order of the Court or registered with the requisite statutory bodies, for example, the agreement can be registered against an interest in land where there is dispute over family land. If Mediation fails, the Mediator cannot be a witness in Arbitration or Litigation for either of the parties where he/she had facilitated the process.

The advantages of Mediation over Arbitration and Litigation:-

a) Mediation is informal and voluntary unlike Arbitration and Litigation where the process is formal and mandatory once commenced. This makes Mediation flexible and devoid of technicalities or statutory/ procedural controls.

b) Whereas in Mediation, the decision is arrived at by the parties on their own accord, in Litigation and Arbitration, a third party, resolves the dispute and the decision of either the Arbitrator, in case of Arbitration or the judge in litigation is imposed upon the parties. In Mediation, the parties own both the process and the decision.

c) The decision of the parties in Mediation is not binding and can be denounced by either party or both. However, in Arbitration and Litigation, the decision can be enforced by either party. This is advantageous as the parties are at liberty to seek remedy in Court or Arbitration if Mediation fails.

d) In Arbitration and Litigation, one party wins while the other loses based on the determinations made on account of established rights and obligations. In Mediation, all parties are winners as the issue of rights and obligation do not arise as the dispute is determined by the parties on the basis of interests rather than rights.

e) The chances of continued relationship diminishes or is totally extinguished in Arbitration and Litigation but Mediation provides better solutions and build lasting relations by enhancing communication and understanding between the parties.

f) Mediation saves costs.

g) Parties in Mediation are not limited in the kind of resolution to arrive at so long as it beneficial to all parties or just either of them. This means that relationships are restored and interests safeguarded.

h) The confidential nature of Mediation means that the parties are protected against public scrutiny and the matters are kept private between the parties.

Disadvantages of Mediation compared to Arbitration and Litigation include:-

a) There is lack of precedents in Mediation as each dispute is resolved in a manner peculiar to the parties.

b) Mediation cannot work in all disputes especially where there is need for punitive judgment, protection of victim, need to establish a rule of law, where the disputants do not have authority to resolve the dispute or are incompetent and where there is a dishonest party.

c) The non-binding nature of Mediation is disadvantageous because the parties can renege on the agreement thereby aggravating the dispute.

Conclusion

The benefits of Mediation as a form of dispute resolution far outweigh the disadvantages. Where disputes or conflicts are suitable for Mediation, the success rate is high so that even when parties do not arrive with a resolution during assisted Mediation, they can engage in direct negotiations as the communication barrier is broken or minimized. In recognition of its effectiveness, Mediation has now been incorporated in the judicial system and Court mandated Mediation is now common as provided under Article 159(2) (3) of the Constitution of Kenya. Several legislations have been amended or enacted to make provision for Mediation or Alternative Dispute Resolution a part and parcel of resolving disputes between the parties. Once these provisions of Alternative Dispute Resolution are fully implemented, it will result in reduction of back log in the Courts and an expansion of the already existing Alternative Dispute Resolution systems/ Mechanism.

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High Court Declares Section 29 of Kenya Information and Communication Act Unconstitutional

By Arthur Kung'u
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Through a recent judgment (19th April, 2016) delivered by Justice Mumbi Ngugi in the case of *Geofffrey Andare vs. The Hon. Attorney General and Director of Public Prosecutions (Petition No. 149 Of 2015),* the High Court of Kenya has declared section 29 of the Kenya Information and Communication Act, Cap 411A ("the Act") as unconstitutional.

In the aforesaid case, the Petitioner was challenging his ongoing prosecution under section 29 of the Act on the basis that the said section was unconstitutional. The Petitioner had been charged under section 29 of the Act with the offence of improper use of licensed telecommunication system contrary to section 29(b) of the Act. The particulars of the offence were that he, through his Facebook account, posted grossly offensive electronic mail with regard to the complainant. Section 29 of the Act provides as follows:

"A person who by means of a licensed telecommunication system—

(a) sends a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or

(b) sends a message that he knows to be false for the purpose of causing annoyance, inconvenience or needless anxiety to another person, commits an offence and shall be liable on conviction to a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding three months, or to both."

The Petitioner contended that section 29 of the Act created a vague offence and was broadly worded especially with regard to the meaning of 'grossly offensive', 'indecent', 'obscene 'menacing', 'causing annoyance' 'inconvenience' or 'needless anxiety'. He further contended that since none of the terms are defined in the Act or are capable of precise or objective legal definition or understanding, section 29 of the Act flies in the face of the principle in law that requires certainty in legislation which creates criminal offences. The Petitioner further argued that section 29 of the Act unduly limited the right to freedom of expression which is provided for under Article 33 of the Constitution.

In its reasoned judgment, the Court found that section 29 of the Act imposed a limitation on the right to freedom of expression in vague, imprecise and undefined terms that were not within the scope of the limitations that are allowed under article 33 (2) of the Constitution. The Court further held that the Respondents in the Petition had not demonstrated that the limitation on freedom of expression provided for under section 29 of the Act meets the requirements for limitation of rights and fundamental freedoms as set out under Article 24 of the Constitution.

Moreover, the Court found that section 29 of the Act does not provide for the blameworthy mental element or state of mind (mens rea) that is required in law to accompany a blameworthy act for the same to constitute a criminal offence. In agreeing with the Petitioner's and the Interested Party's submissions, the Court observed that section 29 of the Act which criminalises the act of sending a "message or other matter that is grossly offensive or of an indecent, obscene or menacing character…" does not require the mental element on the part of the sender of the message that would render his or her act criminal in nature. The Court stated that the offence created by section 29 of the Act appears to be premised on how other people interpret the message, not the sender of the message.

While declining to issue prohibitory orders against the Director of Public Prosecutions to prevent him from continuing the prosecution of the Petitioner in the criminal case filed against him, the Court however, categorically stated that the Director of Public Prosecutions could not continue to prosecute the Petitioner under the provisions of section 29 of the Kenya Information and Communications Act, which the Court had since found to be unconstitutional.

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The Panama Papers- a Legal Perspective

By Claire Mwangi
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Following the leaks of the now famous (or is it infamous) "Panama Papers", there is in the public mind generally a negative innuendo regarding assumed culpability on the part of the persons named in the papers. The media no doubt plays the role of surrogate for the public in gathering and disseminating information on behalf of and for the benefit of the public. However, in reporting tax evasion, tax avoidance and money laundering surrounding Mossack Fonseca, care should be taken to ensure that the information which is largely in the public interest, is published in a context that is neither reckless, nor indifferent to the truth. Let us for a moment recap the allegations bedeviling the Mossack Fonseca law firm.

Mossack Fonseca Group is a Panamanian law firm and corporate service provider established in 1977 providing comprehensive legal and trust services, with over 500 staff members across every continent. The firm received worldwide media attention in April 2016, when information on off-shore tax havens and client information was published in the Panama Papers.

The Panama Papers are an unprecedented leak of 11.5 million files from the database of Mossack Fonseca which is the world's fourth biggest offshore law firm. The records were obtained from an anonymous source by a German newspaper, which shared them with the International Consortium of Investigative Journalists (the ICIJ). The ICIJ then shared the records with a large network of international partners, including the Guardian Newspaper and the British Broadcasting Corporation (BBC). The files show the myriad ways in which the rich have exploited secretive offshore tax regimes. Twelve national leaders are among 143 politicians, their families and close associates from around the world known to have been using offshore tax havens.

Various leaders locally and internationally have been mentioned in the leaked documents, but it is worthy of note that Iceland's Prime Minister has since resigned amidst the Panama Papers scandal and a replacement named in his place. There definitely exist legitimate reasons to create a company in an offshore jurisdiction and many legal and natural persons would declare them to their tax authorities should the same be required. The assumption that offshore accounts are vehicles for tax evasion may not hold true. I wish to address a few questions that may arise touching on the Panama Papers:-

1. What is a tax haven?

It is a geographical area outside the jurisdiction of one's home country which imposes only a few restrictions on legitimate business-activities within its jurisdiction, and little or no income tax is levied.

2. Is it wrong to have an offshore account?

The practice of opening offshore accounts and operating offshore companies is not illegal.

3. **Is there a restriction of persons in Kenya who may or may not open an offshore account?**

In mandatory terms, the Constitution of Kenya prohibits state officers (the President, his deputy, Cabinet Secretaries, Members of Parliament, Judges, Magistrates, the Attorney General, Director of Public Prosecutions among others), from operating offshore accounts. Article 76 (2) stipulates as follows: - "A State officer shall not—(a) maintain a bank account outside Kenya except in accordance with an Act of Parliament."

Subject to Article 76 (2) of the Constitution, section 19 of the Leadership and Integrity Act, Cap 182 Laws of Kenya, allows a state officer with the approval of the Ethics and Anti-Corruption Commission (EACC) to operate offshore accounts. The Leadership and Integrity Act further mandates state officers to submit statements of the offshore accounts annually to EACC, authorizing EACC to verify such statements and any other information from the foreign financial institution in which the account is held.

It is therefore well within the scope of the EACC to investigate the allegations arising in the Panama Papers in collaboration with any foreign government or international organization. There need not necessarily be a complainant to spur the EACC to commence its investigations, it is empowered, on its own initiative, to conduct such investigations.

In addition to the annual submission of statements on offshore accounts, section 26 of the Public Officer Ethics Act, Cap 183 Laws of Kenya requires every public officer to submit a declaration of the income, assets and liabilities of himself, his spouse or spouses and his dependent children under the age of 18.

4. Are Know Your Customer (KYC) policies implemented when opening these offshore accounts?

It is expected that the KYC protocols are observed and complied with when opening these offshore accounts. KYC policies are an important step developed globally to prevent identity theft, financial fraud, money laundering and terrorist financing. The usage of KYC requirements when opening bank accounts across states has gained such wide recognition, qualifying as a general practice accepted as a source of public international law.

By and large, the imputation of guilt or otherwise of the persons named in the Panama Papers ought to be examined on a case by case basis. Caution should be exercised so as not to make a blanket condemnation without the benefit of the full facts.

Parting Shot

Well, we have never been good with good byes. To be honest, there is nothing good in them. Just like the burning yellow rises and shines over all creation, kindly let us tell you hello in advance for the next issue.

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