Q3-2016

NR&Co Quarterly ...Legal Briefs

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KARIBU!

Opening word from the editor

Elizabeth Ngonde

Protection of rights and fundamental freedoms is an integral part of our society. This issue highlights some developments that have emerged relating to the rights protected under chapter 4 of the Constitution. For instance, there is the right to privacy which entails the right not to have - (a) the person, home or property searched; (b) their possessions seized; (c) information relating to their family or private affairs unnecessarily required or revealed; and (d) the privacy of their communication infringed. There is also freedom of expression, which includes freedom to seek, receive or impart information or ideas. There is however no absolute right and in the exercise of the rights protected under the law, every person is expected to respect the rights and reputation of others.

It has now become necessary for everyone to be familiar with the laws enacted in every sector and every aspect of life as well as have an understanding of the consequences attendant to breach of law. In this issue, we focus on disclosure of information.

We look at how it is possible to exercise one's right of expression while respecting the rights of others. In most cases, it is challenging to find the delicate balance necessary in the circumstances without the risk of being sued.

Knowledge is power. In our *Legislative and Case Updates*, we draw your attention to some of the recent laws passed by the Parliament and those that are still pending in the August house. The role of the Courts in the development of the law cannot be trivialized. In the recent past, Judges have actualized the spirit of our Constitution by giving purposive interpretation of the law, thereby promoting enforcement of rights and fundamental freedoms.

In our *Contributors' Platform*, meet the Firm's Process Servers! We also briefly address matters relating to Public Private Partnerships, Protection of Trademarks, Taxation of Proceeds from Illegal Trade and a snip view of the CBK's Circular to Commercial Banks.

Last but not least, the members of the Firm recently participated in various international activities and they share their experience in the Firm around the Globe column.

Enjoy our Q3 Legal Briefs!

THE FIRM AROUND THE GLOBE…

This year, members of the Firm, namely, Mr. Mwangi Karume, a Partner and Head of the Commercial, Conveyancing and Corporate Department; Kevin Walumbe, a lawyer at the Firm and Rosemary Kamau, a lawyer at the Firm, had the opportunity to travel around the world, representing the Firm in the various forums attended.

The travels included South Africa, Germany, Switzerland and the Netherlands. This is what they had to say about their travels……

Mwangi Karume, Partner and Head of Commercial, Conveyancing and Corporate Department

The Firm, being a member of Primerus Business Law Institute- Europe, Middle East & Africa (EMEA Institute) representing Kenya, was invited to attend the Primerus Europe, Middle East & Africa (EMEA) Conference which took place between 14th to 15th July, 2016 and was held at Hamburg, Germany. The event was hosted by Primerus in conjunction with the Association of Corporate Counsel Europe (ACC Europe) and was supported by UNIDROIT.

The theme of the Conference was "UNIDROIT. Principles of International Commercial Contracts". Some of the activities that took place during the conference include:

- A legal seminar titled "UNIDROIT. Principles of International Commercial Contracts: A Valid and Cost Saving Alternative to Domestic Law in International Business Transactions".
- Excellent discussions on client development, opportunities to do business with Primerus US International Law Firms and Strategies for 2017.
- Networking with fellow Primerus members and corporate clients.

Our membersip in Primerus allows our clients to have access to over 200 law firms and 3,000 corporate clients around the world. This proves our rich and quality service that can be provided.

Kevin Walumbe, Lawyer

I was honoured to be part of the Kenyan team that participated in the Regional African Round of the European Law Students Association ("ELSA") Moot Court Competition on World Trade Organization ("WTO") Law as well as the Final Oral Rounds of the ELSA Moot Court Competition.

The moot court competition is a simulation of proceedings before actual WTO panels. It is designed to enhance knowledge of international trade and economic law; and familiarity with WTO dispute settlement procedures, with a view to building capacity for meaningful engagement in multilateral trade.

The Regional Rounds that took place between 29th March and 2nd April, 2016 were held at the Rhodes University, Grahamstown, South Africa and they involved a hypothetical case on: subsidies covered under the Agreement on Subsidies and Countervailing Measures; government intervention in enhancing the use of clean energy; the use of tariffs and the malleability of WTO law with other national and international laws.

The team then proceeded to the Final Rounds of the ELSA Moot Court Competition which took place between 7th and 12th June, 2016, at the Graduate Institute & World Trade Organization Headquarters in Geneva-Switzerland. The Final Oral Rounds coincided with the 16th Annual Conference on WTO Law held on 11th and 12th July, 2016 where we were addressed by leading trade law experts, WTO Appellate Body Members and leading academicians.

Through the Moot Competitions, I was exposed to international trade and economic law which is of great benefit to investors and States at large. We bagged the price of Best Written Submissions for the Respondent at both the Regional and Final Rounds. For more information visit www.emc2.elsa.org.

Rosemary Kamau. Lawyer

I had the privilege of participating in the International Criminal Court (ICC) Moot Court Competition earlier this year in May, 2016.

The ICC Moot Court Competition welcomes universities from all over the world for a large scale moot court simulating the proceedings of the ICC. The Competition consisted of an extensive six-day educational and social program, which brought together students of diverse backgrounds and cultures to the Hague to challenge their skills as future international lawyers. The final round took place in an actual ICC courtroom with ICC judges adjudicating.

This year's competition revolved around the issues of Crimes against Humanity (article 7 of the Rome Statute) as well as War Crimes (article 8 of the Rome Statute). There was a third issue on the disqualification of a Judge pursuant to article 40 & 41 of the Rome Statute. The three The three roles played were Prosecution Counsel, Counsel on behalf of the Victims and the Government Counsel.

Through the competition, I was able to interact with various teams from Australia, Poland, Ukraine, Afghanistan and many others. The winners of the Global Rounds at the Hague were a team from Singapore. Their articulation of the issues was spot on and their role play as Victims' Counsel was excellent. All in all, the trip was totally worth it. For more information visit http://iccmoot.com/

LEGISLATIVE UPDATES

There have been several changes and developments in the legislative sector including the coming into force of the entire Companies Act, 2015 by virtue of Legal Notice No. 109 of 2016, the establishment of a regime to facilitate the provision of legal aid which in turn promotes access to justice through the Legal Aid Act, 2016 and the deliberation of various sector-specific Bills by Parliament. Some of the changes are captured in the following brief outline.

1. THE BANKING (AMENDMENT) ACT, 2016

H.E. President Uhuru Kenyatta assented to the Banking (Amendment) Act on 24th August, 2016. The Act intends to control interest rates pertaining to bank loans and deposits. Section 31A puts an obligation on the banks or financial institutions to disclose all charges and terms relating to a loan before granting the loan to a borrower. Section 33B introduces a ceiling on interest rate chargeable for a credit facility in Kenya and places it at no more than four percent (4%), the base rate set and published by the Central Bank of Kenya (CBK). The Act also places the minimum interest rate granted on a deposit held in an interest earning account in Kenya to at least seventy percent (70%), the base rate published by the CBK.

The penalty for a bank or financial institution which agrees to lend at an interest rate in excess of that prescribed above is a fine of not less than Kenya Shillings One Million (Kshs. 1,000,000.00) or to imprisonment for not less than one (1) year, or both.

2. THE LEGAL AID ACT, 2016

The Legal Aid Act establishes the National Legal Aid Service which has the function of establishing and administering a national legal aid scheme that is affordable, accessible and accountable. The said Service provides legal aid in civil, criminal, children, constitutional and public interest matters to indigent persons. Such aid however does not extend to civil matters of a company, trust, public institution, civil society or non-governmental organisation. Legal aid is also not provided in matters of tax, debt recovery, bankruptcy, insolvency and defamation. Access to legal services by persons in Kenya will be enhanced following the passing of this Act.

It is worthy to note that the Act provides that the Courts should not award costs of a suit against an aided person (if the aided person loses the suit) save for exceptional circumstances. Moreover, an aided person is not required to provide security for costs other than in exceptional circumstances.

3. MINING ACT, 2016

The Act vests all mineral resources in the national government which has a right of pre-emption in strategic minerals in Kenya before such minerals are sold. Strategic minerals include all radio-active minerals and minerals which are declared as strategic minerals by the Cabinet Secretary for Mining.

The Act however does not apply to petroleum and hydro-carbon gases. With regard to acquisition of rights in minerals by a company, such a company has to be established in Kenya and it should neither be subject to winding-up nor liquidation. Moreover, its directors are required to show the required expertise, technical and financial capacity. It should be noted that the requirement of financial capacity does not apply to artisanal mining.

Several bodies have been established under the Act such as: the National Mining Corporation, the Mineral Rights Board, the Directorate of Mines and the Directorate of Geology. The Mineral Rights Board makes recommendations to the Cabinet Secretary on the declaration of certain minerals as strategic minerals as well as on areas suitable for small scale and artisanal mining. The National Mining Corporation, on the other hand, engages in mineral prospecting and invests on behalf of the national government.

Government participation in mining licences is also incorporated in the Act under section 48. Accordingly where a mineral right is for a large scale mining operation, the State acquires ten percent (10%) free carried interest in share capital of the right in respect of which financial contribution shall be paid by the State.

Local equity participation is stipulated under section 49 of the Act whereby the Cabinet Secretary prescribes limits of capital expenditure. Where a holder of a mining licence exceeds such prescribed limit, it is mandatory for such holder to list at least twenty percent (20%) of its equity on a local stock exchange within three (3) years after commencement of production. Such period may however be extended by the Cabinet Secretary after consultation with the National Treasury for reasons that the market conditions do not allow for a successful completion of offering of local stock exchange. Moreover, the holder of a mining licence may apply to the Cabinet Secretary to execute an equitable alternative mechanism that allows the holder to meet the limit of capital expenditure.

Employment and training of Kenyans is also emphasized and holders of mineral rights are required to submit to the Cabinet Secretary a detailed programme for recruitment and training of citizens. Section 47 of the Act further provides that the holder of a mineral right shall give preference in employment to members of the community and citizens of Kenya.

4. THE CAPITAL MARKETS (NAIROBI SECURITIES EXCHANGE LIMITED SHAREHOLDING) REGULATIONS, 2016

Pursuant to Section 12(1) of the Capital Markets Act, the Cabinet Secretary for the National Treasury has published the above Regulations vide Legal Notice No. 74 of 2016. The said Regulations limit the percentage of shareholding whereby a private company is not allowed to hold more than five percent (5%) of the equity share capital of the Nairobi Securities Exchange

whereas a public company is not allowed to hold more than ten percent (10%) of such equity. The trading participants are also not allowed to cumulatively hold more than forty (40%) percent of the total equity shareholding.

Regulation 6 provides that any person holding equity shares in the Nairobi Securities Exchange in excess of the percentage limits should reduce his shareholding within six (6) months or apply to the Capital Markets Authority for a waiver of the restrictions with regard to a private or public company.

5. THE FINANCIAL SERVICES BILL, 2016

The Bill aims to provide for the establishment of uniform norms and standards in relation to the conduct of providers of financial products and financial services for the purpose of promoting and maintaining a robust, fair and efficient financial sector in Kenya.

The Bill will establish, inter alia, the following:

a) The Financial Services Authority as the governing body;
b) The Financial Sector Ombudsman which shall be responsible for resolving complaints by financial customers in relation to providers of financial products and/or services;
c) The Financial Sector Tribunal which shall be responsible for reviewing certain decisions as stipulated in the said Bill; and
d) The Compensation Funds Board which shall be responsible for keeping and managing the Financial Sector Compensation Funds.

The Bill also aims to establish the Financial Services Authority as the only regulatory body for financial services in Kenya. In this regard, the functions of the Retirement Benefits Authority (RBA), the Insurance Regulatory Authority (IRA), the Capital Markets Authority (CMA) and the Sacco Societies Regulatory Authority (SASRA) would be assumed by the Financial Services Authority.

6. THE MOVABLE PROPERTY SECURITY RIGHTS BILL, 2016

The purpose of this Bill is to provide for the use of movable property as collateral for credit facilities, to promote consistency and certainty in secured financing relating to movable assets and to enhance the ability of individuals and entities to access credit using movable assets.

The Bill further proposes the establishment of a Registry for the purpose of receiving, storing and making accessible to the public, information on registered notices with regard to security rights and rights of non-consensual creditors and for the general running of the Registry.

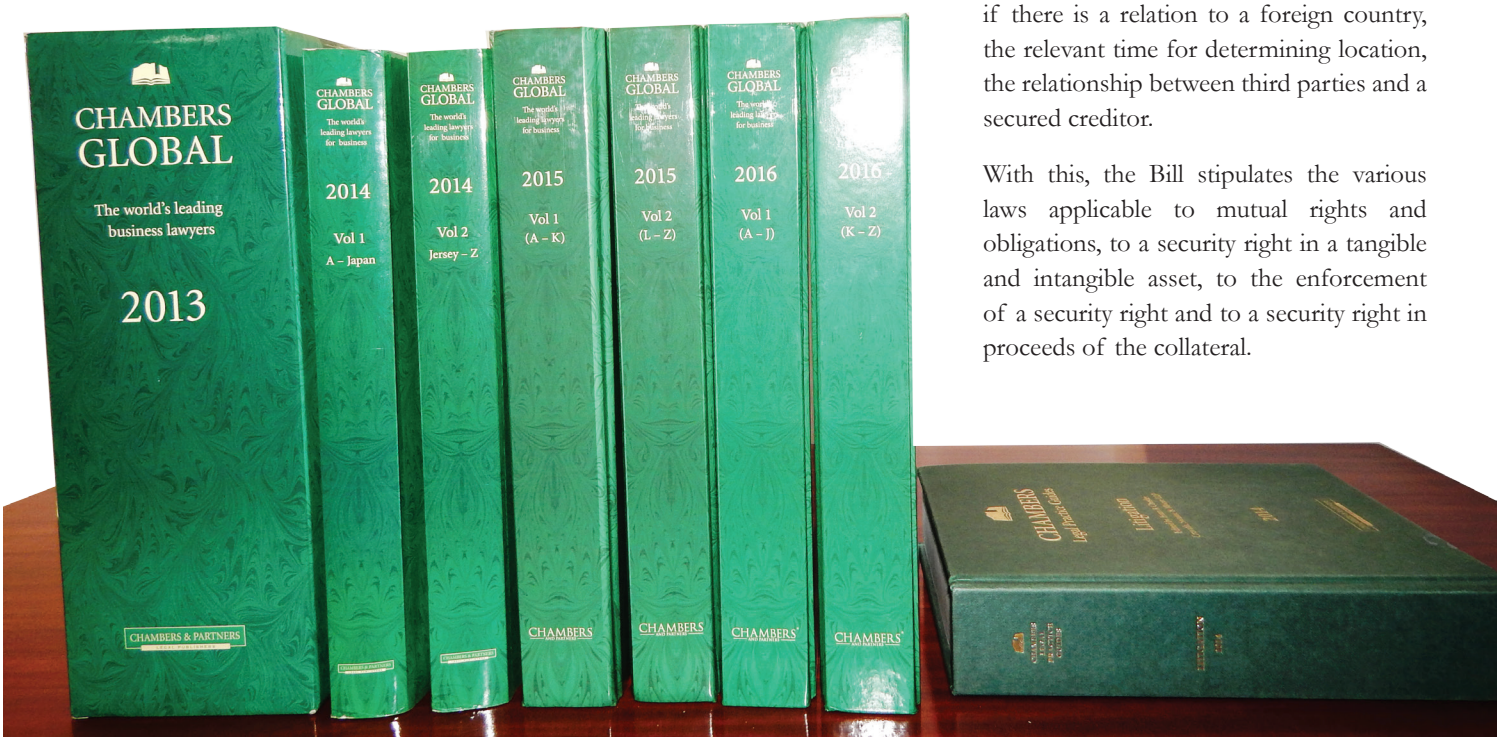
The proposed Bill will not apply to security rights in: book-entry securities under the Central Depositories Act, a vessel (including a mortgage right subject to the Merchant Shipping Act), an aircraft subject to the Civil Aviation Act or any lien, charge or other interest created by law.

The following are also not governed under the Act:

a) Security rights in proceeds of collateral if the proceeds constitute a type of asset that is governed by another law; and
b) The rights and obligations of the grantor and the secured creditor under the Consumer Protection Act.

The Bill also introduces various rules that will determine the applicable law on certain aspects of a secured transaction, such as the location of the grantor or the collateral if there is a relation to a foreign country, the relevant time for determining location, the relationship between third parties and a secured creditor.

With this, the Bill stipulates the various laws applicable to mutual rights and obligations, to a security right in a tangible and intangible asset, to the enforcement of a security right and to a security right in proceeds of the collateral.



CASE HIGHLIGHTS

The following are some of the decisions that have had an impact in the realms of justice in the last quarter. Of particular interest is the judicial recognition of goodwill as property that is constitutionally protected under Article 40 of the Constitution of Kenya, 2010.

1. BIA TOSHA DISTRIBUTORS LIMITED .VS. KENYA BREWERIES LIMITED & 3 OTHERS, (PETITION NO. 249 OF 2016)

The Petitioner in this case claimed to have an exclusive interest over certain distribution areas in which it had been appointed as the sole distributor by the Respondents. Such appointment was subject to payment of goodwill by the Petitioner, which, according to the contracts, was non-refundable. The Respondents later repossessed the distribution areas dubbed, "Bia Tosha Territory", prompting the Petitioner to pray for conservatory orders pending the hearing and determination of the Petition.

The Court held that value can be placed on goodwill as a proprietary interest and as such, once goodwill is paid and acquired, it is deemed to be property which is a constitutionally protected right under Article 40 of the Constitution. As it stands, this decision will greatly impact on the concept of goodwill that is often applicable in business transactions.*(http://kenyalaw.org/caselaw/cases/view/123490/ for more information)*

2. NYUTU AGROVET LIMITED .VS. AIRTEL NETWORK KENYA LIMITED (CIVIL APPLICATION SUP. 3 OF 2015)

The Applicant in this case applied to the Court of Appeal seeking the issuance of a certificate under Article 163 (4), (b) of the Constitution (on matters of general public importance), which would enable it lodge an appeal in the Supreme Court. The main issue in contention which the Applicant seeks to be determined by the Supreme Court is whether or not there is a right of appeal from the High Court to the Court of Appeal on a decision made under Section 35 of the Arbitration Act, 1995.

After considering the merits of the case and the arguments advanced by the respective parties, the Court of Appeal allowed the application and certified the matter as one of general public importance, thereby granting leave to the Applicant and paving the way for filing of an Appeal to the Supreme Court, to conclusively determine whether or not the Court of Appeal has jurisdiction to hear and determine appeals from the High Court with regard to arbitral awards.

The Applicant will also be seeking the Supreme Court's interpretation on the scope of law as regards court intervention in arbitral proceedings. *(http://kenyalaw.org/caselaw/cases/view/123312/ for more information)*

3. BRITISH AMERICAN TOBACCO KENYA LTD .VS. CABINET SECRETARY FOR THE MINISTRY OF HEALTH & 4 OTHERS, PETITION NO. 143 OF 2015

The Petitioner, through a Petition dated 14th April, 2015, challenged the constitutionality of the Tobacco Regulations, 2014 ("the Regulations") with regard to public participation in the process leading to the enactment of the Regulations and the content of some of the Regulations pertaining to: the disclosure of product information, the solatium compensatory contribution fund, the warning requirements on tobacco products and the restriction of interactions between public authorities and the tobacco industry.

The Petitioner averred that the Cabinet Secretary for Health and the Tobacco Control Board did not engage with the tobacco industry as stakeholders in the process of developing the Regulations. It also submitted that the Regulations infringe on their constitutional rights to intellectual property with regard to the fact the Cabinet Secretary is yet to avail information on the requirements of packaging and labeling and as such, the warning requirements may prevent the Petitioner from fully using its trademarks.

The Petitioner was also of the view that the solatium compensatory contribution is unconstitutional due to the fact that the Petitioner was not given an opportunity to comment on the matter neither was there a reference to a determination of a lawful obligation to pay the compensation. Regulations 20 – 36 were also challenged as being discriminatory through limiting interactions between public authorities and the tobacco industry unlike any other industry.

With regard to disclosure of product information, the Petitioner pointed out that the information required under Regulation 42 may as well comprise of manufacturers' trade secrets and as such it infringes on the Petitioner's intellectual property rights.

It was held that:-

a) The Petitioner and other industry players were consulted and the Regulations could not be nullified due to non-consideration of the Petitioner's view. There is essentially no requirement that 'the views held by any particular group or individual on a matter before the legislature or regulation – making body must prevail.'
b) The legislative intent of the Regulations pertaining to packaging and labeling requirements was to regulate advertising of tobacco products and to ensure that consumers are fully aware of the nature and content of tobacco products. Such intent is in accordance with the Constitution and the Tobacco Control Act.
c) The intent behind the establishment of the Solatium Compensatory Contribution Fund was to assist the state in dealing with the adverse effects of tobacco consumption. It is some form of 'compensatory payment for the negative consequences of tobacco smoking in the area of public health'.
d) Section 53 of the Tobacco Control Act gives the Cabinet Secretary of Health wide powers with respect to the making of regulations for meeting the objects of the Act. It is thus within the mandate

of the Cabinet Secretary to make regulations that limit the interaction between the tobacco industry and public officers. The Regulations also do not ban such interactions but merely regulate them. Having regard to the nature of the industry, the differential treatment with other industries is permissible.

e) The product disclosure requirements under Regulations 12, 13 and 42 are aimed at identifying the products and ingredients manufacturers of tobacco products use. The requirements of Regulation 12 are also very clear and there is no violation of the Petitioner's constitutional right to intellectual property. However, Regulation 13 (b) is null and void to the extent that it requires tobacco manufacturers and importers to disclose information pertaining to their market share in the industry, which information is only within the knowledge of the market regulators.

This judgment acknowledges the priority of public health over commercial interests. It further gives due consideration to Article 43 of the Constitution which acknowledges the right of every person to the highest attainable standard of health and Article 46 which, on the other hand, acknowledges consumers' right to information about goods and services and their right to protection of their health, safety and economic interests.

(http://kenyalaw.org/caselaw/cases/view/120311/ for more information)

4. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 3 OTHERS .VS. THE JUDICIAL SERVICE COMMISSION & OTHERS, PETITION NO. 314 OF 2016 (CONSOLIDATED WITH JR NO. 306 OF 2016 AND PETITION NO. 324 OF 2016)

The Consolidated Proceedings related to the short listing of candidates for the positions of the Chief Justice, Deputy Chief Justice and a Judge of the Supreme Court of Kenya. The Petitioners in the case challenged the procedure adopted by the Judicial Service Commission ("Commission") in the recruitment process and sought that the Court quashes the decision of the Commission in shortlisting several candidates and orders the Commission to issue a fresh advertisement for the three vacant positions.

By a Judgment delivered on 31st August, 2016, the Court made the following findings:

1) The High Court has the jurisdiction, the mandate and power to investigate claims of unconstitutionality, illegality and irrationality on the part of the Judicial Service Commission.
2) The Judicial Service Commission has the power to conduct an initial review of all applications submitted for completeness and conformity with minimum constitutional and statutory requirements and in so doing may properly reject the applicants whose applications do not conform thereto.
3) The Commission did not violate the requirement of public participation.
4) The fact that the Commission included extraneous matters, that is requiring the applicants to provide clearance certificates from various governmental and professional agencies, in the advertisement does not warrant the quashing of the said advertisement in the circumstances of this case. However, the clearance certificates cannot be the basis upon which the decision to shortlist applicants can be made. The clearance certificates may be prima facie evidence whether the respective applicants meet the minimum qualifications of possessing a high moral character, integrity and impartiality, the prima facie evidence only amounts to a rebuttable presumption which can only be dealt with at the interview stage.
5) The Court held that there was no discrimination or bias on the part of the Commission in the initial review of the applications.
6) The right of access to information is not an unlimited right and may be limited as provided by the law. The Judicial Service Commission is under an obligation to furnish a Kenyan citizen with information under Article 35(1)(a) of the Constitution with as much precision as the circumstances permit and justify its decision not to disclose the information which it deems inappropriate but taking into account the overriding objective of respecting the applicants' right to privacy.
7) The decision of the Judicial Service Commission to shortlist the candidates for some, and not all, of the positions applied for was irrational.
8) The decision of the Commission to summarily reject applications pursuant to Regulation 13 of the First Schedule to the Judicial Service Act before the stage of interview was unsupported by the law and was tainted with procedural irregularity.

(http://kenyalaw.org/caselaw/cases/view/125135/ for more information)

INTERLUDE.....

A doctor and a lawyer are talking at a party. Their conversation is constantly interrupted by people describing their ailments and asking the doctor for free medical advice. After an hour of this,the exasperated doctor asks the lawyer, "What do you do to stop people from asking you for legal advice when you're out of the office?"

"I give it to them," replies the lawyer, "and then I send them a bill."

The doctor is shocked, but agrees to give it a try. The next day, still feeling slightly guilty, the doctor prepares the bills. When he goes to place them in the mailbox, he finds a bill from the lawyer. Pinterest

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A burglar's wife was in the witness-box, and the prosecuting counsel was conducting a vigorous cross-examination.

"Madam, you are the wife of this man?"

"Yes".

"You knew he was a burglar when you married him?"

"Yes."

"May I ask how you came to marry such an individual?"

"You may", returned the witness sarcastically.

"I was getting old, and had to choose between a burglar and a lawyer."

The cross-examination ended at this point. The Art of a Lawyer: Humour in Law

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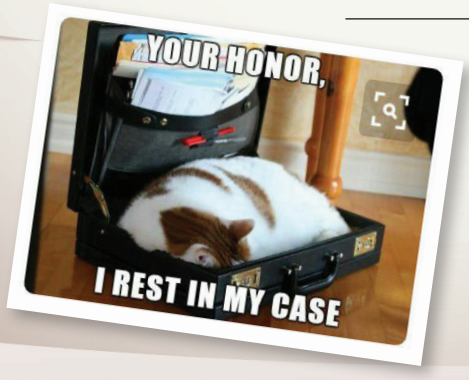

CONTRIBUTORS' PLATFORM

Taxation of Proceeds from Illegal Trade

By Gitau Komu
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On 15th April, 2016, an interesting Judgment was delivered by the Court of Appeal in Civil Appeal Number 55 of 2009 between Kenya Revenue Authority ("the Appellant") and Yaya Towers Limited ("the Respondent") [2016] eKLR. The significance of the Judgment is that there has been no prior local decision on the aspects therein.

Background

The Appellant filed an appeal against the High Court's Ruling dated and delivered on 21st November, 2008 in which the High Court allowed the Respondent's Application and had issued the following Orders:

a) an Order of Certiorari to bring to the High Court for the purpose of being quashed, the decision of the Applicant made under the Income Tax Act, Chapter 470 of the Laws of Kenya, demanding payment from the Respondent of arrears of income tax in the total sum of Kshs. 17,775,190.10.

b) an Order of Prohibition directed to the Appellant prohibiting the Appellant from enforcing the said decision or demanding the said payment from the Respondent.

The undisputed facts were that the Respondent entered into a consultancy contract with a firm known as Modave Technologies for the services to be rendered by David Saunders, a partner in the firm. Modave Technologies later changed its status to a limited liability company which continued to render services to the Respondent, under a new contract.

The Appellant asserted that the Respondent was statutorily obligated to make Pay As You Earn Deductions in respect of David Saunders, assessed at Kshs. 17,775,190.10 under the Appellant's letter dated 31st March, 2006. The said sum was inclusive of penalties as that date. On the other hand, the Respondent contended that the employment of David Saunders was illegal and hence not subject to taxation.

The Court of Appeal proceeded to crystallize the issues arising to a consideration on whether profits from illegal services rendered to the Respondent are taxable.

Decision

Firstly, the Court of Appeal observed that even if a business is illegal, or as in this case the services obtained were rendered by an illegal entity, it is still subject to taxation. The Court advanced that holding otherwise would entitle a wrong doer to benefit from the illegal profits earned from unlawful business and on top of that be exempted from taxation.

The Court of Appeal echoed the words of Lord Morison in F. A. Lindsay, E.A Woodward & W. Hiscox v Commissioner of Inland Revenue Tax Cases Volume 18 Page 43, where the appellants therein contended that the transactions carried out by them were illegal and that the profit arising therefrom was not assessable, in which he stated that:

"It is quite immaterial that the particular method of carrying on the trade involved the making of a false declaration to the Customs authorities or giving bribes to persons in America. In my opinion, these are entirely irrelevant considerations. When it is established that a trade has existed for a year, the question is whether it realised a profit as ascertained under the rules of the statute. It is quite in vain for the person who has realized the profit to prove that he made it by cheating or fraudulent trading, or to attempt to contend that the profit he has earned ought to escape chargeability because he might have been convicted of a breach of the law. During the discussion a question was raised as to whether the profits or gains of a burglar were subject to tax. Obviously not, because burglary is not a trade or business; but if a trader committed a housebreaking and stole his rival's order book and, from its information, was able to increase the profits of his own business, I have no doubt that these profits are subject to tax. It is, in my opinion, absurd to suppose that honest gains are charged to tax and dishonest gains escape. To hold otherwise would involve a plain breach of the rules of the statute, which require the full amount of the profits to be taxed and merely put a premium on dishonest trading. The burglar and the swindler, who carry on a trade or business for profit, are as liable to tax as an honest business man, and, in addition, they get their deserts elsewhere." [Emphasis mine]

Secondly, the Court of Appeal held that if it were to hold that profits of such an illegal business are not taxable, tax payers would endeavor to have their business tainted with illegality for the purposes of securing exemption from taxation.

The Court of Appeal thus found that the appeal had merit and allowed it with costs. Accordingly, it set aside the ruling of the High Court dated 21st November, 2008 and all consequential orders.

Comment

It is clear that the Court of Appeal placed much emphasis on the fact that, for the sake of avoiding an absurdity where the gains

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of an honest business are taxed whilst the dishonest escape taxation, proceeds from illegal trade are subject to taxation.

The Court of Appeal, by its Judgment, effectively upheld the mandatory provisions of Section 3 (1) of the Income Tax Act, Chapter 470 of the Laws of Kenya, which stipulates:

"Subject to, and in accordance with, this Act, a tax to be known as income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya." [Emphasis mine]

This Judgment provides authority for the application of the afore-stated statutory provision, without exception, towards the promotion of administrative fairness and in the interest of public policy.

The Central Bank of Kenya Cracks the Whip Against Errant Lenders on Credit Reference Bureau Reporting

By Arthur Kung'u
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In a move akin to the recent bid by Kenya's Parliament to curb banking interest rates vide the Banking (Amendment) Act, 2016, the Central Bank of Kenya has recently sought to rein in commercial banks and other lenders that have been improperly submitting customer information to credit reference bureaus (CRBs). This was done through a Circular issued by the Central Bank on 10th August, 2016, addressed to the chief executive officers of all commercial banks, mortgage finance companies, microfinance institutions and credit reference bureaus.

Lately, there has been a noticeably worrying trend by some lenders to forward information to CRBs pertaining to their customers in a manner which is inconsistent with the laws governing the credit information sharing (CIS) mechanism in Kenya. In the said Circular, the Central Bank of Kenya pointed out some of the ways in which banks have been misusing the CIS mechanism, such as the failure to submit accurate and complete data to the CRBs; failing to advise customers when they have been adversely listed by CRBs, as is required by law; sending messages to customers that threaten to adversely list them with CRBs for matters that are not related to credit/their creditworthiness; and failing to give loans to customers simply because they have been adversely listed with CRBs. On this last example, the Central Bank clarified that the CIS mechanism was not meant to be used as a tool for blacklisting customers but was instead aimed for use as a risk management tool, to enable financial institutions assess and determine the risk attached to giving a particular loan to a customer.

The Central Bank indicated in its Circular that all lenders are required to adhere strictly to the provisions of the Credit Reference Bureau Regulations, 2013. Of particular emphasis by the Central Bank was that lenders should adhere to the requirement under the Regulations that credit information providers who furnish a customer's negative credit information to a Credit Reference Bureau should issue to the customer a notice of intention to submit the negative information within thirty days before submitting of the negative information and also ensure that such information is accurate.

Lenders were also reminded to adhere to the requirement under the law that when they submit a customer's credit information to a CRB, they ought to ensure that the affected customer is notified within thirty days of such submission that their credit information has been shared with that particular Credit Reference Bureau(s).In the past, some bank customers were never informed by the lender about the submission of their credit information to a CRB and have only become aware of the same once they apply for credit facilities and are out-rightly denied the same, based solely on

CONTRIBUTORS' PLATFORM

their adverse listing in a Credit Reference Bureau.

The Central Bank further pointed out the need for Lenders to ensure that they only submit credit information pertaining to their customers which is in accordance with the Regulations. Under the Credit Reference Bureau Regulations, lenders are only supposed to share information concerning a customer's non-performing loan and any other negative information of a customer. The Regulations define "negative information" as any adverse customer information relating to a customer which includes non-performing loan or credit default or late payment on all types of facilities or claims; the dishonor of cheques meant for settlement of credits in favour of institutions, other than for technical reasons; accounts compulsorily closed other than for administrative reasons; proven cases of frauds and forgeries; proven cases of cheque kiting; false declarations and statements; receiverships, bankruptcies and liquidations; tendering of false securities; and misapplication of borrowed funds.

It is widely hoped and anticipated that the recent Circular by the Central Bank with regard to the use of the CIS mechanism will bring about the much-needed rationality in the sharing of customer information by lenders with Credit Reference Bureaus. It is also hoped that the prudent use of the CIS system by lenders and the Credit Reference Bureaus will lower the cost of borrowing for customers who have a good credit history, a benefit which is yet to be realized in Kenya long after the CIS mechanism was commenced in 2010.

Protection of Trade Marks in Kenya

By James Mbugua
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Introducing Trade Marks in Kenya

Generally, trademarks can be understood as signs capable of distinguishing the goods or services of one enterprise from those of other enterprises. In Kenya, a trade mark can be registered in relation to goods for the purpose of *indicating a connection in the course of trade between the goods* and the person having the right either as proprietor or as registered user to use the mark whether with or without any indication of the identity of that person or *distinguishing goods*. Trademarks can also be registered as service marks in relation to services for the purpose of indicating that a particular person is connected, in the course of business, with the provision of those services, whether with or without any indication of the identity of that person or distinguishing services.

Trademarks are registered under specific classes according to the classification provided for under the Nice Agreement (1957) commonly referred to as the Nice Classification (NCL). Accordingly, in Kenya, the protection afforded by registration of trademarks is class specific.

Trade mark enforceability rests primarily on two closely related concepts. These are:

(a) Registration

Section 5 of the Act generally requires that marks are registered to be enforceable subject to a few exceptions discussed below.

A mark is not registrable in Kenya on the following grounds:

(i) if it is likely to deceive or cause confusion or otherwise;
(ii) if it is a scandalous design; or
(iii) if it would be contrary to law or morality.

Similarly, any mark that is identical with or nearly resembles a mark belonging to a different proprietor and already on the register in respect of the same goods or description of goods or services is not registrable in Kenya.

In Kenya, the courts have held that descriptive expressions or slogan which are widely used and familiar within the public domain, should not be registrable as trademarks. For instance, in *Mathew Ashers Ochieng v. Kenya Oil Company Limited & Kobil Petroleum Limited*, it was has held that descriptive expressions or slogan such as "PROUDLY KENYAN", which are widely used and familiar within the public domain, should not be registrable as trademarks. In orbiter, the court noted that an individual cannot be exclusively allowed to use a common word in furtherance of his trade or business and at the same time restrict such word from the others who are entitled to an equal use.

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(b) Use

Upon registration, a mark must remain in active use lest anyone can apply for the mark to be expunged and removed from the Register. The test for use is that if up to one month before the date of the application, a continuous period of five (5) years or longer has elapsed during which there is no *bona fide* use of the mark in relation to the specific goods or services by any proprietor. However, the mark must have been used in the 'trade mark sense' and not for descriptive purposes. In *Mother Care v. Penguin Ltd* [1988] R.P.C., a leading case on trade mark infringement, the words "Mother Care" in the title of the book were not used as a trade mark or in a trade mark sense. For this reason, the court held that there was no serious issue to be tried on infringement since the words were being used descriptively with the words 'Other Care' on what the book was about.

Kenyan courts have in the past had to grapple with the question of what amounts to use of trademark. Most commonly, one of the most prevailing questions remains on whether the international use or use outside Kenya would amount to 'use' envisioned under Kenya's Trademark Act. In *Brooke Bond v. Chai Ltd* [1971] EA 10 at 12 Spry, Ag P., stated that *"A trade usage in other parts of the world would not be a ground for depriving a proprietor of his right to a trade mark registered in Kenya in a passing-off action, although it might well be a reason for refusing an application for registration. In my judgment, refusal of an application for registration refers not only to the original application, but also to challenges to such registration."*

Trade Mark Infringement and Enforcement

Although the Act creates several trade mark related offences, the responsibility of enforcement of trademarks falls primarily on the registered owner of the trademark. Passing off is the common law equivalent of trade mark infringement although the two terms have been used conterminously in Kenyan courts. In essence, passing-off concerns the wrongful appropriation of the benefit of the reputation or goodwill of another (Sihanya, 2016). In an action for passing off, one must prove that he/she has a legal right over the mark and that there is misrepresentation or deception by the other party which is likely to lead to confusion with the owners good (Bently& Sherman, 2014).

In infringement proceedings, the enquiry is directed at a comparison between the registered marks as such and the allegedly offending mark as such while in passing off proceedings, a comparison is involved between the whole get-up of the goods marketed by the plaintiff and the whole get-up of the defendant's goods *(Adidas SportschuhfabrikenAdiDassler kg v. Harry Wait & Co (PTY) Ltd* 1976 (1) SA 530 (T)). In this regard, the enquiry into alleged infringement is confined within much narrower limits than the inquiry into alleged passing off.

One of the main questions with regards to enforcement of trademarks in Kenya revolves around the question of whether the mark is registered or not. There is a secondary question on the use of the mark. Under section 5 of the Act, there is a requirement for registration for one to be allowed to institute legal proceedings to enforce one's trademark. However, non-registration does not bar the right of action against any individual for passing off. Under sections 15A, this requirement for registration does not extend to well-known, notorious and famous marks.

It is noteworthy that the registration or application for registration of a trade mark does not give one absolute right of exclusive use over the mark. In the recent case of *Solpia Kenya Limited v. Style Industries Limited & Another,* Gikonyo J. stated that as a principle of law, the fact of registration of trade mark *per se* does not entitle the proprietor of trade mark to an automatic injunction to restrain use of the trade mark by a person who has *continuously used* the trade mark prior to, during and after the registration of trade mark. In other words, in the face of a claim of *prior* user of trade mark, and absent other strong and cogent evidence, the fact of registration of trade mark does not invariably constitute a prima facie case with a probability of success in the sense of the case of *Giella v. Cassman Brown* so to entitle one to an interlocutory injunction against such prior user.[1]

Interestingly, the courts have also been reluctant to grant injunctions against potential infringement especially in respect of registered trademarks over the common slogans. In Mathew AshersOchieng, Justice M. A. Warsame held that:

"[T]he use of descriptive expressions or slogans in general use …. cannot entitle the plaintiff to a relief of injunction simply because he has in his possession a registration document issued by a sleeping public officer who is not conscious of the legal consequences of allowing such a registration. The words … widely used and is familiar within the public domain, therefore no party can restrict its use, whether for business or otherwise."

Trade mark dilution in Kenya

Trade mark dilution is an aspect of trade mark infringement which is tied in with the 'advertising function' of trade marks. Trade mark dilution relates to the idea that the purpose of trade mark law should

[1]Gikonyo J., at para 29 in *Solpia Kenya Limited v. Style Industries Limited & Another* [2015] eKLR.

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be to protect the efforts and investments made by the trade mark owner and the independent value (good will value) of the trade mark (Bently& Sherman, 2014).

Dilution is a form of injury or harm that occurs where the advertising value of a trade mark is misappropriated and used in respect of the perpetrator's non-competing goods.Trade mark dilution may take the form of blurring, genericisation or tarnishment (Sihanya, 2016).

Certain aspects of trade mark dilution including blurring and tarnishment are unlawful under Kenya's Trade Mark Act. Section 15A(4) on the protection of well-known marks provides that a trade mark shall not be registered if that trade mark, or an essential part thereof, is likely to impair, interfere with or take unfair advantage of the distinctive character of the well-known trade mark. Section 7(1)(d) of the Act provides that a registered mark should not be used in such a manner likely to cause injury or prejudice to the proprietor or licensee of the trade mark.

On blurring, Bently quotes Schechter who used the example of the reputable and ostentatious brand of Rolls Royce and observes that, "If you allow Rolls-Royce Restaurants, and Rolls-Royce cafeterias, and Rolls-Royce pants and Rolls-Royce candy, in ten years you will not have the Rolls Royce mark anymore."

Tarnishment occurs through unsavoury or unflattering associations, or linking with products of inferior quality the result of which is the trade mark's reputation is diminished through this negative association. Genericisation on the other hand, may be caused by the consumers, proprietors of the mark and even by competitors. An example of genericisation may include the common use of the word 'Omo' owned by Unilever Kenya Ltd to refer to all powder soap: Please sell me 'Omo ya Sunflower'; common use of the word 'Bamba' owned by Safaricom Ltd to refer to all airtime scratch cards: 'Please sell me Bamba fifty ya Airtel'; common use of the word 'Thermos' to refer to all vacuum flasks although initially registered as a brand name. There are no pure legal solutions to dealing with genericisation and proprietors have to adopt other extra-legal approaches such as advertising to deal with the matter (Sihanya, 2016).

Remedies in trade mark infringement

Some of the remedies available to the owner of the trade mark in case of infringement include court action for injunctions, action for damages, erasure or expunction of the infringing mark. Besides the court process, the owner of the trade mark may also adopt some self-help mechanisms including counter advertisements to warn consumers of the infringing marks and sometimes counterfeit products. In case of counterfeit products marketed under infringing marks, the counterfeit products can be destroyed pursuant to a court order authorising such destruction.

The most sought remedy in Kenya with regards to trade mark infringement are injunctions including interlocutory injunction. However, even before institution of such suits, the practice is to issue the alleged infringer with a Cease and Desist letter which also doubles as a demand notice in case a suit is to follow.

A Drive-through the Upcoming Public Private Partnership (PPP) Roads' Project

By Wilkistar Mumbi

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Kenya is set to launch the Public Private Partnerships (PPP) Projects in the road transport sector in September, 2016. The anticipated projects are the construction of the second Nyali Bridge, the Nairobi Southern Bypass, the Nairobi – Nakuru Highway (A104), the Mombasa - Nairobi Highway(A109) and the operation and maintenance of the Nairobi - Thika Highway (A-2).

In preparation, the government has over the years undertaken feasibility studies, secured approvals from the National Treasury and sought advisory opinion on the legal, technical, financial, environment and social aspects over the projects which could last over 30 years. The A104 and A109 are particularly key as they form part of the Northern Corridor Roads Network. Though this launch will be the first PPP

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projects on the road transport network in Kenya, there are several PPP projects in Kenya that have successful been carried out. They include the port of Mombasa grain terminal that was built in 1998; the Malindi Water utility which was built in 1999 on a 5-year management contract; the Jomo Kenyatta International Airport cargo terminal which was built in 1998; the Kenya-Uganda railway concession in 2006, among others.

In the recent past, many African governments including Kenya's have promoted and heavily invested in PPPs. There has been high level political support, development of a legal and regulatory framework, a prioritization and financing of PPP projects. These are pragmatic and strategic approaches which not only encourage the flourishing of the PPP sector but also attract Foreign Direct Investments.

The enactment the Public Private Partnership Act, 2013 and regulations thereof capacitate PPP projects and realization of the double-digit growth rate in line with Vision 2030. It does so by providing a clear process for developing and procuring PPPs, institutional framework and the minimum PPP contractual obligations.

Further, the Act under Section 11 sets up a dedicated PPP Unit, a practice embraced by various countries including Nigeria, Ghana, Senegal and Malawi. The PPP Unit responsible for overall coordination, promotion, and oversight of the implementation of the PPP Program in the country. It boasts PPP expertise. Its establishment as a Special Purpose Unit within the National Treasury gives potential investors greater assurance of proper management.

The Act bestows legal capacity for Contracting Authorities to enter into PPP contracts. Contracting Authorities under the Act include state departments, agencies, state corporations or County Governments intending to have a function undertaken by it performed by the private party. The Kenya National Highways Authority (KeNHA) and the Kenya Urban Roads Authority (KURA) in the case of the roads PPP Projects act jointly as the Contracting Authority.

Risk management under the Act is catered for by the provision of Letters of Support, Guarantees and subsidies, it also provides step-in rights to lenders. There is a provision for compensation to investors if the project is terminated due to political instability, the direct impact of change of laws or any other unavoidable circumstances.

At the moment, KeNHA and KURA desire that the development of the bidding documents and the bidding process itself will appeal to and invite qualified bidders. We can then look forward to procurement by competitive bidding, competitive dialogue with the bidders, regulations for bidders in a consortium, evaluation of the bidders' technical and financial bids amongst other conditions set by the Act for a free, fair and open bidding process.

The major challenges faced in road PPP Projects include land acquisition where there is no land reserved for the road. The other challenges would be interferences in the project by the state and litigation claims. Nevertheless, progress continues in anticipation of the bidding process and in the hope of attaining a bankable, viable and sustainable project.

Who is a Process Server?

From the Process Servers' Desk

A Process Server is a licensed individual who serves court process such as notices and pleadings to a party requiring them to respond in a case filed in a court, government body, or tribunal. Notice is usually provided by serving the party in question with court documents such as Summons, Statements of Claim, Plaints and other court related pleadings. Some documents must be served personally, while others may be served upon a person of legal age (above 18years) or an agent of the defendant at the intended party's residence or place of employment.

Order 5 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya governs the process server's conduct in ensuring service is carried out in a highly effective and appropriate manner. It also lays out the court pleadings or notices that must be served personally to the defendant and those that can be served upon agents or even by registered post.

Requirements

The Judiciary requires process servers to have an O level education certificate, commonly known as Kenya Certificate of Secondary Education (KCSE), with Mean grade of C- or its equivalent with at least a grade of C- or credit passes in Kiswahili, English and Geography. Process servers are also required to have:-

a) A good school leaving certificate with a clean record from the Head Teacher and good reference from previous employer;
b) Computer applications skills;
c) Good oral and written communication skills;

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d) Good interpersonal skills;
e) High degree of integrity.

(http://jobs.judiciary.go.ke/index.php/public_controller/view_each_job_past?job_ref=JSC/PS/1/2015 for more information)

The High Court of Kenya Process Servers' Committee conducts oral and written examinations yearly; to be successful in the examinations, one has to score at least fifty percent (50%). Upon qualification, one is issued with a PROCESS SERVER'S LICENCE which is renewed yearly.

It should be noted that, notwithstanding the requirements for becoming a process server, the job must be performed according to the specific set of guidelines and without breach of law. Indeed personal process server's skills and abilities may help determine whether a case will proceed or not.

Employment Opportunities

Qualified process servers can run private offices or can be employed by courts, firms of Advocates, tribunals, state law offices, commissions, banks' legal departments, auctioneering firms, insurance firms among many other organizations.

Remuneration

Similar to any other profession in Kenya, a process server's salary varies depending on the employer.

Theoretically, the process server can simply visit the party's home, business premises, place of work and hand deliver the relevant pleadings or court documents to the defendant. However, in actual practice the job is normally much more difficult.

First, t**he party concerned must be found**. In many cases, the person's last known address is not his or her current address and therefore, the act of locating someone who may not want to be found, can indeed be time consuming and frustrating. Pleadings or Notices, for instance summons and orders, must be served to the party in person.

While many parties are respectful of the legal system and will accept the documents without protest, this is never guaranteed. Some would-be recipients have perfect knowledge of the laws of process serving, and will try their best to avoid being served. It is critical that the process server should have at least as much legal knowledge of the system as the would-be recipient has.

It is vital to note that if the papers are served incorrectly, the would-be defendant has a ground to challenge the improper service in court and he or she can even absent himself or herself from appearing in court thus frustrating the case. Moreover, such absenteeism and applications to challenge service waste precious time of the advocates as well as of the judges/tribunals.

Sometimes process service becomes a cat and mouse game. In that regard, the process server may be forced to follow the intended recipient, employ diversionary tactics and/ or use any other legal methods to ensure that service is effected.

Once the documents are served upon the intended persons or corporations, an Affidavit of Service, also called a Proof of Service/Return of Service, is commissioned or notarized before filing in court. It is later given to the party who requested the service.

A process servers' job is generally a simple job but can be made complex or even dangerous by circumstances or having little knowledge and/ or information of the due process of law compared to that of the intended recipient/defendant.

Process Service is especially made dangerous when land is involved. This is due to the fact that it is generally known and appreciated in Kenya that land is an emotive issue thus when injunctive orders are issued by court and a process server attempts to effect service upon the affected party, the said party interprets the same to mean either:

a) his land has been taken away; or
b) the process server is a party to the suit; or
c) the process server can assist him 'escape' the suit and defeat justice.

In brief

Most process servers offer various legal support services including:-

- Filing of Documents in court and tribunals.
- Payment of relevant court fees.
- Verification of documents and pleadings to be filed in courts to ensure compliance of rules and directions.
- Files retrievals and fixing matters for hearing.

A process server should maintain confidentiality and should possess some of the following qualities and attributes: reliability, honesty, self motivation and good grooming.

Do not avoid us!

Many people have a perception or belief that they can avoid a lawsuit by evading a process server. After all, a lawsuit cannot officially commence until the defendant has been given proper

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notice…unfortunately, many people are wrong. The spirit of the law knows these tricks and has made provisions for those difficult defendants. Just because one avoids a process server, it does not mean that he or she cannot be sued and served. It simply means the Plaintiff has to opt for other modes of service that can prove expensive and damaging to evading person's reputation. These involve: newspaper advertisements, registered post and notices on doors and gates.

-----be expectant, I'm serving you soon...

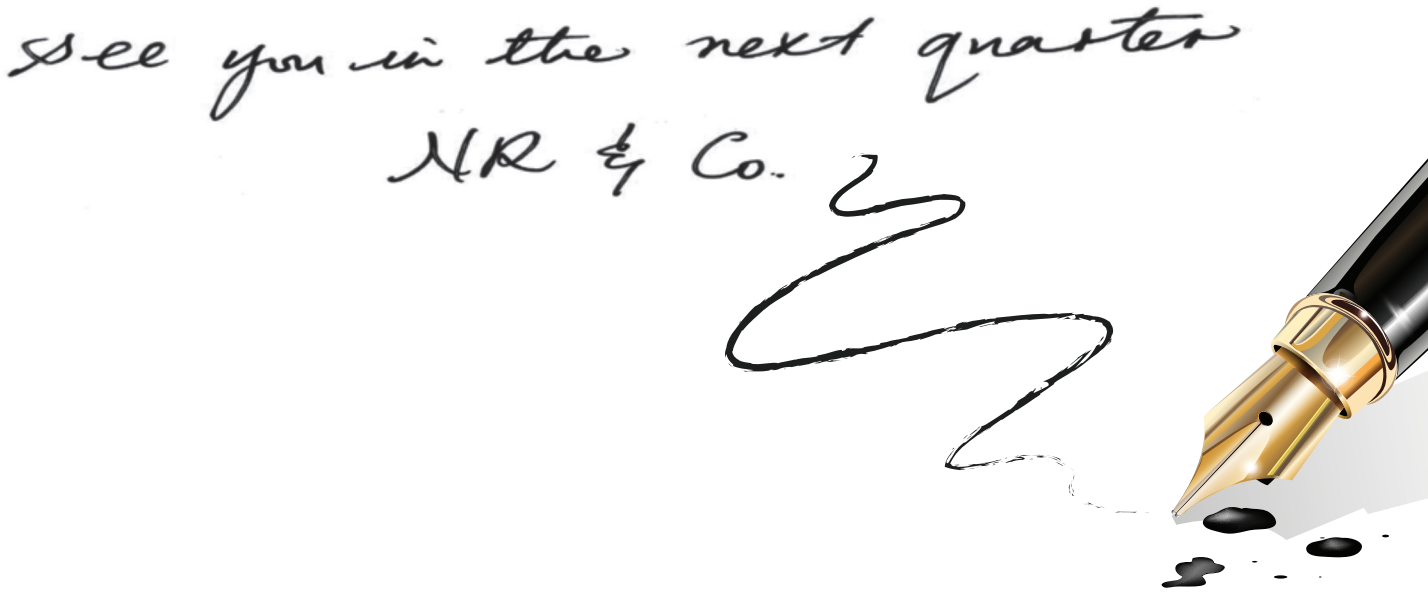
Author, Njoroge Regeru & Company Advocates, Process Servers' Desk

(www.destinyprivateinvestigation.com)

APPOINTMENT OF LAND CONTROL BOARD MEMBERS

The Cabinet Secretary for Lands and Physical Planning, via Gazette Notice No. 6324 of 2016, appointed Land Control Members for the following Counties: (1) Nandi County, (2) Laikipia County, (3) Bungoma County, (4) Busia County, (5) Mombasa County, and (6) Kiambu County. The appointment is effective from 1st June, 2016 and the Board Members will hold office for three consecutive years. Please note that the Gazette Notice supersedes all other notices published with regard to the aforementioned Counties.

Wisdom is a shelter as money is a shelter, but the advantage of knowledge is this: Wisdom preserves those who have it.



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