Q4 -2016

NR&Co Quarterly ...Legal Briefs

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KARIBU!

Opening word from the editor

E. Nduta Munene

This issue kicks off with a great start! The year is drawing to an end and the much anticipated Christmas season is upon us as we continue to lay focus on the importance of protecting the fundamental rights and freedoms outlined in our Constitution. The NR & Co. team is also growing with the entry of a new Associate in our Corporate, Commercial & Conveyancing department, Mr. Robert Kaniu Gitonga.

We begin with the enactment of the Banking Amendment Act, 2016, which caused quite a stir in the Banking Sector by effecting a cap on the rate of interest charged for loans and fixing the minimum rate of interest that banking institutions must pay on deposits held, among other things.

In the local film and production sector, the Kenya Film and Classification Board's (KFCB) published the Film, Stage Plays and Publications Bill 2016. The questions that arose from the Bill from various stakeholders were: is it wise to grant a single body such sweeping powers to censor and control each and every form of media? Would it not be dangerous to allow Internet Service Providers to breach the privacy of all of its users and to monitor their activities? The above questions and more are covered in the Legislative Updates section of this Newsletter.

This time round our Contributor's Platform draws your attention to the Life Span of a Court Case and what the expectations of parties should be once a matter is filed in court. It also makes an introduction to the Code of Corporate Governance Practices for Issuers of Securities to the Public. We also take a look into the HIV & AIDS Tribunal's structure and functionality. The final contributor then discusses the various types of Company Resolutions under the new Companies Act, 2015.

On Corporate Social Responsibility, we appreciate the firm representatives who took part in this year's Nairobi Hospice 10 Km Charity Walk as well as the Stan-Chart Marathon.

Lastly, the end of the year brings no greater joy than the opportunity to express seasons greetings and good wishes. We appreciate working with every single one of our client's and partners and we hope that the holidays and the coming year will bring you happiness and success.

Enjoy our Q4 Legal Briefs.

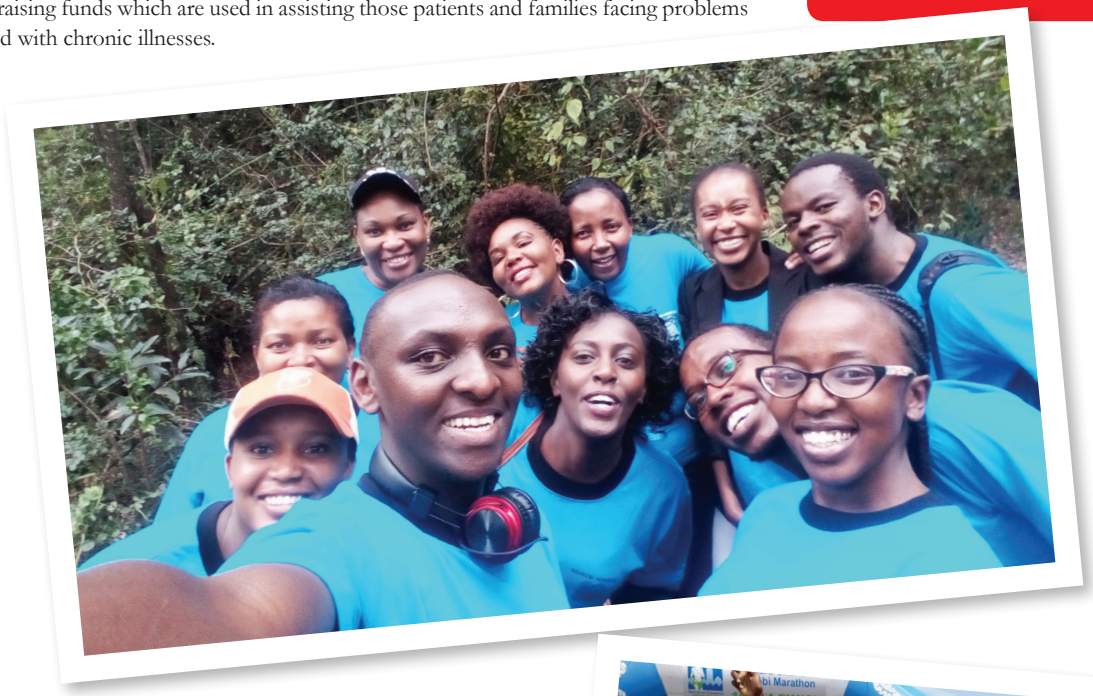
FIRM HIGHLIGHTS

Introducing Robert Kaniu Gitonga….

The newest member in our team, Robert, is an advocate of the High Court of Kenya having pursued an LLM in Commercial Law in the University of Cape Town, South Africa. He is an Associate in the firm's Corporate Commercial and Conveyancing Department and specializes in: Commercial Law, Real Estate and Conveyancing Law, Banking and Securities, Corporate Law; Competition Law and Corporate Governance. During his free time, he likes to play Rugby and Golf.

In other news……..

Fifteen members of the Firm took part in the NAIROBI HOSPICE ANNUAL CHARITY 10 KM WALK within Ngong Road Forest on 24th September, 2016. The walk was geared towards raising funds which are used in assisting those patients and families facing problems associated with chronic illnesses.



The Firm members also took part in the STANDARD CHARTERED MARATHON, 2016 and they do have something to show for it

In the end we are a family, it doesn't matter who we are, where we come from, what mistakes we have made, so long as we come together with God on our side, nothing can stand against us.

LEGISLATIVE UPDATES

The last quarter has seen the public debate various Bills that have caused quite a stir. Receiving most of the public attention was the Banking (Amendment) Bill which was signed into law and continues to raise public debates to-date. The Films, Stage Plays and Publications Bill, 2016 thereafter aroused much agitation. Still on sensitive matters in the Kenyan environment, two bills on land have been passed-exempting spousal consent as an overriding objective-making this segment vital.

1. THE ACCESS TO INFORMATION ACT, 2016

The Access to Information Act, 2016 came into force on 21st September, 2016. The Act gives effect to Article 35 of the Constitution of Kenya, 2010 and confers on the Commission on Administrative Justice the oversight and enforcement functions with regards to release of any information sought from any public and/or private body. The Commission on Administrative Justice now has the power to review the decision of any public or private body not to release information where a request has been made (section 14 of the Act). Please also note that the right to access to information may be limited in the instance when the release of any information may infringe professional confidentiality as recognized in law or by rules of a registered association of a profession. *(http://www.kenyalaw.org/lex//actview.xql?actid=No.%2031%20of%202016 for more information)*

2. THE BANKING (AMENDMENT) ACT, 2016

The Banking (Amendment) Act, 2016 came into force on 14th September, 2016. The Act amended the Banking Act to include section 33B which provides that the maximum interest rate chargeable to a credit facility in Kenya shall be no more than four per cent, the base rate set and published by the Central Bank of Kenya. The section also provides that a bank or financial institution shall set the minimum interest rate granted on a deposit held in interest earning in Kenya to at least seventy per cent, the base rate set and published by the Central Bank of Kenya. *(http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2016/Banking_Amendment_Act2016.pdf for more information)*

3. THE FINANCE ACT, 2016

The Finance Act, 2016 under section 1 provides that various sections of the Act come into force on diverse dates of the 19th January, 2016, 9th June, 2016, 1st July, 2016 and 1st January, 2017. It is important to note that the date of assent of the Act was 13th September, 2016 and therefore the sections that have commencement dates prior to September are retrospective in nature. The various sections and their respective commencement dates are:

a) Sections 2, 3, 5, 7, 9, 10, 11, 12, 13, 14, 15, 18, 19, 22, 23, 24, 25, 28, 29, 30, 31, 32, 34, 36, 54 and 67 of the Act, effectively amend the Income Tax Act, Chapter 470 of the Laws of Kenya; the Excise Duty Act, Act No. 23 of 2015; the Value Added Tax Act, Act No. 35 of 2013; the Tax Procedures Act, Act No. 29 of 2015; the Alcoholic Drinks Control Act, Act No. 4 of 2010 and the Special Economic Zones Act, Act No. 16 of 2015. These sections are retrospective and are noted to have effectively commenced on 9th June, 2016.

b) Sections 39(a) of the Act which amends section 37 of the Tax Procedure Act, Act No. 29 of 2015 and section 41 of the Act which amends section 42 of the Tax Procedure Act, are retrospective and are noted to have commenced on 19th January, 2016.

c) Sections 16, 20, 21, 26, 29, 33 and 37 of the Act amend the Income Tax Act, the Excise Duty Act, the Value Added Tax Act and the Tax Procedures Act, 2015. These sections are retrospective and are noted to have commenced on 1st July, 2016.

d) All other sections of the Act effectively come into force on 1st January, 2017.

Also note that the Act deletes section 975 (2) (b) of the Companies Act, 2015 which required that at least thirty percent of a company's shareholding be held by Kenyan citizens by birth.
(http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2016/FinanceAct_No38of2016.pdf for more information)

4. THE COMMUNITY LAND ACT, 2016

The Community Land Act, 2016 came into force on 21st September, 2016. The Act provides that a registered community may upon application and with approval of the members of the registered community, allocate part of its registered community land to a member or a group of members of the community for exclusive use and occupation for such period as the registered community shall determine. The Act also provides that community land may be converted to private land either by transfer or allocation by the registered community subject to the ratification of the community assembly.
(http://www.kenyalaw.org/lex//actview.xql?actid=No.%2027%20of%202016 for more information)

5. THE LAND LAWS (AMENDMENT) ACT

The Act was passed into law pursuant to the Constitutional exempting for Parliament to prescribe minimum and maximum land holding acreage in respect of private land and giving powers to the National Land Commission to initiate investigations into present or historical land injustices.

The Act also makes several amendments to the Land Act, Land Registration Act and the National Land Commission Act. In addition, it provides for several matters which had not been addressed by the preceding land laws among them: the procedure of land conversion from freehold to leasehold, clarifications on the roles between the National Land Commission and the Ministry of Land, pre-emptive rights of leasehold owners

provided they are Kenyan citizens. The Act also introduced alternative dispute resolutions for various land disputes and has shifted the timelines for the registration of instruments conferring a disposition/ dealing in land and that of banks exercising their statutory power of sale.

On land holding acreage the prescription will be subjected to guidelines on land holdings among married couples and family members, holding by non-citizens and holding across different zones by one person.

However, though this law was assented into law on 31st August, 2016 following a petition filed, the High Court issued injunctive orders staying its commencement. *(http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2016/LandLaws_Amendment_Act_28of2016.pdf for more information)*

6. FILMS, STAGE PLAYS AND PUBLICATIONS BILL, 2016

The Bill seeks to provide for the regulation of the creation, exhibition and distribution of films, for the classification of broadcast content, online outdoor advertisements, print publications, stage plays, for the registration of cinemas and theatres and for purposes incidental thereto and connected therewith.

The Bill effectively empowers the Kenya Film Classification Board ("the Board") to, inter alia:

a) Monitor and enforce compliance with the provisions of the Bill;
b) Classify films, broadcast and online content, stage performances, gaming applications, publications and related promotional materials;
c) Impose age restrictions on viewership; and
d) Register local and international film makers, agents, distributors and exhibitors.

If the Bill becomes law, every internet service provider must-

a) Ensure that:-
i) Exhibitors and distributors who use their platforms are registered in accordance with the provisions of the Act;
ii) The content to be exhibited or distributed through their platforms is classified according in accordance with the Act; and
iii) All programs being streamed through their platforms comply with the classification guidelines of the Board.
b) Take reasonable steps to prevent the use of their services for hosting or distributing pornography, radicalization materials, glamorization of use of drugs and alcohol, hate speech and demining any religion and community

c) Report all persons maintaining or hosting or distributing all content reasonably suspected to be in violation of the Act.

The Bill also proposes to repeal the Film and Stage Performances Act, Chapter 222 of the Laws of Kenya. *(http://kfcb.co.ke/wp-content/uploads/2016/10/DRAFT-BILL-KFCB-21-7-Draft-10.pdf for more information)*

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CASE HIGHLIGHTS

In the last quarter, there were numerous court decisions including those touching on the extent of freezing orders and the jurisdiction of Magistrate Courts. Below is a summary of the same:-

1. BROWN FIELD DEVELOPERS LIMITED VERSUS BANKING FRAUD INVESTIGATIONS UNIT & 4 OTHERS [2016] eKLR

The High Court held in this case, inter alia, that "……it was unnecessary to obtain a blanket freezing order which had apparently no limits yet the Respondents themselves had focused on only an aspect of the Petitioner's funds…….In so far as the order to attach and freeze the subject bank account continues for an indefinite period of time and in so far as it was not necessary for the entire account for purposes of the investigations, I find that the Petitioner right to property which is not absolute has been violated and continues to be violated." Accordingly, any freezing orders sought over a person's funds should not cover the entire bank account but rather the funds in questions. *(http://kenyalaw.org/caselaw/cases/view/122791/index.php?id=3479 for more information)*

2. KENYA COMMERCIAL BANK LTD VERSUS BRYCESON N. KUBOKA [2016] eKLR

This was an appeal from the decision of a trial court. In the plaint filed in the trial court, the Respondent pleaded that the subject Bank had without proof of any wrongdoing frozen the Respondents account and thereby occasioned to the Respondent loss and damage. The Respondent sought an order for an account of all transactions and payments through the account as well as loss of income and costs. To that accusation the Bank asserted that it had the right to debit the plaintiff's account on discovery of the fact that some receipts or vouchers were invalid, or if the cardholder makes claim against the bank.

The court stated inter alia, that:

"My understanding of the bank-customer relationship is that so long as there is credit balance on the account the customer has the right to access and withdraw it at will unless where there is a contract to the contrary. As it were the bank merely keeps the money safe on behalf of the customer. It has no right or indeed any claim over the property in the money. The money simply doesn't belong to it to deal with it as it pleases. That to me is all the trial court found in the judgment challenged before me."

Banks are not allowed to freeze or to debit the account of a customer without a court order or in the absence of a contract that enables them to do so.

The High Court further reiterated the trial court's position that Banks will be held liable to compensate their customers in cases where they wrongfully freeze the accounts of their clients. However, these lost earnings have to be claimed and proven strictly as special damages. In cases where these are not so claimed or proven, the court may grant these as general damages. *(http://kenyalaw.org/caselaw/cases/view/126972/ for more information)*

3. MALINDI LAW SOCIETY VERSUS THE ATTORNEY GENERAL & OTHERS, CONSITUTIONAL PETITION NO 3 OF 2016 MALINDI (Unreported)

This was a Constitutional Petition wherein the Petitioner contended that the Statute Law (Miscellaneous Amendments) Act of 2015, the Magistrates' Court Act of 2015 and the High Court (Organization and Administration) Act of 2015 were in conflict with the Constitution of Kenya, 2010. The Petitioner argued that both the Statute Law (Miscellaneous Amendments) Act of 2015 and the Magistrates' Court Act of 2015 gave jurisdiction to magistrates to hear disputes relating to environment and land as well as employment and labour disputes contrary to Article 166 of the Constitution. Consequently, the Petitioner argued that once a judge is appointed and sworn to a specific superior court, such a judge cannot have power to exercise jurisdiction reserved to any other superior court by the Constitution. The Petitioner further submitted that no person or authority has power to assign a judge jurisdiction not conferred by the Constitution or statutes to a court which he or she was not appointed. The court held:

"My understanding of the bank-customer relationship is that so long as there is credit balance on the account the customer has the right to access and withdraw it at will unless where there is a contract to the contrary. As it were the bank merely keeps the money safe on behalf of the customer. It has no right or indeed any claim over the property in the money. The money simply doesn't belong to it to deal with it as it pleases. That to me is all the trial court found in the judgment challenged before me."

i) Section 2 of the Statute Law (Miscellaneous Amendments) Act 2015:
   a) So far as it relates to the transfer of judges from the High Court to courts of equal status and vice versa, is inconsistent with both Articles 165 (5) and 162(2) of the Constitution and therefore null and void; and
   b) In relation to the jurisdiction of the subordinate courts in respect of matters relating to the environment and use, occupation of and title to land is inconsistent with Article 162(2) of the Constitution, and therefore null and void.

ii) Sections 13(4) and 36(3) of the High Court (Organization and Administration) Act, 2015 are not unconstitutional.

iii) Sections 7(3), 8(d) and 26(3) and (4) of the Environment and Land Court Act are unconstitutional and therefore null and void.

iv) Sections 9(2) and (b) of the Magistrates' Court Act, 2015 are unconstitutional and therefore null and void.

v) Section 10(6) of the Magistrates' Court Act, 2015 (in relation to the Court's power to punish for contempt in the face of the Court) is not unconstitutional.

vi) An order of Certiorari do issue to bring to this court for the purposes of being quashed, Gazette Notices Nos. 1472 dated the 1st day of March, 2016 and published on the 11th day of March, 2016 and 1745 dated the 14th day of March, 2016 and published on the 18th day of March, 2016.

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INTERLUDE.....

In some cases the judges feel distinctly uncomfortable with a witness or an accused person. An old woman had a charge of drunkenness dismissed and was full of gratitude. "I thought", she said, "you wouldn't be hard on me, your worship. I know how often a kind heart beats behind an ugly face."

When Chief Justice Parsons, the American Judge, was a leading advocate, he was engaged in a heavy case which gave rise to many encounters between himself and the opposing leader, Mr. Sullivan. During Parsons' submission, Sullivan picked up Parson's large black hat, and wrote with a piece of chalk upon it: "This is the hat of a d-d rascal." The lawyers began to titter, and the inscription soon caught the eye of Parsons, who at once said, "May it please your Honour, I crave the protection of the Court. Brother Sullivan has been stealing my hat, and writing his own name upon it."

The Art of a Lawyer: Humour in Law

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The Life-Span of a Court Case

By Elizabeth Ngonde
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Often, parties institute Court proceedings expecting a smooth sail and pre-determined results within a specified period of time. When engaging an advocate to either institute or defend a case, most parties want an assurance that the case will be determined in his/her favor within the shortest time possible.

A litigation lawyer relies on the information and documents availed by the client in respect of the dispute. It is on the basis of the information and documents, a lawyer formulates the preliminary opinion on the dispute, advises the client on what the law says about his/her dispute, the possible outcome in court as well as the challenges that may be encountered. Thereafter, it is important to discuss the client's expectation and agree on a strategy so as to manage the said expectations given the known challenges in litigation as discussed hereunder. At this stage, the lawyer can initiate negotiations towards an out of court settlement, if the client is amenable to the same.

It is not possible for any lawyer to know with exactitude the time it will take to have a case determined conclusively. However, depending on experience of the lawyer and the nature of the case, it is possible to give an estimation of the time it may take for a case to be concluded. The only exception is where there is specific provision in the law setting time for determination of certain kind of disputes or where the directions have been given to have a particular dispute concluded within a set period of time. For example the disputes under the Election Act can no longer last the entire term.

Most parties are disappointed when they do not get instantaneous justice. It follows that a lawyer's most tricky responsibility is to manage a client's expectations. This can be achieved by informing a client at the point of instruction that courts cannot legitimately look at a matter on one assumption alone, favoring one party and ignoring the other party. This is because of each party's entitlement to a fair hearing. The right to fair hearing is protected under the Constitution of Kenya. Every accused person is presumed innocent until proven guilty. Article 50 of the Constitution of Kenya provides that each party must be accorded a fair hearing. The elements of fair trial include the right –

(a) to be presumed innocent until the contrary is proven;
(b) to be informed of the charge, with sufficient detail to answer it;
(c) to have adequate time and facilities to prepare a defence;
(d) to have a trial begin and conclude without unreasonable delay;
(e) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to evidence;
(f) to adduce and challenge evidence; and
(g) to refuse to give self-incriminating evidence.

It means that all decisions of court have to meet procedural hearing whose components are to hear all parties so that the decision of the court is based on all information. Each party has the right to call witnesses and cross- examine the witnesses called by the other party. This ensures that parties contradict or correct all allegations and adduce evidence in support of their case.

In some cases, the nature of the dispute mutates with time as the parties to the case give evidence and produce documents relied upon in support or in defense of the case. The changes in a case are made through amendment to pleadings and production of additional documents. Generally, amendments to pleadings will be allowed at any stage of the case. It is therefore important for a party to avail to his or her lawyer, all the documents and information relating to the dispute at the preliminary stage regardless of whether the said information supports the party's case or is incriminating. However, this does not preclude production of documents or information at a later stage if the said information or documents becomes available after the filing of the case.

Apart from the need to accord everyone the right to a fair hearing, there are other reasons why court cases cannot be concluded instantaneous. These include-

(i) unavailability of witnesses to testify when the matter is set down for hearing for whatever reasons;
(ii) default on the counsel part to meet a deadline set for a pre-trial or delay in filing requisite documents;
(iii) ill health of either the party, party's witness, the advocate or the judicial officer;
(iv) transfer of the judicial officer necessitating to have the case be heard afresh by another judicial officer or have proceedings typed before the case can continue;
(v) inadequate preparation for the case by advocates or parties causing adjournments;

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Reforms made by the Judiciary

To address delay attributable to the parties or their advocates, the law, in particular the Civil Procedure Act and Rules impose penalties such as fines, adjournment fees and in some cases, a defaulting party is barred from adducing evidence if that party has caused incessant adjournments.

In the past 5 years, the judiciary has taken radical measures to ensure that justice is not only easily accessible but has had hearing of cases expedited. To achieve the foregoing, the law now makes it the responsibility of the parties and their advocates to participate in the processes of the Court and to comply with the directions and orders of the Court.

Some of the transformation witnessed in the judiciary include; - increase of the number of judicial officers, decentralization of the Court of Appeal, increase of the number of the High Court stations and magistrates' courts, use of suitable technology and increase of mobile courts.

The establishment of specialized courts such as the Land and Environment Court, Employment and Labour Relations Courts and creation of additional divisions of the High Court has also played a role in reduction of case backlog.

The Service weeks conducted by the judicial officers has also seen expedited conclusion of cases. The Service weeks have prompted parties to take requisite steps towards expedited conclusion of cases. Early on, shortage of judicial officers and congestion of their diaries was largely blamed for delay in conclusion of court cases. However, the ball has now been thrown into the hands of the parties and their lawyers.

The case management conferences and pre-trial conference which are been conducted in all courts will see conclusion of cases within a short time but only if parties are ready and willing to comply with directions and orders given by the court.

Moreover, the Court of Appeal has now embarked on clearing backlog that will see appeals brought to update by December, 2017. Where there is lax on the part of the parties, the courts are issuing notices to dismiss the cases.

The Family Division of the High Court has been marking old succession matters as settled if parties have not taken action to settle the matter for a period of time.

Conclusion

With the introduction of Court mandated Alternative Dispute Resolution such as Arbitration, Conciliation and Mediation, the message to the litigants is loud and clear, that it is upon the parties and their advocates to bring disputes to speedier conclusion. Whereas the lawyers play a major role in concluding court cases in the shortest time possible, parties also have a role in ensuring that they follow up their advocates and get to know the different stages of their as well as what is required of them as parties.

Introduction to the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015

By Robert Kaniu
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On 4th March 2016, through gazette notice number 1420, the Capital Markets Authority (CMA) issued the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 ("the 2015 Code"). The 2015 Code replaces the 2002 Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya ("2002 Guidelines").

The 2015 Code is applicable to listed companies or unlisted companies that issue securities to the public. The purpose of the Code is to "provide the minimum standards required from shareholders, directors, chief executive officers and management of a listed company or an unlisted company that issues securities to the public, so as to promote high standards of conduct as well as ensure that they exercise their duties and responsibilities with clarity, assurance and effectiveness".

The 2015 Code is now in effect and is supposed to be implemented within a year from the date of gazettement. Compliance with the 2015 Code shall be through the board of directors disclosing a statement of policy on good governance and the status of application of the Code at the end of every year in its annual report.

The Need for Good Corporate Governance Practice among Listed Companies

Listed companies are significant economic drivers in Kenya. According to Ng'inja L in her Dissertation, 'Factors Affecting the Performance of Companies Listed on the Nairobi Securities Exchange' (September, 2015), The University of Reading, listed

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companies are part of the capital markets ecosystem that allow for the sufficient transfer of funds from those that save money to those that need it. These funds are channeled through the stock market, to allow the listed companies to produce goods and services which considerably contribute to the economy's Growth Domestic Product (GDP).

According to Du Plessis, McConvill and Bagaric (2005), in their book *Principles of Contemporary Corporate Governance Cambrid*ge University Press, good corporate governance is imperative since it reduces the likelihood of fraud and enrichment of the people in control of the company at the expense of the company. Good corporate governance also increases wealth creation by improving the performance of openly managed and financially sound companies. Lastly, well governed companies can attract institutional investors and can allow companies in emerging markets to 'become a magnet for global capital'.

According to Paul Muthaura, the Chief Executive of the Capital Markets Authority, the enactment of the Code of 2015 first "will bolster the efforts that the industry continues to put in place to ensure that Kenya is able to attract local and foreign interest and investment". Secondly, he believes that the reforms leading to the enactment of the Code "were informed by the need to respond to the changing business environment and the desire to align local standards to global best practice to promote institutional strengthening for listed companies'.

The 2015 Code introduces three features that align it with the best practice in corporate governance: the "apply or explain" approach, stakeholder inclusivity and good corporate citizenship.

The "Apply or Explain" approach

The "apply or explain" approach incorporates a principle based approach which jettisons the rules based approach, also known as the "comply or explain" approach, in the 2002 Guidelines. The "apply or explain" approach utilizes a compliance structure based on principles, recommendations and guidelines where the principles inform the recommendations for compliance and the guidelines are intended to assist companies in understanding and implementing recommendations. Issuers of securities to the public are required to explain in their annual reports how they have applied the recommendations.

The "apply or explain" approach was informed by the discourse on the need for corporate governance. As stated by *Du Plessis, McConvill and Bagaric,* the debate is "whether corporate governance comes at the expense of focusing on what is really important to the Company and its shareholders- the bottom line! Whether providing attention to 'conformance' in terms of adhering comes at the expense of performance? Is implementing good corporate governance practices a necessary ingredient for corporate success?"

The "comply or explain" approach was a "one size fits all" view involving heavy regulation of companies which did not allow companies the opportunity to implement practices which are best for their own interest. On the other hand the "apply or explain" principles allows the board of directors flexibility in applying a recommendation under the 2015 Code, in the particular circumstances be in the best interests of the Company and still achieve the specific principle.

However, listed companies must adhere to the minimum standards as provided in the Capital Markets (Securities) (Public Offers, Listing and Disclosures) (Amendment) Regulations, 2016 which include establishing audit, risk management, remuneration committees, professional qualifications of company secretaries and auditors, transparent policies and procedures for remuneration, dispute resolution.

Stakeholder Inclusivity

The 2015 Code aligns to the stakeholder inclusivity theory that differs from the shareholder primacy theory in the 2002 Guidelines. Shareholder primacy views the company as a legal instrument for shareholders to maximize their own interest which is investment returns. Stakeholder inclusivity views the corporation as a locus in relation to wider external stakeholders' interests as opposed to merely shareholders' wealth.

A stakeholder inclusivity approach allow a company to consider the legitimate interest and expectation of stakeholders other than shareholders on the basis that it is in the best interest of the company and not merely as an instrument to serve the interest of the company.

The 2015 Code defines a stakeholder as "a party that has an interest in an enterprise or project and primary stakeholders in a typical company including its investors, employees, customers and suppliers whereas other stakeholders include the community, government and trade associations". Chapter 4 of the 2015 Code addresses stakeholder relations. The overview to Chapter 4 evinces stakeholder inclusivity by providing that "effective management of stakeholders will positively impact the company's achievement of its strategy and long-term growth." Under Chapter 4 of the 2015 Code, Stakeholders are considered

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to be "any group who can affect, or be affected by the Company, its decision and its reputation." Further, principle 4.1 of the 2015 Code provides that the Board of Directors shall "proactively manage the relationship with stakeholders".

Good Corporate Citizenship

Chapter 5 of the 2015 Code recognizes that "good corporate citizenship is the establishment of ethical relationship between the company and the society in which it operates. As good corporate citizens of the societies in which they do business, companies have, apart from rights, legal and moral obligations in respect of their social and natural environments. The company as a good corporate citizen should protect, enhance and invest in the well-being of society and the natural ecology."

Principle 5.1 provides that the Board shall set standards of ethical behaviour required of its members, senior executives and all employees and ensure observance of those standards. In setting the standards, the Board shall have regard to the national standards on ethical conduct by public entities.

Good corporate citizenship conflates the social, environment and economic place of a company in the society. It views a company as a person who should operate in a fair manner within the society and environment. Good corporate also allows effective leadership characterized by ethical values.

Conclusion

The 2015 Code is a welcomed attempt at engaging the tension between compliance and substantive commitment to implementing good corporate governance. The 2015 Code seeks to bring out good corporate governance that will allow ethical leadership for the benefit of the company and non-shareholder stakeholders. The best arbiter will be time in determining the efficiency of the 2015 Code.

The HIV and AIDS Tribunal

By Ruth Regeru
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The HIV and AIDS Tribunal ("the Tribunal") in Kenya is the first of its kind in the world. It is established by Section 25 of the HIV and AIDS Prevention and Control Act, 2006 ("the Act") with the mandate to adjudicate cases relating to violations of HIV-related human rights. Its overall goal is to reduce stigma and discrimination towards persons living with HIV & AIDS.

Background

Ambrose Rachier revealed the following background information with regard to the Tribunal in an interview with UNAIDS on 23 February, 2012:

On or about November 1999, President Daniel Arap Moi (as he then was) declared HIV and AIDS a national disaster which declaration led to the establishment of the National AIDS Control Council. A taskforce on legal issues relating to HIV and AIDS was also instituted by the then Attorney General, Amos Wako and was chaired by Ambrose Rachier.

The task force was mandated to 'provide legal guidance on what laws were necessary to facilitate HIV prevention, treatment and care.' In July 2002, the task force submitted a report indicating three issues to be addressed: stigma and discrimination, access to HIV prevention, treatment and care services and access to justice for people living with and/or affected by HIV & AIDS. The report further recommended a HIV & AIDS-specific legislation and establishment of an Employment Equity Tribunal for HIV & AIDS.

Thereafter the drafting of the HIV & AIDS Prevention and Control Bill began. The Bill was tabled in Parliament in September 2003, adopted in December 2006 and assented to in December 2006 by President Mwai Kibaki (as he then was). With regard to the Employment Equity Tribunal, Parliament expanded the said Tribunal's mandate on the basis that discrimination against HIV and AIDS affected and infected persons extends beyond matters of employment. It was on that basis that the HIV Equity Tribunal (now the HIV and AIDS Tribunal) was created.

Through Legal Notice No. 34 of 2009, the Minister of State for Special Programmes appointed 30th March, 2009, as the date on which the Act, other than sections 14,

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18, 22, 24 and 39 thereof would come into operation. Later on, through Legal Notice No. 180 of 2010, the Minister of State for Special Programmes appointed 1st December, 2010, as the commencement date of sections 14, 18, 22 and 24 of the Act thus essentially bringing all the provisions of the Act into effect. Later on, in June 2011, the Tribunal members were sworn in.

Composition of the Tribunal

Section 25 of the Act stipulates that the members of the Tribunal are appointed by the Attorney General and are seven (7) in total. Such members include:

a) A chairman who is an advocate of the High Court of not less than seven (7) years standing;
b) Two (2) advocates of the High Court of not less than five (5)years standing;
c) Two (2) medical practitioners recognized by the Medical Practitioners and Dentists Board as specialists under the Medical Practitioners and Dentists Act (Cap. 253); and
d) Two (2) persons having such specialized skill or knowledge necessary for the discharge of the functions of the Tribunal.

It is worthy to note that Section 25 (2) of the Act attempts to address gender balance in requiring at least two (2) of the persons referred to in (a), (b) and (c) above to be women. This however amounts to a possible ratio of 2: 7 of women to men. Thus section 25 (2) of the Act, though well-meant, does not expressly meet the required standard under Article 27 (7) of the Constitution, 2010 which stipulates that not more than two-thirds of members of elective and appointive bodies shall be of the same gender.

On the other hand, the quorum for a meeting of the Tribunal is the chairman and four (4) other members. Additionally, all matters before the Tribunal are decided by the votes of a majority of the members present.

Section 25 (6) stipulates that the office of a member of the Tribunal shall become vacant:

a) at the expiration of three (3) years from the date of his or her appointment;
b) if he or she ceases by any reason to be such advocate or medical practitioner as referred to in Section 25 (1);
c) if he or she is removed from membership of the Tribunal by the Attorney-General for failure to discharge the functions of his or her Office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour; and
d) if he or she resigns the office of member of the Tribunal.

Currently, the Tribunal is chaired by Jotham Arwa.

The Organizational Structure of the Tribunal

Courtesy of HIV & AIDS Tribunal, 2013 in the HIV & AIDS Tribunal Strategic Plan 2013 – 2017 at p. 18

Jurisdiction of the Tribunal

Section 26 of the Act stipulates that the Tribunal has jurisdiction to hear and determine:

a) complaints arising out of any breach of the provisions of the Act; and
b) any matter or appeal as may be made to it pursuant to the provisions of the Act.

The provisions referred to in (a) above include section 12 which provides a penalty for unsafe procedures or practices that cause another person to be infected with HIV. Section 13 of the Act further stipulates that no person shall compel another to undergo a HIV test be it with regard to employment, marriage, admission into any educational institution, entry into or travel out of the country or the provision of healthcare and/or insurance cover.

Section 20, 21, 22 and 23 further provide for privacy guidelines with regard to records, confidentiality of records, disclosure of information and penalty for breach of confidentiality respectively.

In that regard, the Tribunal has jurisdiction to hear and determine complaints arising out of breach of any of the above-mentioned sections of the Act.

With regard to section 26 (b) of the Act, section 35 (5) and (6) provide for the Tribunal's appellate jurisdiction in the instance a person is aggrieved by a determination of the Commissioner of Insurance as to what is reasonable for the purposes of exclusion from credit and insurance services; such person may appeal within thirty (30) days to the Tribunal and the decision of the Tribunal is final.

The Tribunal can also perform other functions conferred upon it by the Act

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or any other written law. Its jurisdiction however does not extend to criminal matters.

Powers of the Tribunal

The Tribunal has the power of a subordinate court to: summon witnesses, take evidence upon oath or affirmation, call for the production of books and other documents, summon expert evidence, award the costs of any proceedings before it and direct that costs be taxed in accordance with any scale prescribed for suits in the High Court or to award a specific sum as costs.

Practice and Procedure of the Tribunal

Section 30 of the Act stipulates that 'the Chief Justice may in consultation with the chairman of the Tribunal, and by Notice in the Gazette make rules governing the practice and procedure of the Tribunal having regard to the objectives of the Act.

Such rules are however yet to be made and as such, the Tribunal has adopted a rather flexible approach in exercising its jurisdiction.

Accordingly, complaints are made through drafting of a simple letter addressed to the Tribunal at no cost to the Complainant (Eba P., 2016). Moreover any interested party may be represented before the Tribunal by an advocate or by any other person whom the Tribunal may, in its discretion, admit to be heard on behalf of the party (Section 27 (8) of the Act).

Ambrose Rachier confirmed that the Tribunal has established a registry that receives complaints in writing. The complaints are then reviewed and assigned having regard to the substance in issue. The Tribunal in its 2013 -2017 Strategic Plan noted that in a period of two years from November 2011, the Tribunal received two hundred and thirty two (232) cases of which seventy-three (73) were referred to normal courts and other institutions whilst the rest have already been heard. It further notes that judgment has been delivered in 21% of the cases (HIV & AIDS Tribunal, 2013).

Hearings are conducted in camera and the complainants have the option to withhold names and other personal details in the Tribunal papers (Eba P., 2016).

Section 27 (7) of the Act provides that upon lodging of a claim, the Tribunal may confirm, set aside or vary the order or decision in question or make such other order as may be appropriate in the circumstances. Such other order is described to include an order for the payment of damages or for the maintenance of the status quo of any matter until the determination of the complaint or appeal.

The Tribunal may also make an order directing that specific steps be taken to stop the discriminatory practice complained of or requiring the respondent to make regular progress reports to the Tribunal regarding the implementation of the Tribunal's order.

Where there is disobedience to give evidence, section 28 of the Act provides for a fine not exceeding Kenya Shillings Fifteen Thousand (Kshs. 15,000.00) or to imprisonment for a term not exceeding two (2) years, or to both such fine and imprisonment.

Moreover, where a party is awarded damages or costs by the Tribunal, it is issued a certificate upon application, stating the amount of the damages or costs. The successful party may then file the certificate in the High Court and upon such filing, the certificate is deemed to be a decree of the High Court.

Conclusion

The Tribunal has a unique aspect in being the only HIV & AIDS Tribunal in the entire world. Its constitution ensures cohesion, expertise and unity of purpose. The Tribunal is also highly flexible compared to courts to ensure complainants access justice in the most effective and efficient manner.

However, the Tribunal faces various challenges such as: inadequate physical infrastructure, inadequate human resources, lack of operational rules of procedure and low public awareness. The challenges thus have to be dealt with for the Tribunal to reach its utmost potential. *(http://www.unaids.org/en/resources/presscentre/featurestories/2012/february/20120223akenya, http://news.bbc.co.uk/2/hi/africa/538071.stm and https://www.hhrjournal.org/2016/02/the-hiv-and-aids-tribunal-ofkenya-an-effective-mechanism-for-the-enforcement-of-hiv-related-human-rights/ for more information)*

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Company Resolutions

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Resolutions are matters that are raised at a meeting for decision and put to the vote by the shareholders. Under the Companies Act, 2015 a company resolution of a private company may be passed either as a written resolution or at a meeting of the members. For public companies, resolutions must be passed at a meeting of the members.

An important difference between voting on a written resolution and voting at a meeting is that, in the case of a meeting, the percentage figures refer to those who vote (whether in person or in proxy) whereas in the case of a written resolution the percentage figures refer to those who are entitled to vote. Therefore, a written resolution is passed by a majority of not less than seventy-five percent if it is passed by members representing not less than seventy-five percent of the total voting rights of eligible members.

Written resolutions may pass decisions requiring either a special or ordinary resolution. A Special Resolution is passed by a majority of members or a class of members, not less than seventy-five percent whereas an ordinary resolution is one supported by a simple majority of those entitled to vote.

Types of Resolutions

• Special Resolution

For a Special Resolution to be approved by shareholders it must be supported by at least 75% of the voting rights exercised on the resolution. It is passed for the most important decisions relating to the company's affairs. Section 262 (3) provides they can be passed either by the directors or members of the company. To pass a Special Resolution, the company must first give notice of the intention to pass the resolution at least twenty-eight days before the meeting at which it is moved.

New instances for passing of Special Resolutions under the Companies Act 2015 include:

a) Granting authority for the allotment of securities by the directors without or subject to modified restriction;
b) Seeking approval for certain off-market purchases by a company of its own shares; and
c) When seeking approval for payment out of capital for the redemption or purchase of its shares.

• Opt in/out Resolutions

Opt in or Opt out Resolutions are a new introduction under the Companies Act, 2015. They qualify as special resolutions but are used for takeovers. A company may opt in for the purposes of a takeover. The company may also revoke an opting-in resolution by a further special resolution called an opting-out resolution.

• Ordinary Resolutions

For an ordinary resolution to be approved by the shareholders, it must be supported by more than 50% of the voting rights exercised on the resolution. They are passed to:

a) remove a director from office before the end of the director's period of office (Section 139 refers to such a resolution as an ordinary resolution); or
b) remove an auditor before, the end of the auditor's term of office.

For these ordinary resolutions, the Act requires that the resolution is accompanied by a special notice. The company must then lodge a copy of the resolutions with the Registrar for registration within fourteen days after the resolution is passed. Failure to lodge the resolution is an offence and the Act provides that ach officer of the company on conviction will be liable to a fine not exceeding twenty thousand shillings for each such offence.

• Extraordinary Resolutions

Under Cap 485, companies could pass extraordinary resolutions for all general meetings other than annual general meetings. With the scraping of the requirement for annual general meetings for private companies, the new Companies Act does not address extraordinary resolutions.

Meetings

Under the repealed Act, a company could hold the following types of meetings: (1) statutory, (2) Annual General Meeting (AGM), (3) Extra-Ordinary General Meeting and (4) Class Meetings. The new Act does not make it compulsory for the private company to hold annual general meetings. However, a public company is required to hold its AGM within six months of the end of its financial year.

The Act provides that a general meeting may be called by the directors, on their

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own motion or if compelled to do so by the members, the members, a class of members, or the auditor general in specific instances.

When passing a resolution to remove the auditor, the company must immediately serve the special notice to the auditor who may then make written representations to the company and request the company to notify the representations to the company's members. It is at this instance that the auditor can call a meeting of the members.

The Act also empowers the Court to make an order requiring a meeting to be convened, held and conducted in any manner the Court considers appropriate, either on its own initiative, or on the application of a director of the company or of a member of the company who would be entitled to vote at the meeting.

In convening a general meeting, a private company must give at least twenty-one days' notice while a public company, must give at least twenty-one days' notice to members for annual general meetings and at least fourteen days notice to members for any other general meeting. The notice can be done either in hard copy, in electronic form or via website. The previous practice of issuing notices of meetings by newspaper advertisement is not catered for in the new Act.

A general meeting may be convened by shorter notice than that otherwise required if it is agreed by the members.

The notice must indicate the time and date of the meeting, the place of the meeting and the general nature of the business to be dealt with at the meeting. It must be communicated to each member of the company and each director.

Circulation of Resolutions

The Directors Resolution must be sent or delivered to members of the company as soon as practicable after it has received request from members representing not less than the prerequisite percentage of the total voting rights of all members entitled to vote on the resolution. The prerequisite percentage is five per cent under the Act or a lower percentage if specified under the company's articles. The Resolution sent out must have attached to it, or enclosed, a statement informing the member how to signify agreement to the resolution and of the date by which the resolution is required to be passed if it is not to lapse.

A resolution proposed by members must also circulate to every eligible member of the company a copy of the resolution and a copy of an accompanying statement. The members who propose the circulation are to meet the cost of circulating the resolution unless the company resolves otherwise. The resolution is passed when the required majority of eligible members have signified their agreement to the resolution.

Validity of resolutions

A resolution of members of a company is validly passed at a general meeting if (1) notice of the meeting and of the resolution is given; and (2) the meeting is held and conducted, in accordance with this Act and the company's articles. The resolutions must not be void, defaming of a person, or frivolous. All resolutions must be registered with the registrar of companies 14 days after they have been passed.

Conclusion

On meetings and Company resolutions, the new Act has not sought to overturn the tables. The 2015 has upheld most of the practices under the old Act, embracing the use of technology and including shareholders in decision making when it comes to takeovers. The provisions on meetings and resolutions have been given as the basic core regulations and the Act allows for members to opt for regulations under the companies' Articles of Association.

Happy Holidays!

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Notes