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# NR&CoQuarterly ...Legal Briefs

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KARIBU!

## Editor's Note

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Dear Reader, welcome to our last Newsletter this year. As another good year draws to an end, we are grateful for our association with you. This quarter's legislative update gives insight into new laws passed recently. In particular, laws dealing with the government's fiscal planning, competition law, protection of data and copyright in Kenya.

Under the Law Global Corner, we share some of the key measures adopted by the Country. We observe Kenya's commitment to its international obligations by participating in the Rome Statute Assembly of State Parties 2019 meeting and assent to the Yaounde Declaration, 2019 signifying Kenya's commitment to fighting illegal financial flows and tax evasion.

We highlight certain recent court decisions dealing with arbitration as a dispute resolution mechanism in matrimonial disputes, the right of appeal to Courts in arbitration proceedings and the mandatory requirement for oral hearings before termination of employment.

In the contributor's platform, in the wake of a pivotal Court decision, I share my insights on the legal implications of an insurance company advancing credit commercially as do banks. We also discuss matters tax in two other articles. The first, in recognition of Africa's fast rising digital space, discusses the difficulties faced by tax authorities in Africa in the taxation of the digital economy and attempts to offer solutions. The second dissects the intricacies of withholding tax and withholding value added tax in Kenya.

Enjoy the read and happy holidays!

THE FIRM

## LEGISLATIVE UPDATES

In this section, we highlight new laws relating to fiscal planning, competition law, data protection and copyright protection in Kenya.

### The Finance Act, 2019

The Act amends numerous Statutes relating to various taxes and duties and other incidental matters. The key amendments include:

**A. The Income Tax Act**

The Income Tax Act introduces tax chargeable against income earned through a digital marketplace ("a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means").

Businesses whose turnover does not exceed or is not expected to exceed five million shillings (Kshs.5,000,000.00) during any year of income will, starting January 2020, be liable to remit both turnover tax and presumptive tax. Nonetheless, a person who would otherwise be liable to pay turnover tax may notify the Commissioner in writing electing not to be subject to this provision. Turnover tax shall not apply to: rental income; management or professional or training fees; and income of incorporated companies or any income that is subject to a final withholding tax.

The provision for exemption from income tax has been widened to include, any gain or loss incurred during a transfer of property that is necessitated by incorporation, recapitalization, acquisition, amalgamation, separation, dissolution or similar restructuring of a corporate entity. Further the exemption should be:

a) A legal or regulatory requirement;
b) As a result of a directive or compulsory acquisition by the government;
c) An internal restructuring within a group which does not involve transfer of property to a third party; and/or
d) In the public interest and approved by the Cabinet Secretary.

**B.The Value Added Tax Act**

Just as in the Income Tax Act, supplies made through a digital marketplace shall now be subject to VAT.

**C. The Tax Procedures Act**

There is introduced a new provision requiring the Commissioner to refrain from recovering penalties or interest from a company that lists on the growth segment of a securities exchange in Kenya.

This applies in respect to any year of income prior to the date of listing, provided that the company makes a full disclosure of its past income, assets and liabilities for the two years immediately preceding the date of listing as well as the principal tax being paid in full.

This provision shall not apply in respect of any tax where the person liable to pay tax:

a) Has been assessed in respect of the tax or any matter relating to the tax; or
b) Is under audit or investigation in respect of the undisclosed income or any matter relating to the undisclosed income

If a company delists from the exchange in which it is listed before expiry of five years from the date of listing, it shall be assessed for all taxes, penalties or interest for the years it was in operation prior to listing. However, this provision shall cease to apply after three years of its commencement.

The Act also introduces a penalty to withholding tax agents who fail to remit such tax to the Commissioner. Penalties and interest thereon shall apply to the collection and recovery of the unremitted tax as if it were tax due and payable by that agent. The due date for such payment shall be the date on which the amount of tax should have been remitted to the Commissioner.

The Act authorizes the Commissioner to make a determination on objections raised with his office within sixty (60) days from the date of receipt of either: the notice of objection; or any further information the Commissioner may require from the tax payer. In the event that the Commissioner fails to make the determination within the sixty (60) days, the objection shall be deemed to be allowed.

**D. The Banking Act (Cap. 488)**

Due to Parliament's failure to reach the two-thirds voting threshold needed to oust the President's reservations on the capping rate, Section 33B of the Act stands repealed.

This eradicates the cap on interest charged on loans. Consequently, this re-conveys Central Bank's power to regulate on the interest rate charged on credit as part of its monetary policies. However, any agreement or arrangement to borrow or lend which was entered into or varied prior the repeal of Section 33B, shall continue to be in force on such terms, including interest rates for the duration specified in the agreement or arrangement.

**The Competition (Amendment) Act, 2019**

The Act seeks to curtail the abuse of bargaining or buyer power by an undertaking or a group of undertakings as purchasers of products or services in Kenya such as; delayed payment by a buyer without justifiable reasons in breach of agreed terms of payment, unilateral or threat to termination of a commercial contract without notice or on an unreasonable short notice, refusal to accept or return any goods without a justifiable reason, transfer of costs or risk to a supplier for promotion of goods or services, transfer of commercial risk meant to be borne by the buyer; demand for unfavorable terms to the suppliers, reduction of prices below competitive level and bidding up of inputs by the buyer for purposes of excluding competitors from the market.

The Act mandates the Competition Authority of Kenya (CAK) to undertake investigations in relation to any complaints amounting to abuse of buyer power. The CAK is also required to establish a code of practice in consultation with the relevant stakeholders, government agencies and the Attorney General, which CAK shall be responsible to monitor its compliance.

Further, the Act requires all buyers and suppliers within a specific sector to develop a binding code of practice. Upon which breach of such code of practice shall be escalated to the Authority for determination.

LEGISLATIVE UPDATES

Lastly the Act emphasizes that an agreement between the buyers and suppliers shall include as a minimum requirement the following: terms of payment; the payment date; interest rate payable on late payment; the conditions for termination and variation of the contract with reasonable notice; and a disputes resolution mechanism.

## The Data Protection Act, 2019

The Act is a long awaited legislative instrument meant to assist Kenya in seizing opportunities arising from digital transformation and aligning with international frameworks of data protection.

It applies to both natural and legal persons; public authorities, agencies and other bodies; and to both a resident and non-resident data controller and a data processor who processes personal data for subjects located in Kenya. This makes the provisions of this Act extra-territorial in Kenya.

The provisions of the Act are not applicable where: personal data is collected by an individual in the course of a purely personal or house hold activity; data is necessary for national security or public interest; disclosure is required by or under any written law or by an order of the court; personal data collected for research; processing is undertaken by a person for the publication of literary or artistic material; or data controller reasonably believes that publication would be in the public interest.

The principles under the Act mandate that data should be processed in a manner that: upholds the data subject's right to privacy; is lawful; for explicit, specified and legitimate purpose; limited to the purpose of which it is collected; accurate and up to date; kept in a form that identifies the data subjects for no longer than is necessary; and not transferred outside Kenya unless as permitted under the Act.

The Act establishes the Office of the Data Protection Commissioner, to be headed by a Data Commissioner whose functions include establishment and maintenance of a register of data controllers and processors, exercise oversight on data processing operations and promote self-regulation of data controllers and data processors.

The Act, in view of public interest, restricts the processing of sensitive personal data to a very limited set of circumstances. Notably the Act, provides that personal data relating to a data subject's health may only be processed by or under the responsibility of a health care provider or by a person subject to the obligation of professional secrecy under any law.

The Act only allows transfer of personal data outside Kenya subject to the approval of the Data Commissioner upon proof of existence of appropriate safeguards for the data being transferred.

Similarly, Data Controllers are mandated by the Act to employ appropriate security measures to prevent unauthorized access, disclosure or loss of data collected by them. Further, in the event of breach, they are required to report it to the Data Commissioner within 72 hours and to the affected data subjects without undue delay.

## The Copyright (Amendment) Act No. 20 of 2019

The Copyright (Amendment) Act became operational on 2nd October, 2019. The Amendment Act introduces several constructive changes to the Copyright Act, 2001 (the Main Act) and the protection of intellectual property in the country. The Amendment Act envisages the registration of copyright by, inter alia, the author or owner of a work. The Kenyan Copyright Board (KECOBO) is required to maintain a register of all works, which is prima facie proof of copyright.

The Amendment Act introduces an artist's resale royalty right, which will apply for as long as the copyright subsists in the work of art. It asserts that artists' resale right is inalienable, prescribes the value of royalties payable, as well as the various circumstances in which the right falls away. For instance, it does not apply in commercial resale of artwork for charity purposes.

Also introduced is the definition of Internet Service Providers (ISPs). Provision is made for the issuance of take-down Notices as one of the mechanisms for the removal of infringing content, to be accompanied by an affidavit or declaration of ownership of the copyright by the owner/complainant. An aggrieved party may also apply for an injunction before the High Court of Kenya.

The Amendment Act provides for the establishment of a Copyright Tribunal by the Chief Justice. The jurisdiction of the Tribunal will include appeals from KECOBO, disputes arising from collective management organizations and those concerning the registration of copyright.

Following criticism over misappropriation of member's revenue collected by the societies, the Kenya Revenue Authority has been tasked with the collection of royalties on behalf of these organizations. Also noteworthy is the introduction of additional fair use exclusion or defence to copyright infringement where work has been adapted to accommodate the blind or visually impaired persons.

The Amendment Act also stipulates that assignments of copyright may only be deemed valid if recorded with KECOBO and a certificate of recordal duly issued by the board.

## The Anti-Corruption and Economic Crimes (Amendment) Bill, 2019

The principal object of the Bill is to amend the Anti-Corruption and Economics Crimes Act to hold managers, Chief Executive Officers, Directors of public institutions personally liable for losses incurred by an institution as a result of corruption. Further, it bars anyone convicted under the Act from holding office as a public or state officer.

## CASE HIGHLIGHTS

In this section, we highlight cases touching on the right of appeal to the Courts in Arbitration proceedings; Use of alternative dispute resolution mechanisms in matrimonial cases; and fair termination in employment.

### 1. Council of Governors & 47 others vs. Attorney General & 6 others [2019] eKLR

In this case, the Supreme Court of Kenya was tasked to considered whether it had jurisdiction to render an Advisory Opinion on issues which were pending before the High Court.

During the hearing, it emerged that the issues in question formed part of the questions pending determination in 2 other High Court Petitions. In its Ruling (in the affirmative), the Supreme Court noted that for the Supreme Court to render an Advisory Opinion on matters pending before the High Court, the Court must be persuaded that the issues raised are of great public importance and require urgent resolution through an Advisory Opinion. Noting that the issues before it related to the realization of a devolved governance scheme which raises a variety of structural, management and operational challenges unbeknown to traditional dispute settlement, the Court was convinced that the issues raised could not await the normal appeal mechanism so as to reach the Supreme Court for resolution.

### 2. TSJ vs. SHSR [2019] eKLR

The crux of the dispute in this Appeal was the applicability of arbitration to matters of personal law: divorce, division of matrimonial property, and custody and maintenance of children.

In the facts, the Court noted that the parties belonged to the Shia Imami Ismailia Muslim faith. They got married in accordance with the principles of that faith, the Islamic law and rites, and were duly issued with a marriage form certifying the marriage by the H.H. The Aga Khan Shia Imami Ismailia Provincial Council. On 3rd November 2010, the husband (the respondent) applied to the H.H. The Aga Khan Shia Imami Ismailia National Conciliation and Arbitration Board, Nairobi (the Arbitration Board) for prayers that the wife (the appellant) should leave the matrimonial home on grounds of irreconcilable differences. In the alternative, he applied for the dissolution of the marriage.

In September, 2012, the Arbitration Board issued an arbitral award in relation to spousal and child maintenance and the dissolution of the marriage. However, the husband failed to comply with the award. Dissatisfied, the wife lodged this appeal. The Court of Appeal in ruling in favour of the wife made the following findings: firstly, that the Constitution of Kenya, 2010 [Articles 152(2)(c) and 189] has extended the application of arbitration beyond the traditional commercial sphere; secondly, that in view of Section 72 of the Marriage Act the power to dissolve an Islamic Marriage can reside outside of the courts; and lastly that the marriage contract between parties having duly provided for arbitration made the resultant award valid within the meaning of section 3 of the Arbitration Act.

### 3. Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited & Another (Petition No. 12 of 2016)

The Appeal before the Supreme Court originated against the Ruling of the Court of Appeal on ground of lack of a right of appeal to the Court of Appeal following a decision made under section 35 of the Arbitration Act, 1995.

In deciding the Appeal, the Supreme Court noted that it was necessitated by the long-standing debate on the extent of the Court of Appeal's jurisdiction in arbitration matters and in ensuring that there is clarity of law on that issue. The Supreme Court isolated two main issues for determination, that is, whether sections 10 and 35 of the Arbitration Act, 1995 contravene a party's right to access justice under Article 48, 50(1) and 164(3) of the Constitution and are therefore unconstitutional to that extent. The second issue was whether there is a right of appeal to the Court of Appeal following a decision by the High Court under section 35 of the Arbitration Act, 1995.

With regard to the first issue, the Supreme Court held that Article 164(3) of the Constitution does not confer a right of appeal but rather only particularizes the confines of the powers of the Court of Appeal by delimiting the extent to which a litigant can approach it. As such, statutory limitations on appeals do not necessarily infringe on the right to access justice. Accordingly, Courts may still exercise their discretion to refuse to assume jurisdiction where there is a statutory limit on appeals, even where a right of appeal exists.

In relation to the question on whether a right of appeal to the Court of Appeal exists under section 35 of the Arbitration Act, the Supreme Court noted that section 35 of the Arbitration Act does not expressly bar further appeals to the Court of Appeal. Further, based on a comparative analysis of the Canadian, Singaporean and English jurisprudence, the Court prescribed a narrow jurisdiction in instances where the decision is so grave, so manifestly wrong and completely closes the door of justice to a party. Notably, the Court stipulated that the jurisdiction must be so sparingly exercised and only exercised in the clearest of cases.

### 4. Kenya Revenue Authority –vs- Reuwel Waithaka Gitahi & 2 others [2019] eKLR

This was an appeal challenging the Employment and Labour Relations Court decision which declared reinstatement of the three respondents to their former ranks as they were unfairly terminated. The labour court further ordered payment of their salaries, bonuses and allowances within 30 days.

The Court of Appeal noted the issues for determination to include, inter alia, ***a) whether the summary dismissal of the respondents was wrongful or substantively justified and (b) whether the dismissal was procedurally fair.***

At the hearing of the Appeal, it emerged that the Respondents were not allowed to appear with another employee at the hearings, and were not supplied with the necessary documents to mount their defenses and appeals, despite requests made, and a court order issued for supply of the documents.

In its judgment, the Court held that although the employer proved that there were reasonable and sufficient grounds for the termination of their employment services, the process undertaken fell short of the requirement for procedural fairness.

The court also noted that fairness of a hearing is not only determined solely by its oral nature, but also through an exchange of letters.

The Court in interpreting section 41 of the Employment Act, held that four elements must thus be discernible for the procedure to pass:- (i) an explanation of the grounds of termination in a language understood by the employee; (ii) the reason for which the employer is considering termination; (iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made; (iv) hearing and considering any representations made by the employee and the person chosen by the employee." Accordingly, the Court of Appeal held that oral hearings as envisaged by Article 41 of the Employment Act are mandatory, in order to meet the test for procedural fairness.

LAW GLOBAL


## KENYAN MPs HALT ONLINE LAND TRANSACTIONS

The National Assembly Committee on Delegated Legislation has annulled the Land Registration (Electronic Land Transactions) Regulations 2019 which required that all transactions relating to land, that is, searches, application for registration of documents, transfer of ownership or lease, caution and withdrawal of caution and issuance of consent and valuation requests be done online. The Committee noted that the Regulations were in contravention of Sections 5 and 5A of the Statutory Instruments Act and did not adhere to the requirements of public participation.

*(For more details; http://www.parliament.go.ke/sites/default/files/2019-1/Report%20on%20Electronic%20Land%20Transactions%20Regulations.pdf)*

## KENYA SIGNS THE YAOUNDÉ DECLARATION ON ILLICIT FINANCIAL FLOWS AND INTERNATIONAL TAX EVASION

Kenya has signed the Yaoundé Declaration of 2017 on international tax evasion and illicit financial flows (IFFs). Kenya is the 27th country to sign the Yaoundé Declaration, an initiative of the African Union, which calls for tax transparency and international cooperation in tackling tax evasion. It estimated that Africa loses $50 to $60 billion each year through IFFs. IFFs take different forms such as tax evasion, corruption and money laundering. By signing into law the Declaration, Kenya has affirmed its commitment to fighting IFFs through improved international tax cooperation.

*(For more detail; https://www.oecd.org/tax/transparency/yaounde-declaration.pdf)*

## ASSEMBLY OF STATE PARTIES, 2019

State parties to the Rome Statute convened in The Hague from 2nd to 7th December for the 18th annual session of the Assembly of State Parties (ASP). The ASP is the legislative and management oversight body of the ICC composed of representatives of member states to the Rome Statute. During this year's session, the ASP discussed the functioning of the International Criminal Court (ICC), the upcoming ICC judicial and prosecutor elections, victims' rights, state cooperation, amendments to the Statute and the 2020 ICC Budget. Kenya was represented by H.E Mr. Lawrence Lenayapa, Ambassador of Kenya to the Kingdom of Netherlands. Mr. Lenayapa commented on the Office of the Prosecutor's (OTP) report on the Kenyan cases at the ICC and decried the decision of the OTP to adopt a target based, as opposed to evidence driven approach in bringing charges against the accused. Mr. Lenayapa also called for transparency in election of a new holder of the OTP. He commended the current Prosecutor for her efforts to investigate allegations of misconduct against staff of OTP. In his conclusion, Mr. Lenayapa affirmed Kenya's commitment in strengthening the Rome Statute System.

*(For more details; https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/GD.KEN.3.12.pdf)*

## UN CLIMATE CHANGE CONFERENCE [Conference of Parties (COP) 25]

In the wake of typhoons, cyclones and wild fires around the world, the UN has spearheaded efforts to reduce greenhouse gas emissions and counter the devastating effects of climate change. The UN Climate Change Conference, which took place from 2nd to 13th December in Madrid, aims at ensuring the operationalization of the Paris Climate Change Agreement. In his opening speech to the delegates, the UN Secretary General H. E Mr. Antonio Guterres applauded the European Investment Bank for its decision to stop funding fossil fuel projects by the end of 2021. Mr. Guterres called upon governments, businesses and civil societies to work towards achieving their set standards under the Paris Agreement.

*(For more details; https://unfccc.int/sites/default/files/resource/UN%20Secretary-General%27s%20remarks%20at%20opening%20ceremony%20of%20UN%20Climate%20Change%20Conference%20COP25.pdf)*

## GAMBIA SUES MYANMAR AT THE INTERNATIONAL COURT OF JUSTICE

On 11th November, 2019, the Republic of the Gambia instituted proceedings against the Republic of the Union of Myanmar for acts of genocide against members of the Rohingya group living in the Rakhine State of Myanmar. The suit seeks to compel Myanmar to uphold its international obligation under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The case is still ongoing and it will be interesting to see whether the Court will hold the government of Myanmar (also known as Burma) responsible for the crime of genocide.

*(For more details; https://www.icj-cij.org/en/case/178 )*

CONTRIBUTORS' PLATFORM

# The place of insurance companies in the lending business

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Recently the Court of Appeal in *George Lalla Oduor v Cannon Assurance (K) Ltd [2016] Civil Appeal No. 51 of 2017* (unreported) held that insurance companies must be regulated by the Banking Act Cap 488 of Laws of Kenya, for them to effectively create an enforceable charge over immovable property. This means that the insurer has to obtain a license to carry out financial business for purposes of advancing credit, as mandated by the Banking Act.

Before the repeal of the interest rate cap, a number of individuals and small medium enterprises found difficulties in acquiring credit from banks and other lending institutions, as they were flagged as high risk clients due to their low financial income and unrealizable assets. As a result, large corporations had access to loans from the conventional financial institutions. In the long run this created new business for existing non-bank financial institutions and lead to a blooming rise of digital lending apps.

In order to understand the capacity of insurers in offering credit, it is important to analyze the specific regulatory framework that governs the business of an insurance company. The Insurance Act Cap 487 Laws of Kenya (**"the Act"**) is the main legal frame work upon which the business of an insurance company is regulated. Subsequently, the Insurance Regulations, 1986 (**"the Regulations"**) are the guidelines set to ensure insurers effectively run their business by satisfying the provisions of the Act. The Insurance Regulatory Authority (**"IRA"**) is the body mandated to oversee and supervise the operations of an insurance company and ensuring its compliance with the laws of Kenya.

## What is the meaning of Insurance Business?

First, the Act establishes the relevant business that a registered insurance company may engage in, including and not limited to issuing performance bonds and contracts of guarantee in return for payment of one or more premiums. Additionally, insurers are not to engage in any business that relates to benefits provided by a society to its members or their dependents as well as undertake any business that results to a bailment relationship.

It is noticeable under the Act, that the definition of insurance business does not include nor exclude the business of advancing credit as part of insurance business. This rather creates a loophole on the scope of an insurer's business with regard to lending.

However, under section 2 of the Banking Act, financial business has been defined as:

*(a) the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice; and*

*(b) the employing of money held on deposit or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money;*

Equally, the same section defines a financial institution as: "A company, other than a bank, which carries on, or proposes to carry on, *financial business* and includes any other company which the Minister may, by notice in the Gazette, declare to be a financial institution for the purposes of this Act."

Similarly, the Black's Law Dictionary defines financial institution as: "A business, organization, or other entity *that manages money,* credit, or capital, such as a bank, credit union, savings and loan association, securities broker or dealer, pawnbroker, *or investment company.*

It is worth noting that, an insurance company is viewed as a financial institution in the commercial sector. This is by the mere fact that an insurance company (insurer) accepts money from the public (insured) and manages the same in order to indemnify the insured against liability from the occurrence of some specified event. Likewise, an insurer is also noted to be an investment company through its various types of long term insurance policies, which include and not limited to life insurance policy.

Accordingly, the business world has also referred to an insurer as a non-bank financial institution that provides protection of assets for both individuals and corporations, hence contributing significantly in their investments and economic growth. It is from the foregoing definitions that an insurance company may be presumed to be a financial institution.

CONTRIBUTORS' PLATFORM

## Investment Policy of Insurers

Section 50 of the Act requires an insurer to submit to IRA an investment policy, which is in line with the guidelines of its constitution and articles of association. In the said policy the insurer is required to outline the mode it shall undertake while investing in its assets.

Subsequently, the Insurance (Investment Management) Guideline, 2017 (**"the Guidelines"**) provides certain objectives that should be adhered to by insurers. One of the key objectives, enables insurers to diversify their insurance business. This is achieved through investing into a wide range of instruments and returns whose aim is to generate high income, in order for the insurers to spread their risks as well as taking into account the associated risks.

This wide diversification of an insurer's commercial activity, may be interpreted to allow insurers to engage in the business of advancing loans or credit facilities. This finding was also adopted by the trial Court in the case of **George Lalla Oduor v Cannon Assurance (K) Ltd [2016] eKLR.** However, the Appellate Court held a contrary opinion by rejecting that the Insurance Act authorized an insurer to engage in mortgage business, thus the resulting charge was unenforceable.

Contrastingly, the Court of Appeal in **Jubilee Insurance Company Limited v Kishor Ramji Hirani & 2 others [2019] eKLR** took cognizance of the fact that the appellant was a legitimate lender for having created a charge over the suit property as security for the loan advanced to the respondents. Although, the Court did not consider whether an insurer is authorized to engage in advancing loans, it held that there was a legitimate charge created by Jubilee Insurance over the suit property as security for the advanced loan. These conflicting decisions from the same Court have caused a stir on the position of insurance companies in the lending business. Hence proving that the law is not settled and thus calls for an Application to the Supreme Court to have a defined decision.

## Restrictions and Prohibited Business of an Insurer

With respect to the insurer's shareholders, employees or their family members, the insurer is restricted from advancing loans against its own shares as well as permitting any outstanding advances unless adequate security over a life policy assurance is provided. This means that the insurer is allowed by law to make credit advances as long as it adheres to the laid out limitations. Nonetheless, this provision is limited to the insurer's employees and silent on accommodating other members of the public.

Additionally, an insurer registered under the Act is allowed to carry out business according to its objects that are lodged with IRA. This provides a leeway for an insurer to include in its articles of association as being in the business of advancing credit facilities along with carrying out insurance business. The same is in line with section 28 (1) of the Companies Act, 2015 which stipulates that a company's objects unless restricted, they are deemed to be unrestricted. Thus an insurer may increase the various choices of investment it wishes to undertake in order for it to make high returns.

## Credit and Mortgage Insurance

Insurers are also in the business of undertaking liability of an individual's loan in the event that they default in payment. This is provided for in the form of group credit insurance.

Similarly, in a mortgage life insurance a mortgagee (now chargee) is entitled to charge a property and maintain the policy in case the mortgagor (now chargor) neglects to do so. The standard practice has been that a long term insurance policy such as the life insurance policy acts as a sufficient security in such arrangements. Once the chargor dies without having satisfied the charge, the chargee of the policy is entitled to reimbursement for premiums paid during the life tenancy of the chargor.

## Conclusion

In view of the foregoing, it is evident that the law is not settled on whether an insurer is authorized to advance loans to the general public and create an enforceable charge against real property. This is also noted by few reported cases, which evidently portray the uncertainty of the law and that lending by an insurer though not common in Kenya, it is still practiced.

Comparatively, a huge structural change has also been noted in the United Kingdom, where The Telegraph reported that, six (6) out of sixteen (16) lenders issuing loans of more than One Hundred Million Pounds (£ 100m) are insurance companies. Hence insurers are stepping in as lenders to replace the UK and European banks that have traditionally been the power houses in financing the property sector. The same can be said of Kenya through the interpretation of the law and borrowing from international standard practice, we can now acknowledge that insurance companies are legitimate lenders for purposes of carrying out their diversified insurance business.

# Taxation of the digital economy in Africa; an uphill task

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The challenge of taxing the digital economy is a global one and is not unique to Africa. In fact, the problem largely emanates from globalization. Joseph Stiglitz in his book *Making globalization work* aptly summarizes the challenge of globalization as below:

*"The current process of globalization is generating unbalanced outcomes, both between and within countries. Wealth is being created, but too many people and countries are not sharing in its benefits. They also have little or no voice in shaping the process. Seen through the eyes of the vast majority of women and men, globalization has not met their simple and legitimate aspirations for decent jobs, and a better future for their children…these global imbalances are morally unacceptable and politically unsustainable."*

## What is a digital economy?

IGI Global (an international publishing company specializing in research publications in information technology and information technology management) defines the digital economy as 'a digital business predominantly based on e-business and e-commerce aimed at e-goods and e-services production.'

The OECD, The Tax Challenges Arising from Digitalization – Interim Report 16 March 2018), OECD/G20 Inclusive Framework on BEPS identifies an emerging business model which comprises of partial to total use of the digital space. Further the model is characterized by remote presence, reliance on intangibles and data and heavy user participation. These business are found across diverse sectors not limited to finance, the service and products industries. Examples of businesses with extensively digitalized business models and heavy presence in Africa include Alibaba, Facebook and Jumia.

## Challenges faced in taxing the digital economy in Africa

The digital economy by its very nature is often made up of one or several enterprises spread across multiple jurisdictions. The arising question in taxation of such enterprises is therefore often: how and in what jurisdiction should multinational enterprises (MNEs) be taxed? For instance, what is the nexus of taxation? What methodology should be used to allocate profits to this nexus? What methodology for tax collections should be employed?

## How can tax accountability be measured?

The OECD released an interim report on digitization's tax challenges, building on an earlier Base erosion and profit shifting (BASE) report under Action 1. Despite the in-depth discussion of taxation of the digital economy therein, the report fails to make solid taxation recommendations. The report also notes that a majority of the represented 113 countries resisted the adoption of interim measures on account of the fact that such measures could run counter to international consensus instituting precedence that may be difficult to depart from thereafter. The table below represents the various forms of digital tax introduced in some jurisdictions:

## Implications of the key trends on taxation of the digital economy

Disclosed implications are two fold; the first being in respect to State tax agencies and the second to businesses. Firstly, there exists a lack of real cooperation and transparency among tax jurisdictions as evidenced by the State protectionist forms of digital tax introduced across the globe. Secondly, there is a lack of certainty for businesses the world over curtailing proper planning. Additionally, it must be noted that the digital market also includes home-grown small and medium sized enterprises (SMEs). Non-discriminative and oppressive digital economy tax therefore hampers growth of SMEs hurting African national economies

The current rules and state practice provide an inappropriate balance between the taxing rights of residence and source jurisdictions. The favoring residence jurisdictions encourages Illicit Financial Flows (IFFs) through artificial profit shifting to tax havens leading to loss of large amounts.

## Recommendations on the challenges

The most fundamental recommendation is the pursuit of taxation of the digital economy pegged on a principle based approach to taxation; not limited to, fairness and simplicity. Principally, any tax system and tax must be based on fairness and equality. Therefore, meticulous case by case analysis must be conducted in respect to every sector incidental to the digital sector before levying tax. Does the levy promote or hurt connectivity and businesses? The carrying out of a delicate balancing act is needed in these instances. Additionally, the consideration of the different levels of development is equally important.

CONTRIBUTORS' PLATFORM

Building tax administration capacity especially on avenues to discover number of users, destination of sales and sales made to effectively administer revenue collection. Connected to this is the strengthening of other sector related laws such as data protection and anti-corruption laws.

Political negotiations must be employed together with revenue administrations' interventions. For instance, the recent United States of America tax reforms were championed by President Trump and not merely abandoned to the Internal Revenue Service. Regional integration blocs such as the African Union must be equally seized of matters involving the taxation of the digital economy in Africa. Taxation of the digital economy being a global problem, must be met with collective action at all stages.

| Country | Practice |
|---|---|
| Israel and India | Significant economic presence test used to create permanent establishment to levy the 'Digital Services Tax'. Deployment of 'Equalization levy' (6%) on business to business transactions in the digital advertising space in India |
| UK, Australia and USA | Specific tax regimes for MNEs |
| Hungary, Italy | Turnover taxes for targeted sectors of the digital economy: (Hungary- tax on digital advertising; Italy- tax on digital transactions). |
| Uganda and Kenya | Introduced social media tax (that has led to a decline of internet users according to national surveys) and excise duty fee on mobile money transactions. The 2019 Kenyan Finance Act introduced income tax and VAT in respect to the digital market whereby incidence of the later tax falls on the consumer proving oppressive and unfair. |

# A practical approach to withholding tax and withholding VAT in Kenya

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This is a method of tax collection whereby the payer of certain income is responsible for deducting tax at source from payments made and remitting the deducted tax to Kenya Revenue Authority (KRA). The percentage deducted varies between incomes and is dependent on whether the seller is a resident or non-resident. The rate applicable on professional fees is 5% for residents and 20% for non-residents.

## How do you pay withholding Tax?

Any amount withheld should be remitted to KRA on or before the 20th of the month following the date of withholding by the client. Payment of withholding tax is done online via KRA Portal. The withholder generates a payment slip and the same together with the cheque is presented to any of the KRA appointed banks. The payment can also be done through M-PESA using KRA pay bill no. 572572. The Account Number is the Payment Registration number quoted at the top right corner of the generated payment slip. When the withholder successfully remits the withheld amount to KRA, a withholding certificate is sent to the registered email on iTax.

It is important to note that withholding tax is not a final tax. One is required to declare the income and withholding tax certificates upon filing individual tax returns and pay any tax due.

Currently, the portion of VAT that is withheld is 2% of the 16% with effect from 7th November 2019. Previously the rate of withholding VAT was 6% of the total VAT. The VAT withholding agents are legally expected to remit the withheld VAT on behalf of the suppliers to KRA within fourteen (14) days from the date of withholding the amount.

However, to enable the supplier to utilise the withheld amounts within the tax period, it is advisable to remit the withheld VAT within the fourteen days or within the month that the amounts are withheld. In case the agent remits the withheld amounts on a date past the end of that tax period, the supplier will not be able to utilise the amount for that tax period but in the next tax period. This will result in a scenario where the supplier has withheld VAT amounts and will be required to pay VAT to the Government.

## How the System Works

The withholding VAT system provisions require that the system operate like a two cheque system where a supplier's payment is split into two. When the appointed agent makes payments to the suppliers, they deduct the 2% (Value Added Tax (VAT) and remit to Kenya Revenue Authority (KRA). The balance of the payment and the 14% VAT are paid to the supplier.

Notably, Withholding VAT is only remitted on making payment to the supplier and not on accrual basis.

Once the 2% VAT has been remitted to KRA through the i-Tax platform, an acknowledgement receipt in the form of a certificate is sent to the supplier by KRA.

The 2% VAT partially offsets the VAT debt of the supplier for the month that the amounts are received. Effective 3rd April 2017, the VAT withholding agents are required to permit the withheld VAT to KRA within 14 days of deducting the VAT.


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