



Q1-2016

NR&Co Quarterly

...Legal Briefs

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KARIBU!

Opening word from the senior partner



Njoroge Regeru

I am extremely pleased to welcome you to read and enjoy the contents of this, our inaugural newsletter. We intend to make the newsletter a regular feature of our professional life, published quarterly for the primary objective of keeping in

touch with our clients and updating them on such developments in the law as are important to them and relevant to their businesses.

We would like our clients to get to know more about our Firm and its members, hence the opening section which gives an over-view as to the ethos and guiding principles of the Firm, the various areas in which our lawyers practise and the diverse clientele whose legal interests we take care of.

The newsletter will aim to keep its readers updated on developments pertaining to new laws and regulations in a *Legislative Updates* section which will be a key feature of the newsletter. In this issue,

we have updated you on legislative developments in the areas of administration of estates, tax law, corporate law and the jurisdiction of various courts.

In the *Case Highlights* section, we will keep you posted on what has been baking in the judicial oven, thus alerting you on decisions that will impact on you and your businesses in one way or another. In this issue, we have selected cases on drafting of legal documents by unqualified persons, the respective roles of the National Land Commission and the Ministry of Land, the Court's power to alter the nominees under a pension benefit scheme and the empowerment of employees under probationary contracts.

The Courts and their procedures can at times seem like an intractable jungle. Guidance on this is to be found in the *Contributors' Platform* section of this issue. The section contains other articles which I hope will be useful and informative to you.

We trust that you, our esteemed clients, colleagues and friends will find this newsletter to be both informative and enjoyable. We will endeavour to make the newsletter as beneficial to you as possible by addressing as wide and varied a range of subjects as we possibly can every quarter.

Happy Reading!

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Njoroge Regeru & Company Advocates has carved a niche for itself in the field of private legal practice in Kenya and has gained recognition as the Firm that will go the extra mile to meet its clients' needs. The Firm is motivated by a commitment to provide to its diverse clientele a high level of service and an excellent work product at a reasonable cost.

With more than 14 qualified lawyers including partners and paralegals, the Firm is well equipped to render legal services in a competent, timely and efficient manner in various fields including:

- Banking & Finance/ Capital Markets
- Corporate & Commercial Practice
- Litigation including commercial, civil, constitutional and administrative law, judicial review, labour and employment disputes
- Arbitration & ADR
- Mergers & Acquisitions
- Conveyancing & Securities
- Intellectual Property
- Energy law
- Public notary services

The Firm accords top priority to client care, endeavouring to provide a personalized and results- focused service through the Partner-Associate matrix that we employ in our dealings with our clients, at all times keeping them fully updated on ongoing matters.

The Firm values integrity in all its dealings and its members are continually improving themselves through training and professional education, to the benefit of our clients. Corporate Social Responsibility is cherished in our firm and every quarter, we participate in community service and we support selected charities.

The Firm's clientele includes commercial banks and financial institutions, corporates carrying on business in diverse sectors in the economy, multinational corporations, governmental and non-governmental institutions, international organizations, development agencies, state corporations and individuals.

Year on year, the Firm has been recognized and ranked by various internationally acclaimed institutions including Chambers Global and IFLR 1000. The Firm is also a member and the exclusive local representative of the International Society of Primerus Law Firms.



Training Session at Windsor Golf and Country Club



Some of the 27 member team which took part in the First Lady's Half Marathon on 6th March, 2016



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LEGISLATIVE UPDATES

The ease of doing business in Kenya is dependent on the enactment and enforcement of laws. The start of 2016 saw the commencement of various laws enacted and published in the last year which may influence how businesses and conflicts are determined. In our first quarter, we have looked into seven pieces of legislation while in the next, we will consider the provisions of the Insurance Bill, 2014 vis-à-vis the Insurance Act, Chapter 487 of the Laws of Kenya.

1. COMMENCEMENT OF THE INSOLVENCY ACT, ACT NO. 18 OF 2015

Parts of the Insolvency Act have now come into force vide Legal Notice No. 1 of 2016 and Legal Notice 244 of 2015. The effect of this is:

- (a) Section 89 of the Law of Succession Act has been repealed (see section 732(4) of the Insolvency Act).
- (b) The administration of insolvent deceased's estates will be done pursuant to Part V of the Act.
- (c) Companies will be liquidated and administered based on the provisions of the Act.

(http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Insolvency_Act18of2015_-_compressed.pdf for more information)

2. COMPANIES ACT, 2015

Please be advised that the Companies Bill, 2015, was assented to on 11th September, 2015. Certain parts of the Companies Act, 2015, came into force on 6th November, 2015, whereas the rest will come into force by notice in the Kenya Gazette. Some of the key changes that will be brought about by the new Act include the following:

- (a) A company can now be formed by a single person;
- (b) Private limited companies with a share capital of less than Kshs. 50 million are not mandated to have a company secretary;
- (c) A company's capacity to operate as was previously outlined in the objects clause will now be unlimited unless a

particular activity has been specifically excluded by the company's articles of association;

- (d) A company's official documents/deeds can now be validly executed by a single director;
- (e) The 42 day period that was previously allowed for filing annual returns with the Companies Registrar has now been reduced to 28 days; and
- (f) The deadline for registration of a charge is now 30 days from the day on which the charge is created, down from the previous period of 42 days.

The publication of the Companies Act (General) Regulations, 2015 provide for the procedures and processes to be followed, as well as the company forms to be used in light of the recently enacted Companies Act, 2015.

(http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TheCompaniesAct_No17of2015_RevisedCompressed.pdf for more information)

3. TAX PROCEDURES ACT, 2015

The Act was signed into law by the President in December, 2015 and it seeks to provide uniform procedures for administering the Income Tax Act, Value Added Tax Act, and Excise Duty Act. It will further harmonize and consolidate tax procedural rules for the administration of tax laws in Kenya.

(<http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TaxProceduresActNo29of2015.pdf> for more information)

4. MAGISTRATES COURT ACT, NO. 26 OF 2015

This Act was assented to in December, 2015 and came into force on 2nd January, 2016. Some of the key changes introduced by the passing of the Act include the revision of the pecuniary jurisdiction of the Magistrates Courts. The pecuniary jurisdiction of the Chief Magistrate Court has been enhanced from Kshs. 7,000,000 to Kshs. 20,000,000.

It is also worth noting that subject to the above-indicated pecuniary jurisdiction, the

Act has now empowered the Magistrates Courts to entertain matters pertaining to the Bill of Rights, which was previously a preserve of the Constitutional and Human Rights Division of the High Court.

(http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/Magistrates_CourtsAct_26of2015.pdf for more information)

5. STATUTE LAW (MISCELLANEOUS AMENDMENTS) ACT, 2015

This Bill proposes a raft of changes to various laws in Kenya. Some of the key changes that the Bill proposes are the following:

- a) It seeks to transfer the hearing of appeals in disputes under the Valuation for Rating Act, Rent Restriction Act, Landlord and Tenant (Shops, Hotels and Catering Establishments) Act to the Environmental and Land Court from the High Court.
- b) Through synchronized amendments to the Land Act and the Land Registration Act, the Bill seeks to empower subordinate courts to hear and determine disputes, actions and proceedings concerning land. Essentially, this removes the exclusive jurisdiction of the Environment and Land Court to adjudicate land disputes.
- c) The Bill seeks to amend the Criminal Procedure Code to empower the High Court to revise the orders of a subordinate court. The Bill seeks to provide for the High Court to stay the order of a subordinate court pending the filing of an application for review by the Director of Public Prosecutions in proceedings under specified statutes, including the Prevention of Terrorism Act, the Anti-Money Laundering Act and the Prevention of Organized Crimes Act.

(<http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2015/StatuelawMiscellaneousAmendmentAct2015.PDF> for more information)

6. CHANGES IN TRAFFIC LAWS

The Traffic Act CAP. 403, Revised Edition 2014

The Traffic Amendment (No. 2) Act No. 38 of 2012, the Traffic (Amendment) Act No. 37 of 2012 and the Security Laws (Amendment) Act No. 19 of 2014 have had a significant impact on the Traffic Act and the Traffic Regulations in Kenya. Accordingly, the following key rules should be adhered to:-

- a) One should surrender their identification plates to the Registrar of Motor Vehicles for cancellation in instances where a motor vehicle ceases to be used on the road.
- b) Section 43 (1) of the Act provides for a penalty of ten thousand shillings in cases of over-speeding. Where there is a second or subsequent conviction, an individual may be disqualified from holding a licence for a period not exceeding three months.
- c) Driving under the influence attracts a fine of a sum not exceeding one hundred thousand or an imprisonment term not exceeding two years or both such fine and imprisonment.
- d) Public service operators are required to adhere to the uniforms and badges rules pursuant to section 103 A (1) of the Act and Regulation number 7 of the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014.

<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20403> for more information)

The Traffic Act (Amendment) Rules, 2015

These rules relate to the maximum number of passengers, whether seated or standing, in public service vehicles. Accordingly the licence issued to public service vehicles that carry both seating and standing passengers, determines the number of passengers.

<http://kenyalaw.org/ke/index.php?id=5184> for more information)

Directions for Traffic Cases, 2015

The Judiciary and the National Police Service released new directions for traffic cases due to public concern on arbitrary arrests, detention of alleged traffic offenders and delays in processing of traffic cases. Accordingly, the key directions are:-

- a) All suspected traffic offenders in respect of offences punishable by a fine only or by imprisonment for a term not exceeding six months should not be held in police custody.
- b) All suspected traffic offenders should be expeditiously released on reasonable bail or bond conditions pending charge or trial unless there are compelling reasons not to grant such bail or bond.
- c) Court fines should be processed in court before the judge or magistrate (<http://www.judiciary.go.ke/portal/blog/post/judiciary-and-police-release-new-regulations-to-manage-traffic-cases> for more information)

- a) Some of the Special Economic Zones (SEZs) contemplated under the Act include; (a) free trade zones; (b) industrial parks; (c) free ports; (d) information communication technology parks; (e) science and technology parks; (f) agricultural zones; (g) tourist and recreational zones; (h) business service parks; and (i) livestock zones.

- b) Such SEZs are regarded as being outside the customs territory so far as import duties and levies are concerned.

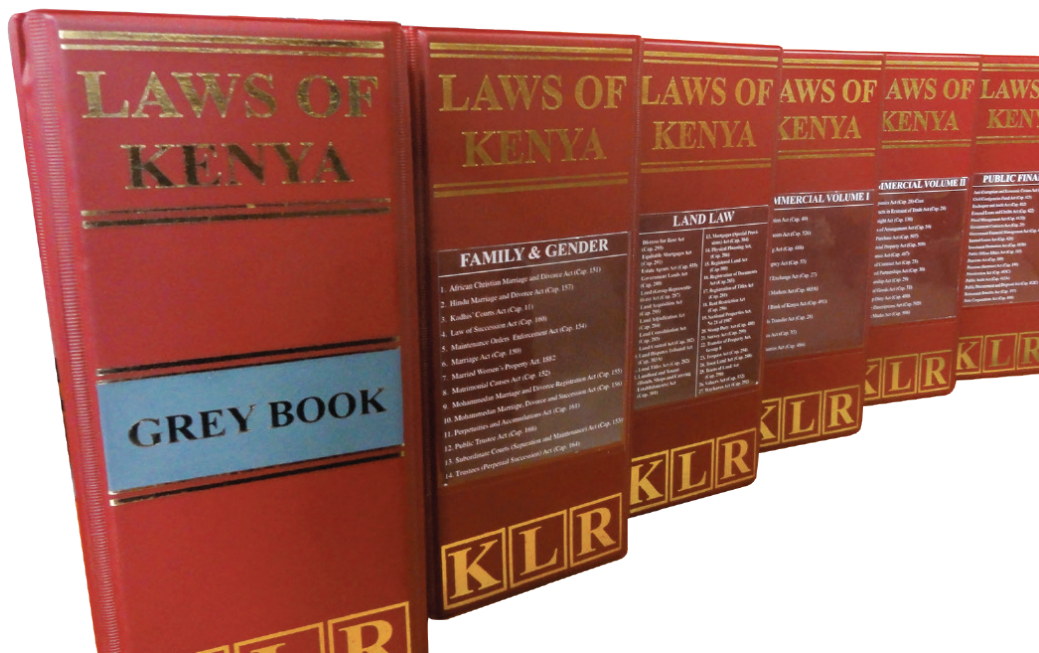
- c) Incentives given in the Act to attract investors include exemption from all taxes and duties payable under the Excise Duty Act, the Income Tax Act, East African Community Customs Management Act and the Value Added Tax Act, on all special economic zone transactions. Foreign investors are also exempt from a levy on work permits for up to 20% foreign work force

- d) For an entity to qualify as an SEZ developer, it must be a company incorporated in Kenya.

<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2016%20of%202015> for more information)

7. SPECIAL ECONOMIC ZONES ACT, NO. 16 OF 2015

Parliament passed the Special Economic Zones Act in mid 2015 it became operational on 15th December 2015. The Act is aimed at promoting trade in Kenya by creating an enabling environment for both local and foreign investment.



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CASE HIGHLIGHTS

A country's justice system will often be judged on the quality of the judgments handed down and the judiciary's appreciation of the needs and challenges of an ever-evolving society. In this segment, we highlight four cases decided in the recent past:-

1. NATIONAL BANK OF KENYA LIMITED V. ANAJ WAREHOUSING LIMITED (PETITION NO. 36 OF 2014 IN THE SUPREME COURT OF KENYA)

This was an appeal from the Judgment of the Court of Appeal sitting in Mombasa, dated 27th February, 2014 which upheld the decision of the High Court (Ibrahim J, as he then was) in Mombasa Civil Case No. 311 of 2000, *Anaj Warehousing Limited v. National Bank of Kenya Limited & Registrar of Titles*, rendered on 26th July, 2011.

The case involved section 34 of the Advocates Act, Cap 16 of the Laws of Kenya. The main issue for determination was whether a document or instrument of conveyance is null and void for all purposes, on the ground that it was prepared, attested and executed by an advocate who did not have a current practising certificate, within the meaning of Section 34 (1) (a) of the Advocates Act.

The court over-ruled the decision of the Court of Appeal and held that no instrument or document of conveyance becomes invalid under Section 34(1a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. Further, the court stated that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.

The Supreme Court recommended the judgment to the Attorney General and the Law Society of Kenya to be used to address the gaps and inconsistencies in the Advocates Act.

(<http://kenyalaw.org/caselaw/cases/view/116468/> for more information)

This decision is a welcome development to banks and other financial institutions as it safeguards their interests during the creation and registration of security documentation. Such documentation will henceforth be upheld and enforced notwithstanding the fact that the same may have been prepared by an advocate who lacked a current practising certificate.

2. IN THE MATTER OF THE NATIONAL LAND COMMISSION (NLC), ADVISORY OPINION REFERENCE NUMBER 2 OF 2014

In this advisory opinion, the NLC sought the Supreme Court's interpretation of the relationship between NLC's mandate and that of the Ministry of Land, Housing and Urban Development. The Supreme Court ultimately advised that the NLC has a mandate in respect of various processes leading to the registration of land, but neither the Constitution nor statute law confers upon it the power to register titles in land. The Supreme Court advised that the latter function is a preserve of the National Government, and the Ministry of Land, Housing and Urban Development has the authority to issue land titles on behalf of the National Government. The Court further indicated that the NLC has functions that are in nature, consultative, advisory, and safeguard-oriented.

(<http://kenyalaw.org/caselaw/cases/view/116512/> for more information)

3. ALFONCE M'MWANDA MUGANGA & PHOEBE CHUGHU M'MWANDA V VALENTINE MWAWASI MWAUSI & CFC LIFE ASSURANCE LIMITED (CIVIL APPLICATION NO. 48 OF 2014)

The deceased insured had nominated her two children and her husband (1st respondent) as the beneficiaries under her pension plan. She had also made a parental responsibility agreement with the 1st respondent for the benefit of their children. The pensioner was later murdered and her husband was convicted for the crime.

The children's grandparents' (the petitioners) argued that the 1st respondent had a responsibility to provide for his children but as he was incarcerated, it would be impossible for him to do so. The petitioners sought an order that the 30% pension benefit that would otherwise have gone to the 1st respondent be paid to them as they were the guardians with legal and actual custody of the minors and that the 1st respondent actually murdered his deceased.

The High Court ruled that an insurance company can pay pension benefits to someone else other than the nominated individual. The Court relied on the Retirement Benefits Act and the Retirement Benefits Regulations in rendering its decision. Accordingly, the Court proceeded to award the 30% benefit to the petitioners.

4. MERCY NJOKI KARINGITHI V EMERALD HOTELS RESORTS & LODGES LTD (CAUSE NO. 337 OF 2013)

In this case, the Claimant was appointed by the Respondent as an Executive Assistant and one of the terms of the employment was that the Claimant would be on probation for a period of two months. A few weeks later, the Respondent served the Claimant with a letter informing her that her appointment was being revoked due to the unprocedural manner it had been carried out.

The High Court held that whereas in the past employees working under probationary contracts could not bring an action against their employers for summary dismissal or wrongful termination, Article 41 of the Constitution of Kenya, 2010 has since given such employees the right to enjoy that which the Employment Act, 2007 denied them. Therefore, persons working under probationary contracts can now institute such actions against their employers.

(<http://kenyalaw.org/caselaw/cases/view/97766/> for more information)



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INTERLUDE.....

1. *A lawyer's wife became fed up with her brilliant husband who always seemed so sure of himself on points of law. One afternoon, when their grandfather clock just struck one she said, 'If I were to smash that clock to pieces with a hammer, could I be charged with killing time?' 'Oh, no,' said her husband, 'it would be a case of self defence- the clock struck first.'*
2. *A famous barrister was appearing in court on behalf of a lady with the unusual name of Tickle. He began his remarks by saying Tickle, the defendant, my lord...' 'Tickle her yourself,' interrupted the judge. 'You're nearer than I am.'*
3. *A prominent lawyer had overstepped the mark and was obliged to apologise to the court. He bowed to the judge and said, 'Your Honour is right and I am wrong, as your Honour generally is.' The judge is still trying to work out whether he had been complimented or insulted.*



CONTRIBUTORS' PLATFORM

New court and registry practice directions



By Wilkistar Mumbi

The long awaited digitization of court proceedings is finally with us! The judiciary now assures that proceedings will be available 24 hours-after the court rises! Hopefully, this ultra-modern approach will expedite hearings. The first phase rolls out in the Nairobi Commercial and Admiralty Court Division but we hope that it eventually move out to the other courts and stations.

In line with the need for timely delivery of justice, the High Court Practice Directions are that there shall no longer be examination-in-chief carried out during hearings. The witness statement filed is to reflect the testimony of the witness and cross-reference the attached bundle of documents that the witness relies on. The advocate guiding the witness is merely to introduce the witness and seek confirmation that the witness will rely on their filed statement. Cross-examination and Re-examination will remain.

The court registry follows suit in the mandate of timely delivery by no longer preparing awards after the judgment. The practice now is the party in whose favour the judgment is made, prepares the decree which is sent for approval by the Deputy Registrar and thereafter sealing it as an official court decree.

At the subordinate court level, section 7 of the newly enacted Magistrate's Court Act, No. 26 of 2015 sets out the new revised pecuniary jurisdiction of the subordinate courts at: 20 million shillings for the Chief Magistrate, 15 million shillings for the Senior Principal Magistrate, 10 million shillings for the Principal Magistrate, 7 million shillings for the Senior Resident Magistrate and 5 Million Shillings for the Resident Magistrate. The discretion to revise the pecuniary jurisdiction further has been left to the Chief Justice under Section 7, subsection 2.

The Act further amends section 49 of the Law of Succession Act. The rank of magistrates who hear and determine matters of succession as appointed by the Chief Justice is now that of a Magistrate's Court and not the Resident Magistrate.

The Magistrate's Court now also has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. However, this jurisdiction is limited to the rights under Article 25 of the Constitution of Kenya (non-derogatory rights). Despite this extension of their admissibility, the Magistrate's Courts are not to hear and determine claims for loss

or damages suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.

Magistrates appointed by the Chief Justice, by Gazette Notice, to preside over cases involving environment and land matters of any area of the country through Section 26 of the Environment and Land Act must also adhere to the new pecuniary jurisdictions set out.

Through section 7(3) of the Magistrate's Court Act, the Magistrate's Court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African Customary Law —

- (a) land held under customary tenure;
- (b) marriage, divorce, maintenance or dowry;
- (c) seduction or pregnancy of an unmarried woman or girl;
- (d) enticement of, or adultery with a married person;
- (e) matters affecting status, and in particular the status of widows and
- (f) children including guardianship, custody, adoption and legitimacy; and
- (g) intestate succession and administration of intestate estates, so far as they are not governed by any written law.



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It is important to note that whereas Section 5 of the Judicature Act makes it very clear that the power to punish for contempt rests exclusively with the High Court and the Court of Appeal, the Magistrate's Court Act now gives the subordinate Courts power to punish contempt in civil cases under Section 10 of the Act.

Advocates and litigants should be on the look-out for the establishment of the Small Claims Court now that the Small Claims Court Act has been assented to.

Combating terrorism in Kenya

By Kevin Walumbwe



Terrorism knows no boundaries. Its damning effects have been felt by the entire international community but for some reason, Kenya has persistently remained on the receiving end. The aim of terrorists is deliberate; to instill fear in the civilian population and put pressure on government to meet certain political ends. Though its perpetrators term it as a war, it is not a war! Claire de Than and Edwin Shorts rightly define it as the use of violence against *non-war* targets to achieve political gains. Attacking civilians is cowardly, intolerable and against the law.

What has the International Community Done?

The international community has been up in arms in adopting conventions that are binding in nature which deal with certain

terrorist activities. These include: *The Tokyo Convention On Crimes and Certain Other Acts Committed on Board Aircraft (1963)*; *The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents (New York 1973)*; *The International Convention Against the Taking of Hostages (New York 1979)*; *The Convention for the Suppression of Unlawful Acts against the Safety of Marine Navigation (Rome 1988)*; *International Convention for the Suppression of Terrorist Bombings (1998)*; and *The International Convention for the Suppression of financing of Terrorism (1999)*. These treaties are however neither uniform nor heavily ratified. A singular treaty dedicated to fighting terrorism ought to be adopted.

Military Aggression

The international community has also acknowledged the use of offensive military force beyond national borders in a bid to counter international terrorism. This method of offensive counter terrorism fighting has been employed by both the United States of America in the wake of the 11th November 2001 attack and by Kenya in 2012 after random attacks in the country.

The hit back attacks on Kenyan soil and most recently the horrifying ambush on a Kenyan military camp in El Adde, Somalia, resulting from a mighty wage of military offensive in Somalia are an indication that we may not triumph merely through soldierly valor. It is not however guaranteed that the attacks will cease when our troops retreat. The international community should thus heed President Kenyatta's call for more forces from the African Union Mission in Somalia (Amisom). Sustained offence might be more fruitful than retreat albeit with disheartening repercussions.

Preventive Measures

A 2015 report by the Senate Security team chaired by Garissa Senator Yusuf Haji states that the three official entry points: Mandera, Liboi and El wak are vast and open, thus porous. However, that does not mean our security system should be as permeable.

Our intelligence structure, coupled with the help of able friends like the United States, Israel, the United Kingdom and others, has been lauded for warning the government about planned terrorist attacks way before they happen. Additionally, Kenya has been recognized for its improved technological development. As such, if concerted efforts are put together, the technology can be used to effectively detect and neutralize threats before they cross into our territory. The recently acquired drone which is to be used to carry out surveillance in areas infested by *Al-Shabaab* terrorists is a great leap towards fighting terrorism.

Vigilance at Home

President George Washington Bush, on 29 January 2002 said:

America is no longer protected by vast oceans. We are protected from attack only by vigorous action abroad and increased vigilance at home.

The above statement is equally applicable to Kenya. We are neither protected by the permeable borders nor the Sea. Granted, we may have the Prevention of Terrorism Act, granted, we may wage a strong offensive; but winning the fight against terrorism is really dependent on the vigilance of the citizens. Standing together as one amid attacks despite our religious leanings is one such gesture that shows the citizens are united and vigilant in the fight against terror. Similarly, leaders must be ready to honour their promises on leading the vigilant fight against terrorism. We must name and shame sympathizers, funders, recruiters and supporters.

Conclusion

Fighting terrorism requires taking bold steps. The fight is even harder when the perpetrators recruit our own and wage war on our land. The government must be lauded for the efforts it has taken to combat the threat. Though there has been a decline in attacks on Kenya soil, we must not lower our guard. *A luta continua, vitória é certa.*

CONTRIBUTORS' PLATFORM

Additional guidelines on large cash transactions (Banking Circular No.1 of 2016)



By Ruth Wairimu Regero

Terrorism and money laundering can in no doubt bring a Nation to its knees; ultimately, it can destroy the humanity that dwells in a society. Unity, governance and regulation are the panacea for such lunacy. It is in the same breathe that the Central Bank of Kenya (CBK), the regulator of the banking sector in Kenya, issued additional guidelines with regard to large cash transactions on 5th January, 2016. Through the guidelines, CBK is fostering the liquidity, solvency and proper functioning of a stable market which is its principal object pursuant to section 4 of the Central Bank of Kenya Act.

The guidelines require banking institutions to obtain the following additional information when handling cash transactions of Kenya Shillings one million or more:-

- Necessity of large cash transaction deposit or withdrawal;
- Reason as to not using electronic means;
- Destination of the money from the bank;

- Purpose of the money;
- Direct and indirect beneficiaries;
- Full identity of the intended beneficiaries; and
- The source of the money

If such information is not given, the bank may report the transaction as a suspicious transaction. Additionally, where false information is given, the bank should take appropriate action which includes termination of the bank-customer relationship.

What are the preceding guidelines?

Guideline on Anti-Money Laundering and Combating the Financing of Terrorism- CBK/PG/08

Paragraph 5.6.5 and 5.6.6 of the guideline address customer due diligence whereby institutions are required to: identify the customer and beneficial owner, understand the purpose and intended nature of the business relationship and establish the person's or entity's source of funds. Paragraph 5.8 requires a written statement from a customer confirming that the nature of his or her business activities normally and reasonably generates substantial amounts of cash in situations of a large cash transaction. Additionally, paragraph 5.15 requires institutions to report suspicious activities to the Financial Reporting Center immediately.

What amounts to a suspicious transaction?

CBK Guidance Note No.1 of 2011 defines a suspicious transaction as 'one that departs from the normal patterns of account activity that has been noted on a customer's account.'

What is the Bank's duty of confidentiality?

This was analyzed in Tournier v National Provincial and Union Bank of England [1924]1KB 461 whereby it was established that the duty of confidentiality is a legal duty as it arises from contract. The duty is however not absolute and as such, the bank can disclose customer information where there is: compulsion by law, a duty

to the public to disclose, implied or express consent of the customer and bank interests which require disclosure.

To further illustrate the exception of compulsion by law, section 17 of the Proceeds of Crime and Anti-Money Laundering Act, 2009, provides that the provisions of the Act override the secrecy obligation owed to a customer which is imposed by any other law.

Is there an infringement on the right to privacy?

Article 31 of the Constitution of Kenya, 2010 provides that every person has a right to privacy which includes the right not to have information relating to their private affairs unnecessarily required or revealed. However, pursuant to Article 24 of the Constitution, such a right can be limited to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

What are the penalties in instances of malicious reporting?

Section 16 (4) as read with section 10 of the Proceeds of Crime and Anti-Money Laundering Act, 2009, provides a penalty of imprisonment for a term not exceeding two years, or a fine not exceeding one million shillings, or to both in the case of a natural person, and a fine not exceeding five million shillings or the amount of the value of the property involved in the offence (whichever is the higher) in the case of a body corporate.

Is there creation of a slippery slope with regard to customer information?

There have been situations in other countries for instance, in Canada, where Greg Weston reported that medical details, tax returns and employee records are collected in the efforts of reporting suspicious transactions (CBC News, 2013).

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However, this is not the case with CBK as there are clear guidelines on reporting suspicious transactions and there is a penalty for malicious reporting.

Conclusion

The additional guidelines come in the wake of terrorism and money laundering which make banks and in extension, the economy, vulnerable. There have been previous claims of money laundering in Kenya such as the scandal at Charterhouse

whereby account holders and their business associates were believed to be involved in narcotics trafficking, smuggling, money laundering and tax evasion (Ngirachu J, Daily Nation, 2010).

Moreover, there was the incident of the Hawalas whereby thirteen money remittance firms were suspended by the Government on the suspicion of financing terrorism. However, in 2015, the President directed the Central Bank of Kenya to

issue comprehensive regulations that guide the operations of the firms, upon which their suspension would be lifted (Jamah A., Standard Media, 2015). The additional guidelines are therefore more of a necessity than a stringent measure.

The law protects both the customer and the bank and as such there is neither infringement on the right to privacy nor on the Bank's duty of confidentiality. (Media, 2015).

Essence

Knowledge is the skeleton,
Wisdom feeds the soul,
What will I have to show
When the cloak takes its toll?

Will there be talk of towers?
Will glory shower?
Will hate hover?

The sun rises, the sun sets
So do our ages and our end
The souls we tend
The bridges we mend
Legacy trickles on every bend

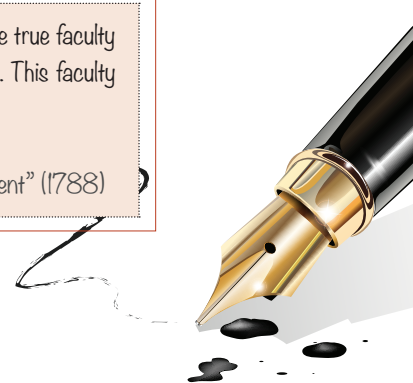
An extension of ourselves on scend
Wisdom the perfect blend

RR

Without counsel purposes are disappointed; but in the multitude of counsellors they are established.
Proverbs 15:22

As the true method of knowledge is experiment, the true faculty of knowing must be the faculty which experiences. This faculty I treat of.

William Blake, All Religions Are One, "The Argument" (1788)



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