Q4 -2020

NR&CoQuarterly ...Legal Briefs

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KARIBU!

Editor's Note

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Dear Reader,

This year has been one that has taught us to be open to possibilities and agile in the face of challenges; to focus on the important things and keep guard the landmarks we set in our lives (Carole Mandy "Seeking landmarks when things change" Sunday Nation (20th December, 2020), Lifestyle p4"). We are grateful for the grace to see and experience the end of the year and hope to see you in the next!

'Cause I'm certain brighter days are yet to come, Ain't no question that tomorrow there'll be good times (Good times) I believe with every beat of my heart…'
Better Days (lyrics by Sauti Sol)

In this quarter, the editorial team has put together something special for our readers.

There has been of legislation and regulations passed this quarter. Notably, the Sectional Properties Act; Legal Notice No. 190-and the Value Added Tax (Digital Marketplace Supply) Regulations, 2020.

Of note, the implementation of the Data Protection Act, No. 24 of 2019 is set to be on course with the appointment of Ms. Immaculate Kassait as Kenya's first Data Commissioner.

Some of the cases we highlight in this edition include the judgment by the East African Court of Justice in EACJ Reference No. 20 of 2019 Martha Wangari Karua Vs. The Attorney General of the Republic of Kenya where the court awarded Hon. Martha Karua a sum of USD 25,000 (about Ksh2.7 million) in damages which will attract a simple interest of 6 per cent from the date of the judgment until full payment for infringement of her right to fair trial.

Secondly, the Supreme Court Petition No. 29 of 2019 Alnashir Popat & 8 Others Vs. Capital Markets Authority in which Mr. Regeru and Ms. Claire Mwangi participated in the Petition which saw the Supreme Court set aside the Court of Appeal Judgement and hold that that Administrative tribunals are not supposed to operate like courts of law and must act fairly.

On to the Contributor's Platform, our Partner and colleague Elizabeth Ngonde and Nashon Odhiambo discuss the issue of laws applicable for disputes arising from international employment contracts. Catherine Mwaura in her article, discusses the future of litigation financing in Kenya and finally, a word from the Clerks' Desk on the Firm's transition from a manual registry system to an electronic registry management system, closes this editorial piece.

Have a look, read and share.

We wish you a Merry Christmas and a Prosperous New Year 2021!

Enjoy the holidays.


"Life isn't about waiting for the storm
to pass...It's about learning to dance in
the rain."
Vivian Greene

LEGISLATIVE UPDATES

This quarter has seen the assent of the Sectional Properties Act, 2020 and the publication of Legal Notice No. 190, the Value Added Tax (Digital Marketplace Supply) Regulations, 2020.

1) THE SECTIONAL PROPERTIES ACT, 2020

The new Act has repealed the current law which is the Sectional Properties Act, 1987.

The formulation of the Sectional Properties Act was informed by the fact that the previous law was not responsive to emerging market needs such as the growing demand for affordable housing, and master-planned estates as well as efficient mortgage transactions.

The principal object of the Act is to provide for the division of buildings into units to be owned by individual proprietors and common property to be owned by proprietors of the units as tenants in common and to provide for the use and management of the units and common property and for connected purposes.

Some of the key changes brought by the new Act include:

1. The Act provides for vesting of reversionary interest on individual unit owners as opposed to Management Companies.

2. The Act also provides for the closure of the head-title or head-lease. Closure of the head-title means each unit holder will have his/her own title which is not dependent on the head-lease. This has the effect of vesting absolute rights on individual unit owners as they can now deal in the property in such manner as they wish.

2) LEGAL NOTICE No. 190- THE VALUE ADDED TAX (DIGITAL MARKETPLACE SUPPLY) REGULATIONS, 2020

In exercise of the powers conferred by section 5 (8) as read with section 67 of the Value Added Tax Act, 2013, the Cabinet Secretary for the National Treasury and Planning made the Regulations to govern the digital marketplace supply.

The following are some of the taxable supplies made through a digital market place:

a) Downloadable digital content including downloadable mobile applications, e-books and films;
b) Subscription-based media including news, magazines and journals;
c) Over-the-top services including streaming television shows, films, music, podcasts and any form of digital content;
d) Software programmes including software, drivers, website filters and firewalls;
e) Electronic data management including website hosting, online data warehousing, file-sharing and cloud storage services;
f) Music, and games;
g) Search engine and automated helpdesk services including customizable search engine services;
h) Tickets for live events, theatres or restaurants;
i) Distance teaching through pre-recorded media or e-learning including online courses and training;
j) Digital content for listening, viewing or playing on any audio, visual or digital media;
k) Services that links the supplier to the recipient including transport hailing services or platforms;
l) Electronic services under section 8 (3); and
m) Any other service provided through a digital marketplace that is not exempt under the Act.

Application of Tax

Tax shall apply to taxable supplies when supplied in Kenya. A business entity that is required to account for the value added tax on taxable supplies made on a digital marketplace shall notify the supplier from the export country that the supplier is not required to account for the tax in Kenya for the supply.

Where the supplier from an export country is notified as provided above herein, the supplier shall not be required to charge the tax on the supply to the business entity. Where a business entity fails to notify the supplier and the supplier charges tax, the business entity shall not be allowed to deduct the tax charged.

A person from an export country who makes a business-to-consumer supply of services to a recipient who is in Kenya shall register for tax through a simplified tax registration framework. A person registered shall declare and pay tax on the supplies made on the digital marketplace at the rate specified in section 5 (2) (b) of the Act.

A person from an export country making a business-to-consumer supply to a recipient in Kenya who elects not to register in accordance with regulation 7 shall appoint a tax representative in accordance with section 15A of the Tax Procedures Act, 2015.

A business-to-consumer supplier on a digital marketplace from an export country who is registered under these Regulations shall not be required to issue an electronic tax invoice: Provided that the supplier shall issue an invoice or receipt showing the value of the supply and the tax deducted thereon.

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The tax for a supply made on a digital marketplace from an export country to a recipient in Kenya in a business-to-consumer transaction shall be paid by the supplier or the tax representative of the supplier. A registered person shall submit a return in the prescribed form and remit the tax due in each tax period to the Commissioner on or before the twentieth day of the month following the end of the tax period. Where an intermediary makes a supply on a digital marketplace on behalf of another person, the intermediary shall be required to charge and account for the tax on the supply whether such other person is registered for tax or not.

A person who fails to comply with the provisions of these Regulations shall be liable to the penalties prescribed under the Act or the Tax Procedures Act, 2015.

APPOINTMENT OF A NEW DATA COMMISSIONER

With the appointment of Ms. Immaculate Kassait as the first Data Commissioner, the implementation of the Data Protection Act, No. 24 of 2019 ("the DPA") is on course. It is expected that the Data Commissioner, shall, inter alia, (1) develop regulations on data protection, (2) establish and maintain a register of data controllers and data processors, (3) promote self-regulation among data controllers and data processors, (4) receive and investigate any complaint by any person on infringements of the rights under the DPA and (5) carry out inspections of public and private entities with a view to evaluating the processing of personal data, and (6) promote international cooperation in matters relating to data protection and ensure country's compliance on data protection obligations under international conventions and agreements.

CASE HIGHLIGHTS

In this section, we highlight some of the cases decided in the course of this quarter:

1) EACJ REFERENCE NO. 20 OF 2019 MARTHA WANGARI KARUA VS THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA

This was a Reference filed before the East African Court of Justice ("the EACJ") pursuant to Articles 6(d), 7(2) and 27(1) and 30 of the Treaty for the Establishment of the East African Community ("the EAC Treaty").

In the Reference, the Applicant-Martha Karua, alleged that the Respondent-the Republic of Kenya, through its judicial organ, violated the Applicants right to a fair trial, a fair hearing and to access substantive justice and in so doing failed to abide by its own Constitution, its commitment to the fundamental and operational principles of the East African Community ("the EAC") and to uphold its obligation under various international, continental and regional Treaties and Conventions that bind it.

The Applicant who is the NARC Kenya leader, had vied for the position of Kirinyaga governor in the August 2017 election in which Ms Waiguru was declared winner. The Applicant then filed a petition in Kenyan courts but it was dismissed. She then moved to the Arusha-based EACJ in November 2019. Before the EACJ, she claimed video evidence that she had filed with the High Court of Kenya at Kerugoya was lost or stolen while in the court's custody, but the court still went ahead to determine the election petition without investigating the issue.

In its Ruling, the EACJ First Instance Division Court Judges, Justice Monica Mugenyi, Charles Nyawello and Charles Nyachae declared that the State infringed on Ms. Karua's right to access to justice.

The Court noted that the Kenyan Government, through acts and/or omissions of its judicial organ, violated its commitments to the fundamental and operational principles of the EAC, specifically the principle of rule of law guaranteed under the EAC Treaty.

The Court further noted with utmost respect, the impugned Supreme Court decision did fall short on the said judicial organ's constitutional duty and curtailed Ms. Karua's right to access justice. It thus contravened the rule of law principle enshrined in the EAC Treaty.

The Court went on to award the Applicant USD 25,000 (about Ksh2.7 million) in damages which will attract a simple interest of 6 per cent from the date of the judgment until full payment for infringement of her right to fair trial.

2) SUPREME COURT PETITION NO. 29 OF 2019- ALNASHIR POPAT & 8 OTHERS vs. CAPITAL MARKETS AUTHORITY

This was an appeal brought as of right under Article 163(4) (a) of the Constitution against the judgment of the Court of Appeal which overturned the decision of the High Court.

In that judgment, delivered on 28th June 2019, the Court of Appeal held that the Respondent is not in breach of Article 47 of the Constitution; the provisions of the Fair Administrative Action Act, 2015; or the rules of natural justice; and as such it was not a judge in its own cause as the Capital Markets Authority Act expressly authorizes it to perform dual and overlapping, inquisitorial and enforcement functions.

A brief background of the case is that, on 12th August 2015, the Respondent approved the Imperial Bank Limited (now in receivership) ("the Bank")'s application to issue to the general public a corporate bond of K.Shs. 2 billion (the bond issue). The record shows that it was only the then Bank's Managing Director and the Bank's Chief Finance Officer who were privy to that application and who, together with various external transaction advisors, handled all the correspondence regarding the bond issue. The Bank's said Group Managing Director later on died.

On 21st September 2015, the Acting Managing Director and his deputy informed the 1 Petitioner, who was the non-executive Chairman of the Bank's Board of Directors, that the former Group Managing Director had for many years authorized illegal disbursements of vast amounts of the Bank's monies in transactions concealed from the Respondent, the Central Bank of Kenya (CBK) and the Bank's Board.

The Board reported the matter to CBK and on the basis of the damning revelation in that interim report, CBK placed the Bank under receivership and appointed the Kenya Deposit Insurance Corporation its Receiver/Manager. The Respondent on its part instructed the Nairobi Stock Exchange (NSE) not to proceed with the listing of the Bank's bond issue on the Fixed Income Securities Market Segment until further notice.

Pursuant to its regulatory authority, the Respondent decided to inquire into the circumstances prevailing in the Bank during the bond application and approval period to determine whether the Petitioners, as directors of the Bank had, by their actions or omissions, contravened banking regulatory requirements. Consequently, the Respondent served the petitioners with Notices to Show Cause and required them to respond, within 14 days to seven allegations of negligence in the discharge of their mandate as directors of the Bank. In the High Court, the Court found that given the Respondent's dual inquisitorial and enforcement mandate and the fact that it had admittedly considered and approved the bond issue as merited, a well informed and fair minded observer, given all facts would conclude that there existed a possibility of bias on the part of the Respondent against the Appellants.

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On the Respondent's appeal and the Appellants' cross-appeal against that decision at the Court of Appeal, the Court of Appeal held that since the Capital Markets Act, Cap 485A ("the CMA Act") expressly authorized the overlapping inquisitorial and enforcement functions, the Respondent is expected to make unprejudiced judgment on matters it has investigated. It consequently allowed the appeal and dismissed the cross-appeal clarifying that the Respondent was at liberty to continue with the administrative proceedings it had commenced against the appellants.

This decision provoked the Appeal to the Supreme Court.

The Supreme Court addressed three major issues:

a) whether the overlapping roles that the Capital Markets Act vests in the Capital Markets Authority constitute a violation of Articles 47(1) and 50(1) (as read with Article 25(c)) of the Constitution;

b) whether Section 11(3) (cc) and (h) of the Capital Markets Act which authorizes the overlapping, is and should be declared unconstitutional; and

c) whether the Respondent's attempted enforcement proceedings were or were likely to be biased against the Petitioners.

The Supreme Court in its judgement noted the following:

(1) In addressing the impugned Section 11(3) of the CMA Act, the Court was of the view that the overlap doesn't foul the nemo judex in causa sua esse principle as argued by the Petitioners. Noting that the rights to fair administrative action and fair hearing are universal.

The natural justice nemo judex in causa sua esse principle is one of the fundamental principles in literally all common law jurisdictions. The Court endorsed the view of the Respondent that Administrative tribunals are not supposed to operate like courts of law. That is why they are allowed to be masters of their own procedure although they must act fairly.

For purposes of efficiency and in the carrying out of the objective of the CMA Act, especially in the expeditious disposal of disputes that arise in the operations of the capital markets, the functions set out in Section 11(3)(cc)(h) cannot be performed by separate bodies thus Section 11(3)(cc)(h) is not unconstitutional.

(2) On the question of bias, the Supreme Court agreed with the trial Judge and noted that there was a possibility of bias in the administrative proceedings commenced by the Respondent. *The Court held:*
"we find and hold that in the discharge of its mandate under the CMA Act, the respondent must always first determine whether or not its act or decision is judicial or quasi-judicial and whether or not it is likely to adversely affect the rights the persons or bodies under investigation. If it is either of the two or both, it must comply with the requirements of impartiality and independence under Articles 50 (1) and 47 of the Constitution. And it has no difficulty in doing so as Sections 11A(1) and 14(1) of the CMA Act empowers the respondent to delegate its functions and powers to other bodies or persons. As such, the objectives of the CMA Act will still be realized."

3) PETITION 284 & 353 OF 2019 (CONSOLIDATED)- SENATE OF THE REPUBLIC OF KENYA & 4 OTHERS V SPEAKER OF THE NATIONAL ASSEMBLY & ANOTHER; ATTORNEY GENERAL & 7 OTHERS (INTERESTED PARTIES) [2020] eKLR

This case before the High Court originated from the National Assembly legislating various Acts of Parliament without passing through the Senate. The Petitioner submitted that on diverse dates between 2017 and 2019, the National Assembly passed a total of 23 Acts of Parliament without the participation of the Senate and unilaterally forwarded 15 others to the Senate without complying with Article 110 (3) of the Constitution.

The Senate was aggrieved by the National Assembly's actions and it sought, amongst other things, the nullification of the Acts passed or amended by the National Assembly without reference to the Senate. The Petitioners listed 24 Bills (one of the Bills had been listed twice) that have been presented to the President for his assent without the requisite concurrence of the Speaker of the Senate and 15 bills unilaterally forwarded to the Senate for its consideration.
The impugned Acts are:

1. The Public Trustee (Amendment) Act, No. 6 of the 2018;
2. The Building Surveyors Act, 2018, No. 19 of 2018;
3. The Computer Misuse and Cybercrime, Act, No. 5 of 2018;
4. The Statute Law (Miscellaneous Amendment Act),No. 4 of 2018;
5. The Kenya Coast Guard Service Act. No. 11 of 2018;

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6. The Tax Laws (Amendments) Act, No. 9 of 2018

7. The Statute Law (Miscellaneous Amendments) Act, No. 18 of 2018

8. The Supplementary Appropriation Act, No. 2 of 2018;

9. The Equalization Fund Appropriation Act No. 3 of 2018;

10. The Sacco Societies (Amendment) Act, 2018 No. 16 of 2018;

11. The Finance Act, No. 10 of 2018;

12. The Appropriations Act, No. 7 of 2018;

13. The Capital Markets (Amendments) Act, No. 15 of 2018;

14. The National Youth Service Act No. 17 of 2018;

15. The Supplementary Appropriations Act, No. 13 of 2018;

16. The Health Laws (Amendment)Act, No. of 5 of 2019;

17. The Sports (Amendment) Act, No. 7 of 2019;

18. The National Government Constituency Development Fund Act, 2015;

19. The National Cohesion and Integration (Amendment) Act, 2019;

20. The Statute law (Miscellaneous Amendment) Act, 2019;

21. The Supplementary Appropriation Act, No. 9 of 2019;

22. The Appropriations Act, 2019; and

23. The Insurance (Amendment) Act, 2019

The Court noted in their judgement that their decision was heavily influenced by the opinion of the Supreme Court in Reference No. 2 of 2013 as they are bound by that opinion.

In their judgement, the Court declared that the listed (23) Acts of Parliament passed by the National Assembly are unconstitutional thus null and void. However, order declaring the Acts of Parliament as null and void, is suspended for a period of nine (9) months from the date of the Judgement within which period, the Respondents ought to have complied with the provisions of Article 110(3) of the Constitution and regularised these Acts of Parliament and in default, they stand nullified.

STRANGE LAWS OR ARE THEY?

Our travel plans may have been impacted negatively this festive season, so how about we try and fulfil your wanderlust!!

Here is a set of the most outrageous laws from around the world that you might have a hard time believing they actually exist. Can you identify which one is **True** and which is **False**?

1. For the seafood lovers and for those who would want to take up fishing as a hobby, be careful how you hold your salmon in the U.K. Under the Salmon Act, 1986, it is deemed illegal to handle a salmon suspiciously.

2. With an aim to keep public spaces clean, Singapore has banned chewing gum. In fact no gum is bought or sold there.

3. Did you know that it is illegal to go jogging as a group in Burundi? Yes. Jogging as a group is classified as a crime as it is considered that people might use the activity as a cover up for illegal activity. You might just want to hold off on your fitness plans while you are there!

4. The age of selfies! Whether you are a millennial, gen X or boomer you have tried it at least once. Even though you might not want to admit it. Just be careful where you take one in Sri Lanka. Taking a selfie in front of the Buddha is not only illegal it is considered disrespectful to turn your back to a Buddha statue.

5. In Italy, it is illegal for citizens to frown in public unless they are at a funeral or visiting someone in hospital. As the saying goes, when in Rome do as the Romans do.

6. Are you a fan of Canadian music and artists? If not, you might just become one if you visit Canada. According to Canadian Law, 35% of all broadcasted content should be of Canadian origin from 6am-6pm, Monday-Friday.

7. As difficult as it may be to fathom, it is legal to marry a dead person in France. However, you are required to show compelling reasons such as that you and the deceased had plans to get married one day.

8. For food lovers you might want to travel to Denmark. In Danish restaurants, you do not have to pay for your food unless, by your own opinion, you are "full" at the end of the meal. If not, then you can proceed without paying the bill at all.

Travelling- It leaves you speechless then turns you into a storyteller! - Ibn Battuta

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Disputes arising from International Employment Contracts

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International contracts are contracts where different countries are involved, are executed and performed in different countries and the individuals involved may be of different nationalities. International contractual engagements across the globe are more common today than before. Kenya has for a long time maintained its market without regard to the country of origin of the products or the personnel/ labour. Kenyans have also migrated all over the world for work and business purposes. Though not expected at the time of executing the contract, disputes of varied nature arise out of every engagement. It is therefore critical to be prepared to effectively resolve such disputes.

The location of the Court seized with the jurisdiction to determine disputes arising from the contract and the law applicable to the contract are critical themes requiring clarity and concurrence at the time of executing contracts.

In an employment contract, a scenario may arise whereby a Kenyan citizen is employed by a French company and stationed at a branch in the United States of America. The employee operates between the branches in the United States and Kenya. In case of a dispute arising from such a contract, the law applicable will naturally flow from the law stated in the contract. From a common law standpoint, contracting parties are free to choose the system of law to govern their contract, provided that the choice of law is not contrary to public policy. The law governing a contract has been deemed as the law which parties intended, or may be presumed to have intended to submit themselves to.

However, in the case where no particular law is stated in the contract, the Courts must step in to decide the jurisdiction and the system of law applicable to the contract. These two issues are different. A dispute arising from the scenario above may be governed by the law of France and the Employment and Labour Relations Court of Kenya would have jurisdiction to hear and determine the same applying the law of France.

It is a settled principle of law that a Court cannot act without jurisdiction. The jurisdiction of the Employment and Labour Relation Court in Kenya is anchored in Article 162 of the Constitution of Kenya, the Employment and Labour Relations Court Act and the Employment Act, 2007.

When making a determination on the suitable jurisdiction, the Courts usually consider the connecting and dominant factors of the contract and the place of performance of the said contract. These factors also apply when a Court is deciding the choice of law. The factors include, the place where the contract was concluded, the place where the contract is being performed, and the habitual residence of the parties and finally, the nationality of the parties. The location stipulated in the job description during the job advertisement and the State in which the employee remitted his or her statutory deduction are critical factors in arriving at a decision as the jurisdiction of the Court and/or the choice of law applicable to the contract.

Considering the scenario given above, the Employment and Labour Relations Court of Kenya may assume jurisdiction by the mere fact the employee carried out his/her operations between Kenya and the United States. It is noteworthy that jurisdiction of the Employment and Labour Relations Court may be limited if the employer enjoys absolute immunity pursuant to the provisions of the Privileges and Immunities Act. This position was stated in the Supreme Court case of ***Karen Njeri Kandie v Alassane Ba & another [2017] eKLR.***

In contracts involving the European Community entities, the Lugano Convention would apply in determination of the question of jurisdiction. Article 5 (1) of the convention provides that a party domiciled in a State that is bound by this convention may be sued in another State bound by the convention, for civil or contractual matters.

Conflict of Laws

In the scenario presented above, the systems of law that will be at play when determining disputes arising from such contract include; - the law of France, the Kenyan and the United States legal systems. The Court seized with the dispute will invoke the provisions of the Convention on the Law Applicable to Contractual Obligations (Rome Convention) in order to arrive at the proper choice of law to govern the contract. Article 6 thereof provides that, in the absence of a choice of law, the employment contract is to be governed by: -

- The law of the country which the employee habitually works;

- If the employee does not habitually work in one particular country, then the law of the country in which the place of business through which he was engaged is situated unless it appears that the contract is more connected with another country, in which case the laws of that country will apply.

This provision may be overruled if the contract appears to be more connected to another state.

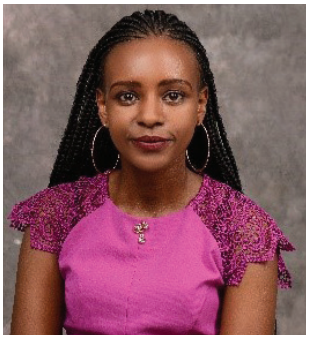
Article 6 of the Rome convention is in line with the maxim of lex loci laboris which means that national law should be applied to every labour relationship created within the territorial boundaries of the respective states. This principle of law has been applied in Kenyan Courts in the case of: - ***Dede Asi Annine Amanor Wilks vs. Action Aid Internaital (2014) eKLR*** where Court stated as follows; -

"Labour standards are viewed as falling within international public policy. States will not cede their sovereignty easily over issues that concern implementation of labour standards within their territorial boundaries. Like criminal law, labour law is highly territorial. The maxim in labour is lex loci laboris, which means that national law should be applied to every labour relationship, created within the territorial boundaries of the respective state".

Thus in the absence of a clear stipulation of the choice of law in the employment contract, the applicable law will first be informed by the law of the state in which the employee is stationed; unless it can be proved that the contract was more connected to laws of another state.

The choice of law is of utmost importance as it can be a basis of disputing a claim. A claim may be valid pursuant to law of one state but invalid when subjected to the law of another state. In order to avoid the uncertainty that conflict of laws brings, including the length of time taken by courts to decide preliminary issues such as laws applicable and the uncertainty in the validity of claims, it is prudent to ensure that the laws governing the contract and the jurisdiction of the court are clearly stated in the contract. It is also important to have a general understanding of legal status of the parties to the contract before executing the same.

The Future of Litigation Financing in Kenya



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More often than not, individuals shy away from pursuing legitimate claims for lack of funding. It is not surprising that often suits are won by those who can afford to litigate for a long period of time. Litigation financing is one of the emerging trends in litigation that has enabled persons litigate in matters that they would otherwise not be in a financial position to pursue. This article will look at what litigation financing is, the Kenyan position on advocate remuneration, how litigation financing has worked in other jurisdictions and finally, if and how it could be implemented in the Kenyan jurisdiction by looking at the merits and demerits.

Litigation financing is an arrangement where a party involved in litigation or arbitration seeks funding from a third party entity to fund their Suit. The third party entity could be a bank, private equity firm or even an individual.

Currently, there is no express law governing how litigation can be funded in Kenya. The wording of section 45(1) of the Advocates Act points out that the terms of remuneration of an Advocate are governed by the agreement entered into by the client and their Advocate in the course of contentious business or civil litigation. The Advocates Act section 46 prohibits Advocates from entering into agreements where they purchase any interest in a client's claim in a contentious proceeding, or agree to be remunerated based on a contingency fee.

This prohibition applies to both litigation and arbitration. The law also prohibits champertous arrangements in which a person provides a litigant with funds to prosecute an action in return for a share of the proceeds. A champertous agreement varies from litigation financing in that, in the latter, the third party entity funding the litigant does not gain any share of the proceeds in the event of success of the suit.

Litigation Financing in the U.S.A

Litigation financing in Kenya is not as clear cut as it is in other jurisdictions such as

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the USA. Litigation financing has secured a place in the U.S.A disputes landscape as a growing investment opportunity. There are a number of third-party funding companies in the U.S.A which advance money to litigants if they have reasonable belief that the case has merit. Such companies structure loans to which they advance to the litigant and in turn receive a percentage of the costs in the event the litigant wins the case.

In addition, the U.S.A allows for lawyers to handle cases on a contingency fee basis therefore allowing lawyers to handle cases by taking a percentage of the ultimate recovery, if any. It is not a surprise that U.S.A has one of the highest number of litigation cases if you couple contingency fees with the general prohibition against the funder getting a percentage if the litigant loses the case.

Is Kenya ready to adopt litigation financing?

How can litigation financing be implemented and embraced in Kenya without contravening section 45 and 46 of the Advocates Act? A look at both sides of the coin might provide a picture as to whether Kenya can and is ready to embrace litigation financing.

Proponents of litigation financing have argued that it enables access to justice for all. Litigation is an expensive venture and many at times people shy away from pursuing meritorious cases due to lack of funds. Litigation financing steps in to fill that gap and provide funding to people that cannot afford to pay advocates.

Secondly, champions of litigation financing have argued that public interest cases such as class action suits would benefit from receiving funding as such cases affect the public directly.

On the other hand naysayers have brought forth concerns that emerge from litigation financing. First, section 2 of the Advocates Act has described a client as a person who in their own capacity or on behalf of another, or as a trustee or personal representative has power to retain and employ an Advocate. It further provides that a client is any person who is or may be liable to pay to an Advocate any costs. The problem then arises as to who is the client between the litigant and Third Party funder and to whom does the Advocate form the Advocate- Client relationship. The Advocates Act considers both people as Clients. Whose interests does the Advocate then pursue? Is it the litigant they are defending or the person that is essentially paying them especially in situations where the third party entity and the litigant are not in consensus as to the direction the case should take.

Secondly, the availability of funds may encourage persons to pursue frivolous and vexatious claims simply because there are funds at their disposal.

Conclusion

It is clear that litigation financing can be quite beneficial in Kenya by ensuring access to justice to all which is in line with Article 48 of the Constitution of Kenya, 2010. However, proper legislation will need to be enacted to highlight the parameters in which litigation financing can be used such as the type of cases that litigation financing can be implemented so as to avoid frivolous cases as well as the extent of influence the third party funder can have on the case.

Njoroge Regeru & Company Advocates Transition from Registry Systems to an Electronic Registry Management System

The journey towards a fully Automated Registry envisioned a few years ago in the law firm was reinvented and re-engineered with the emergence of the Covid-19 Pandemic. The Pandemic changed the norm from the traditional-known normal to a very new normal which entailed embracing technology.

Meetings and Court proceedings are now held virtually, thus documents too must be relayed through the system hence the natural barriers of distance, physical filing and exchange of documents becoming irrelevant.

The Kenya Judiciary quickly adopted and enhanced the E-filing Process that had commenced years back but remained unexploited. With the need driving the demand, all Court users embraced the now quintessential new normal like never

before and the whole process and idea now has been a real game changer. The E-filing system has indeed enhanced operations, reliability, transparency and efficiency of services.

With this push for a virtual world came a pull into a fully automated files registry. At Njoroge Regeru and Company ("the Firm"), we indeed set our best foot forward to ensure that clients and staffs' needs are consistently attended to. This is in line with our vision and mission of being recognized and acknowledged as a provider of competent, efficient, prompt and cost-effective legal services on the widest possible spectrum of client needs-while at the same time navigating the pandemic season's requirements and dictates.

Full Digitalization of the registry files and records is now set to replace the traditional registry where tens of thousands of files are kept in bunkers, chest of drawers, safes and generally on shelves and a log maintained for physical retrieval purposes.

Process of Indexing

With E-Registry, all files are scanned and stored in such a way that they are accessible and jealously safeguarded against possible damage or attack. This is done by creating and maintaining indexing fields with multiple search-able fields or attributes of information as contained in the original file. The process of scanning and indexing is used to capture and link the context of the files with their content.

By scanning, it is ensured that the content, context and structure of records is preserved by capturing the authentic original file or the conversion of incoming/existing paper records to electronic/digital form. E-Registry requires that files data is captured on all paper records and subsequent extraction of the said raw data for processing on software. This requires knowledge, skills and wisdom from more than one discipline. The Legal Mind, Registry experts, data Handlers and information technology experts just to mention a few.

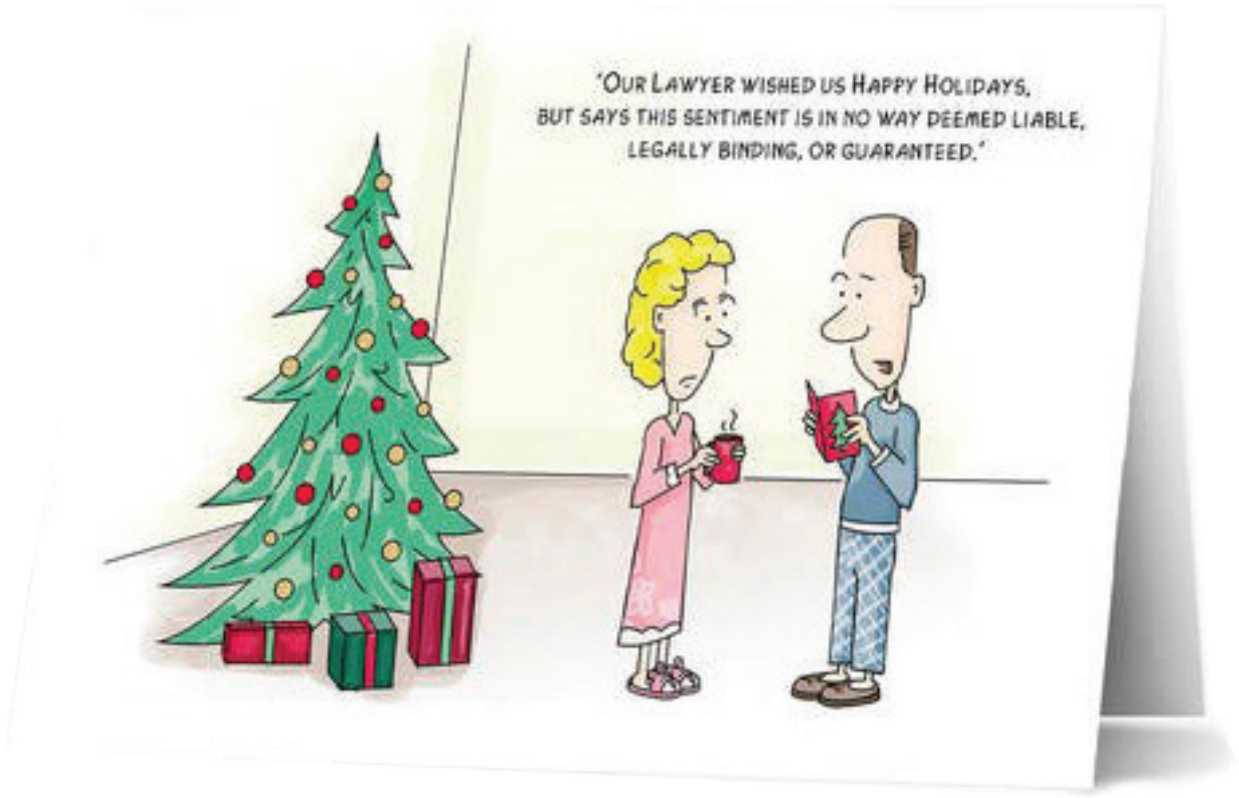
All files and Registry functions should be fully functional in manual system before attempts are made to automate them. This automation improves archival and files functions by making it possible to undertake activities that are too complicated, time and space consuming to be done effectively and efficiently. The first phase of the process has been successfully completed in this last quarter of the year and engagements underway for the 2nd and final phase for the full automation and software development.

The E-Registry can be office based where users use Intranets- (an internal computer network belonging to an Organization and accessible only by qualified users within the Organization) thus protecting the integrity of the file and confidentiality. This is the current state in the Firm. It also can be cloud-based thus accessible remotely on the Google platform through tailor-made software or even both. This is the direction the Firm is taking.

An E-Registry enhances efficiency since at the click of a button, users are well able to retrieve documents and correspondences contained in respective files. Feedback to clients becomes real-time as retrieved documents can be electronically exchanged without the bustle and hustle of getting to the Registry Archives and pulling out of the physical files to attend to clients' queries.

Automation not only improves archival and records functions but also make it possible to undertake activities that were too complicated or time and space consuming to be done efficiently and effectively.

CONTRIBUTORS' PLATFORM



TO ALL OUR ESTEEMED CLIENTS AND VISITORS

TAKE NOTICE that we will close our offices on Tuesday, 22nd December, 2020 at 5.00pm for the Christmas and New Year festivities. We will re-open on Monday, 4th January, 2020 at 8.00am.

In the event of any emergencies during the aforesaid period, you may contact the following:

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