

Q2 -2020

NR&amp;Co Quarterly | ...Legal Briefs

# NR&Co Quarterly

*...Legal Briefs*

## Table of Contents

Editor's Note .....	1
Budget 2020/21.....	2
Legislative Updates .....	5
Case Highlights.....	8
Interlude .....	9
Contributors' Platform.....	10
Acknowledgments.....	14

### Editorial team

Claire Mwangi  
 Rosemary Kamau  
 Ruth Regero  
 Catherine Wangui  
 Nashon Odhiambo  
 Rodney Wesonga

### Contributors

Claire Mwangi  
 Rosemary Kamau  
 Jackson Mwangi  
 Sandra Bucha  
 Rodney Wesonga  
 Catherine Wangui  
 Nashon Odhiambo

### Design & layout:

Grace King'ori

### Publisher

Njoroge Regeru & Company Advocates

### Disclaimer

This Newsletter is for informative purposes only and it is not to be relied upon as legal advice. None of the information contained in the Newsletter is intended to create, and receipt of it does not constitute, an advocate-client relationship. Nothing in this Newsletter is intended to guarantee, warranty or predict the outcome of any particular case and should not be construed as such a guarantee, warranty or prediction. The authors are not responsible or liable in damages or otherwise howsoever for any actions (or lack thereof) taken as a result of relying on or in any way using any of the information contained in this Newsletter and shall in no event be liable for any damages resulting from reliance on or use of any of the information herein contained. Nothing contained in this Newsletter should be construed as constituting any legal advice on any subject to any person. It is recommended that readers facing specific situations should take specific advice from suitably qualified professionals.

### Njoroge Regeru & Co. Advocates

Arbor House, Arboretum Drive  
 PO Box 46971-00100 GPO Nairobi  
 Tel: +254-020-2612531/2613646  
 020-3586592/2319224,  
 Cell: 0722 206 884, 0733 608 141, 0752 431 961  
[www.njorogeregeru.com](http://www.njorogeregeru.com)



KARIBU!

## Editor's Note



Claire Mwangi  
[craig@njorogeregeru.com](mailto:craig@njorogeregeru.com)

As we get well into the year and trying to keep safe with the ongoing COVID-19 pandemic, we are pleased to share with you our second quarterly briefing. This Newsletter Issue highlights the various efforts by the Government of Kenya ("GOK") in keeping families and households afloat while managing the negative effects of the Covid-19 on Kenya's economy. Some of the efforts by GOK include the Economic Stimulus Programme and the expansive 2020 Budget which aims to catalyze economic activity for business recovery in Kenya.

On the Legislative Updates section, there have been quite a number of legislative amendments and regulations promulgated during this quarter. These include:(a) the Small Claims Court (Amendment Act), 2020 which seeks to promote the effective disposal and management of small claims, which affect small and medium enterprises; (b) the Tax Laws (Amendment)

Act, 2020 which amends tax related laws such as the Income Tax Act, and the Tax Procedures Act, 2015.

Over to the Case Highlights sections, this Issue highlights the case of **Mohan Galot V Walter Omosa Nyakundi & 21 Others; Pravin Galot & 2 Others (Interested Parties) [2020] eKLR** which discusses the technological issues with regard to virtual hearings. Additionally, in **In re Application for Leave to hold the postponed Law Society of Kenya Annual General Meeting Virtually [2020] eKLR** the court permitted the conduct of annual general meetings virtually/electronically following the impact of the COVID-19 Pandemic.

Our team of advocates has also taken time to address various topics which would be informative to our clients. At the Contributors' Platform, I analyze the benefits of Mediation over Arbitration as an alternative dispute resolution mechanism. Mediation serves as a surest mode of preserving the privacy of the parties and the dispute compared to Arbitration, whilst giving the desired finality in resolving disputes. My colleague, J.M Kamenju, in his article discusses the danger posed on one's title to property based on the registration process and possible revocation of titles and why the defense of "an innocent purchaser for value" might not be of great help. Finally, Rosemary Kamau and Rodney Wesonga celebrate the great feat by Kenya in joining the United Nations Security Council ("UNSC") as a non-permanent member and discuss opportunities present at the UNSC to bolster the African voice in the fulfillment of the international peace and security mandate.

Stay Safe and Happy Reading!

## A. INSIGHTS

The Cabinet Secretary for Finance, Ukur Yattani, made his maiden budget presentation on Thursday, 11<sup>th</sup> June, 2020. The 2020/21 financial year budget comes in the wake of a global health pandemic, ravaging floods in different parts of the country and a locust invasion, all of whose effects the country is, unfortunately, still recovering from. It is thus little wonder that the theme of the new fiscal year's budget is "Stimulating the Economy to Safeguard Livelihoods, Jobs, Businesses and Industrial Recovery"; highlighting the government's intention to address various adverse effects on the economy and the lives of citizens and residents alike.

The Kshs. 2.79 Trillion budget targets revenue collection, inclusive of



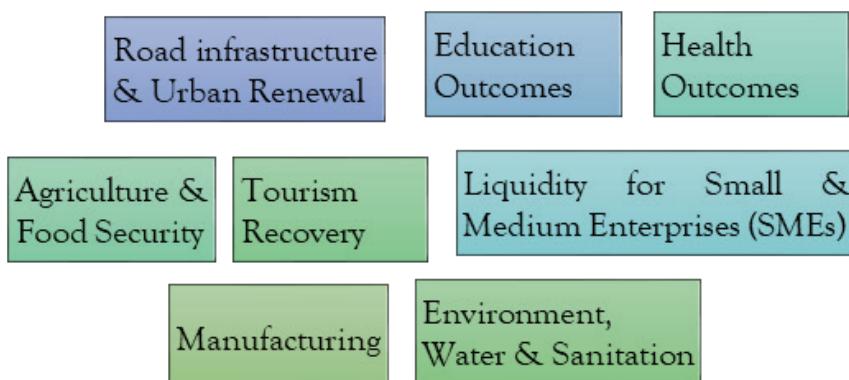
Appropriations-in-Aid (AIA) of Kshs. 1.89 Trillion. Included in the projected revenue is ordinary revenues projected at Kshs. 1.63 Trillion. The Kshs. 840.6 Billion deficit is to be financed through semi-concessional loans (Kshs. 124.1 B), project loans (Kshs.

250.5 B), commercial financing (Kshs. 6.2 B), program support (Kshs. 150 B), foreign payments (Kshs. 179.6 B) and net domestic financing (Kshs. 493.7 B). Whilst the projected revenue stagnated from the 2019/2020 budget, the 2020/2021 budget has seen a decrease in deficit.

## B. FOCUS AREAS

### 1. Economic Stimulus Programme

The government intends to roll out an economic stimulus programme that will catalyse economic activity, provide livelihood to Kenyans and enable businesses to recover from the adverse effects of the COVID-19 pandemic. This eight-point stimulus package focuses on improving or enhancing the following areas: -



Aside from fund allocation, the government aims to create jobs through specific programmes targeting unemployed youth and trained professionals this being in addition to supporting local industries and using local labour.

## 2. The Big 4 Agenda

In continued support of the implementation of the Big Four Agenda, the Government has allocated Kshs. 128.3 Billion towards the actualization of various projects under the Agenda. Notably, to reduce over-reliance on rain-fed agriculture the Government has allocated Kshs. 10.6 Billion to increase agricultural productivity and build resilience

to climate change risks under the Kenya Climate Smart Agriculture Project. Further, the Government has operationalized the Kenya Mortgage Refinance Company (KMRC) to address funding constraints, increase access to affordable credit, grow the primary mortgage market and reduce the funding cost of residential mortgages.

In cognizance of the factors needed to support the Big Four Agenda, the Government has outlined four enablers for the successful implementation of the Agenda. These are: (1) a conducive business environment for investment, (2) infrastructural development, (3) sustained

investment in social services for the welfare of Kenyans and (4) continued support to counties for enhanced service delivery.

With regard to the first enabler, the Government intends to maintain macroeconomic stability through prudent fiscal and monetary policies so as to support economic recovery, maintain price stability and safeguard livelihoods, jobs and businesses. To do so, the Government through its monetary policy will maintain inflation within the target range of 2.5% on either side of 5.0%. In addition, the Government has reduced the Central Bank Rate (CBR) from 8.25% to 7.0% and after

## BUDGET 2020/21

lowered the Cash Reserve Ratio (CRR) requirement from 5.25% to 4.25%. These interventions have released Kshs. 35 Billion to commercial banks thus infusing liquidity into the market.

Under infrastructural development, the Government has allocated Kshs. 18.1 Billion for the construction of SGR Phase II and Kshs 6.0 Billion for the LAPSSET project, among other projects, so as to modernize ports and further develop and manage efficient and safe rail transport. To further enhance service delivery and open new frontiers for employment creation, the Government has allocated Kshs. 2.2 Billion for National Optic Fibre Backbone Infrastructure (Phase II) Expansion.

### 3. Support of Micro, Small & Medium Enterprises

The Government intends to support the recovery and growth of Micro, Small and Medium Enterprises through various interventions including operationalization of the Credit Guarantee Scheme. Additionally, the Government shall gazette and enforce a list of items for local procurement in a bid to promote the “Buy Kenya, Build Kenya” initiative.

### 4. Public Procurement

As part of structural reforms, the Public Procurement and Asset Disposal Regulations, 2020 have been published. These regulations seek to enhance uniformity of operations of procurement entities in addition to promoting local economy. Along further procurement lines, the Government has finalized the e-Government Procurement Strategy which is aimed at optimizing procurement and facilitating the roll-out of an end-to-end e-procurement system by December 2020. It is intended that all procurement processes will be undertaken through the online platform.

### 5. The Nairobi International Financial Centre

The National Treasury is in the process of actualizing the Nairobi International Financial Centre. The Centre is expected to play an important role in attracting investments and private capital to support economic growth as well as mobilizing additional financing for the “Big Four” flagship projects.

Additionally, the National Treasury is expecting to conduct Kenya's first National Risk Assessment on Money Laundering and Terrorism Financing. This will assist the country's competent authorities to assign responsibilities for combating money laundering and terrorism financing to the relevant Government agencies on the basis of identified risks and vulnerabilities. Further, the National Treasury is re-engineering and upgrading the pensions system in order to clear all pension payment backlog by the end of the calendar year 2020. This will pave way for a modernized pension management system that will guarantee smooth transition of retirees from a monthly salary cheque to a monthly pension payment.

### 6. Green Climate Financing

The National Treasury proposes to tap into the Green Climate Financing by issuing the first “Sovereign Green Bond” to finance major infrastructure projects in the coming financial year. The proceeds of this bond will be directed towards green projects at both the National and County level.

### 7. Capital Markets

Government has also proposed amendments to the Capital Markets Act (CAP 485A) to provide for the regulation of private equity and venture capital companies by the Capital Markets Authority (CMA). This is in a bid to implement the Investment Guidelines under the Retirement Benefits Regulations

which allow pension schemes to invest up to 10% of their assets in private equity funds and venture capital funds licensed by the Capital Markets Authority (CMA).

### C. ECONOMIC STIMULUS PROGRAMME

President Uhuru Kenyatta on 23<sup>rd</sup> May, 2020 unveiled a KShs.53.7 Billion eight-point Economic Stimulus Programme aimed at injecting money to the economy to cushion citizens from the effects of the COVID19 pandemic.

The stimulus targets key sectors of the economy including:-

#### 1. Infrastructure

##### Funds allocated: KShs.5 Billion

The President indicated that due to ongoing heavy rainfall, infrastructure has been adversely affected across the country. Money allocated would thus be geared towards hiring local labour to rehabilitate access roads, foot bridges and other public infrastructure. This initiative is anticipated to generate construction jobs for Kenyans across the country.

The Government also hopes that with the use of local labour and construction materials, in line with the “Buy Kenya Build Kenya Policy,” the money will stimulate and support micro and small business enterprises.

#### 2. Education

##### Funds allocated: Kshs. 6.5 Billion

The monies allocated are geared towards hiring of 10,000 teachers and 1,000 ICT interns to support digital learning. The funds are further intended to be channelled towards improvement of school infrastructure, which includes acquisition of 250,000 locally fabricated desks with the aim of not only improving school infrastructure but also creating jobs.

### 3. SMEs

#### Funds allocated: KShs.10 Billion

The funds are geared towards fast-tracking payment of outstanding Value Added Tax (VAT) refunds and other pending payments. A further KShs.3 Billion has been set aside as seed capital for the SME Credit Guarantee Scheme. This allocation is aimed at providing affordable credit to SMEs that have been negatively impacted by the pandemic.

### 4. Health

The President indicated that the Government intends to hire an additional 5,000 healthcare workers with diploma or certificate level qualifications on one-year contracts. This move is intended to not only enhance the country's COVID-19 response capability but also the implementation of the Universal Health Coverage (UHC) programme. KShs.1.7 Billion was set aside for the expansion of bed capacity in public hospitals. The President also indicated that more resources would be allocated to medical research facilities to enhance their capacity; a critical move towards innovation in the medical field.

### 5. Agriculture

Under this sector, the Government is expected to spend KShs. 3 Billion on the

supply of farm inputs through e-vouchers targeting 200,000 small-scale farmers. This is meant to cushion farmers from adverse weather conditions as well as secure food supply chains in the post COVID-19 period and into the future.

An additional Kshs. 1.5 Billion has been set aside to assist flower and horticultural producers to access international markets, in cognizance of the shortage of flights into and out of the country.

### 6. Tourism

The tourism sector has been one of the hardest hit if not the worst hit sector since the onset of the first case of COVID- 19 due to restricted movement and suspension of international flights. To this end, the Government plans to provide soft loans to hotels and related establishments through the Tourism Finance Corporation (TFC).

KShs.2 Billion will also be set aside to support renovation of facilities and the restructuring of business operations in the industry. Further funding will also be allocated to support the operations of Utalii College with the aim of guaranteeing the steady supply of well-trained hospitality professionals.

The Government also seeks to engage 5,500 community scouts under the Kenya Wildlife Service at a cost of Kshs. 1 Billion. Additionally, support will be made available to about 160 community conservancies at a cost of Kshs. 1 Billion.

### 7. Environment and water

#### Funds set aside: Kshs. 850 million

These funds are to be channelled largely towards mitigation of deforestation and climate change impacts. The stimulus also seeks to enhance provision of water throughout the country through rehabilitation of wells, water pans and underground tanks with special focus on the arid and semi-arid areas. A further Kshs. 1 Billion has been set aside for flood control measures and Kshs. 540 million for the Greening Kenya Campaign.

### 8. Manufacturing

This is the final element in the stimulus programme under which the President noted that an initial investment of Kshs. 600 million would be used to purchase locally manufactured vehicles. This is expected to sustain the operations of local motor vehicle manufacturers.

## LEGISLATIVE UPDATES

There have been quite a number of legislative amendments and regulations during this unprecedented time. In this section, we address the following: The Small Claims Court (Amendment Act), 2020; Tax Laws (Amendment) Act, 2020; National Construction Authority (Defects liability) Regulations, 2020; Business Act (Credit Reference Bureau) Regulations, 2020 and the Finance Act, 2020.

### **1) THE SMALL CLAIMS COURT (AMENDMENT) ACT, 2020**

On 30<sup>th</sup> April, 2020, the President assented to the Small Claims Court Bill in a bid to promote the effective disposal and management of small claims, which affect small and medium enterprises. The Bill further sought to align the Small Claims Court Act with Articles 48 and 50 of the Constitution, on the right to access justice and the right to a fair hearing respectively.

Among key amendments to the Small Claims Court Act is the adjusted monetary jurisdiction of Small Claims Courts. While the courts previously had jurisdiction to determine matters capped at two hundred thousand shillings (Kshs. 200,000.00), the new prescribed pecuniary limit is one million shillings (Kshs. 1,000,000.00).

In addition, parties to small claims matters need not be represented by advocates. The Small Claims Court (Amendment) Act has expanded the scope of authorized representatives to include the next of kin or a close representative of a party to the proceedings. The only attendant requirement, as per the Act, is that such a representative must be appointed in writing and approved by the Adjudicator prior to representing a party in proceedings. For advocates who appear before the Court, the Act empowers the Chief Justice, in consultation with the Council of the Law Society of Kenya, to make orders prescribing and regulating their remuneration.

In a bid to ensure the expeditious disposal of cases, the Small Claims Court

(Amendment) Act limits the number of adjournments the Court may issue to three (3). Further, such adjournments may only be allowed on grounds of exceptional and unforeseen circumstances, which as listed under the Act include: the absence of any of the parties concerned, their representatives or any other participant who is required to appear in court for justified personal reasons; an application by a party for the Adjudicator to withdraw from hearing the matter; and a request by the parties to settle the matter out of court.

### **2) THE TAX LAWS (AMENDMENT) ACT 2020**

The Tax Laws (Amendment) Bill 2020 was assented to by the President into an Act on 25<sup>th</sup> April, 2020. The Act has amended various tax related laws such as Income Tax Act, Value Added Tax Act, 2013, Excise Duty Act, 2015, Tax Procedures Act, 2015, Miscellaneous Fees and Levies Act, 2016, Kenya Revenue Authority Act, 1995 and the Retirement Benefits Act, 1997.

The Act has introduced the following changes;

#### **(a) Turnover Tax**

Turnover Tax of 1% shall be payable by any business with an annual turnover of between Kshs. 1,000,000.00 and Kshs. 50 million and is now extended to incorporated companies. Previously, the rate was 3% and the turnover threshold was Kshs.5 million, and was only applicable to sole proprietors and partnerships.

#### **(b) Presumptive Tax**

Collection of presumptive tax at 15% of the Single Business Permit fee has been removed. Turnover tax will now be fully payable to the Kenya Revenue Authority through the filing of monthly returns.

#### **(c) Withholding Tax**

Withholding tax is now applicable on sales promotion, marketing, advertising services, transportation of goods (excluding air and shipping transport services) paid to non-residents at the rate of 20%. Withholding tax is also applicable to

insurance or reinsurance premium, except insurance or reinsurance premium paid in respect of aviation insurance.

Withholding tax rate on dividends paid to non-residents has been increased from the current 10% to 15%.

Dividends paid or received by special economic zone developers, operators and enterprises are now subject to withholding tax. Therefore, dividends paid by Special Economic Zones' entities to non-resident persons will be subject to withholding tax at a non-resident rate.

#### **(d) Value Added Tax**

The Act has amended the VAT base of petroleum products by deleting the proviso to Section 5 (2) (a) of the VAT Act, 2013. Excise duty, fees and other charges which were previously excluded from VAT value will now be subjected to VAT.

The Act has amended the proviso to Section 16(1) of the VAT Act to allow for a credit note to be issued within 30 days of a determination of a matter in court where the matter relates to a commercial dispute in court with regard to the price payable. Currently, a credit note can only be issued within 6 months of the issuance of an original tax invoice.

#### **(e) Corporate Income Tax**

The Act has introduced a resident corporate tax of Kshs.5 for every Kshs.20, which translates to a corporate tax rate of 25%. The reduced resident corporate tax rate applies from the year of income 2020.

#### **(f) Miscellaneous Fees and Levies Act**

The Act has introduced a processing fee of Ksh.10,000.00 on motor vehicles imported or purchased duty free prior to clearance through Customs.

#### **(g) Tax Procedures**

The Act has reduced the penalty for late filing of a turnover tax from Kshs.5,000 to Kshs.1,000.00.

The Act has increased the period within which the Commissioner is required to

## LEGISLATIVE UPDATES

respond to a private ruling application from 45 days to 60 days.

### 3) NATIONAL CONSTRUCTION AUTHORITY (DEFECTS LIABILITY) REGULATIONS, 2020

Legal Notice No. 64 of 2020 introduced the National Construction Authority (Defects Liability) Regulations, 2020, which seeks to, among other things, outline the obligations of parties during the patent and latent defects liability periods.

The Defects Liability Regulations outline the difference between latent defects and patent defects. The former are defined as a concealed structural flaw in a commercial building or fixed installation that exists but is not apparent or readily detectable during the latent defects liability period whereas the latter has been defined as a defect which is detectable upon reasonable inspection during the construction period and can be notified to the contractor either before practical completion or during the defects liability period. Another key definition rendered by the Regulations is that of the term ‘defects liability period’, which has been set out as the period after the construction of a commercial building has been completed, from practical completion to hand-over of the commercial building during which a contractor may return to the commercial building to remedy any patent defects.

The Regulations provide that every contract for the construction of a commercial building must prescribe a patent liability defects period. This period is to be set at a minimum of twelve (12) months after practical completion. Contractors, sub-contractors and relevant professionals, who include architects and quantity surveyors, shall be responsible for the rectification of patent defects that become apparent during the patent liability defects period. During this period, the owner of the commercial building together with the contractor, relevant professionals or sub-contractor shall jointly prepare a schedule

specifying the patent defects identified. This schedule provides the basis for the owner’s certification that the contractor, relevant professionals or sub-contractor have made good the defects identified.

With regard to latent defects, the Regulations also provide that every contract for the construction of a commercial building must prescribe a latent liability defects period. This period is to be set at a minimum of six (6) years after the lapse of the patent liability defects period. Similar to their obligations under the patent liability defects period, contractors, relevant professionals and sub-contractors shall be liable for patent defects that become apparent during the latent defects liability period.

The Regulations further require that contractors and sub-contractors to obtain insurance covers for latent defects that may become apparent during the latent defects liability period. On the other hand, relevant professionals are required to obtain a professional indemnity cover for latent defects that may become apparent during the latent defects liability period while every owner of a commercial building is required at all times to insure the commercial building against structural damage attributable to the owner.

### 4) BUSINESS ACT (CREDIT REFERENCE BUREAU) REGULATIONS, 2020

Central Bank of Kenya announced back in April, 2020, the publication of the Credit Reference Bureau Regulations, 2020. The Regulations are made pursuant to Section 31(3) of the Banking Act and seek to replace the Credit Reference Bureau Regulations, 2013.

The new regulations provide the following reforms:

1. A minimum threshold has now been set at Kenya Shillings One Thousand (Kshs.1000) for negative credit information submitted to Credit

Reference Bureaus. Consequently, borrowers that had been blacklisted under the CRB for loans under Kshs. 1000 will be delisted. Additionally, borrower’s information regarding non-performing loans of less than Kshs. 1000 will not be submitted to CRB.

2. Persons applying for CRB clearance certificates for the first time will now be able to do so at no charge.
3. SACCOS regulated by Sacco Society Regulatory Authority (SASRA) have now been included as authorized subscribers of credit data to CRBs. Consequently, these SACCOS will be able to submit borrower’s credit information to CRBs and receive credit reports directly from them.
4. Conversely, Central Bank of Kenya has withdrawn the approvals granted to unregulated digital (mobile-based) and credit-only lenders as third party credit information providers to CRBs. Thus, unregulated digital and credit only lenders will no longer submit credit information of their borrowers to CRBs.
5. Finally, with the recommendation of the Central Bank of Kenya, the Cabinet Secretary for the National Treasury and Planning has suspended, for a period of six months, the listing of negative credit information for borrowers whose loans were performing previously but have become non-performing from April 1, 2020. Consequently, loans that fall in arrears from April 1 to September 30, 2020, will not lead to the “blacklisting” of the borrower on the CRBs. This is one of the measures taken in light of the Covid-19 pandemic aimed at shielding borrowers from its effects.

### 5) FINANCE ACT, 2020

The Finance Act, 2020 was signed into law on 30<sup>th</sup> June, 2020. The new Act provides for the following reforms:

#### a) Increased upper limit of rental income subject to residential Income Tax

The Act increases the upper threshold to qualify for residential rental income tax from Kshs. 10 million to KShs.15

## LEGISLATIVE UPDATES

million does not change the lower limit for the tax, as does the applicable rate of tax, which - is 10%. Rental income tax may apply to rental income earned between KShs.144, 000 and Kshs. 15 million in a year of income.

### b) Introduction of a Minimum Tax

There is an introduction of minimum tax which will be payable at the rate of 1% of the gross income of a person.

The minimum tax will be payable if a person's:

- (i) Income is not exempt under the Income Tax Act;
- (ii) Income is not from employment, residential rent, capital gains, mining or oil exploration, capital gains or subject to turnover tax;
- (iii) Minimum tax payable is lower than the instalment tax payable.

### c) Introduction of Digital Service Tax

The Finance Act introduces a Digital Service Tax. Digital Service Tax that is payable by a person whose income from the provision of services is derived from or accrues from Kenya through a digital marketplace at a rate of 1.5% of the gross transaction value of services.

### d) Repeal of provisions relating to Home Ownership Service Plan in the Income Tax Act

The Repeal of provisions relating to Home Ownership Service Plan mean there will be no there will be no tax deduction allowed in respect to contributions made to a registered Home Ownership Service Plan.

The deletion of Section 22C allows tax deduction of HOSP contributions up to a limit of Kshs. 96,000 per year. Further, this section exempts interest income earned by a depositor on such deposits up to a maximum of KShs.3, 000,000.00.

### e) Removal of tax exemptions

The Act has removed tax exemptions for the following income categories:

- i) income earned from the National Social Security Fund (NSSF). This will result in reduction of retirement benefits.;
- ii) employment income received as bonuses, overtime and retirement benefits (for employees whose taxable employment income before the bonuses and allowances does not exceed the lowest tax band which is currently KShs.24,000.00 (approx. USD 226);
- iii) monthly or lump sum pension payments to persons above 65 years of age.

### f) Creation of non-deductible expenses

The Act outlaws several business expenses. These expenses include:

- (i) Membership subscription and fees on members' clubs and trade associations.
- (ii) Legal and other incident capital expenditure relating to the authorization and issue of shares, debentures or similar securities.
- (iii) Legal and incident capital expenditure relating to listing without raising additional capital.
- (iv) All listing expenses.
- (v) Club subscriptions paid for employees.
- (vi) Capital expenditure incurred on the construction of a public school, hospital, road or any social infrastructure.

### g) Kenya Revenue Authority Act: Restrictions on suing KRA

The Act imposes a time limit of 12 months from the date an action arose within which one can sue KRA or 6 months from the cessation of a continuing damage or injury. The Bill further introduces a requirement to give KRA a month's notice to sue which should be served on the Commissioner General before instituting legal proceedings against KRA.

### h) Introduction of the Voluntary Tax Disclosure Programme

The introduction of the voluntary tax disclosure programme means that persons who voluntarily disclose their undisclosed tax liabilities that have accrued within a period of 5 years prior to 1st July, 2020, will be granted relief from penalties on the disclosed taxes.

### i) Expansion of the oversight mandate of the Capital Markets Authority

The Act to expand the oversight mandate of the Capital Markets Authority (CMA) includes private equity and venture capital firms with access to public funds, within its mandate. CMA will therefore be required to license, approve and regulate them.

## CASE HIGHLIGHTS

This Issue highlights the case of Mohan Galot V Walter Omosa Nyakundi & 21 Others; Pravin Galot & 2 Others (Interested Parties) [2020] eKLR which discusses the technological issues with regard to virtual hearings. Additionally, in In re Application for Leave to hold the postponed Law Society of Kenya Annual General Meeting Virtually [2020] eKLR the Court permitted the conduct of annual general meetings virtually/electronically following the impact of the COVID-19 Pandemic.

### **1) MOHAN GALOT V WALTER OMOSA NYAKUNDI & 21 OTHERS; PRAVIN GALOT & 2 OTHERS (INTERESTED PARTIES) [2020] eKLR**

The Application in this case was premised on the grounds that the Plaintiff/Applicant's Advocates were notified by the Executive Officer that the said matter was to proceed on 7<sup>th</sup> May 2020, via zoom and that the said Executive Officer confirmed that the hearing would begin at 10.00 a.m. At around 9.50a.m, the Plaintiff/Applicant's Advocate logged into zoom using the meeting ID and received a notification advising him to await for the host to admit him to the ELC personal meeting.

The Applicant's Advocate received further notification that the host had terminated the meeting but when he logged in again, he was never allowed into the meeting and he was therefore never part of the proceedings and subsequent orders were issued *ex parte*.

The Applicant's Advocate argued that his absence was not intentional as it was beyond his control as it was the duty of the ICT Officer charged with responsibility of granting access to allow him to join the hearing. He further argued that the ICT Officer's conduct was suspicious, questionable and inexcusable and that the ICT Officer's action was an act of human intervention.

The Defendants rejected any claims that there was collusion with the ICT Officer and that the issued orders should stand.

The Court in its ruling relied on Order 12 Rule 7 and Order 51 Rule 15 of the Civil Procedure Rules on setting aside the *ex parte* judgement and noted that the power to set aside *ex parte* orders are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that justice has been done quoting the case of **Patel v E.A Cargo Handling Services Ltd (1974) EA 75**.

Subsequently, the Court went ahead and set aside the orders to give a chance to the Applicant to be heard on the application to enjoin the interested party in the case. The Court found that the absence of the Applicant's advocate was not intentional as it was beyond his control due to issues of technological error. On the question of collusion between the ICT Officer and the Defendant, the Court found that there was insufficient evidence to warrant investigations on the ICT Officer for collusion and the specific prayer was denied.

### **2) IN RE APPLICATION FOR LEAVE TO HOLD THE POSTPONED LAW SOCIETY OF KENYA ANNUAL GENERAL MEETING VIRTUALLY [2020] eKLR**

The Applicant in this case, the Law Society of Kenya (LSK) sought leave to virtually hold its Advocates' Benevolent Association, Annual General Meetings (AGMs) which was initially proposed for 28<sup>th</sup> March, 2020. The said AGMs were not held due to the COVID-19 pandemic and also pursuant to Legal Notices 51 to 54 of 2020 issued under the Public Health Act.

The Applicant argued that although the holding of its AGM through a virtual platform was permitted by Regulation 97 of the Regulations and that its Council's determination of the place for holding the meeting through the virtual platform was in accordance with Section 30(1) of the Advocates Act, it would nonetheless require leave of court to proceed in such manner.

Bearing in mind the public health laws, regulations and directives that have currently been put in place but not limited to the Public Health (Covid-19) Restriction of Movement of Persons and Related Measures) Rules, 2020 and the statutory obligations of the Society, the Court was being called upon to expand the meaning of the word "venue" that was referred to in Section 30(1) of the Act and determine if the same included a virtual platform. The pronouncement by the Court was therefore critical as this was the first time the AGM was going to be held electronically.

The disruption of the nature of COVID-19 pandemic was unprecedented and was unforeseen by human kind. The law did not envisage an AGM not taking off due to force majeure. In view of this lacuna, it was the considered opinion of Court that sufficient notice had to be given in a case where an AGM had not taken off for any reason.

This was particularly important because as in this case, the Applicant was adopting a new mode of conducting its AGM that many of its members would be interacting with for the first time.

For the foregoing reasons, the Court's decision was that:

The Applicant was granted leave to hold, the Law Society of Kenya and Advocates' Benevolent Annual General Meetings that had been slated for 28<sup>th</sup> March 2020 but postponed on 18<sup>th</sup> March 2020, to a date to be communicated to members, by the LSK Council.

For the avoidance of doubt, the period of issuance of the requisite notices prior to convening the AGM and Agenda must be strictly complied with and adhered to and all members accorded an opportunity to participate in the said AGM as stipulated in the Law Society Act No 4 of 2015 and Law Society of Kenya (General) Regulations, 2020.

## INTERLUDE

*A careful stance would ease the pain  
 A thoughtful watch would save lives.  
 What's yours may seem great and yours to determine  
 Not so, when the same affects lives.  
 Wash hands, wear masks are simple things that would save you and yours  
 Protect your business and keep your granaries full.  
 Do not be sly, just think of others  
 The walls will soon come down and life will be as old.  
 Wash hands, wear masks are simple things that would save you and yours*



*California Department of Managed Health Care*

# Arbitration –vs- Mediation: Where does the Future Lie?



By Claire Mwangi  
claire@njorogeregeru.com

## Introduction

Any dispute resolution mechanism adopted by parties is primarily premised on the benefits and advantages that the dispute resolution mechanism presents. Article 159 (2) (c) of the Constitution promotes the use of *inter alia*, Arbitration and Mediation as Alternative forms of Dispute Resolution (ADR). This article seeks to analyse some features of the two dispute resolution mechanisms and which presents a promising future in the resolution of parties' disputes.

## Arbitration Overview

Parties choose arbitration because of among other reasons, the flexibility and privacy of the proceedings, and their ability to choose directly or indirectly the tribunal that would determine the dispute in question. The final and binding nature of an Arbitral Award as espoused under Section 32A of the Arbitration Act presents yet another advantage of an arbitral process, with no challenge allowed on an arbitrator's finding of facts. Lord Justice Steyn in the case of **Geagas S. A v Trammo Gas Ltd (The "Baleares") [1993] 1 Lloyd's L R 215** put it succinctly as follows:-

*"The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact."*

The above position was adopted by the **Court of Appeal** in Kenya Oil Company Limited & another v Kenya Pipeline Company [2014] eKLR. Whereas the purpose of the enactment of arbitration law is deemed as an effort to reduce the burden on the Courts, of what purpose is an arbitral award that is fundamentally flawed as relates to the factual findings? Is there value in having a dispute resolution mechanism where parties are forced to accept as binding obvious factual mistakes by arbitrators resulting in huge financial consequences and with no available legal mechanism of challenging the same? Certainly not.

The privacy and confidentiality of arbitration proceedings and having a matter determined out of the public gaze presents another advantage in arbitration. The question that then arises is to what extent the privacy and confidentiality subsists. Sections 35 and 36 of the Arbitration Act provide for enforcement and recognition of awards in which case, the arbitral award is presented as an annexure to the affidavit filed in Court for determination of the application.

The production of the award in Court thus results in defeating the privacy and confidentiality of arbitral proceedings. This therefore means that whereas parties commence arbitration proceedings whilst enjoying the privacy and confidentiality thereof, this privacy and confidentiality is uncertain as there is no telling if the Arbitral Award may end up in Court. This advantage is therefore a conditional one and is not guaranteed.

The confidentiality of an arbitral award could be cured if the Arbitration Act provided for 2 forms of awards; one that protects the facts and findings by only giving the final orders to be used solely for enforcement applications and thereby maintain confidentiality. However, for setting aside applications, the entire award needs to be placed before the Court, which still defeats the confidentiality of arbitration proceedings.

## Mediation Overview

Mediation is assisted negotiation that focuses on the power of discussion, face to face meetings and compromise by the disputing parties. Mediation seeks to attend to parties' sensitivities, their wants and needs, which are rarely articulated in writing. It is a non-adversarial dispute resolution mechanism that is voluntary and results in a speedy resolution of the dispute as it involves bringing together the disputing parties who actively participate and generate a solution that is acceptable to them as the settlement is based on their interests as opposed to their positions.

Unlike Arbitration, parties are not buried in copious documentation as the issues are understood by the parties who have the authority to settle the dispute and who speak through the Mediator. The dispute, if successfully resolved, culminates into a mediation agreement which stipulates the action points to be undertaken by the

## CONTRIBUTORS' PLATFORM

respective parties. The proceedings of the Mediation process remain confidential and do not form part of the mediation agreement and are not admissible in any Court proceedings. The mind-set of parties engaged in a mediation process is not to win, but really, to find a mutually acceptable solution to the problem.

### **Conclusion**

It is absolutely critical that careful consideration is done by parties before incorporating arbitration agreements in

their contracts as has been the practice. Parties must assess the value of resolving their disputes either through an arbitral process or Mediation and make an informed choice as to which form of ADR would meet their needs.

Whereas Arbitration promises finality and confidentiality, the reality is that the dissatisfied party will always try to challenge factual findings disguised under Sections 35 and 36 of the Arbitration Act. Arbitration does not therefore achieve its intended

purpose of finality, confidentiality, and expeditious disposal of disputes. On the other hand, confidentiality is more often than not achieved in Mediation and if parties agree, the finality of the dispute is realized. In this regard, parties should consider amending their contracts to remove Arbitration as a mode of resolving disputes and replacing it with Mediation and if Mediation fails, parties can escalate their dispute directly to Courts.

# Why your Title may be Revoked for No Fault of Yours and Why the Defence of an Innocent Purchaser for Value Might not Help You



Jackson Mwangi Kamenju  
jackson@njorogeregeru.com

It has always been believed and submitted that an innocent purchaser for value is protected irrespective of fraud and that his/her title cannot be impeached. This has been termed as the paradox of registered conveyancing (Lwanga –vs- Registrar of Titles Misc. Cause No. 7A of 1977 (1980) HCB 24).

It is trite law that one cannot pass a better title than he/she has, but there is an exception where a person buys land/property from another person without any knowledge of the fraud and/or has

no notice of any third parties as against the property/land she/he is buying. The purchaser in the circumstances is regarded as an innocent purchaser for value or in other terms a bona fide innocent purchaser for value.

The provision of Section 80 (2) of the Land Registration Act, 2012 has been a refuge to purchasers of land (even banks where the subject land is charged) who have bought land and acquired titles to the land only for the titles to be challenged on the basis that the land was sold to them fraudulently.

However, with the Land Registration Act, 2012 the concept of innocent purchaser for value is no longer a guaranteed safe refuge. This is because there is a distinction between section 26 (1) (a) and (1) (b) of the Land Registration Act with the use of the conjunction “OR” for a reason. It will be seen from the above, that the idea of good title is a rebuttable notion and title to land may be impeached for any of the given 2 reasons:-

- (a) if it is procured through fraud or misrepresentation, to which the person is proved to be a party;

Under this part for someone to impeach a registered proprietor who is a holder of a title he/she must prove the element of fraud and misrepresentation and go further to prove that the proprietor was part of the alleged fraud or misrepresentation or had notice of the same. This was the traditional and original refuge of a person who had bought land only for the title to be challenged later by the legitimate owner, once it could not be proved he was part of the fraud, misrepresentation or had notice of the same he/she was regarded as an innocent purchaser and the courts could not interfere with the title.

The Court of Appeal in the case of Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR stated that the protection accorded by law in the event of fraud to a bona fide purchaser without notice is only against equitable interests and the defence of “an innocent purchaser without notice” is only available against the claims of any prior equitable owner.

## CONTRIBUTORS' PLATFORM

(b) or where it is procured illegally, unprocedurally, or through a corrupt scheme;

Under this part, a party only needs to prove that the title one holds was procured illegally or unprocedurally or even through corruption. This is to say, the title that by right or law is not supposed to be in the registered proprietor's name, that is, the land was illegally acquired, or unprocedurally acquired (for example, valuation was not done, stamp duty was not paid, consent was not sought (now removed), the registration process was not fully complied with) or even acquired through corruption. If the above elements are proved, the court may revoke a title notwithstanding that the proprietor was not party or even aware of the illegality, the procedural error or even the corrupt element.

In Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR (Alice Chemutai case), a title that was in the name of a deceased person, was illegally

transferred to a third party and the third party subsequently charged the title to a bank but failed to service the loan. The Bank sent its agents to value the land for purposes of putting it up for sale. It is only then that the rightful beneficiaries first became suspicious and proceeded to conduct a search of the property only to discover that it had been transferred to the third party. One of the beneficiaries filed a suit in court for cancellation of the title and rectification of the register.

In court, the bank argued that it was not privy to any illegal transactions; that the third party/chargee presented to the bank a title deed; and that the bank did not have any notice of any defect in the title. The bank further justified that they carried out due diligence and obtained a search which showed that the third party/chargee was the registered proprietor, that without any proof of participation in the alleged fraud, the charge was valid, and that it was then too late to rectify the register. Lastly the bank implored the court not to nullify the charge as it would set a dangerous precedent

which could harm the economy that was heavily reliant on secured borrowing.

The court held that:-

"Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, .....it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part."

Going forward you might need to ask for all documents pertaining to a transfer of land (including all the previous registered transfer instruments, certified copies of green cards etc.). Moving forward you might also consider engaging qualified professionals for your conveyancing transactions, the risk of engaging land brokers or persons who are likely to engage in corruption and take shortcuts may come to haunt you later.

## The African Voice gets Louder and Mightier at the United Nations Security Council



Rosemary Kamau  
rosemary@njorogeregeru.com



Rodney Wesonga  
lanyers@njorogeregeru.com

The successful election of Kenya as a non-permanent member ("NPM") of the United Security Council ("UNSC") is a testament of the African Union's ("AU") solidarity and impactful endorsement. However, it must be clarified that the AU's endorsement of

Kenya did not guarantee Kenya of this much heralded position in the global arena. Although, the AU has the largest continental membership in the world, the AU is not a recognized member or body of the United Nations. Accordingly, to clinch the NPM seat, Kenya had to garner at least a two-thirds majority vote from the members of the United Nations General Assembly ("UNGA").

As per Rule 142 of the UNGA Rules of Procedure, UNGA elects each year five NPMs of the UNSC for a term of two years. In 2020, at the opening of the UNGA vote on 17th June, 2020, Kenya managed to garner 113 votes against 78 votes to Djibouti. This invariably meant

## CONTRIBUTORS' PLATFORM

that there would be a second round of voting. On 18<sup>th</sup> June, 2020, Kenya had its seat at the UNSC table confirmed with 129 votes against Djibouti's 62 votes.

The much sought-after seat at the UNSC was a response to the increased membership of states to the United Nations. Previously, the UNSC comprised of eleven members, five of whom had permanent membership while six members were non-permanent of the UNSC. Following the UNGA Resolution 1991(XVIII), Article 23 of the United Nations Charter was amended to reflect an increase of the UNSC membership to fifteen comprising of five (5) states with permanent membership and ten (10) states with non-permanent membership. The election of the NPMs would be based on the contribution of the potential member to the maintenance of international peace and security and to other purposes of the Organization, and also to equitable geographical distribution with five seats reserved for African-Asian states, two seats reserved for Western European and other states, one seat reserved for Eastern European states and two seats reserved for Latin American states. Thus, an election as a NPM to the UNSC is a coveted prize in international law and politics.

Noting that the primary responsibility of the UNSC is the maintenance of international peace and security, the UNSC is characterized as the most powerful organ of the United Nations ("UN"). In order to properly carry out its functions, the UNSC has the power to investigate the existence of any threat to the peace, breach of the peace or act of aggression and make recommendations or decide what measures shall be taken. In this regard, the UNSC may recommend measures not involving the use of armed force such as the freezing of accounts of individual members of armed groups (S/RES/1267(1999) and S/RES/1373 (2001)), the imposition of sanctions and embargoes, the referral of disputes to the International Court of Justice or for pacific settlement of

disputes. In other instances, the UNSC may "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security" (Article 42 of the United Nations Charter). Accordingly, the UNSC is a decision making organ. In this regard, decisions before the UNSC are made through voting procedures, where the permanent members exercise veto power whilst the NPMs possess voting rights of one vote each, rendering affirmative votes of nine on all matters before the UNSC.

Although, the NPMs lack veto power, their individual and collective contribution has the potential of watering down a motion by a permanent member of the UNSC. Thus, an NPM's role before the UNSC wields great influence on the UNSC's decision making role. It is no wonder that Kenya's bid to join the UNSC had a ten-point agenda and campaign manifesto.

Kenya launched its candidature for the NPM seat at the UNSC on 7<sup>th</sup> November, 2019 for the period 2021/2022 with a ten-point pledge for Africa. In particular, Kenya's agenda include: (1) Building bridges, (2) Peace keeping and support operations, (3) Regional peace and security, (4) Counteracting terrorism and prevention of extremism, (5) Women, peace and security, (6) Youth empowerment, (7) Humanitarian action, (8) Justice, Human Rights and Democracy, (9) Environment and Climate Change Agenda, and (10) Sustainable Development Goals Agenda.

In order for Kenya to achieve this visionary agenda, Kenya must exploit the different opportunities for participation that come up at the UNSC. For instance, Kenya may take up the rotational council presidency to put forward its agenda and bolster the support for increased participation by African countries in the UNSC. Secondly, Kenya may offer to be a pen-holder of some of the issues discussed before the UNSC and gain recognition as an authority on the outcomes to be drafted in relation to those issues. Thirdly, Kenya may convene

informal meetings and invite experts from organizations and institutions to discuss the issues dear to Kenya and Africa at large. These opportunities not only bolster support for Kenya but create a platform for discussions on solutions customized to resolve African problems.

### a) The UNSC Presidency

The UNSC's Provisional Rules of Procedure offer several opportunities that an NPM may exploit and make tangible contributions to the UNSC's work. According to the UNSC's Provisional Rules of Procedure, the UNSC presidency rotates on a monthly basis amongst the fifteen members. This means that each member would at least assume the role of president for at least one or two months during its tenure. In this role, the president presides over the UNSC meetings and under the authority of the UNSC, represents in its capacity as an organ of the UNSC. Invariably, the president may organize several events surrounding a matter for discussion, facilitate negotiations on an issue and act as the UNSC representative in interactions with other UN members and entities, outside stakeholders and the public.

### b) The Pen-holder system

Over the course of time, the UNSC developed Working Methods and Techniques to address its internal division of labour. The Pen-holder system is one such working method, where the subsidiary body chair of a particular issue to be decided upon by the UNSC would be responsible for drafting outcomes (including resolutions, presidential statements and press statements) and chairing subsequent negotiations on a particular issue.

Procedurally, the pen-holder system was previously cherished by the permanent members of the UNSC who would draft the different resolutions and presidential statements which would bind the UNSC without much amendment. Thus, being a pen-holder of a particular issue is a prestigious position with a weighty

## CONTRIBUTORS' PLATFORM

responsibility since other members of the UNSC would differ to the pen-holder.

### c) Informal meetings

As part of the UNSC working methods and techniques, informal meetings such as the “Arria-formula meetings” have since been developed. The Arria-formula meetings became a useful means of hearing from a wider range of perspectives on a given topic, often times from experts who are not members of the UNSC.

The Arria-formula meetings differ from the formal consultations of the UNSC in the following respects:

- a) The Arria-formula meetings may take place at a conference room or at the lobby and not in the Security Council Consultation Room. This solidifies its informal nature for open, transparent and non-binding discussions.
- b) The meetings are for individual members to decide upon issues that may have or will come up for negotiations.
- c) An invite to the meeting is sent to the individual members of the UNSC and the Secretariat is not expected to attend unless invited.

Despite the informal nature of the Arria-formula meetings, these meetings have the potential to be lobbying tools or avenues for in-depth discussions.

Accordingly, Kenya’s election to the UNSC as an NPM is a win for Africa’s agenda.

### ACKNOWLEDGMENTS

The editorial team would like to express its sincere gratitude to all those members of the Firm who, in one way or another, contributed to the conception, preparation and eventual production of this Newsletter. The dedication and input of the writers and contributors is appreciated and we look forward to continued support in the issues to follow.

Tel: + (254 ) 020 3586592, 254 020 231 9224  
+ (254 ) 020 2612531, 254 (020) 261 3646  
Mobile: 0722-206-884, 0733-608-141

Email: info@njorogeregeru.com  
Website: www.njorogeregeru.com  
Dropping Zone No.8  
Revlon Professional Plaza  
Tubman Road / Biashara Street

