



# NR&Co Quarterly

## ...Legal Briefs



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### KARIBU!

## Editor's Note



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Dear Reader, welcome to our second Newsletter this year. We are grateful to have made it thus far despite the continuing ravaging effects of the Covid-19 Pandemic. In the wise words of Kiran Mazumdar-Shaw "Ultimately, the greatest lesson that COVID-19 can teach humanity is that we are all in this together". May we always continue being there for one another, play our part in overcoming this Pandemic and may we never stop believing better days are yet to come.

The editorial team has put together quite the literary spread for our readers in this quarter's edition and hope to keep you well informed.

We begin with the Legislative Updates where there has been a number of legislation and pending bills that are of great interest this

quarter. Notably, the Employment Amendment Act, 2021, Business Laws Amendment Act, 2021, and finally the Central Bank of Kenya Bill, 2021

Over to the Case Highlights where we discuss the case of Stanley Waweru - Chairman & 3 others (Suing as Officials of Kitengela Bar Owners' Association) Vs. National Assembly & 2 others (2021) eKLR. The parties in this case, being officials of the Isinya East Sub-County Bar Association, filed a Petition against the National Assembly and the Commissioner of Kenya Revenue Authority seeking to challenge the provisions of the Finance Act, 2020 that were to introduce a Minimum Tax on Gross Turnover at the rate of 1%.

Our team of lawyers has also taken time to address various topics which would be informative to our clients. At the Contributor's Platform, to begin with, my colleague Naomi Ngugi discusses Venture Capitalism in Kenya. Ida Wambaa, in her article discusses redefining "caveat emptor" –let 'buyers be aware' - on abuse of buyer power. Finally, Nondi Jimmy discusses privately initiated proposals as the solution to private public partnerships.

Last but not least, we celebrate our fathers and father figures who undoubtedly have left an indelible mark in our lives.

Take Care, Stay Safe and Happy Reading!

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THE FIRM

He said  
did



“Going to Church on Sunday was mandatory.

He was very strict... you could not stay

at home on Sunday and if you did.....”



“Rīa kīrīa gī gīaku na ūiganīre na kīrīa ūrī nakīo”

[Utilise what strictly belongs to you and be content with what you have]

“Honesty above everything else”

“Respect your elders”

“My dad...he would discipline you with a simple stare”.

“He made a decision that I did not understand then but I realise it is what got me to where I am; it was the best decision; a decision that changed my trajectory.”

[On my first job] “It is up to you now; your fate is now in your hands; show them what you are made of”

“Work harder than before”

“Do not dwell on the ill things people say, you will come across worse; be psychologically prepared”



“Heshima si utumwa” [Respect/ Courtesy is not slavery]

“Hard work pays”

“BE COURAGEOUS - DO NOT LOSE HOPE”

“I remember my dad was really present in our education; he assisted with homework, reviewed our performance...books...I was poor in math and he got me a tutor...long story short, I created a marking scheme in every exam and was index 1 in class 8” 😊

“Work smarter not harder; choose the kind of friends you want”.

“Being the 1<sup>st</sup> born ...he has set the pace and he would like me to follow the pace and maintain our family tradition.”



“Everyone needs a mentor & someone they can share with”

“Never be ashamed of who you are or your background/ where you come from”.

## LEGISLATIVE UPDATES

Notable Regulations, Policies and Legal Notices introduced in the second quarter of 2021 are as follows:

### EMPLOYMENT AMENDMENT ACT, 2021

The Employment (Amendment) Act, 2021 (the Amendment Act) was assented to on the 30th of March 2021 and came into force on 15th April 2021. It introduces a provision on pre-adoptive leave and defines an Exit Certificate.

#### Exit Certificate

An exit certificate is defined as a written authority given by a registered adoption society to a prospective adoptive parent to take the child from the custody of the adoptive society.

The exit certificate serves as documentation evidencing the intention of the adoption society to place the child in the prospective adoptive parent's custody.

#### Pre-Adoptive Leave

The Employment Act, 2007, under Section 29A, provides that, where an employee adopts a child, the employee shall be eligible to one month's pre-adoptive leave with full pay from the date of the placement of the child.

The employee is required to give the employer a prior notice of 14 days of the intention of the adoption society to place the child in the custody of the employee. Such notice shall be accompanied by documentation evidencing the intention of the adoption society to place the child in the custody of the employee and written authority by the adoption society allowing the employee to adopt.

Additionally, it also provides that an employee entitled to pre-adoptive leave shall not forfeit their annual leave entitlement on account of having taken pre-adoptive leave.

### BUSINESS LAWS AMENDMENT ACT, 2021

The Business Laws (Amendment) Act, 2021 has amended a number of Acts of Parliament including: -

#### • The Law of Contract Act

The Business Laws (Amendment) Act amends the Law of Contract Act by expanding the definition of the term "sign" to include the execution of documents in accordance with Section 37 of the Companies Act, 2015. A document is validly executed by a company if it is signed on behalf of the company; by two authorized signatories or by a director of the company in the presence of a witness who attests the signature.

The result of this is that the complicated process of sealing documents and then having them witnessed by two directors or one director and a company secretary has been done away with. This amendment will also facilitate the use of technology in the execution of company documents.

#### • The Industrial Training Act

The Industrial Training Act was amended to include a timeline within which a training levy should be remitted, that is, at the end of a financial year of a business but not later than the ninth day of the month following the end of the financial year.

#### • The Stamp Duty Act

The Stamp Duty Act has been amended to include a new category of transactions that are exempted from Stamp Duty. Accordingly, payment of fixed stamp duty of Kenya Shillings One Hundred on contracts chargeable as conveyances on sale under the Stamp Duty Act has been exempted. This is in an effort to reduce the cost of doing business.

#### • The National Social Security Fund Act

This Act is amended by including a timeline within which employers are required to remit age benefits for a retired employee. Employers are now obligated to remit age benefits on the ninth (9th) day of every month or on such a later date as the National Social Security Fund Board may, in consultation with the Cabinet Secretary, prescribe.

#### • The Companies Act

This Act has been amended by expanding the definition of the term "general meeting" to include virtual and hybrid meetings.

Hybrid meetings, in relation to a company general meeting, are defined as meetings where some of the participants are in the same physical location whilst other participants join the meeting through electronic means including video conference, audio conference, web conference or such other electronic means.

In the instance of a hybrid or virtual meeting, a company is now required to specify the means of joining and participating in the meeting.

Paragraph 11 of the Sixth Schedule- on official seal of an existing company has been deleted. This means that all companies, including those that were in existence before the enactment of the Companies Act, 2015- are now relieved of the obligation to have an official company seal.

These amendments seek to ease the process of doing business in Kenya. Further, the fact that businesses are now allowed to hold virtual and hybrid general meetings will help cure some of the challenges that businesses are currently facing as a result of the Covid-19 pandemic. In the long run, they will also help businesses save on costs that are normally incurred in holding physical meetings.

## LEGISLATIVE UPDATES

- **The Insolvency Act**

Section 474 of the Insolvency Act which provides for share of assets in relation to unsecured creditors where a floating charge relates to a company's property has been amended to include the following new exemptions on its applicability: -

- where the liquidator, administrator or provisional liquidator applies to the Court for an order on the ground that the cost of making a distribution to unsecured creditors would be disproportionate to the benefits;
- a holder of a floating charge applies to the Court on the grounds that the effect of paying out some unsecured creditors unfairly harms its interests and the Court grants an order to that effect.

The Insolvency Act has further been revised to include a Pre-Insolvency Moratorium to prevent creditors from taking an enforcement action while a company considers its option for rescue.

Other provisions on moratoriums have also been revised to various effects including but not limited to: companies with large outstanding liabilities (One Billion shillings or more) are now eligible to obtain a moratorium; directors who wish to obtain a moratorium are now required to prepare, among other things, a document setting out why the moratorium is desirable; a security given by a company where a moratorium already exists will only be realized if after consideration by the company, the security was beneficial to the company; and directors of a company can apply to Court for the extension of a moratorium.

- **Small Claims Court Act**

Section 34 of the Small Claims Court Act, 2016 is amended to introduce a provision that all matters in the Small Claims Court Act shall be determined within Sixty (60) days of filing of the claim.

## THE CENTRAL BANK OF KENYA BILL, 2021

The Central Bank of Kenya (Amendment) Bill, No. 10 of 2021 (The 2021 Bill) attempts to regulate digital credit service provider by requiring the licensing of digital borrowing platforms in Kenya by the Central Bank of Kenya (CBK). Published on 16 April 2021, it has a principal objective of amending the Central Bank of Kenya Act to allow the Central Bank of Kenya (CBK) to regulate digital credit service providers and ensure that there is a fair and non-discriminatory marketplace for access to credit. It mainly focuses on the regulation of financial products and services including digital credit services and the digital mobile lenders who offer credit facilities in form of mobile money lending applications.

### The 2021 Bill Objectives

It covers the objectives and further define the specific terms 'digital channels' means the internet, mobile devices, computer devices, applications and any other digital systems as maybe prescribed by CBK; 'digital credit' is defined to mean a credit facility or arrangement where money is lent or borrowed through a digital channel; 'digital credit business' as the business of providing credit facilities or loan services through a digital channel; and 'digital credit providers' as a person licensed by the Bank to carry on digital credit business. This empowers the CBK to effectively regulate the growing digital lending sector.

The 2021 Bill proposes a grace period from the time that it will come into force for existing digital money lenders who were in the business of providing digital credit/loan facilities before the enactment of the proposed 2021 Bill must, within six months from the date of such enactment, to register with the CBK. With no existing legal framework governing digital borrowing platforms in Kenya, digital

credit providers have so far been operative with no restrictions. This has led to a high level of public interest and concern relating to several factors such as manipulation of borrowers. A number of allegations have been made against digital lenders including charging of outrageous interest rates.

### The CBK Mandate under the Bill

The proposed legislation authorizes the CBK to make further regulations to give effect to the provisions in the Bill, including but not limited to registration requirements, capital adequacy requirements, licence fees, permissible and prohibited activities and reporting requirements. It anticipates that the regulations will be made within three months of the coming into force of the Bill.

The proposed amendments under the Bill give the CBK the authority to: determine minimum liquidity and capital adequacy requirements for digital credit providers; approve digital channels and business models through which digital credit business may be conducted; supervise digital credit providers; suspend or revoke a licence; and direct or require such changes as they may consider necessary.

The 2021 Bill gives the CBK very wide powers and legislators must be mindful that the regulations should help, not hinder, technological innovation, while protecting consumer rights. The wide powers granted to the CBK under the 2021 Bill must be judiciously exercised to avoid any unintended consequences of stifling growth of businesses and access to credit. The Bill must go through the legislative process in Kenya which involves a first reading, second reading and third reading of bills in parliament followed by presidential assent and enactment.

### Regulation to Lenders

CBK may, from time to time, issue directives regarding its payment system or a payment instrument. A directive issued by CBK would not have any retroactive effect.

In addition, the Bill requires that, for a person to conduct any digital credit business in Kenya, they must be licenced by the CBK under the Act or any other written laws. The application for licencing shall be made to CBK in such form and shall be accompanied by the necessary information and fee as may be prescribed.

The penalty for non-compliance of this provision, on conviction, is imprisonment for a term of three (3) years, a fine of Kshs 5 million, or both. The Bill also provides that lenders shall register with the CBK.

Should the Bill be enacted as it is, digital lenders will be placed under the supervision and regulation of the CBK. It is proposed that CBK will, within three months of enactment, publish comprehensive regulations outlining the requirements that digital lenders must meet as well as the extent to which they will be regulated.

While the Bill seeks to regulate digital lenders and to protect low income households and small businesses from what has become a significant source of debt, the detail on the level of regulation will only be understood once the proposed regulations are published. We would also expect that the CBK will put in place regulatory sandboxes before implementation of the regulations to ensure that innovation in the sector is not stifled.

### Consumer protection

The Bill is among the several efforts to regulate the business of ever-growing Kenyan credit market. This is to ensure consumer protection in digital lending.

CBK will also list all permitted and prohibited activities, anti-money laundering, and measures essential to counter financing terrorism, allowing digital lenders to share credit information while protecting consumers' data protection and privacy.

While it is for the noble cause, it may lead to uncertainty with reference to the scope of its application. For example, the Bill does not clearly define what constitutes 'credit facilities'.

The memorandum provided by the sponsor in support of this Bill states that the purpose is to ensure that all credit only lenders in Kenya are licenced and regulated by CBK. The Bill however as currently drafted seeks to make amendments to the CBK Act to regulate digital money lenders only.

### Conclusion

The main purpose of the Bill is to amend the Central Bank of Kenya Act to provide for licensing of digital credit service providers, who are not regulated under any other law. As matters stand, there is no legal framework governing digital borrowing platforms.

The CBK will have an obligation to ensure a fair and non-discriminatory marketplace for access to credit.

## CASE HIGHLIGHTS

We focus on the following case in this quarter:

**STANLEY WAWERU - CHAIRMAN  
& 3 OTHERS (SUING AS OFFICIALS  
OF KITENGELA BAR OWNERS'  
ASSOCIATION) V NATIONAL  
ASSEMBLY [2021] EKLK**

The parties in this case are officials of the Isinya East Sub-County Bar Association (the "Association") who filed a Petition against the National Assembly and the Commissioner of Kenya Revenue Authority. The Association sought to challenge provisions of the Finance Act, 2020 that were to come to force on 1st January 2021. These provisions intend to amend section 12D of the Income Tax Act (the "Amendment") by introducing a Minimum Tax on Gross Turnover at the rate of 1%.

The Association filed the Petition on the basis that the proposed amendment was inconsistent with the Income Tax Act which states that income subject to tax is in respect of gains or profits after all expenses allowable by law are deducted. The Association therefore wanted the Court to

grant them orders declaring this provision unconstitutional, declaring that only net income shall be taxed, and granting orders preventing the government from collecting or demanding payment of Minimum Tax according to the Tax Laws (Amendment) Act, 2020.

The Commissioner of Kenya Revenue Authority published Guidelines on Minimum Tax defining Gross Turnover. According to the Association, the reading of the Amendment together with the Guidelines has the effect of including those in a loss-making position in the requirement to pay minimum tax. This is contrary to the current law that only charges tax on gains or profits. The Association's argument is that the imposition of tax on those making losses is unequitable and discriminatory. This is because the tax burden will be unfairly imposed on those struggling to sustain or maintain their businesses. Furthermore, they contend that the proposed Amendment is discriminatory since those in the energy, petroleum and insurance sector will be exempt from this minimum tax, while those in the consumer products sector will not be.

According to the High Court, there was a real danger to the taxpayer if this provision was enforced since according to the Guidelines published by the Kenya Revenue Authority, the tax would not only be subject to profit or gains but could also apply to losses since all persons would be subject to the minimum tax requirement. The effect of this provision would be to place already strained businesses and individuals to the point of financial collapse.

The Court granted Conservatory Orders with the effect of suspending the enforcement of the provision on Minimum Tax pending hearing and determination of main case to enable them to analyse the claims raised by the Association.

*Note this is not a final determination but a ruling which is meant to preserve the status quo until the final case is heard and determined.*

INTERLUDE

# A Bunch of Firsts



### CJ'S QUIZ

- A. Who was the first African Judge in the Republic of Kenya?
- B. Who was the first Chief Justice of Independent Kenya?
- C. Which Chief Justice served as CJ in both Kenya and Ghana?
- D. Who was the first Kenyan to serve as Chief Justice?
- E. Who was the first Chief Justice to Nullify an election?
- F. Who was the longest serving Chief Justice in Kenya?
- G. Who was the first Chief Justice to serve under the Constitution of Kenya 2010?
- H. Who was the first Chief Justice of Indian Ancestry to hold the Office?
- I. Who was the first woman Chief Justice?

**BONUS QUESTION:** Anyone who can find the picture of CJ No.4 email it to [newsletter@njorogeregeru.com](mailto:newsletter@njorogeregeru.com)

**ANSWERS:** No 6. Justice Cecil Henry Ethelwood Miller (1986-1989); No 1. Sir John Ainley (1964-1968); No 8. Justice Fred Kwasi James Wicks (1971-1982) / No 12. Justice Johnson Evan Gicheru (2003-2011); No 13. Dr. Willy Mutunga (2011-2016); No 5. Justice Chumal Madan (1985-1986); No 15. Justice Martha Koome (2021-Present).

## Venture Capitals in Kenya



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Venture capital is a type of financing, akin to private equity, that investors provide to start-up companies and small businesses believed to possess long-term growth potential. Venture capital is mainly derived from investors, investment banks and other financial institutions. It does not always necessarily take monetary form; it may be offered in the form of technical or managerial expertise.

Over the past few years, Kenya has gradually gained a reputation as having one of the best start-up ecosystems in Africa. It has also been described as being the epicentre of East Africa's private equity and venture capital transactions in volume and value. According to a survey conducted by *African Private Equity and Venture Capital Association Limited (AVCA)* in March 2020, 88% of limited partners who participated in the survey identified West Africa as the most attractive investment region over the next three years. Conversely, 89% of general partners who participated in the survey identified East Africa, and specifically Kenya, as possessing the most investment potential over the same time-period.

### Features of Venture Capitals

As earlier indicated, venture capital investments are typically channelled into start-ups/early-stage companies, as opposed to private equity deals that tend to fund established companies seeking additional equity. Persons who invest venture capital are referred to as venture capitalists. Venture capital investment may also be referred to as risk capital or patient risk capital. This is because it involves a high risk of losing money if the venture is unsuccessful. Venture capitalists also have to be patient as it may take a long term for their investments to be realised.

The basic features of venture capital investment can be summarized as follows: -

- Long-term investments;
- High-risk;
- Investments are channelled into start-ups;
- Venture capitalists participate in the management of the funded company;
- Equity participation and capital gains

### Types of Venture Capital Funding

There exist various types of venture capital, distinguished based on their applications at various stages of a business. However, there are three main types of venture capital: early-stage financing, expansion financing and acquisition/buyout financing.

The venture capital funding process is conducted in six phases as follows: -

- Low-level financing to fine-tune a new idea.
- Financing for firms needing funds for product development funding and marketing.
- Financing for manufacturing and early sales funding.
- Operational capital granted to early-stage companies which are mainly selling products, but not making products yet.

- “Mezzanine financing”; in this stage, funds are used to expand a newly beneficial company.
- “Called bridge financing”; funds in this stage are applied to finance the publicization process.

Venture capital present various advantages. For one, because venture capitalists play an active role in the management and running of the funded start-up business, the business is able to gain access to extra resources in critical areas such as legal, tax and personnel. Furthermore, in addition to the financial support, venture capitalists can provide start-up businesses with a valuable source of guidance and consultation. This guidance may be influential in helping the young business in making vital business decisions.

Conversely, due to the large injection of cash and professional investors, its highly likely that venture capital partners will want to be involved in the running of the business. The size of their stake generally determines how much power they have in influencing the company. In addition, where a venture capital firm has more than 50% stake in a company, the original owners of the company are bound to lose management control. Essentially, it may be perceived as giving up ownership of your business.

Any business considering sourcing for venture capital funding should therefore make several considerations, key amongst them - whether the loss of ownership and control is an issue for the business owners. Businesses that are open to active input from a venture capital firm are bound to gain from a venture capital arrangement. It is also key to note that venture capital companies that have access to public funds are now regulated by the Capital Markets Authority.

# Redefining “Caveat Emptor” –Let ‘Buyers be Aware’ of the Law on Abuse of Buyer Power



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“Competition Authority fines Carrefour” is the latest headline in a string of stories surrounding Kenya’s retail sector. On 4th February 2020, the Competition Authority (the “Authority”) which derives its powers from the Competition Act, 2010 (the “Act”) issued its first decision on Abuse of Buyer Power. The retail industry has been affected by the inequality in bargaining power where suppliers have been calling for regulation of the market after some retail chains were said to be engaging in multiple forms of unfair practices. The law on Abuse of Buyer Power seeks to ensure parties have fair bargaining power when one is more powerful due to its position in the market or influence over various levels of the supply chain. This article will analyse the law on Abuse of Buyer Power using the recent decision by the Competition Tribunal (the “Tribunal”) dated 20th April 2021.

The Competition Act, 2010 in Kenya was amended by the Competition (Amendment) Act, 2016 to include Abuse of Buyer Power by firms as an offence. The Act defines Buyer Power as the influence exerted by an undertaking in the purchaser position to obtain more favourable terms from a supplier or impose long term opportunity costs. The Act was further amended by

the Competition (Amendment) Act, 2019 granting the Authority express powers to investigate and enforce compliance. The Act outlines some of the conduct that is viewed as an Abuse of Buyer Power; delays in payment of suppliers in breach of agreement; unilateral termination of commercial relationship without notice; refusal to return or receive goods in breach of agreement; transfer of costs or risk to suppliers; demands for preferential terms; reducing prices below competitive levels; and manipulating prices to exclude competitors from the market.

Competition law interferes with the laissez-faire nature of markets in a bid to protect consumers and ensure a competitive environment. It is presumed that the consumer (purchaser/buyer) must be protected from the more dominant player (supplier/seller) when contracting. There are, therefore, regulations on abuse of dominance and unfair trade practices due to the possible unequal bargaining power in the market. Several jurisdictions, namely: France, United Kingdom, Thailand, Korea, Japan, and South Africa have used competition policy to regulate the excesses of the retail sector by virtue of their advantage in the market. This has mainly been done through preventing mergers and penalising unfair contract terms which has been seen to be a more traditional application of competition law.

The decision by the Tribunal came out of an Appeal by Majid AL Futtaim Hypermarkets Limited (“Carrefour”) against the decision of the Authority. Orchards Limited (“Orchards Ltd”) had initially filed a complaint to the Authority against Carrefour for various reasons as discussed below. This decision is of

particular importance since it may have impacts on commercial relations between parties going forward. The Tribunal in its judgement addressed several key issues: -

## • Buyer Power and Abuse of Buyer Power

Buyer Power is defined in the Act by its effects. The offending conduct is established in either: the contract terms; payment requested for infrastructure; or the price paid to suppliers. It is, therefore, found to exist if there is conduct that amounts to an Abuse of Buyer Power. The Tribunal affirmed the interpretation of the Authority in determining Carrefour had Buyer Power due to its superior position, and thus could impose unfair terms. This was done by refusing to renegotiate terms with Orchard Ltd after their terms of engagement had changed, imposing onerous terms in the form of rebates and listing fees thus transferring commercial risk, refusing to take delivery of goods, refusal in renewing the contract after it had expired without cause.

This decision has a direct effect on the freedom of commercial parties to contract where one party possesses an asymmetrical advantage in bargaining power. The retail chain was ordered to amend all offending provisions which could lead to Abuse of Buyer Power. Thus, a party can be found to have Buyer Power if the terms of engagement are deemed to be too onerous and detrimental to the other party. The result of such onerous terms is that the party in a superior bargaining position is forced to act in “fairness” when contracting. This may inevitably have the effect of altering what is considered as normal business practice.

## CONTRIBUTORS' PLATFORM

• **Scope of the Law**

The Authority is granted the discretion to allow parties to come to an amicable settlement before rendering its final decision. The Act also allows parties to produce evidence to rebut the alleged complaints against them. The Tribunal relied on Buyer Power Guidelines, and International Best Practice to determine whether Carrefour's conduct amounted to Abuse of Buyer Power. The guidelines were found to be a policy document, and thus not legally binding, but could persuasively guide both the public and the Authority. International best practice was also found to be a persuasive tool to analyse evidence though not binding in the Kenyan legal system. The Tribunal, however, noted the lack of consistency by Carrefour in the manner they relied on the decisions made by the international bodies. The Chain was said to use the guidelines only when

it suited it and disputed the Authority's reliance on the same Guidelines used in other jurisdictions. The best move for businesses is to be cognisant of how other jurisdictions are developing the law on buyer power.

• **Right of Refusal: refusing to accept delivery of goods without justification**

On this matter the Tribunal stated that this is an offence under the Act. However, it was decided that the matter would be assessed by the parties as per the commercial contract. It is now an offence to, "Receive or return goods in breach of the agreement." This is a new addition to the law on commercial engagements. The Sale of Goods Act (Cap 31 of the Laws of Kenya) allows for remedies in the form of damages and the right to terminate a contract. It will be interesting to see how this Law is applied in future, since it now

creates penal consequences where the remedy for commercial engagements has always been to compensate the aggrieved contracting party.

**Conclusion**

This decision is bound to have serious impacts on the conduct of parties when engaging in commercial contracts since the law has a wide scope of who can be considered to have buyer power. For some, the decision as applied may have the impact of creating uncertainty in commercial engagements while for others, especially those supplying to the Retail sector, they may see this as a positive move. In the upshot, this can be seen as the first step in what may be a long journey in developing the law on Abuse of Buyer Power and applying it within the Kenyan context.

## Privately Initiated Proposals: The Solution to Private Public Partnerships



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There is a global tendency to improve governance and increase transparency in the procurement of large public infrastructure projects. This includes a tendency to mainstream a clear and fair privately-initiated-proposal framework within or outside the solicited Private-Public Partnership (PPP) proposal framework.

Private-sector participation in infrastructure is most often structured through a public-planning process in which the government initiates a project idea, develops the required studies, and launches a competitive-tender process to identify the most appropriate bidder. An alternative to this is a privately initiated process referred to as privately initiated proposals (PIP). A private-sector entity (PIP proponent) reaches out to the government with a proposal to develop an infrastructure project, without an explicit request from the government to do so. The main difference between publicly and privately initiated projects is that the latter allows a private entity to initiate and develop the project concept, typically a public-sector role.

PIP policy frameworks normally follow a five-stage project sequence: (1) submission of the proposal by the private entity; (2) evaluation of the PIP by the public agency; (3) development of the studies for the PIP project; (4) procurement of the PIP project; and (5) implementation of the project (the construction and operations phases).

**Why Government is Opting for PIP in its Development Agenda**

Firstly, overcoming lack of public-sector capacity: Some governments lack technical capacity and financial resources to identify, develop, procure and implement infrastructure projects. These governments believe that PIP can help overcome public-sector capacity constraints. Lack of capacity manifests in two common challenges; delays

## CONTRIBUTORS' PLATFORM

in implementing infrastructure projects, and inability to develop bankable projects that can secure financing. However, these reasons are merely symptoms of a deeper issue lack of public-sector capacity.

Secondly, many governments lack the technical expertise and experience to develop projects successfully from beginning to end, or thirdly, they lack the financial resources to hire external advisors to support them in developing and procuring projects. Countries with limited public-sector capacity typically rely on PIP proponents to develop the projects, in return for which the PIP proponents typically expect the projects to be awarded to them.

Limited public-sector capacity is often reflected in long delays in implementing infrastructure projects. Alternatively, other governments may possess the required levels of public-sector capacity but lack the resources to develop and implement the number of infrastructure projects required. These governments may use PIPs to expand the number of projects that can be implemented during a short timeframe.

Additionally, harnessing private-sector innovation and creativity: Many governments seek to harness private sector innovation and creativity to solve infrastructure needs. This results from an understanding that the private sector can provide creative solutions to infrastructure problems that the public sector cannot develop itself.

Indeed, Colombia's 2012 PPP law (Law 1508) allows PIPs that are privately financed to take advantage of an abbreviated procurement process; suggesting that the government has intentionally structured its PIP framework such that these PIP projects can be implemented more rapidly.

Of times, governments' beliefs about access to finance are based on actual rejections from financiers. This makes them receptive to PIPs that include a financing solution.

### Reliability of the Kenyan Legal System on PIP

The specific law governing Public Private Partnerships (PPPs) in Kenya is the Public Private Partnerships Act of 2013 (the "Act"). A new Public Private Partnerships Bill, 2021 is proposed to replace the current Act. The PPP Bill, 2021 seeks to expand the scope of arrangements to facilitate greater participation by private parties. Some of the additional arrangements are Annuity-based Design, Build, Finance and Operate, Strategic Partnerships and Joint Venture Partnerships.

These partnerships are characterized by a sharing of investments, risks, rewards and responsibilities between the two parties. Under the PPP contract, the Government retains total strategic control of the service or facility and secures new infrastructure which becomes part of government assets at the end of the contract life. In addition to this, the project's performance risks are allocated to the party best able to manage or mitigate them.

The Kenya Government in 2010 undertook a further review of the legal and regulatory framework. This resulted in the issuance of the policy statement on PPPs by the office of the Deputy Prime Minister of Finance in November, 2011 (the PPPs policy). The objective of the PPPs policy was to articulate the Government's commitment to PPPs and to provide a basis for the enactment of a PPP law to address the identified gaps as well as conflicts in the legal and regulatory framework.

The Government of Kenya, through the policy statement commits to support PPP projects by setting up a Project Facilitation Fund. The Fund will allow public entities to prepare private partnership proposals and ensure that those projects are bankable. The fund will also be used to plug the possibility gap finance to implement the projects that are socially desirable but they are not bankable without government

intervention. The Fund also provides a liquidity source to meet contingent costs that arise unexpectedly during the project implementation. The Government of Kenya also commits to yearly budgetary allocations to the Fund to allow the government to meet its contingent liabilities.

The PPP Act is the main legislation guiding public and private partnerships in Kenya. It also establishes the relevant institutions for the monitoring and evaluation of PPP projects. Section 4 of the Act establishes the PPP Committee which has the responsibility of ensuring that each and every project agreement is consistent with the policy guidelines on PPPs. The Committee also has the role of approving the project proposals submitted to it by the contracting authority and is in charge of approving and accepting feasibility studies on project proposals. Further, the Committee has powers to: oversee the implementation of the policies laid out under section 7 of the Act, require information from any parties and take custody of project agreement made under the Act.

### Conclusion

One of the supporters of PPPs, Harold Ayodo, in his article 'Public-private partnerships the way to go' published on November 5th, 2015 argues that PPPs may save the Kenya Government from unreliable contractors who, with delayed completions, burdened the economy with cost overruns, poor maintenance, poor design, poor project selection and grand corruption.

PIP has become a preference based on the tendering disadvantages, for instance: leading suppliers may not tender; suppliers are forced to play competitive tendering hence poor quality; tender process is extremely slow; and purchase of goods and services is based on price tag rather than capability.

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