

NR & CO.

QUARTERLY



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A number of activities have been undertaken in the legislative and regulatory sector of the 4th quarter of 2021 with over five (5) parliamentary Bills being passed into law. Notable Acts include the Central Bank of Kenya (Amendment) Act of 2021, the Law of Succession (Amendment) Act of 2021 and the Trustees (Perpetual Succession (Amendment) Act of 2021.. {Continued on pg 6}



Its been 35 years!! [Pg.5]



NJOROGE REGERU AND COMPANY

ADVOCATES, COMMISSIONERS FOR OATHS AND NOTARIES PUBLIC

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EDITOR'S NOTE

Dear Reader,

Happy New Year! With the new year come new beginnings, the Firm of Njoroge Regeru & Company Advocates would therefore like to introduce all to the new look of our quarterly Newsletter. On that note, we would like to welcome you to this quarter's Newsletter where we have prepared an exciting and broad range of topics to discuss.

The Newsletter begins by celebrating our founding and name partner Mr. Njoroge Regeru himself as he celebrates 35 years in practice. A journey that has been long, yet very rewarding.

We also inform all that the Arbor House Arbitration Center for dispute resolution is well equipped to service all when seeking a venue to handle their disputes. It is an ideal venue for meetings, trainings, workshops, arbitrations and mediations.

Several key pieces of legislation come into force, specifically the long-awaited Law of Succession (Amendment) Act, 2021; the Trustees (Perpetual Succession) (Amendment) Act, 2021; and the Central Bank of Kenya (Amendment) Act, 2021 that creates a mechanism to licence and regulate digital lenders. The legislative updates also focus on a key regulation, being the Sectional Properties Regulation, 2021 that will give force to the Sectional Properties Act, 2020. We also highlight the Guidelines for private and public organizations to create procedures for the prevention of bribery.

We then move on to case highlights, where we discuss a recent judgement in the case of *Republic v Joe Mucheru (Cabinet Secretary Ministry of Information Communication & Technology)*, *Fred Matiangi (Cabinet Secretary Ministry of Interior & Coordination of National Government)*, *Attorney General And Immaculate Kasait (Data Commissioner) Exparte Katiba Institute And Yash Pal Ghai (Interested Parties)* this decision touches on key issues of Data Protection and puts the provisions of the Data Protection Act, 2019 to the test as the law in this area evolves.

This being a special issue of the Newsletter, we focus our attention on highlights beyond the Kenyan borders. The International Highlights discuss the judgement in the case of *Somalia v Kenya* from the International Court of Justice. We also look at a key address given by the President of Kenya at the annual *United Nations Conference of Parties to the United Nations Framework Convention on Climate Change (COP26)*. It is good to note how our country is engaged in its part to preserve our planet for the benefit of future generations.

Last but certainly not least, we have three insightful articles from our contributors ranging from topics about land, succession and regulatory sandboxes. We have all heard of the issues surrounding land in Kenya, Jackson Kamenju and Rodney Wesonga have prepared a succinct article on the implications of the Ndungu Land Report. As a reader, you will have a better understanding into how this report affects title to land in Kenya. Ruth Regero has prepared a brief on frequently asked questions (FAQs) about executors, therefore depending on whether you have a will or not, consider this the first step into the world of drafting a Will. Finally, Ida Wambaa introduces us to the concept of 'regulatory sandboxes' as a novel mechanism of regulating new technologies.

Happy reading and we wish you all a prosperous new year!

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The onset of the COVID-19 Pandemic in March 2020 had an unprecedented impact on the administration of justice in Kenya. Courts of law were closed down and although there has been some guarded re-opening of some courts, litigators and litigants are still learning to come to terms with a new reality where justice is pursued and delivered by virtual means. Struggling to strike a balance that works for most parties, litigators and their clients found a workable solution: Arbitration, mediation and other forms of alternative Dispute Resolution (ADR) conducted through in- person sessions. This created a need for ideal venues at which to conduct such proceedings.

It is against the background outlined above that Arbor House Arbitration Centre (AHAC) was set up with a view to providing a discreet, quiet and pleasant environment in which lawyers, other professional and their clients could meet to resolve disputes.

AHAC enjoys a number of attributes which make it an ideal venue for your next meeting, workshop, training or for conduct of legal proceedings:

1. Ambience

The wide range of spaces has been designed with your needs, convenience, safety and health in mind. The spaces are generous to allow comfortable social distancing, airy and well lit using natural lighting owing to the modern design of the building. All Covid-19 protocols are enforced strictly.



2. Location

AHAC is located in close proximity to most major commercial centres including the Central Business District(CBD), Westlands, Karen, The junction, Lavington, Upper Hill and the Kilimani Area.



3. Accessibility

AHAC is easily accessible through modern bypasses, highways and ring roads. The Centre enjoys a location outside the congested sections of the city, largely free from traffic jams that most of other areas experience at all times

4. Technologically enhanced spaces

AHAC has been equipped with the latest technology to ensure that your needs are met. Our clients can host conference meetings with their teams from anywhere in the world with the assurance of quality, uninterrupted connectivity. Your stress free technology experience at AHAC is assured by:

- Fast speed internet
- High Bandwidth
- Standby backup generator
- Privacy
- Data Protection



5. Environment

AHAC is located in a serene environment with a pleasant view of the adjacent Arboretum Forest, along the Arboretum Drive. The surrounding exotic trees create a clean atmosphere, away from all the pollution. The natural environment attracts different kinds of birds which are a sight to behold through our huge windows facing the trees. We also have a spacious break out outdoor area with comfortable outdoor furniture for those short breaks in between your meetings.



6. Affordability and support services

A perusal of AHAC's rates on its website gives you the assurance that the rates have been worked out with your needs and pocket in mind. The friendly prices include WI-FI, refreshments and snacks. At a reasonable cost, your printing, copying, scanning and binding will be done swiftly. For your meals requirements if you want to maximize on the lunch break, orders can be placed with Kune, a reputable company based at Arbor House.

7. Diversity of Available spaces

Appreciating that one size does not fit all, AHAC has a wide range of spaces to choose from to suit your particular needs;

- A large central area that can be configured to sit between 10 and 40 persons
- Conference rooms of varying sizes.
- Co-working spaces.
- 4-person private office.
- 6-Person private office.
- Corner office at KShs. 100,000+ VAT
- Lounge Area for your relaxation.
- Break out area on open, furnished terraces.

8. Parking

AHAC provides secure and ample parking at the basement level, at the ground floor level and across the road at Maua Gardens.



9. Security

AHAC provides 24-hour security surveillance cameras and the security team of Lavington Guards is supported by KK guard panic button services

BOOKINGS

Your bookings will be processed smoothly and promptly. To make a booking, please feel free to reach out to AHAC using the contacts given below;

 **0706 808 080** 
 **info@ahbc.co.ke**
 **www.ahbc.co.ke**
   : arbor house business centre



Pauline Maina | Centre Manager

It's been 35 Years!!

A journey of a thousand miles begins with a single step. This year, we celebrate the epitome of discipline, hard work, elegance, brilliance, ingenuity...I mean, we could go on but it would probably be too long of a sentiment.

Such qualities can simply not be hidden and they shine bright, loud and quite unashamedly through our Njoroge Regeru be it in his work or his day-to-day interaction with others. He is what we would call the Leonidas of our time. Kindly thus join us in celebrating Mr. Regeru's 35 year-admission-anniversary.

For the sports fans, Muhammad Ali in an interview with David Frost, when asked what he would like people to think of him when he's gone, he said:

"I would like for them to say, he took a few cups of love; he took one tablespoon of patience, one tea spoon of generosity, one pint of kindness; he took one quart of laughter, one pinch of concern, and then he mixed willingness with happiness. He added lots of faith, and he stirred it up well. Then he spread it and expanded it over a lifetime and he served it to each and every deserving person he met."



Whereas the heavy weight champion is indeed one of a kind, one string of likeness that runs across the great is discipline and heart.

On Wednesday 13th October, 2021 Njoroge Regeru, the Firm's Founding and Senior Partner, celebrated 35 years since he was called to the Bar. In commenting on his time as an Advocate, he said;

"It has been a roller-coaster of a ride, with highs and lows, twists and turns, wins and losses, laughs and tears and all other variables that characterise human existence"





Legislative Updates

A number of activities have been undertaken in the legislative and regulatory sector this 4th quarter of 2021 with over five (5) parliamentary Bills being passed into law. Notable Acts include the; Central Bank of Kenya (Amendment) Act, 2021, the Law of Succession (Amendment) Act, 2021 and the Trustees (Perpetual Succession (Amendment) Act, 2021. We also note that certain regulations and guidelines have been published in relation to sectional property and prevention of corruption. A summary of the aforesaid is as follows:

CENTRAL BANK OF KENYA (AMENDMENT) ACT, 2021

On 7th December, 2021 the President assented to the Central Bank of Kenya (Amendment) Bill, 2021. This Bill sought to regulate 'Digital Lenders' by amending the Central Bank of Kenya Act (Cap 491) (the Primary Act). Digital lending was previously unregulated in Kenya. [This has been discussed in an earlier issue of our Newsletter (NL Q2 2021)].

The Central Bank of Kenya (Amendment) Act, 2021 (the "Amendment Act") regulates 'digital credit providers.' The Act stipulates that digital credit providers will be licensed by the Central Bank of Kenya (CBK) which shall also publish all licensed digital lenders in the Gazette. The Act defines 'digital credit' as a credit facility or arrangement where money is lent or borrowed through a digital channel.

'Digital channel' is defined in the Act as the internet, mobile devices, computer devices, applications and any other digital systems prescribed by the CBK. This means that any business providing credit facilities or loan services through a digital channel will now be regulated by the CBK.

The scope of regulation provided for in the Amendment Act is as follows, CBK will:

- a. License digital credit providers;
- b. Approve digital channels;
- c. Determine pricing parameters for digital credit;
- d. Supervise digital credit providers; and
- e. Suspend or revoke a license.

An application for a license under the provisions of the Amendment Act shall include copies of the following:

- a. Certificate of incorporation under the Companies Act;
- b. Certified copy of the applicant's memorandum and articles of association;
- c. Notification of the company's registered address;
- d. Certificate of registration under the Data Protection Act;
- e. A statement as to compliance with the provisions of the Consumer Protection Act, on credit arrangements; and
- f. Such other documents as may be prescribed by the CBK; and
- g. Terms and conditions applicable to the digital credit and which must be accepted by the borrower before activation of a mobile loan account.

The CBK in consultation with other regulators namely, the Office of the Data Protection Commissioner and the Communications Authority shall make additional regulations. A digital lender shall also disclose any information of its customers to the licensed credit reference bureaus, where such information is reasonably required for the discharge of the functions of the digital lenders and the licensed credit reference bureaus.

Any person who engages in digital credit business shall apply for a license within six (6) months of publication of regulations to be made under this Act. The regulations are to be made three (3) months after the Act comes into force.

LAW OF SUCCESSION (AMENDMENT) ACT, 2021

The Law of Succession (Amendment) Bill, 2021 (the "Amendment Act") was assented to on 17th November, 2021. It amends the Law of Succession Act (Cap 160) (the "Principal Act") in an effort to promote gender parity. Some of the provisions affected are provisions on dependants, intestacy and intermeddling.

(a) Dependants

The term 'spouse', though largely referred to in the Principal Act, was not specifically defined therein. The Principal Act instead provided that: -

"wife" includes a wife who is separated from her husband and the terms "husband" and "spouse", "widow" and "widower" shall have a corresponding meaning

The Amendment Act has thus introduced a definition of the term 'spouse' for purposes of clarity and gender balance. The term spouse is now defined as husband or wife. Consequently, and in the same spirit of promoting gender equality, the definition of the term 'Dependant' has been revised to mean:

- i. a spouse(s) and the children of the deceased whether or not maintained by the deceased prior to the deceased's death; and
- ii. the deceased's parents, step-parents, grand parents, grandchildren, stepchildren, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death Accordingly, a husband need not prove maintenance by his deceased wife so as to qualify to be a dependant as was the case in the Principal Act. Additionally, former wives are not recognised as outright dependants unless they can prove maintenance.

The Amendment Act also clarifies the position of law with respect to the presumption of marriage. Accordingly, marriage is defined as that which is set out in the Marriage Act, 2014. The effect of such definition is that marriages ought to be registered under the provisions of the said Marriage Act so as to be considered valid and binding.

(b) Intestacy

The Principal Act provided that where a person dies intestate (without a will), the surviving spouse would have a life interest in the estate. However, where such spouse happened to be a widow and they remarried, their life interest would dissolve.

The Amendment Act has thus come in to correct the gender disparity and provide that despite the surviving spouse's gender, where a surviving spouse re-marries, their life interest dissolves.

Additionally, where a person dies intestate leaving neither a spouse nor children, the hierarchy set out in the Principal Act (in relation to devolving of the deceased's estate) has been amended to have the parents first; if either parent is deceased, then the surviving parent.

This is a deviation from the previous provision that set out the deceased's father first then the deceased mother as an alternative where the father was dead.

(c) Intermeddling

The Amendment Act provides the following specific definition of the term 'intermeddling':

- i. taking possession of, disposing of the property of the deceased without the authority under the Principal Act or any other applicable law;
- ii. ejecting by force or by coercion a surviving spouse or child from a matrimonial home; or
- iii. any unlawful dealing with the deceased person's estate.

TRUSTEES (PERPETUAL SUCCESSION) (AMENDMENT) ACT, 2021

The Trustee(Perpetual Succession)(Amendment)Act, 2021 (the "Act") seeks to enable accumulation of generational wealth as well as provide for enforcers of trusts.

One key aspect of the Act is the provision for family trusts which had earlier been contemplated by the Finance Act, 2021. Accordingly, family trusts are defined under the Act as trusts that are registered or incorporated for the purpose of planning one's personal estate or for preservation of wealth for multiple generations. A family trust should however be a non-trading entity.

The Finance Act, 2021 aforesaid set out various tax exemptions for family trusts such as stamp duty and capital gains tax.

In respect of enforcers, the Act sets out that an enforcer is the settlor or any other person or body of persons appointed by the settlor to monitor the administration of a trust. Such person however should however not be the trustee for purposes of autonomy.

SECTIONAL PROPERTIES REGULATIONS, 2021

The Sectional Properties Regulations, 2021 (the "Regulations") were established pursuant to the Sectional Properties Act, 2020 (the "Act") on 26th November, 2021. These Regulations prescribe the manner in which Sectional Property will be registered in Kenya under the Land Registration Act, 2012 ("LRA").

They further prescribe: the manner of registering sectional plans, forms to be used under the Act, fees to be paid (to be prescribed under the LRA general regulations), and the practice and procedure of Court proceedings

1. Sectional Plans

A sectional plan is a geo-referenced plan of units or a part of land prepared by a surveyor and approved by the statutory body responsible for the survey of land. The Regulations provide that sectional plans being presented for registration should be: -

- a. drawn on tracing linen or polyester film using waterproof ink;
- b. prepared in sheets;
- c. accompanied by the rent apportionment form (Form SP1), where applicable;
- d. submitted to the authority responsible for survey authentication.

Additionally, sectional plans being presented for registration should have:-

- a. Plan sheets
- b. A proper illustration of the unit including the approximate floor area
- c. Certificates to accompany sectional plans as set out in the Act, that is certificates from the county government

2. Registration of Sectional Plans

The Regulations provide that registration of a sectional plan shall be done in accordance with the LRA (General) Regulations, 2017. This application should be accompanied by the Certificate of Title or Lease and an application for registration of a corporation. Upon successful registration, a Certificate of Title or a Certificate of Lease shall be issued. The Act and Regulations prescribe by-laws of the corporation.

Kindly note that under the Act, the register for the parcel of land is closed and separate registers for units opened. Also note, that upon registration of a sectional plan the registrar has twenty-one (21) days to submit it to the county government for purposes of apportionment of rates to each unit. This is to enable each individual unit owner to pay rates separately.

3. Conversion to Sectional Units

The Act requires long-term leases to be converted to sectional units. Various stakeholder discussions have been held on such conversion mainly with the aim of ensuring proper and seamless transition.

Accordingly, the Regulations set out Form SP 16 for purposes of application for such conversion. This application should be accompanied by the: original title; sublease or long-term lease; certificate of lease; or parcel title.

Kindly note that where the original title is missing or the management company fails to avail the architectural plans the registrar can issue a notice allowing 60 days for the title to be availed and/ or sworn affidavits to be issued in respect of the architectural plans.

Within one (1) year of registering a corporation, the management company is required to transfer all assets and liabilities to the corporation; essentially winding up the company.

Notwithstanding the aforesaid, there are long-term leases that are exempt from conversion; that is: those in which the agreement does not transfer reversionary interest and those that involve strategic projects that are of national importance.

Conclusion

The Regulations provide procedural clarity to the Act and offer people engaging in conveyancing transactions a way forward on the how to apply the provisions of the newly enacted Sectional Properties Act, 2020.

GUIDELINES TO ASSIST PUBLIC AND PRIVATE ENTITIES IN THE PREPARATION OF PROCEDURES FOR THE PREVENTION OF BRIBERY AND CORRUPTION

These guidelines were issued by the Attorney-General and the Ethics & Anti-Corruption Commission. The Bribery Act, 2016 (the "Act") requires both public and private entities to establish procedures for the prevention of bribery and corruption; failure to do so is an offence. Therefore, these Guidelines were published to assist public and private entities in preparing their procedures/ policies for the prevention of bribery and corruption.

The Act provides that a state officer, public officer and any person holding a position of authority in a public entity shall report knowledge or suspicion of an any act of bribery or corruption within 24 hours. Failure to do so is a crime that upon conviction carries a maximum sentence of ten (10) years in prison or a fine of Kenya Shillings One Million (K.Shs.1,000,000.00).

The Act further provides for protection of whistle-blowers, informants, or witnesses. The Guidelines thus sets out the following principles that ought to be considered in establishing the requisite procedures or policies. Such procedures should:

- a. be in writing;
- b. be in an official language;
- c. be translated into any other relevant language;
- d. provide for an implementation structure or arrangement;
- e. have a reporting mechanism and feedback for further administrative action;
- f. have measures for protection of whistle-blowers, informants and witnesses;
- g. provide for communication, training and dissemination to internal and external stakeholders;
- h. have an enforcement structure to address violation of the law;
- i. provide for co-operation with other agencies.

The entity or body is also required to develop risk assessment and management procedures as well as have measures on monitoring or evaluating the effectiveness of the procedures. These procedures should take into account the size, scale and nature of operation of the entity as well as the identified risk(s).

CASE HIGHLIGHTS

We focus on a recent case affecting the public interest, highlighting the legal developments.

REPUBLIC V JOE MUCHERU & OTHERS (2021)

eKLR

Republic v Joe Mucheru (Cabinet Secretary Ministry Of Information Communication & Technology), Fred Mwangi (Cabinet Secretary Ministry Of Interior & Coordination Of National Government), Attorney General And Immaculate Kasait (Data Commissioner) Exparte Katiba Institute And Yash Pal Ghai (Interested Parties) commonly referred to as the “Huduma Number Case”

The Applicants in this Judicial Review Proceeding are a constitutional research, policy and litigation institute and a person registered under the National Integrated Management System (NIIMS) who is considered a data subject, according to section the Data Protection Act (2019). A data subject is an identifiable natural person who is the subject of personal data. The Respondents are as mentioned above.

This case challenged the launching of the ‘Huduma Card’ without a data impact assessment contrary to section 31 of the Data Protection Act. The applicants also argued that the Respondents defied the orders in the case of *Nubian Rights Forum & 2 others vs Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties)[2020]* eKLR (“Nubian Case”) on similar issues.

Background

The ‘Huduma Number Case’ involves series of cases and legal amendments that began sometime in March, 2019 when the government began collecting personal and biometric data for a process that was commonly referred to as the registration process for ‘Huduma Number’. This number would be a unique identification number to be maintained in a national population register. Registered persons were to be issued with an identification card known as the ‘Huduma Card’.

However, this process was challenged in three cases, including the Nubian Case. The three cases were consolidated and the Court determined that the collection of certain data in absence of strict regulation was intrusive and unconstitutional violating Article 31 of the Constitution on the right to privacy.

During the pendency of the Nubians case, the Data Protection Act (2019) commenced in November, 2019 give effect to the Constitutional right to privacy. This Act establishes the Office of the Data Commissioner, who was tasked with the obligation of making regulations pursuant to the Act (the regulations are yet to be implemented).

The Statute Law (Miscellaneous Amendment) Act, 2018 amended the Registration of Persons Act. This amendment introduced NIIMS. The Miscellaneous Amendment Act was

nullified in the case of *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties)[2020]* eKLR on the basis that the approval of the Miscellaneous Act was not approved by the Senate. However, this decision was reversed on Appeal, where the Court determined only Bills concerning counties must be approved by both houses of Parliament.

Judgement

The Court addressed several issues including whether the Applicants had the right to bring a Judicial Review application before the Court. The issue in contention was that the Data Protection Act and regulations provide for a dispute resolution mechanism where, a data subject can lodge a complaint with the Data Commissioner. This would allow the Complainant other avenues, before bringing the matter before the Courts. Furthermore, the Court ruled that an aggrieved person should exhaust all other internal avenues provided by law in the Data Protection Act before approaching the Court.

The Court also addressed the question of the retrospective application of the Act to the case. The collection of data for NIIMS was being carried out before the Data Protection Act was enacted. The rule is that a law should not be created to apply to a time before its enactment. However, there are several exceptions based on how the law is interpreted. Specifically, Parliament can provide for the law to apply to a period before its enactment.

The Court therefore considered Article 31 of the Constitution on the Right to Privacy together with the Preamble of the Data Protection Act and the section on the purpose of the Act. Both provisions stating the Act was created to give effect to the provisions contained in Article 31 of the Constitution. Therefore, the Act could not be considered retrospectively, but rather further elaboration on the right to privacy and its enforcement should be made. The Court determined the collection of personal data by the state should have taken into account the citizen’s right to privacy. Furthermore, the Registration of Persons Act amendment which gave effect to this process should have considered the Constitutionality of the process before embarking on collecting personal data.

Therefore, on a balance of rights the right to privacy and subsequently the procedures regulating the protection of personal data under section 31 of the Act were held to be in the wider public interest. The Court therefore ruled that section 31 of the Act could be applied retrospectively. Section 31 provides that anyone controlling personal data should carry out a data impact assessment.

This ensures they are not violating anyone’s right to privacy while using personal data. Thus, the data impact assessment should have been carried out before rolling out Huduma Cards. This was the basis on which the Court used to stop the process of rolling out the Huduma

Cards. Therefore, the government was required to carrying out a data impact assessment in compliance with the Data Protection Act before processing any citizens personal data or rolling out the Huduma Card

INTERNATIONAL UPDATES



SOMALIA V KENYA INTERNATIONAL COURT OF JUSTICE (ICJ)

This case involved the Maritime Delimitation in the Indian Ocean. Delimitation is the fixing of limits or boundaries. The case was initiated by the Republic of Somalia (“Somalia”) against the Republic of Kenya (“Kenya”). The dispute was in relation to the establishment of a single maritime boundary. The case was filed on 28th August, 2014 and final judgment was read on 12th October, 2021.

International maritime boundaries are usually established by agreement between the parties. The United Nations Convention on the Law of the Sea (UNCLOS) was established as a legal framework for all marine and maritime activities. This convention therefore provides a comprehensive regime of law and order in the world’s oceans and seas establishing the rules governing the uses of oceans and their resources. Both Somalia and Kenya have ratified this convention. The main issue between the two counties was the chosen methodology of establishing the maritime boundary. Somalia wanted the court to rely on the delimitation methodology (which will be discussed further below). Kenya held the position that Somalia had agreed to the boundary being established parallel to latitudes from the point the two countries territorial boundary extends towards the sea.

The Court having reviewed the evidence provided by both countries established that there was no compelling evidence supporting Kenya’s claim. Therefore, Somalia was not deemed to have agreed to an existence of a maritime boundary either by acquiescence or by written agreement. Furthermore, the Court noted that Kenya’s claim, that the boundary should be established parallel to the latitudes, would produce a cut-off effect on the maritime projections of Somalia’s coast.

Delimitation Methodology

The Court observed that in order to determine a maritime boundary, states should find an equitable solution. However, if this is not possible between the parties the Court shall use the provisions of UNCLOS to establish the delimitation of the continental shelf. Alternatively, the Court may rely on established jurisprudence as in the case of *Maritime Delimitation in the Black Sea (Romania v Ukraine)* where the Court established three stages for determining a maritime boundary. The test is as follows:

- Establish the provisional equidistance line from the most appropriate base points’ on the parties Coasts;
- Consider whether there are factors calling for adjustment or shifting of the equidistant line, to achieve an equitable result; and
- Subject the established line to the disproportionately test.

The Court applied this three stage-test in establishing Somalia and Kenya’s maritime boundary. The boundary was established by establishing the provisional equidistant line. This line begins from the endpoint of the maritime boundary in the territorial sea and continues for 200 nautical miles into the sea. The Court then considered whether this line would need to be adjusted. Kenya submitted several concerns with the established line as by the Court.

They include:

- Security concerns;
- Kenya’s fisherfolk’s access to natural resources in the sea;
- Oil concessions; and
- Cut-off effect to Kenya’s maritime area.

The Court was not convinced of substantial evidence of Kenya’s concerns to adjust the maritime boundary save for the concern on the cut-off effect of the maritime boundary. The court was satisfied that according to the disproportionality test, the established maritime boundary achieved an equitable solution between the two States. (Illustrations of the established boundary can be found in the full court judgment. This can be accessed on the International Court of Justice (ICJ) website <https://www.icj-cij.org/public/files/casereLATED/161/161-20211012-JUD-01-00-EN.pdf>).

The Court finally noted that this case established the maritime boundary between the two countries. Therefore, since this issue had not previously been adjudicated on to its conclusion then Kenya could not be held to be in violation of international obligations under UNCLOS.

UNITED NATIONS GLOBAL WARMING CONFERENCE (COP26)

The twenty-sixth (26th) session of the Conference of Parties to the United Nations Framework Convention on Climate Change (COP26) was held from the 31st October, 2021 to 12th November, 2021 in Glasgow, Scotland.

It is a two-week conference on climate that has taken place annually since 1995. It is a formal negotiating session for countries to advance their climate commitments and actions, but has also become an important forum for a wide variety of stakeholders from around the world to gather and discuss the climate crisis and solutions. It is where member states collectively grapple with the climate crisis. Especially since climate has risen to the top of the global agenda with the UN Secretary-General calling the recent report of the Intergovernmental Panel on Climate Change, "A code red for humanity". The devastating climate impact that has been seen over the years, the rising sea levels, drought, severe floods and even wild fires are all causes for concern. The Paris Agreement, which is worth mentioning, is a legally binding international treaty on Climate Change. It is a multilateral climate change process because for the first time a binding agreement brings all nations into common cause to undertake ambitious efforts to combat climate change. It was adopted by 196 Parties at Cop 21 in Paris on 12th December 2015, and which entered into force on 4th November 2016. The goal of this agreement is to limit global warming to well below 2 degrees. The climate scientists however, have suggested that it would be preferable for the levels to be at 1.5 degrees celsius.

President Uhuru Kenyatta's Speech at COP26

On 1st November, 2021 Kenya's President, Uhuru Kenyatta, gave Kenya's Statement on environment and climate impact. In his Statement, he made it clear that Kenya's priority during their tenure at the United Nations Security Council is to ensure that the voice of Africa and that of the Global South is amplified. This is because, when it comes to climate change there has been a recognition of the increased existential threat to these states more than those in the Global North.

It is also very important to note that Africa as a continent is not a significant source of greenhouse gas emissions. Globally, the greenhouse gas emissions have reached a whopping 50 billion tonnes. Yet, Africa only accounts for 2-3% of the world's carbon dioxide emissions from energy and industrial resources. Although this is so, the people on the continent suffer greatly as the States on the continent do not have the means, nor the funding to ensure that the impact of climate change globally does not affect its people or even its environment. Africa is the most vulnerable continent to the impacts of climate change. Countries are already experiencing loss and damage of an increasing magnitude and frequency. It was incredibly concerning that during the adoption of the agenda of the conference the item on the special needs and circumstances of Africa was yet again not adopted.

The Intergovernmental Panel on Climate Change (IPCC) has underscored the special needs and circumstances of Africa contributing to the vulnerability and the low adaptation capacity of African Countries to Climate Change. They further note that even with the scaled global action, it will not be possible to avoid or reduce loss and damage from the impacts of climate change and that by 2030 the economic costs in developing countries is expected to be between US dollars 290 Billion and US dollars 580 Billion.

We need to urgently implement bold mitigation and adaptation measures to avert the looming crisis. It is the least we can do to bequeath a peaceful and sustainable planet to future generations. Kenya has developed a robust climate change action plan in our bid to help scale up efforts to maintain a low carbon development trajectory. The plan includes: commitment to restore degraded water towers; accelerate forests restoration and increase tree cover to at least 10% of our land area; as well as promote a sustainable blue economy and green manufacturing.

Kenya is a pacesetter in the energy sector. We are among the top eight (8) global leaders in geothermal power development and home to the largest wind power project in Africa. Currently close to 90% of the electricity used by Kenya is from renewable energy sources. We plan to achieve 100% renewable energy by 2030.

Kenya is therefore doing its fair share in the battle against environmental degradation. Kenya came to this meeting with high expectations that COP26 will deliver on at least four (4) issues:

1. An increase in ambition in emissions reduction. The major emitters must make more efforts to reduce their emission reduction beyond making commitments. We all must harness low carbon investment opportunities, as we reboot our economies.
2. A quantum increase in climate finance. Two times in a row developing countries have been promised US \$100 billion per year but it is yet to be delivered today, and yet another pledge has been made for 2023.
3. Ambition on adaptation and loss and damage with climate impacts increasing provisions to help the most vulnerable to adapt, including through increased financial support should be strengthened.
4. We expect that detailed rules and procedures for implementing the Paris agreement will be finalised, and a clear way forward for a climate resilient pathway set. We also expect that the agreement will be sufficiently inclusive to accommodate the needs and priorities of developing countries and in particular, the special circumstances of Africa.

What does this mean for the Kenyan people? We will wait to hear what the Government is going to ask of us. However, you can still do your part and choose sustainable practice in your everyday actions.

CONTRIBUTORS' PLATFORM

ANALYSIS OF THE LEGAL IMPLICATION OF THE NDUNGU LAND REPORT ON THE PROPERTIES MENTIONED THEREIN



The post-colonial era in Kenya was marked by an insatiable appetite to own prime land or any piece of land by Kenyans. The situation was further compounded during the Nyayo era where land was used as a commodity to reward political cronies. While the Commissioner of Land(s) was allocating Land under instructions of the president, he was always allocating land under "his own authority". The upshot of all these is that we ended up with public land being illegally and irregularly allocated to private persons; this was mostly done through private companies registered solely for purposes of acquiring land illegally and unprocedurally. It is against this background that a special commission was constituted by former President Mwai Kibaki to look into irregular/illegally acquired land better known as the Ndungu Commission.

The Ndungu Commission published a comprehensive report ("The Ndungu Report") which tabulated various properties that, according to the report, had either been illegally or irregularly acquired. As per the report, some of the public lands that were irregularly/illegally acquired included forest land, state corporation land, reserved roads among others.

The Ndungu Report has become an important historical document and reference point when it comes to ascertaining veracity of a title in the sphere of legal due diligence. Whereas some of the land listed in the report has been repossessed by the Government, for majority of the listed parcels of land, no step has been taken to recover them. Some of the land parcels have even changed hands mid-way as there is essentially no form of caution or caveat registered against the majority, if not all, of the listed land.

As regards the probity of the Report, majority of the parties mentioned in the Report have complained that the Ndungu Commission made findings and recommendations without properly and objectively inquiring on how their parcels of land were allocated to them hence failing to protect their dignity, and in the process disregarded the provisions of Article 19 of the Constitution of Kenya, 2010 [Rights & Fundamental Freedoms]. Some players have beseeched the Court to invoke Article 35(2) of the Constitution of Kenya, 2010 which provides that every person has the right to the correction or deletion of untrue or misleading information that affects them.

Further, they have argued that the Commission's decision to recommend revocation of their titles is/was drastic, disproportionate and effectively constitutes arbitral deprivation of property contrary to Article 40 of the Constitution as well as Article 47 of the Constitution which entitles every person to fair administrative action (includes making prior inquiries and conducting research before making any recommendations).

From the foregoing, it is clear that the Ndungu Report by itself has created more questions than answers -not only on the legal implications of the status of ownership of the land listed therein but also on the legal effect (if any) of the Report. It is noteworthy to point out that the Court in *Geoffrey Kirimi Itania vs. Chief Land Registrar & 3 others [2018] eKLR* held that the Ndungu report contained only recommendations and not binding resolutions. The recommendations contained in the report were primarily on revocation and repossession of titles, investigations as well as policy developments.

In the case of *John Peter Mureithi & 2 others v Attorney General & 4 others* [2006] eKLR, the Court opined that it was clear that neither the recommendations nor the findings of the Ndung'u Report can override the Constitution. The Court further had no hesitation in observing that the recommendations would have to be implemented with the constitutional provisions including any other written law. It was also noted the Ndung'u Report recommendations have not yet assumed any statutory form.

In the above-mentioned case of *Geofrey Kiriimi v Chief Land Registrar*; the Court held that a Memo/Notice that had been issued by the Chief Land Registrar directing all the District Land Registrars to place a caution/restriction on all the properties listed in the Ndung'u Report was improper and ordered for the removal of the same.

It is clear that the implementation of the report has never been actualized to date. A perusal of the Truth, Justice and Reconciliation Act, 2008. (the "Act") clearly shows that Parliament intended that the recommendations of the Commission be implemented. That is why it provided the implementation and monitoring mechanism in sections 49 and 50 of the Act as follows:

"49. Implementation of Commission's report

(1) *The Minister shall, upon the publication of the report of the Commission, operationalise the implementation mechanism or arrangement in accordance with the recommendations of the Commission under section 48*

(2)(f) *to monitor the implementation of the recommendations of the Commission and to facilitate their implementation*

(3) *Implementation of the report of the Commission shall commence within six months upon publication.*

50. Report to the National Assembly

(1) *The Minister shall report to the National Assembly within three months of receipt of the report of the Commission, and twice a year thereafter, as to the implementation of the Commission's recommendations.*

(2) *All recommendations shall be implemented, and where the implementation of any recommendation has not been complied with, the National Assembly shall require the Minister to furnish it with reasons for non-implementation."*

The above recommendations were never actualized, the set timelines have already lapsed and it is arguable that the report will never be implemented at all.

According to Section 2 of the Act, it is the Cabinet Secretary responsible for matters relating to justice and constitutional affairs (though functionally speaking the docket is under The Hon. Attorney General) who is supposed to be responsible for the implementation of the Report. Considering the current structure of the Government, we may not have a Cabinet Secretary responsible for matters relating to justice and constitutional affairs (though functionally speaking the docket is under The Hon. Attorney General), the report is thus otiose.

The same was noted by the Court in the case of *Republic v Truth Justice and Reconciliation Commission & 3 others Ex-parte Ngengi Muigai* [2015] eKLR where the applicant had challenged the findings in the Ndung'u Land Report. The Court opined that the Report remains a public record and it cannot be wished away and since Parliament had not done any implementation on the Report, the Applicant did not suffer any prejudice by having his land mentioned in the Report considering that when the Report will be implemented, he will be granted the opportunity to defend himself.

Additionally, in *East Africa Portland Cement Company Limited v Attorney General* [2021] eKLR, the Court noted that the recommendations of the Ndung'u Commission Report, were not geared towards making a final determination on the issue of proprietorship of land. Indeed, the Court was aware that after the said Report was published, several institutions, including the EACC, launched investigations on the proprietary of the impugned titles and where evidence was available, filed suits in court to have the titles revoked. What then happens to parcels listed in the Report and whose root of ownership has never been investigated or claimed by the Government? Do we assume that those titles are proper and thus the reason why the relevant Government agencies have not taken a step to investigate them? Is it a chapter that we need to re-open or close completely?

The above questions need to be answered to do away with confusion, anxiety and uncertainty as regards ownership of the properties listed in the Report. One of the pillars of the rule of law is the predictability of law so that individuals and other juristic persons can plan their lives and affairs on the basis of certainty of the applicable law; as Justice Nyamu opined in *John Peter Mureithi & 2 Others v Attorney General & 4 others* [2006] eKLR "

...In this judgment I have no ready answers to the questions, but the policy makers and the courts have in my view a great responsibility to come up with possible answers now and in the future."

Otherwise, it is open that the effect of the Report to any land listed therein has effectively placed the subject land under a cloud of suspicion which has acted as a social bar on the property's transactability and diminished the listed property value in the eyes of the investing public.

In conclusion, there is also a possibility that with conversion of Land Reference Numbers to Block Numbers, we may not be able to effectively make any connection between the properties which were listed as Land Reference Numbers in the Report to the new Block Numbers that the subject properties will take.

EXECUTOR(S) OF A WILL

What to Know – Frequently Asked Questions



Who is a Personal Representative?

A personal representative is a person authorised in law to dispose off the property of a deceased. In essence, the personal representative steps into the shoes of the deceased in order to lawfully do such things as the deceased may have done if they were alive.

A personal representative appointed under a Will to distribute the property of the deceased according to the terms of the Will is known as an executor whilst where there is no Will, the person appointed by court to deal with a deceased person's property is known as an administrator.

Who can be appointed as an Executor?

Persons who are qualified for appointment as executors include: spouses, advocates, banks, friends and public trustees. It is worth noting that not all persons may be appointed as executors of an estate; minors, persons of unsound mind and persons declared bankrupt have no capacity to take out a grant.

How many Executors can be appointed?

A Court cannot issue a grant of representation (probate/administration) to more than four **(4) persons** in respect of the same property.

What is the purpose of an Executor?

The Executor has certain duties and powers to ensure the wishes of the deceased are met.

What are the Powers of an Executor?

It is vital to note that the position of an executor is one of trust. Accordingly, the executor should always act in the best interests of the estate's beneficiaries in executing his/her powers.

Powers of an executor include: -

- a. to enforce all court orders which survive the deceased or those orders that arose out of the deceased's death;
- b. to sell any assets of the Deceased PROVIDED: -
 - i. such sale seems necessary and desirable;
 - ii. such sale is in the execution of the executor's duties;
 - iii. any purchase of the assets by the Executor him/herself can be nullified/invalidated if it is shown that another person is interested in the asset purchased;
 - iv. no immovable property can be sold before confirmation of the grant
- c. to transfer the property of the deceased to the specific beneficiaries upon confirmation of the grant of probate;
- d. after confirmation of the grant of probate, to appropriate any of the deceased's assets towards satisfaction of a deceased's wishes in respect of any gift/ legacy PROVIDED
 - i. no appropriation shall be made so as to affect adversely any specific legacy;
 - ii. no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without such person's consent.

Where does an Executor derive his/her Power?

An executor derives their authority from the Will and a grant of probate merely confirms the executor's authority.

This is to mean that where there is a Will and a grant of probate is issued by Court, such grant has the effect of: -

- a. acknowledging/ establishing the Will - its existence and its contents; and
- b. rendering valid the acts done by the executor between the date of the death of the deceased and date of issue of the grant provided that such acts fall within the duties of the executor.

It is vital to note that though the previous acts of the executor are validated by the grant of probate, the executor does not have power to distribute the property of a deceased person prior to confirmation of the grant.

What are the Duties of an Executor?

Funeral Expenses: To provide and pay out of the estate of the deceased expenses for a reasonable funeral for the deceased.

Collect and Preserve the Assets of the Deceased:

This includes collecting all debts owing to the deceased and moneys payable to his personal representatives by reason of his/her death.

¹ On the contrary, where there is no Will, a grant of letters of administration only takes effect as from the date of such grant.

In the case of *Re Estate of David Kyuli Kaindi (Deceased) [2016] eKLR*, the Honourable Court asserted the following:

"The role of personal representatives is clearly set out in the law, in the Law of Succession Act, Cap 160, Laws of Kenya. That role can be reduced into three (3) broad sub-roles. One, there is the duty to collect, get in and preserve the estate. The first duty is followed by the duty to pay the debts and liabilities of the estate. The last one is distribution of the estate. The personal representative is obliged to gather the estate together before he can think of settling debts and liabilities. The estate that is distributed is what remains after debts have been paid and liabilities settled.

It is important to note that the collection of the estate entails several things. It involves ascertaining and identifying the assets that belong to the estate. This would include collecting debts and perfecting imperfect titles. Ideally, one cannot move to distribution of the estate before they have ascertained and collected the estate, for what should be distributed is what has been ascertained and collected. It may involve suing debtors and enforcing causes of action that accrue in favour of the estate, like taking out proceedings against debtors and tortfeasors, to recover debts and damages. The other two duties should follow only after that. This would mean that where the first duty is not discharged satisfactorily the personal representative would encounter difficulties discharging the other two duties. I would repeat that debts are paid out of what has been collected, and distribution is of what is available after payment of debts and settlement of liabilities." **(emphasis applied)**

It is vital to note that any personal representative who:

- a. wilfully or recklessly neglects to get in any asset forming part of the estate; or
- b. misapplies such asset; or
- c. subjects any such asset to loss or damage

shall be guilty of an offence and shall be liable to a fine not exceeding Kenya Shillings Ten Thousand (Kshs.10,000.00) or to an imprisonment for a term not exceeding one (1) year or to both such fine and imprisonment. In addition, such personal representative shall be liable to make good any loss or damage so occasioned.

It is also vital to note the statutory provision on intermeddling, that is, no person is allowed to take possession, dispose or otherwise intermeddle with the free property of a deceased person prior to confirmation of the grant. Where there is intermeddling, the person intermeddling is:

- i. guilty of an offence and liable to a fine not exceeding Kenya Shillings Ten Thousand (Kshs.10,000.00) or to a term of imprisonment not exceeding one (1) year or to both such fine and imprisonment; and
- ii. answerable to the rightful executor or administrator, to the extent of the assets with which they have intermeddled after deducting any payments made in the due course of administration

Application for Grant of Probate

Where it is proved that the deceased had left a valid will. To pay out of the estate of the deceased **expenses of procuring Grant and other administration expenses:**

To ascertain and pay out all debts of the estate

Application for Confirmation of Grant:

Upon the lapse of 6 months from the date of the grant of probate, the executor has a duty to produce to the Court a full and accurate inventory of the assets, liabilities and all dealings of the deceased up to the date of the account and make an application for confirmation of grant.

Distribution &/ or Retention of Assets/ Complete Administration:

Upon the confirmation of a grant, the executor has a duty to distribute the assets or to retain on trust all assets remaining after payment of expenses and debts.

The executor thus has a duty to complete the administration of the estate within six months from the date of confirmation of the grant. This applies to all matters concerning the estate except continuing trusts. The executor is also required to produce to the court a full and accurate account of the completed administration. Where the executor is unable to complete the administration within six months, they can approach the court for extension of time.

Duty to act as Trustee in Certain Cases:

A personal representative has a duty to act as trustee in instances where the administration of the estate of a deceased person involves any continuing trusts, whether by way of life interest or for minor beneficiaries or otherwise.

What Constitutes an Offence by an Executor?

The following amount to offences that attract a fine not exceeding Kenya Shillings Ten Thousand (<Kshs.10,000.00) or an imprisonment for a term not exceeding one (1) year or both such fine and imprisonment:

- a. wilful or reckless neglect preserve & collect the estate of the deceased;
- b. misapplication of an asset of the deceased;
- c. subjecting any asset of the deceased to loss or damage;
- d. wilful failure to produce to the court any such inventory or account as is required;
- e. wilful or reckless production of any such inventory or account which is false in any material particular;
- f. continued administration of an estate whilst knowing or having reason to believe that the estate will prove to be insolvent without petitioning for administration of the estate in bankruptcy.

REGULATORY SANDBOXES AND THE CAPITAL MARKETS AUTHORITY



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According to the United Nations Secretary General Special Advocate (UNSGSA) Fintech Sub-Group, a 'regulatory sandbox' is an approach to legal regulation that can be summarized in writing and published. The regulatory sandbox allows regulators to carry out time-bound testing of innovations in a controlled environment. These sandboxes operate like a 'sandbox' more commonly referred to in Kenya as a 'sandpit'. In a sandpit, sand is put in a confined space (like in a box or a pit) where children are allowed and encouraged to play freely while being supervised by a caregiver.

The regulators have the opportunity to oversee and supervise the activities of innovators testing out new products in a controlled market space. These sandboxes have been applied in relation to the testing of novel financial products and technologies. Regulation in regard to innovation has typically taken the wait-and-see approach (as was witnessed in the evolution of the internet) or alternatively the test-and-learn approach (as was used in the development of M-Pesa). Both these approaches are alternate solutions to the challenges of trying to regulate new innovations in the market, while still protecting consumer interests.

The drawback of using the above solutions is that regulation of emerging products is always left playing catch-up. Alternatively, the regulation ends up stifling the progress of new products or services. A regulatory sandbox therefore creates an environment for key stakeholders together with innovators to create a balance between allowing new innovations to exist within the market and simultaneously coming up with solutions to mitigate the resultant risks. This concept has been applied to products all over the world. It has been used in jurisdictions such as Singapore, Malaysia, Australia, Abu Dhabi, Indonesia, Hong Kong and the United Kingdom.

In 2019, Kenya through the Capital Markets Authority (CMA) joined the list of countries using regulatory sandboxes as a mode of regulating new innovations, specifically Financial Technologies (FinTechs). The sandbox is in conformity to the CMA 2018-2023 Strategic Plan of leveraging technology across the capital markets value chain.

The Capital Markets Authority (CMA) is the body tasked with developing and regulating capital markets in Kenya. It therefore launched a program inviting companies limited by shares to apply to participate in regulatory sandboxes. The Regulatory Sandboxes intend to enable innovative capital markets related products, solutions and services to be developed and tested in live environments before being allowed to participate in the open market. This approach allows the regulator to understand emerging technologies and support evidence-based approaches to regulation. The regulatory sandboxes are not applicable to proposed products, services or business models that are already addressed under existing laws and regulation. (CMA Regulatory Sandbox Policy Guidance Note). The applicants to the regulatory sandbox must provide a test plan and this should incorporate safeguards to identify potential risks of the product to the market or sector in which the innovation operates.

Furthermore, they are required to provide performance indicators, metrics, objectives and remedial measures for clients. The consequence of being approved to participate in the CMA regulatory sandboxes is: a licence or approval to operate in Kenya, a letter of no objection or adopting new laws or regulations as a result of information gained during the testing phases of the regulatory sandbox.

The models considered in the 'Consultative Paper on Policy Framework for implementation of a Regulatory Sandbox to support FinTechs' are the Industry-led model and the CMA-model. The industry-led model is categorized into two: the virtual sandbox and the sandbox umbrella. The virtual sandbox would allow firms to test their solutions virtually without entering into the real market. The sandbox umbrella would allow unauthorized innovators to offer their services under its shelter and appoint representatives. This would allow not-for-profit companies established by the industry to act as a sandbox umbrella.

The CMA-led models include developing a regulatory sandbox as a new regulated activity and amending the waiver test contained in the Capital Markets Act (the "Act"). The waiver approach would allow firms to operate without needing to fulfill certain conditions under the Act. However, the approach being adopted by the CMA currently is developing a regulatory sandbox approach. In this approach the CMA has created a sandbox regime that allows for a streamlined authorization process, that requires less requirements when testing. It was established by the Policy Guidance Note March 2019, introducing regulatory sandboxes to the market.

In 2021, the CMA has admitted several firms to the regulatory sandbox. The first firm to be admitted into the sandbox was Innova Limited which had developed a cloud-based data analytic software. This software would be used by bankers, actuaries, regulators and pension managers. They also admitted Pezesha Africa Limited to test its internet-based crowd-funding platform. This platform would allow small and medium (SME's) to access loan debentures. The Central Depository and Settlement Corporation (CDSC) was also admitted. Firms can also opt to remain anonymous while they participate in the regulatory sandbox and test out the products.

Another firm whose application was successful and asked to take part in the regulatory sandbox is Acron Investments Management Limited, a Real Estate Investment Trust (REIT). The company has developed a product known as 'Vuka' that aggregates retail investors into asset backed financial products in a regulated and transparent structure. This product allows members of the public to accumulate wealth by investing in a diversified portfolio of income generating rental housing. This innovation is targeted at retail investors such as chamas, SACCOS and other medium to long term investors.

The CMA (at the time of writing this article) has received a total of twenty-four (24) applications for the regulatory sandbox. The innovations are in blockchain technology, real-estate, roboadvertising, global stocks, Electronic Know Your customer platforms, screen-based security lending, borrowing platforms, RegTech solutions, crowd funding, data analytics, among others.

It is clear that the possibilities for innovation are endless. It will therefore be interesting to monitor the progress of these innovations and how the law, technology and regulation will develop in time as a result of this regulatory sandbox.

Acknowledgements

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.



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