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NR&CoQuarterly ...Legal Briefs

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KARIBU!

Editor's Note

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It gives me immense joy to welcome you all to our first Newsletter of the year 2018.

As the latin maxim goes, *"ignorantia juris non excusat"* (ignorance of the law excuses not). The maxim has been adopted in Kenya's legal system vide section 7 of the Penal Code. The effect is that every person who is within Kenya's jurisdiction is presumed to know the law. Therefore, no person can escape legal liability by pleading that he is ignorant of the law that creates such liability.

In truth, however, it is almost impossible for any individual, even one with substantial legal training, to know all the laws on all facets of the Kenyan state. For the layman, the law might at times look like an intractable jungle. Yet, every businessman would be well advised to keep a tab on developments in the law especially such laws as directly affecting his business. It is therefore a key objective of this magazine to help our clients and other readers to know some of the laws.

On 8th March, 2018, the world celebrated International Women's Day. Our firm was not left behind. We kick off this edition with a glimpse at how the firm celebrated the day in re-affirmation of the firm's commitment to gender equality. Gender equality is one of the United Nation's seventeen (17) sustainable Development Goals (SDGs). In our contributor's platform, we delve deeper into the other SDGs and interrogate the role of businesses in promoting the SDGs.

In the legislative updates section, we analyze the Public Finance Management (Amendment) Bill, 2017 which aims to introduce various changes to the management of public finances. We also analyze the Constitution of Kenya (Amendment) Bill 2018 which aims at actualizing the two-thirds gender principle. Finally, we look at the Land Value Index Laws (Amendment) Bill, 2018 which aims at easing the process of compulsory acquisition of land for development purposes.

In our case highlights section, we analyze **Anthony Otiende Otiende –vs- Public Service Commission & 2 others**, a case which relates to legality of regulations and forms some of which are currently being used by the land's office. The case is of immense interest to land owners, investors, bankers who lend money on the security of land and the public generally. We also discuss the case of **Mamta Peush Mahajan –vs- Yashwant Kumari Mahajan** in which the Court clarified that contrary to popular opinion, not all contracts require perfection in the sense of signature, attestation and registration in order to create binding obligations.

It is our hope that you will enjoy reading this edition and that you will find it quite informative.

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FIRM HIGHLIGHTS

In this Quarter's Issue, we look at how the Firm celebrated International Womens Day. Having a celebration of this day reaffirmed the Firm's commitment to gender equality.

In the words of Mr. Njoroge Regeru:

"This Firm is blind to gender characterisation, we seek to offer equal opportunity to all irrespective of gender, your success or failure at the Firm will not be because of your gender,rather it will be self imposed…"

The International Women's Day was celebrated as early as in the 1909 in the United States. The day was observed following the 1908 garment workers' strike in New York where women were protesting against poor working conditions. Subsequently, in 1975 the United Nations began celebrating International Women's Day on 8th March. Later on in 1977 the United Nations General Assembly passed a resolution proclaiming a United Nations Day for Women's Rights and International Peace urging the Member States to designate a day to be observed in this respect in accordance with their historical and national traditions.

Today the Women Rights Movement has evolved to address more issues including political representation and movements against sexual harrassment, characterised by various 'hashtags,' in the recent past such as, #MeToo and #TimesUp.

Gender Equality is one of the Sustainable Development Goals of 2015 and all entities, whether government or private are expected to address these issues and support the realisation of the global agenda for the next 15years.

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LEGISLATIVE UPDATES

In this Issue's Legislative update we look at the Public Finance Management (Amendment) Bill, 2017 dated 29th December 2017, the Constitutional Amendment Bill, 2018, the Land Value Index Laws (Amendment) Bill, 2018 which are both dated 12th February 2018 and the Warehouse Receipts System Bill,2018 dated 7th February 2018 as well as the Companies (General) (Amendment) Regulations, 2018.

1. The Public Finance Management (Amendment) Bill, 2017

The Public Finance Management (Amendment) Bill (the "Bill") in the overall seeks to clarify on errors and inconsistencies between different sections of the Public Finance Management Act (the "Act"). It proposes to amend the Act to the effect that financial management provisions are identical for National and County governments.

Further, there are various provisions in the Bill seeking to align the Act to the relevant Constitutional provisions such as Article 210 and Article 222(1) which relate to imposition of tax and expenditure before annual Appropriation Bill respectively.

A. Substantial Amendments

i) The Functions of the Parliamentary Budget Office

The Bill proposes to expand the mandate of the Parliamentary Budget Office to include:

- Undertaking, monitoring and evaluation of government projects and programmes with a view to inform legislative budget and economic analysis;
- Producing the Budget Options Paper which shall be the basis of evaluating the Budget Policy Statement and annual estimates; and
- Reviewing the County Fiscal Strategy Papers and the Controller of Budget Reports with a view to informing the relevant Committees of Parliament on revenue allocation.

ii) Fiscal Responsibility Principles

The Bill proposes to amend the requirement of 30% budgetary allocation for development to only apply to the National Government. Thus, if the Bill is passed County Governments will not be required to make specific budgetary allocations for development.

iii) Timelines

The Bill introduces amendments to increase timelines for compliance with requirements under the Act in several instances such as: the obligation of the National Treasury to publish the schedule of disbursements from the consolidated fund to the County Governments by 15th June of every year instead of 30th May. Additionally, the County Assembly will have 30 days instead of 14 days to consider and approve the County Fiscal Strategy Paper.

iv) Procurement before a General Election

The Bill also seeks to insert a new clause prohibiting the National and County Governments from carrying out procurement three months before a general election on their development votes unless with the approval of the National Treasury.

v) Signing Loan Documents on behalf of Government Entities

The Bill revokes the express powers granted to accounting officers of a government entity and other officers authorized by legislation to execute loan documents on behalf of the entity. In the amendment, such powers may only be granted through delegation by the Cabinet Secretary of Finance or the County Executive Member responsible for Finance at the County Level.

vi) Waivers

If the Bill passes, only the Cabinet Secretary of Finance and the respective County Executive Member responsible for Finance will have power to grant waivers or variations on taxes, fees or charges and not the collector or receiver of revenue.

vii) County Exchequer Accounts

All counties will be required to maintain their exchequer accounts only in the Central Bank of Kenya to facilitate the easy operationalisation of the Treasury Single Account. Currently, the Act allows counties to maintain an exchequer account in a bank approved by the County Executive of Finance, which bank is not necessarily the Central Bank.

In order to control the number of bank accounts opened by the county governments and the various county entities, the Bill introduces new provisions on the criteria for consideration by the County Treasury before approving the opening of a bank account.

The Bill also seeks to introduce a new provision requiring county governments to surrender to the county exchequer account any funds withdrawn from the County Revenue Fund but not spent at the end of the financial year within fourteen days of receipt of the audit report.

viii) The Public Sector Accounting Standards Board

The Public Sector Accounting Standards Board as established in the Act will be accountable to the Cabinet Secretary for matters relating to Finance if the Bill is passed. The Cabinet Secretary may request periodic reports from the Board which reports should be submitted within two weeks of the request.

In summary, the Bill is an important step in clarifying the inconsistencies in the Act, as well as disparities between the Act and the Constitution. Nevertheless, there is need to take a closer look at the Bill especially on the timelines to ensure there is flow in the budgetary and financial process as well as its practical application.

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2. Constitution Of Kenya (Amendment) Bill, 2018

The Constitution of Kenya (Amendment) Bill, 2018 proposes amendments to the Constitution on membership of the National Assembly and Senate. The key object of these amendments is to give effect to the two-thirds gender rule as required by Articles 27 and 81 of the Constitution.

To this end, the Bill proposes amendments to Article 90 and 97 of the Constitution as follows:

a) a two term limit to persons nominated for special seats; for example, a person nominated to the National Assembly to represent the youth cannot serve in that capacity for more than two terms;
b) the membership of the National Assembly to be increased through the inclusion of special seat members necessary to ensure that no more than two-thirds of the elected members are of the same gender.
c) The members in the special seats shall be nominated according to Article 90 which obliges political parties participating in an election to nominate such potential persons and to forward their list to the Independent Electoral and Boundaries Commission ahead of the elections for Members of Parliament.

The proposed provisions if enacted into law, shall lapse after twenty years from the date of the first general elections after commencement of the Act. However, Parliament, by support of not less than two-thirds of members in both Houses of Parliament, may enact legislation to extend the period of application by a fixed term not exceeding ten years. It is expected that at the end of the said 20-30 year period, the country shall have made sufficient progress and from then on both genders will be able to compete on an equal footing.

Article 98 of the Constitution is also amended to introduce similar changes to the membership of the Senate.

There are however, concerns on the effect of the amendments on the already ballooning wage bill.

3. The Land Value Index Laws (Amendment) Bill, 2018

This Bill has been reintroduced in Parliament albeit with some changes and clarifications.

It proposes to introduce Amendments to the Land Act, 2012, Land Registration Act, 2012 and the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act.

It provides for the assessment of land value index in compulsory acquisition of land. In the overall the Bill seeks to ease the process of compulsory acquisition of land for the purposes of development projects particularly infrastructure projects, in a bid to encourage investments. The Bill also seeks to standardize the compensation in compulsory acquisition to prevent inequities in compensation. To this end, the proposed provisions go into the details of the factors to be considered in assessing the land's value and those that should be disregarded. The Bill also provides for considerations in compensating persons occupying land in good faith without any title to that land.

The Bill further introduces definitions of the terms 'just compensation,' 'prompt' and 'full' for clarity purposes.

Forms of compensation under the Bill include monetary compensation and non-monetary compensation such as: allocation of an alternative parcel of land, issuance of a government bond, grant or transfer of development and rights or equity shares in a government owned entity.

Further, the Bill seeks to prohibit the Courts from issuing orders stopping the development of compulsorily acquired land if public funds have already been acquired for that purpose. The Bill also seeks to establish the Land Acquisition Tribunal which has jurisdiction over disputes relating to the process of compulsory acquisition.

With regard to the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, the Bill provides that internal displacement of persons resulting from a lawful compulsory acquisition of land that is subject to prompt payment in full of just compensation to the persons shall not constitute arbitrary displacement.

4. Warehouse Receipts System Bill, 2018

The Warehouse Receipts System Bill (the "Bill") seeks to provide a legal framework for the development and regulation of a warehouse receipt system for agricultural commodities. The proposal for this legislation is informed by the benefits that can be reaped from having a formal receipt system that allows players in the agricultural sector to address marketing challenges such as access to credit facilities.

The Bill provides for the establishment of the Warehouse Receipt System Council (the "Council") and the Warehouse Receipts Appeals Committee for purposes of its administration. The Warehouse Receipts Appeals Committee is proposed to hear and determine appeals relating to decisions made by the Council whilst the Council is charged with development of a Warehouse Receipt System and establishment of a central registry for management of warehouse receipts transactions among other functions.

Warehouse Operators

A warehouse operator is defined under the Bill as a person engaging in the business of storing goods for hire and the issuance of warehouse receipts.

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Where a warehouse operator wishes to operate within the warehouse receipts system, he or she is required to obtain a licence from the Council. Such licence is valid for a period of twelve (12) months from the date of issue and may be renewed subject to compliance with any set conditions.

Warehouse Receipts

Licensed warehouse operators have the power to issue warehouse receipts for any agricultural commodity deposited in their warehouse. Such receipt may be in hard or electronic form and should contain, at the minimum, the description of the agricultural commodity, the name and physical address of the warehouse operator, the name and physical address of the warehouse and a statement that the agricultural commodity covered by the warehouse receipt is insured by the warehouse operator for the full value thereof.

Upon issue, the receipt should be delivered to the registrar (the Chief Executive Officer of the Council) within fourteen (14) days for registration. Once registration is complete, the holder of the receipt is issued with a certificate of registration which forms conclusive evidence of the issue of the receipt. Accordingly, upon presentation of a duly registered receipt, a warehouse operator is required to deliver the goods in his or her warehouse to the holder of the said receipt.

A warehouse receipt can also be used as collateral where it is regarded as a negotiable document. The Bill provides under clause 34 that a warehouse receipt may be negotiated by endorsement and delivery to another person. The receipt is duly negotiated if it is purchased in good faith and for value without notice of any defect or claim to it by any other person.

Under the Moveable Property Security Rights Act, 2017 (the "Act"), *a negotiable document is defined as a 'warehouse receipt or bill of lading that embodies a right to delivery of tangible assets and satisfies the requirements for negotiability.'* (Emphasis ours)

The Act further provides, under Section 13, that the security right in a negotiable document extends to the tangible asset covered by the document provided that the issuer is in possession of the asset at the time the security right in the document is created. This provision is reflected by clause 36 of the Bill which provides that the transferee of a negotiable warehouse receipt acquires: the transferor's title to goods, direct obligation of the warehouse operator to hold possession of the goods for the transferee and all rights accruing under the law of agency.

Accordingly, the Warehouse Receipt System Bill provides for the specifics of the warehouse receipts alluded to in the Moveable Property Security Rights Act, 2017 which seeks to broaden the scope of property that can be used as security for credit.

5. Company (General) (Amendment) Regulations, 2018

The Company (General) (Amendment) Regulations, 2018 only affect the fee in respect of registration of companies. In that regard, the set fee for registration of companies is Kenya Shillings Ten Thousand (Kshs.10,000.00).

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CASE HIGHLIGHTS

In this part, we highlight recent cases touching on the binding nature of draft commercial agreements and the impugned land registry regulations and forms.

MAMTA PEEUSH MAHAJAN V YASHWANT KUMARI MAHAJAN (2017) EKLR

In this case, the Court had the opportunity to pronounce itself on a common misconception to the effect that documented agreements must be completed and perfected by signature, attestation and registration to create binding obligations.

The parties had signed a share transfer agreement labeled as a draft copy in respect of a specific number of shares in specified companies for an agreed price. However, the agreement was neither dated nor attested. Thereafter, parties engaged in further negotiations which collapsed. The Defendant thus reneged on the terms of the signed draft agreement whilst the Plaintiff argued that the agreement was binding on the parties. On the other hand, the Defendant asserted that the agreement had no binding effect as it was a mere draft that had not been perfected by attestation and dating.

The Court held the agreement to be valid notwithstanding the deficiencies pointed out by the Defendant.

Further, the Court held that a draft agreement is binding between the parties as long as it is shown that the said agreement is complete, the terms are certain and that the parties' conduct reveal an intention to complete the transaction. In fact, the Court ruled that an offer in a draft contract can be deemed as accepted even if the draft is not signed if the parties show intention to be bound. It is important to note that the decision does not affect the drafting of contracts which must be perfected pursuant to their governing statutes.

For more information please see *https://goo.gl/DucLjY*

ANTHONY OTIENDE OTIENDE V PUBLIC SERVICE COMMISSION & 2 OTHERS (2018) EKLR

The Cabinet Secretary for the Ministry of Land, Housing and Urban Development had made an Application (the "Application") seeking variation and extension of the time within which the said Ministry was to promulgate regulations and land registration forms in compliance with the judgment of the Court (Onguto J) dated 19th December 2016.

The impugned forms were held invalid and unlawful on the grounds that the Cabinet Secretary promulgated the forms without: the input of the National Land Commission, approval of Parliament and public participation. However, the Court had suspended the declaration of invalidity for twelve months to give the Cabinet Secretary time to take steps and promulgate regulations and forms in compliance with the law. This was informed by the immediate consequences of the declaration on the registration of titles processes currently ongoing and already undertaken. Had it not been suspended, the nullification of approximately 3 million title documents would have resulted in nationwide disruption of the economy.

The Application was allowed. In so ruling, the Court observed that the Cabinet Secretary had done everything within his power to enact the forms and that while the said forms were pending parliamentary approval, the Cabinet Secretary could not control parliamentary processes.

Consequently, the declaration of invalidity remains suspended for an additional period of six (6) months from 31st January, 2018 till 31st July, 2018. Till then, Parliament may or may not approve the regulations. If they fail to do so, it remains to be seen whether the Court will grant another extension or the 2016 judgment will be enforced.

For more information please see *https://goo.gl/oXS7Qc*

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INTERLUDE.....

In future, please say my client rather than, "My super very very totally not guilty client"

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Demystifying the Role of Businesses in Promoting Sustainable Development Goals (SDGS)

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On 25th September, 2015 the United Nations General Assembly by a unanimous vote of its 193 member states adopted 17 Sustainable Development Goals (SDGs) as a 15 years blueprint (global agenda) for development (2015 to 2030).

The SDGs are a global call for everyone (including businesses) to take actions for the benefit of all people and the planet with particular focus on ending poverty, fighting inequality and tackling climate change.

Prioritizing Areas of Focus:

While it may not be possible for a business to address all the 17 SDGs, every business is expected to choose which SDGs are relevant and feasible to address in their areas of operation and establish practical steps to align their business objectives towards addressing those specific SDGs.

Why is this important? Many investors, business partners and customers are increasingly demanding that their service providers demonstrate how their businesses are contributing towards making the world a better place and tackling global challenges highlighted in the SDGs. Global brands are particularly cautious of reputational risks and will shy from engaging with brands in their supply chain that fail to demonstrate commitment to promoting SDGs. Today, one negative tweet can have catastrophic impact on a company's brand reputation resulting to customers' backlash, hefty fines for non-compliance and reputational risk that may cost millions of dollars in salvaging a tainted brand.

Embracing sustainable corporate culture can also lead to streamlining a company's operations to respond to changing market demands and customers' preferences, reduce waste, promote brand reputation and ultimately maximize profits. It therefore makes business sense for companies to embrace SDGs and develop a sustainable corporate culture.

Highlight of Global Trends on Corporate Sustainability:

On 16th June, 2011 the United Nations Human Rights Council endorsed a resolution to adopt United Nations Guiding Principles on Business and Human Rights (UNGPs). Although non-binding, UNGPs set out international obligation on states and corporations to adopt sustainable corporate culture that embraces a "respect protect and remedy framework' to mitigate and address adverse effects of businesses on employees, environment and communities that interact with their business.

To encourage and support businesses to easily understand and adopt sustainable and socially responsible policies and practices, the United Nations developed an action plan for businesses dubbed the **United Nations Global Compact (UNGC)** which set out ten (10) principle obligations expected of sustainable businesses. Companies are required to make commitment to develop and implement policies and systems to comply with the 10 obligations covering the identified thematic business challenges of human rights, labor, environment and anti-corruption.

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Country Level Actions on Corporate Sustainability:

Many countries, including Kenya, have established local Global Compact Network whose membership comprise of leading corporations, SMEs and small businesses who have made a commitment to adopt sustainable policies and practices in their businesses in line with their international obligations under the UN Global Compact.

In 2016, the Nairobi Securities Exchange (NSE) joined the UN Global Compact and signed the Code of Ethics for Businesses in Kenya which was developed on behalf of the private sector by Kenya Private Sector Alliance (KEPSA), Global Compact Network Kenya, and the Kenya Association of Manufacturers (KAM), and has been endorsed by H.E. President Uhuru Kenyatta as a key intervention towards addressing corruption and unethical practices within the government and private sector.

Today, 142 companies/businesses in Kenya have signed up to be members of the Global Compact Network Kenya while 600 companies have signed the Code of Ethics for Businesses in Kenya.

The Law Society of Kenya in collaboration with international leading law firms are undertaking training for in-house counsels and commercial lawyers to assist their corporate clients in developing and implementing frameworks to promote sustainable corporate culture in line with the UN Global Compact.

The International Bar Association (IBA) has also developed a "Practical Guide on Business and Human Rights for Business Lawyers" adopted in 2016 to guide commercial lawyers to advice their corporate clients on compliance with their international obligations as well as ensure law firms implement the same framework in their workplaces.

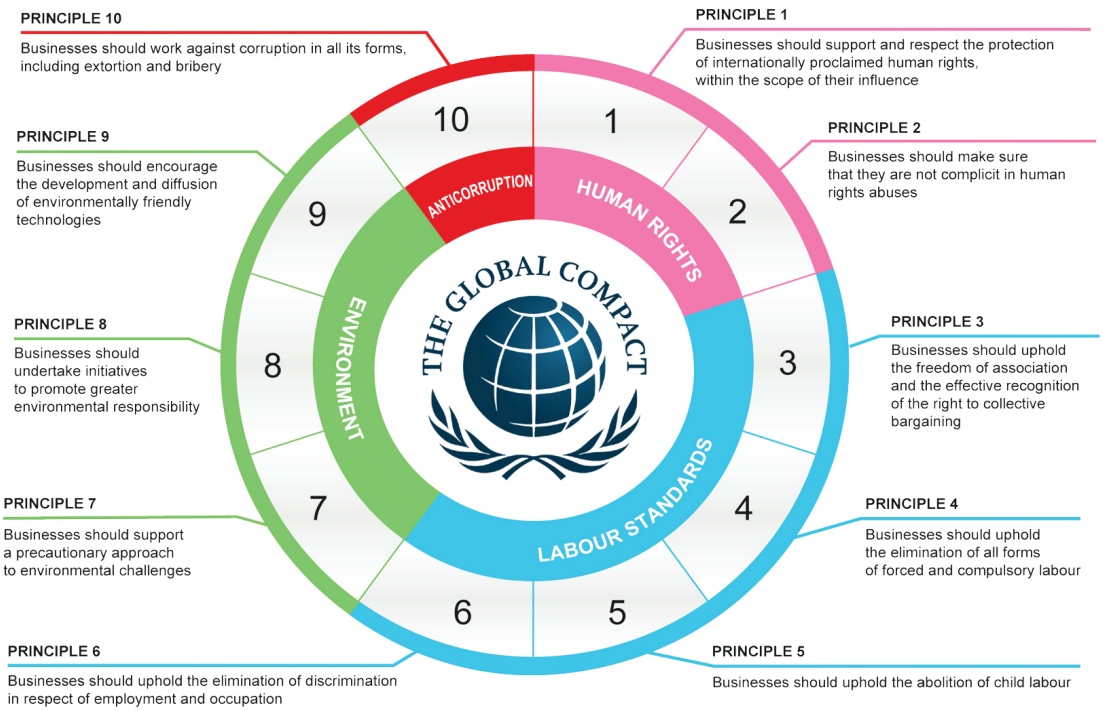
The Department of Justice in the Office of the Attorney General is also coordinating development of Kenya's National Action Plan on Business and Human Rights (NAP) which will inform policies and legislation in Kenya on compliance of businesses with their obligations to protect respect and remedy adverse impact of businesses and promote alignment of businesses with realization of SDGs and Kenya's development blueprint, Vision 2030.

What is expected of Companies?

External corporate lawyers and in-house counsels are expected to guide their corporate clients in developing policy frameworks for responsible and sustainable businesses in compliance with the Global Compact obligations. These policies include:-

- Equality inclusivity and diversity policies
- Sexual harassment policies
- Fair administrative action and access to remedy frameworks
- Anti-bribery and anti-corruption policies
- Human rights due diligence policies
- Non-financial reporting policies/guidelines, among others.

Sustainable Companies are therefore expected not to merely have a CSR policy but to mainstream sustainable development goals and national development agenda as part of their product offering and business strategy, embrace code of ethics for businesses and make commitments to develop policies and frameworks to comply with international obligations enshrined in the United Nations Global Compact.



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Redundancy Notice and Consultation: Egg-Chicken Affair

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The Employment Act defines redundancy as "…the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment."

The principal procedural elements of an effective termination on account of redundancy include: issuance of redundancy notice by the employer to the affected employee, consultation between the employer and would-be-affected employees, adoption of an objective selection criterion, settling of terminal benefits and issuance of certificate of service to the employee declared redundant and whose employment is terminated.

This article discusses the notice and consultations requirements.

1. Notice

The employer is mandated to issue a notice showing "reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended termination on account of redundancy" whether the employee is unionized or not.

Before the decision of the Court of Appeal in the case of ***African Nazarene University v David Mutevu & 103 others [2017] eKLR,*** jurisprudence was unsettled regarding the number of notices to be issued. Where the Court held that two notices are mandatory, it reasoned that the first one is a general notice of intention to terminate employees' contract of employment on account of redundancy, supposedly premised on paragraph 40(1)(a) or 40(1)(b) of the Employment Act. This notice was meant to elicit consultations between the employer and the employees generally. The second one is a one month's notice, which is issued after the conclusion of the consultations on all the issues relating to the redundancy supposedly pursuant to paragraph 40(1)(f) of the Employment Act. Unlike the first notice, this notice is issued to the specific employees affected by the redundancy, informing them of the decision to declare them redundant. In respect of the second notice, the employer was given the alternative of paying the affected employee a month's salary in lieu of the notice.

However, the Court of Appeal in the case of ***Africa Nazarene University v David Mutevu & 103 others (supra)***, held that the employer is only mandated to issue one notice to the affected employee. To this end, the Court clarified that paragraph 40(1)(f) is all about payment in lieu of notice issued under either paragraphs 40(1)(a) or 40(1)(b) as opposed to a second notice.

2. Consultations

The Court of Appeal, in the case of ***Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR,*** held that it is imperative for an employer to conduct consultations with the employee prior to the termination on account of redundancy. In the case of ***Africa Nazarene University v David Mutevu& 103 others (supra),*** the same court differently constituted observed that section 40 of the Employment Act makes no mention of consultations as a condition for a valid termination on account of redundancy. Nonetheless, it held that fair labor practices, as mandated by the Constitution, requires consultations between the employer and the employee.

3. Quagmire

The question that begs to be answered from the foregoing jurisprudence is: at what point are the consultations done? Conducting consultations after the notice is issued is preposterous. The employer would have already manifested its intention to terminate the employment contract of the employee to whom the notice has been issued. On the other hand, it is inconceivable that an employer would hold consultations on a subject over which the employees are not somewhat notified.

Conclusion

Whereas the employer is not mandated to issue more than one notice to the employees, practical fulfillment of the consultation requirement demands that the employees are informed of the looming termination on account of redundancy so as to usher in consultations at the end of which the identified employee is issued the mandatory notice.

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Emergence of the Oil and Gas in Turkana: A Curse or a Blessing?

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It appears that things are looking up for Kenya following the discovery of oil and gas in the Turkana Area... but are they really? Are we on the path of what has been called the 'oil curse'?... Presence or absence of natural resources as seen through the years not only in Kenya but also worldwide, can impact positively on a State but there is also an ugly flipside.

The key concern in the extractives industry is the equitable distribution of the wealth. Kenya must be careful in her approach to the issue because it is what will make or break the emerging extractives sector.

A proposal on the distribution of benefits was already made in the Petroleum (Exploration, Development and Production) Bill, 2015. The Bill proposed that the oil revenue be shared as follows: National Government 70%, County Governments 20% and Communities 10%. However, the Bill failed to get presidential assent.

The President sent it back to Parliament with a Memorandum proposing to review the communities share to 5%. The proposal was incorporated into the Petroleum (Exploration, Development and Production) Bill, 2017. The Bill stirred a lot of disagreement in the National Assembly especially because it was reintroduced at the height of the electioneering period.

The leaders from Turkana area were particularly opposed to the proposal insisting that the community should get at least 10%. The Bill was eventually withdrawn.

Below is a summary of the relevant legal provisions relating to benefit sharing.

Legal Framework

Article 10(2) (b) of the Constitution sets out the national values and principles of governance which include: equity, social justice, inclusiveness and equality. Therefore, these principles must be adhered to in decisions concerning benefits sharing. Further, Article 69(1) (a) obliges the State to ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits.

From the international legal framework, the African Charter of Human and Peoples Rights, Article 21 provides for the right of all persons to 'freely dispose of their wealth and natural resources but that right is to be exercised in the exclusive interest of the people.' In addition, the Charter obliges State parties to 'eliminate all forms of foreign economic exploitation especially from international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.'

There is a clear obligation in the law to ensure equitable benefit to the people. The Blacks' Law Dictionary defines the word 'equitable' to mean 'just or consistent with the principles of justice and right.' Therefore, any benefit sharing formulae adopted should be within those parameters.

Comparative analysis

Ghana

The practice in Ghana is viewed as one of the apt practices in benefit distribution. The government retains 80% of the revenue which is used to cover the general budget whilst 10% is dispensed into the Mineral Development Fund (MDF) which is used to fund the public mining sector and funding ad hoc flagship projects in mining communities. There is also a royalty agreements system set at 5% provided directly to the government quarterly which forms the main source of revenue derived from gold mining.

The system can however not be said to be perfect because there has been instances of misappropriation of funds.

Nigeria

On the other hand, Nigeria is an example of a country where the benefits of oil have failed to reflect on the status of the local communities. Nigeria is an oil resource-based economy with oil accounting for over 90% of the country exports. The country has three levels of government, that is, federal, state and local. The federal government gets about half of the revenue whilst the state governments get about quarter and the local governments gets a fifth; the rest goes into special funds.

However, the country is still experiencing high rates of poverty, oil rich areas are still characterized by poor infrastructure and unemployment levels are at worrying levels. Not to mention the massive environmental damage. Unfortunately, most of the oil used in the country is imported despite the fact that Nigeria is the leading producer of crude oil in Africa.

Conclusion

Focus should be on prior-informed consent, public participation, equity and fairness in drawing benefits to the community.

In the case of Kenya, Turkana County is an area that has been marginalized and has experienced numerous challenges including food shortage and insecurity unlike other parts of the country. The extractives industry may thus be the spark Turkana County needs to empower its people and subsequently set a blaze to the resilient economy of our country. Indeed such a future must be jealously guarded and must not be taken away by selfish interests. The formula adopted must thus ensure that the benefits of any exploration are ploughed back to the County for the benefit of the Communities.
Focus should be on ensuring they have access to good infrastructure, basic facilities such as better health care and embarking on projects aimed at ensuring food security. The National Government and County Government must also be willing to engage in conversations with stakeholders and the communities on the ground.

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PROVIDENCE OF PRECEDENCE

In the lore of Law Lords of old
And in the words of Law as told and spoke
We loudly laud the long gone,
And honor the order they still uphold

For then, now and future to come
They gave for us and unto us
Wise words that warn of war
And of more as yet to come!

Hear now as stories are told:
"Here now we live by Law,
We came we saw; we learnt we know
The rule of Law is friend not foe!"

by Ngatia Wambugu

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