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NR&CoQuarterly ...Legal Briefs

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KARIBU!

Editor's Note

Rosemary Kamau
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The Taskforce on Distributed Ledgers and Artificial Intelligence (DLAI) is set to release its report on the exploration and analysis of upcoming digital technologies that demonstrate great potential to transform Kenya's economy including disruptive technologies that are currently shaping the global economy such as distributed ledger technologies (blockchain and hashgraph), artificial intelligence (AI), 5G wireless technology, and the internet of things, this June. As such, this quarter's Newsletter focuses on the strides taken in developing a National Data Protection Framework and the opportunities available in the use of technology whilst resolving disputes.

In recognition of the technological advancements our country is taking, the Firm engaged Sentinel Africa Consulting in a discussion on the use of Artificial Intelligence, Blockchain Technology and Robotics as well as the technological disruptors to the legal profession.

> "The internet is becoming the town square for the global village"- *Bill Gates*

The Contributor's platform features articles by different writers on the use of Online Dispute Resolution as an alternative to the traditional forms of dispute resolution, the uncertainty on the finality of arbitral awards as well as a redefined corporate social responsibility with a duty to promote sustainable development.

The icing on the cake revolves around the admission of two great and experienced Advocates to the partnership of the Firm. Flip over to find out who they are even as we both congratulate them and support them in this new phase of their professional lives.

Enjoy the read!

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FIRM HIGHLIGHTS

We are pleased to anounce the admission to partnership in our Firm of Ms. Elizabeth Ngonde and Mr. Grishon Thuo. Both Ms. Ngonde and Mr. Thuo practise in the Dispute Resolution Department. Please join us in wishing them the very best in their new roles.

Ms. Ngonde holds a Bachelor of Laws from the University of Mysore-Karnataka, India and a Post Graduate Diploma in Law from the Kenya Schol of Law. She is member of the Law Society of Kenya and the East Africa Law Society.

She joined the Firm on 1st September, 2012.

Mr. Thuo is a graduate of the University of Nairobi with a Bachelor of Laws degree with Honours. He holds a Post Graduate Diploma in Law from the Kenya School of Law. He is an Advocate of the High Court of Kenya having been admitted on 21st Decemeber, 2010 and an Associate Member of the Chartered Insitute of Arbitrators.

In other news…

Keeping up with the country's technological strides, the Firm engaged Sentinel Africa Consulting on 18th May, 2018 for a training session on "the Effects of Emerging Technologies on the Legal Profession". During the session, Firm members brainstormed on and got a deep appreciation of the application of and opportunities for Artificial Intelligence, Robotics and Blockchain technology in law. Here are some of the highlights on innovation:

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LEGISLATIVE UPDATES

Great *advancements require great leaps*. The increasing use of technology not only confirms the era we are in, that is, the information age but also reveals the need for legislation on the various issues arising in this age, particularly the need for privacy. In this Quarter, we review two key pieces of legislation: the Computer Misuse and Cyber crimes Act, 2018 and the Data Protection Bill, 2018.

1. The Computer Misuse and Cyber Crimes Act, No. 5 of 2018

The Computer Misuse and Cybercrimes Act, Act No. 5 of 2018 ("the Act") came into force on 30th May, 2018. The Act seeks to: provide for offences relating to computer systems; enable the timely and effective detection, prohibition, prevention, response, investigation and prosecution of computer and cyber crimes and facilitate international co-operation in dealing with computer and cyber crimes. Other objectives of the Act include:

a) Protection of the confidentiality, integrity and availability of computer systems, programs and date; and

b) Protection of the rights to privacy, freedom of expression and access to information as guaranteed under the Constitution

One of the most notable aspects of the Act is the recognition and definition of blockchain technology as "a digitized, decentralized, public ledger of all crypto currency transactions". Accordingly, not only does the Act permit the advancement and development of the country's technological systems but also paves way for the development of a National Data Protection Framework as well as legislation on the Right to Privacy.

Central to the Act is the creation of offences in relation to gaining unauthorized access to a computer system. The Act provides that "a person who causes, whether temporarily or permanently, a computer system to perform a function, by infringing security measures, with intent to gain access, and knowing such access is unauthorized, commits an offence and is liable on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years, or to both" (section 14(1) of the Act).

Further, the Act limits the constitutional freedom of expression in respect of the intentional publication of false, misleading or fictitious data or misinformation that —

a) is likely to —
   (i) propagate war; or
   (ii) incite persons to violence;
b) constitutes hate speech;
c) advocates hatred that —
   (i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
   (ii) is based on any ground of discrimination specified or contemplated in Article 27(4) of the Constitution; or
d) negatively affects the rights or reputations of others

(For more: http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/

2. The Data Protection Bill, 2018

The Bill is aimed at giving effect to the constitutional right to privacy against the backdrop of digitization through the protection of personal data collected, used or stored by both private and public entities.

The Bill espouses the principles that guide the interpretation and the application of the law as it relates to the protection of personal data. It includes: non-intrusion of privacy, prior informed consent to collection of information, right of access to personal information by the respective data subjects, non-distribution of personal information inconsistently with the purpose for which it was collected, non-storage of personal information for a period that is longer than is necessary for achieving the purpose for which it was collected and technical security to personal information.
The Bill expounds on the right of data subject (a person from whom personal information is obtained) including the right to: be informed of the intended use of data, access to the said data, object to collection of all or part of data, correction of false or misleading data, deletion of false, misleading data or data that has been objected to and explanation on the processing of data and outcome of such processing.

The Bill further sets out the circumstances under which the right to privacy may be limited. These include circumstances where: the information is publicly available; prior authorization to collection and processing of the data in question has been issued; non-disclosure does not prejudice the interests of the data subject; non-disclosure is necessary for the compliance of a written law, institution or furtherance of court proceedings, protection of public revenue and property is necessary; compliance would be prejudicial to the purpose for which the information is collected.

Interestingly, the Bill seeks to prohibit automated profiling of data subject based on personal data without human intervention where such profiling results in legal effects that substantially affect the data subject. Also, the Bill sets out the criteria for processing special personal information, information relating to religious beliefs, race, health, trade union activities, data relating to a minor and political persuasions.

Further, the Bill seeks to prohibit the trans-border flow of personal information except in circumstances where the data

LEGISLATIVE UPDATES

subject has consented to the said flow, the flow is beneficial to the data subject, the flow is necessary for contract-efficacy or the recipient of the information is subject to a law that mandates the putting in place of adequate measures for the protection of personal data.

Notably, the Bill vests the oversight and implementation of the law (including investigation of abuses) in the Kenya National Commission on Human Rights.

3. Establishment of the Taskforce on the Development of Policy and Regulatory Framework for Privacy and Data Protection in Kenya

The Cabinet Secretary for Information Communication and Technology vide Gazette Notice No. 4367 dated 3rd May, 2018, established the Taskforce on the Development of Policy and Regulatory Framework for Privacy and Data Protection in Kenya. The Taskforce is mandated with specific tasks namely: comprehensively auditing the existing legal framework on privacy and data protection in Kenya; identifying the gaps and inconsistencies therein; proposing a policy, legal and institutional framework for privacy and data protection that gives effect to any relevant international treaty ratified by Kenya, the Bill of Rights and the applicable values and principles as enshrined in the Constitution; and transparently drafting policy and legislative proposals on privacy and data protection taking into account stakeholder consultations.

To discharge its mandate, the taskforce is empowered to hold meetings, public forums, and consultations. The term of the taskforce is three (3) months from 15th March, 2018, within which it is expected to have completed its work and presented its report to the Cabinet Secretary for Information Communication and Technology.

Notably, Privacy and Data Protection Bill is currently pending before the Parliament. It remains to be seen whether the findings of the Taskforce will somewhat find expression in the said Bill or as a separate Bill to be tabled before the Parliament. It is hoped that, for optimal and prudent utilization of resources, the Privacy and Data Protection Bill will be stayed pending proposals by the Taskforce and harmonization of the Bill with the said proposals.

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CASE HIGHLIGHTS

In this segment we accentuate cases on the Right to Privacy, the Right of State Organs, in their character as such, to enforce the Bill of Rights and the Right to a Clean and Healthy Environment.

1. Kenya Human Rights Commission versus Communications Authority of Kenya & 4 Others (2018) eKLR

This was a Petition by the Kenya Human Rights Commission (KHRC) (the "Petitioner") against the Communication Authority of Kenya (CAK), the Attorney General, Safaricom Limited, Airtel Networks Kenya Limited and Orange-Telkom Kenya (the "Respondents"). The Petition challenged the constitutionality of the proposed installation of generic devise management system (DMS) on the networks of the mobile service providers. The Petitioner's principal argument was that the DMS had ability to access subscribers' information in a manner that could constitute a breach of the right to privacy as guaranteed under Article 31 of the Constitution. On the other hand, the CAK argued that the object of the DMS was to counter crime, theft of devices and the proliferation of stolen and counterfeit devices.

The Court noted that it must consider the proportionality of such a measure in justifying the limitation of a right. The key question in the court's view and as established from other jurisprudence is whether the end could be pursued by less drastic means and whether the law results in adverse consequences not necessarily related to the objects of those laws in the first place.

Upon consideration of the matters at hand, the Court held that the proposed DMS System did not meet the criteria set out for limitation of rights under Article 24 of the Constitution. Further, that there were statutory bodies mandated to combat counterfeit goods, that is the Anti- Counterfeit Agency while the Kenya Bureau of Standards is responsible for standardization of goods and thus CAK could not purport to exercise that mandate. On the question of public participation in the process leading up to the decision of the acquisition and installation of the DMS system, the Court restated the standard of what is sufficient opportunity for public participation as established in past cases and held that the millions of subscribers likely to be affected by the proposals to install the DMS System were never involved in the consultations. Further, in the Court's view the failure to engage the public constituted a breach of the requirements of a fair administrative action. The Court was also of the view that the DMS and the manner of its introduction was against consumer rights.

Finally, the Court issued prohibitive orders against the implementation of the decision by CAK to install the DMS System.

2. Meru County Government versus Ethics & Anti- Corruption Commission (2018) eKLR

This was an Appeal by the Meru County Government in the Court of Appeal against the decision of the High Court dismissing their Petition challenging the seizure of all documents from its Procurement Department. The Petitioner challenged the actions of the officers of the Respondent on grounds that they had violated various rights and fundamental freedoms of officers of the Petitioner.

The crux of the Appellant/Petitioner's case was that the High court had erred in failing to appreciate that the Appellant was a person protected under the Bill of Rights and thus entitled to enforce those Rights. The Petitioner placed reliance on Article 260 of the Constitution which defines a person to include a company as well as a body of persons whether incorporated or unincorporated, and Section 6 of the County Government Act, 2012 which defines a County Government as a body corporate.

The Court upheld the decision of the High Court and observed that indeed State Organs can enforce their constitutional right, to the extent that it is necessary to protecting their rights, capabilities, competencies and privileges accorded to them by the Constitution. However, they cannot in and of themselves purport to claim for themselves qua State organs, the rights enumerated in the Bill of Rights because those rights belong only to individuals as natural persons who only can enforce or protect them in person or through any other persons be they natural or juristic.

3. Elizabeth Kurer and Detlef Heir (Suing on their behalf and on behalf of aggrieved residents of Watamu within Kilifi County) versus County Government of Kilifi & 4 others [2018] eKLR

This was a Petition seeking a declaration that one of the Respondents, Comeback Restaurant, Lounge and Disco operating a restaurant in the Watamu area had violated the right of the residents to a clean and healthy environment as a result of playing loud music. The petitioners sought orders for an injunction prohibiting the Restaurant from playing live music, streamed music and or any other music. The Petitioners accused the County Government of Kilifi of failing to implement the Kilifi County Liquor Control Act which they accused the restaurant of brazenly breaching despite their numerous complaints.

The Court dismissed the Petition on grounds that the Petitioner did not persuade the Court that they had been authorized by the relevant lead agency, that is, the National Environmental Management Authority, to carry out the measurements to determine that there was excessive noise nor did they demonstrate that they had knowledge in the proper use of the equipment as provided under the Environmental Management and Coordination (Noise and Excessive Vibration Pollution) (Control) Regulations, 2009. The Petitioner was ordered to pay costs to one of the Respondents, who was the lessor of the property to the operators of the Restaurant. In the Court's view enjoining them was a gross error on the part of the petitioner because their only mistake if any was leasing the property.

For more information visit: http://kenyalaw.org/caselaw/cases/view/124993/

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INTERLUDE.....

She: I have a doctor's appointment today but I really don't want to go…

He: Just call in sick then.

(https://short-funny.com/clean-jokes.php#ixzz5IrUAQ1sE accessed on 19th June, 2018)

I'm not clothes but cover your body;
The more am used the thinner I grow;
What am I?(Answer: "rba fo paos")

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An Overview of the Online Dispute Resolution Mechanisms and its Use in Kenya

By Anne Mwangi
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The world has experienced rapid digitization in various spheres of life and the field of law has not been left behind. The growth of online transactions-both national and cross-border raised a need for new mechanisms fit to resolve disputes arising from such transactions. One such mechanism is online dispute resolution ("ODR"). Online dispute resolution is a "mechanism for resolving disputes through the use of electronic communications and other information and communication technology". As the name suggests, the process requires the use of the internet to resolve disputes whether or not they occurred online or offline.

ODR applies the principles of various alternative forms of dispute resolution such as arbitration, negotiation or mediation and provides an amalgam of the same on an online platform. The process may apply to disputes arising out of both a business-to business (B2B) as well as business-to-consumer (B2C) transactions. It can also be applied to domain name disputes and Intellectual Property disputes. Research has shown that countries with well-regulated ODR mechanisms in place receive greater confidence in online and cross-border transaction from foreign investors.

Like all other forms of alternative dispute resolution, ODR can assist the parties in resolving the dispute in a simple, fast, flexible and secure manner. Unlike all other forms of dispute resolution, the process dispenses with the need for physical presence at a meeting or hearing. ODR manifests in various ways with varying degrees of human involvement in the process. In general, the process requires that the parties submit their claims on an ODR platform specially designed to handle online disputes. The ODR platform can then use intelligent software to either automatically generate a settlement based on the weight of each party's claims or generate a list of suitable options for the parties' consideration.

In the alternative, ODR may take the form of Online Mediation or Online Arbitration. Online Mediation maintains the process of conventional mediation but performed entirely online with the help of ICT variations including but not limited to video-conferencing and emails. The role of the mediator can also be taken up by a technology simulator.

Online Arbitration is similar to the aspects of online mediation with the exception that the final award granted is binding in nature. Submission of documents, evidence and witness hearings can all be performed through online means such as email, teleconferencing and videoconferencing.

Benefits of ODR

ODR maintains all the benefits of regular dispute resolution while conferring a few extra benefits that are special to it:

1. **Cost Savings and convenience** especially where ordinary circumstances would require one or both of the parties to incur travel and accommodation expenses in order to proceed with the mediation or arbitration.
2. **Avoids complex jurisdiction issues** by completely excluding the court in the process of ODR.
3. **Promotes creativity in problem solving** by virtue of introducing computer generated options.

Disadvantages of ODR

1. Applicable to a limited range of disputes: ODR, while highly efficient, is only suitable to a small range of disputes. This is especially so where the resolution is carried out solely by the computer with minimal human intervention. However, in countries with high use of ODR, the mechanism has been used to solve family and divorce disputes.
2. Whereas ADR is praised for its personal nature, ODR creates a sense of impersonality due to the physical absence of the parties. This may reduce the air of trust fostered in ADR.
3. ODR requires access to computers, fast internet and ODR resources which may not be easily available to everyone.
4. Like any other website, ODR platforms run the risk of hacking and therefore inadequate confidentiality, security and authenticity information provided on the platforms.

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Despite its inception in the early 1990's, ODR has only received great use in the European Union, the United States of America and Canada. Developing nations such as India and South Africa have also made great strides towards inculcating ODR as part of their dispute resolution mechanism. In Kenya, prevalence in the use of ODR is seen by Kenya Network Information Centre (KeNIC) in the resolution of domain name disputes through online mediation and online arbitration. The slow growth of ODR in Kenya may be as a result of the lack of regulation of the use of the internet in dispute resolution.

Uncertainty on Finality of Arbitral Awards keeps Business People Guessing

By Grishon Ng'ang'a Thuo
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Arbitration is a non-judicial process for the settlement of disputes where an independent third party makes a decision that is binding on the parties.

Over the years, Arbitration has become a popular method of resolving disputes especially among businesspeople. This popularity may be attributed to certain advantages of Arbitration especially as compared to litigation. One of these advantages is finality. For this reason, drafting of arbitration laws throughout the world demonstrates the need for finality. Such laws give extremely limited room for challenge to Arbitral Awards. It is also common for parties drafting contracts to include in such contracts a phrase to the effect that any dispute arising therefrom would be resolved by arbitration and that the outcome of such arbitration would be "final and binding".

Section 10 of Kenya's Arbitration Act Number 4 of 1995 expressly forbids the Courts from intervening in any matter which is the subject of Arbitration. The Act goes ahead to allow for intervention in certain limited circumstances. For example, under section 35 of the Act, the High Court may set aside an arbitral Award if it is proved that one of the parties to the Arbitration Agreement was under some incapacity, the Award was procured by fraud, bribery, undue influence or corruption, one of the parties was not given proper notice of appointment of Arbitrator or was otherwise prevented from presenting his case, or the Award deals with a dispute which is not within the contemplation of the parties. Under the said section the Award may also be set aside if the subject dispute is not capable of being resolved by arbitration under the laws of Kenya or the Arbitral Award is in conflict of the public policy of Kenya. Section 39 of the Act further allows limited room for appeals from the High Court to the Court of Appeal on matters of law only and only where parties have agreed to such appeal.

For many years, it was settled law that a party could not appeal to the Court of Appeal on a matter that emanated from arbitration except on the limited room provided under section 39 of the Act. However, with the promulgation of the Constitution of Kenya, 2010, this position has been challenged. In particular, it has been argued that Article 164 (3) (a) gives the Court of Appeal jurisdiction to hear and determine all appeals from the High Court without giving any limitation. To that extent, section 10 of the Act (which limits Court intervention) may be said to be inconsistent with the Constitution. As the Constitution is the supreme law of the land, it is arguable that Article 164 (3) (a) of the Constitution prevails over section 10 of the Act thereby enabling the Court of Appeal to entertain appeals on arbitration matters. On the other hand, it may be argued that Article 159 (2) (c) of the Constitution requires the Courts to promote alternative dispute resolution mechanisms such as Arbitration. It is doubtful that Courts would be able to promote arbitration if they robbed it of its finality by entertaining appeals from the High Court.

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At the moment, the Court of Appeal's opinion is divided. In the case of Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR, a five (5) judge bench of the Court of Appeal unanimously ruled that the Court of Appeal could not entertain an appeal on an Arbitration matter. However, in its later decision in DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited [2017] eKLR, the Court of Appeal (differently constituted) held that decisions of the High Court in arbitration matters are generally appealable to the Court of Appeal.

The effect of the aforementioned contradicting decisions is to create uncertainty in the law. Parties entering into agreements today have to make a decision on whether to choose Arbitration as their preferred dispute resolution mechanism yet it is not clear whether Arbitration still retains its initial advantage of finality. However, it is encouraging to note that the **Nyutu Agrovet** case is now before the Supreme Court, the highest Court in Kenya, which is expected to settle the dispute with finality.

Redefining Corporate Social Responsibility: A Duty to Promote Sustainable Development

By Patrick Karanja
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In 2008 Kenya launched its ambitious development agenda dubbed Vision 2030 setting out the blueprint for transforming Kenya into a newly industrialized "middle income" country providing a high quality life to all its citizens by the year 2030." Kenya's Vision 2030 is anchored on ten (10) foundations which include: macroeconomic stability for long term growth, continuity in governance reforms, equity and wealth creation opportunities for the poor, encouraging investment in infrastructure and energy, intensifying application of science, technology and innovation, land reform, human resources development, improving security and building an efficient, motivated and well trained public service.

Kenya's Development Agenda:

In line with the Vision 2030, various flagship projects have been established with the strategic focus of adding value to products and services in various sectors (tourism, agriculture, wholesale and retail trade, manufacturing, business process outsourcing and financial services). It is expected that these initiatives will lead to cohesive and equitable social development that will transform seven identified key sectors which include education, health, water and sanitation, environment, housing, gender equity and poverty eradication. It is further expected that achievement of all these aspirations will be underpinned by adherence to the rule of law, having genuinely competitive and issue-based politics, democratic society with a working public service, transparent and accountable government institutions, security and peace for all where conflicts are effectively managed.

Global Focus on Sustainable Development:

At the global fronts, similar sustainable development initiatives are on top gear spearheaded by states, leading corporations and the civil society movement. State leaders and business leaders are working towards realization of the United Nations Sustainable Development Goals (SGDs) by the year 2030. SDGs articulate the aspirations and commitment of the global community to 17 sustainable development goals which include: 1: No Poverty, 2: Zero Hunger, 3: Good Health and Well-Being for People, 4: Quality Education, 5: Gender Equality, 6: Clean Water and Sanitation, 7: Affordable and Clean Energy, 8: Decent Work and Economic Growth, 9: Industry, Innovation, and Infrastructure,10: Reducing Inequalities, 11: Sustainable Cities and Communities, 12: Responsible Consumption and Production, 13: Climate Action, 14: Life Below Water, 15: Life on Land, 16: Peace, Justice and Strong Institutions, and 17: Partnerships for the Goals.

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Role of Business in Promoting Sustainable Development:

While the primary responsibility of ensuring realization of national development goals and agenda lies with the government, it cannot be gainsaid that people in a country have the responsibility to participate in ensuring realization of its development. This is well articulated in Article 10(2) of the Constitution of Kenya, 2010 which sets out the national values and principles of governance to include: a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; c) good governance, integrity, transparency and accountability; and d) sustainable development. These are the standards and national values expected from both natural persons as well as corporate entities in Kenya. For avoidance of doubt, Article 260 of the Constitution of Kenya 2010 defines a person to include "a company, association or other body of persons whether incorporated or unincorporated".

While traditional corporate response to social challenges was charity based CSR activities, companies are increasingly recognizing CSR as a movement aimed at encouraging companies to be more aware of the impact of their business on the rest of society, including their own stakeholders and the environment. Corporate social responsibility (CSR) is there being seen as a business approach that contributes to sustainable development by delivering economic, social and environmental benefits for all stakeholders.

Call for Action: From CSR to Value Addition

As observed by Professor Rosabeth Moss Kanter of Harvard Business School *"Companies that are breaking the mold are moving beyond corporate social responsibility to social innovation. These companies are the vanguard of the new paradigm. They view community needs as opportunities to develop ideas and demonstrate business technologies, to find and serve new markets, and to solve longstanding business problems."*

These sentiments have also been echoed by business mogul Richard Branson who observed that *"We need government and business to work together for the benefit of everyone. It should no longer be just about typical "corporate social responsibility" where the "responsibility" bit is usually the realm of a small team buried in a basement office - now it should be about every single person in a business taking responsibility to make a difference in everything they do, at work and in their personal lives."*

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In this quarter, NR & Co supported various initiatives towards Corporate Social Responsibility:

In support of the ongoing efforts to restore forest cover in the country we donated 3000 trees to the Million Trees Vision an initiative of Victoria Commercial Bank Ltd.

Separately and as a contribution to education, the Firm donated to the Alliance High School Endowment Fund, Njoroge Regeru, the Firm's Founding Partner, being an alumnus of Alliance High School.

In addition, the Firm hosted three students from the International School of Kenya, Serag El Sadani, Selah Piper, and Marie Vandermeulen, for their work experience during the week of 19th March, 2018. The students were afforded an opportunity to engage with the day to day legal work undertaken by the Firm and we hope they had a rewarding learning experience.

"The work experience I had at the firm provided me with a decent amount of insight into legal work, specifically within corporate law. It was an excellent experience and I learned a lot from it, and I greatly appreciate the opportunity that had been given"

Serag El Sedani

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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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