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Legal Briefs

The Editorial [Pg.2]

International Womens' Day

Innovation and Technology for Gender Equality [Pg.3]

Contributors'

The place of democracy in elections in Kenya & Nigeria [Pg.10]

Editorial Team

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EDITOR'S NOTE

Dear Reader,

As we enter the next quarter of our year, please enjoy the latest edition of our Newsletter. We endeavor to share insightful updates from the houses of parliament, interesting highlights from the Courtrooms of justice and exciting contributions from the chambers of Njoroge Regeru & Company.

We begin this quarter's issue by recalling the annual celebration of International Women's Day. I am reminded of the great strides taken by the women who came before me to chart the path towards the world of possibilities we live in today as we look to the future.

In the legislative updates, we cover matters regarding elections, financial derivatives, foreign exchange and privatization of public entities. We then hop right into the case highlights touching on issues involving matrimonial property and human rights violations. In the Interlude, we return with our comic strip of legal jargon jokes. We then delve into the article contribution by Nashipae Langat and Noel Zetty on Environmental Social Governance and Climate Financing in Kenya, is this the new frontier for sustainability?

We conclude the Newsletter with a piece from Buluma C.N who discusses the Place of Democracy in Elections in Africa. In reading his Article, I am reminded of an African proverb that says, "A bird does not sing because it has an answer, it sings because it has a song."
May the year ahead be inspired, purposeful and prosperous!

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The Firm

International Women's Day 2023: #DigitALL: Innovation and Technology for Gender Equality

International Women's Day is celebrated on March 8th every year. The theme of this year's International Women's Day is #DigitALL: Innovation and Technology for Gender Equality. The theme may be said to be quite timely considering that we continue to experience a myriad of technological advancements especially in Artificial Intelligence with the introduction of chatbots such as ChatGPT that are redefining numerous sectors including various areas in the practice of law. As such, the main focus this year is on the promotion of gender equality and social inclusion in the digital sector, using digital innovation and technology to close the gender gap and creation of opportunities for underrepresented groups.

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Legislative Updates

In this issue we provide updates on various Acts, Bills and Regulations touching on different areas of law including but not limited to elections, financial derivatives, foreign exchange and privatization of public entities:

Independent Electoral and Boundaries Commission (Amendment) Act, 2023

The Independent Electoral and Boundaries Commission (Amendment) Bill was assented to on 23rd January, 2023; it is the first Bill to be assented into law in the year 2023 and the resultant Act commenced on 6th February, 2023.

The Independent Electoral and Boundaries Commission (Amendment) Act, 2023 (the "Amendment Act") amends the Independent Electoral and Boundaries Commission Act (No. 9 of 2011) (the "Principal Act") by introducing new bodies to the selection panel that is tasked with the appointment of commissioners to the Independent Electoral and Boundaries Commission (IEBC).

The Principal Act formerly provided that the Parliamentary Service Commission, the Law Society of Kenya and the Inter-religious Council of Kenya would nominate person(s) to the selection panel. The Amendment Act now provides that the Public Service Commission and the Political Parties Liaison Committee will also appoint person(s) to the selection panel. The selection panel will thus consist of the following seven (7) persons:

a. One man and one woman to be nominated by the Parliamentary Service Commission;
b. An individual nominated by the Public Service Commission;
c. One Person nominated by the Political Parties Liaison Committee;
d. Two persons nominated by the Inter-Religious Council of Kenya; and
e. One person nominated by the Law Society of Kenya.

The body of note in this amendment, is the Political Parties Liaison Committee (the "Committee") established under the Political Parties Act, 2011; both at the National and County level. The principal function of the Committee is to provide a platform for dialogue between the Registrar of Political Parties, IEBC and political parties.

The effect of this amendment may be to harmonize regulation when it comes to the Kenyan Electoral Management Body (EMB) and ensure more diverse stakeholders have an active role in elections.

The Petroleum (Importation) Regulations, 2022 (Legal Notice No. 3 of 2023)

The Petroleum (Importation) Regulations, 2022 were gazetted on 19th January 2023 and were brought about to regulate the importation of refined petroleum products as listed in the first schedule (Super Petrol, Jet A-I and Diesel). However, the regulations empower the Cabinet Secretary for Energy to amend the schedule list. The Regulation does not apply to procurement of Petroleum products for strategic stocks.

The regulations fortify the open tendering system that has been in existence since 2005 and importation companies will be subject to licencing by the Energy and Petroleum Regulatory Authority and an open tendering system. The companies are obligated to comply with the storage and transportation routes and adhere to them strictly, though the CS may amend the travelling routes from the current Kipevu and Shimanzi Oil termini in Mombasa. The transfer of title and risk factors during the transaction are to be provided for in the tendering system section.

The Notice also establishes a Supply Coordination Committee which comprises of the parties to the tendering system agreement and whose main task is to facilitate the implementation of the open tendering system agreement.

Other tasks include the consolidation of volume requirements and communication of tender import calls and result.

In a bid to make the system more transparent, the Supply Coordination Committee will also witness the opening of the bids, verify the accuracy of the products for purposes of pricing and assist the pipeline operators in batching petroleum products

The rules are most welcomed and will seek to streamline the whole process to make it seamless and have cost effective turnarounds. Also the rules will aim to have properly standardized petroleum products imported to help curb adulteration.

The Income Tax (Financial Derivatives) Regulations, 2023

The Income Tax (Financial Derivatives) Regulations (the "Regulations") were formulated pursuant to section 9 (4) of the Income Tax Act (CAP 470) which confers upon the Cabinet Secretary for the National Treasury the power to make regulations governing taxation of any gain accruing to a non-resident person from a financial derivatives contract with a resident person.

The Regulations stipulate the following, amongst other provisions, in relation to financial derivatives contracts between a non-resident and a resident person: -

- First, a financial derivatives contract includes: a futures contract, a forward contract, a swap contract, an options contract and any other financial derivative instrument unless otherwise exempted under the Income Tax Act;
- Any realised gain to a non-resident person, being a realized loss to the resident person shall be chargeable to tax in accordance with the Income Tax Act;
- A realised loss by a resident person shall be allowed as a deduction against any gain accruing from similar activities to the extent that it has not been claimed;
- A gain or loss from a financial derivative is deemed to have been realised at the earlier of either: -
    - the underlying asset changing hands;
    - the settlement of the contract; or
    - the expiry of the contract

Save that in an options contract, the gain or loss is deemed realised at the time of payment of the option premium and at the time the option is exercised;

- Any income from a financial derivative transaction shall be treated as a separate source/ shall be computed separately for a resident person or a permanent establishment in Kenya;
- The tax payable under the Regulations is due and payable on the 20th day of the month after which the loss from a financial derivatives transaction with a non-resident person is realised;
- All persons involved in a financial derivatives contract are required to keep a record of all contracts and financial activities relating to or arising from such a contract.

Kenya Foreign Exchange Code

The Foreign Exchange Code (the "FX Code") was formulated by the Central Bank of Kenya (CBK) for purposes of setting out standards and principles that 'aim to holistically strengthen and promote the integrity and effective functioning of the wholesale foreign exchange market in Kenya'.

It came into effect on 23rd March 2023 and applies to all market participants being the licensed banks that engage in wholesale foreign exchange business in Kenya as part of their licensed business.

Key to note is that the FX Code is structured against the following six (6) principles: -

Ethics

- Market participants are required to strive for the highest ethical and professional standards which requires acting with integrity, honesty and fairness.
- Under the Code, the senior and front line management of participants have, amongst others, been charged with the responsibility for maintaining such standards.
- Additionally, market participants are required to identify and address conflicts of interest.

Governance

- The board of various firms is set out as ultimately responsible for a market participant's foreign exchange business strategy and financial soundness.
- Market participants are further required to have remuneration and promotion structures that are consistent with the market participant's ethical and professional conduct expectations.

Execution

- In execution, market participants are required to be clear on the capacities in which they act.
- They are further required to handle orders with transparency which includes providing clarity as to whether the prices provided by a market participant are 'firm or merely indicative'.

Information Sharing

- Confidentiality and client anonymity are stressed under this principle whereby market participants are required to identify and limit access to confidential information.
- Confidential information, on the other hand, is defined to include foreign exchange trading information and any other information designated as confidential information.

Risk Management and Compliance

- On risk, participants are required to have in place appropriate risk management, compliance and review structures for purposes of managing and/ or mitigating risks arising from a participant's activities in the FX market.

- The key risk types listed under the FX Code are: credit/ counterparty risk; market risk; operational risk; technology risk; settlement risk; compliance risk & legal risk.

Confirmation and Settlement Processes

- Under this principle, market participants are required to, inter alia, have a framework for monitoring and managing capacity in both normal and peak conditions as well as to promptly confirm trades in a secure and efficient manner.

- In respect of netting, the FX Code stipulates that initial trades should be confirmed prior to being included in a netting calculation.

In respect of reporting and compliance requirements, the FX Code requires market participants to: -

- submit a quarterly report to CBK on the level of compliance to the FX Code within fourteen (14) days after the end of every calendar quarter;

The first report being due on 14th July, 2023

- conduct a self-assessment and submit to CBK a report on the participant's level of compliance with the FX **Code by 30th April, 2023;**

- submit to CBK a detailed compliance implementation plan that is approved by its Board **by 30th June, 2023;**

- fully implement the FX Code and be in full compliance **by 31st December, 2023.**

The FX Code can be accessed at: https://www.centralbank.go.ke/wp-content/uploads/2023/03/The-Foreign-Exchange-Code.pdf

Draft Privatization Bill, 2023

The Draft Privatization Bill, 2023 (the "Bill") seeks to repeal the Privatization Act, 2005. Although in the early stages, as the Bill is currently undergoing public participation and is yet to be tabled in Parliament, it will be important to follow the progress as this key piece of legislation undergoes the process of possibly becoming law.

The National Treasury in conjunction with the Economic Planning and Privatization Commission intend to provide a revised framework that will allow for the privatization of public entities, specifically the non-strategic performing state-owned enterprises. Key sectors like transport, water, health, and education, among others will be the target of this Bill with a view to improving the efficiency and competitiveness of Kenya's productive resources.

The Bill seeks to create a Privatization Authority (the "Authority") to regulate the sector and once established shall be capable of suing and being sued, entering into contracts and transactions. The mandate of the Authority shall include advising the government on privatization, facilitating government policies, implementing privatization programs and specific privatization proposals. The Bill also gives the Authority the mandate to constitute a technical advisory committee which shall operate on an ad hoc basis.

Case Highlights

In this segment we highlight various cases, specifically those touching on areas of matrimonial property, as well as the power of Courts in judicial review and human rights violations.

SAISI & 7 OTHERS V DIRECTOR OF PUBLIC PROSECUTIONS & 2 OTHERS

(Petition 39 & 40 of 2019 (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment)

This case began when a complaint was made to the Ethics and Anti-Corruption Commission (EACC) against the appellants (Saisi & 7 others) who were employees of Geothermal Development Company (GDC), a state-owned corporation, for violating public procurement laws. The Director of Public Prosecution (DPP), acting on the recommendation of the EACC, charged the appellants with various offences including willful failure to comply with the law relating to procurement and inappropriate influence on evaluation contrary to the Public Procurement and Disposal Act and abuse of office contrary to the Anti-Corruption and Economic Crimes Act.

Upon being charged, one of the appellants rushed to the High Court and filed judicial review proceedings against the decision of the EACC, seeking orders that the charges brought against her be quashed and prohibition of the DPP from prosecuting her. The High Court granted an order of prohibition barring prosecution by the DPP. The respondents (the DPP & 2 others) appealed the decision of the High Court at the Court of Appeal and the said Court overturned the High Court's decision noting that a court sitting in judicial review proceedings is not to consider the merits of the decision by a public body but rather how the decision was made.

Aggrieved by the decision of the Court of Appeal, the appellants made their way to the Supreme Court. The central issue in the Petitions of Appeal before the Supreme Court was whether the character and scope of judicial review has evolved or changed post the 2010 Constitution. This case therefore sets out the parameters Courts should apply when reviewing decisions of public bodies.

The Supreme Court held that the intention of codifying the right to fair administrative action was to make it a constitutional imperative not just for State bodies, but for any person, body or authority. This was meant to ensure that the right to fair administrative action permeated every aspect of Kenyans' lives from engagements with educational facilities such as universities, to employer-employee relationships, to engaging public bodies in whatever capacity, or any body, person or authority that exercises quasi-judicial functions.

It was the Court's position that the 2010 Constitution was never intended to transform judicial review into a fully-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. The Court went further to explain that under the Fair Administration Actions Act, the Court was granted the power to review administrative or quasi-judicial decisions of public bodies and this required some measure of merit analysis. However, the merit analysis is only limited to the examination of uncontroverted evidence. The controverted evidence is best addressed by the person, body or authority in charge.

The reasoning of the Court was first, that the nature of evidence in judicial review proceedings is based on affidavit evidence and this type of evidence may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. Second, the courts are limited in the nature of reliefs that they may grant to those set out in the Fair Administrative Actions Act.

Finally, it was observed that the Court cannot substitute the decision it is reviewing with one of its own.

JOSEPH OMBOGI OGENTOTO V MARTHA BOSIBORI OGENTOTO

(Petition No. 11 of 2020) [Judgment delivered on 27th January 2023]

This is a Supreme Court decision that sought to unriddle the decision in Peter Mburu Echaria vs. Priscilla Njeri Echaria (Civil Appeal 75 of 2001) which stated that the division of property should be done in full regard to the actual and or financial contribution made towards acquiring and realizing the assets. Many decisions after Echaria have yielded two interpretations.

The first is that Article 45(3) of the Constitution, on parties to a marriage having equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage, means that matrimonial property ought to be divided down the middle through the literal application of 50:50 division ratio. Proponents of this argument largely opine that since non-monetary contribution cannot be quantified but is equally important, a split right in the middle would be appropriate.

The second approach is that a party ought to obtain an equivalent of what they contribute, monetarily or otherwise. This decision from the Supreme Court reiterated that the Echaria decision is still good law. It addressed this issue by stating that while Article 45(3) deals with equality of the fundamental rights of spouses during and at the dissolution of marriage, such equality does not mean the re-distribution of proprietary rights at the dissolution of marriage. Neither does it mean that spouses are automatically entitled to a 50% share by fact of being married.

The Court further averred that the equality under Article 45 (3) means that the courts are to ensure that at the dissolution of a marriage, each party to such marriage gets a fair share of the matrimonial property based on their contribution. This is best done by considering the respective contribution of each party so as to ensure no party is unfairly denied what they deserve as well as to ensure that no party is unfairly given more than what they contributed.

MONICA WANGU WAMWERE AND OTHERS V THE ATTORNEY GENERAL

[Petition No. 9 of 2021- Judgment delivered on 27th January 2023]

This appeal was brought by a group of women called, 'mothers of political prisoners' who alleged that on 3rd March 1992, they were brutally attacked and assaulted by General Service Unit (GSU) officers while demonstrating to urge for the release of the then political prisoners. The Appellants contended that between 4th March 1992 and 19th January 1993, police officers continued to brutally assault them. They further averred that their fundamental rights and freedoms under the Constitution, specifically their right to property, were contravened and grossly violated by police officers and GSU officers. Further, these rights could not be limited and were done so unlawfully and without justification.

The central issues in this appeal were:

1. whether there is a time limitation for seeking redress for historical human rights violations; and
2. the requisite threshold for establishing a claim for violation of a right or fundamental freedom

The Supreme Court held that there is no limitation of time in matters relating to violation of rights under the Constitution which matters ought to be evaluated and decided on a case-to-case basis. A court however, is entitled to consider whether there has been inordinate delay in lodging a claim of violation of rights; claims for violation of rights must thus be filed within a reasonable time and where there is delay, a petitioner must explain the reasons for the delay to the satisfaction of the court.

Turning to the threshold for establishing a claim for violation of a right or fundamental freedom, the Supreme Court affirmed that a petitioner bears the burden to prove their claim of alleged threat or violation of rights and freedoms to the requisite standard of proof, which is on a balance of probabilities.
and the Attorney General.

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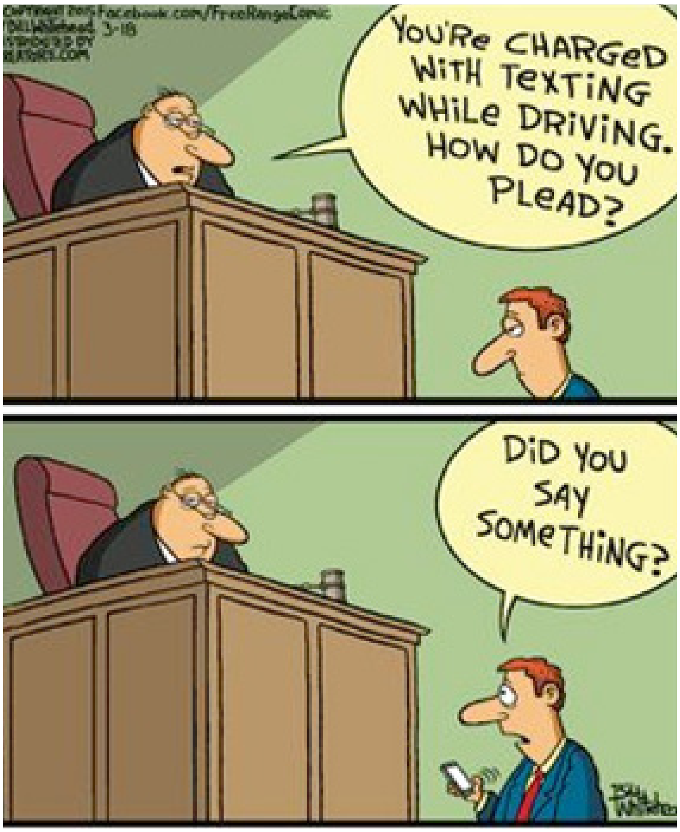
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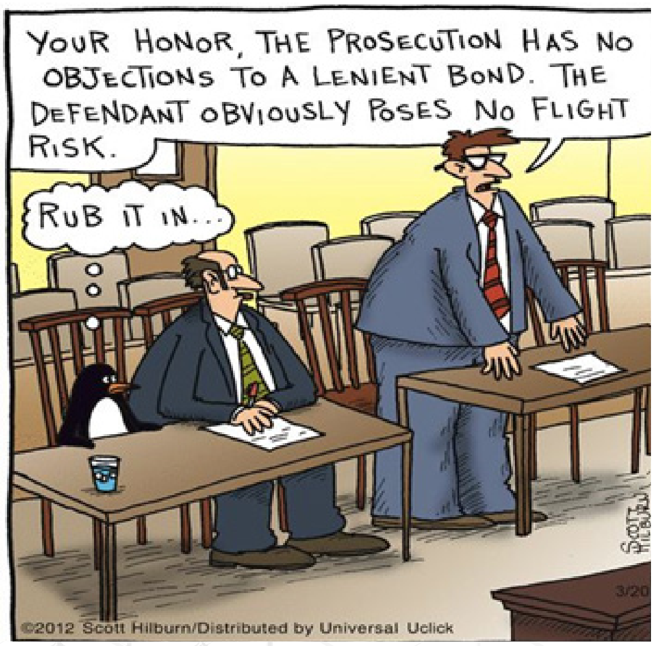
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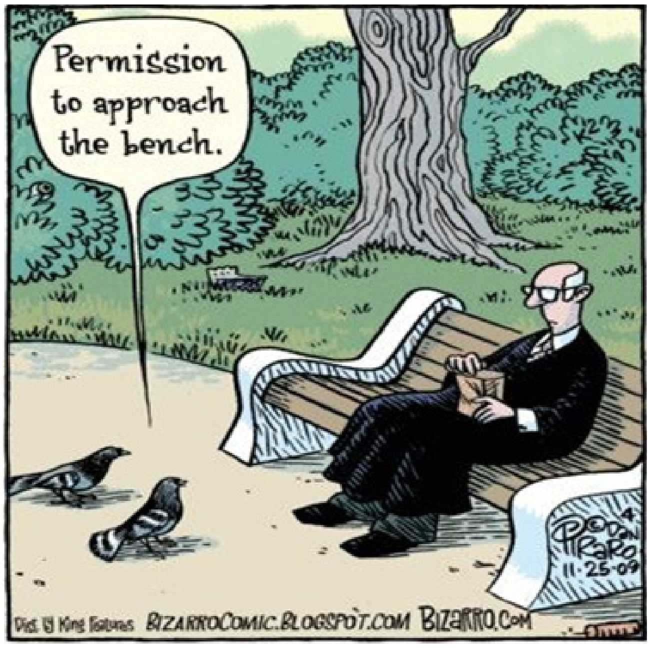
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CONTRIBUTORS' PLATFORM

ESG Considerations in Climate Financing in Kenya: A Pathway to Sustainable Development

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Introduction

Sustainable Development Goals are 17 objectives that were adopted in 2015 to achieve current needs while considering posterity together with 169 targets. Some of the targets include climate action and has certainly seen a streamlining of worldwide efforts to better the planet. An overarching consideration in all of this is the environment. Gone are the days when climate change was a mere buzzword for those in the Green movement. The environment, and posterity, are at the center of every business decision as aptly put by Ivo Knoepfel in his paper of the same title, "Who Cares Wins". Hence the Environmental, Social and Governance (ESG) Tenets. Environmental Social Governance is a new fast growing sphere that seeks to have corporations holistically and sustainably grow and conduct their affairs with a view to adhering to the highest ethical standards in the said areas

Kenya, like many developing countries, faces significant challenges in financing its climate change mitigation and adaptation measures. The country is highly vulnerable to the impacts of climate change, including drought, floods, and extreme weather events, which threaten food security, water resources, and public health. To address these challenges, Kenya has adopted various policies and strategies to promote sustainable development, including the use of environmental, social, and governance (ESG) considerations in its climate financing.

General Considerations in ESG

Recent developments have led to a deeper look at what exactly should be included by corporates and potential investors in conducting an ESG Analysis. In considering environmental factors, corporates should consider energy use, pollution, climate change, waste production, efficient use of natural resources and animal welfare in relation to their business. Social considerations include human rights, employee relations, health and safety, stakeholder and community engagement. Governance considerations include conflicts of interests, independence of the Board, good quality management, transparency and shareholder rights.

Generally, ESG considerations will assist corporates and investors to be more efficient in their operations. Underlying considerations such as energy, carbon footprint and resource preservation will benefit corporates in the long run. Additionally, customers and investors are paying more attention to all matters ESG. This will have a favorable impact on sales and investments, allowing Kenyan corporates to pioneer into new markets.

The interwoven nature of ESG and Sustainable Development Goals, as well as regulatory trends globally means that the shift towards sustainable ways of carrying out business affords corporates that incorporate ESG in their day-to-day activities a chance to avoid legal and regulatory hurdles. This ensures that in the long term, costs that would have been used to remedy legal and regulatory breaches will be saved, and transitions into the global market will be smooth.

How to be ESG Compliant

Some practical steps that can be taken by investors and corporates in ensuring ESG Compliance include taking ESG into consideration when coming up with Key Performance Indicators. In addition to that, corporate entities should set up trainings, workshops and policies to educate employees on the importance of every aspect of ESG in their daily operations.

In particular, investors would benefit from the Principles of Responsible Investment, a voluntary framework for incorporating ESG which is backed by the United Nations and has over 1500 investor signatories worldwide. The Principles are:

- **Principle 1:** Incorporation of ESG issues into investment analysis and decision-making processes.
- **Principle 2:** Active ownership and incorporation of ESG issues into ownership policies and practices.
- **Principle 3:** Seeking appropriate disclosure on ESG issues by the entities in which they invest.
- **Principle 4:** Promotion of acceptance and implementation of the Principles within the investment industry.
- **Principle 5:** Working together to enhance effectiveness in implementing the Principles.
- **Principle 6:** Reporting on individual activities and progress towards implementing the Principles.

ESG and Climate Financing in Kenya

Climate financing refers to the financial resources, mechanisms, and investments that are directed towards climate change mitigation, adaptation, and related activities. The objective of climate financing is to support the transition to a low-carbon and climate-resilient economy, reduce greenhouse gas emissions, and promote sustainable development. ESG considerations play a critical role in climate financing in Kenya.

The country has set up several mechanisms to ensure that climate financing is aligned with its sustainable development goals and the Paris Agreement's objectives. These mechanisms include the Kenya Green Bond Program, the Kenya Climate Change Fund, and the Climate Investment Fund. The Kenya Green Bond Program, for example, promotes the issuance of green bonds, which are debt instruments used to finance climate-friendly projects. The program requires that issuers meet specific environmental criteria and provide transparent information on their environmental impact.

The Kenya Climate Change Fund, on the other hand, provides grants and concessional loans to support climate change adaptation and mitigation projects. The fund prioritizes projects that demonstrate social and environmental benefits, such as job creation, poverty reduction, and biodiversity conservation. The Climate Investment Fund, which Kenya has access to, supports climate action in developing countries by providing concessional financing and technical assistance.

ESG considerations are essential in climate financing in Kenya for several reasons. Firstly, they help to ensure that climate finance is used efficiently and effectively to achieve sustainable development outcomes. By incorporating ESG considerations, financiers can assess the environmental, social, and governance risks and opportunities associated with the projects they finance. This helps to identify potential negative impacts and avoid or mitigate them, while maximizing positive impacts.

Secondly, ESG considerations help to promote transparency and accountability in climate financing. By requiring issuers of green bonds and recipients of climate finance to disclose information on their environmental and social impact, stakeholders can assess the effectiveness of the projects financed. This promotes good governance and helps to build trust between investors and project sponsors.

Finally, ESG considerations help to promote equitable and inclusive climate financing. By prioritizing projects that have social and environmental benefits, climate finance can contribute to poverty reduction, job creation, and gender equality. This helps to ensure that the benefits of climate financing are distributed equitably across society, including vulnerable and marginalized groups.

ESG considerations play a critical role in climate financing in Kenya. By incorporating these considerations, Kenya can ensure that its climate finance is aligned with its sustainable development goals and the Paris Agreement's objectives. This will help promote efficient, effective, transparent, and equitable climate financing, contributing to Kenya's transition to a low-carbon, climate-resilient, and inclusive economy.

THE PLACE OF DEMOCRACY IN ELECTIONS

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> An Election is a whole process from the registration of the voter, preparation of the election, actual casting of the vote, declaration of the result and solving of disputes if any and is not in any way a one-day fete.

KENYA AND NIGERIA

The word democracy stems from the Greek words demos, meaning "people," and kratos, meaning "rule." Democracy is simply a system of government in which the people rule. Democracy can be defined as a government of the people, by the people, for the people. In our modern 21st Century context, this might be seen as a vague and medieval definition.

In 1999, Albert Weale gave an insightful definition of democracy when he stated that, "In a democracy, important public decisions on questions of law and policy depend, directly or indirectly, upon public opinion formally expressed by citizens of the community or those who make up the nationals, the vast bulk of whom have equal political rights."

Daniel Posner's definition on the other hand contradicts Weale's view of democracy when he states that , "Democracy is a competition for power by individuals through elections and the citizens and electorate should not expect to be involved in some of the decisions made, e.g., the increase of taxes and a majority of public policies." This definition may be seen as being the most plainly truthful definition of democracy.

A proper Democratic state can be traced back to 509 B.C when the Romans overthrew the King and came up with a Citizen Republic where there were to be elected two consuls to rule the republic for a single one-year term and were to be advised by the senate who were also part rulers.

Niccolò Machiavelli, in his renowned book "The Prince," stated that the main aim of a government is to be effective. He lived during times of Republic which existed between 1494 and 1512 when the Medici family in a conspiracy with the then Pope overthrew the Republican regime. This was a government that was not a tyranny and people were answerable for their actions and deeds to others, hence power was divided and at the time, this was the closest sketchy depiction of a modern democracy.

We have witnessed electoral processes in Kenya and Nigeria over the past year, elections that have seemingly been marred with all sorts of controversies. There is fear that Nigeria might descend into chaos because of reported tampering with numbers in the election. Observers from various countries, the European Union, and even former presidents are reported to have called out the massive discrepancies and tampering of election recording material through cancellation and altering of figures. Presidential contenders are also reported to have disputed the announced results, and the nation appears to be heading towards a precarious situation. This thus begs the question as to whether democracy is a mirage and fallacy or better yet a social experiment.

The Kenyan presidential general elections are also not exempt from contention. They have in the past, and more recently been contested at the apex court. For the just concluded elections, for instance, a whole week fete gifted us with a battle of the titans as legal minds came together and tore against each other as they brawled over their evidentiary and legal prowess in matters election. At the end of the day, the Supreme Court made a decision which, as would be expected, drew different reactions, views and opinions.

Kenya as a nation is taking strides towards achieving transparency but a lot still has to be done to achieve the highest attainable standard of transparency and trust towards conducting the electoral process otherwise, it would not be worth it to exercise a mirage in democracy.

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