

NR & CO.

QUARTERLY

ISSUE #01/2024



The Editorial [Pg.2]

Legal Briefs

The Firm

Amnesty CIPIT World Privacy Day [Pg.3]

Case Highlights

Absa Bank -vs- Kenya Deposit Insurance Cooperation [Pg.7]

iNTERLUDE

[Pg.8]



NJOROGE REGERU AND COMPANY
■ ADVOCATES, COMMISSIONERS FOR OATHS AND NOTARIES PUBLIC ■

www.njorogeregeru.com

Editorial Team

Elizabeth Ngonde
Grishon N. Thuo
Ruth Regero
Ida Wambaa
Christine Juma
Gordon Gogo
Maryanne Kiilur

Contributors

Christine Amera
Dan Koskey

Design & Layout

Mansion Arts Limited

Publisher

Njoroge Regeru & Company
Advocates

Disclaimer

This Newsletter is for informative purposes only and it is not to be relied upon as legal advice. None of the information contained in the Newsletter is intended to create, and receipt of it does not constitute, an advocate-client relationship. Nothing in this Newsletter is intended to guarantee, warranty or predict the outcome of any particular case and should not be construed as such a guarantee, warranty or prediction. The authors are not responsible or liable in damages or otherwise howsoever for any actions (or lack thereof) taken as a result of relying on or in any way using any of the information contained in this Newsletter and shall in no event be liable for any damages resulting from reliance on or use of any of the information herein contained. Nothing contained in this Newsletter should be construed as constituting any legal advice on any subject to any person. It is recommended that readers facing specific situations should take specific advice from suitably qualified professionals.

EDITOR'S NOTE

Dear Reader,

Welcome to the first quarter's edition of our newsletter for the year 2024 where we delve into key developments and insights shaping the regulatory and legal landscape. In this edition, we shine a spotlight on critical aspects affecting the financial sector, housing policies, and noteworthy legal precedents.

First and foremost, we delve into the Affordable Housing Act, 2024, as we understand the nuances of this legislation for all stakeholders.

We further examine the implications of the Common Reporting Standards (CRS) Regulations on the sharing of consumer information within the banking industry. As global regulations continue to evolve, it is imperative for financial institutions to stay abreast of compliance requirements while navigating the intricacies of information sharing.

In our case highlights segment, we feature decided cases on aspects of trusts and other legal principles. These legal precedents offer valuable insights into judicial interpretations and serve as guiding principles for those grappling with complex legal issues.

Lastly, we showcase our contributors' platform; a forum where thought-provoking articles and insights are shared. We invite you to engage with the articles thoughtfully penned by our contributors.

As we navigate the dynamic landscape of regulations, policy developments and legal precedent, we remain committed to providing valuable perspectives to our readers. We hope this edition of our newsletter serves as a valuable resource and sparks meaningful dialogue on the issues shaping various industries.

Thank you for your continued support and readership.

Elizabeth Ngonde,
elizabeth@njorogeregeru.com



The Firm

In acknowledgment of the paramount significance of data protection and privacy, our Firm attended the "Amnesty CIPIT World Privacy Day" event on 31st January, 2024. This occasion provided an opportunity for in-depth conversations on the dynamic realm of data protection, with a specific focus on H.E President Ruto's recent announcement regarding the digitalization of civil and personal registration.

The proposed initiative involves the introduction of a Unique Personal Identification (UPI) and digital identification document (ID), marking a pivotal development in the arena of data management and security in Kenya. The discussion featured panelists from India, focusing on Aadhar, which is India's extensive biometric ID system. Aadhar, according to the panelists, is characterized by its: simplicity, trustworthiness, resilience, inclusivity and privacy protection. It plays a vital role in India's infrastructure development fostering a collaborative ecosystem for efficient, paperless and cashless service delivery.

In their discussion, the panelists emphasized that this system has been used to uniquely identify over a billion residents in India through minimal biometric data collection.

In Kenya, the Government proposes to launch the Maisha number, which would be the 3rd generation digital ID; the 1st generation being the big handwritten IDs and the 2nd generation being the ones currently used. The introduction of a digital ID is not a new concept as the government had previously tried to introduce the 'Huduma card', however, these efforts proved unsuccessful due to the lack of a comprehensive framework on how the government would secure individuals privacy and personal data.

The Maisha card will be assigned to every newborn at birth or to every Kenyan at registration, serving as a lifelong personal identifier. It would act as a birth certificate number, would facilitate registration for services like education and health insurance, and would become the official ID at eighteen (18) years. The Maisha card is proposed to have high-end security features within the electronic ID, featuring a chip (that will store data), QR code, photo and thumbprint. The government has also proposed to have an electronic version of the same to be accessible via eCitizen, thus providing a comprehensive and secure identification system for citizens throughout their lives.

In light of the developments above, it will be interesting to watch how the government will launch the Maisha Number while addressing challenges related to the implementation of this digital ID system, including securing consent for data usage, addressing concerns about data privacy and security, and ensuring inclusivity to safeguard individual rights





ARBOR HOUSE
ARBITRATION CENTRE
Meet | Resolve | Advance

IDEAL FOR:

Arbitrations
Mediations
Meetings
Workshops
Trainings



ABOUT AHAC

AHAC functions as a discreet, quiet and pleasant environment where lawyers, other professionals and their clients meet to resolve disputes. Your first and only choice for all exclusive and private meetings.



Accessible



Serene Environment



Digital Conference Facilities



Ample Secure Parking



Affordable



Support Services

www.ahbc.co.ke

Arbor House Business Centre, Arboretum Drive • P.O. Box 45169 - 00100, Nairobi, Kenya.
(254) 706 808 080, 0795 338 179, 0780 006 969 • info@ahbc.co.ke





Legislative UPDATES

In this issue, we highlight the recent laws and guidelines or directives passed or issued during the quarter including the Affordable Housing Act, 2024 and Tax Regulations in relation to sharing of consumer information of foreign account holders by banks.

THE AFFORDABLE HOUSING ACT, 2024

The Constitution of Kenya, 2010 guarantees that every Kenyan citizen has the right to access adequate and affordable housing. To give effect to this right, the government has proposed several initiatives to address the housing crisis in the country which included introducing the Affordable Housing Levy in the Finance Act, 2023.

The government introduced the Affordable Housing Levy as a means of raising funds to finance housing developments. Under the Finance Act, 2023 employees were expected to contribute 1.5% of their gross monthly salary whereas their employers would contribute another 1.5% on the employee's behalf.

In the case of **The National Assembly and another v Okiya Omtatah Okoiti and others (Consolidated Civil Application Number E577 of 2023)** the Court of Appeal, in affirming the decision of the High Court, declared the Levy unconstitutional for among other issues, failing to provide a substantive legal framework to collect funds from citizens as required in law. The Court has however not pronounced itself on whether citizens will be refunded the monies collected in the period from July 2023 until the decision of the Court on 10th January, 2023.

On 19th March, 2024 the government gazetted the Affordable Housing Act, 2024 effectively re-introducing the Affordable Housing Levy and establishing an Affordable Housing Fund which shall be used to implement the affordable housing programmes and projects across the country.

Introduction of an Affordable Housing Levy

The Act imposes an Affordable Housing Levy whose rate shall be 1.5% of one's gross salary or accrued income and a matched amount by one's employer. The Levy shall be due and payable by the 9th day of each month to the Collector (this is the Kenya Revenue Authority (KRA) or a person appointed by the Cabinet Secretary in charge of National Treasury).

Establishment of the Affordable Housing Fund

The Act establishes a Fund whose source of funds shall be: the monies payable as per the Affordable Housing Levy; gifts and donations; and income accruing to the Fund from other sources for example from investments.

The monies available in the Affordable Housing Fund shall be allocated into 5 broad payouts. These specific allocations from the Fund are essentially geared towards funding the affordable housing programmes in a bid to promote

home ownership as well as funding low interest loans for acquisition of units within the above-mentioned affordable housing programmes. Additionally, payouts such as the collection fee and the amount to cater for administration expenses may be construed to be incidental costs incurred in furtherance of the Fund's objectives.

Management of the Affordable Housing Fund

A Board shall be established to oversee the management of the Fund. Consequently, the Board shall also coordinate the optimal utilization and cost effectiveness of the Fund's proceeds. In this regard, the proposed law is very particular on what exactly the Board is expected to monitor and evaluate.

The composition of the Board, qualifications for appointment, the tenure of office and other procedures related to the conduct of affairs of the Board are further laid out.

It is worthy to note that misappropriation of the Fund shall attract a fine capped at twenty million shillings or an imprisonment term not exceeding 10 years.

Criteria/ Procedure for Acquisition of the Affordable Housing Units

The affordable housing units shall only be available to Kenyan citizens who are of majority age and who hold an identity card. Additionally, one shall need a KRA PIN and a tax compliance certificate from KRA.

If one meets the set criteria, they may make an application to the agency in charge of the housing programme. Preference shall be given to marginalized persons and vulnerable groups.

It is worth noting that one shall be required to pay a deposit of at least 10% of the value of the unit being applied for (From the wording, the deposit percentage could go up depending on what is approved by the relevant agency).

Loans shall also be advanced by the different agencies for the purpose of acquisition of affordable housing units. The interest rate to be charged shall range from 3% to 9% depending on the type of unit being acquired. Such interest shall be calculated on a reducing balance and payable within the specified period.

Upon acquisition of a Unit, one shall require the prior written consent of the Board to sell the unit purchased.

Consequential Clauses

The effect of the provisions of this Act coming into force is to repeal Section 31B and 31C of the Employment Act, 2007. Section 31B imposes an Affordable Housing Levy on employees whereas Section 31C touches on the resulting obligations of an employer. These sections were inserted by the Finance Act, 2023 which became effective on 1st July 2023.

Implementation and Compliance

As with any other statutory deduction, effective implementation requires the participation of both employers and employees.

Effective from the March payroll, employers are obliged to deduct and remit the 1.5% Levy to be paid by their Employees to the Collector by 9th day of each month. The 1.5% Levy shall be charged on the gross salary of an employee. The gross salary refers to the total amount of money an employee earns before taxes and other payroll deductions are withheld.

NOTE: Resident individuals who prove that they paid the affordable housing levy in a year of income shall be entitled to affordable housing relief for that year of income. Effective 19th March 2024, from the date of assent, the affordable housing relief shall be extended as per Section 30A of the Income Tax Act. The amount of the relief shall be 15% of the employee's contribution but shall not exceed KES 108,000 per annum (KES 9,000 per month).

Employers are also required to match the 1.5% deduction.

It is essential to note that default on payment of the levy shall attract a penalty of 3% of the unpaid amount. It is worth noting that there are several ongoing cases challenging the Constitutionality of this piece of legislation. We note to update our readers on further developments in our preceding issue(s) of the Newsletter.

COMMON REPORTING STANDARDS REGULATIONS: SHARING OF CONSUMER INFORMATION

Pursuant to the Tax Procedures (Common Reporting Standards) Regulations, 2023, which requires all Kenyan banks, trusts and other financial institutions to report foreigners' details to the Kenya Revenue Authority (KRA). This means that the Regulations that came into effect on 1st January 2023 require all the regulated financial institutions to report the stipulated information for the year 2023 is June 30th 2024.

What are the Common Reporting Standards?

The Common Reporting Standards ("CRS") were developed in July 2014 by the Organization for Economic Co-operation and Development ("OECD") which is comprised of developed countries. The objective is to reduce instances of tax evasion through sharing of information amongst jurisdictions on an annual basis. The CRS apply to resident taxpayers with offshore accounts as well as corporate entities.

In complying with the standards, on 8th February 2016, Kenya became the 12th African country and the 94th jurisdiction to sign the Convention on Mutual Administrative Assistance in Tax Matters (the Convention). Subsequently, on 22nd July 2020, Kenya signed the CRS Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information ("MCAA") and adopted the OECD Regulations as drafted. The MCAA is the multilateral framework that enables tax authorities of signatory jurisdictions to automatically exchange financial information annually.

The CRS Regulations

In exercise of the powers conferred by section 6B (6) (introduced by the Finance Act, 2021) of The Tax Procedures Act, 2015, the Cabinet Secretary for National Treasury & Economic Planning formulated the CRS Regulations for purposes of effecting the common reporting standard obligations set out in the said Act.

The purpose of the Regulations is to enhance Kenya's efforts towards tax transparency to consequently mitigate against incidences of tax avoidance and evasion on an international scale by Kenyan residents. The Regulations prescribe the regulated financial institutions, due diligence procedures and the reportable information.

They require reporting financial institutions to file with the KRA Commissioner- General, an information return in respect of each financial account identified as a reportable account that such reporting financial institutions maintain during a calendar year.

The term 'financial institution' is defined in the Regulations as 'a custodial institution, a depository institution, an investment entity, or a specified insurance Company' whilst the term 'reportable account' refers to a financial account maintained by a reporting financial institution and is held by a reportable person, that is –a person resident in a jurisdiction other than the United States of America or Kenya, or a jurisdiction specified by the Commissioner General.

The information to be reported includes the: name, address, residence, tax identification number, date and place of birth of each reportable person that is an account holder, the account number and the account balance or value.

What happens to the information?

KRA will share the information with 106 signatory countries. Most of the countries are popular tax havens which include Switzerland, Panama, the Cayman Islands, Bermuda, the British Virgin Islands, Mauritius, Jersey and Monaco. Whilst Kenya shares the said information, the other signatory countries are expected to share similar information with the KRA. This is all geared towards the discovering cash hidden in offshore accounts.

Reporting financial institutions are required to review all pre-existing entity accounts with aggregate account balances of above \$250,000.00.

Of note however, tax experts have cautioned that banks and KRA walk a tightrope in safeguarding customer confidentiality in line with the Data Protection Act, 2019.

Case **Highlights**

In this segment, we highlight various decided cases, looking into the jurisprudence set by the apex courts on constructive trusts, doctrine of exhaustion, and the principle of fair comment.

Arvind Shah & 7 others v. Mombasa Bricks & Tiles Limited & 5 others [2023] KESC 106 (KLR)

On 28th December 2023, the Supreme Court of Kenya delivered the judgment in this case.

The key issues being addressed were:

- a. Can constructive trusts be imported into a land sale agreement to defeat a registered title?
- b. Can they also be imported into a shareholding of a company to disentitle a registered holder of shares?

This case was an appeal from a ruling of the Court of Appeal which was delivered on 8th July, 2022 and involves Dinesh and Ateet Jetha who, as directors of Mombasa Bricks and Tiles Limited (the "Company"), engaged their friend Arvind Shah when the Company was about to default on a loan.

The Company had been advanced loan facilities from Standard Chartered Bank ("the Bank") which were secured by one of Company's properties. Mr. Shah proposed the Company be restructured through creation of several holding companies to hold the Company's assets as they worked on repaying the secured loan. A resolution was passed by the Company to implement Mr. Shah's proposal and an Agreement dated 31st August, 2005 for sale of the secured property to the holding companies was created. The purchase of the Property was to be financed by Giro Commercial Bank.

Mr. Shah therefore approached the Bank with the sale agreement for the secured Property and offered to settle the outstanding loan on the assurance that the Title would be transferred to one of the holding companies in accordance with the terms of the Agreement.

The dispute between the Parties was therefore: after the sale was concluded and the loan settled, who would be the registered owner?

Mr. Shah, through the holding companies where he was a majority shareholder, claimed that he was the rightful owner of the Property while Dinesh and Ateet Jetha as shareholders of the holding company, were claiming that they had created a constructive trust with Mr. Shah and thus retained ownership of the Property.

The Supreme Court held that a constructive trust is a right traceable from the doctrines of equity. It arises in connection with the legal title to property when a party conducts himself in a manner to deny the other party beneficial interest in the property acquired. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit.

The Supreme Court upheld the rule that a constructive trust could be imported into a land sale agreement to defeat a registered title where it was equitable to treat the legal owner as a trustee; in this case the Trustee being Mr. Shah. This is because the right to property under Article 40 of the Constitution of Kenya, 2010 is not an absolute right and is subject to certain limitations as provided for under Article 40(3), 40(6) and 24 of the Constitution as well as Section 28 of the Land Registration Act, which provides that all registered land shall be subject to certain overriding interests including trusts. Furthermore, a constructive trust could be imported into a company's shareholding to disentitle a registered holder of shares in a company obtained for valuable consideration.

The monumental judgement set the record straight regarding the ultimate recourse courts could grant under such instances, given the existing constitutional and statutory provisions on property rights.

Absa Bank –vs- Kenya Deposit Insurance Cooperation

The High Court vide a ruling dated 15th March 2024, declared Sections 13A (1), Section 21 of the Government Proceedings Act (GPA) and Order 10 Rule 8 to be unconstitutional. The High Court outlined the following sections for determination:

- i. Whether Section 13A of the Government Proceedings Act, the Act itself as a whole, and Order 10 Rule 8 of the Civil Procedure Rules apply to the Defendant as a state corporation;
- ii. Whether Sections 13A of the Government Proceedings Act, the Act itself as a whole, and Order 10 Rule 8 of the Civil Procedure Rules are unconstitutional;
- iii. Whether the Defendant should be granted an enlargement of time to file a Defence.

These Sections were declared to remain inoperative unless otherwise vindicated by a higher Court or amended by the Parliament to align with the provisions of the Constitution.

Section 13A (1) of the Government Proceedings Act (GPA) mandates that before any legal proceedings can be initiated against the government, a written notice of intention to sue must be served to the government. This notice must be in the prescribed form and must be served at least thirty days prior to instituting the proceedings. Section 21 of the Government Proceedings Act (GPA) outlines procedures regarding the satisfaction of orders against the government, its departments, or officers in civil proceedings or arbitration. It mandates that upon the issuance of an order in favour of a party against the government, its department, or officer, the proper court officer must issue a certificate to the beneficiary upon application. This certificate, in prescribed form, details the particulars of the order.

If directed by the court, a separate certificate may be issued specifically for costs awarded to the applicant.

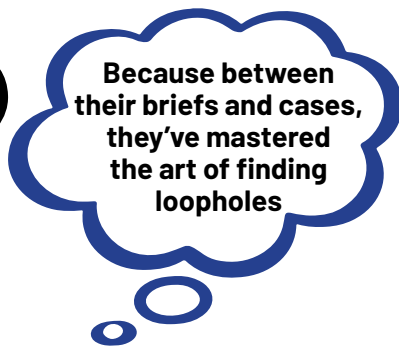
Order 10 Rule 8 of the Civil Procedure Rules provides that no judgement in default of appearance may be entered against the government without the leave of the Court and any application for leave shall be served not less than 7 days before the return day.

The main rationale behind Hon. Judge Dr. Nixon Sifuna's decision is that the three laws are discriminatory, curtail meaningful access to justice, and impede the smooth administration of justice, therefore violating the provision on access to justice pursuant to Article 48 of the Constitution of Kenya. The Learned judge opined that Section 13A and 21 of the Government Proceedings Act are discriminatory against ordinary litigants and giving preferential treatment to the Government. This is because juridically every party

is equal before the law. The Court noted that the Sections are a colonial relic meant to control litigation against the repressive and illegitimate colonial regime.

The judgement consequently held that a litigant does not require to issue a Notice of Intention to sue the Attorney General when they have a claim against the Government. In the event a litigant properly serves the Government, and they fail to enter an appearance or file a defence, a litigant can proceed to request default judgement. In the event of judgement in one's favour being entered against the government; one does not need to obtain a Certificate of Satisfaction as per the impugned Sections. This monumental decision has consequently made attachment and execution of government property a possible option in realizing a decree rendered in one's favour.

iNTERLUDE



In a small-town courthouse, Advocate Maryanne, known for her dry wit and love of puns, found herself defending a client accused of stealing a calendar. As the trial progressed, it became clear that there was no substantial evidence against her client. Maryanne, seizing the moment, addressed the jury with a twinkle in her eye, "Ladies and gentlemen, my client stands accused of taking something as mundane as a calendar. But let me assure you, there are no dates in question, and he's merely trying to make his days count!" The courtroom erupted in laughter, and even the judge couldn't resist a smile. In the end, the Court found the defendant not guilty, and Advocate Maryanne left the courthouse, calendar in hand!



WHY DON'T LAWYERS GO TO THE BEACH? BECAUSE THE STAKES ARE TOO HIGH!

Now, let me share a quick legal story:

Advocate Patrick, known for his sharp wit, once cross-examined a parrot in court. The parrot was an eyewitness to a crime, but every question Smith asked, the parrot replied, "I plead the beak!" The courtroom erupted in laughter, making it the most memorable trial in legal history. Even the judge couldn't resist cracking a smile, proving that sometimes even a feathered friend can outsmart the legal eagles!



ARBOR HOUSE CO-WORKING SPACE

Work | Connect | Thrive



IDEAL FOR:

Meetings,
Workshops,
Trainings &
Virtual Office
Spaces.



ABOUT AHBC

Arbor House Business Centre (AHBC) is a modern and inspiring development that offers a variety of flexible solutions from hot desking to dedicated serviced offices to private meeting rooms.

This innovative, tech-forward space is designed to boost productivity and efficiency. It will appeal to any discerning business from creative start-ups to established businesses.



Work



Connect



Thrive

www.ahbc.co.ke

Arbor House Business Centre, Arboretum Drive • P.O. Box 45169 - 00100, Nairobi, Kenya.
(254) 706 808 080, 0795 338 179, 0780 006 969 • info@ahbc.co.ke

CONTRIBUTORS' PLATFORM

CONSUMER RIGHTS AND THE RULE OF LAW: UPHOLDING CONSUMER PROTECTION IN KENYA



Christine Juma Amara
lawyers@njorogeregeru.com

The Constitution of Kenya, 2010 ("the Constitution") guarantees consumers the right to: goods and services of reasonable quality; information necessary for consumers to gain full benefit from goods and services; protection of their health, safety, and economic interests; and to compensation when injured by defective goods or services.

Kenyan courts have recently pronounced themselves on the consumers' entitlement to product information, without discrimination, in actualisation of the consumer rights in the Constitution as seen in the case of *Mark Ndumia Ndung'u v Nairobi Bottlers Ltd Coca Cola Central, East & West Africa Ltd, Petition 325 of 2015 (2018) eKLR*.

This case review examines consumer rights case law in Kenya and provides a brief commentary of the landscape of these rights in the Kenyan context.

In Kenya, consumer rights are firmly embedded within the legal fabric, as outlined in the Constitution of Kenya 2010. Article 46 of the Constitution guarantees consumers access to goods and services of acceptable quality, essential information for informed decision-making, and safeguards against harm or exploitation. Recent judicial actions in Kenya have underscored the importance of ensuring equal access to product information for all consumers, without discrimination, in alignment with constitutional principles.

Understanding the Case

The case in question centers around Ndung'u, a petitioner who raised concerns regarding the glass-bottled Coca-Cola soda. Ndung'u, a frequent consumer of the product, began investigating its ingredients and found disparities in the packaging information between glass-bottled soda and the plastic-bottled soda. He discovered that the glass-bottled soda and the plastic-bottled soda did not contain

the same crucial details such as nutritional content, contact information, and storage directions, which were present on the plastic bottle packaging. Ndung'u, representing concerned consumers, brought the issue to the forefront, targeting Nairobi Bottlers Ltd and its parent company, Coca-Cola Export Corporation, USA.

Court Proceedings at the High court

He argued that the absence of essential information on glass-bottled soda violated consumer rights enshrined in Article 46 of the Constitution. The lack of nutritional, contact, and storage details impeded consumers' ability to make informed choices, particularly affecting low-income consumers. Ndung'u urged the court to mandate the inclusion of omitted information on the glass bottle packaging, alleging discriminatory practices. Despite initial challenges to Ndung'u's standing as a petitioner, the court upheld his right to bring the case under Article 22 of the Constitution, emphasizing its public interest nature.

The court ruled in favour of Ndung'u, emphasizing the necessity of clear and understandable information for consumers. It held that suppliers must provide nutritional information to safeguard consumers' health, safety, and economic interests. The court rebuked assertions that certain information was common knowledge, emphasizing the importance of explicit guidance for consumers. Ultimately, it mandated the inclusion of essential information on the glass bottle packaging, underscoring the obligation to interpret the Constitution in favour of consumer protection.

Court of Appeal

On appeal, the Court of Appeal affirmed Ndung'u's standing to bring the petition on grounds that the Constitution now allows public interest Bill of Rights litigation on individual basis or on behalf of a class of persons.

The court noted the differentiated treatment of consumers of the Coca-Cola products in plastic bottles are not the only ones entitled to the nutritional, customer care and storage information and noted that Coca Cola had not given any explanation as to why the consumers of the glass-bottled soda are deprived the same information and dismissed the Appeal.

Parallel Legal Pathways

There are other venues for consumer rights enforcement, in addition to the courts.

The Competition Act provides for Consumer welfare in Part VI of the Act. This right is enforced by the Competition Authority of Kenya. The Authority is mandated to receive and investigate consumer complaints from legal or natural persons as well as consumer bodies.; to avail to consumers information and guidelines on the obligation on

the obligation of persons under the Act and the rights and remedies available to consumers under the Act.

Disputes relating to consumers rights are determined by the Authority after completion of investigations, usually by the Consumer Protection Department. The Investigations include oral hearings, submission of evidence, and written statements, and settlements.

The analysis of consumer complaints by the Authority is fundamentally based on the consumer rights enshrined in Article 46 of the Constitution. After Conclusion of a consumer complaint investigation, the Authority may: declare the impugned conduct to be against the prohibitions in part VI of the Act, issue a restraining order against the undertaking violating consumer rights, direct the accused undertaking to take corrective action or reverse the infringement, impose a financial penalty or grant any other relief it deems appropriate as highlighted under section 36 of the Competition Act.

Any person aggrieved by the Authority's decision on consumer rights is entitled to appeal to the Competition Tribunal and then a further appeal at the High Court. Other government regulators such as the Communication Authority of Kenya, the Central Bank of Kenya and the Kenya Civil Aviation Authority are also charged with enforcement of the consumer protection mandate within their respective sectors.

Conclusion

The Constitution has provided for the general framework for the protection of consumer rights in Article 46.

These rights are to be interpreted in a manner that most protects consumers in the market and the courts have found that the consumers' rights to information is paramount to the protection of their health and economic interests; the full enjoyment of the products that consumers purchase; and to access of goods and services of reasonable quality.

There are decisions that are accommodative and protective of the consumers who have markedly less bargaining power in the market compared to manufactures and distributors of goods, thereby promoting the rule of law in Kenya.

The Ndung'u decision develops the jurisprudence on consumer protection in Kenya, particularly in relation to product labelling. Before the decision, the consumer protection laws did not confer suppliers with the obligation to disclose any specific kind of information.

The suppliers are also obligated to reduce the information gap between suppliers and consumers by setting out their product labels, the nutritional information of the product, storage directions and customer service contact information. The suppliers are also mandated to provide this information in the packaging to ensure compliance with the product labelling requirements.



Dan Koskey
lawyers@njorogeregeru.com

FAMILY TRUSTS AND ESTATE PLANNING: A GUIDE TO THE CREATION OF FAMILY TRUSTS

Over the years, more and more people have opted to use Family Trusts for Estate Planning as opposed to creation of Wills. This is because Family Trusts have significant advantages over Wills which include, among others, tax benefits. These advantages together with the simplified process for the registration of Family Trusts under the Trustees (Perpetual Succession) Act, has resulted in greater interest in Family Trusts as a mode of Estate Planning. In this article, we explore what a Family Trust is, the registration process, and the advantages and disadvantages of Family Trusts.

What is a Trust

A Trust is an equitable relationship that arises when property is held by a trustee for the benefit of another person (the beneficiary “usually the children”). The trustee holds this property at the request of another person, usually the parent or parents (the settlor). In sum, a Trust is an entity created to ensure that a property interest is held by the Trustee at the request of the settlor for the benefit of a beneficiary or beneficiaries.

As such, the key parties involved in the proper functioning of a Family Trust include: -

- i. **The Settlor-** this is the person who establishes the Trust, determines the contents of the Trust deed and transfers assets into the Trust as a Trust fund.
- ii. **The Trustee(s)-**the trustee is responsible for managing the assets held within the trust according to the provisions outlined in the trust deed and any accompanying **letter of wishes**. The trustee has a personal obligation to manage and apply the property belonging to the Trust strictly according to the terms contained in the Trust deed for the benefit of the beneficiaries. A trustee who deals with the Trust property inconsistently with the terms of the Trust is personally liable to the beneficiaries for breach of Trust and in the absence of any defences, the Trustee will be required to compensate the beneficiaries for the loss.

- iii. **The Beneficiaries-** these are the individuals who receive benefits from the Family Trust. In this case, the children.
- iv. **The Trust Protector/enforcer-** this is an independent party separate from the trustees who monitors and ensures compliance with the settlor's wishes. This concept of the enforcer was introduced by the Trustees (Perpetual Succession) (Amendment) Act, 2021 (the **“Amendment Act”**). The enforcer is an individual or a corporate entity appointed by the settlor or the beneficiaries whose role is to monitor the administration of the Trust for the benefit of beneficiaries. The enforcer cannot serve as a trustee. An enforcer has a duty to report to the settlor or trustees any financial breaches and require the trustees to take any remedial action or pursue legal action against the trustees.

The letter of wishes referenced above is a written memorandum that provides detailed instructions on how the settlor would have managed the assets if he or she had retained ownership. The letter of wishes ensures streamlined asset distribution and reduces the likelihood of challenges to the settlor's intentions.

Creation of a Family Trust

A Family Trust can either be a living or a testamentary trust. A Living Trust is a legal arrangement used in estate planning and set up by someone during his/her lifetime. It designates a trustee and provides explicit directions for the distribution of assets after the death of the settlor.

Testamentary Trusts on the other hand are established according to the instructions contained in a Will.

Generally, Trusts are registered with the Principal Registrar of Documents and the steps involved in the creation of a Family Trust are as follows:

Step 1: Highlighting the purpose (objectives) and apprehensions of setting up the trust.

At this stage, the settler identifies the purpose and objectives of setting up the trust such as succession planning and securing his or her children's inheritance.

Step 2: Identifying how the trust will be funded

The settlor has to identify the assets (movable or immovable) that will form part of the trust fund. These assets may include government bonds, company shares, employment benefits, Sacco benefits or savings, land, apartments or commercial properties that the settlor owns.

The trust can also be funded by third parties. This can be done through transfers from third parties to the trust, donations, debt settlement by the settlor's debtors into the trust account or contributions from other family members.

Step 3: Deciding who will manage the trust

The settlor appoints a trustee to oversee the trust. A trustee may be an individual or a company charged with the responsibility of administering the trust. The first trustee(s) is usually appointed by the settlor while any subsequent or replacement is appointed in line with the terms of the trust deed.

The settlor may appoint his or her peers, relatives or adult children to be a trustee. The settlor may also engage the services of a professional independent trustee.

Step 4: Preparing the Trust Deed and related documents

In preparing the Trust Deed, the Advocate responsible should ensure that the Trust is self-executing and meets the objectives of the settlor of the trust.

The Advocate must also devise a tax efficient and legally enforceable document that operationalizes the objectives of the settlor.

Step 5: Registration of the Trust

The new legal framework introduced by the Amendment Act has simplified the process of registration of Trusts. The process now involves:

- Registration of the Trust Deed in the Registry of Documents.
- Application for the incorporation of the registered Family Trust in the office of the Principal Registrar of Documents. The Application for incorporation must be approved or rejected within 60 days.

Step 6: Settlement of the Trust assets into the trust

This involves the transfer of property into the Trust. Upon settlement, ownership is transferred to the Trust. Once assets are transferred into a Family Trust, they cease to be the personal property of the settlor and become the property of the Trust itself.

Upon completing the registration process, the Principal Registrar issues a Certificate of Incorporation of the Family Trust within sixty (60) days.

Trusts registered under the Amendment Act enjoy the benefits conferred by the Finance Act, 2021. The Finance Act, 2021 introduced material changes to the taxation of registered Family Trusts, principally, introducing various tax exemptions relating to transactions involving registered Family Trusts. The exemptions include:

- i. Stamp duty and Capital Gains tax on transfer of properties into or out of a registered Family Trust.
- ii. Income tax on income earned by the registered Family Trust.
- iii. (a) Where income paid out to any beneficiary does not exceed Kshs. 10 million a year
(b) Where the income is used exclusively for the purpose of education, medical treatment or early adulthood housing such income is not subjected to tax on the beneficiary.

Advantages of Family Trusts

1. Offer protection for family members with special needs or medical conditions. Provisions can be made within the Trust to ensure that the assets are utilized for the benefit of beneficiaries who require medical care or who are facing challenges due to age or infirmity.
2. Can be designed to be self-executing. In such a case, upon the demise of a settlor, the trustees continue administering the trust without the need to go to court. For Wills, an executor has to obtain a Grant of Probate from a Court of law which involves lengthy Probate and Administration Court processes that may be costly and open to challenge.
3. Where the Trust has been incorporated pursuant to the Amendment Act, the Trust is deemed to be a separate legal entity from the settlor which protects the assets therein from any lawsuits by creditors which may arise against the settlor in his or her personal capacity. In the case of Wills, creditors may sue the Estate of the testator in a bid to recover debts owed by the testator.

Disadvantages of Family Trusts

There are two main disadvantages associated with Family Trusts.

- i. First, the administrative costs incidental to administering the Trust.
- ii. Second, future changes in law regarding Family Trusts may impact on the original objectives of establishing the Trust.

Conclusion

Creating a Family Trust has the potential of offering more protections to beneficiaries and safeguarding generational wealth. Given the recent developments brought about by the Trustees (Perpetual Succession) (Amendment) Act, 2021, the process of creation of a Family Trust is straightforward and takes sixty (60) days. Relatedly, a Family Trust can be created during the currency of the settlor's life (in the case of a Living Trust) giving the settlor greater control over how the trust will be administered in future. Further, through the letter of wishes, the settlor may leave special instructions to the trustee(s) on how he or she desires the beneficiary to be catered for.

In a Family Trust, fears of how the beneficiary will be catered for in the interval between a parent's demise and obtaining a Grant of Probate are allayed. This is because Family Trusts can be designed to be self-executing foreclosing the need to move to Court, by the Trustee, for administration.

Acknowledgements

The Editorial team would like to express its sincere gratitude to all those members of the Firm who, in one way or another, contributed to the conception, preparation and eventual production of this Newsletter. The dedication and input of the writers and contributors is appreciated and we look forward to continued support in the issues to follow.



Njoroge Regeru & Co. Advocates
Arbor House, Arboretum Drive
PO Box 46971-00100 GPO Nairobi

Tel: +254-020-2612531/2613646 | 020-3586592/2319224,

Cell: 0722 206 884, 0733 608 141, 0752 431 961

www.njorogeregeru.com



NJOROGE REGERU AND COMPANY
■ ADVOCATES, COMMISSIONERS FOR OATHS AND NOTARIES PUBLIC ■