NR & CO. QUARTERLY

ISSUE #02/2023

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NJOROGE REGERU AND COMPANY
ADVOCATES, COMMISSIONERS FOR OATHS AND NOTARIES PUBLIC
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EDITOR'S NOTE

Dear Reader,

Welcome to this quarter's newsletter, where we delve into the latest developments in Tax Law, Immigration Law and Land Ownership Law and the exciting role of Artificial Intelligence (AI) in shaping the future of legal practice in Kenya. Particularly, in this edition we explore the recent changes in tax legislation that impact individuals and businesses alike. We also examine the evolving landscape of land ownership law and its implications for property owners across the country. Lastly, we discuss how AI could revolutionize legal practice, enabling lawyers to streamline their workflows and enhance their ability to provide efficient and effective services to clients.

Tax law is a dynamic field that constantly evolves to keep up with changing economic realities. Understanding these changes is crucial for individuals and businesses to remain compliant while optimizing their tax planning strategies. Our expert analysis will break down key amendments, exemptions, and deductions that could have a significant impact on your financial affairs.

Land ownership is a topic of great significance in Kenya as it plays a vital role in economic development and social stability. We discuss a recent legal development related to land tenure arising from the Supreme Court decision in Petition Number 8 (E010) of 2021 [2023] KESC 30 (KLR). Whether you are a homeowner or an investor looking to acquire land or develop property, staying updated on these legal developments is essential for making informed decisions.

In addition to tax law changes and land ownership issues, we cannot overlook the transformative power of AI in reshaping the legal profession. AI-powered tools are revolutionizing legal research, contract analysis, due diligence processes, and more. We explore how the adoption of these technologies can enhance efficiency, accuracy, and cost-effectiveness in legal practice.

As always, our goal is to provide you with insightful content that empowers you with knowledge about relevant legal topics affecting your personal or professional life. We hope this newsletter sparks your interest and encourages further exploration into these fascinating subjects.

Thank you for joining us on this journey as we navigate the ever-changing landscape of law in Kenya.

Cindy Amuka

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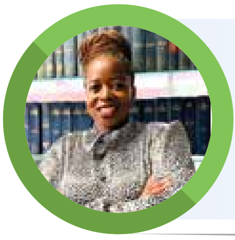
The Firm

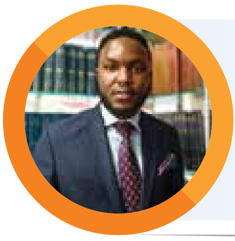
A Canvas of Law: Unveiling Pupil Perspectives for the 2022/2023 Pupillage Program

In this vibrant corner of our newsletter, we invite you to embark on a journey through the brushstrokes of young minds as they navigate the world of law. The front row of this amazing experience is yours to take as we witness the transformation of eager pupils into seasoned practitioners. Here's what the 2022/2023 cohort of pupils had to share about their pupillage experience at Njoroge Regeru & Company.



Noel Zetty

At NR & Co, I have been inspired to venture into the unconventional practice of the law. The experience solidified my attitude on the impossible being non-existent. It in numerous ways affirmed my courage to chart new paths and take on challenges unafraid both in the practice of law and my personal life. I forever stand guided by the very words that 'Success is purpose fulfilled.'



Rodgers Mwangi

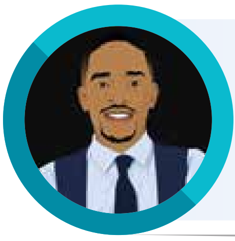
My experience at NR & Co. was enriching. It was a paradigm shift in expanding my knowledge and understanding of the Law. I can confidently say that I am now able to sharply distingusih between theroretical law and the real practice. Such a wholesome and enriching experience.

Nashipae Langat

My pupillage experience at NR & Co. can be summarised as follows "In the halls of justice, I witnessed the power of knowledge, the strength of strategy, and the profound impact of unwaverung dedication'. I would not trade my experience there for anything, not in this life or the after. One word: Invaluable.

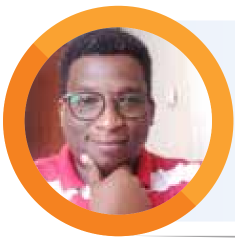
Brian Nioroge

My time at NR & Co. was an extraordinary experience that profoundly shaped my practice of law and provided me with a clear sense of direction. The firm's commitment to excellence in every aspect was contagious and it instilled in me a deep understanding of the profession's standards. I was surrounded by brilliant mentors who generously shared their knowledge and expertise, equipping me with invaluable lessons that extended far beyond the office.



Robert Otieno

My experience at NR & Co. was a transformative journey that has undoubtedly set me up for success. The invaluable training and guidance I received have shaped me into an exceptional advocate. The firm's commitment to excellence, combined with the mentorship of brilliant legal minds, equipped me with the skills and knowledge needed to navigate complex legal challenges.



Eric Wambugu

"During my time at NR & Co. I gained invaluable insights into the intricate working of the legal system and honed my analytical skills. The experience has ignited a passion within me to inspire future generations of advocates. Witnessing seasoned advocates in action has taught me the art of effective advocacy, meticulous research and the significance of perseverance"

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Legislative UPDATES

A number of activities have been undertaken in the legislative and regulatory sector this quarter:

Finance Act, 2023

On 26th June, 2023 the President assented to the Finance Bill which is an omnibus bill of parliament. An omnibus bill is a single piece of legislation that packages together several proposed changes to diverse laws in a single document. The Finance Act is amended annually to make changes to various laws on how the government will impose taxes. The table below breaks down the various amendments to several Acts that relate to the collection of taxes.

*Note: All sections below were to come into operation or be deemed to have come into operation on **1st July, 2023** (unless otherwise specified). **However, in the case filed by Okiya Omtatah, Busia Senator through Petition Number E181, the High Court on 30th June temporarily suspended the implementation of the Act pending hearing and determination of the final suit.***

Act	Amendment
Income Tax Act (Chapter 470)	The Act introduces the deduction of tax for digital content monetization. The introduction of the term 'digital content monetization', which is defined in the following forms: a. Advertisement on websites, social media platforms or similar networks by partnering with brands; b. Sponsorship, where a brand owner pays a content creator for the creation of content or promotion of content; c. Affiliate marketing, where the content creator earns commission whenever the audience of the content creator clicks on the product displayed; d. Subscription services where the audience pays a fee to access content; e. Offering for use a logo, brand or catchphrase associated with the content creator's merchandise sales, eBooks, course or software; f. Licensing the content; g. Commission earned by the content creator from crowd funding. The section on income from businesses where foreign exchange loss or gain is realized is amended to provide that foreign exchange gain or loss shall be deemed a deductible expense or trading receipt provided that the foreign exchange loss shall be deferred and claimed over a period of not more than five (5) years from the date the loss was realized by a person whose gross interest is paid or payable to a non-resident person exceeds thirty percent of the persons earnings. ***This provision has an addition of the time period where a person is allowed to defer the payments due to loss.*** The section on income from employment, inserts a subsection stating that where an employee receives payment for travelling allowance to perform official duties, the milage rate approved by the Automobile Association of Kenya shall be deemed to be reimbursement of the expended amount and is to be excluded in calculation of employee's gains and profits. This section also allows for club entrance and subscription fees against the employer's income. The definition of market value in relation to a share has been amended from the following: "where the shares are fully listed on any securities exchange operating in Kenya, the mid-market value on the date the shares were granted by the employer" to "where the shares are fully listed on any securities exchange operating in Kenya, the mid-market value on the date **the option was exercised by the employer"**. "where the shares are not fully listed, the price which the shares might reasonably be expected to fetch in the sale in the open market, which shall be agreed upon with the Commissioner before the grant of the options" to "where the shares are not fully listed, the price which the shares might reasonably be expected to fetch in the sale in the open market, when the option is exercised.

Income Tax Act (Chapter 470)	This means that under this amendment the option must be exercised first. There is also an addition to the Act which provides that where an employee is offered company shares by an eligible start-up instead of payment, the taxation benefit from the allocated shares shall be deferred and taxed within thirty days, provided the person must remain in employment, the employer shall not dispose of the shares and this is for a five (5) year period from the date on which the shares were awarded. An 'eligible start-up' is a business incorporated in Kenya; with an annual turnover or one hundred million shillings; which does not carry on management or training business; has not been formed as a result of splitting or restructuring an existing entity; and has been in existence for five (5) years or less. Repatriated Income imposed as tax chargeable in addition to income of the permanent establishment. This applies to a non-resident person carrying on business in Kenya. The new formula for tax charged is prescribed in the Act. For non-residents, withholding tax from income from management or professional fees, royalties, interest and rents shall not be refundable or available for deduction against the income where an audit adjustment has been made in respect of such payment. The Act will reduce the minimum threshold of persons who are eligible to pay turnover tax from one million shillings to five hundred thousand Kenyan shillings. The Act also reduces the upper threshold from fifty million shillings to fifteen million shillings and increases the turnover tax rate from one percent to three percent. The effects of this is to bring in to the ambit small enterprises that were previously included due to the minimum turnover threshold and drastically reduce the eligible medium enterprises that are eligible to pay turnover tax Digital Asset Tax has been introduced as tax payable by a person on income derived from the transfer or exchange of digital assets. This includes the owner of a platform or the person facilitating the exchange or transfer of a digital asset. Non-residents who own a platform on which digital assets are exchanged or transferred is required to register under the simplified tax regime. Those required to deduct the digital tax asset shall do so within five (5) working days after the deduction and remit the same to the Commissioner.
	On the provision relating to deductions not allowed, the Act is amended by inserting the provision that any expenditure or loss where the invoice of the transaction is not generated from an electronic tax invoice management system shall not be allowed as deductions. This is except those that are exempt by virtue of the Tax Procedures Act. The Act also deletes the section which discusses expenditure incurred by non-resident person. This means that this is not expressly stated as a non-deductible expense. Under the new law, all parent entity resident in Kenya will be required to file a country-by-country report with the commissioner except where the parent entity is not obligated to file the report in its jurisdiction of tax residence or the jurisdiction in which the parent entity is resident has a current international tax agreement which Kenya is party to. As for the multinational enterprise group, the consolidated group turnover should be at least ninety-five billion shillings. This is a move away from the previous regime that only required parent entity's or constituent entity's or multinational enterprise groups with a gross turnover of ninety billion shillings to file the report. The 'ultimate parent entity' is defined as: one which is not controlled by another entity; one which owns or controls, either directly or indirectly, one or more constituent entity of a multinational enterprise group. Member clubs and trade associations carrying on business, the gross receipts on revenue account shall now include joining fees, welfare contributions and subscriptions but will not include entrance fees. Further, there is no longer any provision to allow the Members clubs' and trade associations to elect that the income for business to be for succeeding years of income. Post- retirement medical fund relief has been introduced to allow a resident individual who proved that in a year of income the person has contributed to a post-retirement medical fund for that year of income. The Act also expands the incomes subject to capital gains.

Value-added Tax Act, 2013	The VAT charged on fuel which includes (petrol, kerosene and spirts) has increased from 8% to 16%. Insurance compensation shall be subject to tax where a person is compensated for their loss of taxable supplies whether or not the goods where subject to tax at a cost of 16%. Several products specifically in the construction sector have moved from being tax exempt to being charged at a rate of 16% while some products specifically in the agricultural sector which were being charged at the rate of 16% are now zero rated. *For zero-rated goods, the government does not charge VAT and allows credits on inputs making the cost of the goods more affordable, where as for exempt goods, the government doesn't tax the sale of the good but the producers cannot claim VAT, this means they shift this burden to the consumer making the price of the good more expensive.*
Tax Appeals Tribunal Act, 2013	The definition of an 'appealable decision' has been amended to replace the term 'tax decision' so as to provide harmony with the Tax Procedures Act. The Act has also introduced a requirement for parties filing an appeal to do so through a memorandum of appeal, statement of fact and tax decision. *Prior to this, there was no formal requirement for the filing of supporting documentation. Therefore, under the new amendment failure to provide supporting documents as prescribed under the Act may be cause to have a suit struck out for being defective.*
Tax Procedures Act, 2015	The Tax Procedures Act is amended by inserting a provision that states that any multilateral treaty entered into on the Governments behalf on collection of taxes shall be carried out in the manner stipulated under that treaty. The Act is also amended to include a provision specifying that where a trust is registered by a Kenyan resident, they are required to keep records and avail them to the Commissioner as and when required whether or not the income was generated in Kenya. The Act further introduces the establishment an electronic system to provide for the issuing of electronic tax invoices. There are certain persons that may be exempt either through a gazette notice issued by the Commissioner or for specified persons as prescribed under the Act. That said, all those who carry on business are required to issue the electronic tax invoice through the system and maintain a record of stocks. The requirement for the amendment of assessment has been simplified in that it is no longer a requirement that the original assessment be amended. The Act also introduces a new section on mutual administrative assistance in the recovery or tax collection claims. The provision that relates to the relief where doubt or difficulty exists in the recovery of tax has been repealed. The Commissioner is also now required to refrain from recovering interest, penalties or fines that were due and to be paid before 31st December, 2022. This proposal goes on to state that where the principal tax was due but had not been paid then one could apply for amnesty and propose a payment plan under the unpaid tax.

Excise Duty Act, 2015	The Act repeals the provision of the Act that provides for adjustment for inflations. The Act provides that the Commissioner has the power to adjust the specific rate of excise duty annually to account for inflation. Where a person lodges a notice of appeal after being served with a notice for suspension of their license, they have fourteen (14) days from the date specified in the notice to remedy the deficiencies that led to the suspension of their license. The Act has specified on the offenses under the Act and provided a penalty that attracts a fine of up-to Kshs. 5 million or imprisonment of up-to three (3) years for duplicating, creating counterfeits, removing, defacing, altering or otherwise interfering with an excise stamp or illegally selling them. Excise Duty on gaming and betting offered through a platform or other medium is to be paid within twenty-four (24) hours from the closure of that transaction day. The excise duty on gaming and betting has also increased from 7.5% to 20%. The rate of excise duty tax on excisable goods such as imported sugar, cement, furniture, cellular phones, cosmetics and others have also increased. As for excisable services such as telephone and internet data services and money transfer services charged by banks, agencies and financial service providers this fee is to be reduced from 20% to 15%. When it comes to money transfer services under the National Payment Systems Act, the excise duty is to be increased from 12% to 15%. The excise duty to be charged on digital lenders is no longer on 'fees' but rather, any amount charged in respect of lending.
Miscellaneous Fees & Levies, 2016	**Import Declaration fee** - goods imported into the country for home use reduced from 3.5% to 2.5% of the custom value. The section under the Act that was allowing for goods imported under the East Africa Community Duty Remission Scheme to be charged at the rate of 1.5 % is to be deleted along with those charged at a rate of 1.5 % when it comes to raw materials and specified products imported by manufacturers or for the input for the construction of houses under the affordable housing scheme. **Export and Investment promotion levy** – to be introduced for goods imported into the country for home use. The goods include: cement klinkers, iron, kraft paper and sacks and bags. These goods specified in the Third Schedule will be taxed at 10% of the customs value. The purpose of the levy will be to provide funds to boost manufacturing, increase exports, create jobs, save foreign exchange and promote investment. **Railway development levy** – the levy on all goods imported into the country for home use is to be reduced from 2.5% to 1.5%. This rate is to be applied across the board since the section providing for a lower rate for certain bodies is to be deleted. The purpose of the levy was to be to provide funds for the construction and operation of the standard gauge railway network. **Tariffs** – the export levy rates has been reduced from 80% to 50% for certain products such as hides and skins while the rate for other products has remained the same at 20%. The goods exempt form imports declaration fee and railway development levy have been increased to include goods imported for official use by international and regional organizations that have bilateral and multilateral agreements in Kenya and liquefied petroleum gas.
Betting Gaming & Lotteries Act, 2015 Insert s 69 AA	The amendments introduce a section that provides that the taxes shall be collected in accordance with the provisions of the Tax Procedures Act, 2015.
Alcoholic Drinks Control Act, 2010	Section 31 of the Act is amended by providing that no person shall sell, manufacture, pack or distribute alcoholic drinks at a price below the minimum input cost. This amendment introduces the definition of 'minimum input cost' which is the cost published by the Kenya Revenue Authority through excise regulations. There is a corresponding amendment to the Kenya Revenue Authority Act, 1995 along with a provision targeted at capacity building and training for the better carrying out of the authroities functions for the staff of the Authority, general public and other jurisdictions. *There is therefore a minimum price imposed for the cost of alcoholic beverages which shall not go below a certain amount.*

Employment Act, 2007	Employers will be required to pay to the National Housing Development Fund, established under the Housing Act which provides for the National Housing Development Fund (Chapter 117), a contribution of 3% of the employee's salary. This contribution is to be made by both the employee and the employer but shall not exceed Kshs. 5,000.00 per month in total. The funds shall be used to purchase a home under the affordable housing scheme for those who qualify for affordable housing. For those who do not qualify, they shall be entitled to recoup their savings after the expiry of seven (7) years from the time they start making their contributions or upon reaching retirement age. The methods proposed to 'recoup' the employees' contributions to the fund will be: a. Transfer their contributions to the retirements benefit scheme or related pension scheme registered with the retirements benefit authority; b. Transfer their contributions to any persons registered and eligible for affordable housing under the scheme; c. Transfer their contributions to their spouse or dependent; d. Receive their contributions in cash (which is to be classified as taxable income and thus subject to tax). The Cabinet Secretary Housing in consultation with the Cabinet Secretary Finance shall make Regulations prescribing the qualifications to be eligible for the scheme. This section shall come into effect on the date the Regulations become operational. This highly controversial proposed amendment is worth monitoring on the implications to the taxpayer, the subsequent regulations to be made and the process of implementation of the scheme.
Unclaimed Financial Assets Act, 2011	The amendment to Act relates to those making claims. With the amendment this section now provides as follows: "Where a claim is allowed, the Authority shall pay over or deliver to the claimant, or such other person that the claimant may designate, the assets or the amount the Authority actually received or the net proceeds if it has been sold by the Authority." *The new words introduced (underlined above) now allow persons other than the claimant to benefit under this Act.*
Statutory Instruments Act, 2013	The Finance Act amends the above-mentioned Act by repealing the section of the Statutory Instruments Act that provides for automatic revocation of statutory instruments after ten (10) years of making the said statutory instrument. This automatic revocation does not occur where the provision in a given statutory instrument is repealed or a regulation is made exempting it from expiry. The exemption described above is not to exceed twelve (12) months and can only be made once. *The purpose of this part of the Act was to ensure continuous, current and up-to date review of statutory instruments by the respective regulatory authorities and agencies.*
Retirement Benefits (Deputy President and State officers) Act, 2014	This Act is in relation to benefits of those holding elective office. The amendments to this Act provide that a person entitled to receive benefits under this Act shall be entitled to receive these benefits, in addition to those they are entitled to under the Parliamentary Pensions Act. Section 16 of the Retirement Benefits Act stated that where a person has received benefits under any other law, those benefits be set-off against the benefits under the current legislation. However, this provision has since been repealed. *Presumably, the repealed provision was implemented to avoid a situation where a person receives benefits twice.*
Retirement Benefits Act, 1997	*The section on the requirements for registration of administrators is amended by reducing the paid-up share capital owned by a Kenyan citizen or an insurance company from sixty (60%) to thirty-three (33%).*
Special Economic Zones Act, 2014 and Export Processing Zones Act, 1990	The respective Acts mentioned above are amending by providing that goods whose content originates from the custom territory shall be exempt from paying importation duty. As for those goods whose content partially originates from customs territory, they shall only pay import duties on the content that does not originate from the custom territory subject to the respective procedures. According to the respective Acts on the zones, a 'custom territory' is defined as the area (territory) where the customs laws apply in full but do not include the zones.

Value Added Tax (Electronic, Internet and Digital Marketplace Supply) Regulations, 2023

These Regulations came into force on 21st March, 2023 and effectively revoked the Value Added Tax (Digital Market Supply) Regulations, 2020. These regulations were created to prescribe the manner in which value added tax (VAT) will be paid specifically by those who supply products over the internet, an electronic network or any digital market place which the supply is made in Kenya. The product(s) being referred to under this regulation include:

- digital content such as ebooks, mobile applications and films;
- subscription based media which includes news magazines and journals;
- software programmes;
- music and games;
- electronic data management including website hosting, file sharing, cloud storage services and others;
- over-the-top services including streaming shows, music, podcasts and all other forms of digital content; among others.

The Regulation therefore requires those regulated to register for tax in Kenya through the online prescribed form. When it comes to those exporting make a regulated supply to a recipient in Kenya, they can either register or elect to appoint a tax representative. Those exporting are not required to issue an electronic tax invoice provided they issue an invoice or receipt showing the value of the supply, the tax deducted and the personal identification number of the customer.
In determining whether the recipient of the supply is in Kenya, the Commissioner shall make the following considerations:

a. whether the payment proxy of the recipient is in Kenya, this means whether the credit card, debit card and bank account details belong to a Kenyan financial service;
b. whether the residence proxy is in Kenya, this includes the billing or home address; and
c. whether the access proxy is in Kenya, this includes the internet billing address or the mobile country code of the subscriber identification module card of the recipient.

Constitution of Kenya (Amendment) Bill, 2023

Implementation of the 2/3rd gender rule has been a subject of long debate in the country since its entrenchment in the Constitution. The provision seeks fair gender representation in public offices, however, its realization has posed great challenges. The Constitution of Kenya Amendment Bill, 2023 currently under consideration seeks to give effect to the 2/3rd gender rule in our Country. The Bill proposes several electoral reforms to enhance the principle.

Key Highlights of the Amendment include:

- The proposal seeks to change the composition of both the National Assembly and Senate under Article 97 and 98(1) of the Constitution respectively, inserting provisions requiring the election of a number of special seats necessary to ensure that not more than two-thirds of any house is of one gender.
- Secondly, the special seats whose election would be through party lists would be determined after the declaration of the results of the general election.
- Nominated persons under such seats in both houses shall only be eligible to serve for a maximum of two terms.
- The proposal preserves the current Parliament's composition by proposing that if passed into law, it shall only become effective from the next general elections.

Universities Regulations 2023, Legal Notice No. 56

On May 2nd, 2023, the Education Cabinet secretary issued new Regulations under Legal Notice No. 56 known as the Universities Regulations, 2023. These Regulations nullified the Universities Regulations of 2014 in accordance with the Universities Act.

Regulations 43(3) of the Universities Regulations, 2023 provides for the requirements for an application for the establishments of a national Open University, which includes among others; a Cabinet Resolution declaring the mandate of the proposed national Open University, and a draft Charter.

These requirements include a Cabinet Resolution declaring the purpose of the proposed national Open University, as well as a draft Charter. The establishment of the Open University of Kenya, as stated in the Delegated Legislation Committee's report on the draft Charter, aims to enhance Open and Distance e-Learning.

Furthermore, the Regulations introduced additional proposals and details for submitting an Application to the Commission for establishing a University. Regulation 5 stipulates that the proposed University must provide evidence of owning 50 acres of land on which the University will be situated. The land should be no less than fifty acres in order to accommodate the University's premises, academic programs, extracurricular activities, and facilities for the well-being of staff and students.

case Highlights

We would like to highlight a few notable cases this quarter:

Transparency International Kenya vs Teresa Carlo Omondi [2023]

This was an Appeal from the judgment of the Employment and Labour Relations Court which held that failure to renew a fixed-term contract amounted to unfair termination. The reason the Court gave was that the wording of a fixed-term contract was such that it created a legitimate expectation for renewal. The subject contract before the Industrial Court was for a two year term and the renewal was contingent upon the employee's satisfactory performance.

The employer contended that the contract had a definitive commencement and termination date which gave rise to no legitimate expectation for its renewal and that the expiry date of the contract was dependent upon the employer's decision to extend the contract or not upon being satisfied by the performance of the employee. The employee on the hand argued that the contract had a clause for extension of employment based on satisfactory performance which she fulfilled. Further, she argued that the employer should have furnished her with reasons for failure to renew the contract.

The Court of Appeal overturned the decision of the ELRC. It held that fixed-term employment contracts do not create any legitimate expectation for renewal. No promise or representation that the contract would be renewed was made by the employer hence the employee had nothing to rely on. The Court went further to assert that once fixed term contracts expire, employers do not have any obligation to furnish reasons for the termination of the contract. This is because such contracts terminate automatically by effluxion of time.

Okoiti & 2 others vs Attorney General & 14 others (Petition Application) 2 (E002 OF 2021) [2023] KESC 31 (KLR) 21st April 2023 (Ruling)

The Application sought the review and vacation of an award of costs by a single judge of the Supreme Court against the Applicant in a public interest matter. The Applicant argued that the judge awarded costs purely on the 'costs follow the event principle' without a positive finding on ill motive, misconduct, bad faith and frivolity on the part of the Applicant. The Applicant urged the Court further that the single judge did not take into account all factors necessary for the determination of costs payable by a losing party. Finally, the Applicant faulted the judge for awarding costs to two Respondents who did not participate in the proceedings.

The Court held that public interest litigants must steer clear from the temptation of seeking costs should they succeed in the litigation. This is because praying for costs would signify self interest rather than public interest. Also as a natural consequence, the public interest litigators will also be amenable to pay costs should they fail in their litigation. The Court further held that costs could not be awarded to a party that had not spent time and resources in prosecuting and defending a matter.

Significantly, the Court also held that it has the jurisdiction to overturn the exercise of discretion by a single judge and that where an injustice was apparent in the single judge's decision, a larger bench could undo the injustice.

Aliaza vs Saul (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR)

This was an appeal from the decision of the Environment and Land Court ("ELC") which had declared a contract for the sale of land void for lack of the Land Control Board consent ("LCB") contrary to Section 6 of the Land Control Act ("LCA").The ELC ordered the Appellant to vacate the suit premises failure to which he will be evicted. Section 6 of the LCA provides that transactions in agricultural land are void for all purposes unless the LCB has consented to it.

The Court of Appeal observed that the LCA is an old piece of legislation whose enactment was informed by deliberate public policy considerations. The Honourable judges observed that when it comes to consent, two situations may arise. First, an applicant may be denied consent by the LCB for good reasons. Second, a mischievous seller may enter a sale agreement and fail to procure the LCB's consent and seek to renege on the transaction later.

It is the second scenario that the court dealt with. The Court held that the provisions of Section 6 of the LCA must be read in light of Section 7 of Schedule 6 to the Constitution to give succor to a party such as the Respondent who wishes to renege on his contractual obligations in order to steal a match on the purchaser.

Since the Respondent (vendor) had: sold the suit land to the Appellant, received the full purchase price for the land and placed the appellant in possession of the land, a constructive trust had been created in favour of the Appellant (purchaser) the moment the Appellant entered the two parcels of land he had purchased from the Respondent.

The failure on the part of the Respondent to obtain the necessary LCB consent within the required 6 months to enable the Appellant transfer the suit land into his name did not render the transaction void. Equity and fairness, the guiding principles of Article 10 of the Constitution require that the LCA is read and interpreted in a manner that does not aid a wrongdoer but renders justice to a party in the position the Appellant finds himself.

INTERNATIONAL UPDATES

NEW IMMIGRATION REFORMS 2023

New Immigration Rules United Kingdom (UK)

On May 23rd, 2023, the United Kingdom announced new Immigration Rules for international students, according to a statement released by the UK Home Office. Under these rules, international students enrolled in non-research postgraduate courses will no longer be permitted to bring their family members or dependents to the country.

To address the migration issue, UK Prime Minister Rishi Sunak has taken a proactive stance. The Home Secretary, Stela Bravermen, stated that only students enrolled in postgraduate research degrees will be allowed to bring their family members, including parents, children, and dependents. This change means that international students on non-research postgraduate courses will not have the option to bring their family members

Additionally, the UK Government also plans to remove the ability for International students to switch out of the student route into work routes before they can complete their course. The rules are necessary to control the rate of migration in the United Kingdom.

The Dignity Act- 2023 United States of America (USA)

This Immigration Legislation focuses on comprehensive Immigration Laws, consisting of a 500-page Bill. The Act addresses concerns related to the processing of asylum claims, visa issuance delays, and the establishment of a pathway to legal status for millions of undocumented immigrants. It aims to provide a bipartisan and meaningful approach that restores dignity to individuals who have been affected by the immigration system.

The Act addresses issues relating to the procession of Asylum claims, delays in the issuance of Visas, and the creation of a pathway to legal status for millions of undocumented immigrants. The Act offers a bipartisan, meaningful approach that restores dignity to people who have been victims of the immigration system.

iNTERLUDE

"Do you promise to pay the bill, the whole bill and nothing but the bill?"

"Actually, I'm a litigator."

CONTRIBUTORS' PLATFORM

TITLES WITHOUT ROOTS; LAND OWNERSHIP IN KENYA AND WHY THE GHOST OF THE PAST MAY COME BACK TO HAUNT YOU FOR THE SINS OF THE FATHERS

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A REVIEW OF THE SUPREME COURT DECISION IN PETITION NUMBER 8 (E010) OF 2021 [DINA MANAGEMENT LIMITED VS COUNTY GOVERNMENT OF MOMBASA AND OTHERS]

> "I will visit the iniquity of the fathers upon the children unto the third and fourth generation…"

The business of conveyancing and more particularly due diligence for the longest time has been limited to procuring land searches and declaring that a title is "clean" and a sale or charge process can be completed. We have sat pretty comfortably putting our hopes on having done a search, conducted a land transfer process, having followed all the set down legal procedures and subsequently having obtained titles in our names thanks to qualified and services of top-notch lawyers.

The history of Land Tenure in Kenya is one that has been marred with a lot of hostility and disproportionality. Ownership of Land can be traced back to the pre-colonial period and even way before during the Hellenistic Period where African Systems of Land ownership was mainly characterized by Communal Land Tenure where the land belonged to the Community or the Monarch (the Sultanate of Zanzibar ,Nubian Empire) and no one in their own individual capacity would claim to own full land rights. Land was also majorly ancestral and passed to the descendants of the deceased thus land would be owned by a whole family or clan and not an individual per se.

In the sunset years of the 19th Century we got to see the introduction of land tenure where private ownership was introduced. We thus started seeing land being owned privately by churches, and religious organizations. Later upon the inception of the Imperial British East Africa Company (IBEA) that was contracted by the British empire to administer their rule in Kenya and the British Government that administered the Kenya Colony, land could now be fully owned by individuals.

We witnessed Colonial leaders unilaterally administer, subdivide, award and take away land from locals in the name of his Majesty the King, citing authority from the Crown, a trait that flowed till the inception of the Constitution of Kenya 2010. In earlier years, we witnessed Heads of State e.g. Moi and Kenyatta dish out land to their stooges and kinsmen. This was the whole basis for the decision in Petition No. 8 (E010) of 2021, where Dina Management Limited the Appellant sought to have the Court of Appeal decision by Justices Warsame, Musinga and Murgor set aside and confer title to the Appellant.

For the longest time, we have buried our heads and have not been concerned with past land records (from the first owner down to ourselves as the current owners) for the land titles that we hold. But then the title of the previous owners all the way back to first owner are extremely important and the same is captured in the recent pronouncement by the highest Court in the Land, the Supreme Court of Kenya in Dina Management Limited Versus County Government of Mombasa & 5 others "Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible."

The Appellant alleged that the land was unalienated Government Land and that it was later alienated as private property in 1989 and was above the statutory mark of 30 Meters from the watermark a Regulation that was adjusted to 110 meters after the Survey Regulations of 1989 came into force and thus was not bound by the 110 meter rule.

After a 6-year court battle, the cardinal question for determination from the High Court to the Supreme Court was whether Dina Management Limited was a bonafide Purchaser for value considering that they were the second Purchasers of the property and had no notice and had not taken part in any irregularity/illegality that had happened way back (almost 30 years back). Dina contested that it was an innocent Purchaser for Value (bonafide purchaser). The court confirmed that the title issued to Moi was done illegally, thus invalidating in totality, the long-standing doctrine of "Bona fide Purchaser for Value Without Notice". This Doctrine basically protects anyone who purchases property genuinely without being a party to the fraud. This was a sharp contradiction to the Nemo Dat Quod non Habet maxim and principle which provides that one cannot pass a good title if they do not have it conferred on them in the first place. Thus, a bad title cannot be made a good title in any way.

The Supreme Court stated that to establish whether Dina was a bona fide purchaser for value, one had to first go to the root of the title, right from the first allotment, as it considered the issue the bone of contention in the matter.At long last the Supreme Court agreed with the holding of the Court of Appeal to wit that Dina could not enjoy protection under the doctrine of innocent purchaser and that where a property is acquired through a procedure against the law, the title cannot qualify for indefeasibility. It held that the title subsequently issued was invalid having been acquired illegally and irregularly.

The above judgment has far reaching implications for property owners, Banks and other financial institutions to the effect that any potential illegality or irregularity that might have happened either during the first acquisition or misstep during subsequent transfers might attract impeachment of the title at the loss of the current registered owner or at the exposure of financial institutions notwithstanding the fact that the illegality/irregularity might have occurred decades ago- akin to the ghost of the past coming to haunt the living.

Formerly an exception to the Nemo Dat rule was the "Bona fide purchaser for value without notice" This can be defined as a bona fide purchaser who buys or acquires a good or property for value without actual, constructive or proper notice of another's claims, deformities, defects etc. of the seller's title. It has been described as a purchase in good faith where the purchaser in good faith paid duly and properly consideration for property without any notice of prior adverse claims. The parameters for one to have good title were set out in Hannington Njuki vs William Nyanzi to include;

a. Hold a valid Certificate of Title;
b. Have had purchased the property in good faith;
c. Have had no knowledge of the fraud;
d. The vendor should have had apparent valid title;
e. The said property ought to have been purchased without any notice of any fraud;
f. The purchaser ought not be party to any fraud.

The Decision in Funzi Development Ltd & Others v County Council of Kwale, Mombasa Civil Appeal No.252 of 2005 [2014] eKLR where the Court of Appeal was echoed and affirmed by the Supreme Court, stated that:

> "...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title."

The solution to avoiding the pitfall of having your title challenged for past mistakes is to make sure that before purchasing a property, you undertake due diligence akin to a forensic exercise to verify that the property you are acquiring is "clean". But then that is a tall order considering the state of our land registries, the storage and retrieval of past records not to mention the role played by some of the land officials in propagating illegalities and irregularities in the lands office. We are also alive to the fact that because of this record keeping problem, we may not be able to track down previous land records more so where a property has been transferred down to over 7 buyers. The 7th buyer in the chain may not have in their custody the previous documents belonging to the last six (6) previous proprietors and as such any previous irregularity/illegality cannot be easily picked.

In conclusion and considering the now settled jurisprudence on the effect of previous illegalities/irregularities on titles, there is a need to introduce watertight "eternal indemnities" in the Agreements for Sale of Land to protect a Purchaser just in case the sins of the past visit or come knocking. This indemnity clauses can be an important refuge and the only hope for a current title owner to seek to be indemnified by the previous owner(s) for any past sins.

THE PLACE OF ARTIFICIAL INTELLIGENCE IN THE FUTURE OF LEGAL PRACTICE IN KENYA

"The future of artificial intelligence in legal practice is not about replacing lawyers, but about empowering them with new tools and capabilities to deliver justice more efficiently and effectively. There's two options left to hang on: 'Adapt or perish'.

Artificial Intelligence (AI) is revolutionizing various industries around the world, and the legal profession is no exception. In Kenya, where the legal landscape is rapidly evolving, AI holds immense potential to transform the future of legal practice. From improving efficiency in legal research to streamlining administrative tasks, AI technologies are poised to reshape the way legal services are delivered in Kenya.

Recently, in what would be a legendary and exciting turn of events, a "robot" lawyer was set to represent a defendant in a traffic ticket case in California this year. The CEO of a New-York based startup DoNotPay, Joshua Browder,

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invented a way for people contesting traffic tickets to use AI generated arguments in court. The workings of the method invented required a person challenging a speeding ticket to wear smart glasses that would then record court proceedings and dictate responses into the defendant's ear from a small speaker. The system relied on a few common AI text generators, including ChatGPT and DaVinci. This is just a tip of the impending shift that AI is set to spearhead in legal practice, not only in Kenya but in the world over. This article explores the current and future applications of AI in the Kenyan legal sector and examines the opportunities and challenges it presents.

Enhancing Legal Research and Case Management

One of the primary areas where AI can have a significant impact is legal research. Traditionally, lawyers spend extensive amounts of time poring over case law, statutes, and legal precedents to build persuasive arguments. AI-powered tools, such as natural language processing and machine learning algorithms, can expedite this process by quickly analyzing vast amounts of legal data. These tools can provide lawyers with relevant case references, identify legal patterns, and extract valuable insights, thereby streamlining the research process and enabling lawyers to deliver more accurate and comprehensive advice to their clients.

Moreover, AI can also assist in case management by automating routine administrative tasks. For instance, AI-powered systems can help lawyers organize and categorize case documents, automate document review and analysis, and facilitate efficient communication with clients.
By automating repetitive tasks, lawyers can devote more time to higher-value activities, such as strategic legal thinking and client counseling.

Improving Access to Justice

AI has the potential to democratize access to justice in Kenya, where legal services can be expensive and time-consuming to obtain, which will go a long way in realizing the Kenyan legal dream of dispensing justice in a fast and expeditious manner. AI-powered chatbots and virtual assistants can provide preliminary legal advice and guidance to individuals who cannot afford traditional legal representation. These virtual assistants can answer common legal queries, provide basic legal information, and guide individuals through the initial steps of legal processes. One such instance is the Ardhi Sasa platform that allows for land transactions over urban land that has been converted to be conducted seamlessly.

Furthermore, AI will help bridge the language barrier in the legal system by enabling automated translation services. This can be particularly beneficial in a multilingual country like Kenya, where legal documents and proceedings may need to be translated into various local languages. AI-powered translation tools can facilitate effective communication between legal professionals and clients, thereby ensuring equal access to justice for all.

Ethical and Regulatory Considerations

As AI becomes more prevalent in the legal sector, it is crucial to address the ethical and regulatory implications associated with its use. Transparency, fairness, and accountability should be at the forefront when developing and implementing AI technologies in legal practice. Algorithms and decision-making processes must be explainable, auditable, and free from biases.

Regulatory bodies in Kenya need to adapt to the evolving landscape by establishing guidelines and standards for the responsible use of AI in the legal profession. This includes addressing concerns regarding data privacy, security, and confidentiality. Additionally, lawyers must be equipped with the necessary skills and knowledge to understand AI systems and use them effectively, while also upholding professional ethics and legal responsibilities.

The future of legal practice in Kenya holds immense promise with the integration of AI technologies. From streamlining legal research and case management to improving access to justice, AI has the potential to revolutionize the legal landscape. However, to fully leverage these technologies, it is essential for the legal community, regulatory bodies, and policymakers to collaborate in addressing the ethical, regulatory, and educational aspects of AI integration. By embracing AI responsibly, Kenya's legal sector can enhance efficiency, increase access to justice, and better serve the needs of its citizens in the digital era.

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