

NR & CO.

QUARTERLY

ISSUE #03/2023



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NJOROGE REGERU AND COMPANY

■ ADVOCATES, COMMISSIONERS FOR OATHS AND NOTARIES PUBLIC ■

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EDITOR'S NOTE

Dear Reader,

A warm welcome to this Quarter's Newsletter.

During the quarter, there has been a number of developments in the financial sector with inflation rate in the month of August averaging 8.52 from the previous average of 8.68 in July. The CEOs' survey in July indicated subdued business optimism in sectoral growth prospects largely owing to high interest rates, political factors and the weakening Kenyan shilling. Key drivers of growth have however been identified to be talent management, customer centricity and expansion into new markets.

During the Quarter, Counties held the 8th Devolution Conference in Uasin Gishu County whose theme and sub-theme was "10 Years of Devolution; the Present and Future" and "Driving Transformation from the local level: County Governments as the Centre of Economic Development" respectively.

This newsletter therefore analyses resource allocation at the national and county government levels and the need for counties to diversify their sources of revenue. We also delve into the inaugural Africa Climate Summit 2023 held in Nairobi, whilst highlighting the Nairobi Declaration. The Summit was preceded by the enactment of the Climate Change (Amendment) Act, 2023 on 1st September, 2023.

The Legislative Updates and Case Highlights segments provide analysis on Laws, Guidelines and Court Decisions on a wide array of sectors including anti-money laundering and combating the financing of terrorism, launch of DhowCSD, promotion of transparency and investor protection mechanisms in relation to online foreign exchange brokers, jurisdiction of courts in issue of grants of representation and registration of unions.

On stewardship front, the Firm is pleased to feature its activities at the Light and Hope Centre in Korogocho, Nairobi which speaks to the Firm's continued acknowledgment of sense of reaching out to the community. Lastly, in the interlude segment, we share some of the insights of the Firm's recent mental health training.

Savour the read!



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The Firm

“

There are two ways of spreading light; to be the candle or the mirror that reflects it.

~ Edith Wharton



LIGHT & HOPE CENTRE

The Firm was pleased to visit Light and Hope Centre in Korogocho, Nairobi on 4th August, 2023.

The Centre takes care of differently abled children who are from less privileged families and who are in need of extra assistance especially when their parents are at work. It is more of a “day-care center” for children and some adults with special needs.

The Firm made a small but hopefully meaningful contribution by providing various foodstuffs, a television (you should have seen how happy they were!) and spending the whole afternoon with the children, support staff and parents in the Centre. The Firm members also offered a helping hand in feeding the children, sharing a meal, singing, playing and dancing. Additionally, members of the Firm had an opportunity to visit the upcoming ultra-modern library and e-learning facility being set up by one of the Firm's own, Jackson Kamenju; a seasoned Associate attached to the Firm's Corporate, Commercial and Conveyancing department.

The library, once completed, will serve the children of Korogocho slums by giving them a place to learn, commune and grow. The Firm is not oblivious of the fact that children, in general, need a conducive environment to study after school, research and, one might say, exercise their natural curiosity of the world. Such opportunity for children in slums is unfortunately quite slim. As such, the library, once up and running, is intended to provide a conducive environment where children can study after school and during the weekends or holidays as well as a safe space to enable them to read books, research, learn, unlearn and relearn.

The visit was indeed a blessing both to the Firm members, facilitators and members of the two (2) facilities.

We as NR&Co. spearheaded by the Corporate Social Responsibility (CSR) Committee of the Firm, endeavour to touch and inspire the society in order to make changes that impact communities. We aspire to be hummingbirds, as the Nobel Laureate Prof. Wangari Maathai put it.





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Legislative UPDATES

In this issue, we highlight the recent laws (including proposed laws) and guidelines or directives passed or issued during the quarter relating to various sectors including anti-money laundering and combating of terrorism, marriage, finance and data protection.

ANTI-MONEY LAUNDERING AND COMBATING OF TERRORISM FINANCING LAWS (AMENDMENT) ACT, 2023

The Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act was assented to on 1st September, 2023 and commenced on 15th September, 2023. The resultant Act, that is, the Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act, 2023 (the “**Amendment Act**”) is an omnibus statute amending over a dozen laws.

It is a welcome move in filling the lacuna of legal protection when it comes to the fight against money laundering, predicate offences and other resulting crimes e.g. terrorism within the country.

Of note, the Financial Action Task Force (FATF) standards, being the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, were numerous referred to during the legislative process as well as adopted in the provisions of the Amendment Act. The said standards/recommendations are divided into seven areas, that is: Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT) policies and coordination; money laundering and confiscation; terrorist financing and financing of proliferation; preventive measures; transparency and beneficial ownership of legal persons and arrangements; powers and responsibilities of competent authorities and other institutional measures; and international cooperation

We analyse hereunder the provisions and effect of the Amendment Act on the various statutes.

a) Extradition (Contiguous and Foreign Countries) Act & Extradition (Commonwealth Countries) Act

[Simplified Extradition]: A fugitive criminal being sought by a requesting State may consent to being extradited to such State without conducting of formal extradition proceedings. Prior to executing a consent however, the fugitive has the right to independent legal counsel as well as an interpreter. A copy of the consent is transmitted to the Central Authority, being the office of the Attorney General, for purposes of arranging the fugitive's surrender to the requesting State.

It is however worth mentioning that where a fugitive consents to the simplified extradition, the fugitive should be advised of their rights and the legal consequences of the simplified extradition procedure and may, expressly renounce their entitlement to the rule of speciality.

The consent or renunciation is further required to be recorded by a magistrate and may not be revoked.

[Terrorist Offences]: The Amendment Act redefines terrorist offences in relation to extraditable offences so as to include terrorism financing.

b) State Corporations Act

[Exemption from Application]: The Financial Reporting Centre (“FRC”) is exempted from application of the State Corporations Act which provides for the establishment, control and regulation of State corporations.

c) The Capital Markets Act, Insurance Act, Banking Act, Central Bank of Kenya Act, Microfinance Act & Law Society of Kenya Act

[Powers on AML & CFT]: The supervisory authorities established or provided for under the respective Acts are empowered to supervise their licensees or regulated professionals to whom the provisions of the Proceeds of Crime and Anti-Money Laundering Act, 2009, apply.

Of note, in respect of: -

- i. the Insurance Act, a liquidator is required to maintain information and records on the beneficial ownership of an insurer for at least seven (7) years after the date on which the company is dissolved
- ii. the Banking Act, the definition of the term ‘significant shareholder’ is amended to the effect of including a beneficial owner who in turn is defined, under the Companies Act as a ‘*natural person who ultimately owns or controls a legal person or arrangements or the natural person on whose behalf a transaction is conducted, and includes those persons who exercise ultimate effective control over a legal person or arrangement*’.

The terms ‘significant shareholder’ and ‘beneficial owner’ and their definitions are further incorporated in the Central Bank of Kenya Act and the Microfinance Act.

d) Anti-Corruption and Economic Crimes Act

[Proceeds of Corruption] The definition of the term 'economic crime' has been amended to the effect of including offences involving laundering of the proceeds of corruption.

e) Proceeds of Crime and Anti-Money Laundering Act

[Scope]: The scope of application of the Proceeds of Crime and Anti-Money Laundering Act (the "Act") has been set out to be on *'matters relating to combating of money laundering, combating of terrorism financing and combating of the financing of proliferation of weapons of mass destruction'*

[LSK]: The Law Society of Kenya ("LSK") has been, pursuant to the Amendment Act, brought under the ambit of the Act through inclusion of the term 'self-regulatory body' in the Act which term is defined to solely be the LSK. As such, LSK has an obligation to report to the FRC any suspicious transaction that it or its staff may encounter, during the normal course of their duties.

Lawyers, notaries and other independent legal professionals may, on the other hand, submit reports of suspicious transactions through LSK. However, where the relevant information was obtained in circumstances where the said professionals are subject to legal professional secrecy or privilege, the obligation to report does not apply.

To this end, LSK is required to establish appropriate mechanisms for cooperation in exchange of information relating to suspicious transaction reporting and supervision.

Additionally, LSK is charged with the responsibility of supervising and enforcing compliance with the Act or any direction/ guideline made pursuant to the Act by all reporting institutions regulated or supervised by LSK and to whom the provisions of the Act apply. Such responsibility is deemed to form part of the legislative mandate of LSK and constitutes a core function of LSK.

[Collaboration and Cooperation of Supervisory Bodies]: Supervisory bodies under the Act may coordinate and cooperate with domestic and foreign counterparts for purposes of combating money laundering, terrorism financing or proliferation financing.

[Obligation to verify Customer Identity]: Reporting institutions (being a financial institution or a designated non-financial business and profession [includes non-governmental organisations and legal practitioners]) are required to identify and verify any applicant seeking to enter into a business relationship or carry out a transaction with them or any customer, whether permanent or occasional. Such verification is to be undertaken through taking of reasonable measures to establish the true identity of the applicant or customer by requiring them to produce an official record attesting to their identity; such as a national identity card, passport, driver's licence or certificate of birth.

In the case of verification of a government department, the Amendment Act now requires production of the relevant authorisation from the National Treasury in addition to a letter from the accounting officer.

Reporting institutions are further required to undertake customer due diligence on the existing customers or clients on the basis of materiality and risk and taking into account whether the customer due diligence measures have previously been undertaken and the adequacy of data obtained.

Where an applicant indicates that they are acting on someone else's behalf, a reporting institution is categorically required to verify that such applicant is duly authorised, identify and verify the identity of that person, establish the true identity of the person on whose behalf or for whose ultimate benefit the applicant may be acting for as well as identify and verify the identity of the beneficial owner.

[Higher Risk Countries]: One of the functions of the FRC is set out to be dissemination of the following information to reporting institutions: -

- any identified high-risk country;
- countermeasures applicable to the country;
- concerns regarding the weaknesses in the AML, CFT and countering of proliferation financing systems of that country; and
- any publicly available information published by the FATF on any jurisdiction which has been identified by it as having significant or strategic deficiencies in its AML, CFT and countering of proliferation financing measures.

[Reporting Threshold]: the reporting threshold has been revised from US\$10,000.00 to US\$15,000.00 (or its equivalent in any other currency) to the effect that reporting institutions are now required to file reports with FRC on all cash transactions exceeding US\$15,000.00 (or its equivalent in any other currency) whether the transaction appears suspicious or not.

f) National Police Service Act

[Controlled Delivery]: a gazetted officer of the rank of inspector and above may, if they consider it necessary, allow illicit or suspect consignments to pass out or through Kenya for purposes of investigating an offence and identifying the people involved in the commission of the offence.

g) Ethics and Anti-Corruption Commission Act

[Functions of the Commission]: In respect of collaboration and cooperation with State organs and agencies, such State organs or agencies may grant the Commission access to relevant information in the prevention and investigation of economic crime.

h) Mutual Legal Assistance Act

[Refusal of Legal Assistance]: Mutual legal assistance in criminal matters should not be refused solely on the grounds that the offence amounts to an offence of a fiscal nature or on the grounds of bank or other financial

institution or designated non-financial business or profession secrecy or confidentiality rules.

The effect of this amendment is to enlarge the grounds for non-refusal of mutual legal assistance. As such, confidentiality rules of non-governmental organisations, legal practitioners and such other designated non-financial businesses or professions cannot be relied on in refusal of legal assistance to an international entity – to which Kenya is obligated – or a State requesting for legal assistance.

i) National Payment System Act

[Powers on AML & CFT]: The Central Bank of Kenya (“CBK”) is empowered to supervise all reporting institutions regulated and supervised by it and to whom the provisions of the Proceeds of Crime and Anti-Money Laundering Act, 2009 apply.

j) Limited Liability Partnership Act, 2011

[Requirements for Registration of a Limited Liability Partnership (“LLP”)]: The statement required to be lodged with the Registrar of Companies in registration of an LLP is now required to contain a copy of the register of beneficial owners (*as defined in the Companies Act, 2015*).

[Filing of Annual Returns]: Prior to assent of the Amendment Act, LLPs were required to lodge an annual declaration of solvency or insolvency with the Registrar of Companies not later than 15 months after the registration of the LLP and thereafter once in every calendar year at intervals of not more than 15 months.

The Amendment Act has revised this requirement to the effect that LLPs are now required to file their annual returns with the Registrar of Companies within 30 days of the anniversary of their registration or such other period as the Registrar may, upon application, allow. The annual returns should contain, among other information, the: address of the LLP’s registered office, the LLP’s principal business activities and a declaration of solvency/insolvency.

[Registers and Documents to be kept]: LLPs are required to keep at their registered office a register of charges and securities rights created under the Movable Property Security Rights Act, 2017, a register of their beneficial owners as well as a register of their nominee partners.

In respect of beneficial owners, it is vital to note that proposed LLPs are required to lodge such register with the Registrar of Companies during registration whilst existing LLPs are required to lodge the register with the Registrar within 60 days of coming into force of the section (s.31B) being 60 days from 15th September, 2023. The said period may however be extended on application of an LLP save that such extension should not exceed 30 days.

[Foreign LLPs]: Pursuant to the Amendment Act, express provisions have been inserted in the Limited Liability Partnership Act, 2011 with regard to foreign LLPs. As

such, foreign LLPs are required to be registered in Kenya prior to carrying on business in Kenya.

Such registration involves making an application to the Registrar of Companies in the prescribed form accompanied by notarised copies of the certificate of registration, partnership agreement, particulars of partners and particulars of beneficial owners of the foreign LLP. Additionally, similar to foreign companies, foreign LLPs are required to appoint at least one (1) local representative who is a permanent resident in Kenya or a Kenyan citizen who ordinarily resides in Kenya.

k) Prevention of Terrorism Act, 2012

[Offences]: Various offences relating to CFT and proliferation acts have been provided for to the effect that a person who engages in a proliferation act is liable, upon conviction, to imprisonment for a term not exceeding twenty (20) years or to a fine not exceeding Kshs.20,000,000.00 or to both such imprisonment and fine. Such penalty also applies to a person who provides financial support for a proliferation act(s).

Additionally, where a person finances the travel of an individual to a State other than that person’s State of residence for purposes of perpetration, planning of or participation in a terrorist act or the providing of terrorist training, such financing is expressly set out to be an offence.

Key to note is that the term, ‘proliferation acts’ has been defined as “*proliferation manufacturing, acquiring, possessing, developing, exporting, trans-shipping, brokering, transporting, transferring, stockpiling, supplying, selling or using nuclear, ballistic, chemical, radiological or biological weapons or any other weapon capable of causing mass destruction, and their means of delivery and related materials including technology, goods, software, services or expertise in contravention of the Prevention of Terrorism Act or any international obligations derived from relevant United Nations Security Council Resolutions*’

[Counter Financing of Terrorism Inter-Financing of Terrorism Inter-Ministerial Committee]: A Counter Financing of Terrorism Inter-Financing of Terrorism Inter-Ministerial Committee (the “Committee”) has been established with the mandate to implement resolutions relating to the suppression of terrorism financing as well as proliferation and financing of dealings with weapons of mass destruction. The Committee is further charged with the responsibility of formulating and supervising the implementation of the National Strategy and Action Plan on CFT.

With regard to the membership, the Committee consists of: the Cabinet Secretaries for Interior and National Administration, National Treasury & Economic Planning and Foreign & Diaspora Affairs; the Director Generals for the National Intelligence Service, Immigration and Citizen Services, National Counter Terrorism Centre and FRC; the Attorney General; the Inspector-General of Police; and the Governor of CBK.

I) Companies Act, 2015

[Register of Beneficial Owners]: The previous provision on keeping a register of beneficial owners has been revised to the effect of requiring proposed companies to lodge their register when applying for registration whilst existing companies are required to lodge such register within 60 days of coming into force of the section (s.93A) being 60 days from 15th September, 2023. The said period may however be extended on application of a company save that such extension should not exceed 30 days.

Such requirement likewise applies to foreign companies.

[Register of Nominee Directors]: In addition to the requirement of maintaining a register of beneficial owners, a company is required to maintain a register of nominee directors.

[Company Secretaries]: Previously, it was stipulated that private companies with a paid-up capital of less than Kshs.5,000,000.00 need not have a company secretary. The Amendment Act has slightly revised this provision to the effect that: -

- such provision also applies to companies limited by guarantee; and
- where the private company or company limited by guarantee does not have a company secretary or resident director, then such company is required to appoint a contact person who is a natural person with a permanent residence in Kenya.

In the case of an existing company to which this provision applies, such company is required to lodge a notice of the appointment of the contact person with the Registrar within 60 days of coming into force of the provision being 60 days from 15th September, 2023.

[Preservation of Original Documents]: The period for preservation of hard copy original documents by the Registrar of Companies has been extended from three (3) to seven (7) years after they are lodged.

[Power to Strike-Off a Company]: The Registrar has power to strike-off a company where they reasonably believe that such company is not carrying on business or is not in operation. Pursuant to the Amendment Act, the grounds for such reasonable belief have been enumerated to be where a company has failed to file its annual returns or financial statements for a period of 5 years or more or where a company has failed to comply with the requirement to lodge a copy of the register of beneficial ownership after being issued with a directive as per the provisions of the Companies Act.

THE MARRIAGE (AMENDMENT) BILL, 2023**DIVORCE BY MUTUAL CONSENT**

Justice Mudan (as he then was) in **N. -v- N. & Another [2008] 1 KLR [G & F]** fairly observed that, *"...if two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear then, they are entitled to be released from their matrimonial union..."*

A spouse can thus not be forced to remain in a marriage they no longer believe in. Under the current law, the grounds for dissolution of a marriage differ depending on the kind of marriage celebrated and registered, be it Civil, Christian, Hindu, Islamic or Customary.

These grounds for dissolution include: adultery, cruelty, desertion, exceptional depravity, and even conversion to another religion depending on the kind of marriage the union was celebrated under. There are also grounds based on irretrievable breakdown of the marriage characterized by neglect, separation for a prolonged period, one spouse being incarcerated or insanity of a spouse.

The proposed amendment to the Marriage Act, 2014 seeks to introduce a new provision that will enable divorce by mutual consent. Currently, the law when it comes to divorce has always been fault-based. This means that a party making a petition for divorce has to prove a matrimonial fault against their spouse.

As such, the Bill proposes that parties to Christian, Civil, Customary or Hindu marriages may petition the Court for a **Decree of Divorce by Mutual Consent** on grounds that the marriage has irretrievably broken down, the parties have been mutually separated for at least one (1) year immediately preceding the date of presentation of the petition and that the parties have mutually agreed to dissolve their marriage.

The Bill further provides that the Court may grant the Decree for Divorce by Mutual Consent where: the petition has been made at least one (1) year after the celebration of the marriage, the parties jointly present the petition, both parties freely give consent to the divorce in writing and both parties are present in person at the hearing of the petition.

That notwithstanding, any of the parties to the petition may, by filing an application, withdraw the petition any time before the Decree is granted. Additionally, the Court may, on application of a party, nullify the Decree already granted where consent was obtained by coercion, fraud or undue influence.

It is vital to note that under the proposed Bill, dissolution of a marriage by consensus does not apply to Islamic marriages.

With regard to the stage the Bill is at in the legislative process, it has since undergone its first reading. It would thus be interesting to follow the progress of the Bill especially considering the normative structure and the regard for sanctity of marriage.

REGULATORY GUIDELINES, DIRECTIVES & NOTICES

The 3rd quarter of this year has been characterised by a number of guidelines from regulatory authorities ranging from the Central Bank of Kenya, the Office of the Data Protection Commissioner ("ODPC") to the Capital Markets Authority ("CMA"). Below is a peek into the various guidelines/ directives.

Launch of DhowCSD

- On 11th September, 2023, H.E. President William Ruto launched the DhowCSD at the Central Bank of Kenya.
- The DhowCSD is a Central Securities Depository infrastructure that *'delivers world class levels of registry, custodial and settlement services for both primary and secondary market operations'*.
- DhowCSD may be accessed on the CBK website or may be downloaded from the Google Play or Apple App Store.

Increase in Mobile Money Transaction & Wallet Limits

- To promote and support digitisation of payments, increase of the daily mobile money transaction limit from Kshs.150,000.00 to a max. of Kshs.250,000.00 as well as the size of the mobile money wallet from Kshs.300,000.00 to a max. of Kshs.500,000.00 was approved and took effect from 15th August, 2023.
- The respective current tariff for transactions of upto Kshs.150,000.00 apply for transactions of upto Kshs.250,000.00

Changes to Operations in the Interbank Foreign Exchange Market

- Tenor of swaps and Kenya shilling borrowing where non-resident banks are involved has been limited to a tenor of not less than 6 months. There is however no limit to the tenor of swaps between residents including residents within the East African Community;
- Use of electronic brokerage systems is permitted; and
- The minimum amount that can be traded in the interbank market has been revised to USD.250,000.00 from the previous USD.500,000.00

Guidance to all Dealing and Non-Dealing Online Foreign Exchange Brokers

On 21st September, 2023, CMA released guidelines requiring online foreign exchange brokers to enhance their disclosures and promote transparency and investor protection mechanisms. As such, online foreign exchange brokers are required to: -

- calculate their individual client loss ratios in percentage form based on the amounts lost by retail clients of the Contracts for Difference (CFD) broker;
- not directly or indirectly send or publish any communication to a client relating to the marketing, distribution or sale of an online forex/CFD unless it includes the appropriate risk warning and complies with the conditions in the Guidance;
- submit to CMA, for review and grant of, a no objection prior to roll-out of any new category of CFD products;
- provide their clients with adequate margin stop-out protection to ensure closure of all open positions in online forex/CFD if an individual's account balance decreases to a certain percentage;
- provide their clients with negative balance protection to limit the clients' aggregate liability for all CFDs connected to a CFD trading account with a CFD provider to the funds in that CFD trading account.

Publication of the Personal Data Handbook

- The ODPC recently published a handbook to provide simplified information to data controllers, data processors and data subjects in relation to personal data protection.
- The handbook can be accessed at <https://www.odpc.go.ke/download/personal-data-protection-handbook/?wpdmdl=9408&refresh=6513e5ed6dc141695802861>

case **Highlights**

In this segment, we highlight various decided cases, specifically those touching on the use of powers of attorney in relation to applications to be enjoined as interested parties; registration of unions and revocation of grants of letters of administration previously issued by the High Court

Janmohamed (Suing as the Executrix of the Estate of the Late H.E. Daniel Toroitich Arap Moi) & another v Nathaniel K. Lagat & 4 others; Tiony & another (Intended Interested Party) (Petition 17 (E021) & 24 (E027) of 2022 (Consolidated)) [2023]

The Applicants, Tony Kimaiyo and another, in this case were holders of the Power of Attorney granted by, the 1st Respondent, Nathaniel K. Lagat. They sought leave to be admitted as interested parties and to be allowed to submit written and oral arguments in the petition. The Respondents opposed the application on the grounds that the Applicants lacked the locus standi to approach the court as the 1st Respondent was a substantive party to the proceedings and that the Power of Attorney held by the Applicants did not confer any right of ownership of the suit property. The main issue for determination before the Court was whether a holder of a power of attorney could apply to be joined as an interested party in a suit in which the principal was a substantive party to the suit.

The Supreme Court found the alleged grantor of the Power of Attorney to the Applicants was always an active party to the proceedings before the trial court and at the Court of Appeal.

As such, there was no basis upon which the Applicants could be admitted as interested parties. Additionally, the Court was of the view that the Applicants did not set out any personal interest or stake that is clearly identifiable and proximate, or the prejudice they would likely to suffer in case of non-joinder. The Application was therefore dismissed.

Harrison & 3 others (Suing as Promoters of the Proposed Kenya Musicians Union) v Registrar of Trade Unions (Civil Appeal E130 of 2022) [2023] KEELRC 2006 (KLR) (22 August 2023)

The Appellants in this case were Kenyan musicians who had resolved to register a trade union, known as the Kenya Musicians Union. Pursuant to the provisions of the Labour Relations Act, they submitted an application for registration to the Registrar of Trade Unions.

An objection to the registration was raised by the Kenya Union of Entertainment and Music Industry Employees. Consequently, the application for registration was rejected, on October 25, 2021, on the grounds that there was another trade union- Kenya Union of Entertainment and Music Industry Employees- which sufficiently represented a substantial proportion of the musicians' interests.

The Appellants aggrieved by the decision filed a Memorandum of Appeal at the High Court arguing principally, that the Respondent made a mistake in declining registration as it did not take into account that the Kenya Union of Entertainment and Music Industry Employees involved a wider group of employees, including bouncers, waiters, waitresses, chefs, deejays, event organizers, comedians, among others. The said union was therefore not unique to musicians who are composers of artistic work, mostly attached to music producers and labels for specific projects/ contracts.

The Court held that registration of a trade union was a quasi-judicial function exercised by the Respondent. The Respondent was further ordered to register the Kenya Musicians Union, issue the Union with a certificate of registration and enter the Union's name in the appropriate register.

Musine v Osamo (Sued as co-administrator of the Estate of Stephen Osamo (Deceased) (Miscellaneous Application E012 of 2022) [2023] KEHC 20217 (KLR) (17 July 2023)

This case concerned the Estate of Stephen Osamo, where the Applicant, Musine, sought the revocation of a grant issued by the High Court in Busia HCSC No. 85 of 1999, before the case was subsequently transferred to the Magistrate Court in 2018, where it became Busia CMSC No. 503 of 2018.

The main issue before the High Court was whether the Court still exercised original and exclusive jurisdiction to revoke grants issued by the Magistrates Court. The Court, while addressing itself to the issue, held that, prior to January, 2016, the High Court exercised original and exclusive jurisdiction over all Grants of Representation issued by it and the Magistrate Courts. However, effective January 2016, there was an amendment to the Law of Succession Act to the effect of extending that jurisdiction to the Magistrates Court. As a result of the amendment, the High Court lost the exclusive jurisdiction to revoke all grants issued by it and the Magistrates' Courts.

As such, Magistrates Courts can exercise the jurisdiction to revoke Grants of Representation issued by them whilst the High Court can only exercise appellate jurisdiction over a decision by a Magistrate Court in relation to revocation of grants. The Court further averred that where a Grants of Representation was issued by the High Court before a matter was transferred to the Magistrates Court, the proper procedure to be followed is for the lower court to re-issue the grant or certificate of confirmation of such a grant. Once such transfer has been effected, the concerned parties can now proceed to move the court officially by way of application in chambers.

INTERNATIONAL UPDATES



KENYA HOSTS THE AFRICA CLIMATE SUMMIT, 2023

The Africa Climate Summit is an inaugural event organized by the African Union (AU) Commission.

The Summit serves as a platform to showcase progress, exchange perspectives, and to decide on common priorities for global discussions relating to climate change.

This year, the Commission in collaboration with the host Government of Kenya held the summit in the capital, Nairobi from 4th - 6th September, 2023 under the theme: **“Driving Green Growth and Climate Finance Solutions for Africa and the World”**

This timely event was held ahead of the 28th Conference of the Parties to the United Nations (UN) Framework Convention on Climate Change (COP28) that will be hosted in Dubai, United Arab Emirates (UAE) from 30th November to 12th December 2023.

See below a related article titled **‘The Fight for Our Planet; Africa Climate Summit 2023 & The Climate Change (Amendment) Act’** which delves further into the Summit, climate change and why this topic remains relevant into the future.



iNTERLUDE



In honour of September's suicide prevention & awareness month, NR& Co. family held a Mental Health Training on 8th September, 2023. Below are some of the take-aways -

And which face will I need today?
Which face do you need?
Is it happy, content, excited, calm?
Let's see...
We'll see
Actually, no, you won't



LIFE IS MULTIDIMENSIONAL

Work-life balance is an ideal but tricky balance to achieve. It requires mapping of the various areas of one's life, be it: spiritual, economic, social, physical or mental (ps. each person's areas can be different depending on what one values), after which, it is important to make an intentional effort to develop each of these various facets of one's life.



THE HIERARCHY OF NEEDS

The various stages of individual needs:



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 THAT DISSOLVES ALL WALLS BETWEEN SOULS, FAMILIES & NATIONS.”**

~ Paramahansa Yogananda



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CONTRIBUTORS' PLATFORM

DEVOLUTION AS A MECHANISM OF INCLUSIVE DEVELOPMENT: An Analysis of Resource Allocation at the National and County Government Levels in Kenya



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Back in August 2010, Kenyans endorsed the present Constitution and on August 27, 2023, Kenya marked the 13th anniversary of enactment of the Constitution. Many observers, including judicial officers, labeled the 2010 Constitution as transformative. This is because it was meant to pave a new way for the people, bridging the gap between a history marked by tyranny, centralized authority, exclusion, marginalization and a future that strives for an all-inclusive democratic society. In this vision, the people hold ultimate sovereignty, power is widely dispersed and the currency of human rights is universally recognized.

A central feature of the 2010 Constitution is the entrenchment of devolution as a core principle. As envisioned by the Constitution, devolution carries the potential for democratic and accountable power distribution, national unity, self-governance, public participation, social and economic progress, localized service provision, equitable sharing of resources at national and local levels, protection of minority and marginalized interests, and the decentralization and separation of governmental authority.

The operationalization of the decentralized governance system began in 2013. This Article thus aims to assess as to what degree this system has achieved its intended goals, particularly regarding resource allocation. It seeks to identify outcomes, shortcomings and potential prospects within the decentralization process.

The concentration of power stands contrary to diversity and inclusivity. The history of Kenya before 2010 demonstrates that increased centralization resulted in greater marginalization. Decentralization is often seen as a means to bring governments closer to citizens, enhancing the accountability of officials and deterring corruption. Advocates of decentralization argue that it enhances

service delivery, optimizes resource allocation, improves accountability and reduces corruption.

The allocative efficiency analysis holds that local governments will likely better match public goods to local wants. One pillar of this argument is the assertion that sub-national governments are closer to the people than the central government.

A crucial challenge in Kenyan devolution is striking a balance between the timely provision of adequate resources for sustained service delivery and addressing economic disparities, considering varying county economies and limited national revenue transfers.

Despite the introduction of devolution in 2013, there has been mixed service delivery, with progress seen in health, childhood development, agriculture and education, yet persistent disparities remain.

Counties have also grappled with revenue shortfalls due to delayed disbursements and decreased collection efficiency. Addressing this requires timely financing, enhanced revenue collection through technological innovations, strengthening financial management systems, and digitizing county service delivery for transparency. Streamlining county procurement procedures is also imperative.

Resource allocation to counties employs a weighted formula that factors in various components. Population holds the greatest weight at 45%, followed by a 25% weight for a basic equal share. Additionally, poverty rate contributes 20%, land area contributes 8%, and fiscal responsibility contributes 2%. The responsibility for distributing public financial resources in Kenya rests with the Commission of Revenue Allocation (CRA) whose primary role is to provide recommendations regarding the fair distribution of revenue generated by the national government. This distribution occurs between the National and County Governments as outlined in Article 216 of the Constitution of Kenya.

These formulas were created to promote fairness in resource sharing and to ensure inclusivity in achieving development goals. Over time, these formulas have transitioned from the first generation to the third generation. These changes have been aimed at incorporating socio-economic variables that are considered crucial for enhancing economic growth and elevating the well-being of the population within our nation. The CRA's formulas have been developed and refined to facilitate equitable distribution of resources, thereby fostering inclusivity in the pursuit of economic growth and overall development. This transition from the initial to the current generation of formulas has been utilized as the foundation for revenue sharing between the years 2019 and 2024.

The two-tier system of government, while promoting strong

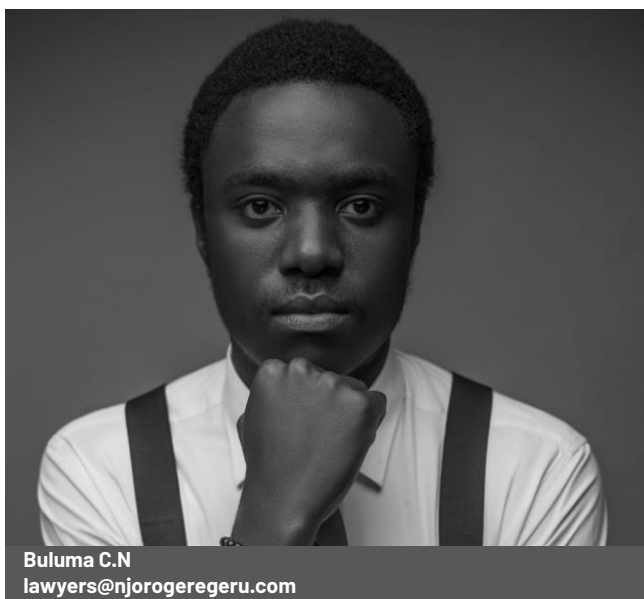
county entities, has led to challenges such as overlapping responsibilities, inflated wage bills, and uncontrolled spending.

To resolve this, a re-evaluation of the system is necessary, clarifying functions and coordinating policy interventions for effective service delivery. Further, the transition to a devolved system is an ongoing process, necessitating the identification of policy gaps at national and county levels to ensure smooth functioning.

To conclude, devolution has so far brought radical changes with respect to resource allocation, promoted local governments and empowered them in self-rule in determining their destiny through public participation, fostered national unity, and narrowed the gaps in economic disparities, particularly in marginalized areas. The major challenges observed here include disagreements between the national and local governments regarding resource sharing and the delayed disbursement of funds from the national treasury. Devolution is neither panacea, nor is it entirely detrimental.

To this end, the notable development here is that the national government has put in place a fiscal framework for sharing national revenues between the national government and the county government through the Commission for Revenue Allocation through the Division of Revenue Act, which stipulates how the national government should share revenue with county governments. Since counties are hit hard by the cash crunch, counties should diversify their own revenue sources and enhance efficiencies in revenue collection. The allocation of resources to counties should be commensurate with devolved functions to enhance timely disbursement and to avoid delays in service delivery.

The Fight for Our Planet; Africa Climate Change Summit 2023 & The Climate Change (Amendment) Act



Part of the preamble of the African Leader's Nairobi Declaration on Climate Change and Call to Action states that climate change is by far the single greatest threat posed to the lives of mankind and all other living things.

We, as a nation, have experienced the effects of global warming first hand through prolonged droughts and raging floods. Scholars have suggested that the situation might become even more precarious as this trend has been on the rise.

On July 4th 2023, the world experienced the warmest/hottest day since the year 1979. It was reported, by the European Union Copernicus Climate Change Service, that the average global temperature hit 17.18°C, a record high that might be broken over and over unless we put in steps to mitigate the seemingly disastrous effects.

Different parts of the world have also experienced adverse and harsh weather extremes such as Hurricane Hillary in the Southern States of Arizona and Nevada together with the Colorado River. Sea levels have also drastically increased as the polar ice keeps melting leading to animals that ideally walked on them, e.g. polar bears, having to swim more – consequently endangering their species.

In Africa, according to the Science Direct Database, since the beginning of 2022 about 4,000 people have been killed with 19 million being affected by extreme weather conditions. Additionally, according to the National Climate Change Action Plan (Kenya) 2018-2022, Kenya's Green-House Gas (GHG) emissions accounted for less than 1%, while that of Africa as a whole is less than 4% of the total global carbon emissions due to human activities such as advancements in the industrial, transportation, energy, forestry, agriculture and waste management realms.

The enacting of the Climate Change (Amendment) Act, 2023 was a positive step taken in the run up to Kenya's hosting of the Africa Climate Summit as it expounds on provisions on emission offset, fast tracking of energy transitions to clean and renewable forms and slashing of emissions by 2030 in line with the Sustainable Development Goals (SDGs).

Kenya hosted the Africa Climate Summit whose Nairobi Declaration on Climate Change seeks to put in measures to mitigate climate change effects, adaptations and financing of the same. The Declaration serves as a common position for the continent as we gear towards the 28th United Nations Climate Change Conference of Parties (COP28) and even beyond. The Declaration also proposes that the AU embraces a climate change theme for the years 2025 and 2026. It is a call to action and seeks to whip collective action on aspects such as reduction in emissions. This will be made possible through use of renewable energy, use of less fossil fuels and use of e-mobility (electric vehicles).

Amongst the matters discussed in the Summit, Green Hydrogen is being considered as an alternative source of energy and it is projected that it could provide a quarter of the EU's energy by 2050. It produces less Carbon (ii) Oxide (CO) and can be used as a perfect replacement as it stores energy for longer periods on top of producing less hazardous end products. This might be a slow but sure acceleration towards energy systems that will tackle climate change. Of note, Kenya and Germany entered into the Green Hydrogen Investment Pact which is a step that seeks to have Kenya fully implement 100% clean energy.

Other considerations include carbon trading, carbon pricing and carbon projects.

Carbon trading as an emission offset method will facilitate in reducing the GHG emissions and will be carried out using the results of mitigation actions from other businesses and/ or activities in order to compensate for the emissions of business actors created elsewhere. It will be undertaken vide carbon markets and emission reductions will be recorded and documented as required by the UN Framework Convention on Climate Change and other standard bodies. Emission trading in the carbon markets will entail there being set an emission cap/carbon budget for respective businesses and then those that meet or comply with the caps set will be issued with emission allowances.

With regard to carbon pricing, the term refers to the valuation of each GHG emission unit produced from human related activities.

Among the most pivotal mitigation measures in lowering carbon emissions provided for in the Declaration is having more carbon projects. The most common carbon project advanced by the previous and current regimes in Kenya has been tree planting exercises as increasing the forest cover goes a long way in helping to mitigate GHG effects and forests act as sinks through the carbon sequestration chain. The carbon projects that receive authorisation have to undergo an environmental impact assessment test in accordance with the Environmental Management and Coordination Act, 1999, as well as a community development agreement wherein public participation guidelines should be strictly adhered to and stakeholders in the national and county governments consulted.

The private sector has been earmarked as a key and pivotal player when it comes to climate change championing. Partnerships with the various companies will prove important towards achieving our targets through tree planting exercises and embracing of clean renewable sources of energy to enable reverse biodiversity loss off and on land, desertification, as well as restore degraded agricultural land. Aspects such as reduced emissions from deforestation and forest degradation, the role of conservation, sustainable management of forests and enhancement of forests carbon stocks in developing countries (REDD+) can easily be hastened if private sector players are involved.

The global call for carbon taxation will also go a long way in aiding combating climate change. This is a tax levied on businesses and industries that surpass the approved emission rate and, in the process, hamper the climate mitigation progress being made and do not employ the use of renewable energy. This can be effected both nationally and internationally through a global financial transaction tax which serves as a "robin hood" type of tax.

The Declaration further envisages implementation of various laws and policies which can be done through assistance of the international community increasing Africa's renewable energy capacity, maintaining the primary

energy intensive processing of the raw materials within the continent, transfer and sharing of environmentally sound technologies with the continent and a final call that trade related environmental tariffs and non-tariff barriers must be subjected to multilateral discussions and ought not to be unilateral.

However, though the Declaration is a well drafted and generally agreed upon document, certain vital aspects need to be addressed such as the Blue Economy and the role sustainable use of ocean resources plays in providing economic growth, improved livelihoods and ocean ecosystem health.

Considerations going forward

Decarbonizing the planet is one of the set goals in the SDG by 2050, and Kenya is firmly on track. It is estimated by the International Energy Association (IEA) that the global energy demand will increase by between 25% to 30% by 2040. Kenya is taking bold steps to ensure this mitigation process is considered urgent and effected as soon as possible. The National Environmental Management Authority has also revamped its registration of Environmental Impact Assessment Experts. Some of the considerations going forward include: -

- Licensing or issuing of permits to firms that seek to engage in carbon trading;
- Devising of a feasible formula to help determine the maximum international carbon trading quota so as to ensure trading of carbon credits does not negate the objectives of the Paris Agreement; and
- Establishing an international and bilateral certification standard to ease trading with other foreign companies and assist in accreditation.

All in all the Africa Climate Summit will enable the Continent, in one voice and intent, shift its focus to the 28th United Nations Climate Change Conference to be held later in the year. Africa will firstly seek to implement the Nairobi Declaration. The focus then shifts onto the transformation of climate financing to be able to meet more realistic targets and embrace newer deals on financing and thus bringing out grounds on which our regulations should be pegged on. However, the full implementation of COP27 first needs to be realised prior to making further proposals especially in regards to financing pledges, e.g. the \$100 Billion annual pledge made at COP15 in Copenhagen, due to the fact that most developing nations in Africa have a moderate and limited capacity to split revenue/funding and save some for climate change action and response.

In conclusion, this is a wake-up call as only 7 years remain to achieve the SDG goals of the 2030 Agenda and hence, steps towards such achievement need to be strategically expedited.

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