NR & CO. QUARTERLY

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EDITOR'S NOTE

Dear Reader,

2024, a year that holds lots of hope and promise. After the year we had last year, a new beginning presents with it new life, new opportunities and new chances to go at everything we desire again. Receive this rejuvenated spirit from the entire Njoroge Regeru & Company team and we hope to journey with you, side by side, all year long.

In this edition, we bring you on the first of many traditions that the Firm has committed to over the years- the journey of reflection by our legal trainees who have spent one rigorous year learning, training and honing their skills to call themselves Advocates.

In the Legislative Updates section, we discuss extensively the Primary Health Care Act, 2023 whose main aim is to provide a solid framework for the delivery of and access to primary health care across the country. More often than not, a 'serious' joke is always made that the way the healthcare in this country is set up, one is always a paycheck away from poverty.

It is for this reason that in this time and age of digitization, we talk about the Digital Health Act, 2023 that aims to push for the adoption of digital technology in healthcare with the aim of improving healthcare all around. The Newsletter also tackles the Facility Improvement Financing Act 2023 and the 'devil on every employer's and employee's shoulder' that is the Social Health Insurance Act, 2023. The case laws herein are worth a read before the contributors explore the ever changing area of law that is Intellectual Property (IP) and contractual terms, human rights vis-à-vis profitability of businesses amid the Palestine-Israeli War.

May our Newsletter remind you throughout the year, that you really are worthy and deserving on your bad days as you are on your best of days.

Noel Zetty,

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The Firm

Spotlight on the 2023 cohort of legal trainees at Njoroge Regeru & Company.

My time at NR&Co. has been a valuable exposure to litigation and corporate matters. I appreciate the opportunity to take ownership of cases through comprehensive interaction with case files and clients, as well as share my individual perspective. Above and beyond, the Firm's commitment to honesty and integrity in its practice, has left a lasting impact on my professional journey. I will definitely carry those values with me into the next chapter of my practice.

~ Maryann Njogu

Working at NR&Co. has been the highlight of my legal career so far. I have had the privilege to work with the most experienced advocates and staff members in the different areas of practice at the Firm. Through this experience, I have broadened my knowledge of the law and acquired new skills which have been refined over the 9 months at the Firm. The emphasis placed on values such as hard work, integrity and excellence is remarkable and has a lasting impact on anyone who is trained at this firm. Looking back, I am satisfied by and grateful for the training I got at NR&Co.

Dan Koskey ~

2023 Cohort

We are grateful to this year's group of legal trainees. Your hard work and dedication have brought you to this milestone. Embrace the opportunities ahead, continue learning, and make a positive impact in your chosen field. Best of luck on your journey!

My time at NR&Co. has been nothing short of momentous, I have experienced a monumental shift in my understanding of the law, transitioning from the theoretical realm to a blend of theory and top table practice. I have imbibed knowledge from the most robust legal minds and team of staff, this has been a life changing experience. I am well improved and will definitely be a great 'Wakili' because of this Firm. Forever grateful for the training received here at NR&Co!

~ Buluma C.N

My experience at NR&Co. allowed me to make meaningful contributions across multiple facets of the legal field, fostering both personal and professional growth. I was greatly inspired by the Firms' values of professionalism, accountability and a culture of continuous learning. I am immensely grateful for the support and mentorship provided by all the partners, associates, and staff members. Their belief in my abilities and willingness to share their knowledge empowered me to take on diverse responsibilities with confidence.

Christine Juma Amera ~

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Legislative UPDATES

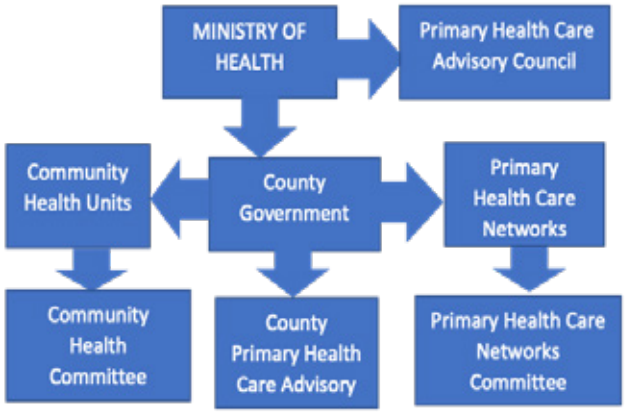
A number of activities have been undertaken in the legislative and regulatory sector this quarter:

On 19th October, 2023, his excellency the President of Kenya assented to four (4) Universal Health Coverage Bills. Universal Health Coverage is an established legal and institutional framework created to transform and empower healthcare in Kenya. The new health care Acts repeal the current National Health Insurance Fund (NHIF) Act, 1998 and in its place, establishes three separate funding models dedicated to Primary Health Care. The universal and quality healthcare is envisioned to be achieved through the following recently enacted Acts of Parliament: -

a) The Primary Health Care Act, 2023

This Act of Parliament seeks to provide a framework for the delivery of and access to primary health care across the country. The Act establishes elaborate primary health care networks and community health units at each county and sub-county level to ensure equitable distribution of resources and healthcare.

The Act, unprecedently establishes a primary healthcare workforce that includes community health promoters and providers and places the obligation on county governments to facilitate the delivery of services. In addition, County Primary Health Care Advisory Committees are established and mandated to facilitate the effective implementation of healthcare through effective mobilization and the development of primary healthcare service delivery. The management of the primary health care services is structured as follows: -



The structured management and network focuses on preventive and primary health care services and aims to transform service delivery into a patient-centred model, and improve the integration of health care.

b) The Digital Health Act, 2023

The Digital Health Act aims to adopt digital technology in health care with the aim of personalizing patient care, improving access to health data and information at all levels, enhancing health care quality and empowering communities through telemedicine. To facilitate the objective of the Act, a Digital Health Agency is established by the Act to develop and maintain a Comprehensive Integrated Health Information System, that will facilitate resource allocation and management and timely data collection and processing.

The Act classifies data into sensitive personal data, administrative data, aggregate health data, medical equipment data and research for health data. Under the Act, the Cabinet Secretary is responsible for developing a governance framework that will address the details of handling health data and ensure that data confidentiality, privacy and security is upheld.
Finally, the Act makes provision for an E-Health system of health care delivery through telemedicine, electronic health records, m-health, e-learning and telehealth.

While there are still gaps to be addressed including how the Cabinet Secretary for Health can ensure that data confidentiality, privacy and security is upheld, the Act also creates an opportunity for expansion of health information management.

c) The Facility Improvement Financing Act, 2023

Initially, before the enactment of this Act a majority of the revenue generated by many health centres and county hospitals was consolidated in the County Revenue Fund which meant that these facilities entirely depended on in-kind budgetary support from the county. The Facility Improvement Financing Act departs from this system and instead provides for health facilities to have financial autonomy to retain revenue collected through user fees among other resources, to cater for their immediate operating costs as needed. Under the facility improvement financing, the Act allows health facilities to open their own bank for payment of its finances and designates the Chief Officer responsible for health in the county as the accounting officer.

Finally, the Act details the role of the National Government in policy research and development to improve financing and sets out the role of the County Governments in supporting the implementation of facility improvement financing. The objectives of this Act if pursued, will help bolster public health facilities, provide financial and managerial autonomy, ensure better resource management, service quality and community development.

d) Social Health Insurance Act, 2023

The Social Health Insurance Act, 2023 repeals the National Health Insurance Fund (NHIF) Act, 1998 and in its place established the Social Health Authority with the aim of breaking down financial barriers to healthcare and address challenges that plagued the previous NHIF and expand health insurance coverage.

The Act reforms how health services are financed and delivered in Kenya, by extending health insurance to all Kenyans based on member contributions, and includes government-subsidized coverage for the poor. The Act establishes different health funds including:

i. **Primary Health Care Fund** - for purposes of purchasing primary health care services from health facilities;
ii. **Social Health Insurance Fund** - which every Kenyan is mandated to register; and
iii. **Emergency, Chronic and Critical Illness Fund** - to cover the costs of emergency treatment and defray the costs of management of chronic illness after the depletion of the social health insurance cover.

Under the Act, any child born after the commencement of the Act shall be registered at birth as a member of the Social Health Insurance Fund, while every other person registerable as a member under the Act shall provide proof of compliance as a precondition to access public services from national or county government entities.

In essence, a person shall only access such healthcare services if the Social Health Insurance Fund are up to date and active, any default on contributions shall attract a 2% penalty rate on the amount due and only upon payment of the outstanding contributions and penalties accrued before resuming access to health care services.

Finally, the Act provides that any person who defaults on the provisions of the Act on the contributions which they as an employer is liable to pay shall commit an offence liable to a conviction to a fine not exceeding 2 million or imprisonment to a term not exceeding three years or both. To that effect, a Dispute Resolution Tribunal is also established under the Act for the purpose of hearing and determining complaints from any person aggrieved by the provisions or decisions made under the Act.

If the objectives of this Acts are cumulatively achieved, it will facilitate proper resource allocation and management of the health sector in the country and ensure the progressive and equitable realization of universal health and the highest attainable standard of health as envisioned in our Constitution.

Privatization Act, 2023

On 9th October, 2023, the President signed the Privatisation Bill into Law, with the aim of encouraging more participation of the private sector in the economy by shifting the production and delivery of products and services from the public sector. To achieve this objective, the Act introduces several significant changes including: -

i. Institutional structure overseeing the privatization process from the Privatization Committee to the Privatization Authority, constituted as a body corporate empowered with all inherent rights, duties and responsibilities.
ii. The Cabinet Secretary for treasury has been tasked with the responsibility of formulating the privatization program in consultation with several task holders for approval by the Cabinet and ratification by the National Assembly. A role previously tasked with the Commission and subject to the sole approval of the Cabinet. The Act stipulates a 60 days' approval and ratification timeline from the date of tabling the program before parliament failure to which the program will automatically be ratified after 90 days.
iii. As regards Privatization methods, the Act eliminates concessions, leases, management contracts, public-private partnerships (PPPs) and liquidations as acceptable options. The Act retains Initial Public Offerings (IPOs) of shares, negotiated sales stemming from pre-emptive rights and introduces sale of shares by public tenders as approved privatization methods. However, under the Act the Authority retains the power to determine other methods subject to the approval of the Cabinet Secretary.

The Act extends the time frame of objections to be lodged with the Authority from 5 days to 15 days, with such objections being limited to issues relating to the implementation of the privatization program and actions of the Authority. In the event of dissatisfaction with the determination of the Authority, an appeal may be lodged with the Privatization Review Board within 15 days of the objection's determination.

As regards penalties and offences under the Act, any person found guilty of stipulated offences including provision of falsified information, valuations and insider trading, may be liable to a fine not exceeding Kshs. 5,000,000.00 or imprisonment for a maximum of two years or both. It is hoped that the initiation of the amendments in the Act will improve infrastructure and delivery of public services through the involvement of the private sector, capital and expertise.

case Highlights

Aliaza v Saul (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (24 June 2022) (Judgment) Aliaza v Saul (2022) KECA 583 (KLR)

In this decision of the Court of Appeal, Justices P. Kiage, M'Inoti, Mumbi Ngugi invoked equitable Principles in determining an issue that appertained the mandatory nature of acquiring consent from the Land Control Board before disposition of Land. The Appeal was filed to challenge the decision of the Environment and Land Court (ELC) dated 20th January 2017 wherein the ELC ordered the Appellant to vacate and leave a parcel of land that had been Registered in the name of the Respondent within a period of three months failure to which he was to be evicted.

It was further held by the Environment and Land Court (trial Court) that the contract for the Sale Suit Property between the Appellant and the Respondent was void for lack of consent of the Land Control Board.

The Appellant filed a Notice of Appeal wherein they raised grounds that the Appellant had entered into a written Agreement for the Sale of Land on 16th September, 2002 and another on 4th October, 2004 and further challenged the ELC Judgment on the basis that the trial Judge erred in law and fact in failing to find that the Respondent persistently and without reasonable cause refused to procure the consent of the local Land Control Board within the statutory period of six months pursuant to the mandatory provision of Section 8 of the Land Control Act.

The Appellant filed supplementary grounds of Appeal in which he cited failure to consider and determine all the issues raised in evidence, failure to take into consideration matters that he ought to have taken into consideration and taking into consideration matters which he ought not to have taken into consideration in coming up with the decision.

Further, it was cited that the trial Court erred in law and fact and thereby misdirected itself in arriving at the finding that the Agreement entered into between the Appellant and Respondent over the suit land was unenforceable, null and void for lack of Land Control Board consent.

By an undated plaint filed in Court, the Respondent sought orders of eviction and general damages against the Appellant on the ground that the transaction between the parties was null and void for want of Land Control Board consent. The Appellant took possession of the suit property and put up a seven roomed permanent house; that he has a borehole, store, ablution block among other structures and amenities.

Under Section 7 of the Land Control Act, consideration paid for a transaction which becomes void is recoverable as a debt subject to Section 22 of the same Act. An application for consent is made under Section 8 (1), which requires that the application for consent should be made in the prescribed form within six months of the making of the agreement.

In coming up with its determination the Court of Appeal relied on *Macharia Mwangi Maina and William Kipsoi Sigei v Kipkoech Arusei & another* which held that the trial judge had erred in failing to apply the concept of **Constructive Trust** and the doctrine of **equitable estoppel** in the matter before it. It is not a statute aimed at aiding unconscionable conduct between the parties. It is in this context that the doctrine of constructive trust comes into play to restore property to the rightful owner and to prevent unjust enrichment. It prevents unconscionable conduct and ensures one party does not benefit at the expense of another.

The Court of Appeal held that failure on the part of the Respondent to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable the Appellant transfer the suit land into his name does not render the transaction void. a constructive trust in his favour was created in respect of the land equity and fairness, the guiding principles in Article 10 of the Constitution, require that the Land Control Act is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party in the position of the Appellant.

Centurion Engineers & Builders Limited v Kenya Bureau of Standards

Centurion Engineers & Builders Limited v Kenya Bureau of Standards (Civil Appeal E398 of 2021) [2023] KECA 1289 (KLR) (27 October 2023) (Judgment) Coram: Dr K.I Laibuta, G.W Ngenye, H.A Omondi

A dispute arose, which necessitated reference to arbitration as the parties had not agreed on the execution of the supplementary agreement with KBS taking the view that the supplementary agreement had two components, one for extra works and the other constituting variation of the original contract. On the other hand, Centurion was of the view that the supplementary agreement was not as was suggested by KBS, and that any necessary variations upon completion of the project would be addressed accordingly. Centurion carried out the works, including the variations and completed the project in July 2010, and, upon completion, KBS declined to pay, resulting in Centurion filing suit in the High Court.

A statement of claim was filed for as much higher sum despite a plaint having already been filed. KBS was of the opinion that the claim presented for determination by the Arbitrator was different and outside the scope of the dispute

referred to him by the Court. The hearing proceeded, and the Arbitrator made an award dated 28th November 2013. KBS was aggrieved and moved to the High Court to set aside and/or vary the said Arbitral award. In its ruling of 26th June 2014, the High Court allowed the Application and remitted the matter to the arbitrator. It was after the second referral that the current award was made.

What was presented before the High Court Tuiyott, J. as he then was) were two applications, one dated 9th June 2015, which sought to set aside the arbitral award, and the other application dated 10th August 2015 sought to have the arbitral award recognized and adopted as a judgment of the Court. The learned Judge set it aside as the outcome would substantially determine whether or not the High Court would enforce the award.

The High Court also held that the Court must subject the Arbitrator's finding to its own independent evaluation or else awards would never be subject to review under Section 35(2)(b)(ii) of the Act. Consequently, the High Court allowed the application dated 9th June 2015 and set aside the arbitral award, citing non-compliance with Section 47 of the Public Procurement and Disposal Act (PPDA)(now repealed) as read with regulation 31 of that Competition Act, in dismissing the application dated 10th August 2015.

The Appellant in their memorandum of Appeal challenging the judgment of the High Court was majorly premised on whether the award was contrary to public policy.
As the Court has severally stated, and now a longstanding principle of law, that parties to contract are bound by the terms and conditions thereof, and that it is not the business of Court to rewrite such contracts.

In *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd [2002] 2 EA 503 [2011] eKLR at 507*, this Court stated: "A Court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved."

The Court of Appeal was persuaded that the variation was arrived at by mutual agreement and meeting of the minds. A reading of the Supplementary Agreement clearly showed that, indeed, there was a variation of the original contract in terms of additional works to the original contract, with the exact amount of each additional work indicated alongside it. The Supplementary Agreement was also clear that, upon completion, the work would be measured and evaluated by the Ministry of Works, and that any necessary variations would be addressed accordingly.

Consequently, the Court of Appeal held that the issue as raised by the Respondent on the contravention of the PPDA was a mere afterthought aimed at avoiding liability of its contractual obligations. It is not disputed that the Appellant indeed carried out and completed the additional works as instructed, and handed over the project to the Respondent, who has since taken possession of the premises for its day-to-day business without paying the Appellant the contractual sums due. The Court agreed with the Appellant that it is indeed entitled to the value for work done under the contract as mutually agreed upon by the parties.

The Court was not persuaded by the Respondent's that the arbitral awards were contrary to public policy, as it is on the record that the Respondent being a public entity used a private document whilst engaging the Appellant to undertake works for it. The Respondent was seen to be seen to be hiding under the provisions of the PPDA, yet it was never referred to in the contract between the parties. The Respondent being a public body ought to have governed itself as such and not shift goal posts.

Makini School Limited v Competition Authority of Kenya (Tribunal Case 011 of 2021) [2023] KECT 466 (KLR) (Civ) (29 August 2023) (Judgment)

This appeal arises from a series of events which took place between September 2017 and April 2019. The Appellant is a group of schools which aim to provide quality education at an affordable cost. The Appellant originally comprised of four (4) campuses, two (2) of which are located on Ngong Road and State House Avenue in Nairobi; and another two (2) in Kisumu at Migosi and Kibos campuses. In 2018, following the acquisition of the Appellant (an education provider operating schools in Africa), the Appellant sought to expand its Kisumu campuses and began scouting for premises.

The Respondent found that these were transactions requiring approval of the Respondent within the meaning of Section 42 of the Competition Act. The Respondent requested the Appellant to furnish it with the Appellant's 2018 audited accounts to facilitate calculation of the penalty provided for under Section 42 (6) of the Act and issued a penalty of a penalty of Kshs 36,199,380.95 as shown in letter from the Respondent dated 26th July 2021. The penalty was subsequently reduced to Kshs.7,239,876 after mitigation by the Appellant.

There was an appeal based on the Respondent's (Authority) finding that there was an illegal M&A the Authority held that the Appellant took up an operational school thus effectively becoming an M&A (Merger and Acquisition). The Appellant signed a lease in March 2019 but entered the school complex in 2018. The lease in favour of Bhayani school was still operational and valid when the Appellant entered the school complex. Consequently, the business of Bhayani School had been transferred to the Appellant.

By a letter dated 15th March 2019, the Appellant offered pupils of Bhayani School admission with the Appellant at the same fee the students had been paying at Bhayani School. Final year students at Bhayani School and their teachers were accommodated within the Appellant to avoid inconveniences and disruption to the learning activities.

11 members of Bhayani School staff were subsequently offered employment with the Appellant and the School Complex has since been rebranded to Makini School and the Bhayani School is now operating as the Appellant.

The Authority listed issues for determination as follows:

- Whether there was a merger between the Appellant and Bhayani School;
- Whether proof of payment of consideration is a mandatory requisite for proof of implementation of a merger;
- Whether the Appellant is in breach of Section 42 (2) of the Act;
- Whether the financial penalty imposed by the Respondent on the Appellant is justified;
- Who bears the cost of this Appeal?

Section 2 of the Competition Act describes a merger as an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover. It further defines an undertaking as any business intended to be carried on or carried on for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or provision of any service and includes a trade association.

It was the Court's considered view that in 2019 when the Appellant took over the School Complex, Bhayani School was an operational undertaking. The Administrators of Mr. Narandas' Estate continued to operate Bhayani School as a business even after his death. The Appellant relied on the Notice to Vacate issued to Bhayani School by the Landlord to illustrate that Bhayani School was in the process of ceasing operations by the time the Appellant took over the School Complex.

In view of the foregoing, and the evidence on record, that as of 2019 when the Appellant took over the School Complex, Bhayani School was not in the process of winding up as suggested by the Appellant. On the contrary, Bhayani School (now hereinafter referred to as the Target) was a fully operational undertaking and thus capable of being acquired.

It was the Tribunal's considered view that customers are the ultimate asset for any profit-making organisation. Students are the customers in a school and remain the main continuous revenue stream for any school that is run as a business. The Tribunal was not persuaded by the Appellant's argument that students being natural persons cannot be classified as assets of a school.

It was the Tribunal's considered view that the execution of the lease by the Appellant, by itself, would not have constituted an acquisition of an asset that would trigger the provisions of the Act. In this appeal, however, this was not the case as there were other activities, namely the retention of former teachers and students of the Target.

In conclusion, the Authority found that the Appellant did not just acquire bare assets of the Target. The students and teachers of the Target collectively constituted an enterprise; the enterprise just changed ownership and control from the Target to the Appellant. The assets were not fractured but continued to be used in combination. The student(candidates)in the Target School continued to learn under their old teachers to avoid disruption as they prepared for their final exams.

The Authority concluded that the Target was an undertaking capable of being acquired at all material times. Students and Teachers of the Target were assets capable of being acquired by the Appellant. The said Students and teachers were in fact acquired by the Appellant. The Target by declaring their status redundant severed the legal link but the economic link was not terminated. The students and teachers were not bare assets but constituted an enterprise and therefore the Appellant in acquiring them took control of a going concern. Therefore, the acquisition of the Target's business constituted a merger within the meaning of Sections 2 and 41 of the Competition Act.

The Appellant argued that the Respondent did not demonstrate that the Appellant paid consideration in respect of the transaction. The Appellant relies on Section 42 (4) of the Competition Act which provides: **Payment of the full purchase price by the acquiring undertaking shall be deemed to be implementation of the merger in question for the purposes of this Section, and payment of a maximum down payment not exceeding twenty percent of the agreed purchase price shall not constitute implementation.**

The Respondent argued that proof of payment is not necessary to prove whether a merger has occurred or not. A reading of Section 2 on the definition of a merger and of Section 41 (2) (a) and (b) of the Act, do not refer to payment of the purchase price as a prerequisite fora merger to have occurred. It was the court's finding that once the parameters outlined there, a merger will be deemed to have taken place.

The Tribunal's understanding of Section 42 (4) is that payment of at least 20% of the purchase price, under a merger transaction, would constitute implementation of a merger even where the outcomes contemplated in Section 2 and Section 41 (2) are intended by the Parties but are yet to materialise.

Having determined that there was a merger, and the approval of the Respondent was not sought, the Tribunal held that the Appellant was in violation of the provisions of Section 42(2) of the Act. Whether the financial penalty imposed by the Respondent on the Appellant is justified. Having determined that the Appellant was in violation of Section 42 (2) of the Act, the court found that penalty imposed by the Respondent was justifed as per the provisions of Section 42 (6) of the Act.

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I think I made too many New Year's resolutions this year. It took me almost a full day to break them all.

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CONTRIBUTORS' PLATFORM

THE INTERPLAY BETWEEN COPYRIGHT OWNERSHIP (INTELLECTUAL PROPERTY), CONTRACTS OF SERVICE AND CONTRACTS FOR SERVICE

Dan Koskey
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Intellectual Property ("IP") refers to a specific type of property that the human mind creates. It is regarded as the recognition, protection and promotion of the work or the product of the mind and of human creativity embodied in tangible form. The broad categories of intellectual property include: Copyright; Patents; Trademarks; Trade Secrets; Industrial Designs; and Utility Models.

In this article, we focus on Copyright law and examine Copyright ownership in relation to copyrightable works created in the course of employment vis-a-vis those created by independent contractors (commissioned works).

Intellectual Property law generally creates exclusive rights in a wide range of things, from novels, computer programs, paintings, films, television broadcasts, performances, through to dress designs, pharmaceuticals and genetically modified animals and plants. These exclusive rights can be categorized into:

i. **economic rights** – which allow the copyright holder to make money from their work(s). The benefits include the right to: reproduce work in different forms, distribute copies of the work, publicly perform, broadcast or through other means communicate the work to the public, translate work into other languages and adapt work such as turning a novel into a movie; and
ii. **moral rights** – which are only conferred on a natural person who creates a particular piece of work. Moral rights allow an author to identify himself or herself as authors of the work and to reject any changes to their work that would harm their reputation.

Only the owner of the specific IP enjoys the exclusive rights guaranteed by the law except where the owner has transferred these rights through an assignment or where the owner permits another person to use his or her IP through licensing. Notably, only economic rights can be transferred by the owner during the owner's lifetime. Moral rights vested in the owner of any copyrightable work can only be transferred upon the death of the author through Wills or by the operation of the law.

Legal Framework for Copyright Protection

There are two main legislations that deal with Copyrights in Kenya, namely: -

a. The Copyright Act, 2001 (as amended in 2022) ("the Act")
b. The Copyright Regulations, 2020.

The Act defines Copyright as a set of exclusive rights granted by law to original authors of literary, musical, artistic and audio-visual works. The act also provides that sound recordings and broadcasts are eligible works for copyright protection.

An author is the individual who created the work. Nonetheless, the owner of copyrightable work can be different from the author of the copyright. It is important to establish who the owner of the Copyright is because it is the owner who holds the legal right to exercise and use the economic rights explained earlier.

In this Article, we shall focus on Section 31(1) of the Act which provides for the 'first right of ownership' as follows:

"Copyright conferred by Sections 23 [by Country of origin] and Section 24 [by National residence] shall vest initially in the author:
Provided that where a work—

a. is commissioned by a person who is not the author's employer under a contract of service; or
b. not having been so commissioned, is made in the course of the author's employment under a contract of service.

The copyright shall be deemed to be transferred to the person who commissioned the work or the author's employer, subject to any agreement between the parties excluding or limiting the transfer."

The above provisions mirror the broad principles of the interrelationship between Authorship and Ownership of Copyrightable work. Authorship and Ownership have long been closely intertwined in Copyright law. Ordinarily, authors are the first owners of Copyright. However, the rule that Copyright initially vests in the author is subject to a number of exceptions.

As mentioned, this article focuses on two instances in which these exceptions arise. These are:

i. Copyright created in the course of employment (under a Contract of Service).
ii. Copyright created where someone commissions another to make a work (under a Contract for Service).

For context, a contract of service refers to an employment relationship whereas a contract for service involves independent contractors. The distinction between these two types of contracts has significant implications in determining the ownership, rights and liabilities associated with copyrighted materials as we explain below:

i) Contract of service (copyright created by employees)

A contract of service refers to an employment agreement between an employer and an employee. Under this kind of contract, the employee operates under the authority and supervision of the employer.

In employment relationships created by contracts of service, and where an employee produces work that is eligible for copyright protection as part of his or her job responsibilities, the employer typically assumes ownership of the copyright by default. This means that the employer holds the exclusive rights to reproduce, distribute, display and modify the copyrighted work.

The Court of Appeal articulated the above position in *Mount Kenya Sundries Limited vs Macmillan Kenya (Publisher) Limited [2016]* eKLR as follows:

"An author may produce copyright material in the course of his or her employment or may produce such material under the control or direction of an organization. In that event, it is the employer or the organization which owns the copyright in the material so produced."

ii) Contract for service (copyright created by independent contractors/commissioned works)

This relationship is established through an independent contractor agreement or freelance agreement. Such agreements define the terms and conditions under which the independent contractors provide specific services or complete a project for the client. In the context of Copyright law, a contract for service is important because it determines ownership of copyrightable works created by the independent contractor.

Kenyan law is more favorable toward the commissioner of a work for hire. The Copyright Act provides that in a commissioned work, the copyright is deemed to transfer to the commissioner of the work unless there is an explicit agreement to the contrary. For instance, in the case of a verbal contract commissioning a work with no mention of ownership, the commissioning party owns the copyright. Further, in the case of a written contract commissioning a work with no mention of ownership, the commissioning party owns the copyright. In both cases, however, the moral rights remain with the author.

In Donald Muhonda Andolo vs Pinnacle Developers Limited & 3 others [2021] eKLR, the High Court adopted a literal interpretation of Section 31 of the Copyright Act. The Court's view was that commissioned work belongs to the person who commissioned the work.

Additionally, in certain circumstances, the Courts may infer that an independent contractor is subject to an implied obligation to assign the copyright to the commissioner. This may give rise to a trust with respect to the copyright in the commissioned work and render the commissioner the equitable owner. This position was espoused in R. Griggs Group vs Roben Footwear.

CONCLUSION

The rule that first ownership of Copyrightable work belongs to the author has two significant exceptions. First, where Copyrightable work is created in the course of employment, the copyright is owned by the employee. Second, in instances where Copyright is created in commissioned work, the Copyright is deemed to have been transferred to the Commissioner.

NAVIGATING THE CHALLENGES OF BRAND AMBASSADORS AND POLITICAL COMMENTARY IN THE WAKE OF THE ONGOING PALESTINE-ISRAELI CONFLICT

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A brand ambassador is an individual usually a public figure, celebrity or influential personality engaged by an organization or company ("brand") to represent, promote and market the brand in a positive light. A key characteristic of brand ambassadors is that they utilize their influence and credibility to build consumer awareness, enhance credibility and create trust and consumer loyalty. As a result, they are seen to embody the values and image of the related brand.

The principle of autonomy of parties to a contract stand as a cornerstone, allowing parties to freely negotiate and determine the terms of their engagement. However, this autonomy can be limited by several factors. Many brand ambassadors find themselves bound by contractual clauses that restrict their ability to engage in political commentary, limiting their expression on specific issues.

In this article, we highlight one such tension by viewing the predicament of brand ambassadors facing contractual constraints, imposed by the brands they represent, that restrict their ability to comment on sensitive geopolitical issues raises compelling questions about the ethical implications of such clauses and their impact on business profitability and reputational risks.

The ongoing Palestine-Israeli conflict serves as a poignant backdrop to the complex interplay between contractual autonomy, business profitability, and the moral responsibility of individuals to engage in social and political discourse.

Autonomy of Contracts: A Foundation for Business Transactions

Freedom of contracts is a fundamental principle that empowers parties to freely enter into agreements, defining the terms and conditions that govern their relationship. This principle allows for flexibility, adaptability, and innovation in contractual relationships, enabling businesses to structure agreements that best serve their interests. However, the unfettered exercise of contractual autonomy may clash with broader societal values, as seen in the ongoing Palestine-Israeli conflict.

The Geopolitical Quandary: Brand Ambassadors Caught in the Crossfire

The current geopolitical landscape has witnessed an outpouring of emotions and opinions on the Palestine-Israeli conflict. Social media, a powerful tool for disseminating information and influencing public opinion, has become a battleground for expressions of solidarity, condemnation, and activism. This environment has placed brand ambassadors, individuals with significant social media followings and influence, in a precarious position.

Profitability vs. Social Responsibility: A Delicate Balance

Businesses, particularly those with a global reach, face a delicate balancing act between preserving their profitability, duty to shareholders and stakeholders, as well as preserving the reputation of the organization vis a vis fulfilling their social and moral responsibility. While contractual restrictions on brand ambassadors may be designed to insulate businesses from controversy and maintain a neutral public image, the evolving expectations of consumers demand more from corporate entities.

Consumers increasingly seek brands that align with their values and demonstrate a commitment to social responsibility and ethical values. In this context, the silencing of brand ambassadors on pressing global issues may not only be viewed as a failure to contribute to societal discourse but also as a missed opportunity for businesses to showcase their commitment to ethical practices.

Potential Legal Remedies: Redefining Contractual Terms

The challenge lies in finding a middle ground that respects contractual obligations and allows for individuals to exercise their right of freedom of expression while allowing brand ambassadors and public personas to engage in meaningful social and political discourse.

Article 33 of the Constitution of Kenya, 2010 provides that every person has the right to freedom of expression which includes: the freedom to seek, receive or impart information or ideas; freedom of artistic creativity; and freedom of scientific research. However, this freedom does not extend to: freedom to spread propaganda for war; incitement to violence; hate speech; or advocacy for hatred that vilifies others or discriminates.

The Constitution therefore underpins the right to freedom of expression by stating that 'every person shall respect the rights and reputations of others.

With these legal parameters in place, legal professionals may explore avenues within existing contract law frameworks to strike a balance that preserves business interests without stifling individual expression.

One potential solution is to revisit and revise the contractual terms governing brand ambassador relationships. Parties can work together to establish guidelines that permit commentary on geopolitical issues in a manner that aligns with the values and interests of both the organization or brand and the ambassador or public persona affiliated to the brand.

Clear and carefully crafted contractual provisions and policies can provide a roadmap for navigating the complexities of political expression while safeguarding the reputation and profitability of the business.

Conclusion

While autonomy of contracts remains a bedrock principle, its application must be tempered with a nuanced understanding of the broader societal context. Businesses and legal experts must collaborate to redefine contractual terms, allowing brand ambassadors the latitude to contribute to essential conversations while safeguarding the interests of all parties involved.

In navigating these challenges, legal professionals play a crucial role in shaping the future of such contractual relationships, fostering a business environment where autonomy coexists harmoniously with social responsibility. As the world grapples with pressing geopolitical issues, the legal community must lead the way in crafting solutions that transcend the dichotomy between profitability and ethical engagement, ensuring a more inclusive and responsible future for businesses in the global arena.

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