

# NR & CO.

## QUARTERLY

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# EDITOR'S NOTE

## Dear Reader,

As we bid farewell to the year 2024, we're pleased to share our last quarter Newsletter—a reflection on milestones, updates, and stories that set the stage for a promising 2025.

We begin with celebrating the Firm's achievements in the last quarter, that is our participation in the Standard Chartered Marathon and partnering with Safaricom PLC for a tree-planting initiative. These moments highlight our commitment to community, sustainability and teamwork.

In **Legislative Updates**, we cover the tax and business laws that commenced on 27th December, 2024 as well as the Capital Markets Authority's reforms focusing on director independence, governance codes, and tenure limits, reshaping Kenya's financial landscape and positioning the country as a regional leader.

The **Case Highlights** section shares key legal stories, including the Mwangi v ABSA bank case on unfair termination of employment and the Daljit Singh Dhanjal v Commissioner of Domestic Taxes ruling on Capital Gains Tax for inherited property.

Our **Contributors' Platform** offers insightful analyses, including reflections on the separation of powers in Kenya's democracy, the fight for fairness in internships across various professions, an insight into customary marriages and the consequences of failing to register a customary marriage.

As you read, we hope you find inspiration and insights. 2024 has been a year of growth and impact, and we're grateful that you have walked this journey with us.

Wishing you a joyful and a prosperous 2025!

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# The Firm

Welcome to Q4 Newsletter! We are delighted to share our holiday wishes and this quarter's legal briefs.

## Festive Cheer & Community Impact

This season, our team proudly participated in the Standard Chartered Marathon, running to support meaningful causes and embodying the spirit of community and teamwork.

Additionally, some of our staff members, in collaboration with Safaricom PLC, turned their hands to nature, participating in a tree-planting initiative aimed at environmental conservation.

In this edition, we celebrate these milestones, the contributions of our incredible team, and the collaborative spirit that defined our year.

As we bid farewell to 2024, we wish you a New Year brimming with joy, purpose, and success.



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Nairobi Marathon





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# Legislative UPDATES

## THE BUSINESS LAWS (AMENDMENT) ACT, 2024

The Business Laws (Amendment) Bill was assented to on 11<sup>th</sup> December, 2024 and the resultant Act commenced on 27<sup>th</sup> December, 2024.

**Penalties:** The Business Laws (Amendment) Act stipulates that the Central Bank of Kenya may prescribe penalties to be paid by institutions that fail to comply with its directions or the prudential guidelines provided that in the case of: -

- an institution or credit reference bureau, such penalty shall not exceed Kshs.20,000,000.00 or three times the gross amount of monetary gain made or loss avoided, whichever is higher;
- a corporate entity, the penalty should not exceed Kshs.3,000,000.00; and
- a natural person, the penalty should not exceed Kshs.1,000,000.00.

**Minimal Capital Requirements:** Every bank or mortgage finance company is required to maintain a core capital of at least Ten Billion Kenya Shillings save that the compliance dates are as follows: -

| Date                            | Kshs (Billion) |
|---------------------------------|----------------|
| 31 <sup>st</sup> December, 2024 | 1.0            |
| 31 <sup>st</sup> December, 2025 | 3.0            |
| 31 <sup>st</sup> December, 2026 | 5.0            |
| 31 <sup>st</sup> December, 2027 | 6.0            |
| 31 <sup>st</sup> December, 2028 | 8.0            |
| 31 <sup>st</sup> December, 2029 | 10.0           |

**Non- Deposit Taking Credit Business:** The Act deletes terms relating to digital credit business and introduces terms related to 'Non- Deposit Taking Credit Business' which term, in itself, is defined as: -

- granting of loans or credit facilities, whether or not digitally, to members of the public or a section of it, with or without interest, and either secured or unsecured on the goods or assets purchased;
- asset financing whether directly or through a third-party financier;
- buy now pay later arrangements but does not include hire purchase agreements;
- credit guarantees;
- pay as you go arrangements;
- peer to peer lending under collective investment schemes

The Central Bank of Kenya has the power and mandate to regulate non-deposit taking credit providers including registration of such providers, determining the parameters for pricing of credit and prescribing an enforceable code of conduct binding all non-deposit-taking credit providers in their conduct of business.

## THE TAX LAWS (AMENDMENT) ACT, 2024

The Tax Laws (Amendment) Act amends the Income Tax Act, Value Added Tax Act, Excise Duty Act and the Miscellaneous Fees and Levies Act. The corresponding Bill was assented to on 11<sup>th</sup> December, 2024 and the resultant Act commenced on 27<sup>th</sup> December, 2024.

Some of the salient provisions introduced by the Act include:

- Raising of the limit of employment or services' benefits to which tax is not chargeable from Kshs.36,000.00 to Kshs.60,000.00;
- Revision of the value of tax-free meals to the first Kshs.60,000.00 in respect of meals served or supplied by an employer to employees in a canteen or cafeteria operated or established by the employer or a third party who is a registered taxpayer;
- Exclusion of the following gains or profits from tax: -
  - Reimbursements: any amount paid to a public officer pursuant to any written law or statutory instrument, with effect from 27<sup>th</sup> July, 2022 to reimburse an expenditure incurred for the purpose of performing official duties, notwithstanding the ownership or control of any assets purchased;
  - an amount not exceeding Kshs. 360,000.00 [revised from Kshs.240,000.00] for each year of service paid by an employer into a registered pension scheme
- Introduction of the Significant Economic Presence Tax which is a tax payable by a non-resident person whose income from the provision of services is derived from or accrues in Kenya through a business carried out over a digital marketplace. A non-resident person is considered to have a significant economic presence where the user(s) of its services is located in Kenya.
- Inclusion of the housing levy, contributions to a post-retirement medical fund (subject to a limit of Kshs.15,000.00 per month) and contributions made to the Social Health Insurance Fund as part of the deductions in computing for a year of income the gains or profits chargeable to tax;
- Removal of family trust income from amongst the tax exemptions; the principal sum of a registered family trust however remains exempted from tax.

## THE TAX PROCEDURES (AMENDMENT) ACT, 2024

The Tax Procedures (Amendment) Bill was assented to on 11<sup>th</sup> December, 2024 and the Act commenced on 27<sup>th</sup> December, 2024. Amongst the changes introduced is a clarification on the contents of an electronic tax invoice. Accordingly, the Act stipulates that an electronic tax invoice should include: -

- a) the words "TAX INVOICE";
- b) the name, address and Personal Identification Number of the supplier;
- c) the name, address and Personal Identification Number, if any, of the purchaser;
- d) the serial number of the tax invoice;
- e) the date and time which the tax invoice was issued and the date and time which the supply was made, if it is different from the date the tax invoice was issued;
- f) the description of the supply including quantity of the goods or the type of services;
- g) the details of any discount allowed at the time of supply;
- h) the consideration for the supply; and
- i) the tax rate charged and total tax amount of tax charged

### Additionally: -

Transactions to which a Personal Identification Number (PIN) is required, have been revised to include registration of an employee working remotely outside Kenya for an employer in Kenya save for an employee outside Kenya working for the national carrier;

In computing the period for lodging a tax objection to the Commissioner General or an appeal to either the Tax Appeals Tribunal, High Court or the Court of Appeal, the Act stipulates that the time computation shall not include Saturdays, Sundays or public holidays.

## KEY CHANGES IN CORPORATE GOVERNANCE FOR LISTED COMPANIES IN KENYA

### Introduction

In December 2023, the Capital Markets Authority (CMA) of Kenya introduced landmark regulatory changes aimed at bolstering governance standards across the nation's capital markets. The gazette of the Capital Markets (Public Offers, Listings and Disclosures) Regulations, 2023 (POLD Regulations) and the Capital Markets (Collective Investment Schemes) Regulations, 2023 (CIS Regulations) marked a significant evolution in Kenya's financial landscape. These reforms focus on transparency, accountability, and reducing conflicts of interest in Kenya's corporate governance structures, particularly affecting publicly listed companies and collective investment schemes.

In August 2024, the CMA released Circular No. 06/2024, which provided further clarity on the application of these regulations. This circular was critical in addressing uncertainties that stakeholders had raised regarding the practical implementation of governance reforms. The goal of these clarifications is to ensure a seamless transition into the new regulatory framework, fostering confidence among investors and bolstering Kenya's position as a financial hub in East Africa.

### 1. Independence of Fund Managers from Trustees and Custodians

The CIS Regulations, 2023 introduced new rules governing collective investment schemes, including provisions to enhance the independence of fund managers, trustees, and custodians. This separation of roles aims to ensure that industry players act in the best interest of their clients without undue influence from other players.

The regulations mandate that these entities be separate corporate bodies to avoid conflicts of interest. However, the rules allow a trustee and custodian to be the same entity as long as they establish internal safeguards to prevent conflicts. This change is essential for enhancing the transparency and accountability of Kenya's growing collective investment scheme sector.

### 2. Executive Directors and Corporate Accountability

The role of executive directors is reaffirmed in the new regulations, emphasizing their dual function in both management and strategic decision-making.

Executive directors, who are also responsible for the company's day-to-day operations, play a pivotal role in shaping corporate strategy while ensuring that business objectives are met efficiently.

This clarification aligns with the global standards of governance, where executive directors are critical to bridging operational functions with strategic leadership, ensuring seamless decision-making processes within a company's boardroom.



### 3. Transition Period for Collective Investment Schemes

The CIS Regulations, 2023 provide for a 12-month transition period for existing collective investment schemes to align their practices with the new governance standards.

This transition period is crucial for enabling firms to restructure their governance frameworks, reporting systems, and operational models to meet the updated regulatory requirements.

During this time, companies are expected to review and adjust their compliance programs, ensuring that their internal policies reflect the new regulations. The phased approach allows businesses to gradually integrate these changes without causing disruption to their operations or market activities.

### 4. Strengthening Non-Executive Director Requirements

Under the POLD Regulations, there is a renewed focus on the independence of non-executive directors, who are tasked with ensuring objective oversight of corporate decision-making processes.

The regulations stipulate that non-executive directors cannot hold executive or employee positions in related entities to avoid conflicts of interest.

This restriction ensures that non-executive directors remain impartial in their board roles, allowing them to focus solely on the interests of shareholders and stakeholders. However, the CMA's clarification does offer some flexibility, permitting non-executive directors of subsidiaries or affiliates to serve on the parent company's board, provided their involvement does not present a conflict.

### 5. Enforceability of the Corporate Governance Code

One of the most significant developments under the POLD Regulations is the enforceability of the Corporate Governance Code for Issuers of Securities to the Public, 2015. While there had previously been uncertainty about whether compliance with the Code was mandatory or voluntary, the new regulations have firmly established its mandatory nature.

This change is designed to promote greater consistency across Kenya's capital markets, ensuring that all publicly listed companies adhere to the same set of governance standards. In cases where conflicts arise between the Corporate Governance Code and the new POLD Regulations, the regulations will take precedence, reinforcing the need for businesses to be fully compliant with the revised governance framework.

### 6. Tenure Limit for Independent Directors

A critical governance reform introduced by the POLD Regulations is the reduction of the maximum tenure for independent directors from nine years to six years. After six years, independent directors must be re-designated as non-executive directors, maintaining the diversity and independence of boards.

This reform is designed to prevent long-term entrenchment, ensuring that board members continue to bring fresh perspectives and independent judgment. The rule applies to new appointments, while existing independent directors can complete their current terms. For sectors like banking, where independence is critical to regulatory compliance, companies will need to ensure that board composition aligns with these new requirements.

## Conclusion

The CMA's efforts to overhaul governance standards within Kenya's capital markets through the POLD and CIS Regulations, 2023, are a significant leap forward in fostering transparency, accountability, and investor confidence. These clarifications, provided in Circular No.06/2024, offer valuable guidance for companies navigating the new regulatory framework. As businesses adapt to the changes, it is hoped that they will enhance the integrity of Kenya's financial sector, making it more attractive to both local and international investors.

By reinforcing corporate governance norms, particularly through the strict implementation of independent director tenure limits, enforceability of governance codes, and separation of roles in collective investment schemes, Kenya is positioning itself as a regional leader in financial regulation. These regulations set a strong precedent for other markets and will likely influence broader governance reforms across various industries.



# case Highlights

## MWANGI V ABSA BANK KENYA PLC (CAUSE E065 OF 2023)

On 1<sup>st</sup> October, 2024, Judge M. Mbaru of the Employment and Labour Relations Court in Mombasa delivered a compelling judgment in the case of Thomas Macharia Mwangi v ABSA Bank Kenya PLC. This case revolved around the claimant, Mwangi, who had served as a branch manager and was later promoted to Senior Branch Manager. His career took a dramatic turn when he was suspended on 17<sup>th</sup> March, 2023 over allegations of granting unauthorized overdraft facilities to clients, specifically INO Safinah Petroleum and DM Kanyi.

After internal investigation, the bank concluded that Mwangi had violated its lending policies, which led to his termination on 26<sup>th</sup> May, 2023. Mwangi argued that his suspension and termination were not only unfair but also malicious, severely damaging his professional reputation. He sought compensation for unpaid bonuses, salary increments and damages for character assassination.

Judge Mbaru addressed the following critical issues: -

- 1. Termination of Employment:** The court found that Mwangi had indeed engaged in unauthorized transactions, including advancing overdrafts and making personal deposits to settle mortgage arrears for a client. These actions directly contradicted the bank's lending policies, justifying the decision to terminate his employment.
- 2. Violation of Constitutional Rights:** The court made a significant ruling regarding Mwangi's right to privacy. It found that ABSA Bank had infringed on his right to privacy by hiring private investigators to monitor him during his suspension. The investigations, which pertained to Mwangi's personal life, were deemed unjustified and unrelated to his work conduct.
- 3. Unpaid Bonuses and Salary Increments:** In a favourable turn for Mwangi, the court awarded him Kenya Shillings Two Million, Three Hundred Thousand (Kshs. 2,300,000.00) for unpaid bonuses for the year 2022. It ruled that the bank's decision to withhold the bonus was unfair, particularly since the disciplinary process was initiated after the bonus had already been communicated. Additionally, Mwangi was entitled to a 13% salary increment totalling to Kenya Shillings Three Hundred and Seventy Three Thousand, Two Hundred and Ninety Four (Kshs. 373,294.00) for the period from January to May 2023, despite his suspension.

Ultimately, Judge Mbaru ruled in favour of Mwangi, awarding him Kenya Shillings Five Million (Kshs.5,000,000.00) in general damages for the violation of his constitutional rights, along with significant financial compensation. This judgment underscores the importance of due process

and transparency in employment terminations, serving as a reminder for employers to respect employee privacy even during internal investigations.

## DALJIT SINGH DHANJAL V COMMISSIONER OF DOMESTIC TAXES (APPEAL E619 OF 2023) [2024]

On 23<sup>rd</sup> August, 2024 the Tax Appeal Tribunal delivered a judgment that affects how taxes are calculated on inherited property.

### Facts

The basis of this dispute was that Dhanjal inherited property from his father in 2014 which he proceeded to sell for Kenya Shillings One Hundred and Seventy Seven Million, Nine Hundred and Fifteen Thousand and Nine Hundred (Kshs.177,915,900.00). As is required of any Vendor in a sale transaction, he filed his returns for Capital Gains Tax (CGT) with the Kenya Revenue Authority (KRA) in respect of the sale. In calculating the tax owed to KRA, Dhanjal calculated the acquisition cost of the property to be its value as at the time he inherited it in 2014. A valuation done at the time valued the property at Kenya Shillings One Hundred and Fifty Million (Kshs.150,000,000.00), which is the figure he relied on in his computation.

Thereafter, KRA issued an additional assessment to which Dhanjal objected, and provided documents in support of the same. A month later, KRA issued its objection decision to which Dhanjal appealed at the Tax Appeals Tribunal (the instant case).

### Issues

Whether Dhanjal's computation of CGT was in accordance with the relevant provisions of the law and if so, whether the additional assessment by KRA was justified.

### Analysis

- a) Appellant's Position:** It was Dhanjal's position that where one inherits land and therefore does not pay actual cash for the property, Paragraph 9(1)(d)(ii) of the Eighth Schedule to the Income Tax Act provides that the applicable adjusted cost of the property is the market value.
- b) Respondent's Position:** On the other hand, KRA argued that since the properties were transferred to the Dhanjal through transmission, he never incurred any cost in the acquisition of the property for the market value to qualify for inclusion under adjusted cost; that he incurred nil consideration cost at the time that the property was acquired or inherited.
- c) Holding of the Tribunal:** The Tax Appeals Tribunal (TAT) held that the market value of inherited property at the time of the acquisition would comprise the adjusted cost

for the property on a transfer subsequent to acquisition by inheritance in accordance with Paragraph 9 of the Eighth Schedule to the Income Tax Act.

The other alternative would have been the amount of the consideration used in computing stamp duty payable at the point of acquisition. However, this particular transaction did not incur any stamp duty payable as transmissions are exempt transactions and cannot, therefore, be used as the deemed amount of consideration in the subsequent transfer of the inherited property.

### Broader Implications of the Decision

To understand the implication of this decision, it is important to first breakdown what Capital Gains Tax (CGT) is and how it is calculated in respect of land.

Capital Gains Tax refers to tax chargeable on net gains made on the transfer of land/ buildings. It is a final tax and is calculated at the rate of 15% of the net gain.

- Transfer value = selling price.
- Incidental costs on transfer = costs associated with selling the property e.g., cost of advertising the property to find a buyer, legal costs.
- Acquisition cost = buying price.
- Incidental costs on acquisition = costs associated with buying the property.

KRA would essentially have increased the tax payable by a person who had inherited property and was now transferring the said property to a purchaser as there would be no deductions.

Following this decision by the TAT, one is allowed to input acquisition costs as the market value of the property as at the time of inheriting it in computation of CGT. As the acquisition cost is a deduction, the tax payable is considerably lower.

### NET GAIN

[ Transfer value - Incidental Costs on Transfer ]  
minus [ Adjusted Cost ]

Adjusted Cost = (acquisition cost + incidental costs on acquisition + any enhancement cost)

# iNTERLUDE

## TELL A JOKE DAY



A man in an interrogation room says, "I'm not saying a word without my lawyer present."

"You are the lawyer," said the policeman.

"Exactly, so where's my present?" replied the lawyer.





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# CONTRIBUTORS' PLATFORM

## THE SEPARATION OF POWERS REIMAGINED: COURTS AND THE PULSE OF KENYA'S DEMOCRACY



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In the grand theatre of governance, the doctrine of separation of powers often takes center stage—a principle as ancient as Montesquieu's seminal musings yet as contemporary as the recent heated impeachment proceedings against Kenya's Deputy President. The High Court's ruling on this matter invites us to revisit this doctrine, not as a static artefact, but as a living, breathing force in Kenya's democratic tapestry.

### The Separation of Powers: A Delicate Balancing Act

At its heart, the doctrine of separation of powers envisages a tripartite government—each branch wielding its own distinct sword. The legislature crafts the laws, the executive enforces them, and the judiciary interprets them, all the while serving as the sentinel against overreach. Yet, when the branches collide, the judiciary is called to arbitrate, not as a partisan actor, but as the guardian of constitutional fidelity.

The High Court reaffirmed this role, declaring its jurisdiction over the impeachment process. Drawing upon Article 165(3) of Kenya's Constitution, the judges underscored that no arm of government operates beyond scrutiny. The judiciary, therefore, retains the solemn responsibility of ensuring procedural fairness and upholding the rule of law, even in the most politically charged arenas.

### From Kenya to the World: A Universal Doctrine

Kenya's judicial intervention echoes across borders, finding resonance in global jurisprudence. In *Marbury v. Madison* (1803), Chief Justice John Marshall proclaimed the U.S. Supreme Court's authority to review acts of Congress. This landmark ruling birthed the principle of judicial review, underscoring that "it is emphatically the province and duty of the judicial department to say what the law is."

Similarly, in India, the Supreme Court's decision in *Kesavananda Bharati v. State of Kerala* (1973) established the basic structure doctrine, ensuring that no constitutional amendment could erode the separation of powers or the rule of law. These precedents illuminate the judiciary's universal role as the arbiter of constitutional boundaries.

### A Judiciary Undaunted by Political Storms

The recent impeachment proceedings revealed the judiciary's strength in navigating the treacherous waters of political power struggles. While the respondents argued that impeachment is a political question—a matter solely for the legislature and executive—the Court rejected this notion, citing the seminal Kenyan case *Martin Nyaga Wambora v. Speaker of the Senate & 6 others* (2014). The Court of Appeal in the Wambora case asserted that "the political question doctrine cannot oust the jurisdiction of courts to interpret the Constitution."

This reasoning is profound. It recognizes that while impeachment processes are inherently political, they must still adhere to constitutional and procedural safeguards. To leave such matters unchecked would risk reducing the rule of law to a mere ornament, vulnerable to the whims of majoritarian politics.

### The Pulse of Democracy

The Court's insistence on procedural fairness in the impeachment proceedings preserves the sanctity of public office and safeguards against arbitrary power. Its ruling reminds us that the judiciary is not an interloper in political processes but an indispensable guardian of constitutional order; the steady heartbeat of democracy.

This case also serves as a cautionary tale for other democracies. From Brazil's impeachment of Dilma Rousseff to the parliamentary no-confidence motions in the UK, the tension between political accountability and procedural fairness persists globally. Kenya's experience reaffirms that the judiciary's role in such matters is not just reactive but transformative—a sentinel ensuring that power, while mighty, remains accountable.

### Conclusion: The Eternal Vigilance of Balance

In the symphony of governance, the doctrine of separation of powers ensures harmony. It is not a doctrine of division but of balance. As history unfolds, the judiciary's steadfastness in defending democracy's principles will continue to inspire nations grappling with the eternal dance of power. For it is in the judiciary's vigilance that democracy finds its resilience, and in its courage, the people their voice.

## A LANDMARK JUDGMENT IN KENYA: RE-DEFINING INTERNSHIPS, RECLAIMING DIGNITY



On 17<sup>th</sup> April, 2024 a modest courtroom in Kenya became the stage for a monumental shift in how internships and mandatory training are perceived. The Employment and Labour Relations Court delivered a judgment that struck at the heart of years of exploitation and neglect. Petition E223 of 2023 [2024] KEELRC 795 wasn't just a case—it was a call for justice, a demand for fairness, and a beacon of hope for thousands of young professionals across Kenya.

The court ruled that the Teachers Service Commission (TSC) practice of hiring fully qualified and registered teachers as “interns” was not only exploitative but unconstitutional. This judgment peeled back the layers of unfair labour practices, urging us to envision a future where internships are not burdens, but bridges to professional excellence.

### The Judgment: A Moment of Reckoning

This victory wasn't just for teachers—it was for dignity. The Court's decision made a resounding statement: those who labour deserve to be treated fairly. Among the key findings: -

- **Interns as Employees:** If you work like an employee, speak like an employee, and perform the same duties as an employee, then by law, you are an employee. The Court declared that interns, who carry the same responsibilities as permanent staff, should be afforded the same rights and respect. Additionally, it was acknowledged that the term ‘employee’ is defined, under the Employment Act, to include apprentices and indentured learners.
- **Unfair Labour Practices:** Labelling a qualified person an “intern” while subjecting them to substandard pay is not only unjust—it is a violation of the constitutional right to fair labour practices.
- **Equality for All:** The Court found that treating permanent teachers differently from their “intern” counterparts violated the principle of equality guaranteed under Article 27 of Kenya's Constitution.

- **End to Exploitation:** The judgment firmly prohibited TSC from recruiting qualified teachers as interns under such inequitable conditions, affirming that teachers—the backbone of Kenya's future—deserve to be treated as professionals, not placeholders.

While the Court did not award compensation or invalidate previous contracts, it drew a bold line in the sand: Kenya's workers deserve better.

### Pupillage: The Lawyer's Gauntlet

As the ruling reverberated through the education sector, it sparked hope in another professional realm: law pupils. For years, Kenya's pupillage system has been a labyrinth of inconsistency and exploitation, a passage that too often drains the spirit instead of shaping a promising career. Given, the six-month vocational training is vital in meeting the qualifications required, it is intentioned to be a stepping stone toward becoming an advocate, however it has, for many, become a rite of disillusionment.

The flaws are undeniable:

- **Blurred Job Descriptions:** Too often, pupils find themselves more in the role of office assistants than budding advocates, their legal aspirations buried beneath piles of paperwork and menial tasks.
- **Toxic Work Environments:** Stories of bullying, discrimination, and harassment are common, endured silently by many who suffer in the shadows of their professional journey.
- **Inconsistent Pay:** Pupils' earnings are at the mercy of individual firms, creating a fragmented and unstable system.

The disparity is stark: some pupils earn upwards of Kshs. 70,000, while others struggle to make the minimum wage, and some aren't paid at all. This lack of consistency breeds financial insecurity and perpetuates inequality, underscoring the urgent need for reform. Worse still, without a formal organization to advocate for their rights, pupils have been left without a unified voice to demand fair treatment.

The Court's judgment against exploitative labour practices serves as a clarion call for the legal profession to rectify this broken system. It is a reminder that pupillage should be a fair investment in both the individual and the profession itself—an opportunity to build careers, not break spirits.

### Medicine: A Healing Profession in Need of Healing

The plight of medical interns in Kenya mirrors that of teachers and lawyers—young professionals, after years of intense study and sacrifice, are left to battle not just diseases, but systemic neglect. Despite investing millions of shillings and over a decade of their lives, many medical interns are faced with inadequate pay, poor working conditions, and minimal supervision. Imagine standing in a crowded ward, the weight of life and death pressing down on you, knowing your efforts are undervalued.

The situation is worsened by the slow government action in placing interns, leaving many without assignments for extended periods. Those who do secure placements

often face a lack of resources and supervision. Meanwhile, foreign-trained doctors, who are often paid higher salaries, are brought in, leaving Kenyan interns to struggle with low wages and uncertain futures.

Kenya's shortage of doctors—one for every 6,355 patients—exacerbates this issue. Delays in placing interns not only stunt their development but also undermine patient care, particularly in rural areas.

Internships are essential for gaining practical experience, building confidence, and alleviating the pressure on Kenya's overstretched healthcare system. If Kenya is to build a resilient and robust healthcare system, it must start by investing in its interns. They are not just the future of medicine—they are the future of Kenya's health. Their contributions must be recognized, their worth upheld, and their potential nurtured.

### **Medical Internships: A Model of Support and Structure in the UK and US**

In the UK, medical internships within the National Health Service (NHS) are designed to ensure that young professionals are supported as they transition from education to practice. Interns receive competitive pay and are guided by mentorship programs, which help them grow in clinical skills and professional development. The NHS's commitment to its medical workforce ensures that interns are equipped with the knowledge, confidence, and experience needed to become competent practitioners.

In the US, medical residency programs offer a combination of rigorous clinical practice and mentorship. These programs are highly competitive, with support systems in place to foster the growth of interns into well-rounded doctors. The investment in medical interns reflects their value within the healthcare system, providing not only financial support but also personal and professional development.

**Pupillage in Law: Structured Development in the UK and US**  
Pupillage in the UK includes mentorship, providing regular feedback, career advice, and emotional support, nurturing the next generation of barristers. It also seeks to ensure fairness and consistency, with clear salary standards.

In the US, law firms offer summer associate programs, compensating young lawyers fairly for their contributions. These programs go beyond offering experience—they provide mentorship and professional development, preparing interns for full-time legal practice. Like the UK, these internships are seen as an investment in future professionals, ensuring that young lawyers are supported as they begin their careers.

### **Teaching Internships: The Importance of Support and Investment in the UK and US**

In the UK, teacher training programs provide a structured pathway for new educators. These programs include mentorship, rigorous training, and competitive salaries, allowing new teachers to focus on professional growth. The emphasis is on long-term development, ensuring that educators not only gain practical experience but also the emotional and professional support necessary to thrive in their careers.

In the US, programs like Teach For America offer strong mentorship and a network of support for new teachers. These programs focus on empowering educators by providing resources and guidance throughout their early years. This approach ensures that teachers feel valued and respected, building the foundation for long-term success in the profession.

### **Kenya's Crossroads: A Call for Transformation**

The judgment against TSC is not merely a legal milestone—it is a call for transformation. It is an opportunity for Kenya to reshape internships and training programs across professions. To rise to this occasion, Kenya must:

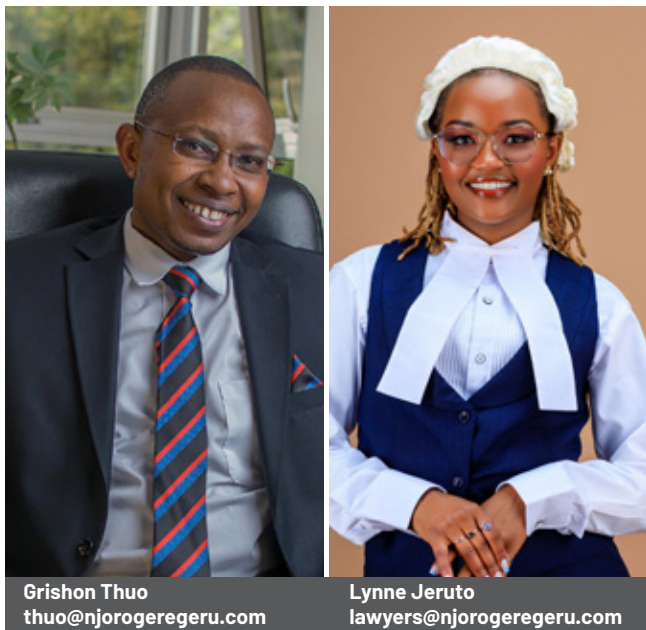
- **Invest in Mentorship:** Interns should leave their programs not only skilled but inspired. Mentorship plays a pivotal role in shaping the leaders of tomorrow.
- **Uphold Dignity:** Interns are not burdens to bear but talents to nurture. Their rights must be protected, and their potential unlocked.
- **Standardize Terms:** Every intern deserves a clear contract, a fair wage, and a well-defined role. This isn't idealism—it is justice. Standardization would benefit not only teachers, lawyers, and doctors but also professionals in other fields such as engineering, journalism etc. ensuring fairness across the board.
- **Enhance Oversight:** Regulatory bodies must actively monitor training programs to ensure compliance. Exploitation thrives in the shadows, and it's time to bring it into the light.

### **A Future Worth Fighting For**

Internships should be stepping stones to success, not nightmares in disguise. For every teacher, lawyer, and doctor who has ever felt invisible, this judgment is a promise: your work matters, your voice matters, and your dignity matters. Kenya now stands at the crossroads of a new future, one where fairness and opportunity are within reach for every young professional.

Let this moment not be a footnote in history but the beginning of a new chapter. A chapter where internships are stepping stones to greatness, where talent is nurtured, and where every intern feels seen, supported, and ready to thrive. The time for change is now

## IS SHE REALLY YOUR WIFE? THE IMPORTANCE OF REGISTERING CUSTOMARY MARRIAGES



### Introduction

Marriage is a happy occasion not only to the newly-weds but to the community at large. A union of two people is a blessing and Article 45 of the Constitution of Kenya recognizes, protects and promotes the institution of family.

There are five (5) kinds of marriages recognized under the Marriage Act, 2014 (the Act) which have the same legal status. These are: -

- a) Christian marriages;
- b) Civil marriages;
- c) Customary marriages;
- d) Hindu marriages; and
- e) Islamic marriages

The focus of this article is on customary marriages. These are marriages celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage. Among the Luo, for example, such a celebration is called Nyombo, Koito among the Kalenjin, Uthoni among the Akamba, and so on.

Before the Marriage Act, customary marriages did not have to be registered. This means that parties would be married and the same would only be known to them and the people who attended the celebration. There was no legal recognition of the same. A party could therefore move to another city and marry another person without the knowledge of the first spouse. The second spouse would not know of the subsisting marriage either as there was no avenue where marriages were registered. There was therefore need for security for the parties to a marriage, that their union be recognized in law and to everybody else.

The Act requires that all marriages be registered. However, there has been laxity in registering marriages since the Act came into force, for various reasons. For example, the mentality among communities that marriages were valid and operational for centuries before the Act, hence did not see the place of a piece of paper, that is a marriage certificate, in validating or invalidating a marriage.

Section 55 of the Act provides for the registration of customary marriages. As to the timelines of registration, Section 96(3) provides that customary marriages shall be registered within three (3) years of coming into force of the Act. The Act also empowers the Cabinet Secretary to extend the timelines for registration via a Gazette Notice. The first deadline was therefore the year 2017 which was three (3) years after the commencement of the Act. However, on 9th June 2017, via Notice published by the Attorney General in Gazette Notice No. 5345 of 2017, the registration period was extended to the year 2020.

How do you, then, register a customary marriage?

### Process of registering a customary marriage

The registration of customary marriages is governed by the Marriage (Customary Marriage) Rules, 2017 (the Rules) in addition to the Act.

For customary marriages contracted before enactment of the Marriage Act;

- The parties shall apply to the Registrar of Marriages for registration of the marriage in the Form prescribed in the Rules and shall be accompanied by a letter of confirmation from the Chief of the area where the marriage ceremony took place.
- Upon being satisfied that the information supplied is true, the Registrar shall issue a certificate of customary marriage in respect of the marriage.
- For customary marriages celebrated after the commencement of the Act;
- Within three (3) months of conclusion of the customary rites conferring the status of husband and wife, the parties shall notify the Registrar of the marriage in the prescribed form. Such notification shall;
  - specify the customary law applied in the marriage of such parties;
  - contain a written declaration by the parties, that the necessary customary requirements to prove the marriage have been undertaken; and
  - contain the signatures or personal marks of two adult witnesses. Each witness shall have played a key cultural role in celebrating the marriage.

The notification shall confirm that the parties to the marriage were eighteen years of age at the time of the marriage, that the marriage is between persons who are not within a prohibited marriage relationship; and that the parties freely consent to the marriage.

- The Registrar shall then display the above notice of marriage in a conspicuous place within the premises for 14 days, inviting any objections to the proposed registration.
- After the expiry of the 14-day period without any objection filed, or where any objections filed have been dispensed with, the Registrar shall issue to the parties an Acknowledgement Certificate of the marriage.
- The parties shall then make an application to the Registrar, for registration of the marriage, accompanied by the Acknowledgement Certificate within 6 months of the marriage.

- Upon the satisfaction of the Registrar that the parties have complied with the Act, and have appeared before him in person, the Registrar shall register the marriage and issue the parties with a certificate of marriage.

The Registrar maintains a Register of Customary Marriages for all customary marriages registered under the Rules. A party who wishes to obtain a certified copy of an entry of a customary marriage in the Register shall apply to the registrar, pay the requisite fee, and shall be issued with the certified copy of the entry. The certified copy of the entry is proof of marriage similar to: -

- a certificate of marriage,
- a certified copy of a certificate of marriage,
- an entry in a register of marriage, or
- an entry in a register of marriages maintained by the proper authority of the Khoja Shia, Ith'nasheri, Shia imam, Ismaili or Bohra communities, or a certified copy of such an entry as provided in Section 59 of the Act.

Legal position of an unregistered customary marriage  
Section 12(e) of the Marriage Act provides that a marriage is voidable if there was a failure to register the marriage.

The Black's Law Dictionary 9th edition defines a voidable marriage as one that, "...is initially invalid but that remains in effect unless terminated by Court order... A voidable marriage can be ratified once the impediment to a legal marriage has been removed."

This means that the marriage lacks validity and a party can at any time petition the court to annul it solely on that reason. This is different from a divorce in that a party petitioning the court does not have to prove the grounds for divorce under Section 69 of the Act, including, adultery, cruelty, desertion, exceptional depravity, and irretrievable breakdown of the marriage. It means that the threshold is much lower than that for a divorce hence easy to annul it. It is also noteworthy that the provision in Section 73(2) of the Act which forbid Courts from annulling marriages unless petitions of annulment were filed within one year of celebration of the marriage, was declared unconstitutional. This therefore means that a party can petition for annulment of marriage over a year since it was celebrated.

Consequences of not registering your customary marriage  
Security. Imagine marrying the love of your life, living together for decades, being blessed with children, and one day, you discovered that, in the eyes of the law, they were never your spouse in the first place. Tragic!

This is the tragedy that befell a couple in the case of **JTO v AP [2024] KEHC 10464 (KLR)**. The parties got married in August 2002 under Luo customary law. Their union was blessed with 3 children. The parties lived together until December

2020, when the Respondent left the country for a visit to the USA, never to return home. The husband petitioned the Magistrate's Court for a divorce claiming desertion and cruelty. The Court held that since the marriage had not been registered, it therefore could not be dissolved by divorce since for a divorce to happen, parties must prove marriage by a certificate or other legally recognized instruments as enumerated in the preceding paragraphs. Essentially, the parties were not married in the first place to warrant them a divorce when things went south. On appeal, the High Court upheld the Judgment of the Magistrate's Court.

This means that legally, it is not enough that thousands of people witnessed and celebrated your marriage, that you exchanged vows with your spouse, that you have lived together for decades or that you have sired children together. For your customary marriage to be legally recognizable, it has to be registered. Registration will provide security to the parties of the marriage in that one cannot just walk away out of the union without a court order and only on the grounds of divorce provided in the Act.

### Property

Property is arguably one of the most emotive things among human beings. People work hard to acquire their possessions and would want security that their efforts would not go to waste by dint of marriage. The question of matrimonial property then comes in. The Matrimonial Property Act (2014) defines matrimonial property as the matrimonial home, household goods or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

It goes without saying that there has to be a marriage for there to be matrimonial property. What then happens in a case where you work so hard to acquire certain assets together with your spouse, register them in one of your names, and then things go south and want your share of the property? It means you might lose your property as you would struggle to prove that such property was matrimonial and hence the spouse in whose name the property was registered held it in trust for the other.

To secure proprietary interests in assets acquired in the subsistence of a marriage, it is imperative to have your customary marriage registered.

### Conclusion

Registration of customary marriages may be an uncomfortable subject among newly-weds or may be overlooked due to the optimism and trust of the parties. However, it is a straightforward process which is very crucial not only for proprietary considerations but also for emotional security. Think of it as building your marriage on a rock; that would not be shaken or washed away by the rains.

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