

Financial Services Sector Report

Q4 2022



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GENERAL

The quarter saw the publication of the Statutory Instruments (Exemption from Expiry) Regulations, 2022 under Legal Notices Nos. 217 Of 2022 and 218 of 2022.

I. Subsidiary Legislation

[The Statutory Instruments \(Exemption from Expiry\) Regulations, 2022, Legal Notice No. 217 of 2022](#) and [The Statutory Instruments \(Exemption from Expiry\) Regulations, 2022,](#)

[Legal Notice No. 218 of 2022 \(together “the Regulations”\)](#)

Statutory instruments ¹ are automatically revoked on day that marks the 10th year after the making of the statutory instrument. This is unless the statutory instrument is repealed, it expires or a regulation is made exempting it from expiry. However only one extension from expiry can be made for each statutory instrument².

The Regulations were published under section 21(2) of the Statutory Instruments Act 2013 as read with the Revision of the Laws Act, the Attorney-General, in consultation with the Sessional Committee on Delegated Legislation of the Senate (in respect of LN No. 217 of 2022) and the Select Committee on Delegated Legislation of the National Assembly (in respect of LN No. 218 of 2022). The Regulations provide that the operation of the statutory instruments made under various Acts of Parliament set out in the Schedule to the Regulations that have a continuing purpose is extended for a period of twelve months with effect from the 25th January, 2023. The Acts include the following relevant to the financial services sector:

- Bills of Exchange Act (Cap. 27)
- Cheques Act (Cap. 35)
- Law of Contract Act (Cap. 23)
- Pensions Act, (Cap. 189)

- Pensions (Increase) Act, (Cap. 190)
- Provident Fund Act, (Cap. 191)
- Parliamentary Pensions Act, (Cap. 196)
- Local Government Loans Act, (Cap. 270)
- Local Authorities Provident Fund Act, (Cap. 272)
- Mortgages (Special Provisions) Act, (Cap. 304)
- Gold Mines Development Loans Act, (Cap. 311)
- Agricultural Finance Corporation Act, (Cap. 323)
- Marine Insurance Act, (Cap. 390)
- Insurance (Motor Vehicles Third Party Risks) Act, (Cap. 405)
- Exchequer and Audit Act, (Cap. 412)
- Provisional Collection of Taxes and Duties Act, (Cap. 415)
- General Loan and Stock Act, (Cap. 419)
- Government Securities Act, (Cap. 421)
- Specific Loan (Commonwealth Development Corporation) Act, (Cap. 440)
- Guarantee (High Commission Posts And Telecommunications Loan) (No. 1) Act (Cap. 450)

¹ Defined under the Statutory Instruments Act, 2013 as “any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or

established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued”.

² Section 21 of the Statutory Instruments Act 2013

- Guarantee (High Commission Posts And Telecommunications Loan) (No. 2) Act (Cap. 451)
- Guarantee (High Commission Posts And Telecommunications Loan) (No. 3) Act (Cap. 452)
- Guarantee (High Commission Railways And Harbours Loan) (No. 1) Act (Cap. 455)
- Guarantee (High Commission Railways And Harbours Loan) (No. 2) Act (Cap. 456)
- Guarantee (High Commission Railways And Harbours Loans) (Supplementary Provisions) Act (Cap. 457)
- Guarantee (High Commission Railways And Harbours Loan) (No. 3) Act (Cap. 458)
- Guarantee (High Commission Railways And Harbours Loan) (No. 4) Act (Cap. 459)
- Guarantee (High Commission Railways And Harbours Loan) (No. 5) Act (Cap. 460)
- International Finance Corporation Act (Cap. 466)
- International Monetary Fund Act (Cap. 467)
- International Monetary Fund (Amendment of Articles) Act (Cap. 468)
- 192. Telecommunications Tax Act (Cap. 473)
- Refinery Throughput Tax Act (Cap. 474)
- Entertainments Tax Act (Cap. 479)
- Second-Hand Motor Vehicles Purchase Tax Act (Cap. 484)
- Capital Markets Act (Cap. 485A)
- Insurance Act (Cap. 487)
- 201. Banking Act (Cap. 488)
- Building Societies Act (Cap. 489)
- Central Bank of Kenya Act (Cap. 491)
- African Development Bank Act (Cap. 492)
- East African Development Bank Act (Cap. 493A)
- Kenya Post Office Savings Bank Act (Cap. 493B)
- Shelter-Afrique Act (Cap. 493C)
- Foreign Investments Protection Act (Cap. 518)
- Investment Disputes Convention Act (Cap. 522)
- National And Grindlays Bank (Apportionment) Act (No. 24 of 1970)
- Public Officers' Pensions (Kenya and United Kingdom) Agreement Act (No. 18 of 1977)
- Barclays Bank of Kenya Limited Act (No. 11 of 1978)
- Petroleum Development Fund Act (No. 4 of 1991)
- Consolidated Bank of Kenya Act (No. 5 of 1991)
- Bank of Baroda (Kenya) Limited Act (No. 5 of 1992)
- Preferential Trade Area Re-Insurance Company (Mandatory Re-Insurance Cessions) Act (No. 3 of 1993)
- African Re-Insurance Corporation (Mandatory Re-Insurance Cessions) Act (No. 2 of 1994)
- Road Maintenance Levy Fund Act (No.9 of 1993)
- Higher Education Loans Board Act (No. 3 of 1995)
- Kenya Revenue Authority Act (No. 2 of 1995)
- Retirement Benefits Act (No. 3 of 1997)
- Kenya Reinsurance Corporation Act (No. 7 of 1997)
- Co-operative Societies Act (No. 12 of 1997)
- Co-operative Societies Act (No. 12 of 1997)
- Local Authorities Transfer Fund Act (No. 8 of 1998)
- National Hospital Insurance Fund Act (No. 9 of 1998)
- Central Depositories Act (No. 4 of 2000)
- Presidential Retirement Benefits Act (No. 11 of 2003)
- Investment Promotion Act (No. 6 of 2004)
- Microfinance Act (No. 19 of 2006)
- Sacco Societies Act (No. 14 of 2008)
- Kenya Deposit Insurance Act (No. 10 of 2012)
- Public Finance Management Act (No. 18 of 2012)
- National Social Security Fund Act (No. 45 of 2013)

BANKING

On 11th November 2022, the Central Bank of Kenya ('CBK') issued a press release providing an update on the credit information sharing framework. CBK noted concern over the use of adverse credit reports issued by credit reference bureaus ('CRBs') to deny borrowers credit.

I. Guidelines, Notices and Circulars

On 11th November 2022, the Central Bank of Kenya ('CBK') issued a [press release](#) providing an update on the credit information sharing framework. CBK noted concern over the use of adverse credit reports issued by credit reference bureaus ('CRBs') to deny borrowers credit. To address this, the CBK has mandated all CRBs to include a statement at the top of every credit report stating *'a customer's credit score should not be used as the sole reason by a lender to deny a customer a loan'* as well as working with CRBs to improve the quality of credit reports and enhance robustness of their credit scoring models. Additionally, the CBK is also engaging banks in the implementation of risk-based credit pricing requiring banks to consider a borrower's credit score in addition to other factors in making a lending decision. The CBK also reminded the public that they are entitled to one free credit report per year.

The CBK [announced](#) the rollout of a Credit Repair Framework by commercial banks, microfinance banks and mortgage finance companies ('Institutions'). The framework is intended to improve credit standing of mobile phone digital borrowers with non-performing loans that have been reported to CRBs. Institutions are required to provide a discount of at least 50% on non-performing mobile phone digital loans outstanding as at the end of October 2022

and update borrowers' credit standing from non-performing to performing. An Institution then enters into a repayment plan with the borrower for a period upto 31st May 2023 when the framework is due to expire. The framework covers loans with repayment period of thirty days or less issued by the Institutions through mobile phones. CBK anticipates that the framework will enable over 4.2 million mobile phone digital borrowers repair their credit standing.

A [press release](#) issued by the CBK on 6th December 2022 announced the reintroduction of charges for transactions between mobile money wallets and bank accounts that were previously waived as part of the COVID-19 pandemic emergency measures. The CBK noted that the mitigation measures enabled payments ecosystem to protect vulnerable Kenyans, support businesses and strengthen economic resilience resulting in:

- an increase in the number of Kenyans actively using mobile money by over 6.2 million;
- an increase of monthly volume and value of P2P transactions from 162 million transactions worth KShs. 234 billion to 440 million transactions worth KShs. 399 billion; and
- an increase of the monthly volume and value of transactions between payment service providers and banks from 18 million transactions worth KShs. 157

billion to over 113 million transactions worth KShs. 800 billion.

The resumption of the charges is aimed at building on the achieved gains, facilitate transition towards sustainable growth of the mobile money ecosystem and ensure affordability of payment services for Kenyans.

CBK also announced a review of the applicable maximum charges for transactions between mobile money and bank accounts as follows:

- maximum charges from transfers from bank accounts to mobile money wallets will be reduced by up to 61% while mobile money to bank account transfers will be reduced by up to 47%;
- tariffs for paybills used to collect and disburse funds by businesses, companies and institutions will be reduced by 50%; and
- charges levied by banks for bank to mobile money transactions will be reduced by 45%.

II. Judicial Decisions

Momentum Credit Limited v Kabuiya (Civil Appeal E035 of 2022) [2022] KEHC 13705 (KLR) (Commercial and Tax) (7 October 2022) (Judgment)³

Brief Facts

Momentum Credit Limited (“the Appellant”), lodged an appeal against the decision of the Small Claims Court which dismissed its (i.e., the

Appellant’s) claim of KShs.731,722.00 against the Respondent.

The Respondent had applied for and obtained a loan facility of KShs.1,300,000.00 from the Appellant sometime in 2020. The Respondent offered up her motor vehicle as security for repayment of the loan facility.

Sometime in 2021, the Respondent defaulted in her repayment obligations thereby prompting the Appellant to repossess and sell the motor vehicle offered as security for the sum of KShs.1,500,000. Since the Respondent’s outstanding liability as at the time of the sale of the motor vehicle was KShs.2,050,328.00, the Appellant instituted at the Small Claims Court, action for recovery of KShs.731,722.00, being the balance of the facility.

In opposing the Appellant’s claim, the Respondent contended that the Appellant had unilaterally altered the interest rate of the loan facility from 14% p.a. to 10% per month. The Appellant’s interest rates, the Respondent contended, were extremely high, illegal, usurious, unconscionable and in contravention of the Banking Act and the lending rates established by the Central Bank of Kenya.

After hearing both parties, the Small Claims Adjudicator dismissed the Appellant’s claim for KShs.731,722.00. The Adjudicator held that:

- (a) The Central Bank of Kenya Act and the Banking Act applied to the Appellant. Accordingly, the penalties and interest levied by the Appellant was unconscionable.
- (b) The Appellant’s claim was untenable given the unconscionable interest rates

³ Available at <http://kenyalaw.org/caselaw/cases/view/242835/> accessed on 16th January 2023

levied on the loan facility availed to the Respondent.

The Appellant was aggrieved by the Adjudicator's decision and lodged an appeal at the High Court. In canvassing its appeal, the Appellant contended that it was not a financial institution regulated by the Banking Act and as such, the *in duplum* rule, which limits the amount of interest recoverable by a bank or financial institution from a non-performing loan, did not apply to its operations and the lending agreement between it and the Respondent.

Issues for Determination

The Appeal raised the following issues for the court's determination, namely whether:

- (a) A microfinance institution operating under Microfinance Act was exempt from the *in duplum* rule.
- (b) A microfinance institution that did not engage in deposit taking activity met the definition of a bank, a financial institution, or a mortgage finance under the Banking Act to warrant regulation under the Banking Act.

Findings

The High Court considered both parties' positions and found that:

- (a) The Respondent, having raised the issue of the applicability of the *in duplum* rule to the lending agreement between herself and the Appellant, bore the burden of proving that the Appellant was regulated under the Banking Act and the Central Bank of Kenya Act. The Respondent had failed in discharging this burden.
- (b) For purposes of section 44, it had to be established that the appellant was a

bank or financial institution. The appellant was neither a bank nor a mortgage finance company. In order to qualify as a financial institution, the appellant had to either be gazetted as such by the Minister or be one that carried on or proposed to carry on financial business as defined under the Banking Act. To qualify as a financial institution, it had to accept money on deposit from members of the public and employ that money or part of it for lending or investment as contemplated under the Act.

- (c) The Appellant was neither a bank nor a financial institution subject to the provisions of the Banking Act.
- (d) The Banking Act, more particularly Section 44 thereof, did not apply to the dealings between the Appellant and the Respondent.
- (e) The interest chargeable by the Appellant for the loan facility advanced to the Respondent was governed by the lending agreement whose provisions had not been disputed by the Appellant. The Honourable Court could not rewrite the contract between the Appellant and the Respondent regarding the applicable interest.

In view of the above findings, the High Court allowed the appeal and set aside the judgment of the Small Claims Court.

Implication

The legal consequence of this decision is that Section 44 of the Banking Act cannot be invoked to limit the interest recoverable by financial institutions not regulated by the Central Bank of Kenya under the Banking Act.

This decision conflicts with the High Court's judgment in **Mugure & 2 others v Higher Education Loans Board (Petition E002 of 2021)**

[2022] KEHC 11951 (KLR) (Civ) (19 August 2022) (Judgment)⁴ in which the court found that all lenders including digital lenders and microfinance institutions, whether regulated under the Banking Act or not, are subject to the application of the in duplum rule.

Given the contradictory findings of the High Court, there is a need by the Court of Appeal to

settle the issue of whether all lenders should be subject to the in duplum rule, regardless of whether or not they are regulated under the Banking Act.

MMAN Advocates will be happy to assist on any issues arising from this decision.

INSURANCE

The quarter under review saw the Insurance Regulatory Authority (IRA) invite public proposals for the amendment of the Insurance Act, Insurance Regulations, Insurance Guidelines and related insurance laws.

I. Guidelines, Notices and Circulars

A public [notice](#) issued by the Insurance Regulatory Authority ('IRA') on 14th October 2022 invited public proposals for amendments

to the Insurance Act, Insurance Regulations, Insurance Guidelines and related insurance laws. The IRA noted that the review aims to facilitate industry stakeholders' participation in response to market developments and stakeholder needs. Submission of proposals closed on 28th October 2022.

INVESTMENTS

The quarter under review saw the publication of the Capital Markets (Investment-Based Crowdfunding) Regulations, 2022 to allow Micro, Small and Medium Enterprises (the "MSME") registered in Kenya and start-ups with a good operating track record and good cooperate governance record to raise funds from investors through licensed crowdfunding platforms.

II. Subsidiary Legislation

Capital Markets (Investment-Based Crowdfunding) Regulations, 2022, Legal Notice No. 175 of 2022

[The Capital Markets \(Investment-Based Crowdfunding\) Regulations, 2022](#) (the

"Regulations") were published by virtue of section 12(1)(d) of the Capital Markets Act, No. 17 of 1989 (the "Act") to allow Micro, Small and Medium Enterprises (the "MSME") registered in Kenya and start-ups with a good operating track record and good cooperate governance record to raise funds from investors through licensed crowdfunding platforms⁵ established,

application, which facilitates interactions between investors and issuers and other related interactions.

⁴ Available at <http://kenyalaw.org/caselaw/cases/view/238886/>

⁵ This is defined under Regulation 1 as a website, internet based portal or such other technological

maintained and operated in Kenya. However, the Regulations only cover investment-based crowdfunding⁶ and prohibit public listed companies and their subsidiaries, entities with a poor governance record and entities that intend to use the funds raised to provide loans or invest in other entities from raising funds through a crowdfunding platform.

In brief, the Regulations provide the following:

a) The Crowdfunding Platform Operators

A person who intends to be a crowdfunding platform operator shall apply to the Capital Markets Authority (the “**Authority**”) in the forms set out in the First Schedule, the application fees set out in the Third Schedule, and other documents relating to the creation, management and maintenance of the platform as listed under Regulation 5. The Regulations state that an applicant is eligible for licensing where the applicant is limited by shares, has a minimum paid up share capital of Kenya Shillings Five Million (Kshs. 5,000,000/-) and has a minimum liquid capital of Kenya Shillings Ten Million (Kshs. 10,000,000/-) or eight percent (8%) of its liabilities, whichever is higher.

The Authority shall license an application where it is satisfied that the applicant has:

- Complied with licensing requirements under Regulation 5;
- The capacity to operate in an orderly, fair and transparent manner;
- Directors and key personnel comply with the requirements as under section 24A of the Act;
- Adequate protectionist and remedial measures in place; and
- Sufficient financial, human and other resources for the operation of its crowdfunding platform.

If the Authority is satisfied that the applicant has met the requirements, they shall proceed to

⁶ This is defined under Regulation 1 as crowdfunding in exchange for shares, debt

grant a licence and shall remain valid unless suspended or revoked under Regulation 11. However, if the application is rejected, the Authority shall communicate the decision to the applicant within fourteen (14) days of the decision and state the grounds for refusal. An applicant aggrieved by the Authority’s decision may appeal to the Capital Markets Tribunal (the “**Tribunal**”) within fifteen (15) days of communication of the rejection.

Any person operating an investment-based crowdfunding platform or holding itself out as a crowdfunding platform operator prior to the commencement of these Regulations shall obtain a license within twelve (12) months after the commencement of these Regulations.

b) Crowdfunding Participants

- Issuers

As mentioned above, MSMEs and start-ups with a good operating track record and a good corporate governance record shall be eligible to raise funds through a crowdfunding platform. In exchange, they shall issue an investment instrument to the investors. However, the Regulations impose fundraising limits under Regulation 14 and the aggregate amount that may be raised by an eligible MSME is Kenya Shillings One Hundred Million (Kshs. 100,000,000/-) within a twelve (12)-month period. However, a crowdfunding platform operator may apply to the Authority for a no-objection where an issuer seeks to raise more than the maximum amount within the twelve (12) months.

- Investors

Regulation 16 provides that sophisticated investors and retail investors subject to investment limits prescribed by the crowdfunding platform operator but up to a maximum of Kenya Shillings One Hundred

securities or any other investment instruments approved by the Capital Markets Authority.

Thousand (Kshs. 100,000/-) are eligible to invest in crowdfunding investments.

c) Crowdfunding Transaction

The investment instruments allowed for purposes of crowdfunding under the Regulations include shares, debt securities including bonds or debentures or any other instruments as shall be approved by the Authority from time to time. The Regulations provide that a crowdfunding platform operator should develop a standardized offering document which should be made available to investors at least fourteen (14) days before the commencement of the offer period strictly on the crowdfunding platform. The offering document must be filed with the crowdfunding platform operator for approval. Further, an eligible issuer is mandated under Regulation 19 to clearly outline, in the offering document: investors' rights and ownership of the investment instruments to be issued and provide the necessary disclosures set out in the Fourth Schedule. Any changes made to the offering documents prior to the close of the offer, must be communicated to the investors and the investors shall be given an opportunity to withdraw the investments within forty-eight (48) hours of such communication.

The issuer shall determine and disclose in the offering document the period in which the offer shall remain open and the threshold amount for the offer to be deemed a successful offer. Where an issuer is unable to meet the prescribed minimum threshold for the target amount, the offer shall be withdrawn and the crowdfunding platform operator refunds the money to investors within forty-eight (48) hours and any costs incurred are borne by the issuer. The issuer may only commence a fresh crowdfunding offer not earlier than ninety (90) days after the withdrawal. Where the crowdfunding transaction is successful, the

crowdfunding platform operator shall make the funds available to the issuer within five (5) business days after the close of the offer.

The crowdfunding offer by the issuer shall include a contractual right of a cooling off period where the investor is allowed to withdraw an offer or agreement to purchase the investment instrument by delivering a notice in the manner prescribed by the crowdfunding platform operator within forty-eight (48) hours from the date of investments subscription, but no withdrawal shall be made after the close of the offer period. Consequently, all funds of the investor shall be refunded within forty-eight (48) hours of the request to cancel.

A crowdfunding platform operator shall take reasonable steps to ensure that the funds raised through its platform are used for the stated purpose. An issuer who proceeds to use the funds for any other purpose commits an offence and shall be liable.

It is important to note that a crowdfunding platform operator is prohibited from:

- Raising own funds through its own platform;
- Offering investment advice;
- Handling investor funds;
- Promising a guaranteed return to investors; and
- Promising a guaranteed outcome of the offer to the issuer.

d) Trading Facility

A crowdfunding platform operator may operate a trading facility for the transfer of the crowdfunded investment instruments. The crowdfunding platform operator shall comply with the following requirements:

- Have in place transparent rules and procedures for fair and orderly trading;

- Inform its platform users on the nature of the facility and applicable fees;
- Provide prospective investor(s) intending to buy the investment instruments with information that was previously availed to earlier investors; and
- Ensure that the prospective investor(s) affirms to the risk acknowledgement form under Regulation 29.

e) Duties of Crowdfunding Platform Operator

- Disclose and display on its platform relevant information relating to the platform and its use;
- Disclose all risks associated with the crowdfunding investment;
- Prominently display a cautionary statement;
- Require each investor to affirm to a risk acknowledgement form, prior to acceptance of the offer;

- Carry out due diligence on prospective issuers and investors intending to use its platform;
- Ensure compliance with data protection and privacy laws;
- Appoint a custodian to hold in trust any funds raised through the platform;
- Keep a copy of all relevant documents;
- Report and provide information to the Authority on a monthly basis; and
- Comply with the Capital Markets (Conduct of Business) (Market Intermediaries) Regulations, 2011, Capital Markets (Corporate Governance) (Market Intermediaries) Regulations 2011, Guidelines on the Prevention of Money Laundering and Terrorism Financing in the Capital Markets and any other existing capital market laws and regulations to the extent applicable except where expressly exempted by the Authority.

RETIREMENT BENEFITS

RBA advised the public on the High Court's decision quashing the 2020 amendment of section 38 (1A) of the Retirement Benefits Act as well as the Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020 ('Mortgage Loans Regulations').

I. Guidelines, Notices and Circulars

The Retirement Benefits Authority ('RBA') published a [notice](#) on 20th December 2022 advising the public of a High Court judgement quashing the 2020 amendment of section 38 (1A) of the Retirement Benefits Act as well as the Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020 ('Mortgage Loans Regulations'). In light of the judgement issued on 23rd November 2022, the RBA instructed trustees not to make further

disbursements pursuant to the quashed Mortgage Loans Regulations.

The amendment of section 38 (1A) of the Retirement Benefits Act together with the Mortgage Loans Regulations aimed to actualise the previous administration's Affordable Housing pillar of the Big 4 Agenda providing that, in addition to securing a mortgage loan, a portion of a pension scheme member's benefits could be utilized to purchase a residential house from authorized institutions.

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