

Financial Services Sector Report

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BANKING

The Financial Reporting Centre (FRC) was provided with additional regulatory authority over financial institutions. This empowers it to stop transactions deemed to be proceeds of crime or money laundering.

The Central Bank of Kenya issued a press release on the emergence of Central Bank Digital Currencies as a new payment method.

I. Acts of Parliament

New Introduction to The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2021 (Find Link [Here.](#))

The Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2021 (the 'Act') which was gazetted on 3rd January 2022 has provided the Financial Reporting Centre (FRC) additional regulatory authority over financial institutions.

Under the newly introduced Section 44A of the Act, the FRC has now been empowered to direct a financial institution not to proceed with a transaction or proposed transaction where it has reasonable grounds to suspect that such a transaction or a proposed transaction may constitute money laundering and related activities or the proceeds of crime or proceeds of unlawful activities or property which is connected to the proceeds of crime or unlawful activities.

Under such circumstances, the FRC may order that such transaction is not effected for a period of up to five (5) working days to allow the FRC to investigate the same. In effect, this means that the FRC can without a court order freeze bank accounts or real estate transactions or any other kind of transaction if it reasonably suspects that a transaction or a proposed transaction may constitute money laundering and related activities or that the funds in a bank account are proceeds of crime. Consequently, financial institutions, including banks and SACCOS should be aware of this new mandate granted to the FRC and ensure they adhere to any such directives issued by the reporting.

II. Guidelines, Notices and Circulars

Emergence of Central Bank Digital Currencies ('CBDCs')

On 10th February 2022, the Central Bank of Kenya ('CBK') issued a [press release](#) announcing the publication of the [Discussion Paper of Central Bank Digital Currencies](#) ('CBDCs') for public comments. The CBK noted the global emergence of new digital payment methods, including CBDCs, to facilitate transactions. The discussion paper outlines Kenya's payment landscape and assesses potential opportunities and risks presented by the adoption of CBDCs. Submission of comments will close on Friday, 20th May 2022 at 5.00 PM.

Launch of the National Payments Strategy 2022-2025

The CBK [announced](#) the launch of the [National Payments Strategy 2022-2025](#) on 23rd February 2022. CBK acknowledged the important milestones achieved since the advent of mobile money payments and noted that Kenyans make over 37.6 million transactions of KShs. 176 Billion daily through non-cash channels. The strategy aims for "a secure, fast, efficient and collaborative payments system that supports financial inclusion and innovations that benefit Kenyans".

KDIC Releases Payment to Depositors and Creditors

On 29th March 2022, the Kenya Deposit Insurance Corporation issued a [press release](#) announcing the release of payments to depositors and creditors for three financial

institutions following a successful sale of assets and recovery process. The chief executive officer noted that the corporation was currently overseeing liquidation of nineteen corporations and that the announced release of payments was a demonstration of the corporation's commitment to ensure disenfranchised depositors and creditors received their dues as and when adequate funds have been accumulated.

- (b) the dispute on interest did not entitle the Plaintiffs to the injunctive orders sought;
- (c) the Plaintiffs had failed to settle the loan balance rightfully due to the Defendant;
- (d) the Defendant Bank was more than capable of paying any monetary damages that may be awarded in favour of the Plaintiffs.

III. Judicial Decisions

Gehlot & Another v African Banking Corporation Limited (Civil Suit 104 of 2018) [2022] KEHC 96 (KLR)¹

Brief Facts:

The Plaintiffs lodged an application seeking to restrain, pending the determination of the suit, the Defendant Bank from selling 2 properties they had pledged to the Defendant Bank as security for various loan facilities.

The Plaintiffs argued that:

- (a) the alleged debt claimed by the Defendant Bank comprised illegal interest and penalty charges contrary to section 44A of the Banking Act;
- (b) the Defendant Bank had already instituted a separate suit to seeking to recover the outstanding arrears. Accordingly, the Bank was not entitled to proceed with the sale/auction of the suit property;
- (c) they would suffer irreparable loss if the Defendant was not enjoined from proceeding with the intended sale.

On its part, the Defendant contended that:

- (a) the Plaintiffs had not met the legal threshold for grant of interim injunctive orders;

Issue for Determination:

The key issue for determination was whether the Plaintiffs had met the legal threshold for grant of an injunctive order restraining the Defendant Bank from exercising its statutory power of sale over the suit properties.

Held:

The wording of section 90 (3) of the Land Act makes it clear that a chargee can only opt for one, out of the several statutory remedies, in recovering the loan amount due from a chargor. Accordingly, the Defendant's conduct of instituting a recovery suit for the loan balance and concurrently seeking to exercise its statutory power of sale:

- (a) raised a *prima facie* with a reasonable probability of success in favour of the Plaintiffs.
- (b) tilted the balance of convenience in the Plaintiffs' favour.

Implication:

Chargees seeking to exercise their accrued statutory remedies should exercise one remedy at a time to avoid the exercise of their remedies being challenged by chargors on grounds of concurrency.

In the circumstances, Chargees must carefully evaluate their available options and select the most efficacious remedy given the circumstances.

¹ Available at <http://kenyalaw.org/caselaw/cases/view/228548/> accessed on 30th March 2022.

FINTECH

Previously unregulated digital credit providers are now required to apply for CBK licensing with the operationalization of the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022.

I. Guidelines, Notices and Circulars

Operationalization of the Central Bank of Kenya (Digital Credit Providers) Regulations, 2022

CBK issued a [press release](#) on 21st March 2022 announcing the operationalization of the Central Bank of Kenya (Digital Credit Providers)

Regulations, 2022 via Legal Notice 46 of 2022. The regulations seek to address public concerns regarding predatory practices of previously unregulated digital credit providers in particular high cost, unethical debt collection practices and abuse of personal information. Accordingly, all previously unregulated digital credit providers are required to apply to CBK for licensing and comply with the [licensing requirements](#) by 17th September 2022.

INVESTMENTS

Regulations to support the legal framework for the Nairobi International Financial Centre are now in place. The Nairobi International Financial Centre is an initiative of Vision 2030.

I. Subsidiary Legislation

The Nairobi International Financial Centre (General) Regulations, Legal Notice No. 268 of 2021 (the “Regulations”)

The Regulations were published by virtue of Section 40 of the Nairobi International Financial Centre Act, No. 25 of 2017 (the “Act”). The Act was established to provide a legal framework to facilitate and support the development of an efficient and globally competitive financial services sector that generates high levels of national savings and investments through the establishment of the Nairobi International Financial Centre (the “Centre”).

The establishment of the Centre is a flagship initiative under the economic pillar of the Kenya Vision 2030. You may read more on the Centre’s impact on our country, investors and entrepreneurs in the article published by us

[here](#) and also in our 2018 Annual Investor Guide [here](#).

The Regulations provide the following:

1. A list of the various qualified activities to be carried out by certified firms. The activities are provided in the first Schedule of the Regulations and they may be conducted subject to the limitations and conditions as may be specified by the National International Financial Centre Authority (the “Authority”). These activities include *inter alia*:
 - a) Financial service activities
 - i. Finance and banking business
 - ii. investment banking business
 - iii. insurance business
 - iv. asset management and administration
 - v. investment business
 - vi. payment business

- vii. pension business
 - viii. financial broking and agency business
 - ix. consumer credit business
 - x. custody business
 - xi. trading, money market and exchange business
- b) Ancillary activities
- i. international legal services
 - ii. accounting and actuarial services
 - iii. financial technology business
 - iv. factoring and invoicing business
 - v. climate business
 - vi. company administration
 - vii. company headquarter activities
 - viii. holding company
 - ix. operating a designated area
 - x. corporate finance activities
 - xi. crowdfunding activities
 - xii. incubation activities
 - xiii. investor company
 - xiv. joint venture company
 - xv. consulting company
2. The application requirements for body corporates or registered partnerships to carry out one or more qualified activities. These requirements include:
- a) completing the forms as specified by the Authority. These forms are not provided in the Regulations.
 - b) submitting the completed forms accompanied by such documents specified by the Authority.
 - c) providing such further information as the Authority may require.
 - d) paying the required fees as prescribed in the Second Schedule of the Regulations.
3. While the Regulations do not provide the requisite application forms, the fees accompanying such applications are provided in the Second Schedule of the Regulations.
4. The requirements for an applicant to remain certified, they are required to demonstrate to the Authority that:
- a) they are fit and proper;
 - b) they have adequate resources, including financial resources;
 - c) they have adequate compliance arrangements, including policies and procedures in order to comply with the applicable requirements; and
 - d) their proposed business activities are in line with Centre legislation and the strategic priorities of the Centre.
- Once the applicant demonstrates the above, the Authority grants an application, further to Regulation 15 (2) and shall notify the applicant of:
- a) their decision;
 - b) the date on which the certification is deemed to take effect;
 - c) the qualified activities the applicant is certified to carry out; and
 - d) any conditions and restrictions applicable to the certification.
- If an application is rejected, the applicant will be notified of the reasons of rejection and their right to appeal the decision to the Financial Centre Tribunal.
5. It empowers the Authority to specify the information and reports required to be presented by the certified firms. The Authority may also specify the timeline for a certified firm to comply with this requirement. In their review of the information provided by the certified firms, the Authority may also appoint an investigator if it appears that there is a contravention of any law or regulation administered by the Authority.
6. The Regulations also penalise the obstruction of the Authority and such obstruction includes:

- a) destruction of documents;
 - b) failure to produce information or documents as specified by the Authority;
 - c) failure to appear before the Authority at the specified time and place to respond to questioning;
 - d) giving false or misleading information; and
 - e) failure to co-operate in an investigation.
7. Sanctions that the Authority may administer if it considers that a certified firm or person has contravened any law, regulation or rule of the Authority. These sanctions include:
- a) imposing a fine not exceeding Kenya Shillings twenty thousand (Kshs. 20,000/-);
 - b) censuring the certified firm;
 - c) directing for restitution or compensation;
 - d) directing for accounting of profits or unjust enrichments;
 - e) directing a certified firm to cease and desist the contravening activities; and
 - f) directing for action to be taken to remedy the contravention.
8. The process the Authority shall undertake when exercising its disciplinary powers. The Authority will issue a decision notice specifying the action it proposes to take and giving the person an opportunity to make any written representations in relation to the proposed action. This action may include:
- a) cease and desist;
 - b) restitution;
 - c) penalty; or
 - d) withdrawal of certification.
- You may find a copy of the Regulations [here](#).

SACCO SOCIETIES

SACCOs conducting specified non-withdrawable deposit taking business may soon be required to pay a levy.

I. Guidelines, Notices and Circulars

Proposal to impose a new levy to SACCOs

Following the commencement of the Sacco Societies (Non-Deposit Taking Business)

Regulations 2020, the Sacco Societies Regulatory Authority ('SASRA') issued a [notice](#) proposing a levy order imposing a levy to be paid by saccos conducting specified non-withdrawable deposit-taking business upon authorization. SASRA published a [regulatory impact statement and draft levy order](#) for public access and feedback from stakeholders.



NOTARIES PUBLIC • COMMISSIONERS FOR OATHS • PATENT AGENTS

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