

Financial Services Sector Report

Q4 2021



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BANKING

In the last quarter of 2021, initiatives were set in motion by the Central Bank of Kenya to regulate digital lenders. Borrowers with less than Kshs 5 million in loan value that had previously been performing but had become non-performing were relieved when negative listings to credit bureaus were suspended for 12 months effective October 1, 2021.

I. Acts of Parliament

Regulation of Digital Lending in Kenya (Find Link [Here.](#))

The Central Bank of Kenya (Amendment) Act, 2021 No.15 Of 2021 that commenced on 23rd December 2021 introduced several new terms and initiatives to regulate digital lending in Kenya. The amendment will now subject “digital lenders” providing “digital credit”, which means a credit facility or arrangement where money is lent or borrowed through a digital channel, to scrutiny through licensing and regulation by the Central Bank of Kenya (the Bank).

The amendments also do not permit any person to run a digital credit business unless that person has been licensed by The Bank under this Act or is permitted to do so under any other written law.

The amendment act gives the Bank the following authority: to license digital credit providers; approve digital channels through which digital credit business may be conducted; determine parameters for pricing of digital credit; supervise digital credit providers; suspend or revoke a license; and direct or require such changes as the Bank may consider necessary

The act also includes a requirement for digital lenders to disclose positive or negative information to Credit Reference Bureaus.

The amendment act was assented due to the rise of many digital lending platforms that have undergone little to no scrutiny from the government. Non- deposit micro-finance institutions were initially only regulated at the discretion of the Company registrar who could require a Letter of No-Objection from the Central Bank before allowing registration.

Central Bank is expected to come up with regulations to cater for the amendments made in this case.

II. Guidelines, Notices and Circulars

On 8th November 2021, the Central Bank of Kenya (‘CBK’) [announced](#) the suspension, for a period 12 months, of listing negative credit information for borrowers with loans below Kenya Shillings five million which loans were performing previously but became non-performing from 1st October 2021. In light of the exceptional circumstances arising from the COVID-19 pandemic, the CBK noted that the suspension would provide an opportunity for Micro Small and Medium Enterprises to turnaround their businesses. The suspension will expire on 30th September 2022.

A [circular](#) issued on 9th December 2022 by CBK published its guideline on transition from the London Interbank Offered Rate (‘LIBOR’). The circular noted the Financial Conduct Authority confirmation that all LIBOR settings would either cease to be provided by any administrator or no longer be representative:

- immediately after 31st December 2021 for all Sterling, Euro, Swiss Franc, Japanese Yen and 1-week and 2-month US Dollar settings; and
- immediately after 30th June 2023 for all remaining US Dollar settings.

In this regard, CBK published its [Guidance](#) to provide commercial banks with the framework to be considered to ensure a well-managed transition that appropriately identifies, assesses and deals with all risks. Commercial banks are mandated to present requisite information to the CBK on a monthly basis.

III. Judicial Decisions

1. Nairobi Civil Appeal No. 417 of 2017: Faraj Abdalla Idha t/a Safif Trading v Gulf African Bank Limited¹

Facts:

The appellant executed a SWIFT/RTGS Application Form instructing the Respondent to transfer a sum of GBP183,000 from his account to Road Range Ltd's UK Bank Account. Subsequently, the Appellant was informed by the Director of Road Range Limited (the beneficiary) that they had not received the funds. The Appellant later established that the Road Range Ltd's bankers were Barclays Bank, Liverpool City Branch and not Halifax Bank as had been indicated in the SWIFT Transfer Notification. On becoming aware of his mistake, the Appellant wrote to the Respondent vide a letter directing them to recall with immediate effect the sum of GBP183,000 that was intended to be transferred to Road Range Ltd. Subsequently, the Respondent notified the Appellant that it had recalled the payment, but only succeeded in recovering GBP119,995.94 resulting in the loss of GBP63,004.06, the amount claimed in the suit leading to the judgment from which this appeal arises.

Issues for determination:

- Nature of the Relationship between Appellant and Respondent and the appurtenant Duties
- Liability of the loss complained of

Held:

- That the banker/customer relationship is in the nature of that between a debtor and his creditor. The Court therefore concluded that the Banker is a debtor with a fiduciary character. That said, it is

indisputable that the Respondent was at all material times under a contractual duty to exercise reasonable care and skill in carrying out its part with regard to operations within its contract with the appellant. The Court found that the Respondent carried out the Appellant's instructions to the letter and transferred the sums in issue to the specified bank and account. As it turned out, the beneficiary had no account with Halifax Bank, but with Barclays Bank, Liverpool City Branch.

- Accordingly, liability for the loss complained of rests squarely on the Appellant's shoulders.

Implication:

The Bank has under a contractual duty to exercise reasonable care and skill in carrying out the customers instructions. The Bank cannot be held liable for loss where there are express (read written) instructions from customer.

2. Malindi Law Society & 12 others v Attorney General & 2 others (Petition 19 & 291 of 2016) [2021] KEHC 168 (KLR)²

Brief Facts:

On August 31, 2016, the President of the Republic of Kenya assented to the Land Laws (Amendment) Bill 2015 to amend the laws relating to land to align them with the Constitution of Kenya, 2010 (Constitution). The Petitioners moved the court seeking to have sections 38, 47, 48 and 61(c), 98 of the Land Laws (Amendment) Act declared unconstitutional. The Petitioners argued that the effect of the amendments sought to be made would be to amend the Constitution through the back door and trample on the

¹ <http://kenyalaw.org/caselaw/cases/view/223447/>

² Available at <http://kenyalaw.org/caselaw/cases/view/221739/> accessed on 10th January 2022.

rights, privileges, and obligations acquired by landowners.

The Petitioners contended that section 47 of the Land Laws (Amendment) Act which had amended Section 12 of the Land Act by introduced the concept of controlled land, was unconstitutional for limiting the right to property within the defined controlled land. Section 47 defined controlled land as land in Kenya which was within a zone 25 Km from the inland national boundary of Kenya; within the 1st and 2nd row from the high-water mark of the Indian Ocean and any other land as could be declared controlled under any statute. Under section 47 (2), no transaction in such controlled land, including transfer for consideration could be dealt with without the prior approval of the Cabinet Secretary. Section 47 further required the Cabinet Secretary to seek the approval of the relevant authorities before sanctioning any transaction.

Section 47 of the Land Laws (Amendment) Act introduced new regulatory burdens on non-citizens with land interests particularly at the coastal strip whenever they sought to deal in their land.

Issue for Determination:

- (a) Whether section 47 of the Land Laws (Amendment) Act which introduced the concept of controlled land was unconstitutional for limiting the right to property.

Held:

- (a) Section 47 of the Land Laws (Amendment) Act had far reaching implications on the ownership rights to property. The exercise of the ownership right to property would be greatly

limited within the defined controlled land.

- (b) The State had not demonstrated that the limitation to property ownership rights brought about by section 47 of the Land Laws (Amendment) Act was justifiable, and that the societal need therefore outweighed an individual's right to enjoy the right or freedom to deal with their properties.
- (c) The amendments sought to be introduced under section 12 of the Land Act vide section 47 of the Land Laws (Amendment) Act were unconstitutional, null and void.

Implication:

The uncertainty visited upon lending institutions owners vide section 47 of the Land Laws (Amendment) Act has been removed. Before section 47 was declared unconstitutional, lenders were uncertain whether they could continue to charge lands at the coastal strip or whether the proprietors of properties at the coastal strip would be able to continue servicing the existing lending facilities without the ability to further charge or otherwise dispose of the properties.

For now, the regulatory burden of obtaining the approval of the Cabinet Secretary of Lands for all transactions involving controlled land as defined under the invalidated amendments, has been alleviated for both lenders and non-citizen land proprietors.

3. Trustees of Maximum Miracle Centre v Equity Bank (K) Limited (Civil Case E055 of 2021) [2021] KEHC 237 (KLR)³

Brief facts:

The Plaintiff obtained a loan facility of KShs.216 million from the Defendant. The loan was

³ Available at <http://kenyalaw.org/caselaw/cases/view/223007/> accessed on 10th January 2022.

secured by several securities charged to the Defendant. Clause 4 of the lending agreement gave the Defendant the right to amend interest charges without notice to the borrower. The Defendant varied the interest rate from the first month after drawdown without informing the Plaintiff. The Defendant commenced the process of exercising its statutory power of sale of the charged properties to realise the loan balance. The Plaintiff moved to court to injunct the impending sale on grounds that the loan balance claimed by the Defendant comprised illegal and contractual interest charges which was neither due nor owing.

Issues for Determination:

- (a) Whether the Plaintiff had met the threshold for grant of interim injunctive orders.
- (b) Whether the Defendant had the right to vary interest rates indiscriminately without notice to the Plaintiff.

Held:

- (a) Even though courts have taken the position that parties are bound by the terms of their contract, and that the court cannot rewrite the terms of such

contract, the lender’s right to vary interest is not absolute and cannot be exercised willy-nilly to charge exorbitant interest rates.

- (b) The court could not overlook the fact that there was a huge disparity between the loan arrears claimed by the Defendant and the amount reflected in the Interest Rates Advisory Centre (“IRAC”) report.
- (c) Given the colossal sum of money that the Plaintiff had paid towards servicing the loan facility from the Defendant, the Plaintiff stood to suffer substantial loss in the event the suit property was sold.
- (d) The Plaintiff had met the legal threshold for grant of interim injunctive orders against the Defendant.

Implication:

A lender’s right to vary interest rates is not absolute. Accordingly, a borrower may successfully injunct a lender from exercising its statutory power of sale in cases where it is proved that the lender abused its right to vary interest rates.

FINTECH

Regulations for digital lenders were stipulated through the enactment of the Central Bank of Kenya (Amendment) Act 2021 which provides for the regulation of digital lenders and the public was invited to submit their comments. The digital credit providers are also required to submit their details before the end of January 2022 to Central Bank of Kenya.

I. Guidelines, Notices and Circulars

The CBK issued a [press release](#) on 23rd December 2021 confirming the enactment of the Central Bank of Kenya (Amendment) Act 2021 which provides for the regulation of digital lenders. The press release also announced

publication of the draft Digital Credit Providers [Regulations](#) and invited the public’s comments. Written submissions ought to be presented before 5PM 21st January 2022 as the CBK (Amendment) Act 2021 requires that its regulations be published by 23rd March 2022. In light of the transition to regulated environment, the CBK also requested all Digital Credit Providers to provide their business details via [this link](#) by 21st January 2022.

INSURANCE

The Insurance Regulatory Authority (IRA) invited public comments on a framework for health insurance in the country.

I. Guidelines, Notices and Circulars

On 1st October 2021, the Insurance Regulatory Authority issued a [notice](#) inviting public

comments to a health insurance [report](#) on the development of a comprehensive legal and regulatory framework for the regulation, supervision and development of health insurance in Kenya. Submission of comments closed on 5th October 2021.

INVESTMENTS

The Public Private Partnerships Act 2021, repealing the 2013 Act, commenced on 23rd December 2021 and streamlines the PPP regulatory framework. The NSE received approval from the CMA to launch day trading.

I. Acts of Parliament

The Public Private Partnerships Act 2021 (Find Link [Here.](#))

The Public Private Partnerships Act 2021 which commenced on 23rd December 2021, provides for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development projects through public private partnerships; to streamline the regulatory framework for public private partnerships and it also repeals the Public Private Partnerships Act, 2013.

The Act establishes a Public-Private partnership committee and highlights the duties of contracting authorities, the determination of the duration of public private partnership agreements. It also outlines pre-qualification procedures, systems on execution of project agreements.

The act also provides for Privately initiated proposals to a contracting authority and outlines the conditions that must be met for the contracting authority to consider such a proposal.

Any investment into this sector-that includes partnership with the National and County government should be cognizant of construction

contract laws as many of the terms such as variations, BOOT- Build, Own, Operate and Transfer etc are technical and are specific to these types of contracts. Another point to note is that the Kenyan government often uses FIDIC contracts for such projects and it is advisable to seek out experts on the same or have basic understanding beforehand on the subject.

II. Guidelines, Notices and Circulars

The Capital Markets Authority ('CMA') published a press release on 23rd November 2021 announcing the issuance of guidelines on share buybacks for listed companies in Kenya. While the guidelines complement the provisions of the Companies Act 2015, the CMA intend to go a step further and to address circumstances specific to listed companies through additional disclosure requirements.

The Nairobi Securities Exchange ('NSE') issued a press release on 3rd December 2021 announcing it had received approval from the CMA to launch day trading. Day trading is defined in the release as the practice of purchasing and selling a security within a single day or trading session or multiple times over the course of the day. In this regard, an incentive

structure has been put in place whereby investors participating in day trades will receive a discount with the second leg of the transaction

levied at 0.114% instead on 0.12% levied on normal trades.

RETIREMENT BENEFITS

This last quarter saw the introduction of the office of the enforcer whose functions include acting on behalf of trustees. Retirement Benefits schemes will now also be required to surrender unclaimed benefits to UFAA.

I. Acts of Parliament

Introduction of the Office of The Enforcer (Find Link [Here.](#))

The Trustee (Perpetual Succession) (Amendment) Act, 2021 which commenced on 23rd December 2021 introduced the office of ‘the enforcer’ defined as the settlor or any other person, body or association of persons who is appointed or replaced by the settlor or the beneficiaries in the absence of the settlor, to monitor the administration of the trust for the benefit of the beneficiaries. The enforcer’s functions are to enforce the terms of the trust; inquire into the status of implementation of the trust; require the trustee to take remedial action, where there is breach of the terms of the trust; report to the settlor or the beneficiaries any financial or other breaches by the trustees; and pursue legal action against the trustees, whether criminal or civil. The enforcer may act in the place of the Trustees during the hearing and determination of any suit.

The amendment also provides for non-charitable trusts outlining that they may be created for a specific purpose notwithstanding the absence of any beneficiary. The non-charitable purpose trust becomes valid if the purpose, whether partly charitable or not, for which the trust is created is specific, capable or fulfilment and is not illegal; and if the terms of the trust provide for the disposition of surplus assets of the trust upon its termination.

II. Guidelines, Notices and Circulars

On 2nd November 2021, the Retirement Benefits Authority issued a [notice](#) advising that all administrators, custodians and trustees of retirement benefit schemes will be required to surrender any unclaimed or otherwise abandoned retirement benefits to the Unclaimed Financial Assets Authority. The notice also clarified unclaimed or abandoned assets to mean:

- benefits in respect of a member who has attained retirement age prescribed by law or in a scheme’s trust deed and rules that have not been claimed for two years from the date they fell due and where there has been no communication from the member with respect to their benefits. Trustees are required to make efforts towards tracing the member before the two-year period.
- retirement benefits in respect of a member who has not been traced and that have remained unclaimed within a period of two years from the completion of winding up proceedings in respect of a scheme.

death benefits that have not been claimed for two years from the date they fell due

SACCO SOCIETIES

Communication by SASRA was sent out to all Non-deposit Taking Sacco Societies concerning the submission of audited financial statements and appointment of external auditors including the legal requirements for this submission.

I. Guidelines, Notices and Circulars

The Sacco Societies Regulatory Authority ('SASRA') published a [notice](#) to all chief executive officers of Non-deposit Taking Sacco Societies with respect to the submission of audited financial statements and appointment of external auditors. The notice reminded the saccos of legal requirements including:

- prescribed format of presenting annual reports and financial statements;
- appointment of external auditors approved by SASRA;
- responsibilities of external auditors to SASRA; and
- deadline for submission of annual reports and audited financial statements.

The notice also advised that SASRA has scheduled capacity building programs to enhance compliance with the Non-withdrawable Deposit Taking Sacco Business Regulations to be communicated in the course of 2022.



NOTARIES PUBLIC • COMMISSIONERS FOR OATHS • PATENT AGENTS

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