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MMAN INSIGHTS

The Legal Landscape in Kenya & Across Africa

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CAROLE AYUGI
Managing Partner,

LETTER FROM THE MANAGING PARTNER

It is with great pleasure that I present to you the 4th edition of MMAN Insights. This is our annual publication geared towards offering insights to investors in Kenya, both local and international. It is my sincere hope that you find this publication not only informative, but also a delight to indulge in. I welcome you to share it amongst your networks.

In this year's publication, we explore what digitisation in land matters means to landowners with services being real time and at the click of a button. The relief it offers to citizens to be able to carry out land transactions online, drastically reduce human error and curb fraud with the launch of Ardhi Sasa in April 2021.

In keeping with the times, we shed insight on what the African Continental Free Trade Area Agreement as a trade pact means in terms of ease of doing business as well as delve into what a sustainable Start-up Ecosystem entails.

Public Private Partnerships are also of interest to investors, both local and international. In this publication, we look at the law, the entities involved and challenges faced within these partnerships.

The team at MMAN Advocates continues to provide innovative and meaningful legal solutions to our clients and in keeping true to our culture of commitment, we deliver a superior experience for our clients. We therefore invite you to visit our website www.mman.co.ke and welcome you to not only read the informative articles and publications but to also feel free to subscribe and receive more insights from our team at MMAN Advocates.

Read on and enjoy!

Carole Ayugi

CAROLE AYUGI

ABOUT MMAN

MMAN Advocates is a Kenyan corporate law firm that provides innovative legal solutions to its clients. The firm comprises of 18 lawyers and over 17 support staff members who offer expert legal advice and support services to businesses, banks and financial institutions, corporate entities, governments, multinationals and private clients.

The Firm has consistently been ranked by leading international legal directories such as Chambers Global, the ILFR1000 and the Legal500 as one of the leading commercial law firms in Kenya.

We provide both local and cross-jurisdictional legal services, either directly or through our international legal networks with our mission being to offer our clients incisive and seamless advice of the highest professional standards. MMAN is the sole Kenya member of TerraLex (www.terralex.org) a pool of law firms rigorously vetted from strategically-resourced locations and the Eversheds Sutherland Africa Alliance, the largest legal network in Africa with firms in 37 countries.

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Our primary practice areas are banking and finance, corporate, commercial, employment and pensions, litigation and alternative dispute resolution, projects and real estate. While we advise clients across all sectors, we have focus on financial services, agribusiness, engineering and construction, energy, TMT, retirement benefits, real estate and transport sectors.

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We take pride in producing high quality work and delivering exceptional legal services. We are committed to continuous improvement and professional growth.

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DOING BUSINESS IN AFRICA

HAMIDA ABASS
Associate

TIGHTENING THE NOOSE ON ANTI-MONEY LAUNDERING (AML) OBLIGATIONS: Investments

The financial crisis of 2007 illustrated the impact unbridled systemic risks have in undermining global financial markets.

The impact money laundering and terror financing has on global economies is far reaching and as a result, various governments have acceded to global financial frameworks in combating the spread of illicit financial flows.

Financial sector players such as banks, insurance companies and investment bodies have various monitoring and reporting obligations under local and international AML frameworks. Owing to the nature of the investment industry and particularly the importance of maintaining client confidence, it is critical for the investment companies to audit their compliance with both local and international AML frameworks.

Locally, sector regulators and intelligence units have the primary responsibility of regulating the financial sector by preventing the integration of illicit financial flows into the financial system.

Pursuant to regulation 31 of the Kenya Proceeds of Crime and Anti Money Laundering Act, No. 9 of 2009 (POCAMLA), reporting institutions including financial institutions[1]

1 Section 2 of the POCAMLA defines financial institutions as any person or entity which conducts as a business, one or more of the following activities or operations: accepting deposits and other repayable funds from the public; lending, including consumer credit, mortgage credit, factoring with or without recourse, and financing of commercial transactions; financial leasing; transferring of funds or value, by any means including both formal and informal channels; issuing and managing means of payment (such as credit and debit cards, cheques, travellers'cheques, money orders and bankers' drafts and electronic money); financial guarantees and commitments; trading in – money market instruments, including cheques, bills, certificates of deposits and derivatives; foreign exchange, exchange, interest rate and index funds; transferable securities and commodity futures trading; participation in securities issues and the provision of financial services related to such issues; individual and collective portfolio management; safekeeping and administration of cash or liquid securities on behalf of other persons; otherwise investing, administering or managing funds or money on behalf of other persons; underwriting and placement of life insurance and other investment related insurance and money and currency changing.

and designated non-financial businesses and professions[2] have an obligation to confirm the legitimacy of the source of funds from their customers. The POCAMLA establishes the Financial Reporting Centre (FRC) whose primary objective is identifying proceeds of crime, money laundering and terror financing.

The FRC also has the statutory power of issuing directives to reporting institutions, analysing reports on unusual transactions and requesting for additional information from reporting institutions. It also liaises with other foreign intelligence units in providing information relating to the commission of an offence.

In 2016, the Central Bank of Kenya (CBK) vide a Banking Circular published additional guidelines to further tighten the noose on AML commitments. This effectively mandated all financial institutions to obtain additional information when handling cash transactions above USD 10,000.

The CBK has also put in place strict foreign exchange controls and regulations of payment between residents and non-residents to ensure cross border transfers and payments are not integrated nor connected with illegal transactions.

In 2020, it was reported that a number of private investment funds were suspected vehicles for financial abuses including the advancement of illicit financial flows.

It is now more critical for investment bodies lacking adequate regulatory frameworks, to undertake self-audits and establish robust compliance programs in order to maintain a good reputation. These compliance programs should cover detailed KYC assessments and enhanced risk assessment exercises which identify potential threat actors.

Through enhanced due diligence apparatuses such as customer screening and verification, financial institutions will be able to determine potential threat actors and report these to the respective national intelligence units.

Screening of domestic and foreign politically exposed persons (PEPs) is a step toward protecting the integrity of the investment industry. According to the Financial Action Task Force Recommendations, dealings with PEPs should be treated cautiously owing to their prominent roles which makes them susceptible to abuses like corruption and abuse of office.

The persistent threat of money laundering will only be effectively managed by analysing the nature of the transactions and customers involved. Investors prefer to invest in various vehicles such as mutual funds, bonds, money markets and other pooled investment vehicles (Investment Vehicles).

Effectively, the onus of establishing AML compliant programs for Investment Vehicles largely falls on their management. It is therefore critical for the management to understand the monitoring and reporting obligations under the applicable domestic legislation and tailor AML policies in this regard.

These tailored policies should assess the potential risks associated with the specific Investment Vehicle; stipulate the AML obligations of the Investment Vehicle; determine a customer due diligence framework and verification tool and project potential threat actors and mitigation measures.

Lastly, the Investment Vehicles should undertake a regular review of their AML programs and policies to keep abreast with domestic and global best practices in the fight against money laundering.

In 2016, the Central Bank of Kenya (CBK) vide a Banking Circular published additional guidelines to further tighten the noose on AML commitments. This effectively mandated all financial institutions to obtain additional information when handling cash transactions above USD 10,000.

2 Section 2 of the POCAMLA defines designated non-financial businesses or professions to mean: casinos (including internet casinos); real estate agencies; dealing in precious metals; dealing in precious stones; accountants who are sole practitioners, partners or employees within professional firms; non-governmental organisations; trust and company service providers and such other business or profession in which the risk of money laundering exists as the Minister may, on the advice of the Centre, declare.

ALLISON AMONDI
Junior Associate

BUILDING A SUSTAINABLE START-UP ECOSYSTEM IN KENYA

Start-ups are defined as young companies or entities founded to develop a unique product or service with a potential for significant business opportunity or impact.

There is no singular definition of the term "start-up" globally with different jurisdictions opting to prescribe eligibility requirements that must be met by an entity to be recognized as a start-up. The Start-Up Bill, 2021 (the "Bill") prescribes the eligibility requirements for an entity to be registered as a Start-Up in Kenya and gain admission into an incubation programme. These requirements are that the entity must:

1. Be an entity registered in Kenya either as a company, partnership, limited liability partnership or non-governmental organisation under the relevant Acts;
2. Be newly registered or has been in existence for a period of not more than seven years, or ten years for start-ups in the biotechnology sector;
3. Have as its objects the innovation, development, production or improvement and commercialisation of innovative products, processes or services or if it is a scalable business model; and
4. Attribute at least 15% of it's expenses to research and development activities.

In addition to the above, other requirements specific to start-ups registered within Kenya are that the entity must have its headquarters or a branch in Kenya and must be at least one third owned by one or more Kenyan citizens.

A stimulating and viable ecosystem is vital to provide start-ups with an environment to grow and thrive. In line with Kenya's Vision 2030 goal, the government has made significant strides towards developing businesses within the ICT sector to create jobs and wealth. The Bill has been preceded by the development of favourable background conditions that have contributed to the development of this ecosystem.

In addition to the Bill, what makes Kenya an attractive location for the setting up of start-ups?

Firstly, in the recent years there has been significant improvement in the ease of setting up companies and other entities in Kenya. This is because of the recent online digitization of the Companies Registry on the eCitizen portal. Another attractive feature is that an individual can set up a company from anywhere in the world through the portal as physical copies of documents are no longer required for incorporation.

For jurisdictions with vibrant start-up ecosystems, they have embraced the concept of an economic government that uses information, communication and technology ("ICT") to provide public services to its citizens. This has been done by Kenya in line with its e-government strategy under the Ministry of ICT.

Secondly, Kenya has a developed digital infrastructure, in particular mobile connectivity, that is vital to startups. In terms of internet infrastructure and broadband speeds, Kenya is ranked second within Africa.

There are also government established funds offering financial and business developmental to young entrepreneurs such as the Youth Enterprise Development Fund, Women Enterprise Fund and Uwezo Fund. These funds have received a great uptake over the years with many youth entrepreneurs receiving loans and other financial support from the government.

There are also numerous incubators for ICT startups that assist Kenyan startups in lowering entry barriers in the ICT sector to implement and scale up their businesses within and outside of Kenya. These programmes focus on development of a startup's products, provision of mentorship opportunities and also adequate internet access to businesses. An example of such a startup incubator is Nailab.

Through this scheme, the government would provide up to 40% of the capital raised by foreign investors.

The Bill aims to establish a framework that will encourage growth of technological development and result in entrepreneurship employment. This Bill is still before Parliament and is yet to be gazetted. Its gazettement will see it join a list of legislations applicable to startups in Kenya such as the Companies Act, No. 17 of 2015 (that governs the incorporation of entities), the Access to Information Act and Kenya Information and Communications Act (that facilitate and promote the development of the ICT sector in Kenya by requiring government to increase the access to information by members of the public).

The Start-Up Bill introduces incentives to promote the establishment and development of startups such as:

1. Admission into incubation programmes for startups on meeting the eligibility requirements;
2. Subsiding the formalization of startups;
3. Facilitating the protection of intellectual property of innovations;
4. Providing support in form of research and development activities;
5. Training and capacity building programmes; and
6. Fiscal incentives such as tax incentives.

THE CREDIT GUARANTEE SCHEME

The Bill introduces a Credit Guarantee Scheme that may be established to assist in the development and growth of startups in Kenya. Through this Credit Guarantee Scheme, startups will have access to financial support, financial and credit information and capacity building on financial and risk management. Credit guarantee schemes offer third-party credit risk mitigation to lenders by absorbing a portion of the lender's losses on the loans made to startups in case of default. Looking at Israel which is considered as having one of best start-up ecosystems in the world, the government has a programme known as the Yozma Funds programme. Through this venture, the government invests and provides support to young tech startups in conjunction with foreign investors. It is an attractive incentive to foreign investors because the government would provide up to 40% of the capital raised by foreign investors. The success of this Fund is also attributed to various factors such as:

1. The structuring of the Fund as a venture capital partnership instead of a government guarantee scheme administered by the Government;
2. Financial support offered through equity investment in the startup;

3. A 5-year option by the private investors to buy out the government's equity share enabling them to leverage their profits; and
4. Allowing foreign financial institutions to invest in startups. This would enable startups learn from and cooperate with foreign entities with a greater knowledge on startups.

Prior to the Yozma Funds programme, Israel had in place a credit guarantee scheme that offered partial guarantees to traded Venture Capitalist Funds for losses from their investments in the start-ups. This did not have as much success as the Yozma fund. This is because the financial support offered was focused on mitigating losses incurred by investors as opposed to injecting or supporting capital invested by foreigners.

What lessons can Kenya learn from other jurisdictions in building its start-up ecosystem?

1. The importance of attracting international and foreign companies to invest in local startups through offering regulatory and tax incentives.
2. Ease entrance of research and development firms into the sector through re-evaluating start-up costs and procedures that may hinder the setting up of new ventures.
3. Establish mechanisms to offer protection to start-ups should the venture not be successful. This would be in addition to the Credit Guarantee Scheme. This can be through making provisions on declaration of bankruptcy specific to start-ups or offering unemployment insurance to start -ups at their early stages.
4. Kenya should place a focus on creating market opportunities for startups not only locally, but also outside of Kenya. This, in conjunction with financial support, will increase the ability of the startup to grow and increase production of its products.

ERNEST MURIUNGI
Junior Associate

EASING DOING BUSINESS IN KENYA:

An Overview Of The Business Laws (Amendment) Acts Of 2020 And 2021

The Business Laws (Amendment) Act, 2020 ("the 2020 Act") and The Business Laws (Amendment) (No.2) Act, 2021 ("the 2021 Act") [collectively "the Acts"] were assented into law on 18th March 2020 and 30th March 2021 respectively. The Acts primarily aimed to facilitate the ease of doing business in Kenya with the 2021 Act having a particular focus on a post-pandemic economic recovery strategy.

In this article, we highlight the changes brought by the Acts in some of the key areas of consideration while doing business i.e. management of company affairs and land laws.

EXECUTION OF DOCUMENTS VIA DIGITAL SIGNATURES

The 2020 Act amended the Law of Contract Act (Cap.23), the Land Registration Act (2012), the Survey Act (Cap. 299) and the Registration of Documents Act (Cap. 283) to permit the use of electronic signatures and advanced electronic signatures in the execution of legal documents such as land instruments and contracts.

In context, the Kenya Information and Communication Act (1998) ("KICA") defines an electronic signature as data in electronic form affixed to or logically associated with other electronic data which may be used to identify the signatory in relation to the data message and indicate the signatory's approval of the information contained in the data message. An advanced electronic signature has been defined as an electronic signature which is (1) uniquely linked to the signatory, (2) capable of identifying the signatory, (3) created using means that the signatory may maintain under their sole control, and (4) linked to the data to which it relates in such manner that any subsequent change to the data may be detectable.

Worth noting, parties intending to sign contracts electronically shall be required to obtain digital signatures from electronic certification service providers who are licensed by the Communications Authority of Kenya.

RATIONALIZING MANAGEMENT OF COMPANY AFFAIRS

The Acts have made significant changes to the management of company affairs as illustrated below:

1. The 2020 Act amended the Companies Act (2015) to do away with the requirement of affixing common seals to signify execution of contracts by companies. Going forward, contracts entered into by companies can be executed in the following ways:

   (b) by two authorized signatories; or

   (c) by a director of the company in the presence of a competent witness; or

   (d) by a person duly appointed by the company through a power of attorney.

2. The 2020 Act sought to protect minority shareholders from being squeezed-out of their companies by majority shareholders as the amendments provided that take-over thresholds be raised to 90% from the previous threshold of 50%.

3. Further, the 2020 Act made it a mandatory requirement for companies to convert any issued bearer shares to registered shares, notwithstanding the provisions of the company's memorandum and articles of association.

4. The 2021 Act amended the Companies Act (2015) to provide for virtual meetings and hybrid meetings as alternatives to physical general meetings. The amendments defined hybrid meetings as general meetings where some participants are in the same physical location while other participants join the meeting through electronic means including video conference, audio conference, web conference or such other electronic means. On the other hand, virtual meetings are defined as general meetings where all members join and participate in the meeting through electronic means including video conference, audio conference, web conference or such other electronic means. It is a requirement that in giving a notice for a hybrid or virtual meeting, the means of joining and participating in the meeting must be specified.

DIGITIZING LAND TRANSACTIONS

In addition to providing for the use of electronic signatures and advanced electronic signatures in the execution of land instruments, the 2020 Act amended the Stamp Duty Act (Cap. 480) to provide for electronic stamping. An entirely electronic stamping process, as intended by the amendments, is yet to materialise noting that a digital assessment platform has not been provided.

Further, the 2020 Act amended the Registration of Documents Act (Cap 285) to allow for all registrable documents to be filed either physically or electronically. To facilitate electronic filing, the Principal Registrar has been empowered to establish and maintain the Principal and Coast registries in electronic form.

The 2020 Act also amended Land Registration Act (2012) to the extent that it relieved the requirement to obtain land rent and rates clearance certificates prior to registration of a transfer or creation of an interest in land, with the exception of registration of leases and charges. The Registrar shall have the power to dispense with verification of execution of an instrument if the instrument has been electronically processed and executed by the parties consenting to it.

CHRISTOPHER KIRAGU
Principal Associate

ENVIRONMENTAL, SOCIAL AND GOVERNANCE CRITERIA: Why They Are Important For Kenyan Businesses Seeking Funding

WHAT IS ESG

ESG refers to environmental, social and governance criteria which in the context of investing drive or impact businesses and inform investment decisions. Environmental criteria examine how a business addresses the impact of its operations or products on the environment. The focus of social criteria is on the labour practices, social trends and policies enacted by a business. Lastly, governance criteria consider the leadership of a business and its management.

ENVIRONMENTAL FACTORS

An investor may decide whether to invest in a company based on its environmental policies or practices. The topic by itself is broad for it covers issues such as climate change, deforestation, pollution, waste management, natural resource management amongst others. Businesses must be aware of the risks that such environmental factors pose to them in their industry and the implications of failing to address them from an investor's perspective. For example, the real estate industry is one of the sectors that faces direct risk from environmental factors such as floods, pollution and waste management. A flood can have adverse effects on real estate by destroying or damaging property and thereby resulting in a direct loss of revenue for businesses, and it can also result in high insurance premiums being paid to mitigate such a future risk.

For a risk-averse investor, the failure to consider environmental factors may result in no investment being made into the business and on the converse, an investor willing to fund the business may seek a controlling stake to oversee that the necessary preventative actions are undertaken to ensure returns.

SOCIAL FACTORS

Social factors can represent a significant risk to a business with investors being critical of how a business interacts and engage with its employees, customers, and the community it serves or within which it operates. Under the social criteria, a potential investor shall also consider how a business addresses health and safety concerns.

Investors are now keen to see how businesses treat their employees, their skill level, the initiatives in place to enhance skill levels and address employee concerns and working conditions. In 2019, PricewaterhouseCoopers published a report called The Productivity Agenda: Moving Beyond Cost Reduction in Financial Services where they identified several actions that their clients were undertaking to achieve positive productivity results, such as better understanding the workforce, rethinking change functions, amongst others. It is acknowledged in the report that addressing such issues can reduce the costs of a business and positively impact a business's profit margin.

Similarly, how a business engages its customers is crucial. Customers are becoming more socially conscious and with the support of legislation, they can agitate for and enforce their rights. Failure to properly address customers concerns can result in boycotts, lawsuits and loss of reputation. If a business is in touch with its consumers, it has greater awareness of consumer trends, customer preferences and satisfaction, and with this information, the business can quickly adapt or address issues which can either allow it to gain an edge on competitors or minimize potential losses from claims or loss of reputation.

A business with a strong governance rating is more attractive given that the leadership in such businesses generally set out clear structures and policies to guide the management and the staff, thereby enhancing compliance internally and reducing the risks related to external compliance

GOVERNANCE FACTORS

The governance criteria address issues such as board quality, diversity, effectiveness, and transparency. A business must address governance issues to minimize disputes and to effectively manage and promote the success of the business. Investors as potential shareholders in a business critically review the governance of a company to ascertain issues such as:

- whether the systems in place are aligned with its governance policies;
- what are the risk management practices and policies of the business;
- the nature of the supply chain of the business and its management;
- whether there is an anti-corruption policy in place; and
- the transparency in the business reporting.

A business with a strong governance rating is more attractive given that the leadership in such businesses generally set out clear structures and policies to guide the management and the staff, thereby enhancing compliance internally and reducing the risks related to external compliance e.g., to government regulations.

CONCLUSION

The prominence of ESG as a criterion to assess a business is likely to increase, with governments taking more proactive action concerning ESG issues and with investors willing to forego an investment that is not aligned with their values or practices. Failing to implement appropriate ESG measures can result in the loss of a potential investor or even the exit of an investor and should therefore be a component of any businesses' strategic plans.

LYNNETTE WANYONYI
Senior Associate

THE COMMON REPORTING STANDARDS FOR FINANCIAL INSTITUTIONS AND ITS IMPLICATION ON DOING BUSINESS IN KENYA

INTRODUCTION

Common Reporting Standards ("CRS") [1] **are standards for automatic exchange of financial account information in tax matters developed by the Organisation for Economic Co-operation and Development ("OECD") with a view to curb tax evasion and to protect the integrity of global financial systems.** The legal basis for the preparation of the CRS is the Convention on Mutual Administrative Assistance in Tax Matters which was ratified by Kenya on 5 December 2019.

In summary, the CRS defines financial institutions to include custodial institutions, depository institutions investment entities and specified insurance companies who are required to report on accounts held by both entities and individuals. The financial information to be reported relates to interest, dividends, account balance or value, income from certain insurance products, sales proceeds from financial assets and other income generated with respect to assets held in the account or payments made with respect to the account. In addition to reporting standards, the CRS also prescribes common due diligence standards to be followed by financial institutions in relation to pre-existing accounts and new accounts to establish tax residence of the holders of financial accounts, and the individuals who control such accounts.

IMPLEMENTATION OF THE CRS IN KENYA

To implement the CRS, participating countries are required to have rules in place that require financial institutions to report information consistent with the CRS provisions.

1 OECD (2014), Standard for Automatic Exchange of Financial Account Information in Tax Matters, OECD Publishing, Paris, https://doi.org/10.1787/9789264216525-en.

In Kenya, the relevant law that provides for the CRS is the Tax Procedures Act 2015 ("the Act"). Following the amendment of the Act vide the Finance Act No. 8 of 2021, the CRS regime was introduced in Kenya with effect from 1 July 2021.

The Act was amended by inserting section 6A and section 6B.

As amended, the Act now provides for the application of multilateral agreements and treaties that have been entered into by or on behalf of the Government of Kenya relating to international tax compliance and prevention of evasion of tax or exchange of information on tax matters in the same manner as provided under the treaties or multilateral agreements. It also defines 'Kenyan financial institution' [2] to be branches of any financial institution resident in Kenya that are located in Kenya.

In addition, the Act includes provisions on financial institutions' obligations in relation to due diligence, identifying reportable accounts and the date by which and the manner in which an information return or a 'nil' return shall be filed with the Commissioner of the Kenya Revenue Authority.

Any agreement entered into in contravention of section 6B of Act or Regulations made under the Act in relation to the CRS[3], shall be void.

The Cabinet Secretary is yet to publish the regulations envisaged under the Act to fully implement the CRS . However, Kenya is expected to exchange information for the first time in September 2022.

From that date, it is expected that the Kenya Revenue Authority will also receive information relating to persons tax resident in Kenya from other participating countries' tax authorities. It however remains to be seen what the requirements relating to financial institutions in Kenya will be.

IMPLICATION ON DOING BUSINESS IN KENYA

The CRS regime is relatively new to Kenya and without publication of the attendant regulations by the Cabinet Secretary in charge of tax matters, the impact of the same on the business environment is yet to be fully established.

The CRS regulations are likely to rely heavily on laws relating to anti-money laundering in particular 'Know Your Customer' requirements and beneficial ownership requirements under the Companies Act 2015. Therefore, in our view, with increased disclosure and reporting requirements being imposed, Kenya will be aligned with international standards, increasing investor confidence in the country and the number of foreign companies seeking to invest in Kenya.

On the flip side, with increased disclosure and reporting requirements, the cost of starting and running a business in Kenya may increase as financial institutions will face an additional compliance obligation.

CONCLUSION

While the implementation of the CRS is a positive step by Kenya in reaffirming her commitment to global efforts to tackle tax evasion, its impact on the 'ease of doing business' remains to be seen. We can only speculate on the likely developments between now and September 2022 when Kenya is expected to begin exchanging information as required by the CRS.

2 Tax Procedures Act 2015, s. 6B (1)
3 Ibid (n 2), s. 6B (6).

MONICA ENGOLA
Principal Associate

IS THE AFRICAN CONTINENTAL FREE TRADE AREA AGREEMENT (AFCFTA) AN ENABLER OF SUSTAINABLE TRADE?

INTRODUCTION

The African Continental Free Trade Area (AfCFTA) Agreement (Agreement) is a free trade agreement that was signed by 44 out of a total of 55 African countries in Kigali, Rwanda on 21 March 2018, at the 10th Extraordinary Summit of the African Union to establish a free trade area across the African continent. Given the number of Countries participating, the AfCTA will be the largest free trade area in the world. The Agreement officially entered into force on 30 May 2019.

Prior to this Agreement, there were various existing economic communities within the African continent including the Arab Maghreb Union (AMU); the Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel-Saharan States (CEN-SAD); the East African Community (EAC); the Economic Community of Central African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority on Development (IGAD) and the Southern African Development Community (SADC).

Some of the existing economic communities in Africa were naturally geographically determined and comprised of countries within the same geographical location while others overlapped across regions within Africa. Historically, trade in Africa was in a strict sense not an establishment of political leadership and comprised majorly movement of goods across long distances. Trade routes and trade hubs connecting the various routes naturally developed and over time formal trade structures were put in place at country and regional level. The AfCFTA was created to build on the benefits derived from the existing economic communities.

On the African continent, internal tariff barriers, border controls and other protectionist policies are hindrances to movement of goods and persons from one country to another. Regional trade agreements and establishment of free trade areas are some of the measures which have been implemented to address these challenges.

It is expected that the Agreement once fully implemented will boost manufacturing and by 2035 contribute to reducing the number of people living in extreme poverty by 30 million people and people living in moderate poverty by 68 million. Other gains expected from this Agreement are increase in real income by US$ 450 billion; increase in the volume of total exports by 29%; intracontinental exports to increase by more than 81% and exports outside the African continent by 19%; increase in employment opportunities and wages for both skilled and unskilled workers. Most gains are expected within the manufacturing sector, followed by agricultural sector and modest gains from trade in services.

Kenya is one of the countries that ratified the Agreement, the others being Algeria, Angola, Burkina Faso, Cameroon, Chad, Republic of Congo, Côte d'Ivoire, Djibouti, Egypt, eSwatini, Equatorial Guinea, Ethiopia, Gabon, Ghana, Guinea, Kenya, Mali, Mauritania, Mauritius, Namibia, Niger, Rwanda, Saharawi Republic, São Tomé and Príncipe, Senegal, Sierra Leone, South Africa, The Gambia, Togo, Uganda, Zimbabwe and more recently Tanzania.

SCOPE OF THE AGREEMENT

The general objectives of the AfFCTA are to: (a) create a single market for goods and services supported by movement of persons to deepen economic integration of the African continent; (b) create a liberalised market for goods and services; (c) contribute to the movement of capital and natural persons and facilitate investments; (d) lay the foundation for the establishment of a Continental Customs Union at a later stage; (e) promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties; (f) enhance the competitiveness of the economies of State Parties within the continent and the global market; (g) promote industrial development through diversification and regional value chain development, agricultural development and food security; and (h) resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.

The specific objectives of the AfCFTA are that member states shall: (a) progressively eliminate tariffs and non-tariff barriers to trade in goods; (b) progressively liberalise trade in services; (c) cooperate on investment, intellectual property rights and competition policy; (d) cooperate on all trade-related areas; (e) cooperate on customs matters and the implementation of trade facilitation measures; (f) establish a mechanism for the settlement of disputes concerning their rights and obligations; and (g) establish and maintain an institutional framework for the implementation and administration of the AfCFTA.

The Agreement comprises of Protocols on Trade in Goods; Protocol on Trade in Services; Protocol on Rules and Procedures on the Settlement of Disputes. In addition, The Protocol on Investment, Protocol on Intellectual Property Rights and Protocol on Competition will be formulated in subsequent phases of implementation.

Generally, the Agreement covers the reduction of tariffs among member countries; trade facilitation policies including those relating to investment and intellectual property rights protection; regulatory measures across the African continent to establish standards and counter technical barriers to trade. The policy areas covered by the Agreement include tariffs on manufactured and agricultural goods; export taxes; customs; competition policy; anti-dumping; counterveiling measures; State Trading Enterprises; technical barriers to trade; sanitary and phytosanitary measures; movement of capital; intellectual property rights; and investment.

KEY PRINCIPLES GOVERNING THE AFCTA

The Agreement will be governed by various principles including those commonly applicable to other preferential trade areas and these include: Most-Favoured-Nation (MFN) Treatment; reciprocity; substantial liberalisation; transparency and disclosure of information; consensus in decision-making; national treatment; flexibility, special and differential treatment.

IMPLEMENTATION OF THE AGREEMENT

Implementation will be done in a phased manner with Phase I focusing on liberalisation of trade in goods and services and specifically eliminating tariffs on 90% of product categories and establishing a framework for dispute settlement. Phase II of implementation will focus on establishing competition and investment policies, and intellectual property rights protection. It is expected that the AfCTA will culminate into a customs union at a later stage.

INSTITUTIONAL FRAMEWORK FOR IMPLEMENTATION

The African Union Assembly which comprises of all African Union Heads of State and Government will provide oversight on the implementation of the Agreement and is also the decision-making body for the AfCTA. Other bodies involved in the implementation of the Agreement are the Council of Ministers comprised of Ministers for Trade or other nominees from State Parties; the Committee of Senior Trade Officials comprised of Permanent Secretaries or other officials from participating countries; The AfCTA Secretariat which is the administrative organ responsible for coordination of implementation of the Agreement; and the Dispute Settlement Mechanism to handle disputes involving participating countries.

The extent to which this and other benefits from AfCFTA will be realised is dependent on how successful the implementation of the Agreement will be

AFCFTA AS A TRADE ENABLER

Generally, intra-African trade, has over time been much lower in comparison with intra-regional trade in other regions for example America, Asia, Europe and Oceania. The foregoing notwithstanding, some of the regional trading blocs have grown in strength and yielded positive results over the years.

Access to wider market: The AfCFTA is expected to create a single market with free movement of goods, services and persons or labour which will facilitate trade and greater access to various business and partnership opportunities within the African continent.

Regional integration: The AfCFTA will facilitate closer regional integration and co-operation amongst member states, and this will in turn create a more condusive environment for intra-African trade.

Increased competitiveness: Increased intra-African trade will promote competitiveness within the manufacturing sector and industries, diversification of exports and to spur infrastructure development and economic growth within the region

Increased foreign direct investment: The benefits from the AfCFTA will make Africa a more attractive trade partner and are expected to increase foreign direct investment and cross-border investment in and within the region. This would in turn facilitate technology and human expertise transfer and creation of new industries across countries within and outside the region.

Promotion of good governance: The AfCFTA is expected to promote good governance in intra-African trade which will in turn create a more condusive environment for trade.

Consumer protection: the removal of tariff and non-tariff barriers would facilitate increase in the quantity, variety, and quality of products. Improved quality and competitive pricing of products is beneficial to consumers.

CHALLENGES

Full implementation of the Agreement is likely to pose various challenges including those listed below:

Policy and institutional changes: To be successful, the AfCFTA requires formulation and implementation by member states of the right policies to support a free market. Given the nature and extent of policy and institutional changes required for example, removal of tariff and non-tariff barriers, infrastructure development, free movement of people and the resources required for effective implementation of the AfCFTA, there are likely to be delays and challenges in having the appropriate policy and institutional framework in place. Further, it is important to put in place supportive policies for the vulnerable member states and groups. It is worth noting that free trade area agreements do not always result in unrestricted free trade.

Infrastructure: Poor or inadequate infrastructure remains one of the major challenges to intra-African trade. Full implementation of the AfCFTA will necessitate considerable improvements in hard and soft infrastructure.

Existing and overlapping memberships of AfCTA participating countries in other regional economic bodies: AfCTA participating countries may find themselves in a difficult position of conflicting obligations or prioritisation of their obligations under other regional bodies over obligations under the AfCTA. Thirdly, there is a downside to lowering non-tariff barriers and implementation of other trade facilitation measures advocated for under the Agreement and some of these negative effects may take a while to materialise so it is yet to be seen how successful this Agreement will be.

Consensus building: Other challenges may arise from the very principles governing the AfCFTA for example consensus building which is very difficult to attain given divergent interests and priorities of member states.

Political instability and obstruction: Some African countries are grappling with political instability, so implementation of the Agreement is neither a priority nor feasible. In some cases, the political will to take the necessary steps for implementation of the Agreement may be lacking or lukewarm.

Equity: Considering that member states are at different levels of development, and economic growth and have variances in social and demographic aspects, ensuring that there is shared prosperity for all member countries will be one of the major challenges for the AfCFTA.

Access to credit and capital: this remains a challenge particularly for small to medium businesses and the informal trade sector. AfCFTA member states will need to put in place appropriate policies to support local businesses access capital and credit, and policies to foster entrepreneurship.

CONCLUSION

Even as participating countries prepare and take appropriate measures in preparation for operationalisation of the Agreement, businesses too should prepare and position themselves for various opportunities available under the AfCTA. The AfCFTA has great potential to facilitate trade and economic growth in Africa. However, the extent to which this and other benefits from AfCFTA will be realised is dependent on how successful the implementation of the Agreement will be.

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02

EMPLOYEE STOCK OWNERSHIP PLANS

ANGELA CHERONO
Principal Associate

TAXATION OF ESOPS

INTRODUCTION

Employees Share Ownership Plans (ESOPs) is an employee benefit plan that gives employees ownership interest in the company that they work for. ESOPs are often used by companies as an incentive to employees to boost the employees' morale in their role in the company as well as increase their commitment to their work within the company.

There are various Kenyan legislations that govern ESOPs, which include: the Companies Act, Trustees Act, Income Tax Act and The Capital Markets Authority Collective Investment Scheme Regulations (2001) under the Capital Markets Act which contains regulations on ESOPs for listed companies and provides inter alia setting up ESOPs, the requirements and investment parameters for ESOPs.

Notably, ESOPs can be effected by a company in the following manner:

- By granting its employees an option to buy shares in the company at some future date;
- Allowing employees to buy into the shares of the company, sometimes at a discount, or;
- Issuing shares directly to its employees,

RELEVANT STATUTORY PROVISIONS ON TAXATION OF ESOPS IN KENYA:

Taxation of employment benefits is governed by the following provisions in the Income Tax Act, Chapter 470, Laws of Kenya ("the Act"):

Pursuant to Section 3(1), income tax shall be charged for each year of income upon all the income of a person, whether resident or non-resident, which will accrue in or derived from Kenya;

Further, Sections 3(2)(a) (ii) provides that income in respect of gains or profits from an employment and services rendered;

i. Section 5(2) (b) defines the aforesaid terms 'gain and profit' to include the value of a benefit, advantage, or facility of whatsoever nature the aggregate value

whereof is not less than Kshs.36,000 granted in respect of employment or services rendered;

ii. Section 5 (5) (a) inter alia states that in the case of an employee share ownership plan, the value of the benefit shall be the difference between the market value, per share, and the offer price, per share, at the date the option is granted by the employer; and

iii. Pursuant to Section 5 (6) provides that for the benefit to be chargeable to tax, the ESOP has to be registered with the Commissioner General of the Kenya Revenue Authority (KRA) as a Collective Investment Scheme

INSTANCES OF TAXATION OF ESOPS

To put the instances in context, it would be prudent to understand use of certain terms, i.e.

- "Vesting" which means the point in time when the rights and interests arising from legal ownership of a share is acquired by the employee.
- "Share option" means the offer made by an employer to an employee to purchase a fixed number of shares at a fixed price, which may be paid for at the end of the vesting period

That said there are 3 different instances tax can be imposed on ESOPs:-

a. **Grant stage:** An eligible employee is not liable to pay tax since the shares do not have a fixed value at that juncture and more particularly, an option is given to the employee to exercise it in future upon vesting. It is however instructive that tax shall be charged if any distributions are made by the Company to the ESOP trustees. In this regard, tax would be charged under section 3 (1) of the Act;

b. **Vesting stage:** This arises when the employee decides to exercise the option granted and thus an employee benefit will accrue within meaning of the Act. Tax shall therefore be charged in accordance with provisions of Section 5(5) (a) of Act above. A case in point is the Equity Bank Kenya Limited v Commissioner of Domestic Taxes [2021] eKLR where Equity's employees were given an opportunity to acquire the shares at discounted prices, a clear conferment of a benefit accruing from their employment. The Court held that the Tax Appeals Tribunal did not err in concluding that Equity, as an employer, should deduct and remit to the Commissioner tax on staff benefits under section 37 of the Income Tax Act and that it made the correct finding that Equity Bank is liable for PAYE on the ESOP benefit to its employees.

c. **Post vesting stage:** Tax payable shall be arise from the dividends due to the employee as the shareholder of the company. In this case withholding tax of 5% shall be chargeable on dividends earned from the shares of the company.

FAITH WANJIKU
Pupil

FREQUENTLY ASKED QUESTIONS ABOUT INTERNATIONAL EMPLOYEE STOCK OWNERSHIP PLANS (ESOPS)

Company globalization and growth is not uncommon in this modern age. Companies are constantly operating and employing people overseas. Many of them have in place employee benefit and incentive schemes in their home-countries which are not extended to the foreign countries where they also have operations due to the extensive legal, regulatory, and administrative complexities of implementing the same outside their domain jurisdictions. Many companies are therefore moving towards ESOPs as a solution of providing employee benefits for their employees overseas.

Here are several Frequently Asked Questions when it comes to international Employee Stock Ownership Plans (ESOPs):

1. WHAT ARE ESOPS?

An Employees Stock Ownership Plan (ESOP) is an employee benefit plan that gives the employees an ownership stake in the company. However, it is important to note that schemes such as the phantom share scheme do not necessarily provide the employee with actual ownership within the company and simulate the share ownership without actually transferring it. Various factors will usually affect the type of scheme chosen by the employer and the arrangement with employees such as local legislation, company ideals and vision, employees' terms of service and pay scale and other factors.

Usually, an employer allocates a certain percentage of the company's stock shares to each eligible employee at no upfront cost. The distribution of shares may be based on the employee's pay scale, terms of service, or some other basis of allocation. The shares for an employee stock ownership plan are held in a trust unit for safety and growth until the employee exits the company or retires. After their exit, the shares are bought back by, and thus returned to, the company for further distribution to other employees.

2. WHAT DIFFERENT TYPES OF ESOPS EXIST?

ESOPs provide a wide range of alternatives through which you can fortify your employees' benefits. It is important for companies to choose a scheme that empowers their vision and growth for the company. ESOPs can be divided into:

a. **Profit sharing schemes** – this is a scheme by which employees share in the profits of a business through share ownership. It may be tailored so that the trustees receive payments from the company and apply these payments in acquiring the ESOP shares. These shares are then 'appropriated' by the trustees to eligible employees in accordance with the trust deed and rules of the scheme.

For any amount above US$ 10,000 the CBK requires that a commercial bank inform it as to the amount and purpose of the remittance.

b. **Savings-related share option schemes** – under this type of ESOP, employees enter into a save-as-you-earn contract to save a fixed amount each month over a specified number of years. An option is granted at the outset over the maximum number of shares which may be acquired with the total savings and the bonus which is payable at the maturity of the savings contract. The option usually gives the employee the opportunity to purchase the shares at a significantly discounted price compared to the market value at the time of the grant.

c. **Share option schemes** – this is a scheme under which an employee is granted a right (known as an 'option') to buy a fixed number of shares at a fixed price at a set point in time. The subscription price, which is usually less than the market value of the shares, is fixed at the date of grant of the option and there may be provisions requiring exercise of the option within strict time limits.

d. **Phantom share schemes** – this is a type of ESOP which gives selected employees, often senior management, many of the benefits of owning shares in the company without actually transferring any shares to them. It simulates share ownership without actually providing it. The employees are granted 'units' which correspond to a fixed number of ESOP shares in the company.

3. WHAT SHOULD I CONSIDER WHEN SETTING UP AN INTERNATIONAL ESOP?

Like any other schemes, setting up an International ESOP can be a daunting task. However, having the right research data about the jurisdiction where you set up the ESOP and planning can help you make strides towards a great scheme. Here are some of the things you need to look out for:

(Please note that we will mainly be focusing on Kenya as the case study for this article)

a. Employee Contractual terms

Often times employers have a contract with their employees for a certain duration of time. This could affect the type of scheme they choose. Some of the schemes are suitable for long term contracts while others can be amended to accommodate short term contracts. Overall, it is imperative that an employer considers the terms they have with their employees while settling on a particular scheme.

b. Taxation and registration of ESOPs with the CMA:

Taxes! Taxes! Taxes! Oh and of course registration.

In a typical ESOP, the benefits vest in an employee over a staggered period or after a fixed period. The benefits will be calculated differently depending on whether the scheme is registered with the Commissioner of the Kenya Revenue Authority (KRA) as a Collective Investment Scheme (CIS) or not. For the ESOP to be registered with the Commissioner, it must have been approved by the Capital Markets Authority as a CIS.

Where the ESOP is registered with the Commissioner, the benefit will be deemed to accrue to the employee at the end of the vesting period and will be based on the difference between the market value and the offer price per share at the date the option is granted by the employer. As the Capital Markets Act governs listed companies, the Capital Markets Authority would only be in a position to approve ESOPs that have been created by listed companies.

For unregistered ESOPs, the taxable benefit is taken to be difference between the market value at the time of vesting, and the offer price per share at the date the option is granted. Whereas in registered schemes the benefit is calculated using the difference between the market price on the date of the grant and the offer price on the date of the grant, in an unregistered scheme the benefit is calculated using the difference between the market price on vesting and the offer price on the date of grant. Since the share price is likely to have appreciated during the vesting period, the taxable benefit would be higher for members of an unregistered ESOP.

Income tax, in the form of PAYE, is charged on the benefit arising in respect of any employment or services rendered and should be deducted by the employer. In instances where the shares are transferred to employees on vesting, the employees acquire investor status in relation to the shares and, consequently, any benefits arising in connection with the shares such as dividends or a subsequent sale of shares will not be considered employment benefits.

For international companies sharing the data of employees, they should be aware of the principle prohibiting the transfer of data outside of Kenya unless there is proof of adequate data protection safeguards or, consent from the data subject has been obtained.

c. Foreign exchange control laws

Foreign exchange controls are various forms of controls imposed by a government on the purchase/sale of foreign currencies by residents, on the purchase/sale of local currency by nonresidents, or the transfers of any currency across national borders. Kenya repealed all exchange control laws in 1993. The Central Bank of Kenya Act [CBK] however provides that every payment made must be effected through an authorised bank licensed by the Central Bank of Kenya. Any contrary mechanism would require approval from the Central Bank.

Further, foreign currency is freely repatriable to/from Kenya provided there is written evidence of an underlying business transaction and the respective bank handling the repatriation is satisfied as to the genuineness of the transaction. For any amount above US$ 10,000 the CBK requires that a commercial bank inform it as to the amount and purpose of the remittance. For any amount below the equivalent of US$ 10,000, commercial banks are not required to obtain any documentary evidence to back the transaction, although in certain cases banks may nonetheless seek an explanation.

d. Data privacy concerns:

The provisions of the Data Protection Act, which governs how data and information may be accessed, processed, stored, transmitted and used within legal parameters in Kenya, should be complied with. For international companies sharing the data of employees, they should be aware of the principle prohibiting the transfer of data outside of Kenya unless there is proof of adequate data protection safeguards or, consent from the data subject has been obtained

e. Eligibility of employee:

The company must be able to produce to the KRA and the bank through which payments relating to the ESOP will be made, documents in support of the transaction. In a typical ESOP, this includes documents such as:

a. a duly executed invitation for application of an award from the company's board of directors

b. a duly executed application for award from the employee

c. an authority for the contributions to be deducted duly executed by the employee and

d. a notice of exercise of the award duly executed by the employee.

f. Resident employee:

The company must ensure that the employee complies with the residency rules in Kenya. A person is resident in Kenya where: they have a permanent home in Kenya and are in Kenya even for a single day in the tax year (calendar year) or do not have a permanent home in Kenya but are in Kenya for 183 days or more in aggregate during the current tax year or are present in Kenya in that year of income and in each of the two preceding years of income for periods averaging more than 122 days per year.

g. Employee status:

In accordance with the Employment Act, the international employer must also ensure that it has on record a written employment contract with the employee which must, among other requirements, state the remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits.

h. Stamp Duty:

The trust deed and rules/governing document of the ESOP should be stamped within 30 days of execution or, if executed outside Kenya, within 30 days of first being introduced into Kenya.

i. Deductions:

All payments deducted towards the ESOP by the Employer can be done so freely in accordance with the terms of the ESOP. The Employment Act however states that an employer may only deduct an amount in which they have no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from their wages. Further, the Act states that the total amount of all deductions which may be made by an employer from an employee's wages at any one time shall not exceed two-thirds of such wages.

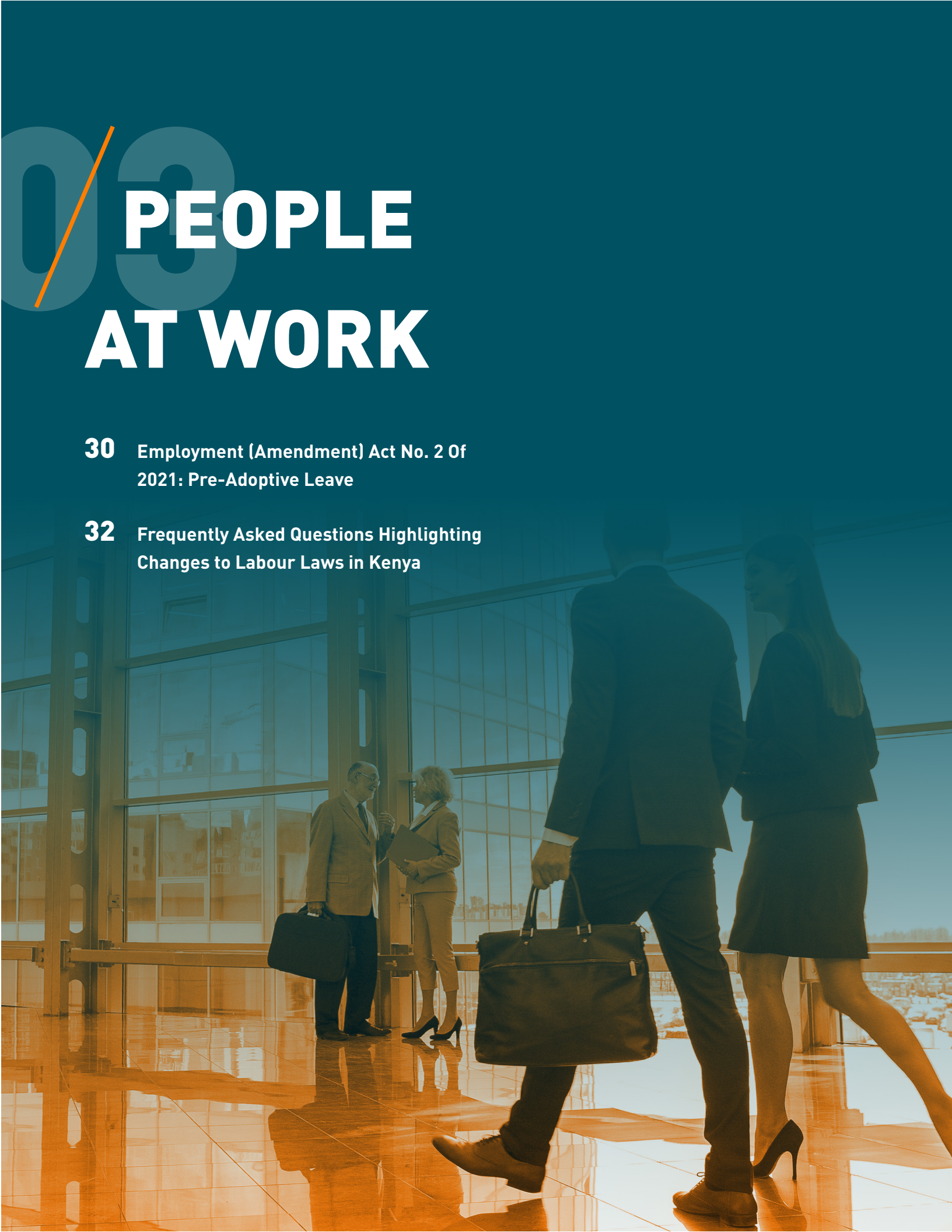
j. Governing Law:

Kenyan courts generally recognize and give effect to governing law and jurisdiction provisions in a contract such as those contained in an ESOPs trust deed and rules. However, under the Constitution of Kenya, the High Court of Kenya has unlimited jurisdiction, and has such jurisdiction notwithstanding such provisions in a contract. Having said this, however, it is settled law that where parties reach agreement as to governing law and jurisdiction, the High Court has discretion whether or not to stay proceedings brought in contravention of such provisions and, in the absence of compelling reasons to do otherwise, is bound to exercise its discretion in favour of a stay.

4. HOW CAN I ESTABLISH AN ESOP?

When establishing an ESOP, you will require a trust deed and registration with the governing body on ESOPs in that particular jurisdiction. If you are considering any of these schemes listed above, you should definitely engage a legal team that will not only guide you the process but take the necessary steps to establish the ESOP.

03 PEOPLE AT WORK



VINCENT OLOO
Senior Associate

EMPLOYMENT (AMENDMENT) ACT NO. 2 OF 2021: PRE-ADOPTIVE LEAVE

On 30th March 2021, The President of Kenya assented to the Employment (Amendment) Act No. 2 of 2021 (hereinafter, "the Employment Amendment Act"). The Employment Amendment Act amends sections 2 and 29 of the Employment Act, 2007 (hereinafter, "the Employment Act") by introducing pre-adoptive leave to employees desirous of adopting children.

EXIT CERTIFICATE (AMENDMENT OF SECTION 2 OF THE EMPLOYMENT ACT)

The Employment Amendment Act amends Section 2 of the Employment Act by introducing the definition of an Exit Certificate. An Exit Certificate, according to the amendment, means a written authority given by a registered adoption society to a prospective adoptive parent to take the child from the custody of the adoptive society.

PRE-ADOPTIVE LEAVE (AMENDMENT OF SECTION 29 OF THE EMPLOYMENT ACT)

The Employment Amendment Act amends section 29 of the Employment Act by introducing section 29A on pre-adoptive leave. An employee shall be entitled to fully paid pre-adoptive leave of one month in instances where a child is placed in the custody of said employee. This leave is in addition to an employee's annual leave. Accordingly, an employee will not be deemed to have forfeited their annual leave entitlement on account of having taken pre-adoptive leave.

To apply for pre-adoptive leave, an eligible employee is required to:

a. Notify their employer in writing, at least 14 days before placement of the child, of the adoption society's intention to place the child in the custody of the employee: and

b. Supply documentation, including a custody agreement and exit certificate (i.e., a certificate from the adoption society allowing the employee to take the child home), proving the intention of the adoption society to place the child in their custody.

In instances where pre-adoptive leave is extended with the consent of the employer or immediately upon expiry of pre-adoptive leave before resuming duties or with the consent of the employer on annual leave, compassionate or any other leave, the one-month pre-adoptive leave shall be deemed to have expired on the final day of such extended leave.

An employee who proceeds on pre-adoptive leave has the right to return to the job which they held immediately prior to the pre-adoptive leave or to a reasonably suitable job on terms and conditions not less favourable than those which would have applied had the employee not proceeded on pre-adoptive leave.

Following the amendments highlighted above, it may be necessary for employers to amend their human resources policies to reflect the pre-adoptive leave entitlement.

FAITH WANJIKU
Pupil

FREQUENTLY ASKED QUESTIONS HIGHLIGHTING CHANGES TO LABOUR LAW IN KENYA

As with all other areas of the Law, Employment in Kenya has seen significant change over the last decade. The Labor market which includes employers, employees, unions, service providers etc must take cognizance of these changes and implement them to keep abreast with the law.

HERE ARE SOME FREQUENTLY ASKED QUESTIONS ON THE HIGHLIGHTS ON LABOUR LAW IN KENYA:

What changes have taken place recently in the employment sector and how does it affect me?

1. Parental Rights

The Employment (Amendment) Act, No. 2 of 2021 introduced provisions on pre-adoptive leave with full pay from the date of placement of the child in the employee's custody. Employers are now required to provide employees who intend to adopt a child, pre-adoptive leave with full pay, provided that the employee provides fourteen (14) days written notice, and the notice is accompanied with documentation evidencing the intention of the adoption society to place the child in the employee's custody.

Effect: amend employee contracts and relevant human resource manuals to provide for pre-adoptive leave and ensure that employees are aware of the requirements for the leave to be granted.

Risk: Failure by employers to provide the employee with pre-adoptive leave constitutes an offence and can result in a fine not exceeding Kenya Shillings Fifty Thousand (KShs. 50,000) or imprisonment not exceeding 3 months or both.

Failure to give an employee leave that they are entitled to also amounts to discrimination and an employee has the right to sue the employer on grounds of discrimination.

2. Pay and Benefits

Via the Finance Act No. 8 of 2021, the Income Tax Act CAP 470 was amended to provide that contributions made to the National Hospital Insurance Fund shall qualify for the application of a personal relief known as an insurance relief. Previously the insurance relief was only afforded on premiums paid towards life and education policies. The amount of insurance relief shall be fifteen per cent of the amount of premiums paid but shall not exceed sixty thousand shillings per annum.

Effect: Payment of contributions in respect to an employee to the Fund is the responsibility of the employer. The employer should ensure that contributions to the Fund take into account the amount of insurance relief provided for under the Income Tax Act as the new provision will lead to higher net salaries payable to the employees.

Risk: Employers risk a general penalty of a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.

3. Tax/Social Security

Via the Business Laws (Amendment)(No.2) Act No. 1 of 2021, the National Social Security Fund Act was amended to provide that contributions owed by an employee are payable by the ninth of day of each month. Under this Act, an employer is required to make contributions to the National Social Security Fund in respect of each employee. Previously, the contributions were payable one month after the end of the month of which the last day of the contribution period it falls.

Effect: Payment of contributions in respect to an employee to the Fund is the responsibility of the employer. Employers should ensure that contributions to the National Social Security Fund on behalf of the employee are remitted by the 9th of the month.

Risk: Failure to remit contributions by the Employer may lead to institution of suits against them by affected employees. Additionally, the employer risks:

a. Imposition of a penalty equal to to five per cent of the amount of that contribution that shall be added to the contribution for each month or part of a month that the amount due remains unpaid; or

b. A fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.

4. Data Protection and Privacy

The Data Protection Commissioner has issued new draft regulations under the Data Protection Act. These regulations are:

a. Data Protection (Compliance & Enforcement) Regulations, 2021;

b. Data Protection (Registration of Data Controllers & Data Processors) Regulations, 2021; and

c. Data Protection (General) Regulations, 2021.

The aim of these draft regulations is to assist with the implementation of the Act. More specifically, they have provisions on:

i. Enabling of a data subject's rights;

ii. Required data protection mechanisms;

iii. Verification of consent;

iv. Restriction on commercial use of personal data;

v. Obligations of data controllers and processors;

vi. Registration of data controllers and processors.

vii. Carrying out data protection impact assessment tests; and

viii. Complaints handling procedures.

Effect: In anticipation of the regulations, employers should take immediate steps to ensure compliance with the Data Protection Act including undertaking audits on how they process personal data, putting in place data privacy and storage policies and also amending contracts to insert data protection clauses.

Risk: There will be no risk until the Regulations have been passed. On the passing of the Regulations, failure

by an employer to comply with the Regulations will result in a fine not exceeding three million shillings or to an imprisonment term not exceeding ten years, or to both. Additionally, under the draft Data Protection (General) Regulations, the Data Protection Commissioner can make an order for payment of an amount not exceeding two thirds (2/3) of the maximum penalty that would have been imposed on conviction.

5. Dismissal/ Severance

In the case of Rose Njambi Mwangi versus Point East Africa Limited Cause E538 of 2020 , the court found that where an employee has brought a suit against an employee for wrongful termination, the employee shall not be entitled to reinstatement and payment of withheld dues for period worked before termination until the matter has been fully adjudicated before the court.

Although the Employment Act provides for reinstatement and payment of withheld dues if termination or summary dismissal is found to be unfair, the same shall only be issued on consideration of practicality and if there are any exceptional circumstances. Reinstatement of an employee is therefore considered as a substantive remedy and not a temporary or provisional relief. It is a remedy to be granted on the conclusion of the full hearing.

Effect: Employers and employees should be aware that an order for reinstatement can only be given by the Employment and Labour Relations Court on the conclusion of the full hearing of a dismissal or severance suit. The same cannot be awarded as a temporary or injunctive relief.

Risk: The employee cannot seek an order from the Court to be immediately reinstated with the Employer pending the hearing and determination of the suit until the hearing has been completed and a judgement given. The Client risks dismissal of the suit with costs should they decide to offer reinstatement as a temporary relief to an already dismissed employee.

6. Immigration

The Directorate of Immigration Services is in the process of automating fully the issuance of e-visas. The Kenya eVisa is an electronic visa travel authorization which allows citizens of eligible countries to travel to the Republic of Kenya for short term stays for tourism, business, and medical purposes. The list of eligible countries can be found on the e-visa website (www.evisa.go.ke). The three types of visas i.e. single-entry visa, transit visa and courtesy visa shall now be issued as e-visas. Via a directive dated 2nd November 2020, it was communicated that the implementation of the 100% e-visa will be effective from the 1st of January 2021. All passengers from countries that require visas to enter Kenya shall be required to apply and obtain an e-visa before boarding an aircraft. The e-visa can be obtained through www.evisa.go.ke.

Effect: Employers should note the e-visa requirement and plan accordingly for its staff members. Ensure all employees who may require visas to enter Kenya to apply and obtain e-visa before boarding an aircraft.

Risk: Failure to have an e-visa may result in the refusal of an employee to enter Kenya.

7. Benefits and Pensions

The Finance Act No. 8 of 2021 has amended the Retirement Benefits Act No. 3 of 1997 to now provide for a post-retirement medical fund under the definition of a retirement benefits scheme. Previously the fund had only been provided for under the Retirement Benefits (Post-Retirement Medical Fund) Guidelines and this amendment is necessary in aligning the definition under the Retirement Benefits Act.

The Finance Act No. 8 of 2021 has also amended the Retirement Benefits Act No. 3 of 1997 to now allow the trustees of retirement benefits schemes and the Retirement Benefits Authority to appoint the Kenya Revenue Authority as an agent to collect unremitted contributions, interests and penalties. The Kenya Revenue Authority additionally has the power to attach an employer's bank accounts in instances of default.

Effect: The employer and trustees of retirement benefits schemes should inform employees as the members of the retirement benefits that they can make additional contributions towards a post-retirement medical fund that is accessible on retirement to cover medical expenses. The fund shall be administered in line with the provisions of the Retirement Benefits Act and its regulations.

On the other hand, in regard to remitting contributions, interests and penalties, defaulting employers will be required to remit the pending contributions to KRA within 21 days; failure to which the KRA will issue notices to the employer's bank, attach the bank account and remit the attached funds to the Scheme within 30 days.

Risk: There is no risk in regard to the contributions towards the post-retirement medical fund because they are voluntary.

However in regard to the second amendment, increases the chances of recovering unremitted contributions from defaulting employers. Employers should be aware of the risk arising with regard to unremitted pension contributions

8. Employment Contracts

Previously, the Companies Act, No. 17 of 2015 was amended to delete the provision requiring companies to use common seals to execute documents. Now, via the Business Laws (Amendment)(No.2) Act No. 1 of 2021, the Law of Contract Act has been amended so as to align the provisions on attestation of documents under both Acts. The definition of the term "sign" under the Law of Contract Act has been amended to include execution of the document in accordance with the Companies Act.

Effect: Employers should note that companies are no longer required to execute documents under common seal. This includes employment contracts. The required mode of execution is by

i. Two authorised signatories.

ii. A director of a company in the presence of a witness to attest the director's signature, or

iii. By a duly appointed attorney.

Risk: There is no risk.

9. Performance And Absence Management

The Kenyan government on 15th March 2020 issued a directive to all businesses to allow employees to work from home with the exception of employees working in critical or essential services.

The nature of some employees' work may however prevent them from working from home and businesses may be faced with challenges on how to engage such employees.

All employees have the right to join a trade union & employers also retain the right to join any employers' organisation.

In such scenarios, businesses should consider the issue of unpaid leave and requesting employees to utilize available leave days.

Effect: Employers should develop policies classifying essential and no-essential workers.

Employers should develop work from home policies and also vary contract terms to allow for working from home.

Employers should develop policies that allow employees to take unpaid leave and/or utilize available leave days. The policies should only be implemented once employees have been consulted on the same.

Risk: An employer risks the institution of a suit against them by their employees if they vary any term of an employee's contract or effect any policies that are detrimental to employees' rights without consulting them. The same may be deemed as an unfair labour practice and the affected employee may be entitled to damages for the same.

10. Whistle Blowing

The Capital Markets Authority has published draft regulations on a proposed whistleblowing awards scheme. The Authority has a Whistle-blower portal available on its website through which individuals are to submit any information relating to offences under the Capital Markets Act (CAP 485A). The draft Capital Markets (Whistle-blower) Regulations, 2021 aims to encourage individuals to use the portal more by proposing to reward whistle-blowers who provide evidence that leads to a successful conviction of offences under the Act such as embezzlement, fraud, misfeasance etc. The draft regulations also assure whistle-blowers that the Authority will take reasonable steps to maintain confidentiality of their identity and any other confidential information. The proposed reward shall be three percent of amount recovered and shall not exceed five million shillings.

Effect: Employees should be informed of the option to report on crimes arising under the Capital Markets Act and that their identities will be protected.

Risk: None.

11. Discrimination

Via a press interview given by the Secretary for Health on January 1st, 2021, the State confirmed that the COVID-19 vaccine being administered by the State is not mandatory and that the same would only be administered to willing persons.

Effect: While an employer has a duty to ensure the health and safety of the workplace, they also must ensure that all employees are treated equally regardless of whether they have received the vaccination or not.

Risk: An affected employee can argue that they have unfairly discriminated against based on their health status (refusal to have the vaccine administered). Such discrimination is unconstitutional.

12. Working Time & Overtime

The Regulation of Wages (General) Order provides that the normal number of working hours should not exceed 52 hours spreading over 6 days. Any night-shift work should not exceed 60 hours spread over the week. The Employment Act further states that all employees are entitled to at least one rest days in every 7-day period.

Overtime is calculated and payable in the following rate:

a. One and a half times of the normal hourly rate for work done in excess of the normal number of hours per week; and

b. Twice the normal hourly rate for work done during the employee's rest day or a public holiday.

To calculate overtime for employees not paid an hourly rate, the basic hourly rate should not be less than one two-hundred-and-twenty-fifth of the employee's basic monthly wage.

Effect: Employers should ensure that their working time and overtime policies are compliant with these new directives. Employers should consult their employees to agree on variation of employment terms and reduced/different working hours as provided in the applicable employment contracts/policies.

The government has issued a mandate for all the Civil servants to be vaccinated before 13th August 2023. While an employer has a duty to ensure the health and safety of the workplace, they also must ensure that all employees are treated equally regardless of whether they have received the vaccination or not.

Risk: Employers who violate the terms of the order risk imprisonment or a fine.

13. Labour Law

The Employment and Labour Relations Court established pursuant to Article 162 (2) of the Constitution has the exclusive original and appellate jurisdiction to hear cases relating to employment and labour relations matters. It is governed by the Employment and Labour Relations Court Act. The Employment and Labour Relations Rules recognise the institution of claims through petitions and judicial review. This allows the courts to deal with cases relating to the violation of the constitutionally founded labour rights

All employees have the right to join a trade union and employers also retain the right to join any employers' organisation or federation of employers' organisation. Employers should also recognise trade unions for the purpose of collective bargaining. The collective agreements will set out the terms and conditions of service for all unionisable employees. These agreements may also include means of alternative dispute resolution i.e. conciliation or arbitration in case of a trade dispute. Where the dispute is not resolved through alternative dispute resolution, the matter may be referred to the Employment and Labour Relations Court for resolution.

Effect: All cases relating to employment and labour matters should be filed in the Employment and Labour Relations Court to ensure compliance with the laws.

Employers should allow their employees to participate in trade unions and recognise these unions to foster a relationship with them. Further, employers should strive to adhere to all the terms and conditions set out in the collective agreements.

Risk: Any employment or labour related cases will not be heard unless brought before a court with jurisdiction. An employer risks the institution of a suit against them by their employees as Laying off workers will only worsen the situation of the most vulnerable members of society.

14. Health and Safety

The Directorate of Occupational Safety and Health Services, in collaboration with key stakeholders have developed draft regulations on the statutory fees and charges for services under various sections of the Occupational Safety and Health. The draft Fee Schedule proposes new fees on various services such as medical examinations on employees, occupational safety and health trainings and surveys.

There has also been published a notice exempting certain premises from the application of Section 44 (12) of the Occupational Safety and Health Act. This section was recently amended to give small businesses with less than 100 employees a chance to start up and operate without registering under Act for a period of one year. The Draft Notice proposes that premises for engineering construction works, factories, workplaces with plant machinery and equipment & workplaces with hazardous substances be required to obtain registration under OSHA immediately on registration of the business. This is due to the level of the risk associated with the business.

Effect: Employers should be aware of the new fees applying to various services offered under the Act.

Risk: Failure by employers to pay the required fees shall constitute an offence and the Client will be liable to a fine not exceeding three hundred thousand shillings or to imprisonment for a term not exceeding three months or to both.

15. Investigation Process

The disciplinary and investigation process is governed by the principles of natural justice which require that, any employee who has had disciplinary proceedings commenced against them is given an opportunity to defend himself or herself before an impartial adjudicator and that correct procedure as laid out in the employee handbook/manuals/contracts or other document (where applicable) is followed and that such procedure also adheres to the rules of natural justice.

Whenever a disciplinary issue arises, best practice and case law states that the first step should be to gather all necessary information and make a preliminary assessment whether to commence disciplinary procedures.

The relevant department, usually the Human Resource Department/Disciplinary Committee will then issue a Show Cause Letter to the employee asking them to defend themselves or explain/justify the conduct that is the subject of the disciplinary case.

If an employee refuses, fails or ignores to do the same, then action can be taken against them. Also, if the employee is unable to give genuine or satisfactory reason then action can be taken against them. The general procedure is that the employee submits a written explanation.

At this point, if it has been provided for in the employee handbook/manuals/contracts or other document, then suspension of the employee as investigations are ongoing can be carried out.

The nature of any investigation and the competence/ expertise of the appropriate investigator will depend on the complexity and seriousness of the issue and will be a matter for the employer to determine.

Thereafter, a disciplinary hearing should follow. The purpose of the disciplinary meeting will be to put across to the affected employee any concerns (including, where appropriate, any investigation report. The employee is entitled to receive reasonable notice prior to a disciplinary meeting.

At the hearing, the employee will be given an opportunity to respond to any concerns raised at the meeting (including, where appropriate, the opportunity to respond to any investigation report) and to answer appropriate questions. Thereafter, the committee shall make a decision on the disciplinary sanction decided upon which should be communicated to the employee. The employee should also be informed of their right to appeal against the decision.

A termination is unfair if the employer fails to prove (a) that the reason for termination is valid (b) that the reason for termination is fair given the employee's conduct, capacity, compatibility or based on operational requirements of the employer and (c) that the employment was terminated in accordance with fair procedure. Any employee who has worked for less than 13 months immediately preceding termination has a right to complain that he has been unfairly terminated. A labour officer may recommend either damages to be paid to the employee (which may include the equivalent of a number of months wages not exceeding twelve months based on gross monthly wage of the employee at the time of dismissal) or a reinstatement or re-engagement of the employee.

Effect: Employers should ensure that they follow the prescribed procedure which is in line with the principles of natural justice. Failure to follow fair procedure may lead to the termination of an employee being ruled as unfair and if so, the aggrieved employee is entitled to payment of 12 months' wages subject to the discretion of the court.

Risk: Failure to follow fair procedure may lead to the termination of an employee being ruled as unfair (as defined by the Employment Act) and if so, the aggrieved employee is entitled to payment of 12 months' wages subject to the discretion of the court.

16. COVID-19

Via a press interview given by the Secretary for Health on January 1st, 2021, the State confirmed that the COVID-19 vaccine being administered by the State is not mandatory and that the same would only be administered to willing persons.

However, the government issued a mandate for all the Civil servants to be vaccinated before 13th August 2023. The petition filed against mandatory vaccination is yet to be determined.

Effect: While an employer has a duty to ensure the health and safety of the workplace, they also must ensure that all employees are treated equally regardless of whether they have received the vaccination or not.

Risk: An affected employee can argue that they have unfairly discriminated against based on their health status (refusal to have the vaccine administered).

04 ONLINE BUSINESS

EDWARD KIMUMA
Junior Associate

THE RETAIL INDUSTRY IN THE DIGITAL SPACE

BACKGROUND

The Covid-19 pandemic nudged the Kenyan public sector as well as private businesses to integrate online platforms as a primary means of interacting with customers and for internal operations. Kenyans became consumers of a digital service in a way be it through the judiciary's e-filing portal, virtual court attendance, shareholders attending hybrid or online general meetings or while working from home. Online service delivery became a consumer expectation rather than a secondary alternative to physical/ in-person interactions.

The retail industry has had to ponder its evolution towards electronic retailing or 'E-tailing' which simply defined is the sale of goods and services through the internet including business-to-business or business-to-consumer transactions[1]. With businesses having to find new ways to access consumers, a change in the retailer-customer relationship has led to retailers developing in-house solutions or partnering with online service providers to avoid being left behind in the race to maintain or expand their customer base.

ADOPTION OF ELECTRONIC RETAILING

In attempting to provide consumer-facing solutions such as online shopping, various retailers have established mobile applications or web-based stores to advertise and sell their products. While this has not necessarily done away with the need to maintain physical stores, it highlights convenience as a key part of the retail consumer's experience. Electronic retailing also seeks to enable a digital lifestyle for consumers where retailers can use personalisation analytics to tailor more bespoke choices and recommendations for customers.

Retailers have also had to consider partnerships and collaborations with delivery service providers such as Glovo and Uber to co-create and deliver value to consumers. In light of the government's COVID-19 prevention guidelines, priority was given to minimal contact access to retail products. The use of mobile money as a mode of payment has also made making purchases electronically a feasible option.

1 https://www.investopedia.com/terms/e/electronic-retailing-e-tailing.asp

LEGAL FRAMEWORK FOR ONLINE RETAIL TRANSACTIONS

A number of Kenyan laws apply to electronic retail transactions. Section 83J of the Kenya Information and Communications Act No 2 of 1998 ('KICA') recognises the formation and validity of contracts through electronic messages. KICA also mandates the Communications Authority to facilitate electronic transactions as well as electronic commerce[2].

The Competition Act No 12 of 2012 aims to, among other things, protect consumers from unfair and misleading market conduct. Part V of this legislation provides certain expectations from suppliers which generally state that:

- A supplier shall not make false or misleading representations with respect to the price, quality, standard, grade or need for any goods or services;
- A supplier shall not engage in conduct that is unconscionable which includes the imposition of unilateral charges or fees not brought to the consumer's attention prior to provision of a service;
- A supplier shall not supply goods that do not comply with prescribed consumer safety standards, or goods that have been declared to be unsafe, or goods that are subject to a permanent ban.

The Consumer Protection Act No 46 of 2012 ('CPA') is intended to provide for the protection of the consumer. CPA defines 'internet agreement' as a consumer agreement formed by text-based internet communications[3] and requires compliance with the following consumer protections in internet agreements:

- Disclosure of prescribed information by the supplier in a manner that ensures that a consumer has accessed and can retain such information;
- Opportunity to accept or decline an agreement and to correct errors immediately before entry into the agreement[4];
- delivery of a copy of the agreement by the supplier within a prescribed period after the consumer enters into the agreement[5]; and
- opportunity to cancel an agreement at any time from the date of entry until seven days after receipt of a copy of the agreement if the supplier did not disclose prescribed information to the consumer or the supplier did not provide the consumer an express opportunity to accept or decline or correct errors immediately before entering into the agreement[6].

It should be noted that CPA does not provide a definition for 'prescribed information' for internet agreements.

The DPA could become a key business risk for retailers who will be required to invest their resources to ensure compliance.

The CPA also incorporates implied conditions and warranties applying to the sale of goods[7] under the Sale of Goods Act CAP 31 ('SGA'). While the SGA was enacted before the internet era, its protections are still applicable to digitally facilitated sales of goods. For instance, section 15 of the SGA states that goods supplied should correspond with their description[8] and section 35 of the SGA entitles a buyer to a reasonable opportunity to examine goods delivered to them. Section 31 gives a buyer an opportunity to reject goods of different description from the contract of sale.

However, the SGA falls short in the context of online retail transactions with ambiguity in provisions such as goods should be of reasonably merchantable quality[9] or where no time is fixed for delivery of goods, a seller is bound to deliver the goods within a reasonable time[10]. Concepts such as 'merchantability' and 'reasonable time' involve matters of

2 Section 83C, KICA
3 Section 2, CPA
4 Section 31, CPA
5 Section 32, CPA
6 Section 33, CPA
7 Section 5 (2), CPA
8 Section 15, SGA
9 Section 5 (1) of CPA & Section 17 (c) of SGA
10 Section 30 (2)

degree for which only a court can give a final determination. The SGA could be reformed to introduce precise terms and to give consumers rights which will be enforceable by them without the need to seek courts for recourse.

The Finance Act 2020 introduced digital service tax ('DST') under the Income Tax Act CAP 470 as a tax payable on income derived or accrued in Kenya from provision of services offered through a digital marketplace. 'Digital Marketplace' is defined as an online platform which enables users to sell or provide services, goods or other property to other users. It is worth noting that DST is currently imposed on non-resident persons only. While the introduction of digital services tax in 2020 was intended to increase the tax revenue base, resident persons were subsequently exempted as they were already subject to income tax on revenue derived from their businesses through digital platforms.

The Data Protection Act No. 24 of 2019 ('DPA') was enacted to give effect to the constitutional right to privacy. Compliance with the DPA is especially important as e-commerce in general is grounded on consumer data, a big-ticket asset in the digital economy. While implementation of the DPA is yet to kick off in earnest, the DPA obliges persons collecting and processing personal data to do so bearing in mind the data protection principles, rights of data subjects and the obligations of data controllers and/ or processors.

CONCLUSION

It is clear that electronic retail transactions are recognised in law and therefore important for retailers who opt to to adopt E-Tailing to take note of the statutory obligations. For instance, the DPA could become a key business risk for retailers who will be required to invest their resources to ensure compliance given its regulations are yet to be prescribed.

DST on non-residents may also discourage potential investors from considering e-Tailing as an option to reach their Kenyan client base or DST may be transferred to consumers resulting in an increase in prices of goods and services rendered over the internet.

CHRISTINE WAMBUI
Junior Associate

A STEP IN THE RIGHT DIRECTION?

Brief Commentary On The Regulation Of Digital Lending In Kenya

The Kenyan lending sector is regulated by the Central Bank of Kenya (CBK) with this mandate provided in its establishing statute. Currently, this mandate is limited to the regulation and supervision of traditional institutions such as banks and microfinance institutions. As we posited in our previous article, digital lending platforms are often exempt from classification as financial institutions as defined in the Banking Act, Cap 488 and the Microfinance Act, No. 19 of 2006. Due to their nature, digital technologies have generally brought several challenges in terms of regulation as they tend to blur the traditional delineation of sectors. As a result, the digital lending sector has been operating under a lacuna in the law as the digital lending service providers currently do not fall within the purview of supervision by CBK.

Earlier this year, Parliament introduced a bill, the Central Bank of Kenya (Amendment) Bill, No. 10 of 2021 (the Bill) which provides revisions to the Central Bank of Kenya Act, Cap 491 (the Act) to expand its regulatory jurisdiction by providing for the regulation of digital credit services in Kenya. If this Bill is enacted into law, all digital credit service providers will be under the control and supervision of the CBK and the digital lending industry will be run in a more uniform and standardised way.

OVERVIEW OF THE BILL

The Bill proposes to amend the Act by introducing the changes indicated below:

- Providing definitions to these terms: “digital channel”, “digital credit”, “digital credit business”, “digital credit provider” and “specified digital credit provider”.
- Including the licensing and supervision of digital credit providers that are not regulated under any other written law as part of the objects of CBK.
- Empowering the CBK to make any such regulations as necessary to give effect to the provisions of the Bill such as:
    - Registration requirements for digital credit businesses.
    - Management requirements for digital credit providers.
    - Reporting requirements for digital credit providers.
    - Permissible and prohibited activities.
    - Anti-money laundering and measures for countering financing terrorism.

- Credit information sharing.
- Data protection.
- Consumer protection.

- Providing for the application for licensing by the CBK for any person who desires to carry out any digital credit business. It also makes it a punishable offence for anyone who contravenes this section setting the liability on conviction as imprisonment for a term of not less than three (3) years or a fine not exceeding five million shillings or both.
- The Bill further provides a transitional clause where any regulations, such as the ones listed above, which give effect to the provisions of the Bill are to be made within three (3) months after the Bill comes into force. Further, any digital credit service providers who are not regulated under any other law will be required to register with CBK within six (6) months of the Bill coming into force.

This Bill therefore represents a step in the right direction in ensuring that the digital lending sector can flourish within a regulated environment.

As the Bill is still undergoing the legislative process with its first reading conducted on 11th May 2021[1] and a report prepared by the National Assembly's departmental committee on finance and national planning on the consideration of the Bill in August 2021[2], it would be beneficial for us to briefly critique the provisions of the Bill in the hopes that any gaps captured may be included prior to granting of the Presidential assent. This assent is granted after the second and third reading of a bill and once granted, the act is set for gazettement and it comes into force.

While it is notable that the Bill provides for the application for licensing to carry out digital credit business, it is silent on various elements surrounding licensing. These include:

- Licensing requirements i.e., factors for consideration by CBK;
- Timelines within which CBK must communicate the status of the application;
- Period of validity of the licence and terms for renewal of the licence, if the same is renewable;
- Factors that may lead to the revocation or suspension of the licence and the procedure to be followed. Currently, the Bill empowers the CBK to suspend and revoke such a licence but it does not provide the conditions that will lead to this consequence and the procedure.

It is essential that the same is provided in the Bill as opposed to the regulations due to the time limitations set for the unregulated digital credit service providers to comply with the provisions of the Bill once in force. The unregulated digital credit service providers will require adequate time to comply with the licensing requirements as they make their applications for the same.

Further, as the CBK will be empowered to supervise digital credit service providers, the Bill needs to include provisions requiring these providers to furnish the CBK with such information as necessary from time to time for CBK to effectively carry out its supervisory function.

CONCLUSION

The existing framework for the regulation of the lending sector lacks the agility to adjust to the nature of fast-paced nature of the digital lending sector. Therefore, it is vital to recognise the efforts of Parliament in the drafting of the Bill.

With the continuous growth and evolution of the digital lending sector and increased uptake of digital credit products by consumers, several regulatory concerns were brought up by both the industry players and the public. One of the concerns such as consumer protection was covered in an article we published in 2020.

1 Kenya Law Reports, National Assembly Bills 2021, http://kenyalaw.org/kl/index.php?id=11332 (last accessed on 24 October 2021)
2 The National Assembly of the Republic of Kenya, Report of the Central Bank of Kenya (Amendment) Bill No. 10, 2021, http://www.parliament.go.ke/sites/default/files/2021-08/Report%20of%20the%20Central%20Bank%20of%20Kenya%20%28Amendment%29%20Bill%20No.%2010%2C%202021.pdf (last accessed on 24 October 2021)

This Bill therefore represents a step in the right direction in ensuring that the digital lending sector can flourish within a regulated environment and ensure that consumers are protected in the process. As Parliament continues to debate and consider this Bill, it is necessary that a balance is struck in the supervision of the digital credit business while also ensuring that technological innovation is safeguarded and not stifled. This can be guaranteed by inviting the industry players in the process as their technical expertise can assist in advising the legislators on the effective and efficient policies that will deliver a suitable environment for the growth of the digital lending sector.

We shall publish an updated article once the Bill comes into force highlighting all the key provisions of the Act and its implications to the digital lending sector.

05

PROPERTY & REAL ESTATE

JUDY KABUBU
Partner

CHRISTINE WAMBUI
Junior Associate

ARDHISASA THE ABCS

The Ministry of Lands and Physical Planning has been plagued with loss of records, destruction of records, theft, misfiling and general manipulation of land records and entries for years. In the recent years there have been initiatives by the Kenyan Government to ease the way of doing business, not only for local corporates and individuals but also for foreigners seeking to invest in different sectors in Kenya including but not limited to the real estate sector. In addition, Land is an integral part of the 'Big 4 Agenda' and the Vision 2030. Indeed, the Ministry is prioritizing issuance of titles to landowners, decentralisation of land management, digitisation of records as well as legal and administrative reforms in all its registries.

The County of Nairobi is the hub of most real estate transactions and is also the County with the majority of land records irregularities. Cognizant of this fact, the Cabinet Secretary, Ministry of Lands and Physical Planning embarked on a mission to regularize the Ministry records staring with land in Nairobi. To this end the Cabinet secretary lunched the the National Land Information Management System (NLIMS) better known as ArdhiSasa. ArdhiSasa was formally launched on in April 2021 by the President of the Republic of Kenya, H.E Uhuru Kenyatta.

ArdhiSasa is an online platform that allows citizens, other stakeholders and interested parties to interact with land information and processes. The online platform seeks to resolve the historical problems experienced by landowners and investors when undertaking transactions. The Land Registration (Electronic Transactions) Regulations, 2020 (the "Regulations") that took effect in July 2020 allow for electronic registration of land transactions [1].

SERVICES OFFERED

ArdhiSasa is designed to undertake the following transaction:

- Land registration - caution, charge, lease, registration of certificates of titles/ lease, replacement of title, restriction, search, stamp duty and transfer;
- Land administration - pay land rent, subdivision, extension of lease, change of user, consent, lease preparation, extension of user, renewal of lease;
- Physical planning - approval of part development plans, planning documents requisition, certificate of compliance;
- Survey and mapping - subdivision, amalgamation, new grant, re-survey, sectional property, extension of lease, change of user;
- Valuation - asset valuation, government leasing, government purchase, estate administration, arbitration

1 See our article on **https://mman.co.ke/content/brief-overview-land-registration-electronic-transactions-regulations-2020**

- Adjudication and settlement - adjudication, settlement; and
- National land commission - land allocation

Once fully functional the online platform will ease the access to land and provide a robust, stable and secure platform where transactions can take place at the click of a button.

As at now, the online platform only covers the Nairobi Registry being land in Nairobi but registered under the repealed Registered Land Act ("RLA") i.e. properties with title numbers Nairobi/Block/..... with the projection that with time ArdhiSasa will cover all land in Kenya.

ArdhiSasa though covering the Nairobi Registry does not cover land that does have geospatial data such as:

- sectional property (flats/apartments/town houses - wherein the long-term leases are registered under the mother title for the land and the reversionary interest in the land is transferred to a management company wholly owned by the owners of the units erected on the land).
- titles where ownership cannot be ascertained with certainty i.e they are double allocation or other disputes.
- Public land

REGISTRATION

To interact with the online platform, the landowner must open an individual or corporate account on the platform. To register on the platform an individual landowner will be required to input their national identity card number (serial number and ID number) casting doubt on how foreigners shall transact. In addition, one is required to input their personal email address and official mobile number for communication by the Ministry of the onetime password and to inform the account holder of the progression of any application made in the system. One will also be required to upload a current passport photograph.

For a corporate account the company will be required to upload company registration number, official company mobile number, company e-mail address and KRA pin.

Further for an individual account user, the online platform allows for one to upgrade their account to a professional account such as registered physical planners, advocates, registered quantity surveyors. For an individual to upgrade their account to a professional user the person must first and foremost have an individual account and have copies of the requisite documentation from the professional body confirming their standing with the professional. This is an important interface as it allows professional to interact with the online platform in their professional capacity and therefore offer the appropriate services to their clients.

For any transaction to take place, the landowner must upload a copy of the original title to the online platform, in the backend the Ministry will validate the application and the landowner can proceed to undertake the transaction.

Currently all transactions relating to properties in the Nairobi Registry, except those outlined above, are being processed through ArdhiSasa. All other services/transactions are being offered manually.

ArdhiSasa has however faced several challenges since its inception such as: the validation of titles process takes anywhere from two (2) months to complete, the completeness and validity of the data in the system, foreigners (individuals or corporate) cannot interact with the online platform until a mechanism to verify Identity information is created, each transaction requires verification and confirmation from the landowner creating a slag in the application processes, downtime in the professional bodies systems leading to the slow upgrading of individual accounts to professional accounts.

In the words of the President "The system will resolve the land problem as it will provide an updated, verified database of land records that are easily available. The system will also ensure investors and those dealing with land are not confronted with warning signs such as 'Plot not for sale', 'danger' and 'Trespassers' will be prosecuted"

Please feel free to reach out to us to assist with the opening of an account, uploading of title documents and any other service currently functional in the ArdhiSasa online platform.

CHRISTINE WAMBUI
Junior Associate

BRIEF OVERIEW ON THE LANDLORD AND TENANT BILL, 2021

The Landlord and Tenant Bill dated 12th February 2021 (the "Bill") was introduced at the National Assembly with the intention of consolidating the laws relating to the renting of business and residential premises. Currently, these are captured under the Rent Restriction Act Chapter 296 Laws of Kenya (the "RRA"), the Distress for Rent Act Chapter 293 Laws of Kenya (the "DRA") and the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Chapter 301 Laws of Kenya (the "LTA"). It is set to balance the interests of the landlords and tenants in a free market economy by ensuring that landlords earn reasonable income from their investment while also protecting the tenants from exploitation.

This Bill applies to:

1. All residential premises other than
   a. Excepted residential premises;
   b. Residential premises leased on serviced tenancies i.e. premises let to an employer who provided the premises to an employee in connection with their employment; and
   c. Residential premises whose monthly rent does not exceed such amounts as prescribed by the Cabinet Secretary.

2. A tenancy of the business premise which –
   a. Is not reduced in writing; or
   b. Is reduced in writing and
      i. Is for a period not exceeding five years;
      ii. Contains a provision for termination other than breach of a covenant within five years of the commencement of the tenancy term.

Some of the salient features of the Bill worth highlighting include:

1. Rent

The rent payable shall be determined by mutual agreement. Where there is no mutual agreement, a tribunal on application by either party will determine the rent based on comparable premises within the area.

2. Procedure for increase and decrease of rent

Section 18 of the Bill lays out the permitted procedure which the landlord must follow to increase rent payable by the tenant. An increase in rent must be justifiable on account of either of the following:

a. The landlord incurring a capital expenditure;

b. Inflation in the economy;

c. Where an additional service is provided to the premises; and

d. Where land rates payable increases or becomes chargeable.

The landlord must issue a written notice to the tenant at least 90 days prior on their intention to increase rent. Failure to do so renders the rent increase invalid. Where a tenant does not object to this notice within 30 days after receipt, they are deemed to have accepted the increase. The landlord may increase rent once every 12 months for residential premises and once every 24 months for business premises.

The landlord is also entitled to decrease rent where they are ceasing to offer any of the prescribed services to the tenant. Such a decrease must be proportional to the reduction of services provided.

To avoid issuing notice for rental increase, it may be prudent for the landlord to ensure that there is a rent escalation clause where the tenancy does not terminate. Additionally, it may be necessary to have surviving clauses in the tenancy agreement.

3. Form of Tenancy Agreement

The parties are free to adopt any form of tenancy agreement that they agree on. The Bill further provides the terms and conditions that shall be implied in all tenancies. These terms and conditions are listed in the Schedule of the Bill and reflect the ones recorded in the LTA.

The Bill further allows the parties to alter the terms and conditions of the tenancy by issuing a notice to the other party. This notice takes effect in 30 days after the date of issue in case of a residential tenancy, 60 days in case of a business tenancy or on the date specified in the notice.

4. Termination

Like the RRA and LTA, the Bill provides that the landlord must give written notice of their intention to terminate to the tenant. This notice must:

a. Provide the termination date;

b. Be signed by the landlord or their agent; and

c. Provide the reasons for termination.

The notice period in case of business tenancies is 24 months whereas it is 12 months for residential tenancies. This is a notable departure from the LTA where the notice period is 2 months for business tenancies. The notices for termination must also be filed at the tribunal.

The tenant is also entitled to terminate the tenancy by issuing a notice to the landlord at least 1 month to the end of the term for residential tenancies and at least 2 months to the end of a business tenancy.

By Sections 28 and 29 the landlord may terminate the tenancy where they require possession of the premises for occupation by themselves, intend to demolish the premises, convert the user of the property or undertake extensive renovations on the property. In such cases, the landlord issues a notice to the tenant specifying these reasons for termination:

a. At least 60 days after the date of the notice where the landlord intends to occupy the premises; and

b. At least 120 days where they are carrying out works or changing the user of the property.

5. Jurisdiction and Power of the Tribunals

Presently, the Rent Tribunal and the Business Premises Rent Tribunal have the jurisdiction to decide on disputes surrounding these tenancies. These tribunals were established by the Cabinet Secretary whereas with the new Bill, the tribunals are to be established by the Chief Justice who determines their jurisdiction.

The members of the tribunal are to be appointed by the Judicial Service Commission. Most notable from the powers listed in Section 5 of the Bill, the tribunals are empowered to grant injunctions, enforce its own orders and punish for contempt as any court of law which is not applicable to the. the current tribunals.

The tribunals are to determine disputes within three months from the date in which the dispute was lodged. This is set to ease the delays in delivery of justice and decrease case backlog.

Appeals lie at the High Court but only on points of law. This is a departure from the RRA where appeals lie at the

Environmental and Land Court ("ELC") on any point of law or in case of premises where the standard rent exceeds Kshs 1,000/- a month on any point of mixed fact or law. The LTA provides for appeals at the ELC.

6. Agent

Where a landlord hires an agent, their duties shall be in writing and also supplied to the tenant.

7. Exclusion of the Act

Like the LTA, the Bill provides that any agreement relating to a condition in a tenancy is void in so far as it purports to:

a. Preclude the operation of the Bill;

b. Provide for termination or surrender of the tenancy where the tenant makes an application to the tribunal;

c. Provide for the imposition of any penalty or liability on applying to the tribunal; or

d. Terminate without issuing notice to either party.

8. Subletting/Assignments

The Bill grants the tenant the right, with the landlord's consent which must not be unreasonably withheld, to assign or sublet the premises.

Where the landlord refuses to consent or is unresponsive to this request within 7 days after receipt, the tenant may issue a termination notice.

CONCLUSION

It is notable that at the time of publishing of this article, the Bill has undergone the 1st reading at the National Assembly on 25th March 2021[1]. This is the introductory stage of a bill with a few stages until it is passed to law. As it is still in its early stages, we expect that there will be some amendments based on commentary from stakeholders. As such, we shall publish further updates on this article once the Bill is passed into law providing the key improvements that the Bill shall provide in the governing of the landlord-tenant relationship.

Overall, the introduction of a consolidated Bill is a welcomed improvement as it promises convenience in the access of the laws relating to tenancies in Kenya. Further, the added powers of the tribunals would encourage ease and efficiency in the access of justice in cases of dispute.

For further reading, the Bill may be accessed at http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2021/TheLandlordandTenantBill_2021.pdf.

1 The National Assembly of the Republic of Kenya, Bill Tracker as at 14th May 2021, **http://parliament.go.ke/sites/default/files/2021-05/BILLS%20TRACKER%20AS%20AT%2014%20MAY%202021.pdf** (accessed on 13th May 2021)

MMAN ADVOCATES

CONTACTS

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1st Floor, Wing B
Capitol Hill Square Off Chyulu Road, Upper Hill,
Nairobi, Kenya.
P. O. Box 8418 - 00200 Nairobi
T: +254 20 259 69 94
T: +254 20 273 75 75

Dropping Zone: No 62
Revlon Plaza
mman@mman.co.ke