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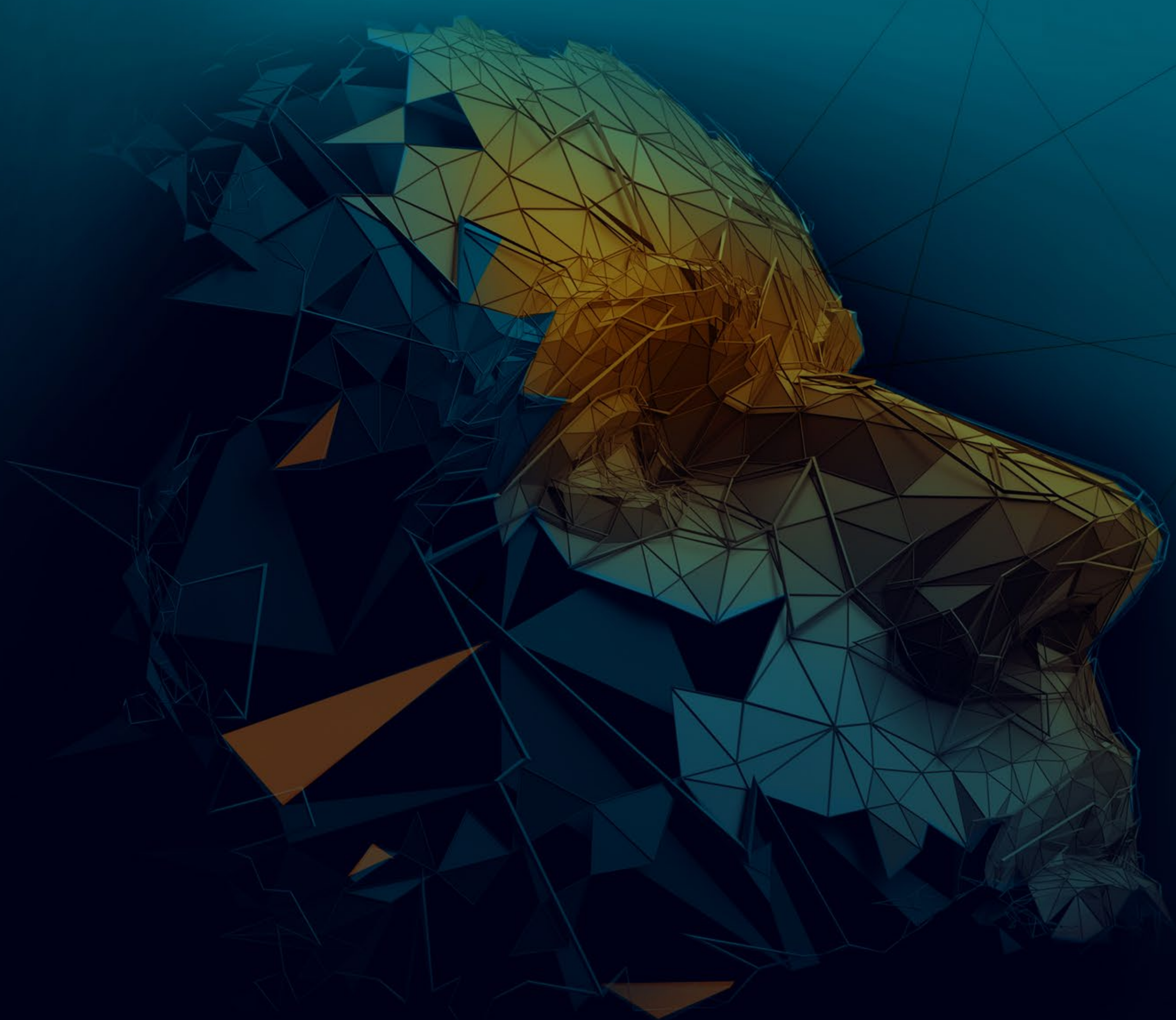
MMAN INSIGHTS

Reimagining the future of business



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EDITOR'S NOTE

Carole Ayugi
Managing Partner

"WE MUST MEET THE CHALLENGE RATHER THAN WISH IT WERE NOT BEFORE US"

William J. Brennan, Jr.,
Former Associate Justice of the U.S. Supreme Court

These are interesting times; with our nations, industries, businesses and individuals having been challenged in a manner that we had all not anticipated. In a short space of time, we have been forced to change our very ways of life to ensure our survival. A knock on effect of this has been the urgent imperative for businesses to adapt to their new market conditions, with the government and the courts following suit to support them during this new normal.

This publication is a collation of articles on issues that we find to be pertinent ranging from virtual courts and virtual shareholder meetings, to buyer power provisions and the protection of SMEs.

We also have a section of this document dedicated to doing business online as well as on employees/talent; which encompass some significant changes that we anticipate will remain long after the pandemic. Data protection in online transactions as well as in due diligence transactions has also been tackled, with our not forgetting to include articles on the effect of this season on the real estate market in Kenya.

I continue to be proud of our team which has continued to serve our clients with the same high level of dedication and quality, whether working at home or at the office. They have also managed to put together this publication to help our clients rise to the challenge that is our new market environment.

It is my pleasure to present you with this, the third edition of MMAN Insights, our annual publication, in the hope that it will aid you as you navigate this new normal.

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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01

PERTINENT ISSUES

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ENFORCEMENT OF BUYER POWER PROVISIONS AND THE PROTECTION OF SMES

Edward Kimuma
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Background

In December 2019 the Competition Act, 2010 (the Act) was amended to define buyer power, prohibit the abuse of buyer power and expand the mandate of the Competition Authority (the Authority) to deal with instances of abuse of buyer power in the Kenyan economy. The amendment could signal relief for a large segment of the country's economy with the most affected victims of buyer power abuse being Small and Medium-Sized Enterprises.

The magnitude of the problem is illustrated by the challenges surrounding retail firms Nakumatt Holdings Ltd. and Uchumi Supermarkets Ltd. In both cases, abuse of buyer power is widely accepted as the cause of the startling levels of debt owed to suppliers at the time of collapse. The liquidation of Nakumatt arose predominantly as a result of unpaid debts of up to Kenya Shillings 38 Billion, of which Kenya Shillings 18.5 Billion was owed to suppliers, many of which are SMEs [1].

Uchumi's debt troubles are being supervised under a 6 - month company voluntary arrangement recognised by court in June 2020. Its creditors will have to take losses of up to 70 percent on amounts owed to them [2].

This article seeks to analyse the Kenyan legal framework for the control of buyer power and consider the Authority's recent enforcement of the provisions.

the amendment could signal relief for a large segment of the economy with the most affected victims of buyer power abuse being SMEs

[1] https://www.the-star.co.ke/news/2020-01-22-court-extends-time-for-nakumatt-wind-up/

[2] https://nation.africa/kenya/business/uchumi-supermarkets-given-6-months-to-pay-4-7-billion-1445522

Legal framework for control of buyer power

The Act defines buyer power as 'the influence exerted by an undertaking or undertakings in the position of a purchaser of a product or service to –

a) Obtain from a supplier more favourable terms; or

b) Impose a long term opportunity cost including harm or withheld benefit, which if carried out would be significantly disproportionate to any resulting long term cost to the undertaking or group of undertakings.

The amendment introduced section 24A into Part III of the Act that:

- Prohibits conduct amounting to abuse of buyer power;
- Empowers the Authority to monitor the activities of sectors or undertakings that may experience or are experiencing abuse of buyer power.
- Requires agreements between buyer and supplier undertakings to include:
  a. Terms of payment.
  b. Payment dates.
  c. Interest rates payable on late payments.
  d. Conditions for termination and variation of contract with reasonable notice.
  e. Mechanisms for dispute resolution.

Section 24A also identifies conduct that shall amount to buyer power as including:

- Delays in payment to suppliers without justifiable reasons in breach of agreed payment terms.
- Unilateral termination or threats of termination of commercial relationships without notice, or with unreasonably short notice and without objectively justifiable reasons.
- Refusal to receive or return any goods without justifiable reason in breach of agreed contractual terms.
- Transfer of costs or risks to suppliers by imposing requirements for suppliers to fund the cost of promotion of the goods or services.
- Transfer of commercial risks that are ordinarily borne by the buyer, to suppliers.
- Demands for preferential terms unfavourable to suppliers or that limit supplies to other buyers.
- Reducing prices by small but significant amounts where it would be difficult for the suppliers to find alternative buyers, or reducing prices below competitive levels.
- Bidding up prices of inputs by buyer undertakings with the aim of excluding competitors from the market.

Recent enforcement activity by the authority

In early February 2020, the Authority reportedly fined Carrefour supermarket, through its franchise holder Majid Al Futtaim, and ordered the French retail firm to review all its supply agreements [3] after the retailer was found to be allegedly exploiting its suppliers. Carrefour was allegedly:

- Including items in its supplier contracts that enabled it to offer ultra - competitive pricing to boost sales and increase market share.
- Forcing suppliers to post their own staff at its outlets at the suppliers' expense.
- Unreasonably rejecting goods already delivered.

In early May 2020, the Authority issued a press release [4] stating that it had commenced investigations in the retail sector specifically regarding delayed payment of suppliers without justifiable reason. The Authority requested local suppliers to supply information on payments owed from major retail supermarkets beyond a credit period of 90 days from date of supply. The Authority issued a further press release on 20th July 2020[5] with its findings following investigations focused on twenty-five mid and large retailers. Three out of four retailers with delayed payments to local suppliers exceeding 90 days had presented payment plans being honoured by the retailers and confirmed through compliance checks by the Authority.

[3] https://www.businessdailyafrica.com/corporate/companies/Carrefour-faces-CAK-wrath-over-unfair-supplier-deals/4003102-5460930-wiln53z/index.html

[4] https://www.cak.go.ke/sites/default/files/2020-05/Request%20for%20Information%20from%20Retail%20Sector%20Suppliers.pdf

[5] https://cak.go.ke/sites/default/files/2020-07/Investigations%20into%20Abuse%20of%20Buyer%20Power%20in%20the%20Retail%20Sector.pdf

With a reported debt portfolio of up to Kenya Shillings 6.2 Billion [6], the Authority's press release also noted supermarket Tusker Mattresses Limited's (Tuskys) prevailing circumstances and advised that it was amenable to a debt settlement plan that would result in all suppliers' invoices being settled over a period of four months, to be monitored for compliance on a weekly basis.

Prospective impact of the authority's enforcement of buyer power provisions; opportunities for buyers and suppliers

Of key concern to undertakings with existing or prospective buyer - supplier arrangements would be the impact on those arrangements of the new legislative provisions on buyer power. Below are some of the likely outcomes:

- Suppliers or other interested parties may engage the Authority to look into arrangements or conduct that may be deemed as instances of abuse of buyer power. The Authority has published a prescribed complaint form enabling complainants to provide details of alleged abuse.

- The current definition of buyer power considers instances where buyer undertakings form alliances or engage in joint purchasing agreements with suppliers. Such arrangements would be deemed to be horizontal relationships under Part III of the Act. In this regard, it may be important for buyer undertakings to review their terms of engagement with other buyers to ensure compliance with the new buyer power provisions.

The undertakings may then approach the Authority for directions on whether such arrangements constitute a restricted trade practice and requiring further intervention by the Authority.

- Suppliers and buyers may also be required to review current and/ or prospective agreement terms to include the provisions now prescribed by section 24A. While a proposed binding code of practice within a sector may be a fallback option for parties in the absence of formal agreements, express contractual terms of payment, termination conditions etc., will provide buyers and suppliers with certainty in the event of disputes.

Conclusion

While the bulk of the Authority's recent enforcement of buyer power provisions appears to have focused on the retail sector, it is worth noting that buyer – supplier relationships exist in almost all economic sectors including manufacturing, telecommunications, insurance and the agricultural sector. The Act also contemplates the potential for abuse of buyer power in both the supply of goods and the supply of services. It may only be a matter of time before the Authority sets its sights on other industries.

[6] https://www.businessdailyafrica.com/corporate/companies/Tuskys-reveals-Sh6-2-billion-supplier-debts/4003102-5607596-uop3e1/index.html

VIRTUAL COURTS: DELIVERING JUSTICE ONLINE

Ernest Muriungi
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Background

With global advancement in technology in the delivery of legal services, 'virtual courts'[1] have become a contemporary alternative to traditional court processes. Over the years, there has been an increased demand by court users for integration of ICT in the dispensation of justice, with a view of promoting transparency and building public trust.

In the face of such demand, the former Chief Justice, Dr. Willy Mutunga established an Integrated Court Management System Committee (ICMSC) that he tasked with the responsibility of addressing challenges relating to the quality of technology infrastructure and innovation within the judiciary. In a further move to bolster the judiciary's capacity to deliver on its mandate, the current Chief Justice Hon. David Maraga issued Practice Directions with respect to electronic case management. The Directions are in line with Chapter 5 of the Judiciary digital strategy agenda under the 2017-2021 Sustaining the Judiciary Transformation Blueprint which seeks to re-engineer judicial processes through ICT.

The Covid-19 pandemic also informed the need to adopt a suitable and efficient mode of service delivery within the judiciary. With restrictions to movement and social gatherings, the CJ was pressed to provide a sustainable solution to the possibility of the lack of access to justice posed by the pandemic. Having established a framework for virtual court procedures, the CJ directed that matters be filed and heard online. Noting the afore-stated technological developments, this article seeks to discuss how digitization of cases and judicial services have assisted in the dispensation of justice.

[1] Refers to an online judicial forum that has no physical presence but still provides the same judicial services that are available in physical courts

[2] https://www.judiciary.go.ke/e-filing-takes-shape-in-nairobi-courts/

Electronic case management

On the 1st of July 2020, the Judiciary Registrar informed the public that filing of cases in courts within Nairobi would be done online via the judiciary electronic filing (e-filing) portal. She gave notice that with improvement in ICT infrastructure, other court stations around the country would gradually adopt the online filing system. As at the publication of this article, the Supreme Court, Court of appeal, most courts stations within Nairobi as well a number of tribunals, have fully adopted the e-filing system.

E-filing refers to the creation and submission of case documents electronically to court registries. It is a web-based application that sits on a server and can be accessed from any location with internet connection [2]. The e-filing system has made it much easier to manage court documents, including when searching for, annotating and/or sharing material between advocates, witnesses and the courts.

The system allows parties to electronically exchange versions of pleadings and court documents via their provided emails. This has greatly improved the access of filed documents remotely by litigants at any time regardless of their location.

In addition, the e-filing system has a module that enables courts to electronically transmit copies of rulings, judgments, directions, orders and other court documents to litigants. According to the current Judiciary Transformation Blueprint, the system is expected to have a case tracking module that incorporates a communication feature which allows court users to send an SMS to learn the status of their case.

Other significant modules within the e-filing system include the e-payment platform which allows litigants to navigate previously complex court fee payment processes and pay for court fees through mobile money. This module is expected to ensure transparency and accountability in court fees collection. Needless to say, it has significantly reduced the amount of time spent in assessing, paying, filing and service of a document.

With time, it is expected that court proceedings will be audio recorded and will replace the former practice of manual recording proceedings by judges and magistrates. According to the Judiciary Transformation Blueprint, the courts will be fitted with digital display and real-time transcription devices.

The judiciary also plans on introducing an e-diary system that will automatically assign court dates to litigants. This shall address the challenges of manual date fixing where the challenge of closed court diaries is a norm.

Virtual proceedings

In the wake of the Covid-19 pandemic, the CJ made provisions for proceedings to take place via online platforms. Typically, Microsoft Teams links for a court session are published with the court cause lists for the day. The parties and/or their appointed advocates join the online link and attend court at an appointed time where the virtual sessions take place.

In virtual proceedings, court sessions are conducted via a live-stream with parties attending remotely and the judge or magistrate ‘presiding’ over computer monitors. Since the online links for the court sessions are provided on the Kenya Law Reports website, the general public may observe proceedings via the live video feed.

Court sessions are conducted via a live-stream with parties attending remotely and the judge or magistrate ‘presiding’ over computer monitors

In practical sense, virtual proceedings have been significantly quicker than the traditional physically attended proceedings. With the further adoption of e-filing, it is indeed a relief that the days of the time-consuming and thumb-numbing activities where litigants have to manually peruse their voluminous documents when addressing court shall soon be forgotten. In some tribunals like the National Civil Aviation and Administrative Review Tribunal (NCAART), documentary evidence appears on the screen of litigants during the hearings. The Tribunal is easily able to refer to documents, free from the distraction, delay and disruption associated with witnesses or opposing counsels locating documents referred to in a hard copy bundle of documents.

The other benefit is that everyone in the virtual session is presented with the same material simultaneously and that effectively the content appearing on the court screen cannot be manipulated by an individual user without the realization of the other people in the session. Indeed, virtual proceedings have served as a panacea for litigants who may be in different locations as it does away with the costs of travel to court.

Shortfalls of the virtual court

While the virtual courts have significantly improved the delivery of justice, there are some challenges that have affected the online access to justice. Some of the challenges include:

- CT infrastructural inadequacies within the judiciary and by litigants. Most people do not have the resources to procure robust, internet-access required for virtual courts.
- Lack of familiarity of the technology in use by the courts. Court users who are not necessarily tech-savvy have had challenges in connecting to online court sessions as well as in filing and accessing documents via the judiciary e-filing portal.
- Issues of latency and clarity in the online court sessions. This challenge has been due to the varying internet connectivity speeds by court users. More often than not, litigants, magistrates and judges have timed out or 'frozen' during the court sessions owing to connectivity issues.
- Insufficient budgetary allocation to the judiciary to equip it with the necessary resources required for a nation-wide transition to the virtual system.
- Uncertainties on some of the modules of the e-filing portal. To date, the transition to a fully automated case management system has been impeded by the lack of coherence in the filing options. Litigants are unable to apply for some processes or documents since the portal does not have all the required modules.

Conclusion

While there have been complaints and issues in the workings of virtual courts, the systems seem to be generally working well. The automation process has yielded positive results effectively enhancing the efficiency of the judiciary.

It is expected that the judiciary will continue its efforts to expand court systems automation to courts outside Nairobi. Even after the pandemic, virtual proceedings may become a norm where litigants can't physically attend court. Kenya's judiciary must therefore take deliberate steps to ensure it stays committed in its promise of service delivery via ICT. Given the mobility, accessibility and flexibility of virtual courts, there is promise that dispute resolution will be cost effective, efficient and will go a long way in revolutionizing dispute resolution practices.

THE EMERGENCE OF VIRTUAL SHAREHOLDERS MEETINGS IN KENYA

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Lynnette Wanyonyi
Associate

Legal framework for virtual general meetings

Pursuant to an amendment to the Companies Act, 2015 (the "Act") by Statute Miscellaneous Act number 12 of 2019, the Act imposes a mandatory requirement for companies whether public or private to convene an annual general meeting with exception of single member companies.

While the Act does not provide for virtual or hybrid[1] meetings, it does not in any way bar companies from holding such meetings. In addition, the model articles for both private and public companies under the Act provide that in determining attendance at a general meeting, it is immaterial whether any or more members attending the general meeting are in the same place as each other.

Therefore, companies that have adopted the model articles are not prohibited from holding hybrid annual general meetings. Further, private companies are permitted to dispense any business of a shareholders meeting via written resolutions signed by all shareholders entitled to attend and vote at any such meeting. Notwithstanding this, prior to COVID19 it was largely unheard of for companies (public or private) to hold shareholder meetings virtually.

prior to COVID19 it was largely unheard of for companies to hold shareholder meetings virtually

[1] A combination of an in-person meeting and virtual meeting.

COVID 19 and general meetings

In light of the emergence and spread of COVID19 in 2020, and the ensuing government directives prohibiting public gatherings to curb the spread of the virus, the Director-General, Business Registration Services issued guidelines on general meetings allowing companies to either (subject to the articles of the company permitting the same):

a. Delay or postpone the meeting following approval by the Registrar.
b. Hold a hybrid and/or virtual meeting.

Private companies

The government directives in place at the time of writing this article prohibit public gatherings of more than 100 people. Therefore, if they so choose, private companies are able to hold their annual general meetings in person, as a private company cannot by law have more than 50 members.

Listed public companies

The High Court via an order issued on 29th April 2020 allowed listed companies to hold virtual general meetings after issuing a 14 days' notice to the shareholders on the intended meeting and on receipt of a no-objection certificate from the Capital Markets Authority. The applicant in this case[2] sought to hold its general meeting outside the provisions of its articles of association on account of COVID19. The applicant's articles of association anticipated that general meetings of shareholders would be physical meetings and did not contemplate that meetings could be held virtually.

In addition, while granting the orders, Majanja D. S. J, provided that any listed company seeking to rely on this order should ensure that their application to the Capital Markets Authority for the no-objection demonstrates that the company's shareholders will be provided with the following:

1. notice of the general meeting as required in the Companies Act, 2015 and applicable regulations.
2. sufficient information to make informed decisions on any resolutions.
3. sufficient opportunity to ask any questions and seek any clarifications from the directors.
4. an opportunity to vote and that the registration and voting procedure is clear.
5. other grounds as are appropriate in the circumstances.

Non-listed public companies

In accordance with the Director- General's guidelines, a public non-listed company can only hold a virtual or hybrid meeting if its articles of association permit such meetings. However, should a non-listed public company wish to hold a virtual meeting without express provisions in their articles, the directors or a shareholder entitle to vote at a general meeting can apply to court pursuant section 280 for orders for such orders. Section 280 provides for power of the Court to order that a general meeting of a company be convened, held and conducted in a manner it considers appropriate if for any reason it is impractical to convene or conduct a meeting as required by the company's articles of association.

Post Covid19 and the future of general meetings

Despite the fact that the effects of COVID19 were and have been extremely challenging to the nation and its citizens, the decision by the government to limit infections by prohibiting public gatherings has provoked companies, investors, Courts and regulators to think differently.

Companies, especially listed companies, have benefited significantly from the reduced costs involved in holding physical general meetings, which in some cases required they hire large auditoriums and even stadiums.

A company wishing to hold virtual or hybrid meetings post COVID19, ought to amend its articles to include language permitting such meetings. The amendments should contain an express provision allowing for the holding of virtual general meetings and electronic voting by shareholders attending the meeting.

[2] HC Misc Application No E680 of 2020 In the matter of WPP Scangroup PLC In the matter for an order allowing the convening of an extraordinary general meeting under Section 280 of the Companies Act, 2015

In addition, the amendments should do away with any and all provisions that indirectly or directly bar holding of virtual meetings.

Nevertheless, there are a number of concerns that should be addressed to ensure that a virtual and/or hybrid general meeting is a fair and efficient process for the shareholders and/or investors. The board should provide an avenue that allows attending shareholders and/or investors to ask questions and note objections. In addition, it ought to ensure that all security risks associated with virtual platforms are mitigated and that the shareholders and/or investors are trained appropriately on the use of the chosen platform.

In conclusion, there are great benefits associated with virtual general meetings such as reduction of a company's operational costs which are likely to persuade shareholders and/or investors to approve inclusion of such provisions within their articles of association. An unanticipated and extremely positive development is increased member participation in meetings, with companies' now seeing double or triple the level of past member participation in meetings due to the ease of signing in from the comfort of one's home, office or even while out and about, due to the smart phone compatibility of meeting platforms. However, it is unlikely following a return to normalcy that public companies will habitually hold virtual or hybrid meetings due to the need for shareholders to scrutinize and question directors on matters presented at the meeting.

LOAN RESTRUCTURING

Waringa Njonjo
Partner

Restructuring is a process by which a company under financial strain agrees with its creditors to reorganise its liabilities with a view to enabling the company to continue its business and avoid defaulting on its obligations. Restructuring can take the form of contractual agreements with creditors or the statutory procedures provided under the Insolvency Act, 2015. It may be undertaken by the company and its lenders alone or in conjunction with the company's other creditors.

This article deals with loan restructuring undertaken by banks and the company.

The process is often undertaken prior to the company becoming insolvent, which as a matter of law is when a company is deemed unable to pay its debts, and where the lenders take the view that the company has positive business prospects.

Once the parties involved have agreed on proceeding with restructuring the company's loans, they are likely to enter into a standstill agreement. This is an agreement by which the company's obligations as at a set date are frozen. The agreement prevents lenders from accelerating the loans, terminating the existing facilities or taking any steps to enforce any securities or institute insolvency proceedings.

During the period the standstill agreement is in force, lenders will typically appoint advisers to assess the company's cash flow projections, the feasibility of the company's business plan, the ability of the company's management team to perform and deliver on such business plan as well as review the availability of additional security that can be provided to the lenders. The information obtained from this review will allow the lenders determine whether to proceed with the restructuring process or institute insolvency proceedings.

Moreover, the review will allow the parties negotiate the terms and conditions of the restructuring agreement to be entered into which would include the following terms:

- Loan repayment rescheduling.
- Capitalisation of interest.
- Extension of loan tenures.
- Consolidation of existing facilities.
- New facilities.
- Costs.
- Additional security.
- Tax implications.
- Any variations that need to be made to the existing loan documentation.

Corporate borrowers who are indebted to banks and other institutions are advised to regularly evaluate their financial position so that they can take advantage of restructuring their loans as an option, should they run into difficulty. Failure to do so will often leave them with no choice but to submit to the less flexible statutory insolvency procedures of administration, court sanctioned restructuring plan, schemes of arrangement or winding-up.

POTENTIAL IN THE AIR: COMMERCIAL DRONE OPERATIONS IN KENYA

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Principal Associate

In March 2020, the Civil Aviation (Unmanned Aircraft Systems) Regulations 2020 (Drone Regulations) were published opening the Kenyan airspace and market to unmanned aircraft systems commonly known as drones, for recreational and commercial use. The global commercial drone market in 2019 was estimated at USD 1.5 billion and is projected to reach USD 8.5 billion by 2027[1]. Forecasts also project that East Africa shall generate drone revenues well over USD 150 million in 2 – 3 years. The potential business opportunities for drones in Kenya are extensive. New opportunities are to be found in the energy, infrastructure, agriculture, transport, security, mining, media, entertainment, manufacturing, information technology, and even the real estate sector.

Regulatory framework

The purview of the Drone Regulations extends from the registration of drones up to their manufacture, modification, testing, and sales. In determining whether to issue a licence to register a drone, the Kenya Civil Aviation Authority (KCAA) will take into consideration, national security, international and regional obligations under treaties and agreements, public safety, terrorism, or organized criminal activities, amongst other considerations.

it is a requirement that all drones are registered with the KCAA on their online drone registration platform

[1] Global Commercial Drone Market - Analysis, Insights and Forecast, 2019-2026 by Industry Research.

Under the Drone Regulations, a person shall be eligible to own a drone (without military specifications) only if the person is:

- A Kenyan citizen.
- A company registered in Kenya.
- Is a national or county government.

To operate drones, an operator will be required to obtain a remote aircraft operating certificate, which shall authorise an operator to conduct drone operations under the conditions and limitations detailed in the operations specifications. A potential commercial drone operator shall need to demonstrate to the KCAA that they have:

- An adequate organisation to undertake the intended drone operations.
- Method(s) of control and supervision of flight operations.
- A training program.
- Ground handling and maintenance arrangements.

The KCAA shall also take into consideration the nature and extent of the envisaged commercial operations, the size, structure, and complexity of the organisation. Also, a security clearance shall need to be issued but this shall be sorted by the KCAA while processing the application. The application for the remote aircraft operating certificate should be filed with the KCAA at least 90 days before the date of the intended operation.

The commercial applications for drones are varied providing simple and even complex solutions to businesses. Under the Drone Regulations, drone operations are classified under three categories, namely:

Category A

which are operations that pose a low risk to the public, property, and aircraft. The drones will be required to operate within visual line of sight at a maximum height of 400 feet above ground level, 50 meters lateral distance from any persons, and with a maximum take-off weight (including the payload) of 25 kgs.

Category B

which are operations that are determined to pose a medium risk to the public, property, and aircraft. The drones under this category are required to operate within visual line of sight (including extended visual line of sight) at all times with the heights above ground and distances from any persons, buildings or objects not associated with the operation being determined by the KCAA. Drones in this category are not allowed to operate in controlled airspace, and any operations in prohibited, restricted, or dangerous areas require the approval from the KCAA. Furthermore, a drone pilot will need to hold a valid license to operate the drone.

Category C

which are operations that pose a high risk to the public, property, and aircraft. Under this category, drones may be operated beyond the visual line of sight and in any airspace not classified as prohibited, restricted or dangerous. Such operations will be subject to air traffic control instructions and guidance with the pilot being required to hold appropriate ratings to operate the drone.

For drone cross-border operations, a drone operator shall be required if commencing operations in Kenya and terminating in a foreign state, to obtain authorisation from the foreign state and any other state over which the drone shall fly. Similarly, if a drone operation commenced in a foreign state and is to terminate in Kenya, authorisation from the KCAA shall be required.

Under the Drone Regulations, it is a requirement that all drones are registered with the KCAA. In this regard, the KCAA has set up an online drone registration platform that is now accessible to the public. The particulars of the operator (corporate or natural persons) shall need to be uploaded together with various supporting documents. Notable amongst the documents is the requirement of a police clearance certificate confirming that the applicant has no criminal record. If an application to register a drone is successful, the KCAA shall issue a certificate of registration for the drone.

In relation to the import and export of drones, a permit must be obtained from the KCAA together with a security clearance and approval which the KCAA shall procure on behalf of an applicant. To export a drone, an operator or seller shall be required to obtain a deregistration certificate. Similarly, with the manufacture, assembly, modification and testing of drones, a party shall be required to obtain authorisation from the KCAA.

The penalties for contravening the Drone Regulations can result, upon conviction, in a fine of up to KShs. 2 million (approx. USD 20,000.00) for each offence or imprisonment for a term of up to 3 years, or both. The Drone Regulations place strict liability on the drone operator and pilot unless they can prove that the contravention occurred without their consent or connivance and that they exercised all due diligence to prevent the contravention.

Opportunities

There are various sectors in the Kenyan market that drones can be used for commercial purposes. A 2019 World Bank publication [2] stated that Kenya's agricultural sector accounted for 21.9% of the country's gross domestic product. Drones can provide solutions for the agricultural sector such as pest control as recently reported in the media when they were used to fight locust. Other uses of drones in the agricultural sector include:

- Crop health assessment.
- Soil sampling.
- Livestock management and monitoring.
- Crop spraying.

Kenya's extractive industries can also benefit greatly from drones particularly in the north of Kenya where oil prospecting is still ongoing. Drones can be used at the prospecting and exploration stages to map large areas thereby facilitating the optimal usage of resources and personnel. This is of particular importance given that some of the areas are remote and without sufficient or non-existent road infrastructure.

As a regional hub, Kenya is strategically placed for the manufacture and export of drones. Kenya already serves as the entryway for the importation of goods for several East and Central African countries. Combined with the logistical flexibility provided by drones and increased adoption of drone technologies, particularly to overcome infrastructure deficiencies, drones provide new opportunities for entrepreneurs and investors. Furthermore, investors and entrepreneurs can also consider the establishment of drone training organisations to serve the local and regional markets to compliment the growth of the sector.

In the current financial year, the Kenyan government has committed KShs. 128.3 billion (approximately USD 1.28 billion) under the Big 4 agenda which is geared to enhancing manufacturing, food security, universal health coverage and affordable housing. Concerning the latter, drones can be used to survey property, inspect site progress thereby providing up to date data to facilitate the management of sites, faster decision making and reducing operational costs. Drones can be used for remote damage assessment particularly for high rise buildings, telecommunication towers, power lines and pipelines. Such uses cut across several sectors, from construction up to the insurance sector.

Over the last decade, Kenya has steadily risen in mobile phone penetration and internet access to become number one on the continent. The embrace of new technology is high, and the operation of drones will open new markets and complement existing ones. A new area that can be explored is the sports and entertainment sector where drone racing is one of the fastest-growing sports. The potential from procuring endorsements up to granting broadcasting rights is a potential area of growth.

The potential for commercial drone operations is clear but there are hurdles such as the limitations to operate drones within the visual line of sight which might exclude certain operators depending on their capability. However, such a huddle can be overcome by applying to the KCAA for an

[2] Kenya Economic Update: Transforming Agricultural Productivity to Achieve Food Security for All, issued in April 2019. https://www.worldbank.org/en/country/kenya/publication/kenya-economic-update-transforming-agricultural-productivity-to-achieve-food-security-for-all

exemption. Similarly, on the restrictions placed on ownership and commercial operations of drones, parties can enter into collaborative agreements such as joint ventures to scale such hurdles.

Drone regulations: What is next?

The KCAA is set to release circulars, manuals, and guidelines to assist owners and operators to comply with the Drone Regulations. In addition to the guidance material, the fees and costs for the permits, approvals and certificates are yet to be released. In preparing the guidance material, the KCAA considered the advisories and best practices from other jurisdictions. Such material shall be instrumental in guiding interested parties in the nuances of the Drone Regulations and providing clarity on administrative procedures thus opening the door for commercial operations.

A NEW FOCUS ON DUE DILIGENCE TRANSACTIONS

Allison Lloyd
Associate

In mergers and acquisitions, the first and most critical step is always a due diligence over the target company and its assets. Areas of focus in due diligence are usually standard but are influenced from time to time by global trends. One recent trend is the increasing importance of data. Today the value of data is immeasurable, and a data breach can result in immense losses to a target company. The importance is also characterized by the recent legislations being enacted by numerous countries on the protection of data, Kenya being one of them. Most companies qualify as data controllers or data processors under the Data Protection Act No. 24 of 2019 (the "Act") by virtue of collecting, storing and disclosing data of different parties such as employees, vendors, suppliers and consumers. Due diligence relies on information availed by the seller to determine the status of the company.

Widening the scope of due diligences in Mergers and Acquisitions (M&A) transactions to include data privacy and protection is necessary as it ensures the assessment of all risks before an acquiring party takes on any liability in a target. The bar has steadily continued to rise on the level of care companies must take to protect personal data. Within agreements, provisions on privacy and data security are increasingly being provided for. Under the Act, failure to adhere with the provisions will result in conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding two years, or to both. Given that data breaches are a common occurrence in current times and can affect the value of a target, a due diligence on data privacy and protection is becoming important in M&A transactions.

Today the value of data is immeasurable, and a data breach can result in immense losses to a target company

Below are guiding points on carrying out a data due diligence to ensure that red flag issues are discovered by the exercise:

1. The parties can, prior to commencing a due diligence, enter into non-disclosure agreements which specify the information that will be interacted with in the course of the due diligence, obligations arising under the non-disclosure agreement to each party and a provision ensuring the parties limit access to the documents by their representatives such as advocates.

2. The parties shall prepare a comprehensive privacy and data security due diligence checklist for the transaction. The checklist should ask specific questions about privacy and data security issues such as the types of personal information collected, third parties with access to the information and previous data breaches that may result in litigious claims. The checklist should also request for the relevant privacy and security related materials such as information security policies.

3. During the due diligence, attention should also be paid to contracts with vendors and third-party service providers. Data protection laws have driven changes in purchase agreements that impose significant privacy compliance requirements. As part of due diligence, the purchaser's advocate should consider whether target has met its obligation and what representations it has made under the agreement with respect to privacy and data security. Contract review is also important to determine whether on change of control in a company, consent must be obtained from any consumers, employees or any other third party to who the third party owes an obligation. Additionally, many businesses will have more obligations under third party commercial contracts in relation to confidential information.

4. The buyer should confirm if the target is subject to any specific industry standards or compliance regulations. For example, entities in the information and technology industry have an additional obligation under the Kenya Information and Communication Act relating to confidentiality of personal data. Such legislations, in addition to the Act should guide the due diligence process.

5. Both parties should limit the access and control of its representatives to the information. It is noteworthy that sometimes the key to closing a deal is the ability to provide requested information to multiple parties such as representatives of the other side of transaction, bankers, auditors and corporate counsel, in a timely fashion. In the new age, data is now being more efficiently shared via virtual data rooms which are platforms offering third party access to uploaded information. The platform requires a user to have login credentials and thus limits and records access. It can also monitor any user's actions. This makes it easier to track third party interactions with personal data and ensure that only those individuals who are involved in the sale process interact with the information required for the due diligence.

Due diligence in M&A transactions should be guided by upcoming trends including data protection. This is important especially with the recent enaction of the Act. This analysis shows the importance of data protection and privacy in a merger and acquisition. The success of a deal may depend on the status of data privacy and protection in an entity.

02

TALENT

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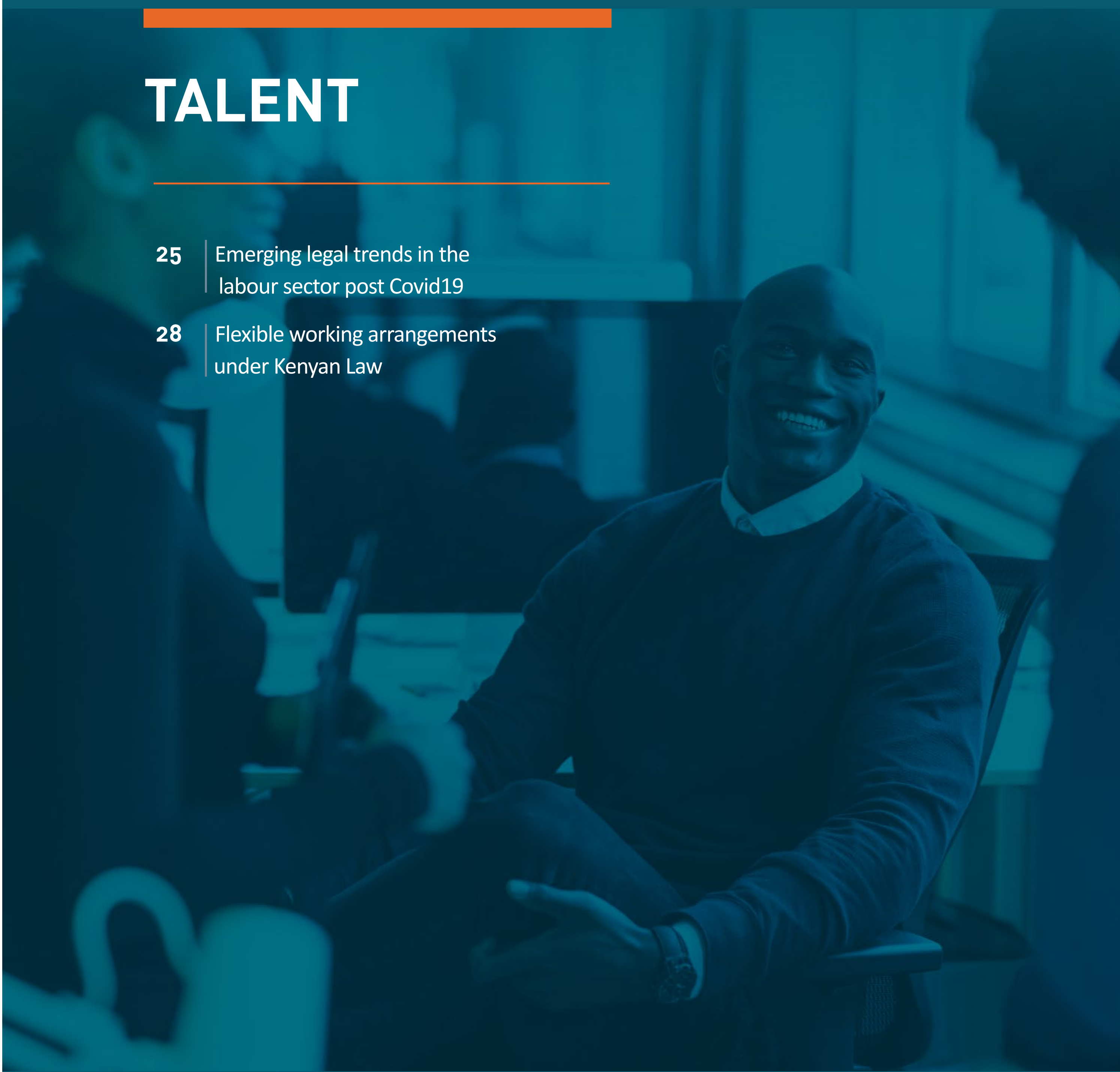

EMERGING LEGAL TRENDS IN THE LABOUR SECTOR POST COVID 19

Victor Muthiri
Associate

Introduction

The declaration of the Covid-19 Pandemic and the resulting preventive and containment measures adopted by the Government of Kenya through the National Emergency Response Committee on Coronavirus have had unpresented consequences on the labour sector in Kenya since mid-March 2020.

The need to enforce preventive and containment measures to curb the spread of Covid-19 at the workplace saw the introduction of further directives by the Directorate of Occupational Safety and Health Services on 14th March 2020 introducing, among others, the concept of working remotely for employers and employees classified as working in the non-essential services sectors to minimise physical interactions and to observe social distancing.

The directives issued by the Government of Kenya led to imposition of partial lockdowns to contain movement of people across Counties and regions affected by the pandemic, and curfews restricting movement within certain timelines, all of which affected work patterns as envisaged in various employment statutes and contracts of service governing the employment relationship of various players in the labour sector of Kenya.

This article will anylyse some of the prevalent trends in the labour sector that have emerged due to the effects of the Covid-19 pandemic.

Covid19 affected work patterns as envisaged in various employment statutes and contracts of service in Kenya's labour sector

Statutory interventions

The Government sought to intervene to caution the effects of the Covid-19 pandemic in the labour sector through the Pandemic Response and Management Bill, 2020. The Bill was published on 17th April 2020 and underwent the 1st Reading on 21st April 2020. It was due for a 2nd Reading on 5th May 2020 but has never gone past this stage to the ultimate assent into law. Clause 30 thereof is dedicated to labour relations and provides as follows in summary:

Where a pandemic adversely affects the ability of an employer to pay salaries or wages: -

- An employer shall not terminate a contract of service or dismiss an employee.
- An employer shall not coerce an employee to take a salary cut.

An employer who is unable to pay salaries or wages shall permit an employee to take a leave of absence without pay for the duration of the pandemic.

We cannot also forget to mention the pending Employment Act (Amendment) Bill 2019 which was published on 15th March 2019. The Bill never went past the 2nd Reading Stage which took place on 18th September 2019. The Bill proposes a raft of positive amendments to the existing Employment Act enacted in the year 2007, which would go a long way in addressing some of the challenges experienced in the labour sector due to the preventive and containment measures adopted to curb the spread of the Covid-19 pandemic globally.

The proposals made in the two Bills unfortunately remain as such until the Bills are passed into law. We shall examine some of the proposals made in the Bills in our analysis of the emerging trends.

Select trends in the labour sector that have emerged due to the effects of the Covid-19 pandemic

Unpaid leave and salary cuts

These measures have been widely applied to caution employers and to ensure employees do not lose their jobs due to the economic hardships brought about by the Covid-19 pandemic. These measures are normally governed by the terms of the contracts of service and require consultations between employers and employees before effecting them.

Although such measures have been proposed in the Pandemic Response and Management Bill, 2020, the provision on sending employees on unpaid leave does not address the employers' obligation to continue remitting statutory deductions such as PAYE, NHIF and NSSF.

Furthermore, the Bill proposes that employment cannot be terminated during the pandemic period due to employer's inability to pay salaries but does not address instances where a business cannot be revived post-pandemic. Whereas the existing law would provide reprieve to an employer by declaring employees redundant on grounds of economic challenges, it does not address the challenge of the employer lacking funds to carry out such an exercise, bearing in mind the requirement to pay severance pay based on the employee's years of service. The proposal on pay-cuts does not address the post-pandemic scenario of restoring the previous terms of pay in the event that the business is revived and resumes its normal operations.

Limits of employees' medical insurance cover

There have been challenges on interpretation of various medical insurance policy covers as appertains attachment of risk while employees work from home as opposed to a designated workplace, as well as covering employees for Covid-19 related claims. Most employers have heard to seek clarification from their insurers to make sure that such medical claims are within the scope of the existing cover and if not, to negotiate terms of extending or acquiring new insurance policies to cover such claims.

Outsourcing and transfer of employment

There are no statutory provisions in Kenya which govern outsourcing and transfer of employees yet this concept has been adopted by organisations in Kenya to meet the vital objectives of focus on core competencies, efficiency and cost cutting especially during this period of the Covid-19 pandemic. Outsourcing has been problematic for some employers due to challenges from employees. Most disputes regarding outsourcing have occurred where employees have been transferred to outsourced companies. Such arrangements have raised issues concerning the concept of transfer of employment or employees. However, there have been judicial interpretations on how the transfer of employees should be carried out and these pronouncements have borrowed or relied on comparative legal provisions from other jurisdictions, such as the UK Transfer of Undertakings (Protection of Employment) (TUPE) Regulations and the South Africa Basic Conditions of Employment Act.

Retirement age in the private sector

Kenyan employment law does not make a provision for retirement age in the private sector. Ordinarily, the matter is regulated by company policy and individual contracts of service. Where such provision is not contained in the company policy or contract of service, various challenges arise. For example, it is not clear whether an employee can voluntarily apply for retirement and whether the employer can treat their application as a resignation, where no policy exists. On the other hand, if an employer proposes to retire an employee on grounds of advancing age but the employee prefers to continue working, termination of the employee's service could be challenged on grounds of unfairness or discrimination.

Retirement on medical grounds

It is not clear at present whether employees who have used up their sick leave but remain unable to resume work should be retired or put on indefinite unpaid leave. Without a specific provision, terminating the services of such an employee would constitute discrimination on the grounds of health status, yet keeping them on the payroll puts a heavy financial burden on employers, who might need to hire a replacement in the interim.

FLEXIBLE WORKING ARRANGEMENTS UNDER KENYAN LAW

Jeff Kinuthia
Lawyer

Introduction

In recent months, the coronavirus pandemic has significantly affected the way a lot of companies carry out their operations by forcing a lot of the work force to work from home. With this in mind, it is important to analyze one key aspect of employment that is likely to undergo significant review and changes: flexible working. Flexible working is an arrangement which was, even prior to the coronavirus pandemic, being touted by many as the future model of working arrangements.

What is flexible working?

Flexible working is an arrangement that provides employees with greater scheduling freedom in how they carry out their employment duties. There are many forms of flexible working including homeworking, part time or reduced hours, job shares, flexi-time, compressed or annualised hours, career breaks, staggered start and finish times or self-rostering.

Such arrangements it has been shown, assist many employees in balancing their family obligations and their work duties whilst also utilizing their time more efficiently. Through flexible working, employees may for example choose to work remotely from a place other than the employer's office; shift their everyday schedule by starting the day later or leaving earlier; and, work for less than the standard working hours either by fewer hours per day or by fewer days per week.

even prior to the Covid19 pandemic, flexible working was being touted by many as the future model of working arrangements

After an initial period of adjustment, a lot of the employees who have been asked to work from home by their employers have gradually adapted to the 'new normal' and there are indications that a lot of these employees would be open to working remotely and having flexible working hours even once the pandemic is over. Working from home has also been seen by many as a welcome relief from the hassle and bustle of commuting to and from work which is often quite time consuming.

What does the law say on flexible working?

Section 10 (2) (f) and (g) of the Employment Act stipulates that every employment contract must provide particulars of the place of work and hours of work for the employee.

Section 10 (3) (d) of the Employment Act further states that such particulars shall indicate either the place of work or, where the employee is required or permitted to work at various places, an indication of that place of work and of the address of the employer.

Regulation 5 of the Regulation of Wages [General] Order [the 'Order'] states that the normal working week shall consist of not more than fifty-two hours of work spread over six days of the week while the normal working week of a person employed on night work shall consist of not more than sixty hours of work per week.

Regulation 7 of the Order however allows an employer and an employee by mutual consent to agree to the deferment of the employee's rest day. These provisions, although providing a framework on the place and time when an employee is required to work, do not empower the employees to have a greater say in such a decision and employees are often given little opportunity to suggest alternatives which are more convenient to them. This position has however slowly been challenged and numerous groups have pushed for the enactment of flexible working as a right that each employee should be entitled to.

Flexible working under the Employment Act (amendment) bill, 2019

In April 2019, the Kenya Law Reform Commission (KLRC) and the State Department for Labour published a draft bill, the Employment Act (amendment) Bill, 2019 [the 'Bill'] and presented it for public consultation. This Bill proposes a wide raft of changes including flexible working. Despite being published in April 2019, the Bill is still in its formative stages and has not been placed before Parliament.

The Bill is very progressive in nature and gives an employee the right to apply to their employer for a change in terms and conditions of employment relating to— (a) the times when the employee is required to work; (b) where, as between employee's home and a place of business of the employer, the employee required to work, or (c) such other aspect the Cabinet Secretary may prescribe.

An employer is obliged to consider such request by an employee and notify them of their decision on the application within a reasonable time. Importantly also, an employer is prevented from rejecting such an application except for the reasons provided in the Bill which are (i) the burden of additional costs; (ii) detrimental effect on ability to meet customer demand; (iii) inability to re-organize work among existing staff; (iv) inability to recruit additional staff; (v) detrimental impact on quality; (vi) detrimental impact on performance; (vii) insufficiency of work during the periods the employee proposes to work, (viii) planned structural changes; and (ix) such other grounds as may be prescribed.

Flexible working in other jurisdictions

The Bill is very progressive in nature and gives an employee the right to apply to their employer for a change in terms and conditions of employment relating to— (a) the times when the employee is required to work; (b) where, as between employee's home and a place of business of the employer, the employee required to work, or (c) such other aspect the Cabinet Secretary may prescribe.

Legally, flexible working is a fairly new concept in African jurisdictions but provisions on the same have been enacted elsewhere in the world. In 2003 for example, eligible employees in the United Kingdom acquired the legal right to request flexible working arrangements and since then flexible working arrangements have become more established internationally in countries such as Italy, Germany, Finland and Australia.

According to an estimate by Forbes Magazine, in 2018, 50 percent of the U.S. workforce was projected to be remote; while in Europe, remote workers had grown from 7.7 percent to 9.8 percent over the past decade and globally, many top companies offer full, half, or partial remote work.
Conclusion and recommendations

The coronavirus pandemic will end sooner or later. That said, as businesses resume operations in line with the gradual and phased re-opening of the economy, employers should begin seriously considering flexible working arrangements which have been shown to lead to better productivity and well-being of employees.

03

REAL ESTATE

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STATE OF COMMERCIAL REAL ESTATE IN KENYA

Christine Wambui
Associate

The rise of the COVID-19 pandemic this year has had quite a significant impact on both the commercial and residential real estate market in Kenya. Globally, as most governments had issued stay-at-home orders or lockdown directives to aid in flattening the curve in the first half of the year, a lot of companies made the change from the traditional approach to a remote working model. Locally, this work-from-home directive was issued by the President on March 15th, this was two days after the first case was confirmed in the country [1]. Employees were encouraged to work from home, with the exception of those working in critical and essential services, in a bid to reduce the risk of infection. This therefore meant that there a lot of the commercial office spaces have remained vacant since then. However, the vacancy of commercial office spaces cannot be solely blamed on the impact of the pandemic. In the previous years, there has been an increase in the supply of commercial real estate in certain locations in Nairobi. This steady increase has led to an oversupply and a stagnation of the market performance in the sector [2].

With the number of new COVID-19 reported cases reducing in the latter half of the year, companies as well as commercial real estate stakeholders are starting to examine how offices will evolve in a post-COVID world.

[1] Presidential Address, https://www.president.go.ke/2020/03/15/address-to-the-nation-by-h-e-uhuru-kenyatta-c-g-h-president-of-the-republic-of-kenya-and-commander-in-chief-of-the-defence-forces-on-covid-19-commonly-known-as-coronavirus/ (Published 15 March 2020)

[2] Cytonn, Nairobi Metropolitan Area Commercial Office Report 2020 (Published 26 April 2020)

While some companies are expecting to fully adopt the remote working model and get rid of their physical offices like Facebook and Twitter 3, others are considering expanding their current premises in order to comply with the social distancing guidelines or a hybrid virtual model where smaller teams work from the office premises and a majority of the employees work from home such banks and other financial institutions with sensitive data . With the employees working from remote locations, this makes it harder to pinpoint data breaches and exactly how they occurred. It is therefore important for organisations considering a permanent move to the remote working model to develop a data protection policy that is specific to this model.

As data controllers and processors, organisations in Kenya have a duty to implement Whereas, the remote working model has existed for a while, this was a first-time experience for a lot of companies especially in Kenya. With this new experience, a great concern for cyber-security and data privacy arose as the companies were more vulnerable to data breaches as they had to create new ways to allow their employees to access data. the appropriate technical and organisational measures to ensure that data protection principles are upheld in an effective manner and that necessary safeguards are integrated for this purpose 4.

It is important to note that the remote working model might not necessarily lead to a slump in demand for office spaces. It is likely that organisations that are downsizing their premises will turn to serviced offices which offer shorter and more flexible lease terms with the added advantage of no set-up costs.

Further, with social distancing being one of the guidelines provided by the Ministry of Health to prevent the spread of infection [5], serviced office spaces also provide a good alternative for organisations that may be investing in modifying their current office spaces in order to comply with the guidelines. These spaces also offer a good option for companies that are seeking to incorporate a degree of remote working to their traditional office-based work operations. It is therefore likely that this concept gains popularity in a post-COVID environment.

On the other hand, even as more organisations might be downsizing their current spaces, it is also likely that some will be looking to acquire more space in order to comply with the standards and guidelines to prevent the spread of infections. The open-plan office layout which has grown in popularity in the recent years as it encourages frequent interaction among workers is likely to be a thing of the past in a post-COVID environment. Commercial real estate developers and landlords will be required to re-design the spaces to reduce the density of the shared space to maintain social distancing.

Further, they will also be required to ensure there is proper ventilation systems in the spaces. The Ministry recommends the adoption of running of both natural ventilation systems and mechanical ones even when the space is unoccupied. Developers and landlords who are able to provide ‘virus-proofed’ spaces are likely to ensure adequate occupancy of their spaces.

[3] CNN Business, These companies plan to make working from home the new normal. as in forever, https://edition.cnn.com/2020/05/22/tech/work-from-home-companies/index.html (Published 25 June 2020)

[4] Section 41 (1), Data Protection Act, No. 24 of 2019, Laws of Kenya

[5] Ministry of Health, Interim Guidance for Health and Safety Measures in Workplaces in the Context of COVID-19, https://www.health.go.ke/wp-content/uploads/2020/06/INTERIM-GUIDANCE-FOR-HEALTH-AND-SAFETY-IN-WORKPLACE.pdf (Published 9 June 2020)

This will likely to compensate for any possible dip in demand of office spaces. Further, tenant preferences are set to change as well with companies seeking shorter term leases as they shift how they interact and engage with their office spaces. It is important for landlords to ensure that these short-term leases do not fall within the purview of a controlled or protected tenancy. Where a commercial tenancy is for a period of five years or less, the tenant is protected by the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. [6] Such tenants enjoy certain statutory benefits that are not available to other tenants. These rights greatly limit the landlord's power to deal with their property. For example increasing the rent or service charge payable by the tenant unless otherwise determined by the Business Rent Tribunal. It is therefore essential that landlords push for lease terms higher than the five-year period, in fact five years one month is adequate to ensure that a controlled tenancy is avoided.

In conclusion, the impact of the pandemic will certainly affect the commercial real estate sector in the medium and short term. All stakeholders are advised to adapt to the shifts in tenant preferences and reassess their business expectations bearing in mind the need to recover from any losses caused by the pandemic.

[6] Cap 301, Laws of Kenya.

COVID-19 IMPACT ON LEASES AND TENANCIES

Christine Wambui
Associate

As COVID-19 continues to threaten the health of the population, its effects are also felt in various sectors of the economy including the real estate market. In dealing with the pandemic, various legal concerns have arisen leading to uncertainty among landlords and tenants. Below, we shall address a few of the concerns.

Does a claim for Force Majeure apply in a tenancy arrangement?

Force majeure clauses are put in place to ensure parties are relieved from fulfilling their obligations when certain circumstances, that are beyond their control, arise thereby making performance impossible. Landlords and tenants who seek to rely on this must:

- Have the force majeure clause present in their agreement-Force majeure cannot be implied in a contract, it must be specifically provided in the contract.
- Demonstrate that the event is specifically covered under the clause.
- That the event is linked to the party's inability to perform their obligation. Implications of force majeure clauses on contractual obligations have been discussed by MMAN in other articles. You may find them here and here.

Currently, a bill has been proposed by the National Assembly to amend the Law of Contract Act, Cap 23 in relation to COVID-19. The amendment seeks to 'renegotiate' contract terms by providing that the COVID-19 pandemic be construed as a force majeure occurrence. It further provides that the following actions are prohibited where the pandemic has affected performance of contractual obligations related to tenancies and leases:

- Commencement of levying of execution.
- Enforcement of security over movable and immovable property used for trade purposes.
- Termination of lease or licence in connection with non-payment of rent or other monies.

Notably, the proposed amendment does not provide a mechanism for determining when a party ceases to be affected by the event. Therefore, the landlord may be unable to terminate the contract until expiry of the lease as the tenant can claim that they are still affected by the pandemic. While the proposed amendment cushions the tenant, the same does not offer reprieve to landlords. However, until the above is passed as law, parties are advised to review their force majeure clause to determine whether they can rely on it.

Can a claim of frustration of the tenancy /lease hold?

A claim for frustration arises where an unforeseen event occurs, without the fault of either party and renders the performance of the contractual obligation impossible or radically different from that which the parties contemplated while entering the contract. Notably, for a contract to be frustrated, the event must be central to the terms of the contract.

Should the government implement a total lock down directive, residential tenants may not be able to claim frustration as they would still be occupying the premises. On the other hand, commercial tenants, may argue that the lock down has hindered their ability to reach the premises to conduct business thereby frustrating their performance of the contract. The threshold to attain to invalidate a contract on the basis of frustration is very high. Frustration of tenancies on account of lockdown may hold in the immediate but is unlikely to affect the performance of the contract in the medium and longterm view.

The downside of a tenant claiming that the contract has been terminated through frustration is that, devoid of a contract, the tenant would be compelled to vacate the premises. Failure to which, in law they either become a tenant at will or be obligated to pay rent. Unless a tenant is willing to immediately vacate the premises, this remedy may not be viable option.

What if the tenant is unable to pay rent as a result of the effects of COVID-19?

Since we cannot establish how long the effects of the virus will be felt by the economy, it is likely that several tenants will be unable to meet their rent payments. Tenants must remember that they cannot simply refuse to pay rent as this will be in breach of their contracts which may lead to termination. It is critical, at this stage that the parties initiate discussions on the available options to keep the contract alive.

Various options available to the parties include rent holidays, reduction of rent for a specified period, postponing of rent payment, establishing payment plans etc. The applicability of the options will be determined on a case-to-case basis dependent on a few factors including the type of tenant, business that the tenant operates and the overall relationship between the landlord and tenant. Once an agreement is reached, tenants should ensure that the same is reduced to writing and executed by both parties.

Tenants and landlords are also advised to assess their relevant insurance policies to confirm whether potential cover is available for business interruption or loss of rent in response to the virus.

What are the obligations of landlords and tenants regarding safety and reducing spread of the virus?

The obligations of the landlord and the tenant are governed by the terms of the lease. Generally, the landlord is responsible for the common areas of a property whereas the tenant is responsible for the leased premises. Therefore, each party must comply with all applicable laws and other government directives relating to health and safety.

It is also important to note that both parties are required to put in place measures to preserve the health, welfare and safety of any of their workers present at the premises pursuant to the Occupational Health and Safety Act, 2007. This requires parties to ensure that they adhere to the various guidelines as provided by the government through the Ministry of Health. With regards to occupier's liability, occupiers should note that their liability remains the same i.e. an occupier is still expected to exercise their duty of care to visitors of the premises.

How should parties navigate the 'keep open' clauses in a lease?

Most leases have a 'keep-open' clause. This requires the tenant to remain open and continue to operate their business in the leased premises for the duration of the lease. In case the tenant seeks to close their business premises, such clauses often provide that they notify the landlord and provide the necessary caretaking and security arrangements as required by the landlord and any insurers of the premises.

In case a tenant is seeking to operate their business remotely, it will be critical for the tenant to ensure that the provisions of this clause are complied with. In the event the government issues a lock down directive, such a directive will likely take precedence over the 'keep-open' covenant thereby preventing the landlord from enforcing the clause.

How is the current closure of the land registries expected to affect ongoing transactions?

Where leases had been executed and not registered, the obligations of the parties are not affected as an obligation is created on execution and not on registration.

In conclusion, please note that we are available to provide contract review services, expound further on these and other COVID – 19 related issues that may arise in the context of such transactions and provide the relevant legal advice.

04

DOING BUSINESS ONLINE

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DATA PROTECTION IN ONLINE TRANSACTIONS: A KENYAN PERSPECTIVE

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Introduction

With global advancement in technology and innovation, coupled with increased consumer awareness, increased access to information and marketing as well as a wide variety of communication channels, online trading platforms have grown considerably to significantly boost the e-commerce industry.

The term 'online transaction' may be broadly understood to refer to any electronic transaction requested through electronic transmission over the internet. Such transactions may take many forms ranging from Business-to-Business transactions, Business-to-Consumer transactions and Person-to-Person transactions. Not all online transactions involve payment albeit the majority do. Further, transactions are not strictly completed upon making payment. In some instances, delivery of goods and services may be part of the transaction. Online transactions may be done both locally within Kenya or cross-border and largely involve interactions amongst various parties i.e. marketplace providers, consumers, purchasers and sellers of goods and services and business system providers.

Online transactions are contractual in nature and this necessitates processing of data personal, sensitive or otherwise for use in fulfilment of various contractual obligations at contract formation and performance.

adequacy and pragmatism of the legal and institutional framework around data protection in online transactions are major concerns

Processing of personal data makes consumers of online transactions susceptible to fraud, identity theft, counterfeit products, online scams as well as questionable practices that include unlawful trading of consumers' personal data and consumer profiling for targeted marketing. Major concerns regarding data protection in online transactions relate to unlawful use of personal data, sharing this data without consent of the data subject, transferring the data outside the data subject's country, lack of clarity on dispute resolution mechanisms, concerns about costs and practicalities of enforcing data protection or consumer rights and uncertainty regarding applicable laws given the cross border nature of online transactions. In the Kenyan context, the biggest concerns are with regards to the adequacy and pragmatism of the legal and institutional framework around data protection in online transactions.

Legal and institutional framework for data protection and online transactions

The concept of data protection is envisaged under the Constitution of Kenya, 2010 which gives bespoke provisions on the right to privacy. The Constitution empowers relevant legislative agencies with the duty to enact laws regarding data protection. The primary pieces of legislation on data protection are the Kenya Information and Communications Act No. 2 of 1998 (KICA) and the Data Protection Act No. 24 of 2019 (DPA). The recently enacted Data Protection Act is expected to offer privacy protection (rights and remedies) for identifiable natural persons [1]; provide a regulated framework[2] and impose restrictions on the collection, processing[3], commercial use, storage and transfer of personal or sensitive data[4]; establish the office of the Data Commissioner charged with the mandate to implement the DPA; provide for enactment of regulations for carrying into effect provisions of the DPA and other related purposes.

The DPA is applicable to processing of personal data by persons deemed as data controllers or data processors established or ordinarily resident in Kenya and processing personal data while in Kenya or not established or ordinarily resident in Kenya, but processing personal data of data subjects located in Kenya.

Key considerations for data protection in online transactions

Parties to online transactions

Various parties engage in online transactions and these include:

- Customers or consumers (data subjects).
- Shops or stores (data controllers).
- Service or system providers (data processors).

Purposes for which personal or sensitive data of data subjects is required for online transactions include:

- Order placement and processing.
- Payments for goods or services and other related costs like shipping.
- Order delivery.
- Order status updates or order tracking.
- Record keeping for customer convenience and to avoid repeated input of data for repeat orders.
- Customer care and support.
- Aecord keeping to facilitate handling of future warranty claims.
- After sales services and marketing.
- Business record keeping for legal, tax, accounting or operational requirements.

sensitive personal data may also be required where certain goods or services are purchased for example health products or services.

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[1] The DPA defines "identifiable natural person" as "a person who can be identified directly or indirectly, by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social or social identity."

[2] the processing of personal data of a data subject is guided by the principles set out in Section 25 (the "Principles");

[3] The DPA defines "processing" as "any operation or sets of operations which is performed on personal data or on sets of personal data whether or not by automated means, such as (a) collection, recording, organisation, structuring; (b) storage, adaptation or alteration; (c) retrieval, consultation or use; (d) disclosure by transmission, dissemination, or otherwise making available; or (e) alignment or combination, restriction, erasure or destruction."

[4] The DPA defines "personal data" as "any information relating to an identified or identifiable natural person and "sensitive personal data" as "data revealing the natural person's race, health status, ethnic social origin, conscience, belief, genetic data, biometric data, property details, marital status, family details including names of the person's children, parents, spouse or spouses, sex or the sexual orientation of the data subject."

Processing personal data in online transactions

A data subject in an online transaction has a right to object to the processing of their personal data unless the data controller or data processor has compelling legitimate interests for the processing which prevail over the data subject's interest. Personal data may be processed in online transactions where:

- The data subject consents to the processing for one or more specified purpose(s); or
- The processing is necessary for the performance of a contract to which the data subject is a party.
- It is for compliance with any legal obligation to which the data controller is subject.
- It is necessary for protecting vital interests of the data subject or another natural person.
- For the performance of any task carried out by a public authority, or in public interest.
- For legitimate interests pursued by the data controller or data processor.
- For historical, statistical, journalistic, literature, art or scientific research.

Data Retention

Personal data of a party to an online transaction should only be retained on grounds of necessity. The data minimisation principle which is enshrined in the DPA requires that personal data should be retained only where retention is necessary for the purpose for which it was required. Where such data is no longer required for the purpose for which it was collected or the purpose has been completed, such data should be deleted, erased, anonymised or pseudonymised.

Rights of a Data Subject in Online Transactions

A data subject in an online transaction has the following rights:

- To be informed of the use their personal data is to be put.
- To access their personal data in custody of data controller or data processor.
- To object to the processing of their personal data.
- To correction of false or misleading data about them;
- To be informed/notified of the purpose of the collection of their personal data.
- To know the third parties to whom their personal data has been or will be transferred to.

Practical considerations to enhance data protection in online transactions

Communication /Language

To promote data protection in online transactions, clarity in communication is very key. Product details, manuals, safety information, advertising materials and other relevant information should be communicated in clear language with translations in other commonly used languages in the target regions. The use of visual, audio, written and other forms of communication and marketing offers an opportunity to various categories of consumers to have adequate information on what data will be collected and the purpose for such collection and to facilitate informed consent.

Transparency and Consent Mechanisms

It is increasingly becoming a common practice for businesses to require consent from data subjects prior to use of their personal data and transparency regarding the purpose for which data is collected.

Security safeguards

Digital businesses should put in place cyber security and digital risk safeguards to protect privacy of data subjects and prevent or minimise unlawful use or disclosure of their personal data.

Use of payment gateways

It is advisable for businesses to use payment gateways services to receive payments for goods and services noting that payment gateways services encrypt payment data and this enhances privacy protection.

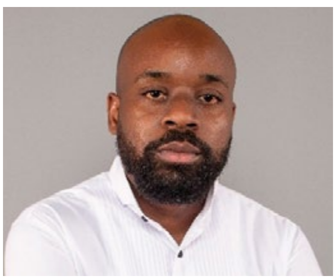
Compliance with statutory principles of data protection

Although the standards may be onerous, to limit potential liability, data collectors and data processors should strive to comply with the fundamental principles of data protection as enshrined in the DPA and other applicable laws.

Conclusion

Provisions of the DPA are applicable to data subjects in both online and other transactions. It is apparent that online transactions pose more risks in respect of handling personal data of data subjects. The DPA has to a large extent not yet been operationalised hence it is yet to be seen whether data subjects in online transactions are afforded adequate privacy or data protection. The DPA provides redress for data protection breaches, however in regard to international online transactions; data subjects in Kenya may find it challenging to seek redress for data protection breaches.

CYBER SECURITY LAWS FOR THE ONLINE TRADER



Rodgers Muyodi
Associate

The state of cyber security laws in Kenya

The global Information Communication and Technology (ICT) growth has transformed how individuals, businesses, and governments produce and receive information. Adoption of ICT into everyday life is widespread in Kenya and the same concept has been adopted from other countries.

As Kenya matured into an information society the nation faced an increasingly evolving cyber threat landscape. Nation states, criminal organizations, and hacktivists from all over the world were, and will continue to exploit ICT vulnerabilities in Kenya. This is simply a reality that every nation with robust ICT infrastructure faces. While these actors sought to illicitly access, alter, disrupt, or destroy sensitive personal, business, and government information, the country has diligently worked to evolve our means of protecting information in order to counter today's threats as well as those coming from over the horizon.

That being the case, Kenya enacted the Computer Misuse and Cybercrimes Act 2018. The Act seeks to provide for all the offences related to computer systems as well as the facilitation of international cooperation in dealing with computer and cybercrime matters among other matters. In that regard, Cybersecurity is defined as the collection of tools, policies, security concepts, security safeguards, guidelines, actions, training, best practices that can be used to protect the cyber environment [1].

One of the fundamental objectives of the Act is to protect the rights to privacy, freedom of expression and access to information as guaranteed under the Constitution. The Constitution plays a fundamental role as well when it comes to the rights of an individual [2]. It is also noteworthy that the Act recognizes blockchain technology where there it imposes a mandate on the committee to actually advise the Government on security related matters that do relate to the use of blockchain technology.

[1] Kenya Information and Communications Act 2013

[2] Article 31, Constitution of Kenya 2010

It is also noteworthy that The President of Kenya signed into law The Kenya Data Protection Act 2019. The Data Protection Act is an answer due to the increased call for protection of both personal and private information, which may be readily and easily accessible in this digital era. The Act regulates how data and information may be accessed, processed, stored, transmitted, and used within legal parameters in Kenya.

Categories of Cybercrime Offences

Cybercrime offences can be broadly categorized by the Act into the following:

- Unauthorized access, interception and interference.
- Offences Access with intent to commit further offences committed through use of computer systems.
- Unauthorized disclosure of a password or access code.
- Offences involving protected computer systems.
- Child pornography.
- Cyber bullying and stalking.
- Computer fraud.
- Cyber Espionage.
- False Publications.

Salient features of the computer misuse and cybercrimes act 2018, offences & penalties

Information Sharing Agreements

The Act has placed a mandate on a private entity to enter into such an agreement with a public entity on due to the critical information infrastructure. However, it also provides that an agreement of such a nature can only be entered into for the main purpose of ensuring cyber security, for the investigation and prosecution of crimes related to cyber security, for the protection of life and property of an individual as well as protecting the national security of the country.

Auditing of Critical Information

The Act places a mandate upon the owner or a person in control of such critical information infrastructure to annually submit a compliance report to the Committee established under the Act to ensure that there is compliance.

Unauthorized Access as an offence

Unauthorized access would occur where that person is not entitled to control access of the kind in question to the program or data or that person does not have consent from any person who is entitled to access the computer system through any function to the program or data.

The Act provides that a person who causes, whether temporarily or permanently, a computer system to perform a function, by infringing security measures, with intent to gain access, and knowing such access is unauthorized, commits an offence and is liable on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding three years, or to both.

Unauthorized Interference

The Act stipulates that such an interference would be on the basis of one not being authorized to cause that interference as well as that person has not obtained consent to interfere from a person who is entitled to cause such an interference. For such an offence, the Act imposes a penalty of a fine not exceeding ten million shillings or to imprisonment for a term not exceeding five years.

Unauthorized Interception

Unauthorized interception will occur where the same will result in a significant financial loss, threatens national security causes physical or psychological injury or death to a person. For its penalty, the Act provides that a person who intentionally and without authorization does any act which intercepts or causes to be intercepted, directly or indirectly and causes the transmission of data to or from a computer system over a telecommunication system commits an offence and is liable, on conviction, to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding five years, or to both.

Illegal Devices and Access Codes

A person who knowingly manufactures, adapts, sells, procures for use, imports, offers to supply, distributes or otherwise makes available a device, program, computer password, access code or similar data designed or adapted primarily for the purpose of committing any offence, commits an offence and is liable, on conviction, to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding ten years, or to both.

Cybersquatting

A person who, intentionally takes or makes use of a name, business name, trademark, domain name or other word or phrase registered, owned or in use by another person on the internet or any other computer network, without authority or right, commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding two years or both.

Interception of Electronic Messages or Money Transfers

The Act provides that a person who unlawfully destroys or aborts any electronic mail or processes through which money or information is being conveyed commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings or to a term of imprisonment not exceeding seven years or to both.

Salient features of the Data Protection Act 2019

Privacy laws are more relevant today than ever before. With data crossing borders following the increased internet penetration and increased use of social media and other digital information platforms, it is becoming more important to ensure that personal data is protected, processed and used for the correct purpose.

As Kenya's economy keeps on growing overnight, so is the need to put in place more stringent measures the main purpose being privacy and protection of information. This is seen in the Data Protection Act (the "Act") which was assented to on the 8th of November 2019 and came in to govern what was otherwise a lawless regime.

Numerous sectors within the country have felt the far reaching effects of the Act. It has numerous objectives including giving effect to Article 31 of the Constitution on the right to privacy, regulation of the processing of personal data and providing for rights of data subjects.

In online trading, the following information could be collected:

- Information that is submitted via the Sites or otherwise supplied. This includes information provided at the time of registering to use certain Sites, subscribing to the Sites, posting material, or requesting further information about the sites. This will include someone's name, postal address, e-mail address, telephone number and other contact information.
- Information which could identify one when one reports a problem with the Sites.
- Personal information contained in a correspondence with the Sites regarding the Sites (such as e-mail, log files and screenshots).
- Responses to surveys where one might be asked to complete a certain research for Sites improvement purposes.
- Information relating to transactions or trades carried out through the Sites.

Some of the highlights of the Data Protection Act include:

Establishment of the Office of the Data Protection Commissioner

The Act establishes the office of the Data Protection Commissioner (the "Commissioner"). The Commissioner's office is mandated with overseeing the implementation of the Act together with establishing and maintaining a register of data controllers and data processors; receiving and investigating any complaints on infringements of the rights under the Act; carrying out inspections of public and private entities with a view to evaluating the processing of personal data; imposing administrative fines for failures to comply with the Act, amongst other functions.

Registration of Data Controllers and Data Processors

All data controllers and data processors are required to be registered with the Commissioner. The Commissioner is required to prescribe thresholds for mandatory registration and is to consider the nature of industry; the volumes of data processed; whether sensitive personal data is being processed amongst other matters. Until such thresholds are prescribed, mandatory registration does not come into play.

Data Privacy & Protection

Every data controller or processor is required to ensure that all personal data is processed lawfully, fairly and in a transparent manner in relation to any data subject. The Act applies to data controllers and processors established or resident in or outside Kenya in so far as they process personal data while in Kenya or of data subjects located in Kenya.

The data subjects have the right to be informed of the use to which their personal data is to be put; to access their personal data; to object to the processing of all or part of their personal data; to correction of false or misleading data; and to deletion of false or misleading data about them.

Care should be taken in the manner in which data is collected, used and processed. The primary overarching principle being that personal data should only be collected directly from the data subject and used (be it for processing, commercial use or otherwise) with the express consent of the subject. There are certain exclusions on the collection of personal data such as data already contained in public records, collection from a different source authorized by the subject and so on.

Transfer of personal data outside Kenya

Data controllers and processors will be permitted to transfer personal data to another country only where the data controller or data processor has given proof to the Commissioner on the appropriate safeguards with respect to the security and protection of the personal data. It is not clear what process needs to be followed in this regard. Further, the Cabinet Secretary may prescribe, based on grounds of strategic interests of the state or protection of revenue, certain nature of processing that can only be effected through a server or a data Centre located in Kenya. There is no indication as to when or whether such a restriction will be implemented.

It should be noteworthy that the Act gives the Commissioner wide powers on investigation of data breaches including powers of entry and search and issuing administrative fines. Where personal data has been accessed or acquired by an unauthorized person, and there is a real risk of harm to the data subject whose personal data has been subjected to the unauthorized access, a data controller is required to notify the Commissioner without delay, within seventy-two hours of becoming aware of such breach.

Offences under the Act attract a fine of up to KES5-million and/or a term of imprisonment of up to ten years.

DIGITAL LENDING IN CREDIT INFORMATION SHARING AND THE DIGITAL CREDIT MARKET IN KENYA

Christine Wambui
Associate

Regulation of digital lending in Kenya

Regulation of lending in Kenya is largely conducted by the Central Bank of Kenya (CBK). Currently, CBK's regulatory framework is limited to supervising traditional institutions such as banks and microfinance institutions. As such due to the character of the digital lending platforms, they are often exempt from classification as financial institutions as under the Banking Act and the Microfinance Act. Digital technologies have often challenged the way governments regulate as they tend to blur the traditional delineation of sectors. Therefore, the digital lenders have been operating under a lacuna in the law. As a result, there have been several reports from borrowers regarding the digital lenders' flouting of consumer protection policies through utilising aggressive debt collection tactics and charging of exorbitant interest rates. It is notable that Kenya's position on the regulation of digital lending remains the same as provided in our article prepared last year.

Credit information sharing in Kenya

Credit Information Sharing (CIS) is a process where credit providers (such as banks, microfinance institutions, Savings and Credit Societies (SACCOs) etc.) exchange information on their outstanding loans and advances through licenced Credit Reference Bureaus (CRBs) 1. This process is very important as it provides the full picture of a borrower's debt obligation thereby encouraging responsible and sustainable debt lending by the creditors.

digital technologies have often challenged the way governments regulate as they tend to blur the traditional delineation of sectors

[1] CIS Kenya, What is Credit Information Sharing (CIS), https://ciskenya.co.ke/credit-information-sharing/#:~:text=Credit%20Information%20Sharing%20(CIS)%20is,Credit%20Reference%20Bureaus%20(CRBs)

Prior to the introduction of the Banking (Credit Reference Bureau) Regulations, 2020 (Regulations), the 2013 CRB Regulations placed a mandatory requirement on all CBK licensed institutions to submit data to the licensed CRBs while non-bank institutions such as digital lenders would participate in the process on a voluntary basis. It is reported that most non-banks would participate in the process only to offload negative credit information to CRBs [2]. It was further reported by Treasury that banks would shy away from using the credit information. Their approach towards credit information was more 'compliance-based' than 'value-based' [3]. Generally, the CIS mechanism would be utilised as a blacklisting tool instead of a risk management tool as it was initially intended. Further, the lack of positive credit information from institutions such as SACCOs would contribute to data inaccuracies as the data provided would not reflect the true position of a borrower's credit information.

In April, CBK introduced the Regulations which have advanced a structure for the exchange of borrowers' credit information between banks, microfinance institutions, SACCOs, credit information providers approved by the CBK and CRBs. The Regulations provide for the following information to be shared among the stakeholders:

- Borrower's identity.
- Borrower's credit status. This includes the nature and amount of loans or credit facilities granted to the borrower and the outstanding amounts.
- Nature and details of securities taken or proposed to be taken by an institution as security for credit facilities;
- Details of payment of credit facilities or default in payment by the borrower.
- Actions taken by an institution to recover unpaid amounts.
- Identity details of the shareholders, directors, partners or officials of an entity which has defaulted in repaying its credit facilities.

Express consent of the borrower must also be sought where the credit information is to be shared to any of the authorised institutions. This is in line with Sections 29 and 30 of the Data Protection Act, No. 24 of 2019. The sections establish the duty of data controllers and processors (i.e. the authorised institutions) to notify data subjects (i.e. the borrower) of the purpose of the collection of their personal data and the prerequisite of obtaining a data subject's consent prior to the processing of their personal data respectively. Credit information providers are also required to give a borrower at least thirty (30) days' prior written or electronic notification of their intention to submit negative information to CRBs. Further, in order to encourage the approved credit providers to utilise the credit information, the Regulations provide that a customer's credit scores be used as one of the factors in determining whether a credit facility should be granted.

Effects of the exclusion to the digital lending sector

In the press release announcing the publication of the Regulations, CBK further declared that it had withdrawn the approvals granted to unregulated digital lenders as third party credit information providers to CRBs. By leaving them out from accessing the CIS mechanism, digital lenders, will no longer be able to use the 'threat' of submitting negative information to CRB, to compel payment of outstanding debt, by borrowers. Further, they will be issuing credit facilities with little to no means of assessing a borrower's credit worthiness which is highly risky.

While it is understandable that the digital lenders' rouge mode of operation needs to be controlled, this move has had the effect of denying any lender the ability to assess a borrower's credit worthiness and locking out of digital lenders, consequently stifling innovation in the lending industry. As we had previously proposed, a better approach that would encourage innovation and responsible development is the 'sandbox approach' [4].

[2] National Treasury and Planning, National Policy to Support Credit Information Sharing (CIS) Mechanism (September 2019)

[3] Ibid

[4] The sandbox approach allows businesses to test out new services, business models and delivery channels in a live environment where consumers are protected. This approach has been utilised in the following jurisdictions: Australia, Hong Kong, Malaysia, Singapore, Switzerland, Thailand, the United Arab Emirates an Sierra Leone – see Herbert Smith Freehills, Hong Kong Launches Regulatory Sandbox in Wake of Developments in Australia, Malaysia, Singapore, and the UK , https://hsfnotes.com/fsrandcorpcrime/2016/10/05/hong-kong-launches-regulatory-sandbox-in-wake-of-developments-in-australia-malaysia-singapore-and-the-uk/ .

Some of digital lenders in Kenya have come together and formed the Digital Lenders Association of Kenya (DLAK) with an aim to ensure that the digital lending industry is built on best practices in lending and consumer protection. DLAK has also established its own code of conduct which is built on consumer protection. This is proof of the market players' willingness to self-regulate and collaborate in order to drive the growth of the industry.

Conclusion

Innovation is fast paced and often outpaces legislation. Instead of putting in place regulations that stifle innovation, governmental authorities, as gatekeepers for society, should collaborate with the digital lenders in order to develop regulation that would safeguard the borrower's interest as well as strengthen the digital lending industry.

As matters stand, it is likely that most digital lenders will withdraw from the market reducing financial inclusion, increasing the cost of securitization and reducing the ability of the ordinary mwananchi and the small scale trader access to debt.

ONLINE TRANSACTIONS AND REMITTANCE OF TAX

Hamida Abass
Associate

Background

Taxes account for a significant amount of Government of Kenya revenue and to this end the Finance Act, 2019 and Finance Act, 2020 (Finance Acts) widened the tax base by introducing various taxes related to online transactions.

In this article, we highlight the taxes that have recently been imposed on online transactions.

Digital Service Tax

Generally, all income accrued in and derived from Kenya by a resident and non-resident person is liable to tax under the provisions of the Income Tax Act Cap 470 (the Income Tax Act) [1].

The Finance Act, 2019 introduced the digital market place[2] as a new area from which the Government of Kenya would begin charging tax. The Finance Act, 20203 imposed a rate of 1.5% of the gross transactional value which will be paid on income accrued and derived from such transactions with effect from 1 January 2021. This tax is known as a digital service tax.

Below are the measures introduced by the Finance Act, 2020[3] with respect to digital service tax:

- The digital service tax (DST) shall be payable by persons deriving income from the provision of service through a digital market place.
- The DST shall be due at the time of the transfer of payment for the service to the service providers.
- The DST paid by a resident or non-resident person with permanent establishment shall be used to offset the DST against tax payable for that year of income.
- The Commissioner General has the power to appoint an agent to collect and remit the DST to the Commissioner[4].

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[1] Section 3 (1) Income Tax Act Cap 470.

[2] The digital market place is defined as "a platform that enables the direct interaction between buyers and sellers of goods and services through electronic means."

[3] Section 4 of the Finance Act, 2020 amended the Income Tax Act by inserting a new clause 12(e) on the Digital Service Tax.

[4] The Finance Act 2020 amended the Tax Procedures Act by inserting a new clause 42 (b) to allow the Commissioner General to appoint agents for the purpose of collecting and remitting the Digital Service Tax.

Value Added Tax (VAT)

Besides the tax on income generated through digital platforms, the Kenya Revenue Authority (Authority) has imposed VAT on the consumers of online goods and services. In particular, Section 5 (7) of the VAT Act No. 35 of 2013 (VAT Act) provides that supplies made through a digital market place are now liable for VAT.

Moreover, pursuant to a public notice dated 24 April 2020 issued by the Authority see here, businesses engaged in trading on digital platforms and not charging VAT on transactions made on those platforms were informed of their VAT obligation and further directed to charge accordingly. Consequently, such businesses are required to account for and remit the VAT to the Authority.

Notably, section 5 (8) of the VAT Act provides that the Cabinet Secretary will make regulations to provide mechanisms for the payment of VAT on the digital market place. Toward this end, the VAT Draft (Digital Marketplace Supply) Regulations,2020 (the Regulations) were published for public comment. These Regulations are intended to support the taxation of the digital market place put forth by the Finance Acts.

The Regulations define the scope of the taxable supplies to include electronic services[5] under section 8(3) of the VAT Act as well as the following categories:

- Downloadable digital content including downloading of mobile applications, e-books and movies.
- Subscription-based media including news, magazines, journals, streaming of TV shows and music, podcasts and online gaming.
- Software programs including downloading of software, drivers, website filters and firewalls.
- Electronic data management including website hosting, online data warehousing, file-sharing and cloud storage services.
- Supply of music, films and games.
- Supply of search-engine and automated helpdesk services including supply of customized search-engine services.
- Tickets bought for live events, theaters, restaurants etc. purchased through the internet.
- Supply of distance teaching via pre-recorded medium or e-learning including supply of online courses and training.
- Supply of digital content for listening, viewing or playing on any audio, visual or digital media.
- Supply of services on online marketplaces that links the supplier to the recipient, including transport hailing platforms;.
- Any other digital marketplace supply as may be determined by the Commissioner.

Excise Tax

The Excise Duty Act No. 23 of 2015 also imposes an excise duty of 12% tax on the excisable value[6] for all fees charged for money transfer services through a cellular device. This essentially captures all mobile transactions charges payable by a customer to a service provider. Correspondingly, the excise duty on fees charged by financial institutions is 20% of the excisable value.

Proposed enforcement mechanisms

Globally, there is a push towards taxing digital services for all income accrued or derived within a country's borders. The OECD discourse on digital taxation is cognisant of the challenges faced by countries in taxing the digital sphere and it is it has taken positive strides to develop possible solutions7.

In Kenya, a number of companies including multinationals are transacting in the digital market place and it for this reason the Government introduced the DST to have these players pay their fair share of taxes on income accrued and derived in Kenya. Accordingly, the Authority has now set up a dedicated unit on the digital market place sector to ensure there are no tax leaks and the DST is collected and accounted for appropriately.

[5] These include services provided or delivered on or through a telecommunications network on (a) websites, web-hosting, or remote maintenance programs and equipment, (b) software and the updating of software, (c) images, text and information, (d) access to databases, (e) self-education packages, (f) music, films and games including games of chance and (g) political, cultural, artistic, sporting, scientific and other broadcasts and events including broadcast television.

[6] Section 9(4) of the Excise Duty Act No. 23 of 2015 provides that the excisable value of services shall be, if the excisable services are supplied by a registered person in an arm's length transaction, the fee, commission, or charge payable for the services; or in any other case, the open market value of the services.

[7] See the Secretariat Proposal for a Unified Approach under Pillar One here. KRA sets up special unit for digital tax tracking- the Business Daily June 29,2020.

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