

the Above Standard

A PUBLICATION OF **TRIPLEOKLAW** ADVOCATES

ISSUE 004
MAY
2019



CLIMATE CHANGE COMPLIANCE AND PRIVATE ENTITIES

TRIPLEOKLAW
ADVOCATES



the Above Standard

MAY • ISSUE 004 • 2019



PUBLISHER

TripleOKLaw Advocates LLP.

EDITOR

Franklin Cheluget

EDITORIAL TEAM

Tom Onyango
Stephen Mallowah
Catherine Kariuki Mulika
Janet Othero
Maureen Mbaka
Leyla Ahmed
Kivindyo Munyao
Evance Odhiambo
Oscar Mbabu
Cynthia Bondi

ART & DESIGN

Smith Creative
www.smithcreative.co.ke

FOR FREE SUBSCRIPTION, go to
www.tripleoklaw.com

TRIPLEOKLAW | 
A D V O C A T E S

ACK Garden House, 5th Floor, Wing C
First Ngong Avenue, off Bishops Road,
P. O. Box 43170 - 00100, Nairobi, KE
Pilot Telephone: +254 20 272 7171

Email: info@tripleoklaw.com
Web: www.tripleoklaw.com

IN THIS ISSUE

12



**HUDUMA NAMBA -
THE IMPERFECTION
TOWARDS PERFECTION**

06

**TOWARDS
EXPEDITION;
THE JUDICIAL
EXPENSE**



17

**INSIDER
TRADING AND
THE RESTORATION
OF INVESTOR
CONFIDENCE**



35

**TIME TO RE-THINK
KENYA'S GUN
OWNERSHIP
LAWS?**



COVER STORY

IN THIS ISSUE

REGULARS

CLIMATE CHANGE

COMPLIANCE AND PRIVATE ENTITIES



22

CLIMATE CHANGE

AND SUSTAINABLE
DEVELOPMENT
PRACTICE

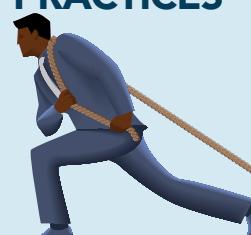


FRANK MUNYAO

10

40

FAIR DEBT COLLECTION PRACTICES





Editor's Note

There was a time when Climate Change was a distant discussion, a western problem. Back then, our farmers had regular climatic patterns: Rains would come in March through to June, cold winds blow in July through to August, short rains follow through to October, then the sun raged hot through December to February- a perfect pattern for healthy harvests. We knew when we needed umbrellas and when we needed boots and scarves.

Fast forward, now, in the words of Barack Obama, climate change is no longer a far-off problem; it is happening here, it is happening now. In the last six months alone, we have seen incredible weather extremes testifying to climate change effects. Undeniably, there is a problem.

Recognizing this as a firm, and in line with our credo of going over and above, there was no more noble way of confronting Climate Change than establishing a whole new department within the firm to specifically promote climate change compliance. Why? Because it is literally a multi-billion-dollar question in private organizations both locally and globally; because one of the most significant,

and perhaps most misunderstood, risks that organizations face today relates to climate change.

So, in this issue let's start the conversation on climate change and sustainability for businesses in Kenya. We also discourse with you about the Huduma Number, insider trading and investor confidence and wrap it up with a light chat with our resident IT guru in place of our KYA section.

As always, our service is towards the legal profession, the public and importantly our esteemed clients. We have therefore made these articles reader friendly to all across the board.

We are happy that our continually increasing pool of readers have turned The Above Standard into a source of great legal knowledge, practice insights and intellectual discourse. Subscribe for this and all our releases by logging into www.tripleoklaw.com and give us your feedback including any topics that you would like to see covered in the future via editorialteam@tripleoklaw.com.

Now we say- bonne lecture!

Franklin Cheluget

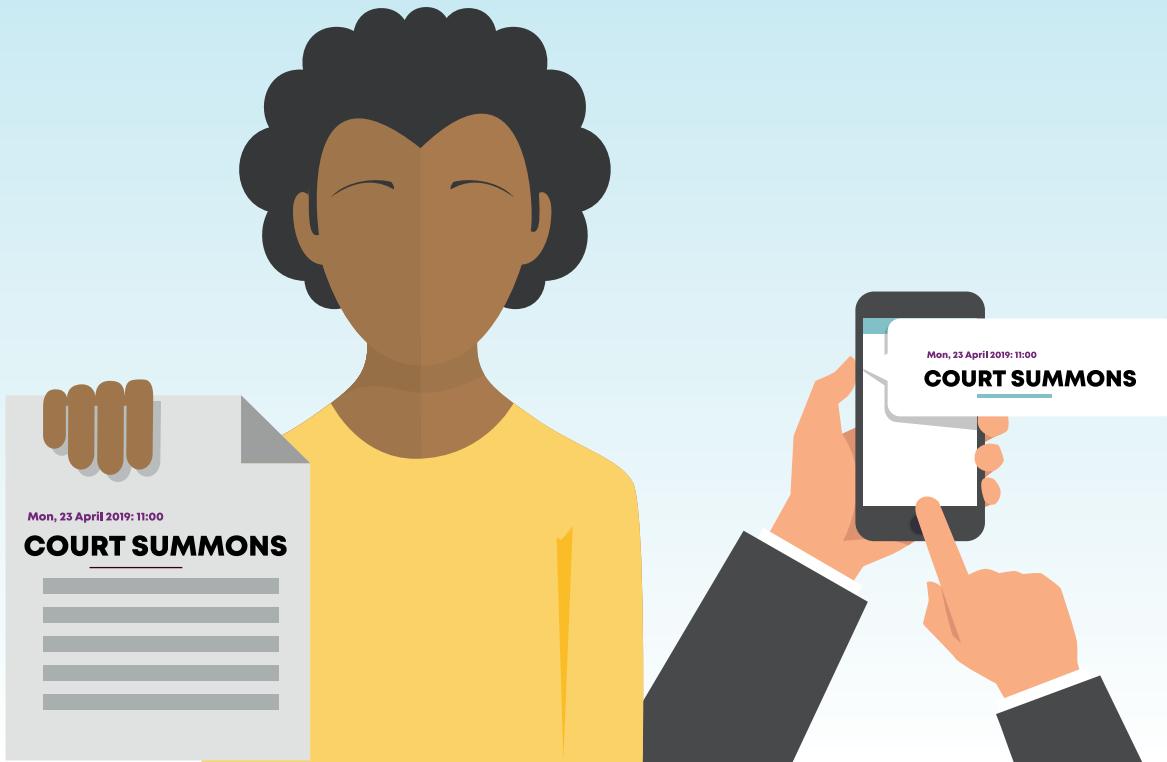


Managing Partner's Note

For close to two decades now, we have continually and consistently provided strategic legal solutions to our valued clients. We pride ourselves for having a global perspective but with African expertise. For our clients, we also strive to see round the bend and anticipate legal issues and provide solutions. Now that Climate Change is a global issue and an African concern especially to private entities, we are pleased to introduce to you our fully-fledged department within the firm to address climate change and its effects to private entities. This publication is not only a result of hard work and dedication by the editorial team and the firm, but also a statement and testament that we continually rise and exceed the expectations and reliance that our clients have come to expect from us over time.

John M. Ojoga

DISCLAIMER: The information contained in this newsletter is for general information only and is not intended to provide legal advice. Information contained herein should not be acted upon in any specific situation without appropriate legal advice. We do not accept responsibility or liability to users or any third parties in relation to use of this newsletter or its contents. All copyright, trademarks and other intellectual property in or arising out of the materials vest solely in TripleOKLaw LLP, Advocates. For further information, contact us on info@tripleoklaw.com



Towards Expedition; the Judicial Expense

.....



**Franklin Cheluget
Brian Onyango**

The waves of legal practice were once seen to be moving towards Procedural technicalities. However, in the wake of the enactment of the Statute Law Miscellaneous Amendment Act No.6 of 2009, the judicial systems are said to have gotten a new lease of life, owing to the insertion of what is now known as the Oxygen principle that resonates as the Overriding objectives.



The new rules are also set to have major impacts on the service of pleadings and summons within Kenya and to foreign jurisdictions. Interestingly, the new rules proposed to permit service by confirmed emails, SMS and Whatsapp messaging in what is referred to as Mobile-enabled messaging Applications. This would significantly bring an end to the old-guard practice of evading service.

The tenets of the overriding objectives, both inserted to the Civil Procedure Act and the Appellate Jurisdiction Act include just, expeditious, proportionate and affordable resolution of disputes, the role of parties and their Counsel to further this ideal, efficient use of the available judicial and administrative resources, the use of suitable technology and the inherent liberty of courts towards the ends of justice. The draftsman's intention was, and has been made clear; in what is clearly a revamp of the judicial practice in civil matters from the old days of technicalities.

The Civil Procedure Act establishes the Rules Committee under Section 81 for purposes inter alia of making rules not inconsistent with the Civil Procedure Act. The Civil Procedure Rules presently in force were formulated on 26th July 2010; and were gazetted vide in LEGAL NOTICE NO. 151 of 10th September 2010.

Section 21 of the Statutory Instruments Act No 23 of 2013 provides that any statutory instrument, (such as the Civil Procedure Rules) automatically expires and thereby cease to have effect 10 years after their making, and so the need of re-enactment. As it stands, unless the Rules are re-enacted, they shall stand expired on 26th July 2020.

In what appears to be a re-enactment by amendment, the Rules Committee has since considered amendments to the Civil Procedure Rules. The rules are most likely to take effect this year 2019 once approved by the Parliamentary Committee of Delegated legislation. These new rules are set to give a facelift to the waves of legal practice. Let's call them the 'new rules' and the following are key highlights thereof;

The 'new rules' set to have the computation of 14 days' timelines for filing of pleadings to include service. Litigants and counsel are therefore required to file and serve pleadings within the period; as opposed to filing only, especially on matters joinder of parties. Further, the pleadings would be required to indicate

email and telephone addresses of advocates.

The new rules would also unlock the stalemate and provide for how costs in the lower court are dealt with, and largely leaves it to the parties to compromise and agree, the absence of which, Magistrates may consider such references. The new rules would also have an effect to the case- tracking where small claims would be included in the case- track system.



These new rules are set to grease the wheels of justice, in civil litigation; at an expense even as the Commercial Division of the High Court has now adopted an e-filing and online case management tool, which shall bring an end to the nightmare of missing files, the dread of file reconstruction and the fear of old-guard injustice. Truly, the Ship of justice is unsinkable.

This is likely to be in line of the Small Claims Court Act, 2016 which sets a 200,000/= cap on cases, even as we await the CJ to appoint adjudicators for the court.

The new rules are also set to have major impacts on the service of pleadings and summons within Kenya and to foreign jurisdictions. Interestingly, the new rules proposed to permit service by confirmed emails, SMS and Whatsapp messaging in what is referred to as Mobile-enabled messaging Applications. This would significantly bring an end to the old- guard practice of evading service.

The Pre-trial directions and conferences are set to change completely. Since the rules as is provide for pre- trial questionnaires, case conference, settlement conference and trial conference which appears to be a lengthy endeavour, the new rules provides for a

single dimension known as Case Management. This would impact on expeditious disposal of suits.

On dismissal and abatement of suits, the new rules seek to allow a party reinstate a suit which has abated as a result of non-attendance or dismissal for want of prosecution.

The new rules shall also provide more particularity on execution of decrees, specifically that an application for execution should specify the mode in which the assistance of court may be required; the effect being that sale of immovable property must be preceded by proclamation.

On appeals, the new rules provide that, instead of a party making an application for the court's direction 21 days after filing an appeal, the judge shall on his own motion give such directions after 30 days. This obviously fastens the wheels of justice significantly.

Litigants have always faced the challenge of having to wait for days and even weeks to have Summons signed and sealed by the Magistrates and judges who are often busy handling the matters before them, or writing rulings and judgments. The new rules now empower the Registrar to sign summonses.

The new rules further sets Judicial review safeguard by upholding the doctrine of res judicata and subjudicis in applications for leave to institute JR, and where leave is granted so as to operate as stay, the new rules allow the judges impose additional terms for security for costs such as to giving cash deposits, bank guarantee or insurance bonds from reputable organizations.

These new rules are set to grease the wheels of justice, in civil litigation; at an expense even as the Commercial Division of the High Court has now adopted an e- filing and online case management tool, which shall bring an end to the nightmare of missing files, the dread of file reconstruction and the fear of old- guard injustice. Truly, the Ship of justice is unsinkable.

For more information on this,
bonyango@tripleoklaw.com

TRIPLEOKLAW
A D V O C A T E S

**TRIPLEOKLAW ADVOCATES HAS BEEN RECOMMENDED
IN THE FOLLOWING 5 PRACTICE AREAS:**

.....

LEADING FIRM KENYA

BANKING, FINANCE AND CAPITAL MARKETS
COMMERCIAL, CORPORATE AND M&A
DISPUTE RESOLUTION
EMPLOYMENT
REAL ESTATE AND CONSTRUCTION

.....

LEADING LAWYER KENYA

DISPUTE RESOLUTION

- John Ohaga

.....

NEXT GENERATION LAWYERS KENYA

BANKING, FINANCE AND CAPITAL MARKETS

- Janet Othero

.....



LEADING FIRM

2019

.....



LEADING INDIVIDUAL

2019

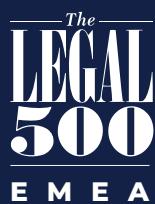
.....



NEXT GENERATION LAWYER

2019

.....



RECOMMENDED LAWYER

2019

.....

Going over & above

...



KYM

Frank Munyao

Interviewer: Joyanne Wanjiru

Frank Munyao is the IT assistant and general KYM at TripleOKlaw. Full of life and always ready with a helpful smile, meet the guy who keeps us up to speed with the tech world daily.

Joyanne: Describe yourself in three words.

Frank: Frank is simple, honest and an optimist.

Joyanne: Tell us about your journey at

TripleOKlaw

Frank: I came as an intern in June 2017. My internship was for three months. I got an extension for one month then another extension for one month but I stayed on.

Joyanne: What made you stay?

Frank: The people. It was great working with everyone, and it still is great working with everyone. It also presented a challenge for me because I came to a new place and learnt new technology and get to experience firsthand what I had been taught at school so..yes, I got to grow a lot.
So, in October I got a surprise when the email confirming my position was sent the previous night and I did not see it until the next morning (*laughing*). People were congratulating me before I actually knew what was going on.

Joyanne: How is it working with lawyers and making the law and I.T integrate?

Frank: It feels great because, one thing I know is that many people are happy with what I'm doing but (*laughing*) lawyers are pressure, (*sighs*) and you keep me on my toes. Because of that I have to be at the fore front of everything, I have to know my stuff, so I do research, lots of research.

Joyanne: Last year our firm won the CIO bronze award in recognition for our adoption and use of technology. What is it you are doing now that would

keep us on the map?

Frank: Well, last year, I would give credit for that award to Francis Mwangi (former CIO) because he was at the pushed off the digitization project. This year, we really want to put this law firm at the



forefront. My (new) boss Mike and I want to make everyone aware of the cyber security risks around. We'll be pushing that this year and let's see how it goes.

Joyanne: What are your career goals?

Frank: I see myself doing IT for a couple of years then going into a new venture. Well, I.T was not my main goal initially, but I do love I.T. My other passion is art, majorly everything art. So that's what I want to do in the long run, get the digital skills and apply them to art.

Joyanne: Liverpool or Tottenham?

Frank: Nope, I am not a football fan.

Joyanne: What do you do for fun?

Frank: I love fitness a lot. I actually used to get guys at the firm to leave the office early to do some workouts. We used to go to Nairobi club and do outdoor activities, but we haven't done that in a while. Also, Mr. Masika is a full-blown sportsman. (*laughing*) and makes good company.

Joyanne: What's your favorite sport?
Frank: Touch rugby.
My team won. It's called Moh Spice Rugby.

Joyanne: What do you think is lacking in the rugby arena in Kenya?

Frank: Good administration. Good administration is what will push this sport out and make it work for Kenya and other sports also have the same issue.

Joyanne: What book are you doing currently?

Frank: I love adventure so I'm currently reading Don Quixote by De La Mancha.

Joyanne: What advise would you give to your fellow young people?

Frank: I'd say like my parents (*laughing*) Read, read, read. It's good to read and keep yourself educated. Also, if you can, stay away from alcohol; that's what my grandpa used to tell me.

Joyanne: What would you like humanity to remember you for?

Frank: Humility.



Books are the quietest
and most constant of
friends; they are the most
accessible and wisest of
counselors, and the most
patient of teachers.

Charles W. Eliot

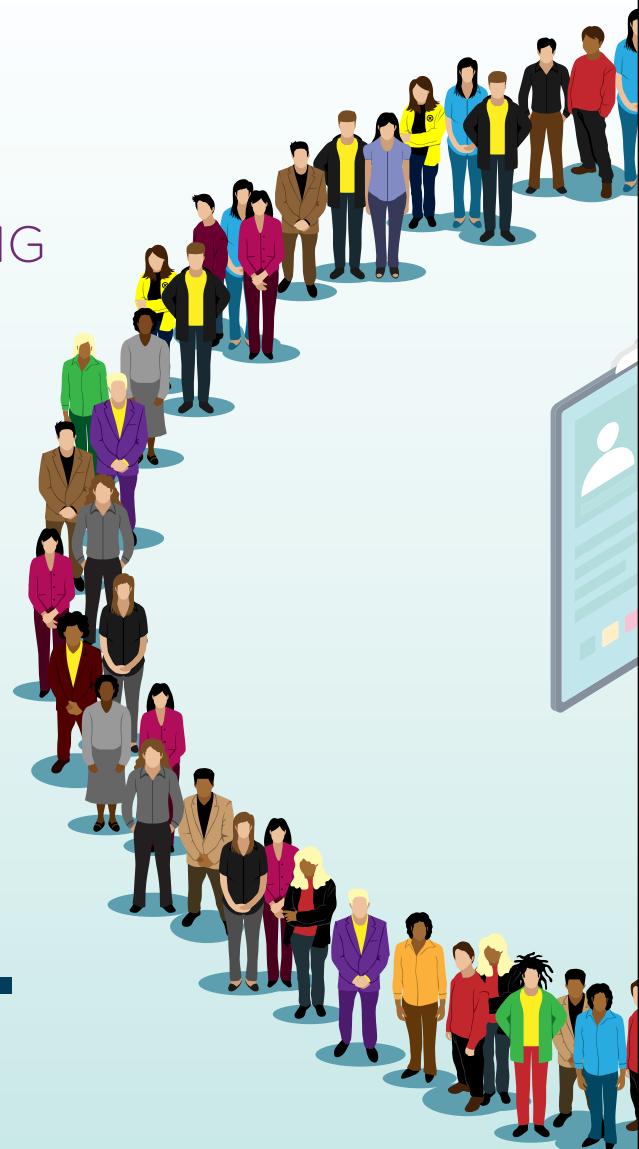
UNLESS YOU HAVE BEEN LIVING UNDER A ROCK, THE PHRASE '**HUDUMA NAMBA**' RINGS A BELL. THE GOVERNMENT HAS ROLLED OUT A NATIONAL BIOMETRIC REGISTRATION EXERCISE FOR ALL ITS CITIZENS AND RESIDENTS IN KENYA.

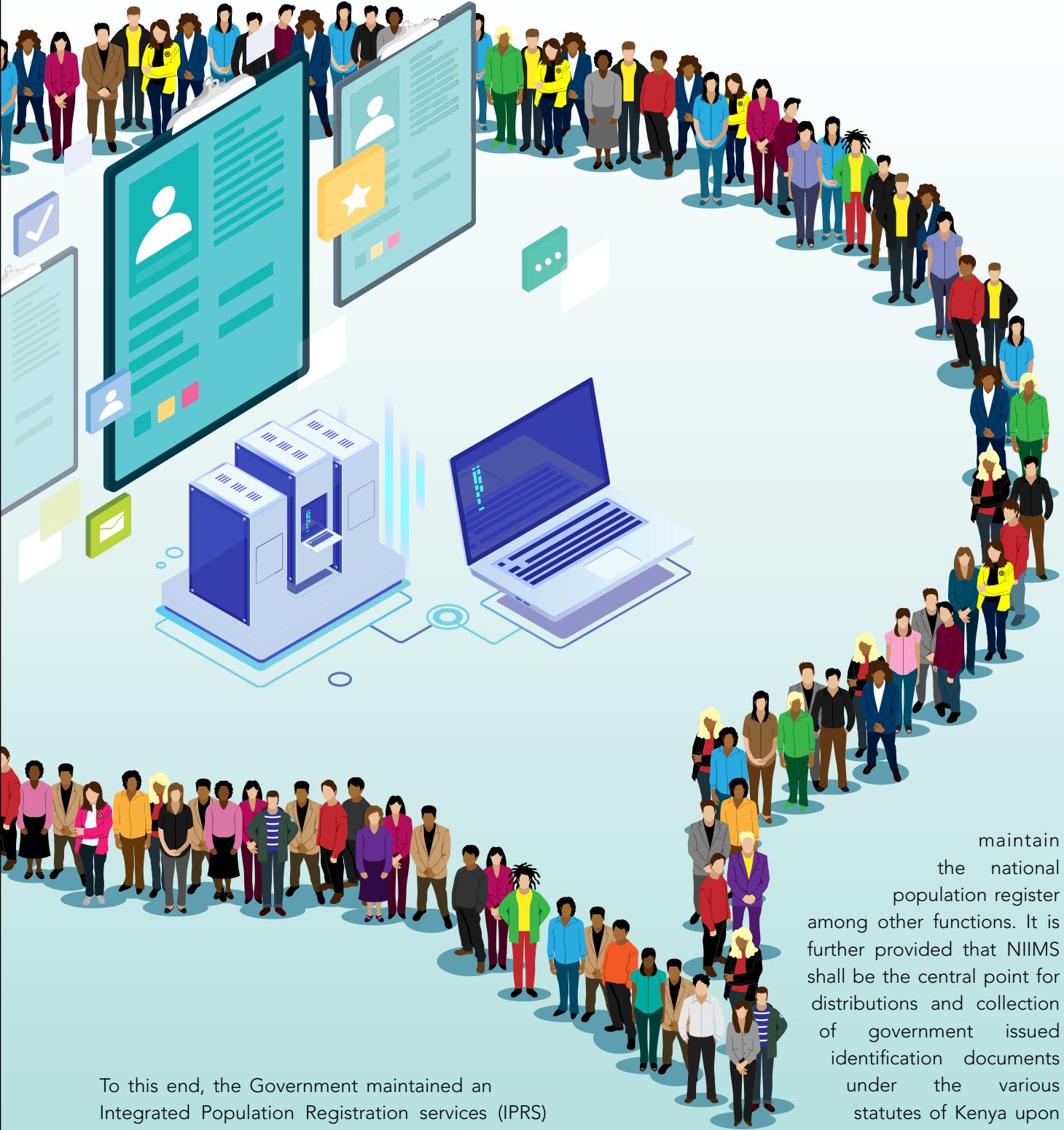
Huduma Namba - the Imperfection Towards Perfection



Catherine Kariuki
Janet Othero
Fiona Makaka
Emmerson Koome

Enabled by Registration of Persons Act, CAP 107 (the Act), the National Registration Bureau has over the years implemented compulsory registration of its citizens who have attained the age of 18 years. In this case, the data collected from the individuals has been; bio data (gender, date of birth, parents' details etc) and biometric data (photo I.D and finger prints).





To this end, the Government maintained an Integrated Population Registration services (IPRS) register as a central database for this data.

Pursuant to an amendment to the Act by a Statute Law Miscellaneous Amendment Act passed in April 2018, the National Integrated Identity Management System (NIIMS) was created. NIIMS is the government system that shall be used to create, manage and

the NIIMS there is to ensure preservation, protection and security of any information or data collected, obtained and maintained or stored in its register. Of importance to note from this amendment of the Act

maintain the national population register among other functions. It is further provided that NIIMS shall be the central point for distributions and collection of government issued identification documents under the various statutes of Kenya upon collation of data with various agencies. Finally,

as a system, shall ensure preservation, protection and security of any information or data collected, obtained and maintained or stored in its register. Of importance to note from this amendment of the Act



is that a service number will be issued to all persons registered in the NIIMS register. This number is called the Huduma Namba.

The NIIMS register is now mandated to collect biometric data such as earlobe geometry, DNA, iris and retina patterns and voice waves in digital forms. It is also empowered to collect Global Positioning System coordinates and property details of persons.

The consequence of the NIIMS is that it will expand the scope of personal data available to the Government and it will all be processed on a single central system.

NIIMS and Data Processing

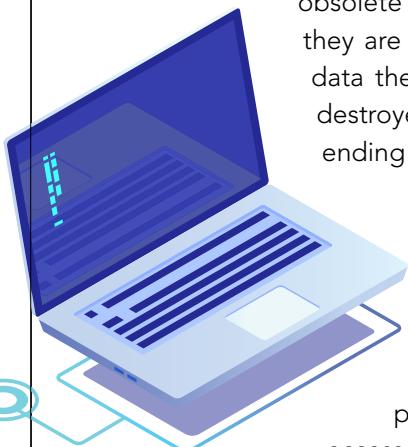
There is no reason given in the amendment statute and whether the consent of an individual needs to be procured for this new category of data. Any entity collecting personal information ought to reveal the reason why it is collecting that data, as a matter of best practice at least, in a very clear and precise manner. The government ought to reveal and justify reasons for collection otherwise it can be regarded as unnecessary.



Notably, there are other Acts that provide for collection of data on persons by various government agencies on different digital platforms. The amendment now enables NIIMS to harmonize and collate into the register information from these Government agencies' databases relating to registration of persons. This begs the question; what framework and policies have been put in place to share and transfer this data between the Government agencies? Are there secure technical measures employed to ensure that the information is accurate such that a citizen will have to present themselves later for verification and correction? There is need for awareness and public participation on the process of data collation between the multiple agencies to avoid data breach and loss.

Once the NIIMS' register of persons is perfected, it is required to reproduce the information as required from time to time. This would mean that various parties would be able to access and use it. Currently, we have several government systems where citizens input their personal information to access services.

These include for example the e-Citizen platform for passport applications, the Integrated Population Registration System for national identification card processes, Lands Information Management Systems for ownership of properties and TIMS for driving licenses. The policy with regards as to whether these platforms will be rendered obsolete in time is not clear. Once they are rendered obsolete, the data they hold will need to be destroyed effectively to avoid it ending up in wrong hands.



Consequently, all the government officers accessing data on these platforms will need to access it on NIIMS for their day to day operations. The result will be implementation and integration of NIIMS in the various offices with different levels of authorized user capabilities. With granted access, the control of data follows. The parent ministry of NIIMS, Ministry of Interior and Coordination of National Government will initially implement use of the system with technical support from Ministry of Information, Communication and Technology. There is need for policies to be made clear to people whose data

they control so that if there are any violations it is easy to seek redress from the relevant agency.

Ownership of the data collected and processed will ultimately vest in the Government. It is not clear to what extent the citizen or resident retains ownership of certain aspects of the data such that they can question the Government on how and why it processes their data. It is also not clear from the amended legislation if one legally cedes ownership of their personal data automatically by registering with NIIMs. Clarity on ownership needs to be stipulated before this data is processed and shared.

The amendment statute finally provides that the NIIMS system shall ensure it preserves, protects, and secures all information and data, collected, obtained, maintained and stored in the register. Cyber-security must always be a priority for any entity, regardless of its size, that collects and processes data. The concerns of any entity holding such pertinent and valuable personal information on such a large scale vary from unauthorized access, breaches, loss, copying and illegal mining of data just to mention a few.

As a Government service, there are questions as to how, what platforms and where the data will be stored. Another concern is what security features it has invested for this system such as encryptions, blockchain, authorization keys and user controls. The security of the data needs to be addressed sufficiently. It is not clear how the system is or will be secured considering the various cyber-attacks the country has seen on Government websites.

Any entity collecting personal information ought to reveal the reason why it is collecting that data, as a matter of best practice at least, in a very clear and precise manner. The government ought to reveal and justify reasons for collection otherwise it can be regarded as unnecessary.

The objective of Huduma Namba by the Government ought to be lauded as a step in the right direction in digitizing services. It allows the Government to capture all personal data required for service delivery to be collated at one central source thus assuring its citizens of expedient service. The Government currently collects a lot of personal information in the process of service delivery through different agencies which usually results in duplication or incompatible data hosted on various platforms. In order to verify and match these data, extra resources are utilized which becomes an unnecessary cost. Secondly, the Government can leverage other technologies such as

.....

artificial intelligence and machine learning to analyze the data it collects to provide better services as part of its Big 4 Agenda.

It is evident that the Government has not addressed its mind to the risks occasioned by using NIIMS and how to mitigate them. A major concern is with regards to empowering legislation surrounding digitization of Government services. The Computer Misuse and Cyber Crimes Act remains challenged in court with certain sections relating to cyber related



As a Government service, there are questions as to how, what platforms and where the data will be stored. Another concern is what security features it has invested for this system such as encryptions, blockchain, authorization keys and user controls. The security of the data needs to be addressed sufficiently. It is not clear how the system is or will be secured considering the various cyber-attacks the country has seen on Government websites.

.....

offences suspended. Some of the offences are highly likely to occur with the operations of this system such as unauthorized access, cyber fraud and cyber espionage. The Act needs to be operational and in effect to ensure offences arising are provided for. Kenya has no law on data protection and privacy yet, although the Data Protection and Privacy Bill is currently pending in Senate.

The Bill needs to be enacted before the use of NIIMS to guarantee citizens that their data is protected. However, there needs to be a better legislative framework to address the more germane

issues regarding NIIMS itself. Parliament should enact a stand-alone bill to establish the system and ensure that it addresses the various issues raised by stakeholders. Unjustified and unnecessary surveillance by the Government is a real concern.

In George Orwell's book 1984, Big Brother is depicted as the government, and it is everywhere. In nearly every aspect of daily life, Big Brother controls what you do, think, eat, and even feel. Big Brother controls everything; information, history, physical, and psychological needs. He calls this totalitarianism, which is a form of governmental control and the total or near total control of the actions, lives, desires and events in its citizens' lives. Is Huduma Namba a step towards digital totalitarianism?

For more information on this, contact the TMT Department on fss@tripleoklaw.com



Insider Trading and the Restoration of Investor Confidence

.....



**Brian Muindi
Oscar Mbabu**

Insider trading refers to the disclosure of privileged information concerning a publicly traded company to another person for gain or to avoid a loss. In Kenya, it is an offence under Section 34 of the Capital Markets Act, punishable by imprisonment, a sizeable fine or both.

The Stock Exchange and its Participants

The Stock Exchange or the bourse, is a facility where various participants, typically stock brokers and traders, can buy and sell securities and other financial instruments. As a secondary market, the bourse plays core economic roles in the development of a given economy. These include the provision of access to financing for listed companies, the function of acting as a sound economic barometer for a given market by highlighting its boom and recession phases, its role as an economic stimulator through the divestment and investment of finances into viable businesses and, chief among its functions, the provision of liquidity where investors enjoy certainty that they can convert their investment into cash in an efficient manner. Central to this discussion is the nature of the liquidity function of the bourse which is largely dependent on the level of investor confidence in the financial markets. An increase in investor confidence in the stock market leads to a consequent increase in the liquidity levels of the market as buyers are willing to buy and sell stocks at an increased frequency. This makes the market significantly more liquid and encourages trades. A drop in investor confidence affects trades in the opposite manner, as it results in a drop in investments which renders the market illiquid and unattractive for investors.

The Nairobi bourse was conceptualized in Kenya between 1922 and 1953, at the Exchange Bar at the Stanley Hotel in downtown Nairobi, where European tradesmen sought not just the richness of a classic single-malt whisky or the refreshment of a warm cup of coffee, but also the access to much-needed capital required to operationalize their respective projects in newly acquired colonial lands. The exchange of shares and stock took place over a "gentleman's agreement" and standard commissions were charged with clients being obligated to honor their contractual commitments of making good delivery and settling relevant costs. Stock broking ran as a sideline business conducted by accountants, auctioneers, estate agents and lawyers who met to exchange prices at the Bar. In 1951, an estate agent named Francis Drummond established the first professional stock broking firm. He also approached the finance minister of Kenya,

Sir Ernest Vasey, and impressed upon him the idea of setting up a stock exchange in East Africa. The two approached London Stock Exchange officials in July 1953 and the London officials accepted to recognize the setting up of the Nairobi Stock Exchange as



Information is the true currency of the bourse as it directly affects the number and volume of bids made for a given stock in the bourse.

an overseas stock exchange. In 1954, the Nairobi Stock Exchange (NSE) was established as a voluntary association under the Societies Act. Since then, the NSE has grown in leaps and bounds. This has been evidenced by various great triumphs. These include:

1. In 1998, the NSE had its first successful privatization through the sale of 20% of Kenya Commercial Bank in the bourse.
2. In 1994, The attainment of 5,030 points by the NSE 20-Share Index led to the NSE being rated by the International Finance Corporation (IFC) as the best performing market in the world with a return of 179% in dollar terms.
3. In 1996, the privatization of Kenya Airways through the NSE took place where more than 110,000 shareholders acquired stakes in the airline and the Government of Kenya reduced its stake from 74% to 26%. This achievement was capped by the Kenya Airways Privatization Team being awarded the World Bank Award for Excellence of 1996, for being a model success story in the divestiture of state-owned enterprises.

In July 6, 2011, The Nairobi Stock Exchange Limited changed its name to the Nairobi Securities Exchange Limited. The change of name was a reflection of the 2010 – 2014 strategic plan of the Nairobi Securities Exchange to evolve into a full service securities



exchange which supports trading, clearing and settlement of equities, debt, derivatives and other associated instruments.

Today, the Nairobi Securities Exchange continues to outperform other markets within the region, and stands as a paragon of profit for foreign investors looking to profit from business in Africa. Market data compiled by African Alliance shows the NSE FTSE 15 Index which tracks the bourse's 15 largest firms by market capitalisation and is mainly used by foreign investors had a dollarised return of -13.5 per cent last year. It outperformed the bourses of Nigeria (-20.6 per cent), South Africa (25.5 per cent), Uganda (-17.2 per cent), Tanzania (-15.4 per cent) and Egypt (-14.2 per cent).

The key contributors to the development and continued performance of the Nairobi bourse are the following market participants:

- 1.** The Listed Companies and Other Financial Institutions, who, in accordance with their strategic and operational needs issue shares, stock and other securities at economically favorable terms for the benefit of the market and its participants.
- 2.** The Intermediaries, who include licensed stock brokers and floor traders, facilitate the expedient transfer of securities in the bourse from the market to the investors.

3. The Investors, who consist of retail and institutional investors, whereby institutional investors , such as mutual funds, investment banks and endowment funds leverage their considerable market knowledge and experience to empirically identify inconsistencies within the prices of listed securities in order to accordingly purchase and profit from them. Retail investors, typically consist of the common *wananchi*, who as individual investors intuitively participate in the bourse by investing less than their institutional counterparts and generating returns without much analysis into the nature and price composition of the securities traded.

4. The Regulator, who include institutions such as the CMA which are creatures of statute, designed to act as guardians of the bourse by ensuring financial fairplay among its participants.

Price-sensitive information and its value in the bourse

The relationship between the participants of the bourse is reflected in the supply and demand of the securities traded from one investor to another, and the facilitation of the same. This also impacts the value of the securities traded, as the higher the demand for the given stock by the investors the higher the price so accorded to it. The effect of supply and demand in the trade of securities is where the value of price-sensitive information derives its value from.

Information is the true currency of the bourse as it directly affects the number and volume of bids made for a given stock in the bourse. Upon distribution into a given economy, positive information, such as information regarding the growth in profit of a listed company or the appointment of a reputably competent executive, increases the demand of a given stock, which increases its bid volume and ultimately reflects in the stock's price. On the other hand, negative information, such as the filing for bankruptcy of a listed company, acts vice-versa and reduces the bid volume of a given stock which negatively impacts its price.

The market's reactions to various types of information is how the market corrects itself to reflect the true value of any given security, as information regarding issuers is made available to the bourse participants through periodic financial statements and press releases. It is also important to note that with the deployment of trading technologies within the stock exchange, such as the T+1 equity settlement scheme in 2011, means that trades are settled just one day after the trade date of a given stock. As such, the market adjusts to information promulgated by various listed companies or other channels such as the press in a relatively rapid manner. From an economic perspective, one of the core functions of information in the financial markets is to correct the market and reflect the true value transferred from one investor to another.

Insider Trading and information flow within the bourse

When insider trades occur, institutional investors who strategically invest in significant amounts of stock do not enjoy the full value of their positions, as the profit margins on stock trades are affected. The predictability of the securities market and its adherence to sound economic and financial hypotheses are the crux of financial practice for institutional investors. It is on the basis of the financial information made to them that they buy shares, assume market positions and create price projections on the future price of given stocks. Insider trades jeopardize their positions by creating unexpected and unpredictable share price changes which are not reflected in the price history of securities. The risk of participating in trading securities thus increases for institutional investors who find themselves sailing choppy waters as they cannot accurately project their margins on given share portfolio investment strategies. Institutional investors also deploy significant resources in terms of technology, innovation and market research in order to establish economic patterns present in a given financial market. Insider trades render their research efforts useless as the trades made based on insider information do not follow any hypotheses or any analysis of the financial health and business strategy

the **CMA** secured the surrender of potentially **illegal gains** amounting to a whopping

**KSH
MILLION** **458**

in the context of ongoing investigations into insider trading on **Kenol Kobil shares**.

• • • • • • • • • • • • • • • • • • • • • • • • • • • • • •

of any given issuer or market segment. The short-term effect is that investors lose both money and time in the fray of an unpredictable and unexpected market and the long-term effect is the market being termed as a high volatility market, with unpredictable stock price fluctuations and poor implementation of financial regulations. This "renegade" status can hamper the liquidity of the market as institutional investors are incentivized to pull their funds and apply them in more predictable markets with lower risk and higher yield.

Second, retail investors suffer significantly from insider trades as well. Due to their inadequate market research and their speculative behavior, retail investors tend to experience the full negative impact of insider trades. The information flow within the financial market from the issuer to the investors tends to place the retail investor at the tail end of the entire information flow process. This causes retail investors to adjust to market changes last, and translates to them maintaining their positions until the share price adjusts completely to the given share price. This means that upon negative information regarding an issuer company being determined but not published, such as a Board Resolution to file for bankruptcy, insiders would get a head start in adjusting their position, then institutional investors would follow suit upon such insider information being published and finally, retail investors, who face the full brunt of the

resultant price depreciation. Once retail investors are left holding devalued stock from a series of such insider trades, their intuitive belief in the profitability of the bourse diminishes drastically. This loss of confidence in the bourse ultimately culminates in numerous retail investors, the critical mass of most bourses, pulling out their funds from the bourse.

The main negative effect felt by the bourse is the fall in liquidity in the stock exchange, as investors are uncertain whether they can liquidate their securities in an efficient and timely manner.

Prosecuting against Insider Trading in Kenya: A Gordian knot

Prosecuting against insider trading in Kenya has been a Gordian knot which the Capital Markets Authority is yet to truly unravel. In 2008, the Authority was faced with its first insider trading scandal in a series of cases. Key among these was *Republic v Terrence Davidson (CR 1338/08)*, where a former director of Uchumi Ltd was accused of the crime of insider trading contrary to the Capital Markets Act. Details regarding the entire transaction were properly canvassed in the related case of *Republic v Christopher Joseph Kirubi & 13 others (CR 900/08)* where it was purported that a cabal within the directorship of Uchumi had played the fall of the retail chain to their favor as they traded in their shares and made significant returns. Retail investors were largely left holding much devalued stock with little to no means of divestiture. In his Judgement, Chief Magistrate Gilbert Mutembei acquitted the directors stating that the Authority had failed to establish his culpability beyond reasonable belief and had not dispensed with their burden of proof. As such, the Court saw it unfit to convict them of insider trading.

From the foregoing, the dispensation of the burden of proof by the Capital Markets Authority has been determined by the Court as being key to the successful prosecution of charges regarding insider trading legislated by Section 13 of the Capital Markets Act. As such, the Authority has rightly invested significantly in the installation and

deployment of market surveillance systems within the bourse's electronic trading platforms which track suspicious trades and record actionable data.

In 2019, the CMA has made significant strides towards changing the narrative around the plight of insider trading in Kenya. In February 19, 2019, The Capital Markets Authority announced the fine issued against Mr. David Maena, formerly of CBA Capital, of a total of Sh166.9 million (\$1.669 million) for engaging in insider trading in Treasury bonds between 2016 and 2017. The statement went further to state that Mr. Maena had been found guilty of dealing with privileged (non-public) information on bond trades, which he used to front run the market and make dual trades in order to profit at the expense of other investors. Moreover, in the next month, the CMA secured the surrender of potentially illegal gains amounting to a whopping Kenya Shillings 458 million in the context of ongoing investigations into insider trading on Kenol Kobil shares.

The recent successes of the CMA in protecting the bourse against insider trading can be attributed to their focus on evidence-based prosecution, competent recruitment and progressive policies in making the Nairobi Stock Exchange, a premier investment destination.

Conclusion

The Capital Market Authority's campaign against insider trading could contribute significantly in restoring trust and predictability in the Nairobi Securities Exchange. Moreover, the curbing of illegal trades will serve a larger purpose, the restoration of confidence in the Kenyan financial market as a whole. The perception that Kenya's regulator has been successful in ensuring fairplay in its financial market will go a long way in solidifying Kenya's position as a top investment destination in Africa.

For more information on this, contact
bmylo@tripleoklaw.com

Climate Change Compliance and Private Entities



**Stephen Mallowah
Christopher Oyier
Maureen Mbaka**

One of the most significant, and perhaps most misunderstood, risks that organizations face today relates to climate change. Many organizations misconstrue the implications of climate change to be long term and, therefore, not necessarily relevant to decisions made today. many of the instruments in use, or proposed, that will increase the contribution of the private sector to adaptation are in the early stages of development.





Aligning public and private investments in low-emission and resilient infrastructure has become critical to increasing resilience, avoiding further emissions lock-in, and delivering on the Sustainable Development Goals. Innovation in technologies, business models and financing tools therefore hold a promise for new opportunities for climate and development.

2. Regulatory uncertainty in Climate Compliance in Kenya

Private sector organizations are increasingly faced with uncertainty over the impacts of climate change on their business models and future profitability. The biggest cause of this uncertainty is the lack of clear information from legislative and regulatory sources on the compliance obligations by the private sector. In addition, the robust rights-based system espoused under the Constitution imposes even more environment-related obligations on the private sector.

The Climate Change Act, ("CCA") requires public and private entities to reinforce climate change disaster risk reduction into their strategies. The Act further implores the national and county governments to provide incentives and obligations for private sector contribution in achieving low carbon climate resilient development.

Of great concern to private sectors perhaps is section 16 of the CCA that mandates the National Climate Change Council to *impose climate change obligations on private entities and to make regulations governing reporting on their performance, including the authority to monitor and evaluate compliance.* The Council's decisions are to be communicated to the relevant entities through the Kenya Gazette but no timelines have been prescribed.

Moreover, the Act further grants NEMA powers to monitor and ensure compliance by the private sector of the yet to be imposed obligations relating to climate resilience. On a positive note, the Act establishes the Climate Change Fund from which the private sector may be eligible for funding and technical assistance for climate related projects.

However, as already noted, no clear guidelines on the implementation of the CCA have been forthcoming from the mandated authorities. Despite this administrative inaction, businesses need to prepare for the imminent regulation in this area. Furthermore, there is sufficient shift in global patterns for private sector involvement in climate resilience action and Kenyan entities can no longer take a back seat

3. Climate Change Risks faced by the Private Sector in Kenya

As elsewhere, private entities in Kenya face additional non-regulatory climate-related risks that affect their business strategies. Insurers for instance, face the dilemma of whether to report climate change risk in their annual reports as the physical risks from climate change are likely to result in more claims and a reduction in the value of insurers' assets. Climate liability claims against corporate customers will also affect premiums and claim payments.

Further, businesses in virtually all sectors face transition risks caused by changing consumer preferences, technological advances, and new governmental policy which may also negatively affect demand for products and services from carbon-intensive sectors.

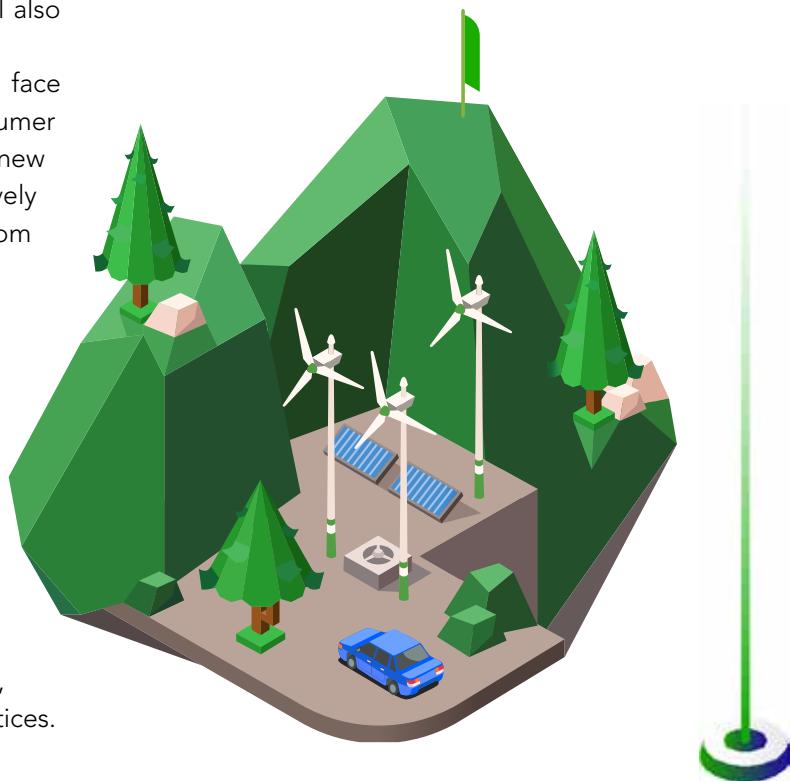
For private organizations, climate-related risks fall into two major categories: risks related to the transition to a lower-carbon economy; and those related to the physical impacts of climate change. In the first category, policy and legal risks are the most crucial. Potential areas for regulation include shifting energy use toward lower emission sources, adopting energy-efficiency solutions, encouraging greater water efficiency measures, and promoting more sustainable land-use practices.

The second risk category is technology. Climate change solutions lie in technological innovations and creativity in response to the effects of climate change.

Shifts in supply and demand have emerged for certain products and services as climate-related risks and opportunities are increasingly considered by businesses as these also affect their markets.

Finally, climate change has been identified as a potential source of reputational risk tied to changing perceptions of an organization's contribution to or detraction from the transition to a lower-carbon economy.

Conversely, physical risks resulting from climate change can be event driven (acute) or longer-term shifts (chronic) in climate patterns. Such risks may have financial implications for organizations, such as direct damage to assets and indirect impacts from supply chain disruption. Organizations' financials may also be affected by changes in water availability, and quality; food security; extreme temperature changes affecting organizations' premises, operations, supply chain, transport needs, and employee safety.



4. Opportunities for the Private Sector

Despite the exposure to climate-related risks, there are immense opportunities for the private sector in ensuring climate change mitigation and adaptation. Resource efficiency remains the best approach to attaining sustainability within the organization and reducing reliance on carbon-intensive production models.

Secondly, it is anticipated that in order to meet

recent reports from OECD and NCE estimate that the global infrastructure investment required from **2016 to 2030** to remain below

2°

USD 7 TRILLION

per year

IEA World Energy Outlook Report 2016) indicates a need for

USD 53 TRILLION

to transition to a low-carbon energy system from **2016 to 2035.**

global emission-reduction goals, countries will need to transition a major percentage of their energy generation to low emission alternatives such as wind, solar, , geothermal, nuclear, and biofuels. This translates to obligations being passed onto the private sector to make adjustments towards energy efficiency.

Thirdly, organizations can access new markets

through collaborating with governments, development banks, small-scale local entrepreneurs, and community groups as they work to shift to a lower-carbon economy.

Finally, climate resilience is key. This involves organizations developing adaptive capacity to respond to climate change to better manage the risks and seize opportunities, including the ability to respond to transition risks and physical risks.

5. Strategies by Government

There is global momentum for transition to green economies through sustainable consumption and production practices both in the public and private sectors. Consequently, more countries are implementing carbon pricing policies and instruments, removing fossil fuel subsidies, carrying out regulatory interventions for energy efficiency and providing targeted support to low-emission innovation. the use of direct and indirect instruments remain at the disposal of the government and will inevitably shape the direction of climate sustainability.

Direct instruments entail the use of public funds to incentivize private sector investments in adaptation-related projects directly. Examples include technical assistance, grants/subsidies loans; and the provision of guarantees. Conversely, indirect tools use public funds to create mechanisms designed to either raise additional adaptation finance or increase private sector investments in adaptation but do not provide direct support. An example is legislative change to induce private sector investments on adaptation.

6. Why adaptation to climate change matters to private organizations

Successful adaptation is about planning for and doing development differently, taking account of both present and future climate risks from the start. it is in the interest of private organizations that they



As of January
2019, GFC funding in
Africa stood at

**USD 2.3
BILLION**

with **36** approved projects and **15**
under implementation.

.....

adapt to the imminent climate change-induced changes .

The primary benefit to organizations is the mitigation of the likely disruption in their production capacity, revenue and supply chains. Secondly, having in place an adaptation strategy enables investors make informed decisions in relation to their investment. Organizations that invest in activities that may not be viable in the longer term may be less resilient to the transition to a lower-carbon economy; and their investors will likely experience lower returns.

Relatedly, to make informed financial decisions, lenders, and insurance underwriters need to understand how these risks and opportunities are



Climate change has been identified as a potential source of reputational risk tied to changing perceptions of an organization's contribution to or detraction from the transition to a lower-carbon economy.

.....

likely to impact an organization's future financial position as reflected in its financials.

In sum, major financial and strategy decisions of private firms depend on improved understanding and analysis of climate-related risks and opportunities in their respective sectors.

7. The Role of the Private sector in Climate Finance

Public and private financial actors are increasingly aware of the role that finance can play in delivering on climate goals. Recent reports from OECD and NCE estimate that the global infrastructure investment required to remain below a 2 degrees Celsius rise is approximately USD 7 trillion per year, whilst an additional study indicates a need for USD 53 trillion to transition to a low-carbon system from 2016 to 2035.

The consensus on climate funding flows from the Paris Agreement, that obliges developed countries to provide finance to developing countries and take the lead in mobilizing climate change finance the major aim being to mobilize financial resources to achieve balance between mitigation and adaptation. Renowned global climate funding facilities include:



WATER PLANT

a. The Global Environment Facility

Established in 1992 and has provided over \$17.9 billion in grants and mobilized an additional \$93.2 billion in co-financing for more than 4500 projects in 170 countries.

b. The Green Climate Fund (GCF)

climate projects in developing countries and has mobilized 10.3 billion USD, accredited 75 entities to channel its resources and approved 93 funding proposals for a total investment from of over \$4.6 billion. As of January 2019, GCF funding in Africa stood at 2.3. billion USD.

Access to GCF resources to undertake is possible for accredited entities.

GCF's funding trail in Africa Includes:

I. Universal Green Energy Access Programme; and

II. KawiSafi Fund

8. Client Services in Climate Law

At TripleOKLaw LLP, our climate lawyers have wide training and experience in climate law and specifically in land use planning, corporate strategy, clean air, clean energy, water quality, hazardous materials, waste and regulatory permits. We adequately meet the needs of our clients in climate-related areas including:

- a) Ensuring regulatory compliance in climate change, air, water, land, recycling, waste and occupational health;
- b) Representation during alleged regulatory noncompliance, and challenges to government actions at both national and county levels; Aiding climate and sustainability planning, including advising on climate risks and building adaptive capacity and strengthening climate resilience;
- c) Advising on implementation of climate mitigation and adaptation measures and developing compliance management systems;
- d) Representation at treaty conventions, conferences and related climate meetings and advising on the implementation of the outcomes;
- e) Legal advisory on the management of multi-jurisdictional international environmental projects;
- f) Advising on climate incidence response;
- g) Advising on green procurement;
- h) Advising on promotion of a climate-friendly lifestyle within organizations;
- i) Preparing funding concept notes, proposals and agreements;
- j) Preparing requests for qualifications (RFQs) and requests for proposals (RFPs) for climate

- related projects;
- k) Drafting, reviewing and negotiating of financing agreements; conducting legal due diligence in connection with funding proposals; and preparing legal advice on the interpretation of statutes, contracts and other legal documents;
- l) Review of funding proposals and legal documents required by donors for its operations, and ensure they are coherent with best practice and the legal framework of the Client;
- m) Conduct and review due diligence in connection with the proposed funding structures;
- o) Drafting, reviewing and aiding the negotiation of internal financing agreements and other legal documents required by the Client for its operations;
- p) Draft and negotiation of legal arrangements with climate-accredited entities;
- q) Advising on renewable energy transactions, such as negotiating and drafting leases for renewable energy installations, negotiating and drafting ancillary agreements, conducting due diligence for complex sites, and designing appropriate risk mitigation measures;
- r) Advising on access to information requirements under the Constitution of Kenya and including recommendations on expected disclosures and reporting obligations;
- s) Representation during administrative review proceedings;
- t) Advising on assignment of climate responsibilities within the organization;
- u) Providing updates on legal developments in relation to climate change and finance;
- v) Engagement and collaboration with non-legal experts such as consultants and engineers; and
- w) Liaison with other offices and departments within the national and county governments in order to assess and address their requirements, to advise on the drafting of legal documents.

For more information on this, contact
the Climate Change Department on
smallowah@tripleoklaw.com

TRIPLEOKLAW ADVOCATES HAVE BEEN RECOMMENDED IN THE FOLLOWING 5 PRACTICE AREAS:

.....
**RECOMMENDED LAWYERS KENYA
BANKING, FINANCE AND CAPITAL MARKETS**

- Janet Othero
- Tom Onyango

.....
**RECOMMENDED LAWYERS KENYA
COMMERCIAL, CORPORATE AND M&A**
- Catherine Mulika
- Jinaro Kibet

.....
**RECOMMENDED LAWYERS KENYA
DISPUTE RESOLUTION**
- Elias Masika
- James Ochieng Oduol
- John Ohaga

**RECOMMENDED LAWYERS KENYA
EMPLOYMENT**
- John Ohaga

**RECOMMENDED LAWYERS KENYA
REAL ESTATE AND CONSTRUCTION**
- Jinaro Kibet



LEADING FIRM

2019



LEADING INDIVIDUAL

2019



NEXT GENERATION LAWYER

2019



RECOMMENDED LAWYER

2019

Going over & above

...



Climate Change and Sustainable Development Practice

.....



**Stephen Mallowah
Esther Nyaguthi**

Climate change law and sustainability is a new and distinct area of legal practice that has arisen out of the global community's establishment of a dedicated international climate change legal regime under the umbrella of the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and the Paris Agreement.



This all-encompassing international foundation has had various national implications ranging from the enactment of legislative instruments such as the Climate Change Act of 2016, Climate change law and sustainability is a new and distinct area of legal practice that has arisen out of the global community's establishment of a dedicated international climate change legal regime under the umbrella of the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and the Paris Agreement. The Environmental Management and Coordination Act of 1999, The Biosafety Act of 2009 amongst others and further increased legal claims within this area of practice.



WHAT SUSTAINABILITY LAWYERS DO

The primary subject matter of the work performed by sustainability lawyers varies considerably and includes environmental law, climate change and clean energy law, corporate law, land use and development law, real estate, construction, mergers and acquisitions, intellectual property, tax, sustainable infrastructure finance, amongst others.

These lawyers perform a wide variety of legal work which includes;

a. Counselling

This includes the traditional client counselling about compliance with statutes, regulations and other legal requirements including assistance in complying with those requirements. These legal requirements are based on the existing regulatory framework revolving around the guiding values and principles of governance in the regulations mentioned above.



The primary subject matter of the work performed by sustainability lawyers varies considerably and includes environmental law, climate change and clean energy law, corporate law, land use and development law, real estate, construction, mergers and acquisitions, intellectual property, tax, sustainable infrastructure finance, among others.



b. Transactional work

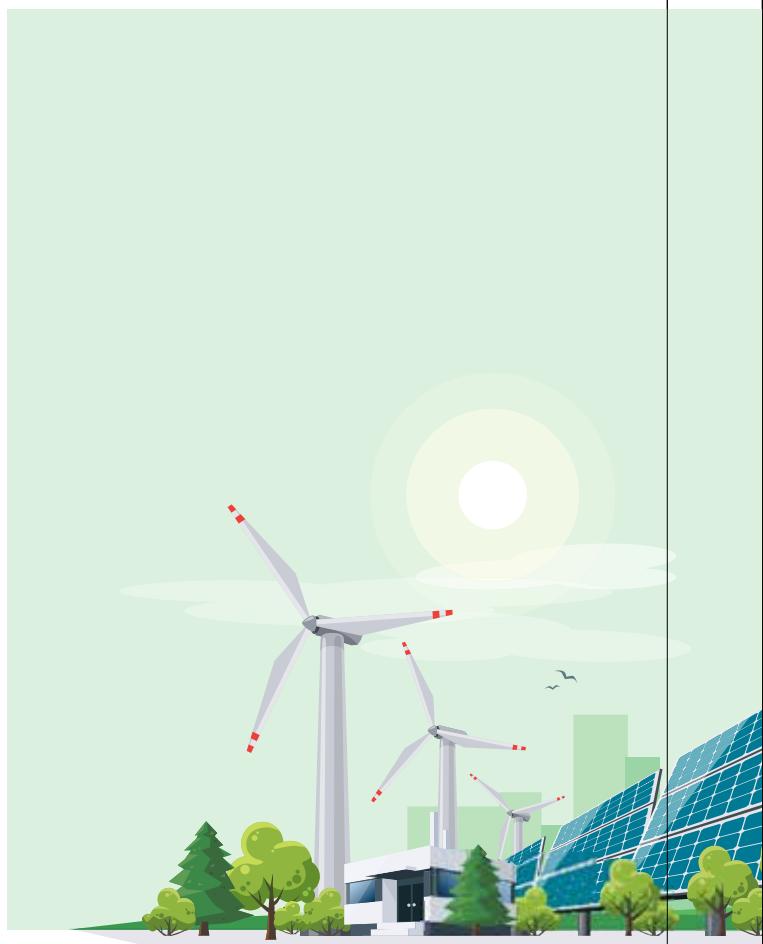
Much transactional work includes sustainability projects, as the legal aspects of these projects can be complex, as a lawyer would have to be involved in writing, negotiating, managing contracts. This generally also includes real estate transactions, environmental due diligence, regulatory compliance evaluation, environmental risk evaluation, negotiation and drafting of environmental provisions and agreements and other environmental activities in corporate mergers and acquisitions, private equity deals and all sorts of offerings on the public market, including both issuers and underwriters and strategic litigation counselling. Other transactional work for lawyers involves solar energy, including negotiations of power purchase agreements, finance agreements and tax related counseling.

c. Litigation

Sustainability litigation practice includes environmental enforcement litigation, environmental enforcement actions, environmental claims brought by private parties and other involved parties. The environmental litigation and trial work encompass cases in the Environmental and lands court and before various tribunals such as the National Environmental Tribunal. Sustainability lawyers also participate in toxic tort litigation whose clients include chemical and other manufacturers, energy companies, transporters, lenders and vendors and private individuals.

d. Advocacy

Lawyers may comment on proposed regulations and proposed legislation. This also involves a level of public consultation and public participation. The Climate Change Act of 2016 provides for public consultation in matters relating to climate change policy, strategy, programme, plan or action. This Act also provides for public participation as



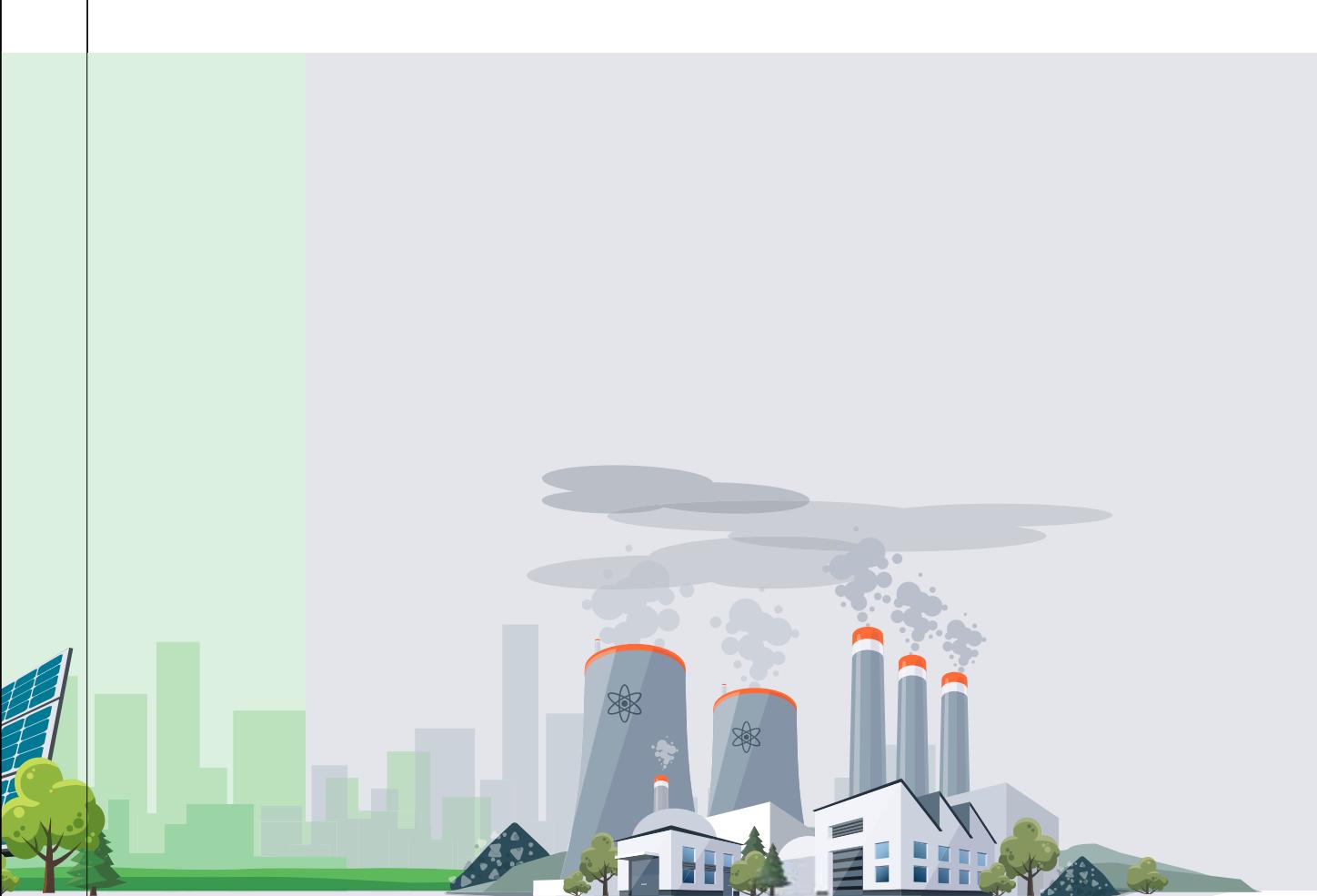
it states that public entities at each level of government shall at all times when developing strategies, laws and policies relating to climate change, undertake public awareness and conduct public consultations.

e. Drafting

This involves writing the public and private laws that govern the behavior of individuals, businesses and organizations in specific contexts. More specifically it involves the drafting of proposed statutes, regulations and representing best practices in sustainability, drafting private governance agreements for land development and editing various disclosure documents.

f. Regulatory Practice

Sustainability lawyers provide support to



Lawyers in the practice of climate change and sustainability are thoroughly familiar with the complex scientific and technical issues facing industries such as coal, oil and chemical, pulp and paper, hazardous waste treatment and electric utility. This allows them to counsel clients comprehensively on these matters within a legal lens.

.....

elaborate national frameworks including governance structures, through such climate policy instruments as Nationally Determined Contributions (NDCs) and Nationally Appropriate Mitigation Actions (NAMAs), in addition to specific regulations for sectors such as energy, transport and waste.

g. Environmental and Compliance Audit Practice

Sustainability lawyers handle environmental audits which include environmental compliance audits to determine a company's compliance with environmental laws, rules and regulations and assessments to determine the environmental condition to corporate assets and real estate in corporate or real estate transfers.

The Environmental Management and Coordination Act provides for the submitting to the Environmental Management Authority for an environmental impact assessment (EIA) for any project. Further to this, the biosafety Act of 2009 contains provision for risk assessment.

h. Climate Finance and Carbon Markets

This involves advisory and engagement strategies to identify and facilitate access to funds from grants to the carbon market for projects, programmes, national actions and at the institutional level. Opportunities include amongst others the voluntary carbon market, bi-lateral crediting mechanisms (Joint Crediting Mechanism), CDM Loan scheme, NAMA Facility, Green Climate Fund, sovereign carbon funds and results-based financing. Locally there is the Climate Change Fund that is provided for in The Climate Change Act of 2016 which provides financing mechanism for granting to persons who encourage and put in place measures for the elimination of climate change including the reduction of greenhouse gases and use or renewable energy, amongst other things.

i. Business Strategy

Sustainability lawyers also aid in carbon finance business strategy for the private and public sector in order to maximize on benefits and reduce on risks. Business strategy would also include advise on sustainability managements systems. Such systems include The Triple Bottom Line Reporting which is a framework that incorporates three dimensions of performance, that is, social, environmental and financial, that once adopted, aims to create greater business value.

WHY APPROACH A SUSTAINABILITY LAWYER?

Lawyers in the practice of climate change and sustainability are thoroughly familiar with the complex scientific and technical issues facing industries such as coal, oil and chemical, pulp and paper, hazardous waste treatment and electric utility. This allows them to counsel clients comprehensively on these matters within a legal lens.

These lawyers are able to identify major sustainability risks and outline the measures that the company is taking to ensure a successful future in instances where clients perceive a sustainability risk. This is aimed at enhancing the company's positioning in the investor market, which will in turn make its shares attractive to global investors who place a premium on sustainable business practices.

Sustainability lawyers also provide clients with counselling on how to align their activities according to sustainable practices that are aimed at mitigating harmful practices.

For more information on this, contact
the Climate Change Department on
smallowah@tripleoklaw.com



“ The only way to stop a bad guy with a gun is with a good guy with a gun. ”

- Wayne LaPierre

EXECUTIVE VICE PRESIDENT- NATIONAL RIFLE ASSOCIATION-USA (NRA).

Time to re-think Kenya's Gun Ownership Laws?



Bryan Muindi
Jack Bwire

Perhaps the most famous quote in modern political philosophy discourse, Thomas Hobbes remarked of the life of human beings in a state of nature as being '*'solitary, poor, nasty, brutish and short.'*' According to Hobbes, in this state of natural condition, humans constantly live in a state of '*'equality, war, constant fear of death, and general insecurity.'*' Hobbes' description is a stark demonstration of a state of being that portrays a lack of law, dominion, and any individual claim to property. It was therefore a state that any reasonable man (*which humans generally are*) would conclude was incompatible with their inherent desire to avoid death, and cling to their self-preservation instincts. Hobbes' sentiments ring true even for the modern political discourse, and succinctly explains the inherent driving will for even the post-modern man.

In order to achieve this inherent desire for survival, humans have invented ways to protect themselves, be it the invention of fire, fenced communities and walled houses, humans have always acted on their primal instinct for survival. However, perhaps the most significant invention was that of organized governments, which allowed the individual to surrender some of their rights to the government state in exchange for among other things, protection. However, what happens where the state fails to protect the individual and the society at large?

The Dusit terrorist attack in the Westlands area in Nairobi that left more than 20 people dead while not the first terrorist attack of its kind in the Country, has helped bring to the fore perhaps more than any other attack, the question and debate on gun ownership in the Country. As widely reported, the attack has forced the government to consider arming private guards in order to prevent future attacks of such kind that were marked frequently by unprepared guards armed only with "*rungus.*"

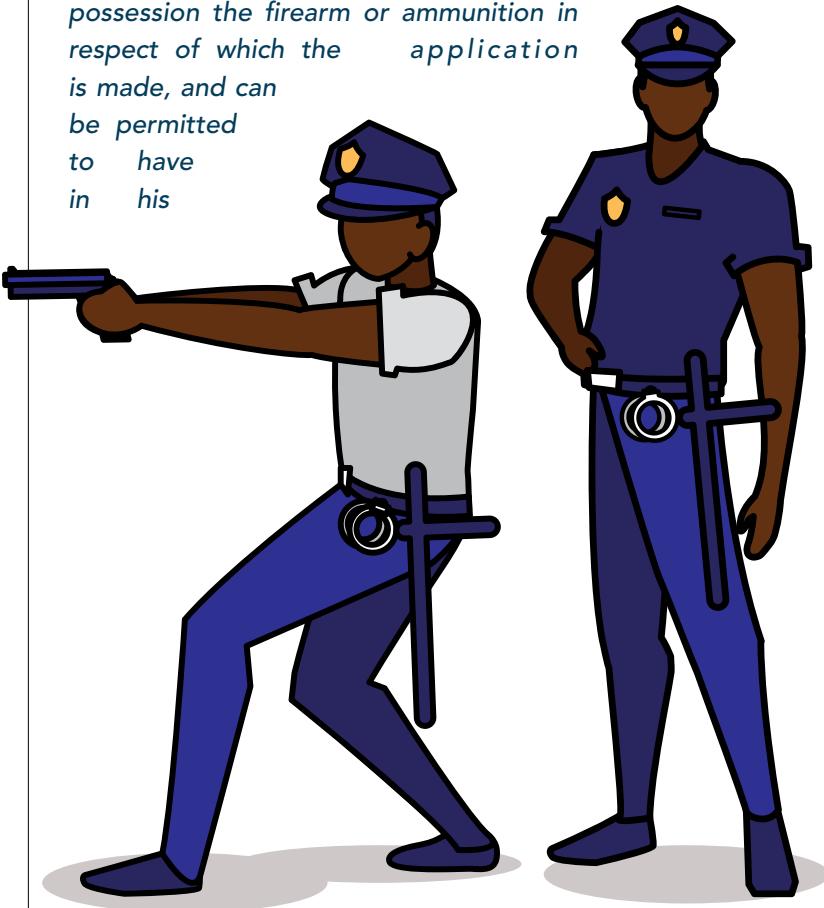
While the government's action has been lauded and criticized in equal measure, questions still mount as to the plausibility of extending this directive to allow private citizens to own firearms to protect themselves not just from terrorists' attacks which are increasing, but against common everyday crimes committed against them. While the current regime of law allows for every citizen the opportunity to own a gun, the requirements and the bar set are so high that more often than not, this opportunity is only accorded the highest members in the society. However, under the *Fire Arms Act* Cap 114 of the Laws of Kenya, every citizen is accorded the opportunity to be able to own a fire arm, although this is not guaranteed as a right, meaning the right to own and possess firearms is generally restrictive.



As widely reported, the attack has forced the government to consider arming private guards in order to prevent future attacks of such kind that were marked frequently by unprepared guards armed only with "*rungus.*"



Under Section 4 of the Act, it's expressly provided that '*no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time.*' The Act goes further to provide under *Section 5* that any application for the grant of a firearm certificate shall only be granted by the licensing officer if '*he is satisfied that the applicant has a good reason for purchasing, acquiring or having in his possession the firearm or ammunition in respect of which the application is made, and can be permitted to have in his*



possession that firearm or ammunition without danger to the public safety or to the peace.'

While the language of the Act seems to be very clear and straight-forward, making it very easy for a law abiding citizen to acquire and own a firearm, that is not always the case practically as the threshold for what amounts to "*a good reason for purchasing, acquiring or having in his possession the firearm or ammunition...*" has been set so high and not clearly defined in the law to allow easy access to these firearms by law abiding citizens. For example, would a reason of "*personal safety*" pass this stringent

the total approximate number of fire arms in the hands of private citizens (**illicitly and legally**) in Kenya stands at

750,000

threshold? While the law as expressed allows for that as a ground for purchase and acquisition of firearms, practically this is not considered a good enough reason by the licensing authorities for grant of a firearm certificate, with their rationale being that grants for personal safety need to be greatly limited as the country's security agencies are "capable of providing protection to the public in most circumstances." This has had the effect of greatly limiting the number of law-abiding citizens who can have access to firearms, with only high level and high-risk individuals (either due to the nature of their work and duties) being granted access to these firearms.

Despite the restrictive nature of the legal regime in the country, firearm possession among civilians has been shown to be steadily rising. According to GunPolicy.org

with only **8,136 guns** being held by **licensed** and **registered** gun holders representing a paltry **one percent.**

8,136



While the government has called for tightening of gun ownership laws to ensure less guns land in the hands of private citizens, it is important to note that such a move would only affect law abiding citizens. Criminals will continue acquiring these guns illegally and using them against law abiding citizens limited by the law in their ability to protect themselves and their families.

.....

one of the world's most comprehensive resource center on gun policy, regulation and ownership, the number of firearms held by private (both illicitly and legally) citizens stands at a whopping 750, 000. This finding is further corroborated by a study conducted by *Small Arms Survey* a Geneva-based institute that provides expertise on small arms and gun violence internationally, which indicated that while the total approximate number of fire arms in the hands of private citizens in Kenya stands at approximately 750, 000, majority of them are illegal, with only 8,136 being held by licensed and registered gun holders representing a paltry one (1%) percent. While the majority of these guns held by civilians illegally is largely spread across few regions in the country like the Coast and the Northern Regions of the country, the worrying trend that has seen illegal gun possession among civilians steadily rise over the years paints a worrying picture, especially with crime reports across the country showing a rise in criminal activities.

According to the National Police Service' *Annual Crime Report of 2016*, crime especially in major towns in the country has been shown to be steadily rising. A look at the crime statistics in the country paints a grim picture, with the statistics showing crimes such as break-ins, homicide, stealing, criminal damage and other offences against the person to be on the

rise. As these crimes continue to be on the rise, the law-abiding private citizen is largely left unprotected and vulnerable, especially with the government's plan to tighten further the gun ownership laws.

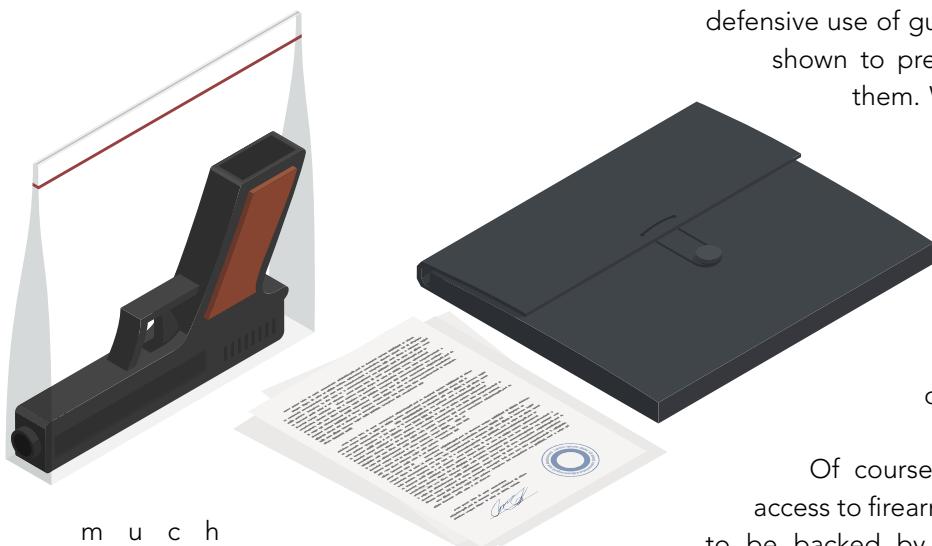
While the government has called for tightening of gun ownership laws to ensure less guns land in the hands of private citizens, it is important to note that such a move would only affect law abiding citizens. Criminals will continue acquiring these guns illegally and using them against law abiding citizens limited by the law in their ability to protect themselves and their families. For every law-abiding citizen who can't acquire a gun for protection, there is equally a crime committing individual who is able to acquire firearms illegally. This is especially true as indicated by empirical evidence across the globe.

Empirical data from countries like the USA, Switzerland, Australia and Great Britain offer an interesting look at the correlation between gun ownership rates and crime rates. While countries like Switzerland and



Of course, any decision to allow greater access to firearms by private citizens would need to be backed by comprehensive legal measures to ensure potential gun owners are fit to possess firearms. This would require a concerted effort between the government and private organizations to ensure proper vetting procedures, training, reporting mechanisms etc. At the end of the day, accountability and transparency might be the points at which the success of any future policy on firearm possession stands.

.....



much higher gun ownership rates compared to other countries globally, they have been shown to have much lower rates of violent crimes compared to many European nations that have strict gun control laws. The empirical data shows little to non-existent correlation between the rates of gun possession among the population and the number of violent and homicide incidences. Studies have also shown that there is no correlation between stricter gun control laws and the rates of crime/gun violence, with the data showing that states with some of the least strict gun control laws have some of the lowest homicide rates, while those with stricter gun laws having some of the highest homicide rates. For example, while Great Britain has some of the strictest gun control laws in the developed world, their violent crime rates for rape, homicide, aggravated assault and burglary is higher compared to other countries in the same categories.

In a one of its kind research conducted by the USA's Centers for Disease Control and Prevention (CDC) and compiled by Institute of Medicine and the National Research Council, it was found that guns are used hundreds of thousands of times per year by law abiding citizens to defend themselves against potential crimes, with the CDC concluding that "self-defense can be an important crime deterrent." The research went to observe further that studies assessing the effect of defensive use of guns have shown "consistently lower injury rates among gun-using crime victims compared with victims who used other self-protective strategies", meaning

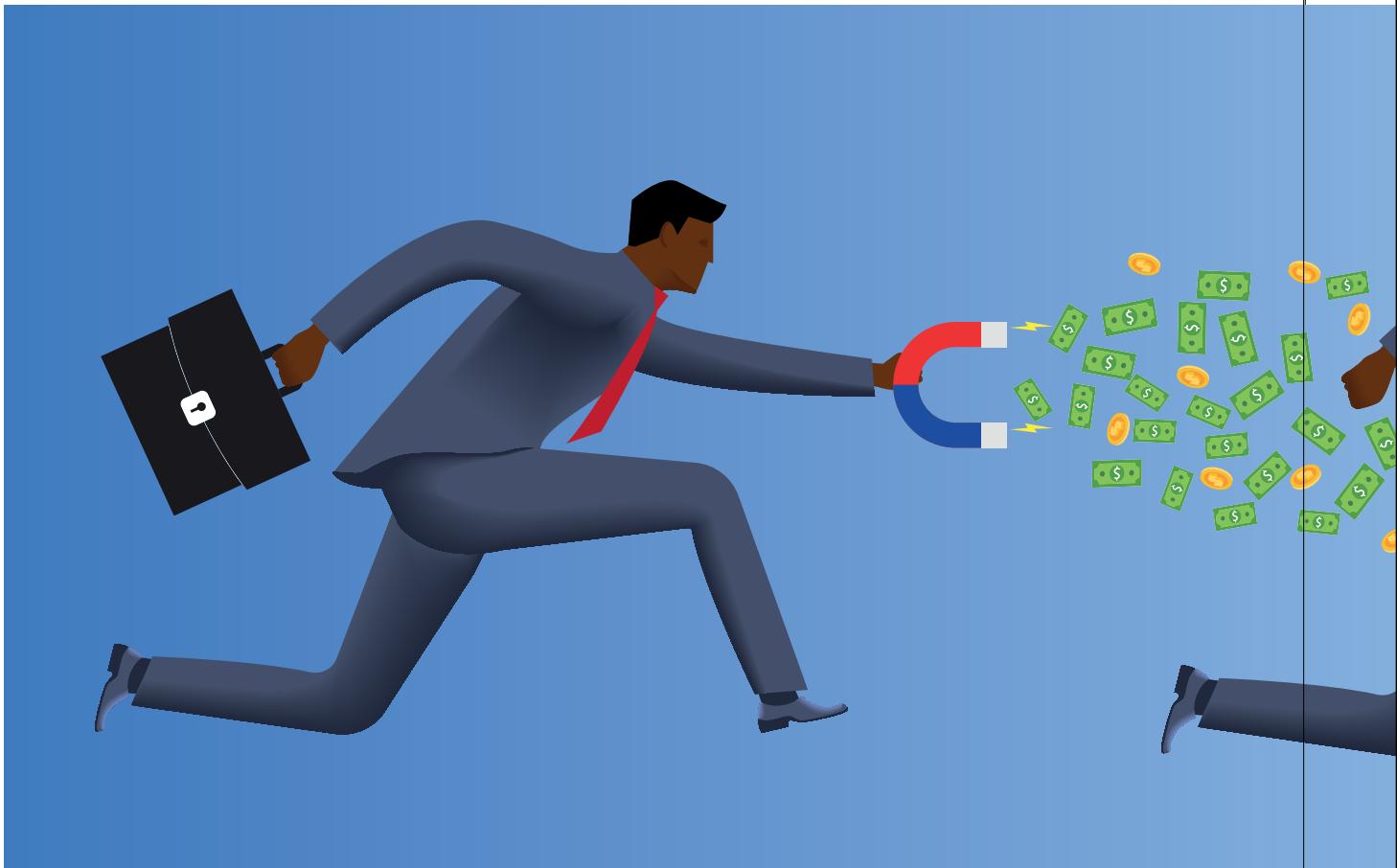
defensive use of guns is not only safe, but has been shown to prevent more crimes than perform them. While these findings will need to be extrapolated to the unique Kenya situation, and the local circumstances accounted for, from a human psychological and behavioral level the difference is likely to be minimal.

Of course, any decision to allow greater access to firearms by private citizens would need to be backed by comprehensive legal measures to ensure potential gun owners are fit to possess firearms. This would require a concerted effort between the government and private organizations to ensure proper vetting procedures, training, reporting mechanisms etc. At the end of the day, accountability and transparency might be the points at which the success of any future policy on firearm possession stands.

The country owes a duty especially to the most vulnerable members of the society to ensure their right of self-defense is guaranteed, if not by the State, then they should be accorded a fair opportunity to protect themselves. Of course, any decision whether to allow greater access to guns for law abiding private citizens would have to be guided by a value-based judgment of whether greater private ownership of guns has the ability to boost security and reduce the surging crimes committed against private citizens, or it carries the potential for increased crime incidences.

While both sides of the debate hold legitimate concerns, what is for sure is that this conversation needs to be had.

For more information on this, contact
bmylo@tripleoklaw.com



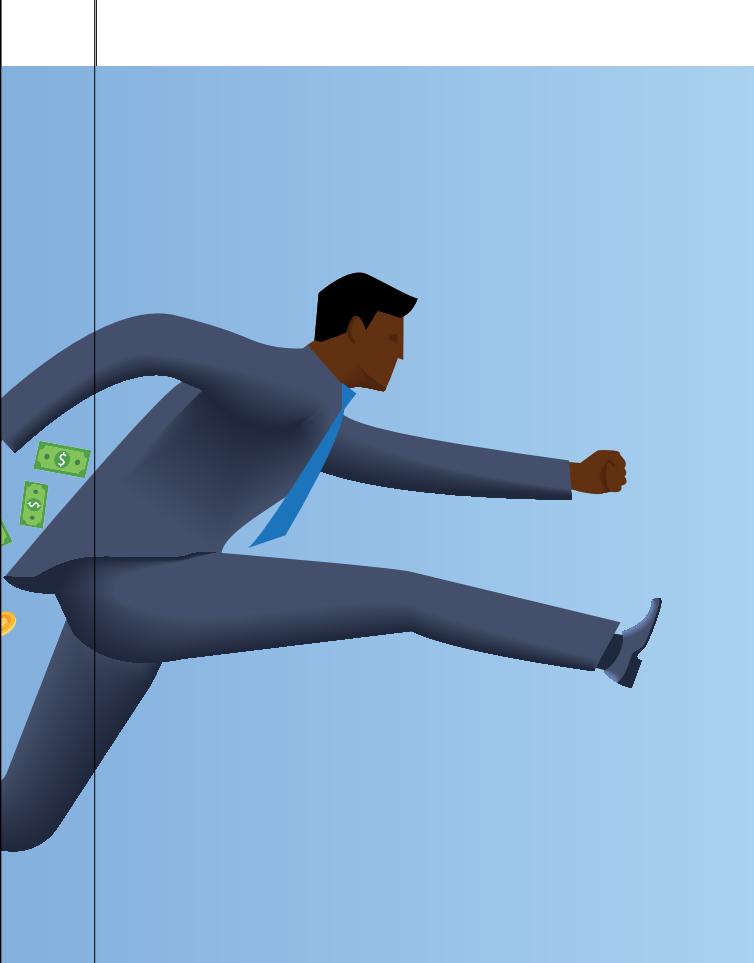
Fair Debt Collection Practices

.....



**Martha Wenene
Evance Odhiambo**

In the past few years, to mitigate reputational and other associated risks, organizations have adopted a customer service approach to debt collection. This has consequently redefined the debt collection industry. Traditionally, most debt collection in Kenya has been outsourced to debt collection agencies. Law firms have also entered this market and taken up the task of not only litigating but also integrating debt collection work into their existing practices.



collecting non-performing debts
that are at least
past due

60 DAYS

.....

Most companies in Kenya and all over the world favour outsourcing debt collection as opposed to performing this function in-house. One of the benefits of outsourcing is that the assigned collector has specialized skill sets, sophisticated collection tools and resources needed to recover debt and facilitate the ability to track down a debtor, whether s/he has changed location or phone contact number. These agents also apply multiple strategies in a bid to get the debtor to pay up his or her outstanding debts. Collection agents may choose to contact family, friends, and neighbors of the borrower in order to confirm the contact information that they have on file for the individual, but they cannot disclose the reason for trying to reach the person. An agent may choose to send by post late payment notices to the debtor as well. Either way, debt collectors ensure that the debtor has their full attention.

One of the benefits of outsourcing is that the assigned collector has specialized skill sets, sophisticated collection tools and resources needed to recover debt and facilitate the ability to track down a debtor, whether s/he has changed location or phone contact number. These agents also apply multiple strategies in a bid to get the debtor to pay up his or her outstanding debts.

.....

If the debtor pays his debt, the creditor pays the collector a percentage of the funds or assets that the agency recovers. On the basis of the contract agreement entered into with the creditor, the debtor may have to pay the full debt at once or portions of the debt at a time. However, if the creditor still does not cover his overdue account, the practice in Kenya is that the collector can update the creditor's report with a 'collection' status. Having this status on a credit report is sure to decrease the individual's credit score. A low credit score will affect his or her chances of obtaining a loan in the long term.

Debt collectors often work for debt-collection



due— and remitting them to the original creditor. The creditor therefore pays the debt collecting agency the requisite fees to this effect. For hard core debts, the collection agencies are professionally obligated to do everything necessary to ensure the debts are collected. In some cases this is not possible and the collectors may refer cases to an advocate firm who will file lawsuits against such debtors that are unwilling to pay.

There are a lot of benefits of using an agency that is also a law firm since the transition from the debt collection to litigation is handled seamlessly. In the process of negotiation with the debtor the Law firm ensures all matters are litigation ready.

Debt collectors use letters, phone calls, fields visit to debtors to contact delinquent borrowers in order to get them to repay what they owe.

When debt collectors can't reach the debtor with the contact information provided by the original creditor, they adopt innovative methods such as using computer software and private investigators. They can further conduct searches for a debtor's assets, such as bank and brokerage accounts, to determine a debtor's ability to repay.

A debt collector has to rely on the debtor to pay and cannot attach a bank account, even if the bank account details are known, unless a garnishee judgment is obtained where the court orders them to repay a certain amount to a particular organization or person owed. To achieve this, a collection agency must take the debtor to court before the statute of limitations runs out and win a judgment against him or her. This judgment allows a collector to begin garnishing wages and bank accounts, but the collector must still contact the debtor's employer and bank to request the money.

Debt collectors also contact delinquent borrowers

There are a lot of benefits of using an agency that is also a law firm since the transition from the debt collection to litigation is handled seamlessly. In the process of negotiation with the debtor the Law firm ensures all matters are litigation ready.

who have a judgment against them. Even when a creditor wins a judgment, it can be difficult to collect the money. Along with placing levies on bank accounts or motor vehicles, debt collectors may place a lien on property or force the sale of an asset.

The Bottom Line

Debt collection is a legitimate business, and if a debt collector contacts you, it's not necessarily the beginning of an abusive relationship. Many collectors are honest people who are doing their jobs and will work with you to create a plan to help you repay your debt, whether that means a payment in full, a series of monthly payments or a specially tailored settlement to fit your situation.

For more information on this, contact
the Debt Collection Department on
eodhiambo@tripleoklaw.com



LEGALLY *Funny*

You might be a lawyer if: you believe that a forty words' sentence is a short one.

.....

How many lawyers does it take to change a bulb?

Depends: Hourly or at a flat fee?

.....

On chasing fees:

Client: I'll give you \$300 to do my worrying for me.

Lawyer: Fine. Where's the three hundred?

Client: That will be your first worry.

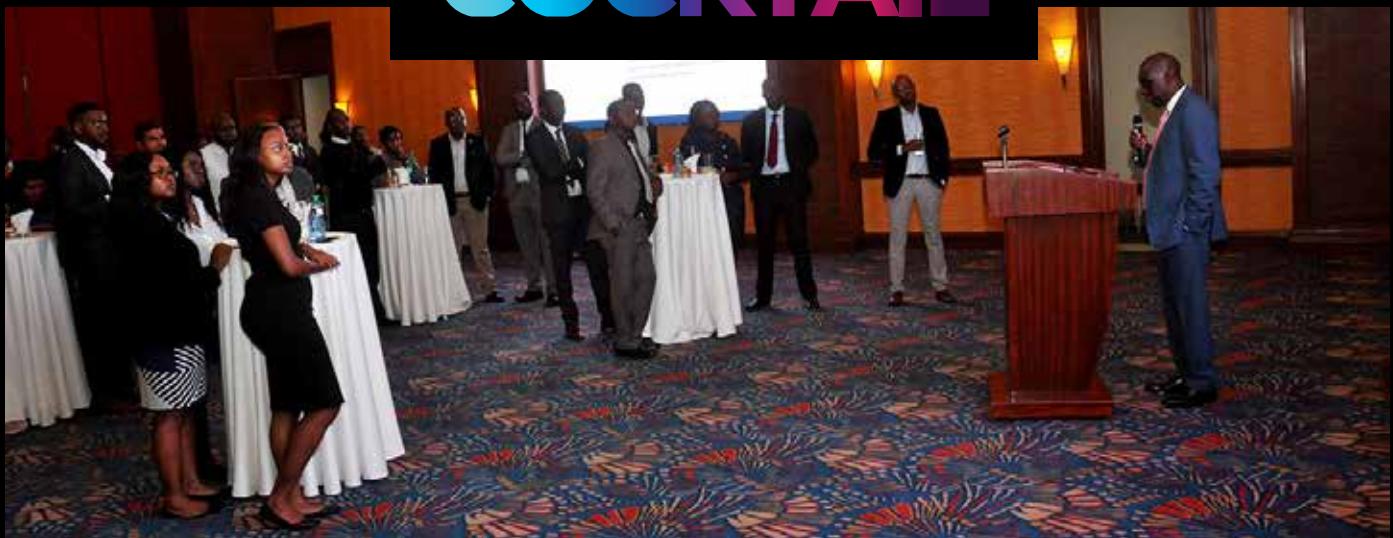
.....

*disclaimer: these jokes are not the product of our innate funny bones but are inspired by various sources of the internet.





CLIENT ENGAGEMENT COCKTAIL





EMPLOYEES OF THE QUARTER



Marysheila Onyango

PARTNER CATEGORY



Kenvine Ouma

ASSOCIATE CATEGORY



Arthur Imbuga

SUPPORT TEAM
CATEGORY



Esther Chelagat

OPERATIONS TEAM
CATEGORY

ALTERNATIVE DISPUTE RESOLUTION

This Team is dedicated to the Alternative Dispute Resolution (ADR) practice. Our aim is to always offer business solutions customized to our clients' interest. We understand the importance of settling disputes where possible before formal proceedings are commenced

Contact person: johaga@tripleoklaw.com

CORPORATE AND COMMERCIAL

We advise corporates, listed companies and financial institutions on the various regulatory requirements for businesses in various sector specific regulations considering the dynamic legal and regulatory framework.

Contact person: jkibet@tripleoklaw.com

FINANCIAL SERVICES

Our Financial Services team of advocates support individual and corporate clients, financial institutions and SMEs in undertaking various investment projects in liaison with other professionals in the financial services sector. We provide wealth management services, project management and finance, environmental scanning for projects among others.

Contact person: dkagagi@tripleoklaw.com

BANKING AND REAL ESTATE

We handle a substantial amount of banking and real estate transactions. The practice area has grown rapidly in tandem with disruptive technologies and the real estate sector in Kenya. The firm handles transactions relating to property acquisition and disposal, due diligence on property, bank securitization and financing arrangements.

Contact person: tonyango@tripleoklaw.com

DISPUTE RESOLUTION

We have a team of experienced Advocates who have handled numerous landmark cases over the years and contributed immensely to the development of jurisprudence in Kenya. Over time we have a proven track record of excellence and diligence, providing timely legal service and support to our clients in various sectors.

Contact person: jochieng@tripleoklaw.com

TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY

The firm has a practice area dedicated to Telecommunications, Media and Technology. As organizations continue to digitize their operations, we offer innovative legal solutions that not only ensures compliance but also mitigates exposure to associated risk.

Contact person: ckariuki@tripleoklaw.com