Q1 -2019

NR&CoQuarterly ...Legal Briefs

Table of Contents

Editorial team
Wilkistar Mumbi
Sarah Ngachi
Alfred Muthama
Ruth Regero

Contributors
Njoroge Regeru
Patrick Karanja
Claire Mwangi
Wilkistar Mumbi
J.M Kamenju

Design & layout:
Grace King'ori

Publisher
Njoroge Regeru & Company Advocates

Njoroge Regeru & Co. Advocates
Arbor House, Arboretum Drive
P.O Box 46971-00100 GPO Nairobi
Tel: +254-020-2612531/2613646
020-3586592/2319224,
Cell: 0722 206 884, 0733 608 141, 0752 431 961
Fax: +254-020-2349211, +254-020-2718485,
2375302
www.njorogeregeru.com

KARIBU!

Editor's Note

Wilkistar Mumbi
mumbi@njorogeregeru.com

"As we get well into the year and start preparing our quarterly reports, we invite you to our quarterly briefing here at NR & Co. Our legislative updates this quarter will give much insight into the new laws on energy, petroleum and urban planning. For instance, it is interesting to note that the population requirement for the attainment of city status has been reduced from 500,000 to 250,000 persons. This information could not be more timely, bearing in mind that the national census will be carried out this year but it will also be important to find out if your locality would qualify as a city, municipality or market center.

We have also highlighted some key public interest decisions made by the High Court this quarter. Ensure you read through the case to learn exactly why the Court suspended the capping of interest rates which had already been passed into law.

Our team of advocates has also taken time to address various topics which would be informative to our clients. Mr. Regeru and Claire have teamed up to explain the principle of non-intervention by Courts on Arbitration matters. The article on Employment Law by Wilkistar Mumbi, particularly on how to handle casual employees, is a must read for all employers engaging employees on temporary contracts. Readers can follow this up with the article by J.M Kamenju on obtaining work and investor permits for foreign nationals.

Feel free to reach out to us via our contacts for a personalized opinion on any issues you may need clarifications on, save for the interlude.

Happy Reading!"

THE FIRM

Marking 2nd Year Work Anniversary

Patrick Karanja
karanja@njorogeregeru.com

I joined NR & Co. Advocates in March 2017 as a Senior Associate in the Corporate, Commercial and Conveyancing Department. Working at NR & Co. has given me a unique opportunity to learn and provide services to clients in diverse areas of the legal profession which I may otherwise have never had a chance to practice in or know about. These include Structured Trade Finance, Mergers and Acquisitions, Infrastructure Projects Legal Transactions Advisory, Energy, Oil and Gas, Public Private Partnership, and Intellectual Property Law at regional and international levels. The highlight of my career at the Firm has been working with Senior Management of Leading Corporations and being part of transactional advisory teams for leading projects in Kenya.

Over the last 2 years I had the opportunity to work with a diverse team of brilliant and supportive legal clerical and administrative staff at the Firm. These include Mr. Njoroge Regeru who is a respected leading lawyer whose brilliance and eloquence were a subject of admiration and spoken of with reverence in my law school years. I have also enjoyed immense mentorship and inspiration from Mr. Mwangi Karume who is the smartest corporate lawyer and yet so humble and pragmatic with the ability to simplify complex legal matters. Mwangi's mantra is that as long as you get the basics right, you can accomplish any technical transaction. What is important is the value you add to the clients in helping them get a solution to the issue.

My biggest challenge and learning moment has been ensuring and providing clients with high quality standards of legal services and meeting tight deadlines. This has required me to focus not just on enhancing my legal skills but also developing my leadership and management skills. My advice to the pupils at the Firm is to make use of the knowledge, experience and resources in the Firm in order to learn and develop competence to become the best lawyers possible. They should remember that "if you do what you need to do, things will turn out exactly the way they are supposed to."

My Experience at the Jean-Pictet Moot Competition 2019

The competition is named after a Swiss jurist and legal practitioner, Jean Simon Pictet. He was once the vice president of the International Committee of the Red Cross and contributed immensely in the development of International Humanitarian Law, especially in the drafting of the 1949 Geneva Conventions and their Commentaries.

The competition is held annually and it equips participants with the practical skills of applying their theoretical international law knowledge to practical scenarios of war-torn countries. It comprises mostly of law students, academicians and legal practitioners whose practice revolves around International Humanitarian Law. This year, the competition was held from 16th – 23rd March, 2019 in Obernai France.

My participation in the competition enabled me to understand the role of an impartial legal advisor to parties in an armed conflict as well as the importance of adhering to the principles of universality, humanity, neutrality and independence. A great takeaway from my experience at the moot was the encouragement in the field of enforcement of human rights and their protection with regards to victims of armed conflict as well as advocating for the respect of International Humanitarian Law.

Alfred Muthama
lawyers@njorogeregeru.com

LEGISLATIVE UPDATES

In this issue we highlight the various Bills and Acts touching on different areas of law including but not limited to contracts, energy, petroleum and urban planning

1. THE ENERGY ACT, 2017

The Energy Bill, 2017 was assented into law on 14th March, 2019. It consolidates the laws relating to energy and sets out the functions of the National and County Government in relation to energy. It further provides for the establishment, powers and functions of the specific energy sector entities (discussed herein below); promotes renewable energy and enables exploration, recovery and commercial utilization of energy. The Act upholds itself as supreme over other laws on matters relating to energy.

The entities tasked in managing and regulating energy resources in the country include: -

(i) **Energy Regulatory Commission** - tasked with the regulation of generation, importation, exportation, transmission, distribution, supply and use of electrical energy apart from licensed nuclear facilities.

(ii) **Rural Electrification and Renewable Energy Corporation** - acts as an oversight authority in the implementation of the Rural Electrification Programme.

(iii) **Nuclear Power, Energy and Petroleum Agency** - provides extensive civic education on Kenya's nuclear power programme and proposes policies and/ or legislation for the successful implementation of a nuclear power programme.

There is also established the Renewable Energy Resource Advisory Committee which is to advise the Cabinet Secretary of Energy and Petroleum on the criteria for allocation of renewable energy resource areas and licensing of these areas to investors.

The Act further establishes the Energy and Petroleum Tribunal which is tasked with deciding on disputes and appeals as in accordance with the provisions of the Act.

The Act endeavors to repeal the Energy Act No. 12 of 2006, the Kenya Nuclear Electricity Board Order, 2013 and the Geothermal Resources Act, 1982. However, statutory instruments issued by the Commissioner or Cabinet Secretary under the repealed laws shall continue to be in force until and unless they have been specifically revoked by the Act.

2. THE PETROLEUM (EXPLORATION, DEVELOPMENT AND PRODUCTION) ACT, 2017

The Petroleum (Exploration, Development and Production) Act, 2017 provides a framework for the contracting, exploration and development of petroleum together with its production within the licensed blocks. It endeavors to repeal the Petroleum (Exploration and Production) Chapter 308 Laws of Kenya.

It further creates obligations for the Government to develop a conducive environment for upstream petroleum investment while ensuring the investments benefit the citizens of Kenya.

Bodies established under the Act include the: National Upstream Petroleum Advisory Committee and Upstream Petroleum Regulatory Authority.

The Act also provides for division of revenue resulting from petroleum operations between the national government, county governments and communities. Accordingly, the counties are entitled to 20% of the national government's share (as per the Act) whilst communities get five (5%) percent of the national government's share.

3. THE URBAN AREAS AND CITIES (AMENDMENT) ACT, 2017

The Urban Areas and Cities (Amendment) Act, 2017 enables county governments to review the criteria for distinguishing an area as a city, municipality, town or market center. To this end, the Act has reduced the population for a city by half, that is, from 500,000 to 250,000.

It has also set out the population of a municipality to be at least 50,000 whilst the population for a town should be at least 10,000 and a market center, 2,000 residents

The Act further establishes various boards to govern and manage cities and municipalities.

4. THE LAW OF CONTRACT (AMENDMENT) BILL, 2019

The purpose of this Amendment Bill is to amend the Law of Contract Act Cap 23 to the effect of providing that in case of a default by the principal borrower, the creditor should, before realizing the assets of the guarantor in law, first realize the assets of the principal borrower.

GAZETTE NOTICES

FINANCE & LABOUR

January - March 2019

TASKFORCE ON THE NATIONAL RISK ASSESSMENT (NRA) ON MONEY LAUNDERING & TERRORISM FINANCING

The Cabinet Secretary for the National Treasury and Planning, appointed the following ministries, departments and agencies to constitute a task force on national risk assessment on money laundering and terrorism financing vide *Gazette No. 2577 (dated 13th March, 2019):*

- The National Treasury and Planning - Chairperson
- Financial Reporting Centre (FRC) - Co-ordinator;
- Central Bank of Kenya (CBK);
- Anti-Narcotics Unit (ANU);
- Anti-Terrorism Police Unit (ATPU);
- Asset Recovery Agency (ARA);
- Banking Fraud Investigations Department Unit (BFID);
- Betting and Licensing Control Board (BCLB);
- Business Registration Service;
- Capital Markets Authority (CMA);
- Directorate of Criminal Investigations (DCI);
- Ethics and Anti-Corruption Commission (EACC);
- Insurance Regulatory Authority (IRA);
- Kenya Bankers Association (KBA);
- Kenya National Bureau of Statistics (KNBS);
- Kenya Revenue Authority (KRA);
- Kenya Wildlife Service (KWS);
- Ministry of Foreign Affairs (MFA);
- Ministry of Interior and Co-ordination of National
- Government;
- Ministry of Lands and Physical Planning;
- National Counter Terrorism Centre (NCTC);
- National Crime Research Centre;
- National Intelligence Service (NIS);
- National Police Service (NPS);
- NGO Co-ordination Board;
- Office of the Attorney General and Department of Justice (OAG and DOJ);
- Office of the Director of Public Prosecutions (ODPP);
- Retirement Benefits Authority (RBA);
- Sacco Societies Regulatory Authority (SASRA); and
- State Department of Immigration.

Obligations of the task force include coordination of the NRA exercise, identification money laundering trends, determination of the vulnerability of financial institutions to money laundering and terrorism financing, development of a national strategy on combating money laundering as well as preparation of the NRA report.

The Secretariat to the task force shall be FRC and the Bank Supervision Department of the CBK.

Please also note that the term of the taskforce shall be one (1) year from the date of commencement of the said Gazette Notice.

The task force is further required to submit to the Cabinet Secretary for Finance a final report by 28th February, 2020 as well as a national strategy on combating money laundering and/or terrorism financing by 31st March, 2020.

APPOINTMENT OF CONCILIATORS

Labour Relations Act, 2007

The Labour Relations Act, 2007 in acknowledgment and promotion of the freedom of association consolidates the law relating to trade unions and trade disputes. Accordingly, where there is a dispute with respect to the constitutional freedom of association, any party to such dispute may refer the dispute to the Cabinet Secretary for Labour & Social Protection to appoint a conciliator to resolve the dispute. It thus follows that the said Act empowers the Cabinet Secretary for Labour & Social Security to appoint conciliators.

Indeed it is in this vein and pursuant to the Constitution of Kenya as well as section 66 (1) (b) of the Labour Relations Act, 2007 that the following persons were appointed as conciliators vide *Gazette Notice No. 2582 (dated 13th February, 2019)*:

Benson Okwaro
Adho Hussein Alkama (Mrs.)
Caroline Ruto
Jemimah Wanza
Albert Njeru
Phyllis Wangwe
Salim Wamwawaza
Abdirashid Salat
Moses Ombokh
Linus Kamulei
Mohat Somane
Harun Mwaura
Martine ole Kamwaro

CASE HIGHLIGHTS

In this segment we highlight cases on the constitutionality of double taxation agreements with respect to required legal procedures of the Treaty Making Ratification Act, 2012 and the legality of capping the interest rate

1. Tax Justice Network-Africa v Cabinet Secretary for National Treasury & 2 Others [2019] eKLR

This case relates to the constitutionality of the Kenya Mauritius Double Taxation Avoidance Agreement with regard to the procedures of the Treaty Making Ratification Act 2012.

The brief facts are that, the petitioner filed a Petition seeking orders that:

(i) The Court to declare the ratification of the Kenya Mauritius Double taxation Avoidance Agreement as unconstitutional, contravening Articles 10 (a) (c) and (d) and 201 of the Constitution;
(ii) The Cabinet Secretary should withdraw the Legal Notice No. 59 of 2014 (Income Tax Act (Double Taxation Relief (Mauritius) Notice, 2012); and
(iii) Costs of the Petition

It was the petitioner's main argument that the failure of the Cabinet Secretary in tabling the Double Taxation Agreement (DTA) before Parliament and enabling public participation, was in violation of the Treaty Act and his actions were thus ultra vires. Further that where the Constitution or any law requires a certain process to be followed, then the requisite procedures should be adhered to in order for a law or an act resulting there-from to be constitutional.

The respondents contested that the petitioner failed to prove how the resultant DTA affected its rights and those of others or how it adversely affects the interpretation of any law in the country. They stated that as per Article 1(1) and 129 of the Constitution, sovereign power of the people can be exercised through Parliament, Judiciary and the Executive (including the Cabinet Secretary), who satisfy public participation. Further it was their defense that the Constitution is also insufficient on how to conduct public participation.

The Court in its determination held that the petitioner did indeed fail to demonstrate how the respondents contravened the specific Articles and precisely which right was violated as mandated in the famous case of Anarita Karimi Njeru v A.G. The court also affirmed the respondents' position that the law needs to be clear on what and how public particiption should be conducted. The Court also analyzed accountability in terms of public participation in today's democracy as involving the coordination between the relevant arms and entities of government in the enactment of any law.

However it was the Court's decision that since it was not shown that the Legal Notice No. 59 of 2014 was laid in Parliament, the said Notice ceased to have effect pursuant to section 11 (4) of the Statutory Instruments Act 2013. There was no order as to costs.

2. Boniface Oduor v Attorney General & Another; Kenya Banker's Association & 2 Others (Interested Parties) 2019 eKLR

This Petition related to the constitutionality of the interest rate capping and auxiliary provisions of section 33B of the Banking Act, which were enacted through the Banking (Amendment) Act No. 25 of 2016.

The petitioner's case was that, the impugned provisions capping the interest rate charged by banks and financial institutions for loans deprived Central Bank of Kenya (CBK) of its exclusive constitutional mandate to solely formulate and implement the monetary policy. The petitioner also contested that failure to present the Bill in Senate for concurrence, resulted to the Statute being unconstitutional and that it was discriminatory to banks and financial institutions in excluding mortgage finance institutions, micro-finance banks, insurance companies and those dealing with Islamic banking. He further contended that the Act deprives banks and financial institutions of their property, by making use of the interest as their assets and dealing with them in a free, open and democratic society contrary to Article 40 of the Constitution.

The Court in arriving at its decision established that the formulation and implementation of monetary policies was a mandate of CBK and that infringement of this function was not properly portrayed by the petitioner.

It further held that legislation of the impugned provision was within the National Assembly's mandate and that matters relating to monetary policy fall under Part 1 of the Fourth Schedule of the Constitution, hence the Banking (Amendment) Bill, 2015 did not require the Senate's approval.

With respect to the issue of discrimination, the Court opined that, under Section 54 of the Banking Act, institutions exempted are those that do not offer banking services, especially those that are established for the specific needs for a particular group of people (such as co-operative societies); insurance companies offer to cover risks at a premium, while Banks dealing with Islamic banking are excluded since they do not charge interest as it goes against Sharia Law.

The Court also established that the provision does not prevent banks and financial institutions from lending or borrowers from accessing credit and that it only caps the rate of interest charged as a means of the Statute's objective to protect consumers.

Also the petitioner portrayed ambiguity in Section 33B (1) and (2) which it imposes a minimum imprisonment to Chief Executive Officers of Banks and financial institutions, argued it to be inhumane treatment and

a denial of the right to fair trial under Articles 25 and 50 of the Constitution; and that the provision is ambiguous and open to contradictory interpretations. The Court in this view established under paragraph 179 to 180 that:x

"179. As can be seen from the aforesaid analysis, no person should be punished for disobeying a law that is uncertain. He must understand in clear terms the law he is required to obey. As drafted, Sections 33B(1) and (2) of the Act are open to different interpretations which could lead to some offending CEOs suffering prejudice while others would go scot free depending on the interpretation that different courts would make.

180. We are therefore persuaded that the provision of Section 33(B)(1) and (2) of the Act violate the Constitution in so far any person contravening the same risks facing criminal liability without the benefit of understanding what s[he] was supposed to comply with. The penalties for contravention of Section 33 B (c) are fairly severe and banks, financial institutions and their respective CEOs risk suffering severe penalties for failure to comply with unclear laws."

And that the petitioner's, CBK's and KBA's submissions hold water that the specific provision is invalid by virtue of ambiguity, imprecision and indefiniteness. In the Court's decision under paragraph 188 to 194 the Court relied on the general principles of sentencing as a means of guiding a judicial officer in identifying relevant factors so as to arrive to a reasonable and judicious sentence. Stemming from the ambiguity of the provision the court found the provision as unconstitutional and as a discrimination against banks and its Chief Executive Officers.

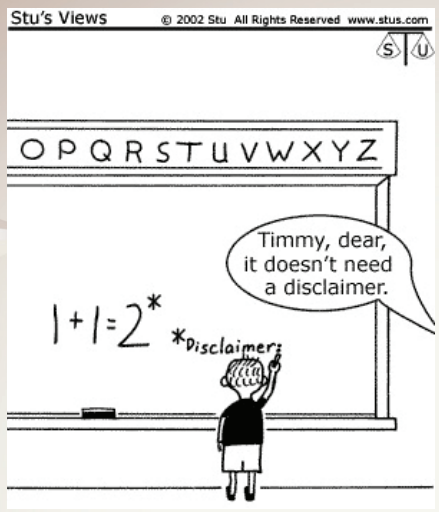
The Court thus declared that Section 33B of the Banking Act (Cap. 488 Laws of Kenya) did not infringe on CBK's constitutional mandate of formulating monetary policy under Article 231 of the Constitution.

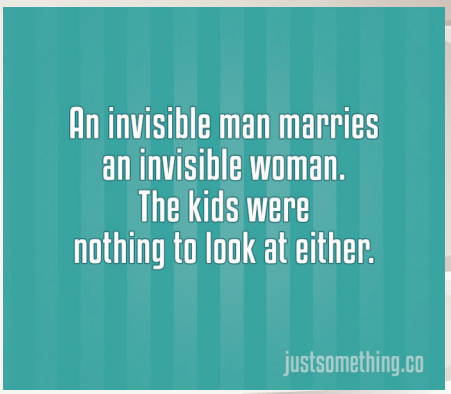
However, sections 33B (1) and 33B (2) were declared unconstitutional, null and void for being vague, ambiguous, and imprecise. The said provisions have since been suspended for twelve (12) months from 14th March, 2019 for the National Assembly to make appropriate amendments to the impugned sections.

For more information visit:
http://kenyalaw.org/caselaw/cases/

NR&CoQuarterly |...Legal Briefs

INTERLUDE.....





CONTRIBUTORS' PLATFORM

To what Extent have Kenyan Courts Honoured the Non-Interventionist Approach to Arbitrations as Espoused under the UNCITRAL Model Law

By Njoroge Regeru and Claire Mwangi

Introduction

The law in Kenya that governs matters arbitration is the Arbitration Act, No. 4 of 1995 ("the Arbitration Act"). Arbitration practice in Kenya is also within the scope of the Constitution of Kenya which, at Article 159 (2) (c) recognizes Arbitration as one of the alternative forms of dispute resolution (ADR) that should be promoted by our Courts. It is in keeping with the spirit of the Constitution to promote Arbitration as an ADR, that the Arbitration Act:-

a) At Section 10 limits the extent of the Court's intervention to strictly the parameters allowed in the Arbitration Act.
b) At Section 32A of the Arbitration Act provides for the binding nature of Arbitral Awards.
c) At Section 39, limits the right of appeal to only questions of law arising out of a domestic arbitration and even then, has to be by agreement of the parties to such arbitration.

The foregoing reflects the practice globally and is further enunciated in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration ("the Model Law"). The purpose of the Model Law is to provide a law acceptable to the States with different legal, social and economic systems and contribute to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations. This purpose is promoted by reflecting worldwide consensus on key aspects of international arbitration practice.

One of these aspects is the non-intervention by the Courts in matters pertaining to Arbitration. To this end, Article 5 of the Model Law limits the extent of the Court's intervention and recognizes the final and binding nature of arbitral awards at Article 35 (1) thereof. Accordingly, the provisions of the Arbitration Act are within the globally acceptable and applicable practices and procedures relating to the non-intervention of Courts in arbitration matters.

However, despite the provisions of the Arbitration Act and the Model Law, there have been manifest contradictions emanating from the High Court and the Court of Appeal on the non-interventionist approach of the Court.

On the one hand, there is a body of cases that have upheld the essence of the Arbitration Act and the Model Law and on the other hand, case law has been passed that seriously erodes the same, but before discussing the case law, and to understand the various dimensions of justice, it is important to look at the philosophical foundations of the concept of justice.

Philosophical Underpinnings of Justice.

Legal Formalism

This is a school of thought where legal rules stand separate from other social and political institutions. According to this theory, judges and other decision makers should decide particular cases, to the extent possible, by the mechanical application of existing legal rules[1]. There is thus an interlinkage between formalism and judicial constraint because judges are limited to the rote application of existing rules, and are prevented from deciding cases according to "their own predilections" or "preferences." The rules informing a judge's decision would thus come from inter alia, the Constitution, the Arbitration Act, the Model Law, or statute law. To the extent a judge's decision of a case is dictated solely by the content of an existing rule, that decision is not determined by anything else, including the values or beliefs or preferences of the judge. This school of thought would thus be associated with some of the decisions passed by the Kenyan Courts as will be discussed below.

Legal Realism

Legal realism was a movement that came in to criticize and oppose formalism.

CONTRIBUTORS' PLATFORM

Legal realists seek to explain what the law really is in terms of practicalities, rather than theory. They seek a common sense approach to the problems relating to law. Their focus is on the actual operation of the law in the social context. According to legal realists, judges do make law. They do this when they interpret the law. [2]As such, what the law is as per statutes and books of law is not really the law until a judicial pronouncement is made on it.

This theory thus encourages judicial discretion. By not limiting them- selves to statutes and books, judges are able to assess facts presented before them, and the practicalities associated with the decisions they make before rendering their judgments. This paper will also highlight cases that have been decided guided by the principles informing this school of thought.

The Non-Interventionist Approach

In the Court of Appeal case of Kenya Shell Limited v Kobil Petroleum Limited, Civ App 57 of 2006 [2006] eKLR, the Court of Appeal declined to grant leave to appeal from the High Court against a decision declining to set aside an Arbitral Award. It is worthy of note that in the High Court, the ground stated in support of the prayer to set aside the Award was that the Award went outside the scope of the reference to arbitration. However, the Court found as follows;

"The matter before us has of course nothing to do with section 35 (2) (b) (ii) (supra). But, in our view, public policy considerations may enure in favour of granting leave to appeal as they would to discourage it. We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings in this matter were conducted underscores that policy. Do we think there is a realistic prospect of success of the intended appeal or, put another way, is there a ground of appeal that merits serious judicial consideration? We think not.

The Kenya Shell decision, brings aspects of legal realism where, the Judges exercised their judicial discretion to bring out an issue of public policy, which had not been raised. The application for leave to appeal was thus dismissed and by so doing, this decision supports the non-interventionist approach by the Courts.

In the Court of Appeal case of Anne Mumbi Hinga v Victoria Njoki Gathara, Civil Appeal No. 8 of 2009 [2009] eKLR the Court was categorical that that there is no right for any Court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act. The Court went on to find in favor of the non-interventionist approach of Courts by finding as follows:-

"The concept of finality of arbitration awards and pro arbitration policy is something shared worldwide by the States whose Arbitration Acts such as ours have been modeled on the UNICITRAL MODEL LAW. The common thread in all the Acts is to restrict judicial review of arbitral awards and to confine the necessary review to that specified in the Acts. The provisions of the Act are wholly exclusive except where a particular provision invites the court's intervention or facilitation."

In the Court of Appeal case of Nyutu Agrovet Limited v Airtel Networks Limited, Civil Appeal (Application) No.61 of 2012 [2015] eKLR the Court found that no right of appeal exists to the Court of Appeal against a finding of the High Court on an application to set aside an arbitral award. This matter is however pending before the Supreme Court and it is hoped that the highest Court in the land will address the issue pertaining to intervention by Courts and resolve the same with finality.

The Interventionist Approach

The Court of Appeal in the case of DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited, Civil Application No. Nai. 302 of 2015 [2017] eKLR held that;

"The fact that section 35 of the Arbitration Act is silent on whether such a decision is appealable to this Court by itself does not bar the right of appeal. The Section grants the High Court jurisdiction to intervene in arbitral proceedings wherein it is invoked. It follows therefore that the decision thereunder is appealable to this Court by virtue of the Constitution."

In so holding, the Court of Appeal in the DHL case not only encouraged and set a precedent for the intrusive nature of Courts, but the decision strongly exhibits the characteristics of legal formalism where judges' decisions are purely derived from enacted law and in this case the Constitution and the Arbitration Act. In keeping with the philosophical school of legal formalism, the Court, when it realized that Section 35 of the Arbitration Act is silent as to whether an appeal can be made to the Court of appeal, proceeded to invoke the provisions of the Constitution in reaching its decision.

Yet another interventionist approach can be gleaned by how the Court made a finding that Arbitration matters are subject to judicial review.

[1]Christopher J. Peters, "Legal Formalism, Procedural
[2]Principles, and Judicial Constraint in American Adjudication" available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=257312 accessed on 29th August, 2018.
Oliver Wendell Holmes Jr., "The Path of the Law," Harvard Law Review, Vol. 10 (1897): 457–78.

Guided by the provisions of the Fair Administrative Action Act, 2015 ("the FAA Act"), which was enacted pursuant to Article 47 of the Constitution, the Court in Sylvana Mpabwanayo Ntaryamira v Allen Waiyaki Gichuhi & another, Judicia

"An arbitrator is a non-state agency whose action, omission or decision affects the legal rights or interests of the parties before him to whom the arbitral proceedings relate cannot be doubted. It is therefore my view and I so hold that pursuant to the provisions of Article 47 as read with the provisions of the Fair Administrative Action Act, 2015, judicial review orders may where appropriate issue against the decisions of an arbitrator."

The above finding adopts a legal formalism point of view as it interprets the Constitution and the FAA in reaching a decision that arbitration matters are subject to judicial review. The above finding does not reflect the practical position. This is because the Arbitration Act is a complete code as regards to challenge of any procedure pertaining to the arbitration process, and as a result, leaves little or no room for judicial review.

Conclusion

Arbitration is one of the ways in which disputing parties access justice as is provided for in the Constitution. As far as the strict interpretation of the Model Law and the Arbitration Act is concerned as relates to Court's intervention, the Supreme Court in the Nyutu case (supra) in rendering its decision will inevitably set the pace for the course that arbitration matters should take and by extension, which philosophical school of thought will gain eminence in the Kenyan legal system.

(This article was first published in the Expert Guides Journal on Commercial Arbitration)

Your In-Out Employee: Casual Employees under the Employment Act, 2007

Wilkistar Mumbi
mumbi@njorogeregeru.com

The general characteristics of casual employees is that they work fewer hours per week than full-time employees; the duration of their employment if shorter; and that their employment automatically terminates after a certain period or upon the occurrence of a specified event.

Casual employment is often on an 'as needed' or 'on demand' or 'gig economy' basis.

The Employment Act of Kenya, 2007 (the Act) defines a casual employee as a person whose terms of engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time. The Kenyan Courts have a strict interpretation of this definition and have rarely interpreted otherwise. *Justice Ongaya in Peter Wambugu Kariuki & 16 other v Kenya Agricultural Research Institute [2013] eKLR* offered a wider interpretation of the definition where the Court held that casual employment is a state of existence to be deciphered from the facts of individual cases as weighed against the cited statutory definition of casual employee.

By its very definition, casual employment is the most basic form of employment. A casual employee is usually paid at the end of each day in accordance with section 5(2) (a) of the Act and his services may be terminated at the close of the day without notice.

Rights of Casual Employees

The casual employee has a right to be paid wages at the end of each day. Casual employees are remunerated under the Wage Bill. Though not provided in the Act, the employer impliedly contracts the employee with a reasonably safe working environment.

The Act provides that a casual employee who is aggrieved by the treatment of his employer under the terms and conditions of his employment may file a complaint with the labour officer. We further note that a casual employee can file a suit against his employer if he is injured while carrying out his duties under the Work Injuries and Benefit Act, 2007.

Conversion of Casual Employment

Often times a casual employee may be engaged in services that take lengthy periods of time. The Act provides that casual employment converts to a contract employment in the following circumstances:

CONTRIBUTORS' PLATFORM

1. If the employee works for a period or a number of continuous working days for over a month; or
2. If the employee performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting to three months or more.

The calculation of wages and the continuous working days, is inclusive of all rest days and public holidays.

Legal Entitlement upon Conversion

As per section 9 (1) of the Act, a casual employee whose employment is converted to contract is entitled to have his terms of service reduced in writing. It is the employer's responsibility to draw up the contract; ensure that it states the particulars of employment; obtain the employee's consent either by him signing or imprinting his thumb print in the presence of another person other than the employer.

Where an employee is illiterate or cannot understand the language in which the contract is written, or the provisions of the contract of service, the employer shall have the contract explained to the employee in a language that the employee understands.

The Kenyan Court of Appeal in *Rashid Mazuri Ramadhani & 10 others v Doshi & Company (Hardware) Limited & another [2018] eKLR* further elaborated on the casual employee's rights after conversion as follows:-

"Section 37 is the one which empowers the Employment and Labour Relations Court (ELRC) to convert a contract of service of an employee engaged on a casual basis, to one where such an employee is deemed to have been engaged under a contract of service and thereby entitling him/her to monthly wages and other benefits such as leave and certificate of service…"

The terms and conditions of work for employees would be stipulated in their respective contracts of service. However, the basic standards required under the Employment Act would have to be met. By basic standards, the law intends the employer to provide for leave, overtime, rest days etc. Any other benefits and privileges that these employees would enjoy would be found in their respective contracts of service.

After conversion, the employee's wages can be paid monthly and he can only be terminated with notice or payment in lieu of notice.

Challenges with the Law

The Act does not make a distinction between permanent employees and temporary employees. It simply defines an employee as: "an individual employed for wages or salary and includes an apprentice and an indentured learner". The standard of casual employment imported by the Act discourages employers from engaging employees on a casual basis. It is advisable for employers to clearly establish the nature of temporary engagements with their employees. The employers must note and differentiate between casual employment, piece-rate work and apprenticeship contracts which are often the types of employment with the shortest duration.

Brief Overview on Registration of Foreign Nationals in Kenya and the Issuance of Work and Investor Permits

J.M. Kamenju

jackson@njorogeregeru.com

Registration of Foreign Nationals

Registration of foreign nationals is governed by the Kenya Citizenship and Immigration Act, 2011 (KCI Act) and the Kenya Citizens and Foreign Nationals Management Service Act, 2011 under which a foreign national is defined as any person who is not a citizen of Kenya.

Accordingly, the law, more particularly, section 56 (2) of the KCI Act, requires that all foreigners resident within Kenya for a period exceeding ninety (90) days be registered with an immigration officer.

However the following persons are exempted from such registration:

a) a serving member of the armed forces, or the armed forces of a friendly power, and his/her spouse and children;
b) a public officer and his/her spouse and children;
c) a person who has been exempted from the provisions of the KCI Act under

section 34(3) of the said Act *(include accredited envoys to Kenya, diplomats/ consular staff and representatives to Kenya from the government of any Commonwealth country)*;

d) a refugee registered under the Refugees Act, 2006 (Act No. 13 of 2006);

e) a person who resides in Kenya for a continuous period not exceeding three (3) months and is in possession of a valid visitor's pass or other authority under the KCI Act such as a special pass or tourist visa.

Work & Investor Permits

A work permit is a document issued by the Director of Immigration Services, under the provisions of Section 40 of the KCI Act, 2011, to enable a foreign national(s) to enter into Kenya and engage in trade, prospecting, farming, business, professional employment, missionary activities or even reside in Kenya. The Director of Immigration issues work/residence permits upon the recommendation of the Permit Determination Committee which is an inter-ministerial Committee appointed by the Cabinet Secretary Ministry of Interior and Coordination of National Government.

Such issue is, however, not guaranteed and the Director may decline to issue a work/ resident permit in various instances such as where the Permit Determination Committee recommends such revocation or where the Director is of the view that such issue is not in the interest of the country. In the event an application is rejected or declined, any person aggrieved by the decision of the Director may appeal to the Cabinet Secretary, for review of the decision.

Classes of Permits

There are various classes of permits as provided for under Section 36(1) of the KCI Act as read with the 7th Schedule of the KCI Regulations, 2012. For the purpose of this article we will highlight Class D (issued to an employed person) and Class G (for investors).

a) Class D: (Employment) Permit

This permit is issued to a person who is offered specific employment by a specific employer, the Government of Kenya or any other person or authority under the control of the Government or an approved technical aid scheme under the United Nations Organization or some other approved Agency *(not being an exempted person under Section 34 (3) of the KCI Act)*, who is in possession of skills or qualifications that are not available in Kenya and whose engagement in that employment will be of benefit to Kenya.

The question of whether the skills being brought by an applicant are available in Kenya is an objective one noting that there are no set procedures or data available for purposes of reference by the immigration department. However, while applying one is required to attach (by uploading) evidence that the skills to be brought by the applicant are not available in the market. Other requirements include:

i) Duly filled and signed Form 25 (via the e-FNS portal);
ii) Two (2) copies of a detailed and signed cover letter from the employer/ organization/ self, addressed to the Director of Immigration Services;
iii) Copy of a valid national passport;
iv) Two (2) recent passport size coloured photographs;
v) Current immigration status if in the country;
vi) Copy of any previous permit(s) and or pass(es) held;
vii) Duly certified copies of academic and professional certificates;
viii) Curriculum vitae;
ix) Duly filled Form 27 (Report on Employment);
x) Name of a Kenyan understudy *(someone who one will be training for the duration of the permit)*;
xi) Certified copies of academic/ professional certificates of the Kenyan understudy;
xii) Curriculum vitae (CV) for the Kenyan understudy;
xiii) Full contact-address, email, cell phone, of the Kenyan understudy;
xiv) Clearance letter from relevant institutions (only needed in special circumstances);
xv) Certificate of company / organization registration (with respect to corporate bodies); and
xvi) Copy of Checklist *(downloaded via e-FNS)*.

It should be noted that documents in foreign languages should be translated into English by either the Embassy, Public Notary, or authorized /recognized institution.

Key to this Class of permit is the illustration of special skills by the applicant.

b) Class G: (Specific trade, business or consultancy) /Investor Permit

This permit is issued to a person who intends to engage, whether alone or in partnership, in a specific trade, business, consultancy or profession (other than a prescribed profession) in Kenya, and who: has obtained any license, registration or other authority or permission that may be necessary for the purpose; has in his/ her own right and at his/her full and free disposition sufficient capital and other resources for the purpose and one whose engagement in trade, business, consultancy or profession will be of benefit to Kenya.

The documentary proof of capital to be invested is at least USD 100,000.00. To this end the Kenya Investment Authority indicates that such proof of investment can be in form of a bank statement (whether from a local bank or a foreign bank) equipment and assets on site or import declaration forms /receipts showing that the investor has already bought equipment /assets worth the required capital.

CONTRIBUTORS' PLATFORM

In practice however, the monies required should be preferably deposited in a Kenyan bank where one is required to sign a consent form authorizing his or her bank to divulge information to the immigration department on the available monies in their account. As well as requiring the bank to verify the certified bank account statements that one would have filled with the department of immigration. The bank statements should clearly show the movement of the capital from the investor to the Kenyan bank.

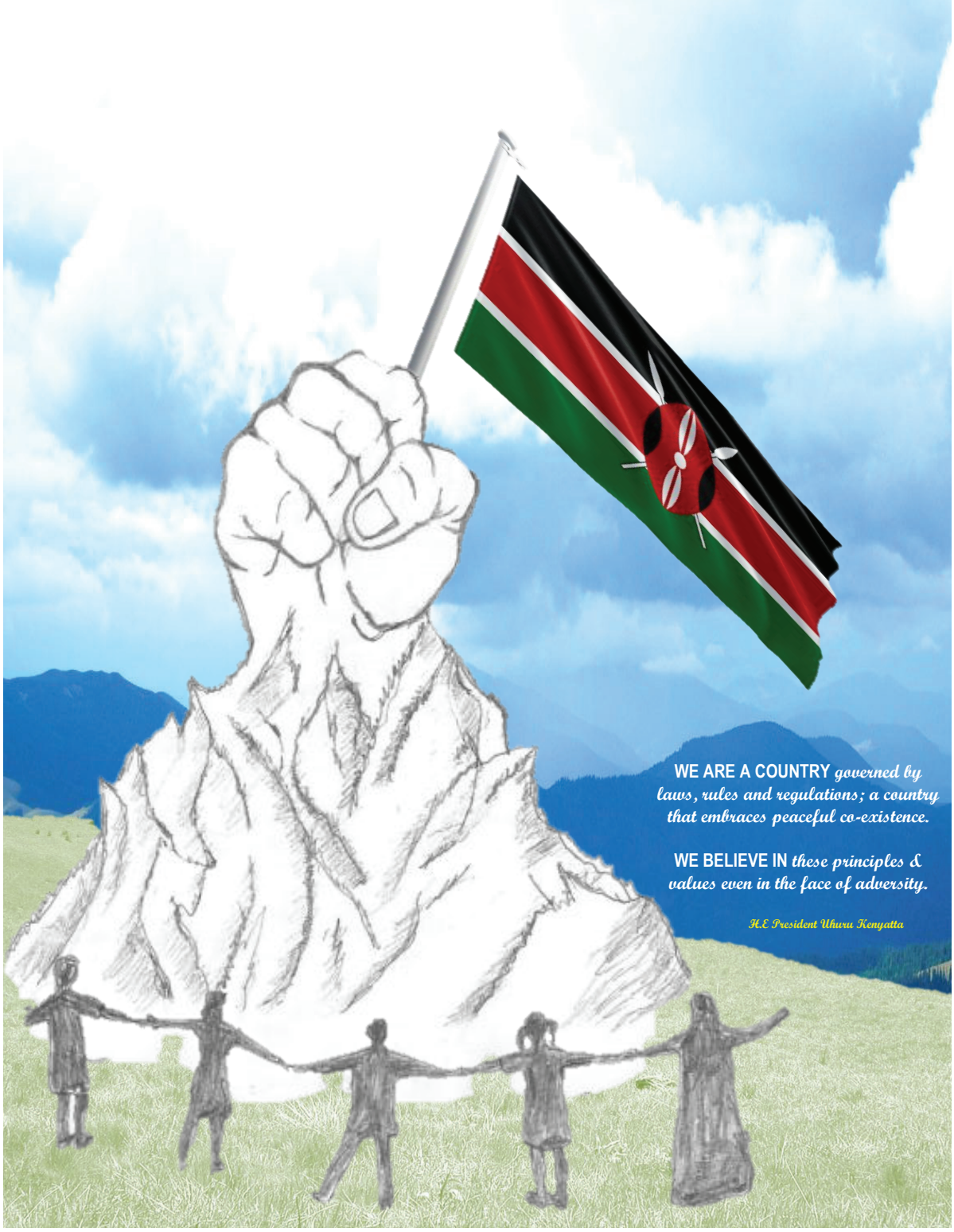
Requirements for class G work permit include

i) Duly filled and signed **Form 25** (*via the e-FNS portal);*
ii) Two copies of detailed and signed cover letter from the company/ organization, addressed to the Director of Immigration Services;
iii) Copy of a valid national passport;
iv) Two (2) recent passport size colored photographs;
v) Current immigration status if in the country;
vi) Copy of any previous permit(s) and or pass(es) held;
vii) Documentary proof of capital to be invested *(at least USD 100,000.00*);
viii) Certificate of incorporation of the company;
ix) Memorandum of Understanding & Articles of Association *(for companies incorporated under the repealed Companies Act Cap 486)*;
x) Shareholding Certificate *(CR 12)*;
xi) Copies of PIN Certificate;
xii) Clearance letter from relevant institutions *(where applicable)*;
xiii) Two (2) copies of bank statement verification form;
xiv) Proof of offshore transaction receipt / slip;
xv) Copy of Checklist.

Similar to Class D documentation, all documents required under Class G which are in foreign languages should be translated into English by either the Embassy, Public Notary, or authorized / recognized institution.

Key to this Class of permit is proof of capital.

It should, however, be noted that for both Class D & G applications, an applicant need only pay a processing fee of Kenya Shillings Ten Thousand (Kshs.10,000.00); issuance fees is paid within thirty one (31) days of approval of the application. It is also important to point out that the Cabinet Secretary for Interior and Coordination of National Government issued a directive last year (on or about 10th December, 2018) to the effect that foreign nationals shall NOT be allowed to remain in or come into the country prior to the issuance of their permits or passes.



ACKNOWLEDGMENTS

The editorial team would like to express its sincere gratitude to all those members of the Firm who, in one way or another, contributed to the conception, preparation and eventual production of this Newsletter. The dedication and input of the writers and contributors is appreciated and we look forward to continued support in the issues to follow.

Tel: + (254) 020 3586592, 254 020 231 9224
+ (254) 020 2612531, 254 (020) 261 3646
Fax: +254 020 2375302, 254 020 234911
Mobile: 0722-206-884, 0733-608-141

Email: info@njorogeregeru.com
Website: www.njorogeregeru.com
Dropping Zone No.8
Revlon Professional Plaza
Tubman Road / Biashara Street

NR&CoQuarterly |...Legal Briefs

Notes

Notes