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Preamble

The Legal Division continues to play its very important role of disseminating relevant legal knowledge to the University community through the bi-monthly Legal Digest. In this Digest we will highlight the subject of amendment to the Constitution of Kenya which is a topic currently under discussion in the political arena. There are several proposed amendments which have not yet been formalized in a Bill of Parliament but are being discussed among the leaders. Some leaders are proposing amendments to reduce the number of constituencies and counties and subsequently Senators and Governors. Some are also proposing reduction of the powers of the President and re-creation of the office of the Prime Minister. Others are calling for a referendum and terming it as part of the *Building Bridges to a new Kenyan Nation* initiative by President Uhuru Kenyatta and ODM Leader Raila Odinga.

The Digest will also look at recent judgments both local and international that are of significance.

Amendment to the Constitution

The Constitution of Kenya was passed in 2010 and since then there have been attempts to amend the Constitution through Constitution (Amendment) Bills. Chapter 16 of the Constitution provides the ways in which the Constitution can be legally amended, that is:

i). Through a referendum-under Article 255 as read together with Article 256 a proposed amendment to the Constitution shall be enacted by Parliament through a Bill and approved through a referendum if the proposed amendment relates to:

- the supremacy of the Constitution;
- the territory of Kenya;
- the sovereignty of the people;
- the national values and principles of governance under Article 10(2) of the Constitution;
- the Bill of Rights;
- the term of office of the President;
- the independence of the Judiciary and the commissions and independent offices;
- the functions of Parliament;
- the objects, principles and structure of devolved government; or

- the manner in which the Constitution shall be amended.

If a referendum is conducted then the proposed amendment will be deemed approved by the people if:

- at least 24% of the registered voters in each of at least half of the counties vote in the referendum; and
- the amendment is supported by a simple majority of the citizens voting in the referendum.

ii). Through an Act of Parliament-Article 256 states that a Bill may be introduced in either the National Assembly or the Senate for amendment of the Constitution. Such a Bill shall not be called for second reading in either House within 90 days after the first reading. The Bill will be passed when each House of Parliament has passed the Bill in both its second and third readings, by not less than 2/3 of all the members of that House. After Parliament passes a Bill to amend the Constitution then the Speakers of the two Houses shall jointly submit the Bill to the President for assent. If a Bill has to be approved through a referendum then the President shall request the IEBC to conduct within 90 days a national referendum for approval of the Bill and within 30 days after the Chair of IEBC has certified to the President that the Bill has been approved through the referendum, the President shall assent to the Bill.

iii). Through popular initiative-an amendment to the Constitution may be proposed by a popular initiative signed by at least 1 million registered voters. A popular initiative for an amendment to the Constitution may be in the form of a general suggestion or a formulated draft Bill. If it is in the form of a general suggestion the promoters must draft it into a Bill. The promoters will present the draft Bill and supporting signatures to the IEBC for verification of signatures. If IEBC is satisfied that the threshold has been met then it will circulate the Bill to each of the county assemblies for consideration. If a county assembly approves the Bill they will send their approval to the Speakers of both Houses of Parliament; if majority of the county assemblies have approved the Bill then it shall be introduced to Parliament and if a majority of the members of each House approve it then it shall be passed and presented to the President for assent.

According to the Constitution, these are the only three ways in which the Constitution can be amended. If for example a Bill proposes to dissolve the Nairobi City County then that will be a Bill subject to a referendum approval. This is because the same seeks to re-structure the devolved government. Before making any amendment to the Constitution one has to consider the type of amendment being proposed so as to know the proper amendment procedure to follow. It also has to be noted the question of referendum is a matter of law and not a matter of politics. The law is very clear on the circumstances in which a referendum will be called for and the procedure in

which a referendum will be conducted. However if there is a proposed amendment on the change of the date of the General Election this can be done through a Bill of Parliament and undergo the procedure under Article 256 without being subjected to a referendum.

Bills (proposed laws)

1. **The Nairobi City County Finance Bill, 2018**

This Bill has been tabled before the Nairobi City County Assembly. This is pursuant to Article 185 of the Constitution which empowers the County Assembly to make any laws that are necessary for effective performance of the functions of the county government.

This Bill seeks to introduce various taxes, fees and other charges that are payable to the Nairobi County Government. The Bill seeks to increase parking fees for saloon cars in the City from Kshs. 300 to Kshs. 400 per day. The Bill also stipulates that parking shall be charged at an hourly rate for some designated areas, it is not mentioned which areas this will be. A new levy on solid waste management has been imposed on homes; for low income or informal settlements the fees will be Kshs. 100 per month, Kshs. Sh300 will be charged for middle income households (medium estates) and Ksh500 per month for upmarket and CBD households.

According to the Bill, boarding primary, secondary, universities and colleges with over 2000 students will be required to pay a solid waste management fee of Ksh65,000/= per month . Hostels with over 100 rooms will be required to pay a garbage collection fee of Kshs. 30,000/= per month.

There will also seeks to revise charges for the erection of bill boards, internal advertisement in PSVs and multi-directional signage.

The new proposed levies are meant to bridge the budget deficit of the Nairobi City County Government. It is their hope that the monies raised from the various sources will generate enough revenue for the budget.

The Nairobi City County Assembly's Budget and Appropriation Committee will be holding public hearings to collect public submission on October 29 and October 30.

2. The draft Income Tax Bill, 2018

The National Treasury of the Republic of Kenya released the draft Income Tax Bill, 2018 for comments by stakeholders. The Bill has not yet been published in the Kenya Gazette. The Bill is still under review and will be amended following public participation and the parliamentary processes.

Some of the key highlights of the draft Bill are:

a) Repeal of the Income Tax Act Cap 470 Laws of Kenya

i). The National Treasury has reviewed the Income Tax Act, (CAP.470) in order to make it productive, simple to comply with, supportive to the Big Four agenda and the growth of the economy as well as embracing international best practice aligned with changes in the present business environment.

ii). The current Income Tax Act was enacted in 1974 and has over the years been amended; however some of the amendments have resulted in inconsistencies in the law; hence the need to overhaul the law and have a new Income Tax Act.

b) Tax Exemption

One of the key impacts that the draft Income Tax Bill proposes is to limit tax exemptions. The Bill proposes to reduce the current income tax exemptions under the current Income Tax Act.

The Bill provides that the income of an institution, body of persons, or irrevocable trust, of a public character established solely for the purposes of the relief of the poverty or distress of the public, or for the advancement of religion or education:-

(a) established in Kenya; or

(b) whose regional headquarters is situated in Kenya

in so far as the Commissioner is satisfied that the income is to be expended either in Kenya or in circumstances in which the expenditure of that income is for purposes which result in the benefit of the residents of Kenya:

The Bill stipulates that this exemption shall be valid only for a period of five years and renewable upon application.

The draft Bill stipulates that any exemption granted under the current Income Tax Act shall remain in force for a period not exceeding three years from commencement of the Bill if passed into law. The Bill does not specify what happens after the lapse of the three year period. The Bill does not also specify whether it will be all tax exemptions or only those that have been excluded under the Bill.

It is noteworthy that USIU falls under this category as it is an institution of higher learning.

Under the current Income Tax Act, there is no requirement for renewal of the tax exemption certificate after five years. Therefore if this Bill is passed into law in its current state it will make it tasking to retain the tax exemption status.

c) Increased revenue sources

The draft Bill proposes to increase income tax revenue by increasing various tax rates:

i). Kenyan resident companies whose taxable income exceeds Ksh 500 million will be subject to an enhanced rate of 35% on the excess above Ksh 500 million. The current rate is 30%.

ii). EPZ enterprises will be subject to a corporate tax rate of 10% (in its first ten years of operations) consistent with the corporate tax rate for Special Economic Zones ("SEZ's"). Currently EPZ enterprises are not being charged a corporate tax for the first ten years.

iii). A higher rate of 35% from 30% of income tax will be introduced for individuals earning more than Kshs 750,000 per month (Kshs 9 million per annum).

iv). Capital gains tax rate will be increased from 5% to 20% and an indexation allowance on the acquisition cost which is pegged to the Consumer Price Indices published by the Kenya National Bureau of Statistics.

v). The introduction of withholding tax of 5% on insurance premiums payable to non-resident companies which will see the increase of the cost of insuring with non-resident companies and it is likely that this cost will simply be passed on the Kenyan customers.

d) General penalty

The general penalty has been increased from Kshs. 100,000 to Kshs. 1 million and the term of imprisonment increased from 6 months to 3 years.

The Retirement Benefits Authority has issued Guidelines applicable to Retirement Benefit Schemes that are under the Authority. These Guidelines and Regulations will apply to the USIU Retirement Benefits Scheme. The USIU-A Retirement Benefits Scheme will need to amend its rules to comply with these Guidelines and Regulations.

The Retirement Benefits (Post-Retirement Medical Funds) Guidelines 2018-Legal Notice No. 192 of 2018

These Guidelines were enacted to provide the framework for the management and administration of post-retirement medical funds.

Some of the salient provisions of the Guidelines are as follows:

i). a retirement benefits scheme shall make provisions in the scheme rules to allow its members to make additional voluntary additional contributions in respect of the funding of a post-retirement medical fund.

ii). A member, sponsor or both shall make contributions to a post-retirement medical fund in accordance with the medical fund rules (rules relating to the establishment, administration and management of post-retirement medical funds).

iii). The contributions into a post-retirement medical fund shall either be a fixed percentage of the member's pensionable emoluments, including other employment-related emoluments; or a fixed shilling amount.

iv). Each post-retirement medical fund shall be administered and managed by trustees to the exclusive benefit of members and their beneficiaries.

v). The contributions made into a post-retirement medical fund shall be invested in accordance with the investment policy of the scheme: Provided that each scheme shall be required to prepare a separate investment strategy for the post-retirement medical fund where the value of the medical fund is at least fifty million shillings.

vi). Medical fund rules shall provide that a member shall not be permitted to access the benefits while the member remains in the employment of the sponsor. However, a member may, subject to the approval of the trustees, be allowed to access the medical benefits on the ground of ill health or if the member becomes incapacitate due to ill health.

vii). A post-retirement medical fund shall be required to conduct actuarial valuations of the fund at least once in every three years.

viii). The scheme rules shall specify how deficits or surpluses in the post-retirement medical fund shall be offset or utilised.

The Retirement Benefits (Good Governance Practices) Guidelines, 2018-Legal Notice No. 193 of 2018

The purpose of these Guidelines are to enable sponsors, members, trustees and service providers to implement and promote proper standards of conduct and sound governance practices.

The salient provisions of these Guidelines are:

i). Under the Guidelines trustees of a scheme shall now be mandated to establish a code of conduct of their retirement benefit schemes which code shall set the values and ethical standards, corporate governance values and standards of integrity to be applied in the management of the scheme. The code of conduct shall be signed by every member of the board of trustees.

ii). Trustees of a scheme shall have an understanding of, and ensure that the scheme complies with, the Constitution, the Retirement Benefits Act and any other written laws governing retirement benefits schemes. Trustees shall obtain professional advice and in respect of the affairs of the scheme.

iii). Among the factors to be considered in the composition of a board of trustees will be:

a. the board of trustees shall have a broad mix of skills and competencies and shall include at least one trustee who shall be professional qualified in any matter related with finance as may be recognised by a relevant industry body;
b. the composition of the board of trustees shall take into account gender balance, and the age and experience of trustees; and
c. the tenures of trustees shall be staggered so that not more than one-third of the trustees shall simultaneously retire.

iv). Members shall participate in the governance of the scheme on the basis of "one member, one vote" rule notwithstanding the size of the members' contributions in the scheme.

v). The board of trustees of a scheme shall, in the scheme's audited financial statements, report the extent to which the board has adhered to the principles of good governance set out in these guidelines.

vi). The board shall constitute the administration and communication committee to handle the scheme's administration, communication and reporting obligations. The chairperson of the board of trustees shall not be a member of the committee.

vii). The board of trustees shall constitute the finance and investment committee to review the scheme's budget and investments and, at least once in every three months, recommend to the board the necessary actions in respect of the budgets or investments. In respect of large scheme, the committee shall review all large projects and monitor the projects' implementation.

viii). The board of trustees shall constitute the audit and risk management committee to review the financial conditions of the scheme, the scheme's internal controls and performance, and recommend remedial actions.

The Retirement Benefits (Occupational Retirement Benefits Schemes) (Amendment) Regulations 2018-Legal Notice No. 139 of 2018

These Regulations amend the Retirement Benefits (Occupational Retirement Benefits Schemes) 2000 as follows:

i). Introduction of the definition of medical fund which is a fund into which all contributions, investment earnings, income and all other moneys payable under the scheme rules or the provisions of this Act and subsidiary Regulations shall be paid for the purposes of accessing medical benefits in retirement. The medical fund is applicable under the Retirement Benefits (Post-Retirement Medical Funds) Guidelines 2018.

ii). No trustee engaged in any profession or business shall be engaged in professional services done by him or his firm in connection to the scheme.

iii). The scheme rules may provide for the payment of retirement benefit by way of an income draw down, as an alternative or in addition to the purchase of annuity for members at retirement age: Provided that the scheme members shall take a minimum period of ten years.

HOT FROM THE BENCH

1. **Wanuri Kahiu & another v CEO, Kenya Film Classification Board Ezekiel Mutua & 4 others [2018] eKLR**

This was a Petition filed at the High Court challenging the constitutionality of sections of the Films and Stage Plays Act Cap 222 for violating freedom of expression including freedom of artistic creativity under Article 33(1) of the Constitution, freedoms of the media under Article 34 of the Constitution, a right of access to information under Article 35 and principles of legality under Article 50(2)(n) of the Constitution that requires that any law which limits a fundamental right and freedom should not to be vague or over broad.

The Petitioner, Wanuri Kahiu, sued the Kenya Film Classification Board (KFCB) and its CEO, Mr. Ezekiel Mutua, claiming that the ban of her film "Rafiki" was an infringement of her constitutional rights, that is, freedom of expression, guaranteed under Article 33 of the Constitution. Together with the Petition, the Petitioner filed an application seeking conservatory orders and stay against the decision of the Kenya Film and Classification Board banning viewing of the film "Rafiki" in Kenya. The Petitioner claimed that the ban on her film deterred her from entering the film under the 'Foreign Film'category at the International Film Competition that includes the Best Foreign Language Film Category at the Academy Awards (Oscars) to be hosted by the USA Academy of Motion Picture Arts and Science for which entries close on 30th September 2018.

KFCB claimed that the ban was justified due to the fact that the film contains objectionable classifiable elements such as homosexual practices that run counter to the laws and culture of Kenyan people. It was their view that the moral of the story in the film was to legitimize lesbianism in Kenya contrary to the laws and the Board's content classification guidelines.

The Court ruled in favour of the Petitioner in the application and gave orders staying the orders of KFCB and allowed the film to be viewed by willing adults in Kenya up to 30th September, 2018. This would allow the Petitioner to enter the film in the Oscars Awards. The full Petition is yet to be heard by the courts.

2. Eunice Wairimu Muturi & another v James Maina Thuku & another [2018] eKLR

In this matter the Plaintiffs, Eunice Wairimu & Washington Muchiri, sued James Maina and Barclays Bank of Kenya on the claim that James Maina had withdrawn an amount of Kshs 9,913,647.50, from Barclays Bank without the proper authorization of one Gerald Muturi Maina. Gerald Muturi Maina and James Maina had opened a joint account at Barclays Bank of Kenya, Gerald then went ahead to deposit an amount of Kshs. 10,000,000/= in that joint account on different dates. He thereafter died and James Maina withdrew from the account the sum of Kshs. 9,913,647.50. The legal representatives (the Plaintiffs) of Gerald Muturi then instituted this matter seeking the court to order James Maina to refund the money to the account on the basis that the money belonged to the deceased, Gerald Muturi, and therefore it follows that the same then belonged to the estate of the deceased.

The court delivered judgment in favour of the Plaintiffs and ordered James Maina to refund the money together with interest. The judge found that James Maina had forged the signature of the deceased on the RTGS form; therefore he was liable to refund the money withdrawn. The judge however made the following remarks:

i). the legal effect of the death of a customer is that is to terminate the bank-customer contract and the mandate of the bank under that contract; and

ii). a bank that makes a payment under a mistake of fact which includes paying against a forged cheque or forged signature, is liable to refund the money to the aggrieved party but the Bank has a right to recover the money from the person benefiting from the payment. In this case however the judge stated that there was no evidence to show the bank was aware of the forged signature or that it colluded with James Maina, the Plaintiffs did not also seek any relief against the Bank; and that is why the court ordered James Maina to refund the money and not the Bank.

4. Victoria Ipomai v Sanlam Kenya PLC [2018] eKLR

Victoria Ipomai (applicant) was appointed as Group Chief Finance Officer by Sanlam Kenya PLC) (Sanlam). The facts of the matter were that on 17 November 2017, Sanlam instituted investigations on an ex gratia payment allegedly made without authorisation. On 1 February 2018, Sanlam's Board Chairman, John Simba and 2 other senior managers summoned the applicant to a meeting at a hotel where she was informed that the investigations had found her culpable (gross negligence/unacceptable conduct), and that it had been resolved that the parties mutually separate.

According to the applicant, the Chair handed to her a draft Mutual Termination Agreement and gave her 2 hours to make a decision thereto, and because of an apparent loss of trust, she agreed to the mutual separation on principle, but subject to negotiations.

The applicant sought legal advice, and her legal advisers wrote to Sanlam proposing the issuance of a satisfactory Certificate of Service, payment of back pay at recommended basic rate for job grade 10 together with pension contributions, 12 months remuneration as compensation, retention of loan subsidy at 6% to 7% and continuance of medical insurance for a further 1 year. Instead of responding to the proposed demands by the applicant, Sanlam's acting Group Chief Executive Officer wrote to the applicant on 13 February 2018 notifying her to appear for a disciplinary hearing in Cape Town, South Africa on 8 March 2018. Sanlam indicated it would cater for all related costs and asked the applicant to proceed on paid leave.

The applicant then instituted this suit at the Employment and Labour Relations Court in Nairobi and in the interim she sought stay of the intended disciplinary proceedings scheduled for 8th March 2018, until the Labour Court heard and determined her main Claim.

The Court found that the *Committee* constituted by Sanlam to handle the applicant's disciplinary case was not properly constituted in terms of its own Policies (the Court is of course alive to the possibility/desirability of an employer providing for an external expert to chair or participate in disciplinary hearings but there ought to be express provision for such in the relevant disciplinary procedures). The Court also found that the parties are domiciled in Kenya and the employment contract was being performed in Kenya. It was subject to Kenyan law as well and the applicant became assured of the protections thereunder. Therefore, holding the disciplinary hearings outside the jurisdiction of the Court (in Cape Town) without a clear agreement as to the law to be applied leaves doubt at this stage as to whether the protections assured employees would be observed.

The court held that an employer who has a disciplinary policy should scrupulously comply with the requirements of such policy and if there is no compliance, the court can intervene in the disciplinary proceedings of an employer.

On that basis, the Court granted orders in favour of the Applicant and ruled that pending the hearing and determination of the main Claim in the suit, the intended disciplinary hearing against the applicant scheduled for 8 March 2018 or any other date in Cape Town South Africa was suspended. The court however clarified that it had not interdicted disciplinary proceedings in Kenya in accordance with Sanlam's Human Resources Policies and Procedures Manual.

5. **Republic v Director Civil Registration Services & another Ex-parte Simon John Githieya [2018] eKLR**

In this matter the Applicant (Simon John Githieya) sued the Director of Civil Registration Services and the AG seeking inclusion of his father's name in his birth certificate. The Applicant is a British and Kenyan national residing in the United Kingdom. The Applicant alleged that his father's name was erroneously entered in his birth record as Josef Kamande instead of Denis Wilfred Graham, and he was seeking a change of the same. The Director of Civil Registration Services refused the request for change of name claiming that the change of name could only be effected at the joint request of his mother and father, or upon production of evidence that his father and mother were married; following this decision the Applicant filed suit.

The Court ruled in favour of the Applicant and held that the Principal Registrar of the Director Civil Registration Services is empowered and has the discretion under section 28 of the Births and Deaths Registration Act to correct any error or omission in any register or index, and such corrections shall be made without erasing the original entry, and shall be authenticated by the signature of the Principal Registrar.

Since this was a judicial review matter the court did not go into the merits of the decision of refusing to amend the birth certificates. The court however ruled that the decision was made without proper reasons and without considering the appropriate law. The court therefore ordered the Director, Civil Registration Services to consider the said Applicant's application in accordance with the provisions of the Constitution and all applicable laws, and to accord the Applicant a fair hearing and to consider all materials and evidence availed by the Applicant during the said consideration.

International Matters

ICSID Case No. ARB/15/29 Cortec Mining Kenya Limited, Cortec (Pty) Limited And Stirling Capital Limited

This was a matter instituted at the International Centre for Settlement of Investment Disputes (ICSID) by Cortec Mining Kenya Limited (Cortec), a mining company, against the Republic of Kenya. ICSID is an organization of the World Bank Group; Kenya ratified the ICSID Convention in 1967 therefore making it subject to the jurisdiction of the ICSID.

The dispute arose out of a mining project at Mrima Hill in Kenya, said to be home to one of the world's largest undeveloped niobium and rare earth deposits. The Claimants

contended that their investment in this project was "nationalized" in August 2013, after they had expended six years and millions of dollars in exploration and development.

According to the Government of Kenya, Cortec knew, as a matter of statute law, a number of key approvals and consents were required and conditions were to be satisfied *before* they could be allowed to obtain a valid mining licence, including requirements arising out of the special protected status of Mrima Hill as a forest reserve, nature reserve and national monument. Cortec was also required to produce a mining feasibility and an approved Environmental Impact Assessment licence, which, according to the Government, they never did. Instead, apparently losing patience with Kenya's "bureaucratic process", Cortec sought political intervention from the administration of President Mwai Kibaki and engaged the services of an intermediary (said by the Government to be unsavoury), Mr. Jacob Juma. Cortec's intent, according to the Government, was to circumvent the legal obstacles and procure a mining licence illegally.

Cortec challenged the "revocation" before the Kenyan High Court, which, on 20th March 2015, ruled that the mining licence issued to Cortec was *void ab initio* on the basis, *inter alia*, that the mining of Mrima Hill was by statute prohibited, and that in any event Cortec had not satisfied the prerequisites to comply with Kenyan law. Cortec then commenced this arbitration. Subsequently, the decision of the Kenyan High Court was upheld (on narrower grounds) by the Kenyan Court of Appeal, which at the time was the highest court in the country.

ICSID found that Cortec had not legally obtained the mining licence. It was held that if the licence was issued it was voidable if not void. The ICSID Tribunal found that the Government of Kenya had established that the mining licence issued to Cortec was contrary to the laws of Kenya and international law and did not qualify as an investment protected by *The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments, dated 13 September 1999 (BIT Treaty)* or the ICSID Convention.

ICSID dismissed Cortec's claim with costs to the Republic of Kenya in the sum of US $3,226,429.21 (Kshs. 327,159,921.89) plus US $322,561.14 (Kshs. 32,707,699.60) in ICSID costs.

***Hakuna Matata* Trademark**

It recently came to the fore that Disney Enterprises Inc. (Disney) had renewed registration of the trademark "Hakuna Matata".
Most Kenyans believed that Disney had just now registered the trademark but the fact is that the trademark application was filed way back in 1994 (probably in anticipation of the release of the movie "Lion King"). Disney is just renewing the registration now.

The contention in the renewal is that the phrase "hakuna matata" can be considered a traditional cultural expression which is protected as intellectual property under the Protection of Traditional Knowledge and Traditional Cultural Expressions Act 2016.

It is noteworthy that Kenya has lost out on some of its traditional intellectual property, to other countries, case in point the *kikoi*, because of lack of their protection. The country now needs to move towards proper implementation of the Protection of Traditional Knowledge and Traditional Cultural Expressions Act, so as to ensure it is not others benefiting from our intellectual property.

SA Judge rules in favour of partner in road accident fund claim

In November 2018 a South African court delivered a groundbreaking judgment for unmarried couples, ruling that the country's Road Accident Fund (RAF) must pay out a woman who was being financially supported by her long-term, live-in boyfriend, who died in a car accident. Gauteng High Court Judge Colleen Collis said there were many couples who chose to live together rather than get married and some of the relationships are akin to marriage. The court held that courts also have a duty to develop the common law in accordance with the spirit of the constitution and the Bill of Rights and that judges can and should adapt the law to reflect the changing social, moral and economic fabric of the country.