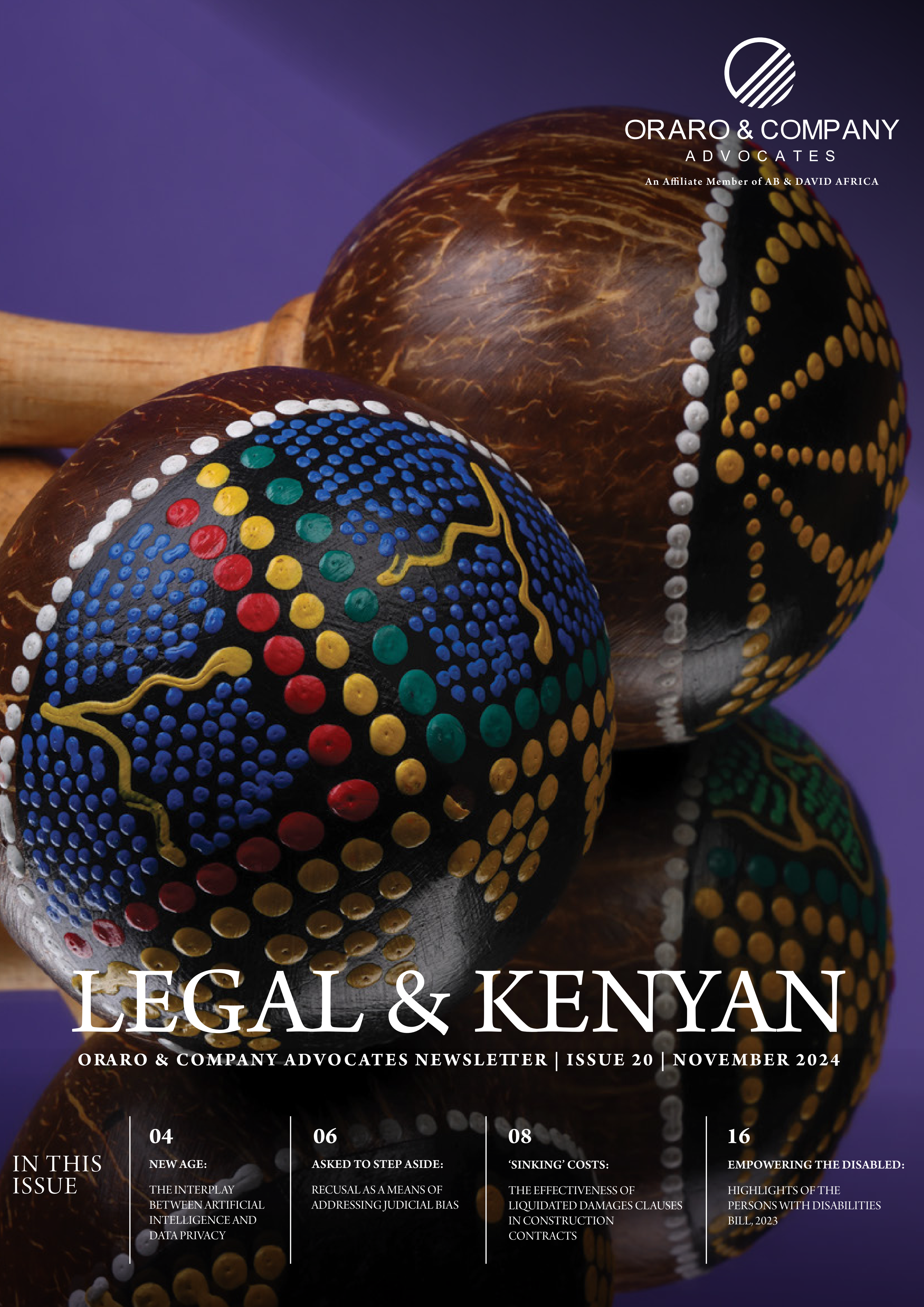

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LEGAL & KENYAN

ORARO & COMPANY ADVOCATES NEWSLETTER | ISSUE 20 | NOVEMBER 2024

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John Mbaluto
Deputy Managing Partner | john@oraro.co.ke

CONTRIBUTORS
Ajak Jok Ajak - Associate
Alfonce Oduor - Legal Assistant
Brian Onyango - Associate
Cindy Oraro - Partner
Claire Mwangi - Senior Associate
Hellen Mwongeli Mutua - Senior Associate
Jacob Ochieng - Partner
James Kituku - Partner
John Mbaluto - Deputy Managing Partner
Jonathan Kisia - Associate
Jonathan Sagini - Legal Assistant
Melanie Mwenda - Legal Assistant
Noella Lubano - Partner
Venessa Sifunjo - Legal Assistant
Wilson Mwania - Bill Reviewer
Zahra Omar - Associate

Coming Full Circle: Issue Twenty

Legal & Kenyan began in August 2015 with a vision to share insightful, thought-provoking perspectives on Kenya's legal landscape with our readers. Our inaugural Issue covered a variety of topics, including my first article titled "*Section 23 of the Registration of Titles Act – Did It Really Protect the Bona Fide Purchaser*?" which explored the uncertainties surrounding land title protection under the law as it stood then, and which was sure to receive due input from the Supreme Court, as appeals to Kenya's topmost Court lay in wait. Sure enough, and in coming full circle, Issue 19 of *Legal & Kenyan*, featured an article entitled "*Upended: The Supreme Court Extinguishes the Doctrine of the Bona Fide Purchaser of Land*", being a critique of the Supreme Court's decision on the protection offered to a *bona fide* purchaser of land and sanctity of title.

Similar full circle coverage of shifting legal sands can be seen in Issues 1 and 12 with regard to the right of appeal from the High Court to the Court of Appeal on applications seeking the setting aside of arbitral awards under section 35 of the Arbitration Act, 1995, with the Supreme Court ultimately expounding upon the said right of appeal and propounding a sieve mechanism for purposes of leave. In short, *Legal & Kenyan* has indeed lived up to its promise and vision of keeping our readers abreast with significant developments on the Kenyan legal scene.

In this Issue, Jacob Ochieng gets the ball rolling with an insightful discussion on the interplay between artificial intelligence and data privacy. Next, Claire Mwangi and I look at recusal as a mode of tackling perceived judicial bias, followed by Noella Lubano and Zahra Omar who explore the effectiveness of liquidated damages clauses in construction contracts. Cindy Oraro and Jonathan Kisia are up next with a follow up piece from Issue 18 of *Legal & Kenyan* on the international financial reporting standards, this time with a focus on Africa's corporate sector.

It doesn't stop there. Hellen Mwongeli Mutua and I team up to unpack the Supreme Court's position on illegally obtained evidence, while the indefatigable duo of Noella Lubano and Zahra Omar return to share their expertly delivered insights on interim measures of protection in arbitration. James Kituku and Brian Onyango then chime in to highlight salient provisions of the Persons with Disabilities Bill, 2023, and Ajak Jok Ajak and I fire the last salvo with an incisive look at the financial inclusion of refugees in Kenya.

Also featured in this Issue is a celebratory note (with photos galore) in which we reflect on the firm's journey of positive environmental impact through the initiative, Oraro & Co. for the Ozone Run, now in its third year running.

Enjoy the read!

John Mbaluto, FCIArb
Editor

Founding Partner's Note

Technology plays a crucial role in enhancing productivity, saving time, cutting costs, improving communication, and expanding access to information. However, like all innovations, it presents challenges, most notably around data privacy. As we continue to adapt to a rapidly changing world, it's crucial to approach technological advancements ethically, ensuring that everyone's rights are upheld.

With that in mind, I invite you to explore the 20th issue of our flagship publication, *Legal & Kenyan*, where our group of authors delve into artificial intelligence and data privacy, financial inclusion of refugees, empowering people with disabilities, amongst a host of other exciting legal topics. We hope you enjoy these discussions as much as we enjoyed bringing them to you.

George Oraro SC
Founding Partner | goraro@oraro.co.ke

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Oraro & Company Advocates go above and beyond for their clients. They are always available to provide prompt, accurate and commercially useful legal advice. They are also very honest about the probability of success of suits and have a very high success rate in litigation practice in Kenya.

LEGAL 500

Jacob Ochieng
Partner | jacob@oraro.co.ke

NEW AGE:

THE INTERPLAY BETWEEN ARTIFICIAL INTELLIGENCE AND DATA PRIVACY

Introduction

Artificial intelligence (**AI**) is now a pervasive phenomenon in the digital world, offering a wide range of everyday uses. At the same time, AI introduces new and unpredictable risks, including the possible invasion of privacy. This article aims to analyse the implications of AI on data privacy and proposes various approaches to mitigate these risks in a rapidly evolving digital environment.

The Constitutional underpinning of data protection is the right to privacy under Article 31 of the Constitution of Kenya, 2010. Further, the Data Protection Act, 2019 (**the Act**) was enacted to give effect to the right to privacy. Under section 37 of the Act, commercial use of data is expressly forbidden except where consent is obtained, the data subject is anonymised, or the use of data is authorised under written law.

Against this backdrop, AI systems typically involve commercial use of data as it involves gathering, storing and analysing vast amounts of personal data, to generate appealing output which can be sold to third parties. Therefore, there is need to adopt ethical data management practices aimed at forestalling potential data breaches thereby guaranteeing the secure and responsible use of data.

Key Concern

The era of Big Data - characterised by the surge in data collection, creation, and storage due to the expansion of the internet - is a key enabler of the rapid rise of AI. As AI continues to proliferate globally, it is expected that the demand for data will similarly increase thereby pushing companies to collect more and diverse types of data from data subjects. In their relentless pursuit of vast data collection, these companies may bypass the underlying principles of data protection under section 25 of the Act. Therefore, this largely unchecked collection of data presents distinct privacy risks that transcend individual concerns, escalating to societal-level threats. Furthermore, the Act, although comprehensive, falls short of addressing the complexities of AI development and the consequential privacy issues that arise.

Issues Arising

Predictive AI, which refers to a computer program's ability to recognise patterns, predict behaviours, and project future events using statistical analysis, relies on vast data sets to conduct advanced pattern analysis. Faced with these demands for data, AI developers like OpenAI have had to seek alternative sources of data to construct and train their models.

Generative AI models can also produce original output that resembles human creativity, such as text, images, music, or code, based on the data they have been trained on. These AI models have captured public attention with their widespread use and have sparked concerns about how they are trained, particularly regarding the data they use and the potential privacy risks associated with interacting with them.

A major issue with these AI models is a lack of transparency around how companies acquire their training data, leading to significant privacy concerns. Real-life examples demonstrating the privacy risks posed by AI systems include the following:

- In 2024, a group of eight (8) newspapers sued ChatGPT maker OpenAI and Microsoft, accusing the tech giants of unlawfully using millions of copyrighted news articles without authorization or compensation to train their AI chatbots.
- In 2024, a YouTuber sued OpenAI for transcribing and using his videos to train its artificial intelligence system.
- Closer home, Vodacom Tanzania was sued in a USD 4.3 Million lawsuit by Sayida Masanja, a businessman, who claimed that the telecom operator fed his personal information to OpenAI's ChatGPT without his consent thereby infringing his privacy.

As AI technologies advance, new avenues for privacy violations are emerging, such as the potential for generative AI systems to infer personal information about individuals or allow users to target others by generating defamatory or impersonating content. As such, there is a likelihood of future product liability lawsuits by data subjects in Kenya being instituted against AI developers like OpenAI.

Further, the data gathered can be exploited to deliberately target individuals for identity theft, fraud, and other cybercrimes. These systems also produce predictive or creative outputs which, through relational inferences, can affect people who were not part of the training datasets or who may have never used these systems. Research shows that when personal, confidential, or legally protected data is included in training datasets, AI systems can retain and later reveal this data as part of their outputs.

As technology becomes increasingly intertwined with our lives, automated systems based on group membership can amplify social biases and stereotypes, leading to adverse decisional outcomes for large segments of the population. People often engage with systems that they may not perceive as highly technical, such as applying for a job, yet AI algorithms may influence whether their applications are reviewed. Another example of how pervasive AI has become is in the healthcare sector where AI systems are increasingly being utilised to analyse patient data as well as support both diagnosis and treatment. These systems collect and examine sensitive medical information, which necessitates robust safeguards to maintain patient privacy.

Given the challenges AI poses to data privacy, as outlined above, it is concerning that we currently rely on AI companies to remove personal information from their training data. Despite the data subject's rights to erasure and to be forgotten, developers can resist such requests by claiming that the provenance of the data used in training AI cannot be proven - or by ignoring the requests altogether. What is needed is a shift towards ensuring that data collection for AI training aligns with the principles of data protection enshrined under the Act.

Conclusion and Recommendations

Currently, Kenya lacks a dedicated or specific AI legal and regulatory framework. However, several existing regulations and initiatives are pertinent to AI development and usage. The Act serves as a foundational legislative piece for safeguarding data in Kenya. Additionally, the Computer Misuse and Cybercrimes Act, 2018 addresses offences related to digital platforms, which could encompass malicious applications of AI within the country.

The era of Big Data - characterised by the massive surge in data collection, creation, and storage as the internet expanded - was a key enabler of the rapid rise of AI. As AI continues to proliferate globally, it is expected that the demand for data among developers will similarly increase thereby pushing companies to collect more and diverse types of data from data subjects.

In 2018, the Kenyan government also established the Blockchain and Artificial Intelligence Task Force which investigated the potential of AI in the public sector and recommended the creation of an AI policy and regulatory framework for Kenya.

While these measures represent significant progress in mitigating the risks associated with unrestrained data collection and commercialization, the following recommendations can further support AI compliance with data privacy standards:

i) Implementing legal frameworks that regulate data intermediaries, that is, data controllers and processors. This can serve as a robust governance mechanism, establishing third parties with clearly defined fiduciary responsibilities aimed at protecting the interests of data subjects. The rationale behind data intermediaries is that an exclusive focus on individual privacy rights may be too narrow, necessitating a more comprehensive and collective approach to data governance. In the case of Large Language Model training – that refers to trained AI models such as ChatGPT – huge datasets are collected and generated, and it would be arduous for each individual linked to this data to negotiate for their data rights. Data intermediaries then come in to give a collective solution as they would play a big role in mediating the relationship between individuals and companies. These entities would function as cooperatives that aggregate data from various sources thereby solving the challenge relating to the volume of consents required in this situation. They would be tasked with managing access to this data in a way that aligns with the values and priorities of the data subjects, ensuring that their interests are safeguarded throughout the AI development process (i.e., through licensing agreements).

ii) Enactment of the proposed Kenya Robotics and Artificial Intelligence Bill, 2023 as well as implementation of the Artificial Intelligence Code of Practice. These dual regimes would collaborate to advance the responsible and ethical development of AI technologies by providing clear guidelines for organisations. These guidelines would emphasise transparency, explainability, and controllability in AI systems. A robust legislative and regulatory framework will define the responsibilities of AI stakeholders throughout the AI lifecycle, requiring organisations to disclose AI data sources and mitigate risks, particularly those related to data breaches. AI providers will be responsible for monitoring operations, overseeing model development and updates, assessing user and community impacts, and ensuring compliance with legal and ethical standards.

iii) Adopting a supply-chain approach to data privacy. AI is pegged on the training of data pieces or data input which influences the AI output. This necessitates the need to ensure data set accountability and transparency all through its lifecycle from input to output thereby broadly looking at the entire data ecosystem that feeds AI to ensure compliance. It is therefore essential to embed data protection throughout the entire lifecycle of technologies used to train AI models, ensuring that personal data is automatically safeguarded within these systems.

John Mbaluto
Deputy Managing Partner | john@oraro.co.ke

Claire Mwangi
Senior Associate | claire@oraro.co.ke

ASKED TO STEP ASIDE:

RECUSAL AS A MEANS OF ADDRESSING JUDICIAL BIAS

Introduction

An allegation of judicial bias calls into question the concept of fair hearing, and the often-touted clarion call against perceptions of judicial bias is that *"justice must not only be done but must also be seen to be done"* – as per Lord Hewart, the then Chief Justice of England in *Rex v Sussex Justices (1924) 1 KB 256.*

Judicial recusal refers to the withdrawal of a judicial officer from ongoing proceedings, for reason of a conflict of interest, perceived bias or lack of impartiality. As an inherent rule, judicial officers are expected to be independent, impartial and beacons of integrity – with recusal offering a means of redress should questions arise as to the lack of the foregoing attributes in relation to a judicial officer.

The importance of recusal in fostering confidence and trust in the administration of justice was underscored by Warsame J (as he then was) in the case of *Alliance Media Kenya Limited v Monier 2000 Limited & Njoroge Regeru (2007) KEHC 2518 (KLR)* as follows:

"In my understanding, the issue of disqualification is a very intricate and delicate one. It is intricate because the attack is made against a person who is supposed to be the pillar and fountain of justice… justice is deeply rooted in the public having confidence and trust in the determination of disputes before the Court. It is of paramount importance to ensure that the confidence of the public is not eroded by the refusal of Judges to disqualify themselves when an application has been made."

When to Recuse Oneself?

A judicial officer should recuse himself in the event a conflict of interest arises in a matter in which he is acting. Under Regulation 20 (1) of the Judicial Service (Code of Conduct and Ethics) Regulations, 2020 (**the Judicial Service Regulations**) a Judge is obligated to use the best efforts to avoid being in situations where personal interests conflict or appear to conflict with his official duties.

Recusal is a matter of judicial discretion and judicial officers should recuse themselves whenever they feel they may not appear to be fair or where they feel their impartiality would be called into question. Regulation 21 of the Judicial Service Regulations, behoves a judicial officer to disqualify oneself in proceedings where his or her impartiality might reasonably be called into question, including but not limited to instances in which the judicial officer has a personal bias or prejudice concerning a party or his advocate or personal knowledge of facts in the proceedings before him. The Judicial Service Regulations are intended to ensure maintenance by judicial officers of integrity and independence of the judicial service.

A judicial officer may recuse himself or herself in any proceedings in which his or her impartiality might reasonably be questioned, including instances where the judicial officer:
i) is a party to the proceedings
ii) was, or is a material witness in the matter in controversy
iii) has personal knowledge of disputed evidentiary facts concerning the proceedings
iv) has actual bias or prejudice concerning a party
v) has a personal interest or is in a relationship with a person who has a personal interest in the outcome of the matter
vi) had previously acted as a counsel for a party in the same matter
vii) is precluded from hearing the matter on account of any other sufficient reason
viii)a member of the judicial officer's family has economic or other interest in the outcome of the matter in question

The foregoing list is by no means exhaustive and the overriding principle is to ensure that the perception of fairness is at all times maintained as was stated by the Supreme Court in the case of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others (2013) eKLR* as follows:

"...it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised."

Objective Standard

Noting that bias may be easy to detect in others but difficult to detect in oneself – the standard to be applied when considering recusal is an objective rather than subjective one. As was stated by the Court in *Sabatasso v Hogan 91 Conn. App. 808, 825 (2005)*:

"The standard to be employed is an objective one, not the Judge's subjective view as to whether he or she can be fair and impartial in hearing the case… Any conduct that would lead a reasonable person knowing all the circumstances to the conclusion that the Judge's impartiality might reasonably be questioned is a basis for the Judge's disqualification. Thus, an impropriety or the appearance of impropriety that would reasonably lead one to question the Judge's impartiality in a given proceeding clearly falls within the scope of the general standard… The standard is not whether the Judge is impartial in fact. It is simply, whether another, not knowing whether or not the Judge is actually impartial, might reasonably question his impartiality, on the basis of all the circumstances."

Doctrinal Exceptions

There may be circumstances in which judicial officers may be compelled to continue sitting, notwithstanding concerns on perceptions of bias or conflicts of interest. The "*doctrine of necessity*" has been used for a long time in common law jurisdictions to allow judges to sit in matters where the Court does not have an alternative competent person to adjudicate a matter before it, and thus quorum cannot be formed without him and no other competent Court can be constituted.

The "*doctrine of the duty to sit*" flows from the Constitution and common law. Since all judicial officers take an oath to serve and administer justice, it is implied that there is a duty to sit imposed upon them by the value and the principle of the rule of law. Judicial officers should thus resist the temptation to recuse themselves simply because it would be more convenient to do so. The doctrine requires judicial officers not to recuse themselves unless there are compelling reasons not to sit. The doctrine was discussed by the Supreme Court (Ibrahim, SCJ) in his Lordship's concurring opinion in *Gladys Boss Shollei v Judicial Service Commission (2018) eKLR* stating that the doctrine safeguards a party's right to be heard and determined before a Court of law:

"Tied to the Constitutional argument above, is the doctrine of the duty of a Judge to sit. Though not profound in our jurisdiction, every Judge has a duty to sit, in a matter which he dushould sit. So that recusal should not be used to cripple a Judge from sitting to hear a matter. This duty to sit is buttressed by the fact that every Judge takes an oath of office "to serve impartially; and to protect, administer and defend the Constitution." It is a doctrine that recognizes that having taken the oath of office, a Judge is capable of rising above any prejudices, save for those rare cases when has to recuse himself. The doctrine also safeguards the parties' right to have their cases heard and determined before a Court of law."

Recusal is a matter of judicial discretion and judicial officers should recuse themselves whenever they feel they may not appear to be fair or where they feel their impartiality would be called into question. Regulation 21 of the Judicial Service Regulations, behoves a judicial officer to disqualify oneself in proceedings where his or her impartiality might reasonably be called into question...

Judicial officers must therefore take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. They should therefore not readily succumb to bullying or intimidation by a party to recuse themselves. In the case of *Prayosha Ventures Limited vs NIC Bank Ltd & Others (2020) eKLR* the Court (Omondi, J - as she then was) dismissed a recusal application and found thus:-

"It is not lost to me that the issue of recusal was spontaneously announced once I declined to extend the orders, and there should be no pretence by Mr. Lagat that the Interested Party instructed him to apply for my recusal... I have no lien over the matter, and would be more than willing to have this matter taken over by another judicial officer, except that the manner in which the recusal is sought reeks of mala fides clothed with sharp practice, outright bullying and intimidation. That where a litigant does not call the tune and pay the piper, then the bias flag is waved all over. Indeed, for good measure, Dr Kiprono reminded this Court that his client would be considering presenting a complaint to the Judicial Service Commission over my conduct in this matter. If that was not intended to scare the daylights out of me, then I do not know why the name of my employer was being invoked at that point."

Similarly, in *Dobbs v Tridios Bank NV (2005) EWCA 468* the Court cautioned itself as follows with respect to the antics of a certain Mr. Dobbs:

"... But it is important for a Judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If Judges were to recuse themselves whenever a litigant - whether it be a represented litigant or a litigant in person - criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select Judges to hear their cases simply by criticizing all the Judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a Judge felt obliged to recuse himself simply because he had been criticized - whether that criticism was justified or not. That would apply, not only to the individual Judge, but to all Judges in this court; if the criticism is indeed that there is no Judge of this court who can give Mr. Dobbs a fair hearing because he is criticizing the system generally. Mr. Dobbs' appeal could never be heard."

Conclusion

Judicial recusal is a fundamental principle that upholds the integrity and impartiality of the justice system. It ensures that judicial officers presiding over cases have no conflicts of interest and can deliver fair and unbiased decisions. It is essential for judicial officers to exercise their discretion judiciously when considering recusal, balancing the principles of fairness, independence, and the efficient administration of justice. Ultimately, the goal is to maintain the integrity of the judicial system and safeguard the fundamental right to a fair and impartial trial for all parties involved.

Noella Lubano
Partner | noella@oraro.co.ke

Zahra Omar
Associate | zahra@oraro.co.ke

'SINKING' COSTS:

THE EFFECTIVENESS OF LIQUIDATED DAMAGES CLAUSES IN CONSTRUCTION CONTRACTS

Liquidated Damages (**LDs**), also known as Liquidated and Ascertained Damages (**LADs**), are clauses that establish a predetermined amount that the breaching party must pay to the other party for a specified breach and operate as an exclusive remedy in respect of that breach. The primary purpose of these clauses is to pre-define the damages payable in the event of a breach, ensuring that the damages are compensatory rather than punitive.

Historical Origins and Development

Penal bonds were commonly used before the introduction of LDs. These bonds involved a promise to pay a specified sum if another obligation was not fulfilled. Initially, common law Courts upheld and enforced these penal bonds – however, Courts of equity intervened, offering relief by restraining actions based solely on penalties.

After the penal bond, the agreed sum for breach of contract emerged, reversing the previous approach where penalties were the primary obligation in agreements. In the 18th Century, a party could choose to sue either for the penalty or for damages.

It was not until 1801 when the doctrine of LDs was first established, pursuant to which a plaintiff could only recover the actual damage proven, even under common law. This implied that if the sum was a pre-estimate of the loss, it would not be regarded as a penalty and could be recovered as LDs.

Difference between LDs and Penalties

The distinction between an LDs clause and a penalty clause in a contract is critical as it affects the enforceability of the stipulated sum in case of breach.

First, a stipulated sum will be classed as a penalty where it is in the nature of a threat fixed *in terrorem* of (i.e., to scare) the other party, coercing them to act in a particular way with the intention of preventing a breach of the contract. Generally speaking, when a stipulated sum is described as being *in terrorem* it implies that the amount is not a genuine pre-estimate of loss, but rather a punitive measure which is designed to coerce the other party into fulfilling their obligations under the contract out of fear of the severe penalty.

Secondly, a stipulated sum is considered to be a penalty if it is extravagant and unconscionable in comparison with the loss that could be proven to have followed from the breach. In addition, when a single stipulated sum is applied to various types of breaches - some of which may carry substantial financial consequences, while others are relatively minor - it raises a presumption that the sum is intended as a penalty.

This presumption, though not definitive, suggests that the sum is not a genuine pre-estimate of damages but rather a punitive measure designed to discourage breaches of any kind.

Pros and Cons

In construction contracts, LDs clauses are a critical tool used to manage and allocate risks associated with potential breaches, particularly delays in project completion. While LDs clauses offer significant advantages in terms of certainty and risk management, they also come with potential drawbacks that must be carefully considered during contract negotiation.

Pros

One of the primary benefits of LDs clauses is that they define the contractor's liability for a specified breach, leaving both parties with certainty on the potential consequences of a breach. It is difficult to predict additional costs within contractual relationships, particularly those related to delays, with the result that establishing fixed monetary liability on the outset offers valuable clarity to both parties. For the contractor, agreeing to LDs provisions reduces uncertainty surrounding potential penalties for missing the completion deadline, allowing for more accurate risk assessment.

In the case of *Ravina Agencies Limited v Coast Water Works Development Agency (2024) KEHC 3264 (KLR)* the Court examined a contractual provision stating that the payment of LDs would not affect the contractor's liabilities. The Court observed that: -

"There is no dispute that the Defendant deducted Kshs 4,415,299.88 from the sums due to the Plaintiff for completed works. The deduction is reflected in the Certificate for Interim Payment dated 14th October 2015, at page 88 of the Plaintiff's Bundle of Documents. The explanation given by DW1 was that the aforesaid sum was deducted as liquidated damages on account of the delay the Plaintiff in completing the works and as pointed out herein above, notice to this effect was given by the Defendant vide its letter date 28th July 2015…

From the uncontroverted evidence presented herein, it took the Plaintiff 1½ years to complete the project. In the premises, the Defendant was within its rights to charge liquidated damages as provided for in Clause 52.1 of the General Conditions of Contract…"

In addition, LDs negate the need for the innocent party to prove actual loss suffered as LDs are recoverable as a debt, thereby bypassing the need for costly proof of damages. The clause enables a contractor to conduct a cost-benefit analysis to assess whether it is more commercially advantageous to pay the stipulated damages or pursue other options. Furthermore, the specified level of LDs serves as a ceiling for damages payable, thereby preventing a party from altering the amount even if the actual loss surpasses the stipulated LDs.

LDs also save time and expenses. By agreeing on a rate for LDs, the need for costly and lengthy legal proceedings to determine the employer's losses from a breach is eliminated. Instead, the employer can simply deduct the damage from an interim or final payment to the contractor, following the issuance of a "*pay less*" notice. Although the contractor must pay the LDs, they avoid the legal costs that would otherwise be incurred in proceedings to determine the general damages owed to the employer for the breach.

Further, from a commercial perspective, the employer's reasons for imposing LDs are likely to include the desire to deter breach of contract or, at least, to encourage compliance by the contractor in the contract.

Cons

Typically, LDs clauses are designed to apply only to specific breaches. However, there are instances where an employer may attempt to impose LDs for a different type of breach. Conversely, though less common, an employer might argue that a particular breach falls outside the scope of the LDs clause, while the contractor contends that it does. For example, if the employer suffers substantial and unforeseen loss, they might seek to bypass the exclusive remedy provided by the LDs clause in favor of pursuing general damages.

One of the primary benefits of LDs clauses is that they define the contractor's liability for a specified breach, leaving both parties with certainty on the potential consequences of a breach. It is difficult to predict additional costs within contractual relationships, particularly those related to delays, with the result that establishing fixed monetary liability on the outset offers valuable clarity to both parties.

Issues related to LDs in a sub-contract arise from the terms agreed upon during contract negotiations. One challenge is passing down LDs from the main contract to the sub-contract. If the sub-contract stipulates a lower LDs amount than the main contract, the main contractor's ability to pass on LDs deductions to the responsible sub-contractor is limited to the lesser amount. This exposes the main contractor as it will be forced to cover the shortfall in the LDs deducted by the employer.

Consequently, if a sub-contractor's delay causes a corresponding delay for the main contractor under the main contract, the amount recovered from the sub-contractor would be borne by the employer. In cases where LDs are the exclusive remedy for delay, the main contractor would receive no additional compensation for direct losses caused by the sub-contractor's delay beyond the LDs paid to the employer under the main contract.

LDs clauses generally do not allow a party to recover a higher sum than the stipulated amount, even if the actual damages are significantly greater. This situation often arises when the stipulated sum is intended to cover a range of varying and potentially unprecedented breaches. In the case of *Diestal v Stephenson (1906) 2 KB 345*, a contract for the sale of coal stipulated that the defaulting party would pay one (1) shilling for every tonne not delivered. Despite the seller's greater loss due to non-delivery, the Court held that the seller was limited to recovering only the stipulated amount.

In an ideal contractual setting, LDs would be negotiated between parties of equal bargaining power ensuring both parties agree on terms that are balanced. This may, however, not be the case in public contracts awarded through tendering processes whereby contracts may be presented on a "*take it or leave it*" basis with the contracting authority having pre-determined LDs.

Alternative Remedy

An alternative remedy or option to LDs is extension of time, where the employer (normally acting through its designated architect) permits the contractor's request for an extension of time with respect to the completion deadline as a result of a relevant delay event specified in the contract. These events include but are not limited to force majeure, variations to design, industrial action, abnormal weather conditions, or delays caused by the employer's failure to hand over the site on time.

Conclusion

LDs clauses serve as a powerful tool in contract management, offering clear benefits in risk allocation, cost certainty, and streamlined dispute resolution. However, they also come with limitations, such as the risk of unenforceability if deemed punitive and the challenge of applying them to unforeseen breaches. Parties must carefully draft LDs clauses to balance fairness with commercial needs, ensuring they are neither excessive nor too restrictive. Ultimately, the decision to include LDs should align with the parties' overall risk management strategy and project objectives.

Cindy Oraro
Partner | cindy@oraro.co.ke

Jonathan Kisia
Associate | kisia@oraro.co.ke

ADVANCING GREEN GOVERNANCE:

STANDARDS, FINANCE AND SUSTAINABILITY IN AFRICA'S CORPORATE SECTOR 2.0

Background

Sustainability and green governance now play a significant role in every sphere of society and business. In the 18th issue of *Legal & Kenyan*, we featured an article titled "Green Governance: Reporting on Sustainability and Climate Change" where we discussed the International Financial Reporting Standards Disclosure of Sustainability-related Financial Information (**IFRS S1**) and Climate-related Disclosures Standards (**IFRS S2**) collectively (**the Standards**) that were issued by the International Sustainability Standards Board (**ISSB**). Under the Standards, corporate entities are tasked with the duty of ensuring that they make sustainability–related disclosures in their annual financial reports in accordance with the Standards' requirements.

The issuance of the Standards reflects the need to meet the commitments made under the Paris Agreement to combat and mitigate climate change. The formation of the ISSB in 2021 and the release of the Standards in 2023 further signify the commitment to this cause. However, while the issuance of the Standards is a step in the right direction, compliance with the Standards is where the actual work lies. It is also important to note that the Standards are one of many sustainability standards introduced in the recent past affecting various industries.

Adoption of the Standards

The effectiveness of any standard lies in its implementation. As the saying goes, "*the proof of the pudding is in the eating*", which is fitting in this context given that the Standards prescribe requirements on corporate entities regarding their specific annual financial reports. To meet the requirements under the Standards, immense resources at the disposal of the entity ought to be present. In these circumstances, the uptake of and compliance with the Standards has been met with good reception from corporate entities of all sizes.

Further, while compliance with the Standards of the ISSB is voluntary, adoption has been well-received globally. Some entities partially adopt the Standards, others adopt slight amendments and others fully embrace the ISSB standard of reporting. Focusing on Africa, countries such as South Africa, Nigeria, and Kenya are some of the notable jurisdictions at the forefront of adoption of the Standards, having made commitments for their full adoption with slight modifications relevant to each jurisdiction.

Green Financing

Undoubtedly, by the nature of their business, the banking and finance industry plays a pivotal role in promoting the adoption of sustainable business practices. "*Green financing*" refers to any structured financial activity designed to ensure a better environmental outcome and a more resilient future. Simply put, it is where financial products and services are issued with environmental considerations. From the perspective of financial institutions, this works best, given that the core nature of their business entails the sale of financial services and products.

The additional aspect now in consideration is the trading of these products and services under environmental or sustainability considerations. This benefits financial institutions by passing some compliance responsibilities onto the customer for them to obtain the relevant product or service they seek from the financial institution. Secondly, these products or services (be it loans, grants, or capital investments) find their way into the financial institution's balance sheet and form part of the institution's annual financial reports.

In Kenya, NCBA Group PLC is one of the financial institutions that have rolled out green finance products and services. In conjunction with Proparco Groupe AFD, NCBA recently signed a facility of KES. 6.7 Billion (USD 50 Million) in a bid to realise the sustainability commitments it made last year through its "*Change the Story*" sustainability agenda. This agenda is anchored on five (5) pillars comprising of fifteen (15) sustainability commitments. The project is expected to support green financing in small and medium-sized enterprises that are women and youth led.

On its part, the Equity Group is one of the players within the financial services industry at the forefront of championing sustainability and sustainable practices within the organisation. Having released its sustainability reports for three (3) consecutive years, Equity Group has made a deliberate effort to align the company's long–term strategies for growth with globally set standards and procedures that enhance sustainable growth. From its FY2023/24 sustainability report, Equity Group has adopted a three–pronged strategy for sustainability, leveraging on deepening its sustainability leadership, resilience for sustainability and finally, deepening its sustainable impact. Going forward, Equity Group plans to continue embedding ESG factors in its operations and lending practices, as the organisation seeks to mature its sustainability practice at group and subsidiary level.

In South Africa, according to Mr. Sim Tshabalala, the Chief Executive Officer of Africa's largest lender in assets – The Standard Bank Group, as a financial institution, it has made huge strides in formulating an array of green finance products and services for both their corporate clients and individual or retail clients. He is on record stating that Standard Bank has made a commitment to green finance ZAR 250 Billion (USD 13 Billion) between 2022 and 2026. Standard Bank has formulated green finance products for its retail customers which enable them to access financing towards solar installations at their homes at lower lending interest rates than through regular loans. Green finance presents an exciting opportunity for the financial services sector and Mr. Tshabalala hazards a guess that in the near future, green finance shall form a big portion of many financial services institutions' corporate and investment portfolios.

Streamlining Internal Processes

These efforts, however, need not be limited to customer-facing products and services. Financial institutions can also streamline their internal processes to become more efficient and sustainable, in accordance with the Standards. What this achieves for the relevant financial institution is that these efforts made in accordance with the Standards are reportable and as such, form part of the entity's annual sustainability reports.

The Central Bank of Kenya (**CBK**) recently reported that lenders in Kenya are now incorporating Artificial Intelligence (**AI**) technologies to improve operational efficiencies, predict consumer behaviour, and manage risk exposures more effectively. CBK further noted that some of Kenya's largest lenders are using AI to reduce risks related to fraud given that, lenders in Kenya have admitted to deploying AI to combat instances of fraud in their sustainability reports. For example, Standard Chartered Bank (Kenya) Limited states in its recently published sustainability report that: *"Our Financial Crime Compliance team continues to proactively identify, prevent potential fraud, terror financing and money laundering activities using next-generation surveillance, financial crime monitoring infrastructure and machine learning."*

Similarly, Stanbic Bank Kenya (which is part of the larger South African based Standard Bank) also recently reported that it leverages: "*… artificial intelligence and other advanced technologies to improve risk assessment, scenario analysis and decision-making processes….*" Its South African parent company reported that digitisation of key consumer processes has been key in making the company more sustainable. This arises from consumer demand for products and services that are as technologically sophisticated and efficient as other facets of their lives. It further reported efforts towards "*de-cashing*" its platform to match with the new entrants offering cashless financial services. This has enabled Standard Bank to reduce the resources it pours into management and securing of cash which ultimately increases efficiency and streamlines its internal processes more sustainably.

It is evident that large corporations, as opposed to smaller ones, have been inclined to adopt and implement the Standards. However, it would be prudent to highlight that there is no "one size fits all" approach to their implementation. It is indeed evolving as a going concern, with stakeholders formulating the best approach for implementing the Standards, based on their own individual circumstances.

Upshot

It is evident that large corporations, as opposed to smaller ones, tend to adopt and implement the Standards. However, it is important to note that there is no "*one size fits all*" approach to their implementation. Implementation is still evolving, with stakeholders formulating the best approach for implementing the Standards, based on their own individual circumstances.

As corporations, notwithstanding their size, chart a way forward in discovering what is the best approach for them to implement the Standards, they may borrow a leaf from those that have already started. When designing their strategy, corporations may consider tailoring some of their services and/or products towards achieving a more sustainable outcome. As such, a corporation would be required to determine the services and/or products on sale within its portfolio that can be tweaked to realise a sustainable outcome in line with the Standards.

Another mechanism available to corporations is to ensure compliance with the Standards within their respective organisations. This can be achieved by enhancing operational efficiencies through leveraging technology to take up certain tasks within the organisation; reduction and possible elimination of unnecessary or redundant processes; and reorganizing human resources for robust and efficient governance structures – all of which are reportable under the Standards.

In conclusion, it is not in doubt that the Standards are fairly new, and the relevant stakeholders and key players continue to formulate the nature of implementation for all entities. As already established, the resource pool required to ensure implementation of the Standards is enormous. These factors, however, should not dissuade entities, nor act as a deterrent factor from the uptake of and compliance with the Standards. On the contrary, they should serve as a catalyst in enhancing their uptake, as it is through an entity addressing the challenges it would face in implementing the Standards, that it will be able to formulate adequate and specific measures to ensure compliance with them.

As a parting shot, in a bid to drive forward the sustainable investment and financing agenda from an African perspective, it would be ideal to formulate and establish an alliance such as the Global Sustainable Investment Alliance – or join it. In our experience, it is a strong platform to advance sustainable investment and finance, ensuring that the financial services sector plays a key role in achieving a more sustainable future.

John Mbaluto
Deputy Managing Partner | john@oraro.co.ke

Hellen Mwongeli Mutua
Senior Associate | hellen@oraro.co.ke

ON A STRAIGHT PATH:

THE SUPREME COURT LAYS DOWN THE LAW ON ILLEGALLY OBTAINED EVIDENCE

While it is trite that all admissible evidence must be relevant, is it the case that all relevant evidence must be admitted? In this article, we embark on a discussion on what is considered illegally obtained evidence under Kenyan law in civil cases and how the Supreme Court has treated illegally obtained evidence in recent decisions.

The Common Law Position

Prior to the promulgation of the Constitution of Kenya, 2010 (**the Constitution**), Kenyan Courts largely looked to common law on how to deal with illegally obtained evidence in civil cases. At common law, there was no prohibition on adducing any evidence before a Court of law, provided that it was relevant to the matters in controversy.

Summing up this position is the holding of the Privy Council in the case of *Kuruma, Son of Kaniu v The Queen (1955) AC 197* where it was held *"... the test to be applied both in civil and in criminal cases in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the Court is not concerned with how it was obtained."* The position of the Privy Council in the *Kuruma* case relied upon the decision in *Reg. v Leatham (1861) 8 Cox C.C.C 498* where it was iterated rather starkly, *"It matters not how you get it, if you steal it even, it would be admissible in evidence."*

Similarly in *Helliwell v Piggot-Sims (1980) FSR 356* it was held that *"... so far as civil cases are concerned, it seems to me that the Judge has no discretion. The evidence is relevant and admissible. The Judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning."*

The Supreme Court of the United States of America also had an opportunity to weigh in on the admissibility of illegally obtained evidence in the case of *Olmstead v United States (1928) 277 US 438* where it held *"... the common law did not reject relevant evidence on the ground that it had been obtained illegally."*

The position set out in the foregoing authorities, i.e., that all relevant evidence is admissible regardless of how it was obtained, has formed the basis of many decisions by Kenyan Courts on the issue of illegally obtained evidence in civil cases, at least until the year 2010.

The promulgation of the Constitution however brought in a different perspective on the issue of illegally obtained evidence. In particular, the Constitution provides as follows in Article 50 (4):
"Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice."

This provision departs from the common law position by providing exceptions to the rule that all evidence, if relevant, is admissible.

Supreme Court Decisions
We now consider two (2) decisions of note handed down by the Kenyan Supreme Court in which the Court considered the issue of illegally obtained evidence with respect to public documents being, *Njonjo Mue & Another v Chairperson of Independent Electoral and Boundaries Commission & 3 Others (2017) eKLR (**the Njonjo Mue case**)* and *Kenya Railways Corporation, the Attorney General and The Public Procurement Oversight Authority v Okiyah Omtatah Okoiti, Wyclife Gisebe Nyakini, The Law Society of Kenya and China Road and Bridge Corporation (2023) eKLR (**the SGR case**).*

The Njonjo Mue Case
The *Njonjo Mue* case was a Presidential Election Petition which sought to challenge the results of the Presidential Election held on 26th October 2017, whereby the Independent Electoral and Boundaries Commission (**IEBC**) declared H. E. Uhuru Muigai Kenyatta the President elect. In urging their case, the Petitioners sought to rely on internal memos (**the Memos**) sent to the Commissioners and staff members of the IEBC. H. E. Kenyatta filed an application urging the Court to expunge the Memos from the Petition, on the basis that the documents had been illegally obtained.

In so contending, H. E. Kenyatta argued that the IEBC had issued a clarification indicating that the contents of the Memos were neither discussed nor sanctioned by it and that it only came to know about the Memos from the media. It was further contended that the Memos raised matters which were yet to be resolved by the IEBC, were not authenticated, were produced in piecemeal and taken out of context, with a view to aid the Petitioners' case.

In rendering its decision, the Supreme Court considered that *"… information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information."* The Supreme Court ultimately made a finding that the Petitioners had failed to account for how they accessed the Memos and had breached the provisions of sections 27 of the IEBC Act and Articles 24 (1) and 35 (1) of the Constitution, pertaining to access to information. As such, the Memos were expunged from the Petition.

The SGR Case
The *SGR case* is the Supreme Court's latest pronouncement on the issue of illegally obtained evidence. This case commenced in the High Court where Okiya Omtatah Okoiti, Wyclife Gisebe Nyakina and the Law Society of Kenya (**the 1st, 2nd and 3rd Petitioners**) filed Petitions against the Kenya Railways Corporation, the Attorney General, the Public Procurement Oversight Authority and China Road and Bridge Corporation (**the 1st, 2nd, 3rd and 4th Respondents**) challenging the procurement process for the construction of the Standard Gauge Railway (**SGR**) contending *inter alia* that the single sourcing or direct procurement for SGR was illegal and that the entire procurement process run afoul various sections of the Public Procurement and Asset Disposal Act of 2005 (**PPDA**) and the Public Finance Management Act, 2012. Of relevance to this article, is

In a marked departure from the previously prevailing common law position that freely allowed for adducing of relevant evidence no matter how it was obtained, the position of Kenyan Courts, as pronounced by the Supreme Court in the foregoing decisions, is that the production of illegally obtained evidence in Court is prohibited, more so in the case of public documents that are produced in violation of the law.

that the petitioners sought to rely on various correspondence between officers of government institutions, the financier of the SGR Project, the 1st, 2nd and 4th Respondents, and the Office of the Deputy President (**the Correspondence**). The Respondents filed a Cross-Petition seeking *inter alia* the expungement of the Correspondence contending that their production was contrary to Articles 31 and 35 of the Constitution, and section 80 of the Evidence Act (Cap. 80) Laws of Kenya.

After hearing the Petitions, Lenaola, J (as he then was) dismissed the Petition and allowed the Cross-Petition to the extent of expunging the Correspondence. On appeal, the Court of Appeal affirmed the High Court's finding on the issue of inadmissibility of illegally obtained evidence. However, the Court of Appeal allowed the Petition to the extent of declaring that the 1st Respondent had failed to comply with Article 227 (1) of the Constitution and sections 6 (1) and 29 of the PPDA.

Finding themselves partially aggrieved by the decision of the Court of Appeal, the Respondents filed Petitions of Appeal in the Supreme Court. In response, the 1st and 2nd Petitioners filed a Cross-Appeal challenging the Court of Appeal's findings, notably the decision to expunge the Correspondence. In defending their position, the 1st and 2nd Petitioners intimated that they obtained the Correspondence from whistleblowers who feared for their safety and thus required anonymity in exchange for providing the highly confidential documents. The Supreme Court found this reason unacceptable, citing the existence of bodies such as the Witness Protection Agency (under section 3A of the Witness Protection Act, 2006) that would have protected the whistleblowers had they provided the Correspondence through the right channels. Further, the explanation was found wanting as it was bereft of details.

Interestingly, some of the Correspondence consisted of documents tabled before Parliament and were being debated in some of Parliament's committees. This, according to the 1st Petitioner, made the impugned documents public documents. However, citing Parliamentary privilege and the power of Parliament to call for evidence including documents under Article 125 of the Constitution, the Supreme Court held that the impugned documents did not mutate into public documents for this reason, and would thus remain inadmissible.

Conclusion
In a marked departure from the previously prevailing common law position that freely allowed for adducing of relevant evidence no matter how it was obtained, the position of Kenyan Courts, as pronounced by the Supreme Court in the foregoing decisions, is that the production of illegally obtained evidence in Court is prohibited, more so in the case of public documents that are produced in violation of the law. It thus appears that in balancing the competing interests, the Court lends greater weight to safeguarding procedural fairness than what the probative value of the evidence might be. The message from the Supreme Court may thus be aptly summarized thus: *The Courts will not look favourably upon a litigant who rushes to Court alleging the violation of the Constitution while relying on evidence obtained in violation of the very same Constitution.*

Noella Lubano
Partner | noella@oraro.co.ke

Zahra Omar
Associate | zahra@oraro.co.ke

GUARDING THE STAKES:

NAVIGATING INTERIM MEASURES OF PROTECTION IN ARBITRATION

Interim measures of protection in arbitration have emerged as a vital tool in safeguarding the interests of parties engaged in dispute resolution. In Kenya, this aspect of arbitration law has garnered significant attention, as it bridges the gap between the initiation of arbitration proceedings and the final award. The ability to secure interim relief can be crucial in preserving assets, maintaining the status quo, and ensuring that the arbitration process remains effective and equitable. With the rise of complex commercial disputes and the increasing reliance on arbitration as a preferred method of dispute resolution, understanding the nuances of interim measures in Kenya is more pertinent than ever. This article delves into the evolving landscape of interim measures of protection in Kenyan arbitration, exploring landmark cases, legislative frameworks, and the delicate balance between Court intervention and arbitral autonomy.

Nature of Interim Measures of Protection

An interim measure of protection is an order issued by either a Court or an arbitral tribunal aimed at preserving the status quo or preventing the dissipation of assets pending the resolution of the dispute. These measures can be granted either before the commencement of the proceedings before the tribunal or during the proceedings but before an award has been rendered. Importantly, the granting of these measures is discretionary and not a matter of right. Various conditions must be met before a tribunal or Court can grant them, particularly when it comes to Court-issued measures. This discretion ensures that Courts do not overstep their bounds and usurp the role of the arbitral tribunal.

Originally, Courts were the sole judicial authority empowered to grant interim measures of protection. However, this position has evolved, with many countries revising their national arbitration laws to explicitly recognize the concurrent jurisdiction of both Courts and arbitral tribunals. Arbitral tribunals in Kenya are permitted to grant preliminary and/or interim relief under both the Arbitration Act, 1995 (**the Arbitration Act**) and institutional rules applicable within the Kenyan jurisdiction. Specifically –

- Section 18 (1) (a) of the Arbitration Act - An arbitral tribunal can order a party to take such interim measures of protection as it deems necessary or appropriate.
- Rule 18 (2) (i) of the Chartered Institute of Arbitrators Rules (**CIArb Rules**) - An arbitral tribunal has jurisdiction to make one or more interim awards, including injunctive relief and conservatory measures.
- Rule 27 (1) of the Nairobi Centre for International Arbitration Rules, 2015 (**NCIA Rules**) - An arbitral tribunal, subject to the agreement between the parties, can issue a range of interim or conservatory orders in the arbitration.

An interim award made pursuant to the CIArb Rules and the NCIA Rules is final and binding upon the parties pursuant to the Arbitration Act and the institutional rules, which define an *"arbitral award"* to include any award by the arbitral tribunal, including an interim award. There is no automatic right of appeal against a decision allowing an application for security for costs brought under section 18 of the Arbitration Act. A party may only appeal such a decision on a point of law that arises within the arbitration or stemming from an award to the High Court (under section 39 of the Arbitration Act). This recourse, however, is only available where parties have expressly reserved their right of appeal. In the absence of such an agreement by the parties, an Arbitrator's award is final and binding and can only be set aside or its enforcement challenged on the basis of the limited grounds set out under section 35 and section 37 of the Arbitration Act.

Role of the Courts

Section 7 (1) of the Arbitration Act provides that the High Court may allow applications for interim measures when so moved by either of the parties. The primary objective of Courts when intervening is to ensure that the subject matter of the arbitration proceedings is not jeopardised before an award is issued, thereby rendering the entire proceedings otiose.

This purpose was well elaborated in the case of *CMC Holdings Limited v Jaguar Land Rover Exports Limited (2013) eKLR* as follows:
"In practice, parties to international arbitrations normally seek interim measures of protection. They provide a party to the arbitration an immediate and temporary injunction if an award subsequently is to be effective. The measures are intended to preserve assets or evidence which are likely to be wasted if conservatory orders are not issued. These orders are not automatic. The purpose of an interim measure of protection is to ensure that the subject matter will be in the same state as it was at the commencement or during the arbitral proceedings. The Court must be satisfied that the subject matter of the arbitral proceedings will not be in the same state at the time the arbitral reference is concluded before it can grant an interim measure of protection."

Section 7 (2) of the Arbitration Act states that where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling, or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

Conditions for Grant of an Interim Measure of Protection

The conditions that a Court or arbitral tribunal must consider before granting interim measures of protection have become well established under Kenyan law. These principles were clearly outlined in the landmark case of *Safaricom Limited v Ocean View Beach Limited & 2 Others (2010) eKLR* which set out the following criteria for consideration:

- The existence of an arbitration agreement.
- Whether the subject matter of the arbitration is under threat.
- A careful assessment of the appropriate measure of protection based on the merits of the application.
- If the measure is requested before the arbitration proceedings commence, the Court or tribunal must specify the duration of the measure to prevent overstepping the tribunal's authority.

In addition, the case of *Futureway Limited v National Oil Corporation of Kenya (2017) eKLR* introduced further considerations, including:

- The urgency with which the applicant has approached the Court.
- The risk of substantial (though not necessarily irreparable) harm or prejudice if the protection is not granted.

An interim measure of protection is an order issued by either a Court or an arbitral tribunal aimed at preserving the status quo or preventing the dissipation of assets pending the resolution of the dispute. These measures can be granted either before the commencement of the proceedings before the tribunal or during the proceedings but before an award has been rendered.

These criteria underscore the careful balance that must be struck between providing necessary protection and respecting the autonomy of the arbitral process. As Kenyan jurisprudence continues to evolve, these guiding principles ensure that interim measures are applied judiciously and fairly, maintaining the integrity of both the arbitration process and the subject matter in dispute.

Emergency Arbitration

In certain cases, the urgency of a matter may require one party to seek interim measures even before an arbitral tribunal has been fully constituted. To address such situations, an increasing number of the leading arbitral institutional rules now include provisions for the appointment of emergency arbitrators. Emergency arbitrators enable parties to obtain urgent relief before the tribunal is constituted and without having to go to Court.

Emergency arbitration is a process that allows parties to seek urgent interim relief before a full arbitral tribunal is constituted. This mechanism is typically invoked when a dispute requires immediate attention, and the parties cannot afford to wait for the formation of the standard tribunal. An emergency arbitrator is usually appointed to hear an application for interim relief pending the substantive arbitration.

Key advantages of emergency arbitration over seeking interim measures from Courts include maintaining the confidentiality of the proceedings, avoiding the jurisdictional pitfalls in seeking Court intervention highlighted above and, in some cases, assuaging the concerns of parties that are apprehensive of obtaining justice from local Courts, especially in the case of foreign parties seeking remedies against national governments and their institutions.

In Kenya, the Arbitration Act and Arbitration Rules do not specifically address emergency or expedited arbitration. However, both the NCIA Rules and the CIArb Rules have provisions in place for managing expedited and emergency arbitrations. Under the CIArb Rules, an emergency arbitrator must be appointed within two (2) days of an application, with the expectation that the arbitrator will resolve the issues raised in the request for interim measures as quickly as possible, ideally within fifteen (15) days of their appointment. Importantly, the emergency arbitrator is also required to ensure that all parties receive reasonable notice and an opportunity to be heard.

The NCIA Rules equally require an emergency arbitrator to be appointed within two (2) days, and the arbitrator is required to establish a schedule for considering the emergency arbitration within two (2) days and make an order or award within fifteen (15) days from appointment, subject to any extensions as may be agreed by the parties. Under Rule 28 (4) of the NCIA Rules, upon expedited formation of the arbitral tribunal, the emergency arbitrator shall have no further power to act in the dispute. Under Rule 28 (6) of the NCIA Rules, an order or award made by the emergency arbitrator is binding on all the parties upon being issued.

It is expected that going forward, parties will increasingly adopt emergency arbitration in seeking interim measures of protection.

James Kituku
Partner | james@oraro.co.ke

Brian Onyango
Associate | brian@oraro.co.ke

EMPOWERING THE DISABLED:

HIGHLIGHTS OF THE PERSONS WITH DISABILITIES BILL, 2023

Nominated Senator, Crystal Asige, tabled the Persons with Disabilities Bill, 2023 (**the Bill**) before the Kenyan Senate on 22nd March 2023. The Bill seeks to replace the Persons with Disabilities Act (Cap. 133) Laws of Kenya (**the Act**), which has been in place since 16th June 2004. The Bill also intends to restructure the National Council for Persons with Disabilities (**NCPWD**) and provide an institutional framework for the protection, promotion and monitoring of the rights of persons with disabilities (**PWDs**).

The Bill is premised on Article 54 of the Constitution, which imposes an obligation on the State to ensure that the rights of PWDs are respected and upheld. The Bill also addresses the evolving needs of PWDs, ensuring that they are fully integrated in society. The Bill demonstrates Kenya's commitment to complying with the Convention on the Rights of Persons with Disabilities by improving the standards of living and day to day activities of PWDs residing in Kenya.

The Bill was passed by the Senate on 21st February 2024 and is currently before the National Assembly for consideration. This article seeks to highlight some salient provisions of the Bill.

Greater Appreciation of PWDs' Rights

PWDs will have the right to employment and will not be disqualified or terminated based on their disability. The Bill supports this by mandating employers to reserve at least five percent (5%) of employment opportunities for PWDs. The Bill additionally proposes that employees with disabilities serve an additional five (5) years, beyond the normal retirement age prescribed by the government. This translates to a retirement age of sixty-five (65) years for such employees with disability, as opposed to the current sixty (60) years stipulated in the Act.

The issue of termination of employment was addressed in the case *Lucy Chepkemoi v Sotik Tea Company Limited (2022) eKLR* where the Court noted that disability is not inability. Therefore, disability alone does not in itself amount to lack of capacity to discharge one's professional duties, to warrant termination of employment.

Secondly, PWDs have the right to protection in all risky situations including armed conflicts, humanitarian emergencies and natural disasters. All institutions are required to obtain data relating to PWDs and share the same with agencies responsible for disaster management. In risky situations, PWDs are to be prioritised by the responding agencies, in the appropriate intervention mechanisms e.g., evacuation etc.

Thirdly, all PWDs have the right to effective access to justice on an equal basis with others. This will be done by exempting them from paying Court fees and providing them with braille services and sign language interpreters when they attend Court. The Attorney General, in consultation with the Law Society of Kenya, will also be required to develop regulations that provide free legal services to PWDs in certain situations, including matters involving infringement of their rights and fundamental freedoms.

Lastly, every PWD has the right to obtain registration documents e.g., a disability card, national identity card, birth certificate, passport etc. These documents will serve as proof of identity when a PWD seeks education, health care services and employment opportunities.

Incentives for PWDs

The Bill provides various incentives to PWDs. Firstly, an employee with a disability can be wholly or partially exempted from paying income tax on employment income. This is after an application for exemption is approved by the Cabinet Secretary responsible for matters relating to finance (**the Cabinet Secretary**) . Previously, a PWD could only apply for a tax exemption after undergoing a vetting process to determine if the applicant had a disability. In Issue 18 of *Legal & Kenyan* published in October 2023, we featured an article in which we discussed whether the tax exemption process for PWDs was superfluous. The article concluded that the vetting process was indeed superfluous as it was an unnecessary obstacle to PWDs who are seeking tax exemptions, since PWDs in seeking the exemption, would have already undergone a mandatory medical examination in advance.

The issue of vetting for purposes of exemption was addressed in *HKK v National Council for Persons with Disability & Another (2023) KEHC 2418 (KLR)* where the NCPWD had declined to renew the exempt status of the petitioner, under the Persons with Disabilities (Income Tax Deductions and Exemptions) Order 2010 despite having furnished the NCPWD with the required documents including a medical report certifying her disability. Consequently, the Court observed among others, that the failure by the NCPWD to renew her exemption deprived her of equal protection under the law, dignity and respect contrary to Articles 27, 28 and 54 of the Constitution.

Secondly, the Bill exempts tools and equipment used by PWDs from import duty and value added tax. This is a good addition as it makes these accessories more affordable and accessible to PWDs.

Finally, PWDs will be afforded an equal opportunity to access financial credit, for example bank loans, mortgages etc. Access to financial credit reduces dependance on others as it allows PWDs to fund their education or business ventures thereby sustaining themselves.

Enhanced Penal Consequences for Offences

Notably, the Bill has significantly enhanced protection for PWDs by augmenting the penal framework relating to offences against them, both in terms of increasing the punishment of existing offences under the Act and introducing new offences which presently do not feature under the Act.

An example is the offence of concealment of PWDs. Under the Act, the penalty is only a fine not exceeding KES. 20,000. However, the Bill has increased the fine tenfold to KES. 200,000 or up to one (1) year imprisonment, or both.

There are also new offences proposed under the Bill, such as performance of a procedure by a medical practitioner, resulting in the infertility of a PWD. This offence will attract a hefty fine of up to KES. 3,000,000 or up to four (4) years imprisonment, or both. Another example is the intentional denial of food or fluids to a PWD by a person exercising care or responsibility over the PWD, which will attract a fine of up to KES. 200,00 or up to one (1) year imprisonment, or both.

Further Accommodation of PWDs

The Bill also proposes a raft of measures to further accommodate PWDs in their day-to-day life.

First, owners of public service vehicles (**PSVs**) would be required to modify their vehicles to suit PWDs. Once the modification is made, they may apply to the Cabinet Secretary for Finance for twenty-five percent (25%) of the modification cost. This would cushion the owners of PSVs from having to bear such costs. The proposed modifications would promote inclusion of PWDs in the transport sector and eliminate barriers that currently impede PWDs from fully enjoying public transport services.

Notably, the Bill has significantly enhanced protection for PWDs by augmenting the penal framework relating to offences against them, both in terms of increasing the punishment of existing offences under the Act and introducing new offences which presently do not feature under the Act.

Secondly, commercial and residential houses built by government agencies will reserve at least five percent (5%) of the units to PWDs, with favorable payment conditions like longer repayment periods.

This will address the barriers that PWDs face in the real estate market. Similarly, five percent (5%) of market stalls would be reserved for PWDs. This would foster economic independence as it would allow PWDs to engage in commercial activities.

Thirdly, all government departments would be required to have a disability mainstreaming unit headed by a member of the department. The disability mainstreaming unit would be responsible for ensuring compliance with the Bill's provisions and discussing disability matters with the NCPWD. This would significantly contribute to the development of inclusive policies for PWDs.

Lastly, all media stations with television and radio broadcasts would, on a monthly basis, be required to allocate an hour of free airtime to discuss disability issues. This would help sensitize members of the public on disability issues and the importance of integrating PWDs in society. The NCPWD would also coordinate the publication of at least a column every month in print media on PWD issues.

Conclusion and Recommendations

Whereas the Bill marks a tremendous step in the right direction as far as enhancing PWD interests is concerned, the following proposals should be considered as the Bill undergoes scrutiny within the National Assembly.

i) The issue of vetting for purposes of registration as a PWD under the 2010 Regulations has not been addressed by the Bill. Therefore, there may be need to introduce an amendment to the Bill, to the effect that once a person has undergone a medical examination to ascertain his or her disability, there should be no further vetting undertaken by the vetting committee of the NCPWD.

ii) The Bill does not specify what the owner of a PSV who modifies his or her vehicle to accommodate PWDs should do, as far as the modification costs are concerned. It only provides that such owner shall apply to the Cabinet Secretary for twenty-five percent (25%) of the direct cost of modification. The drafters should clearly specify the nature of accommodation sought by the PSV's owner from the Cabinet Secretary, whether a cash refund or a tax deduction etc.

iii) Whereas the Bill requires media houses to accord at least one (1) hour of free radio or television coverage on disability related issues per month, it doesn't specify the place of streaming platforms in such coverage, noting that these platforms are increasingly becoming a source of information and interaction with the general public. Therefore, the role and place of social media should be provided for.

iv) Much as the NCPWD is obligated to ensure that at least a column is published per month on print media addressing disability matters, the Bill should consider whether social media posts fit within the scope of print media. It is noteworthy that social media is gaining traction as the new source of written information, which has, to some extent, impacted the business of traditional print media.

John Mbaluto
Deputy Managing Partner | john@oraro.co.ke

Ajak Jok Ajak
Associate | ajak@oraro.co.ke

ALL INCLUDED:

A LOOK AT THE FINANCIAL INCLUSION OF REFUGEES IN KENYA

Introduction

According to the *Blacks' Law Dictionary,* finance is the business aspect that is concerned with the management of money, credit, banking, and investments. Financial inclusion by extrapolation thus means making all the aspects of finance available to every legal person. In ordinary parlance, financial inclusion refers to the ability of individuals and businesses to access useful and affordable financial products and services that meet their needs in facilitating transactions, payments, savings, credit, and insurance that are delivered in a responsible and sustainable way. When addressing refugee financial inclusion, one refers to the ability of refugees to access transaction accounts with a financial institution, micro-finance institution or a digital or electronic instrument for purposes of storing, keeping, sending, and receiving money.

Financial inclusion encompasses various aspects, such as making financial products and services affordable and accessible to low-income earners, expanding financial institutions and service providers to marginalised or rural areas, providing relevant or legal identity documentation to the banking population, creating a data source, and improving literary or financial skills to combat lack of trust in the financial service providers. With that in mind, this article seeks to address the problems impacting refugees' financial inclusion in Kenya.

Background to Kenya's Financial Inclusion Policy

Kenya is on the verge of creating an all-inclusive, knowledge-based economy and has been hailed as one of Africa's leading countries on financial inclusion with a robust policy to combat poverty and increase opportunities for investments for the disaggregated populations. The Kenya National Payments System Vision and Strategy 2025 makes inclusiveness one of its top priorities. The aim is to boost shared prosperity for the Kenyan people. According to the Central Bank of Kenya (**CBK**) 2021 FinAccess Report, Kenya's household financial inclusion rate stood at approximately eighty three percent (83%).

Despite such a robust national financial inclusion policy and strategy, it can be argued that refugees in Kenya have been deliberately excluded from the benefits of the policy due to a discriminatory regulatory framework.

Exclusion of Refugees from Financial Access

Consumers are classified as financially excluded if they lack access to any formal or informal financial products or services. Generally, the universal factors that influence financial inclusion or exclusion include education, wealth, access to livelihoods, urban proximity, and cultural dynamics, such as gender biases or prejudices. All these factors contribute to the overall financial exclusion of refugees in one way or the other. Nonetheless, they are not the biggest threats to refugee financial inclusion in Kenya.

The financial service sector is the most important part of any economy, as it facilitates investments, provides access to capital, and helps manage financial risks, which drive economic growth. In this regard, the sector is heavily regulated to ensure consumer protection as well as a smooth, efficient and inclusive financial service ecosystem. Unfortunately, Kenya's financial regulatory system excludes refugees from accessing financial services and products. For instance, the requirement under section 45 of the Proceeds of Crime and Anti-Money Laundering Act, 2009 (**POCAMLA**) which obligates providers of financial products and services to verify the identity of their customers does not include a Refugee Identification Document (**Refugee ID**) as a transactional document for banking purposes.

Further, the Proceeds of Crime and Anti-Money Laundering Regulations, 2013 (**the Regulations**), explicitly state at regulation 13, that for purposes of section 45 (1) of POCAMLA, a financial or reporting institution shall not enter a business relationship with a customer unless such a customer has a personal identification number (**PIN**) issued by Kenya Revenue Authority (**KRA**). However, a KRA PIN is not ordinarily issued to refugees unless they demonstrate exceptional circumstances that would warrant them to be issued with a KRA PIN. This difficulty effectively bars refugees from operating personal bank accounts.

Second, regulation 7 of the CBK E-Money Regulations, 2013 (**the CBK E-Money Regulations**) stipulates that all e-money issuers shall ensure that they and their agents comply with the applicable provisions of the POCAMLA and the Regulations. Although opening a mobile money account does not require the production of a KRA PIN, the mobile money operators such as Safaricom and Airtel are reporting institutions for the purposes of POCAMLA. In compliance with the CBK E-Money Regulations, Safaricom promulgated the M-Pesa Customer Terms and Conditions which do not include a Refugee ID as part of the required identity documentation for purposes of Account Opening and Maintenance. By implication, Safaricom does not open M-Pesa accounts for refugees.

The immediate former Governor of the CBK, Dr. Patrick Njoroge is on record that an ID is the most important tool and the first step toward financial inclusion. Thus, lacking one effectively prevents individuals from financial access. In the case of refugees, excluding a Refugee ID as a transactional document appears to discriminate against them. Equally, Refugee IDs expire every five (5) years, and it takes up to three (3) years to renew them. This bureaucratic hindrance also contributes to refugee financial exclusion.

Aside from exclusionary regulatory policies, refugees are highly affected by universal factors that limit financial inclusion. For instance, Kenya's refugee encampment policy places refugee camps at the periphery of the country. These places are very remote and do not have on-site providers of financial services and products. In the same vein, the refugee camps are plagued with lack of or limited education opportunities. It is also difficult for refugees to access the labour market and scarce business activities contributes to poor or lack of livelihoods leading to low wealth indices amongst refugees. All these factors contribute to low levels of financial access for refugees.

The Refugees Act, 2021

Article 27 (1) of the Constitution of Kenya, 2010 (**the Constitution**) provides that everyone is equal before the law and has the right to equal protection and equal benefit of the law, which extends to the full enjoyment of all rights and fundamental freedoms. In essence, the supreme law of the land guarantees that both refugees and citizens alike enjoy equal protection and benefit of the law. While the financial regulatory laws arguably disadvantage refugees by excluding them from financial access, Article 27 (4) of the Constitution prohibits the State from enacting laws that are unjust or discriminatory on any grounds, including social origin or status, as it is the case for refugees.

It is in this context that the Refugees Act, 2021 (**the Act**) was passed into law with the intention of setting up a legal, social, and economic ecosystem where refugees could become self-reliant and contribute to the economic development of Kenya. To this end, section 28 (4) of the Act provides that refugees shall be enabled to contribute to the economic and social development of Kenya by facilitating access to, and issuance of, the required documentation at both levels

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of Government. Equally, section 28(5) of the Act grants refugees the right to engage individually or in a group in gainful employment or enterprise or to practice a trade or profession where they are duly qualified.

In addition, section 28 (7) of the Act elevates the status of a Refugee ID by granting it, at the very least, a status similar to that of the Foreign Certificate issued under section 56 (2) of the Citizenship and Immigration Act, 2011 for purposes of meeting legal obligations, receiving or rendering services countrywide. This means that refugees are entitled to access banking services, KRA PINs, mobile money registration, and e-Citizen services using their Refugee IDs, without the need to provide further supporting documentation.

By Legal Notice No. 143 of 2023, pursuant to section 28 (7) of the Act as read together with section 56 (2) of the Kenya Citizenship and Immigration Act, the Cabinet Secretary for Interior and National Administration declared the Refugee ID alongside other refugee identification documents as valid and proper documents for purposes of acquiring services provided by the Government of Kenya. Similarly, Regulation 29 (1) of The Refugees (General) Regulations 2024 converts the Refugee ID into a Refugee Certificate, specifying a format that aligns with Kenya's system of issuing Identification Documents. The foregoing notwithstanding, the effectiveness of the Act may be undermined unless its provisions are equally integrated into the existing laws that govern the financial ecosystems.

Recommendations

The following recommendations ought to be taken into consideration to harmonise the financial laws with the Refugees Act, 2021 to enhance greater refugee financial inclusion:

- The phrase *"subject to special considerations and circumstances of the refugees"* under section 28 (7) of the Act should be interpreted to mean that refugees, unlike foreign nationals who must first obtain either work permits, student permits, or residential permits to be issued Foreign Certificates and KRA PINs, can directly access services without the requirement to first obtain a Class M Work Permit.
- There should be elaborate redress procedures and timelines for issuance of identification documents to avoid delays in the system which has been the major bottleneck in the refugee access to services.
- For greater inclusivity and mobility within the East African region pursuant to section 28 (8) of the Act, refugees from the East African member states should be allowed to travel across borders within the region using their Refugee IDs. This stems from the fact that a Refugee ID usually shows the nationality of the holder.
- Section 45 of the POCAMLA should be amended, along with the accompanying Regulations, to allow banks and financial institutions to accept a Refugee ID as a transactional document with respect to banking and financial services for refugees.
- The CBK E-Money Regulations should be amended to allow Financial Digital Service Providers to accept a Refugee ID as a transactional document in registering mobile money services.

ORARO & CO. FOR THE OZONE RUN 2024: A CELEBRATION OF THREE YEARS OF IMPACT

Now in its third year, the Oraro & Co. for the Ozone Run has emerged as a cherished event, eagerly anticipated by the community it has built. Held on 21st September, 2024, in the lush settings of the Karura Forest, this year's run not only celebrated our collective achievements in raising awareness about mangrove conservation but also reflected on the remarkable journey we have undertaken thus far, together. As participants laced up their sneakers and took to the picturesque trails, the atmosphere was charged with purpose, reminding us that each step taken is not merely an act of fitness but a stride toward a more sustainable and hopeful future.

The 2024 Theme: 'The Power of Mangroves'

Mangrove forests are vital to coastal resilience, serving as natural buffers against storm surges and significantly mitigating the impacts of cyclones and hurricanes. Their intricate root systems filter pollutants and enhance water quality, benefiting both marine life and the local communities reliant on clean water. Additionally, mangroves are biodiversity hotspots, supporting a diverse array of species, including commercially important fish. Protecting these ecosystems is essential for preserving rich biodiversity and preventing habitat loss. Furthermore, mangrove conservation empowers local communities by providing sustainable livelihoods particularly through fishing, making it a crucial element in the fight for environmental sustainability.

Vanga Blue Forest – The 2024 Beneficiaries

This year, the proceeds from the run will support Vanga Blue Forest, a vital community-led mangrove conservation and restoration project located in southern Kenya.

Vanga Blue Forest was developed when the communities of Vanga, Jimbo, and Kiwegu recognized the benefits that its sister project, Mikoko Pamoja, brought to local people and the environment. Launched in 2019, Vanga Blue Forest aims to provide long-term incentives for mangrove protection and restoration through active community involvement.

Governed by the Vanga, Jimbo, and Kiwegu Community Forest Association (VAJIKI CFA), this initiative aims to protect and restore 460 hectares of mangroves, including the stunning mangroves of Sii Island. The Association for Coastal Ecosystem Services, a registered charity in Scotland, acts as the project coordinator. Vanga Blue Forest significantly contributes to combating climate change by capturing and storing over 5,500 tonnes of carbon dioxide each year. Additionally, the project prioritizes reforesting areas previously cleared for salt pans and establishing timber nurseries to address local needs, fostering both environmental restoration and community resilience.

Reflecting on Three Years of the Ozone Run

2022: The Inaugural Run

In 2022, Oraro & Company Advocates made a significant commitment to environmental stewardship by launching the Oraro & Co. for the Ozone Run, a flagship initiative aimed at contributing towards global efforts in combating climate change. Partnering with Ngong Road Forest Sanctuary, the inaugural event celebrated World Ozone Day by raising awareness about the impacts of deforestation. This inaugural run not only highlighted the critical importance of reforestation and conservation but also reaffirmed the firm's commitment to environmental protection, successfully raising funds for the planting of 1,100 indigenous tree seedlings in the sanctuary.

2023: A Commitment to Beat Plastic Pollution

In 2023, aligning with the global call to action for World Environment Day under the theme #BeatPlasticPollution, we proudly pre-

sented the second edition of the Oraro & Co. for the Ozone Run, dedicated to combating one of the gravest environmental challenges of our time. By inviting various stakeholders to participate, we created a platform for collective action in the movement to reduce plastic waste and protect our ecosystems. This year's run aimed to raise awareness about the detrimental effects of plastic pollution - its contamination of water bodies and harm to marine life - while also addressing its significant contribution to greenhouse gas emissions and climate change.

The funds raised from this run benefited Gjenge Makers, enabling them to purchase a crusher that significantly enhanced their production capacity of cabro blocks made from recycled plastic. This investment allows them to expand their innovative work in creating sustainable building materials from recycled plastic waste, amplifying their positive impact on both the environment and local communities. By boosting their capabilities, Gjenge Makers is now better equipped to tackle plastic pollution while providing solutions that contribute to a greener future.

2024: A Wave of Mangrove Action

In 2024, we rode the tide of community spirit with the Oraro & Co. for the Ozone Run, themed 'Protecting Our Shores: The Power of Mangrove Trees.' This year's event powerfully underscored the essential role that mangroves play in safeguarding coastal ecosystems and mitigating climate change. As participants fully immersed themselves in the experience, they responded to the urgent call for marine conservation, emphasizing the significance of these natural buffers that protect shorelines and promote biodiversity.

By raising awareness of the critical benefits of mangrove restoration, we united runners, colleagues, clients, families, and environmental advocates in a shared mission to keep our shores vibrant and resilient. Together, we demonstrated that collective action makes waves in the fight for a sustainable future.

A Heartfelt Thank You

To all our participants, sponsors, clients, colleagues, family, friends and vendors we extend our deepest gratitude for your unwavering support throughout the years. Your commitment to the Oraro & Co. for the Ozone Run has been instrumental in driving our mission forward and raising awareness about critical environmental issues. Each step you took, every donation made, and all the encouragement shared have collectively created a powerful ripple effect. Together, we are not just participants, donors or service providers; we are champions of a cause that transcends distance and time. Thank you for being an integral part of this journey toward a more sustainable future. Your involvement inspires us to strive for greater heights and make a lasting impact for generations to come.

Looking Ahead

As we look to the future, the Oraro & Co. for the Ozone Run is committed to evolving and expanding its impact. We invite everyone to continue this journey with us. Together, we can continue to amplify our voices, joining other active local and global voices in creating a movement that emphasizes the importance of a sustainable future.

Remaining Committed

The Oraro & Co. for the Ozone Run has transformed into more than just an annual event; it is a testament to what can be achieved when a community comes together for a common cause. As we celebrate the successes of the past three years, we remain committed to raising awareness about ozone issues and fostering a healthier environment for all. With every step we take, we move closer to a future where clean air and thriving ecosystems are a reality for generations to come. Let's continue this journey together - breathe easy, live green.

ORARO & COMPANY
ADVOCATES

An Affiliate Member of AB & DAVID AFRICA

CONTACTS:
ACK Garden Annex, 6th Floor, 1st Ngong Avenue
P.O. Box 51236 - 00200, Nairobi, Kenya.
T: +254 709 250 000 | E: legal@oraro.co.ke

| Oraro & Company Advocates

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