



NR&Co Quarterly

...Legal Briefs



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KARIBU!

Editor's Note



Wilson Mwihuri

Welcome all to our first Newsletter of the year 2017.

The poet John Donne once wrote that “no man is an island entire of itself; every man is a piece of the continent, a part of the main...” It is in this spirit that we begin this edition of our Newsletter

by highlighting some of the CSR activities which members of the firm have participated in.

Being an election year, the legislative highlights section of the Newsletter begins with a brief highlight of some of the salient features of the Electoral Laws (Amendment) Act, 2017, the purpose which was to, inter alia, amend both the Elections Act, Independent Electoral and Boundaries Commission Act and Elections Campaign Financing Act. Still under legislative highlights, we consider the effects of the Competition (Amendment) Act 2016, and the Insurance (Amendment) Act, 2016.

In the Case Highlights section, we draw your attention to, among other cases, a landmark decision from the Constitutional Division of the High Court where the Court found the Penal Code provision on criminal defamation to be unconstitutional, therefore striking a blow for freedom of expression.

In our Contributors' Platform, we briefly discuss aspects of key pieces of legislation passed in the recent past. We briefly analyze the Contempt of Court Act 2016, the Bribery Act 2016, and the concept of “Buyer Power” introduced through the Competition (Amendment) Act No. 49 of 2016.

Lastly, the NR & Co. team is also growing with the admission to the Bar of two members of our editorial team, namely Rosemary Kamau and Ruth Regero. Join me in wishing them the best as they begin their professional lives as Advocates of the High Court of Kenya.

We trust that you will enjoy reading this edition of our Newsletter.

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THE FIRM & SOCIETY

“Mother Teresa” ... We all can associate this great icon with one thing; giving. She gave her entire life to the disadvantaged in society, creating a home for them to ensure they can afford to smile, have a cause to live for and hope that tomorrow will be better. Today her legacy will never be forgotten; she is and will always be an icon, a household name, a heroine.

Here at Njoroge Regeru & Company Advocates, we are following in her footsteps in an attempt to lessen the burdens of the needy. We endeavor to hold each other's life and help where we can. To quote from the Bible in Luke 12:48, “For of those to whom much is given, much is required.”

With the beginning of a new year, the firm's main focus is not only goal setting but also setting smart goals. For the year 2017, we intend to continue the trend set previously and we are dedicated to giving back to the community. Tony Robbins, an American businessman, author, and philanthropist rightly stated that setting goals is the first step in turning the invisible into the visible. Goal setting is therefore an important platform that helps both individuals and corporates to achieve their goals.



The firm, through its vision and mission, has continued to set its goals and objectives. In 2016 the firm was involved in several charity events including:-

1. The First Lady's Half Marathon (beyond zero campaign)- This is an event organized by the First Lady of the Republic of Kenya with the aim of reducing maternal death in mothers and infants. In 2016, this event took place on 6th March, 2016 at the Nyayo National Stadium. The participants could choose to run for Two (2) Kilometers, Five (5) Kilometers, Ten (10) Kilometers or 21 Kilometers (half marathon). A total of Twenty-Seven (27) members of staff stood with our mothers and infants by participating in the event.
2. The Nairobi Hospice Walk. This is a walk organized annually by the Nairobi Hospice to raise funds for assisting patients and families of those suffering from chronic illnesses. On the 24th September, 2016 at the Ngong Forest, a total number of Eleven (11) members of the firm participated in the event. It was a fun-filled event as the participants enjoyed the cool breeze of the forest as well as interacted with each other and made new friends. At the end of the day, each participant took home fond memories of the time spent and a certificate of participation as mementos of the day.
3. The Standard Chartered Marathon- This is an annual event organized by the Standard Chartered Bank Kenya Limited with the aim of raising funds for the visually impaired. It was yet another chance for the members of the firm to show their support by joining thousands of Kenyans that showed up for the event. It took place on 30th October, 2016 at the Nyayo National Stadium. A total of Nineteen (19) members of the firm took part. The races were categorized into five (5) Kilometers, Ten (10) Kilometers, Twenty-One (21) Kilometers (half marathon) and Forty-Two (42) Kilometers (full marathon).

Here, the members had a chance to challenge themselves by choosing the races that would put them to the test. They were committed to work up a sweat and burn a few calories in solidarity. And as a bonus, we were honoured to receive an award from the organizers of the event.

4. Starehe Girls High School- The firm adopted a charitable initiative to fund the school. The aim is to help cater for school fees of needy students at the school.

This year, we are still committed to do more and stand with those less privileged than we are, those whose sun seems not to rise and those that need a helping hand. We are dedicating 2017 to giving back to the needy starting with the children.

We will be spreading some love to everyone.



LEGISLATIVE UPDATES

With 2017 being an election year, there is a lot of focus on election laws and the responsible agencies tasked with delivering a credible election. As such, we have kept a keen eye on the latest and most relevant Acts of Parliament and they are as follows:

1. THE ELECTORAL LAWS (AMENDMENT) ACT, 2017

The Election Laws (Amendment) Act (“the Amendment Act”) was assented to on 9th January, 2017 and came into force on 30th January, 2017. The purpose of the Act is to give effect to Article 99(1)(b) of the Constitution and to amend the Elections Act, Independent Electoral and Boundaries Commission Act and Elections Campaign Financing Act.

Among the notable amendments to the Elections Act include Section 4 which reduces the number of days upon which the Independent Electoral and Boundaries Commission (“the Commission”) is to open the register of voters for inspection to thirty days. Section 8 requires both Members of Parliament and those of the County Assemblies to have a degree from a recognized university. However; this requirement shall take effect after the 2017 General Elections. Section 16 amends the Elections Act and requires the Commission to ensure that the number of voters per polling station does not exceed seven hundred to ensure there is efficient and effective elections. The Act further requires the Commission to put in place a complementary mechanism for identification of voters and transmission of election results which must be simple, accurate, verifiable secure, accountable and transparent as required by the Constitution.

The Second Schedule of the Independent Electoral and Boundaries Commission Act has been amended and now requires that in the event of a General Election, the electoral code of conduct shall apply from the date of publication of a notice of election until the swearing in of newly elected candidates.

The Act further provides the procedure to be followed by the Commission in delimitation of electoral boundaries. In addition, the Commission is required to prepare and publish a preliminary report outlining the proposed delimitation and the specific geographical and demographical details relating to such delimitation.

It is also important to note that the Amendment Act has suspended the operations of the Electoral Campaign Financing Act, 2013 which Act shall come into force immediately after the 2017 General Elections.

2. THE COMPETITION (AMENDMENT) ACT, 2016

The Competition (Amendment) Act, 2016 (“the Amendment Act”) came into force on 13th January, 2017. The Amendment Act amends the following sections of the Competition Act (“the Principal Act”): Section 2, Section 5, Section 18, Section 24, Section 34, Section 36, Section 37, Section 41, Section 42, Section 47, Section 48 and Section 70. Specifically,

- a) Section 24 of the Principal Act has been amended to introduce the concept of “buyer power”. The new Section 24(2A) now provides that any conduct that amounts to abuse of buyer power in a market is prohibited. Section 24(2D) defines “buyer power” as *the influence exerted by an undertaking or group of undertaking in the position of a purchase of a product or service to obtain from a supplier more favourable terms, or to impose a long term opportunity cost including harm or withheld benefits which, if carried out, would be significantly disproportionate to any resulting long term cost to the undertaking or group undertakings.*
- b) The new Section 36 (d) now provides that a financial penalty “of up to ten percent of the immediately preceding year’s gross annual turnover in Kenya

of the undertaking or undertakings in question” may be imposed on an undertaking after the Authority has conducted its investigations and is of the view that the undertaking engages in any conduct that may lead to the violation of Sections A, B or C of Part III of the Principal Act.

- c) Section 47 (3) now provides that the authority may impose a financial penalty of up to ten percent of the preceding year’s annual gross turnover and that any person who, being a party to a merger gives materially incorrect or misleading information or fails to comply with any condition attached to the approval for the merger, leading to a revocation of the merger, commits an offence and shall be liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding five years.

3. THE INSURANCE (AMENDMENT) ACT, 2016

The Insurance (Amendment) Act, 2016 (“the Amendment Act”) came into force on 13th January, 2017. The Amendment Act amends the following sections of the Insurance Act (“the Principal Act”); Sections 2, 19, 41, 42, 43, 57, 58, 115 and the Second Schedule. Specifically,

- a) Section 25 of the Principal Act which provides for requirements as to capital structure and voting rights, has been amended by introducing a new subsection (1) (a) which provides that the capital of the insurer may consist of-
 - (i) in the case of a new company, ordinary shares each of which has a single face value with voting rights and shall be irredeemable, and non-cumulative preference shares;
 - (ii) in the case of existing insurers, in addition to the capital in subparagraph

(1), subordinated loans as may be approved by the Insurance Regulatory Authority, share premiums, reserves and any other form of capital as may be determined by the Authority from time to time.”

Subsection 1A provides that the capital provided under subsection (1) (a) “shall not rank in priority to policyholders’ interest at the time of liquidation.”

b) The new section 41(1) of the Act provides that an insurer carrying on

insurance business in Kenya shall at all times maintain the capital adequacy ratio of one hundred per centum. Additionally, an insurer carrying on both long term and general insurance business shall at all times maintain separate capital adequacy ratios.

c) Section 42 (1) now provides that in determining the capital required, an insurer shall take into consideration the capital for insurance risk, market risk, credit risk and operational risk then

apply such capital charges on assets and liabilities as shall be determined by the Authority from time to time. A “capital charge” has been defined to mean the proportion of capital required to take care of the potential deterioration of the economic value of an asset and the uncertainty in estimating liability due to the occurrence of an adverse event.



CASE HIGHLIGHTS

The relationship between the law and its application has remained one that evolves as time progresses and the Courts have ably applied this in their various findings. Highlighted below are some of the key cases decided recently;

1. ANTHONY OTIENDE OTIENDE VERSUS PUBLIC SERVICE COMMISSION & 2 OTHERS [2016] eKLR

One of the concerns raised in the Petition related to the promulgation of regulations and forms (“impugned forms”) by the Cabinet Secretary in charge of Housing, Land and Urban Development (“the Cabinet Secretary”). The impugned forms were promulgated for the purpose of effecting the provisions of the Land Registration Act, 2012 (“the LRA”). The Petitioner argued that under section 110 (2) of the LRA, such forms could only be properly promulgated after consultation with the National Land Commission and approval by Parliament. As a result, the impugned forms were not recognizable under section 43 of the LRA.

In its Judgement, the Court held that although it would be appropriate to invalidate the impugned forms, the same would throw the entire system of registration of titles into disarray and chaos. As a result, the Judge declared that the promulgated registration forms as well as forms of title including Leases, Title Deeds, Grants and Certificates of Title or of Lease unconstitutional, null and void and ordered that the Cabinet Secretary to initiate meaningful engagement with the public, to seek and to take into account the advice of the National Land Commission on the impugned regulations and forms and seek Parliament’s approval on the same within twelve (12) months. The Judge also stated that the declaration of invalidity was not to operate retroactively.

2. JACQUELINE OKUTA & ANOTHER VERSUS ATTORNEY GENERAL & 2 OTHERS, PETITION NO. 397 OF 2016

The Petitioners in this case challenged the constitutionality of the offence of criminal

defamation created under section 194 of the Penal Code. The Petition raised various questions as to whether criminal defamation is a ground on which a constitutional limitation on the rights of freedom of expression could legally be imposed and whether defamation law infringes the right of freedom of expression guaranteed under the Constitution. The Petitioners were first arraigned in court for allegedly making and/or publishing defamatory statements of and concerning the complainant. Through the Petition, they sought a declaration that Section 194 of the Penal Code is unconstitutional and invalid and any continued enforcement of the said section by the Second Respondent against the Petitioners would be unconstitutional.

The Petitioners cited Article 24 of the Constitution which outlines the grounds for justifiable limitation of rights and Article 33 which guarantees to every person the right to freedom of expression. The Respondents argued that Section 194 of the Penal Code was constitutional in a democratic society as it sought to prevent individuals with ill motives from interfering with the rights of other persons.

The Court held that Section 194 of the Penal Code was unconstitutional and invalid to the extent that it covers offences other than those contemplated under Article 33 (2) (a)-(d) of the Constitution of Kenya, 2010 and that any continued enforcement of the said Section against the Petitioners would be unconstitutional and/or a violation of their fundamental right to freedom of expression guaranteed under Article 33 of the Constitution.

3. NAMALWA CHRISTINE MASINDE VERSUS NATIONAL BANK OF KENYA LTD (2016) eKLR

Here, the Plaintiff sued the Defendant for inter alia general damages for being unlawfully blacklisted with the Credit Reference Bureau. The Plaintiff was an account holder with the Defendant and from that relationship, she took a loan

with the Defendant which was serviceable through a check-off system on her salary. She continued to service the loan. However, on 20th May, 2014, the Plaintiff claimed that the Defendant maliciously and unlawfully caused her to be listed with the Credit Reference Bureau as a loan defaulter and as a result, she was unable to access credit facilities at Kenya Commercial Bank. The Plaintiff claimed that as a result of the unlawful listing, she suffered financial embarrassment due to the delay in processing her application for a loan facility. The Court awarded the plaintiff general damages of Kshs.200, 000/- for financial embarrassment and unlawful listing with the Credit Reference Bureau as a loan defaulter.

4. AFRICAN CORPORATION BANK LIMITED VERSUS DR. ZULFIQUAR ALI JAFFERY (2016) eKLR

In this case, the Respondent had Fixed Deposit Accounts with African Corporation Limited, the Appellant. The Respondent had deposited various amounts of monies into those accounts and at no time did he withdraw sums of money from the accounts nor did he otherwise issue instructions to the Appellant to withdraw any money there from save once when he authorized the transfer of funds from one branch of the Bank to another.

Upon request for account statements and upon perusal of the same, the Respondent discovered that unauthorized withdrawals had been made from his said accounts. The court held that the Appellant *was negligent in maintaining the Respondent’s accounts in accordance with normal banking practices and failed to have internal checks and balances to safeguard the sanctity of the Respondent’s accounts and was liable to make good all sums it received from the Respondent together with accrued interest thereon. The Appellant was ordered to pay the Respondent a sum of Kshs.22,014,459.55 and to also pay the Respondent’s costs of the appeal and the costs of the suit in the High Court.*

INTERLUDE.....

Employer to applicant: "In this job we need someone who is responsible."

Applicant: "I'm the one you want. On my last job, every time anything went wrong, they said I was responsible."

(<https://channel9.msdn.com/Forums/Coffeehouse/252336-Professional-Jokes-Must-Read-Fun-Time>)

My father always told me that it is better to give than to get.

- Was he a monk?

- No, he's a boxer.

(<http://www.funny-jokes-quotes.com/profession-jokes.html>)

Q: How do you turn white chocolate into dark chocolate?

A: Turn off the light.

(<http://www.laughfactory.com/jokes/joke-of-the-day#sthash.TT4TJ5Xw.dpuf>)



CONTRIBUTORS' PLATFORM

Analysis of the Contempt of Court Act, 2016



By Christine Wamaitha
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The Contempt of Court Act was assented into law on 23rd December, 2016 and came into force on 13th January, 2017. The Act defines Contempt of Court and limits the powers of Courts in punishing for it. Section 4 of the Act provides that *contempt of court* includes both civil contempt and criminal contempt. Section 5 of the Act further categorizes contempt as direct or contempt in the face of the court, and indirect or contempt outside the court.

Kenya has never had a Contempt of Court Act prior to 23rd December, 2016. The furthest the Country had gone with regard to coming up with legislation for Contempt of Court was the Contempt of Court Bill 2013 which faced a lot of criticism for suppressing the freedom of expression.

The Koinange-Gachoka case also raised serious concerns for freedom of expression in relation to contempt of court. In June 2015, the Chief Magistrates Court at Nairobi convicted Jeff Koinange, a media personality and Tony Gachoka, a political activist for Contempt of Court. The two were accused of defying an interim injunction issued in a defamation case and holding discussions on the ongoing case in the **Jeff Koinange Live "JKLive"** talk show hosted by Mr. Koinange on 1st April, 2015. The two were later convicted of the offence of contempt of court

and sentenced to imprisonment or in the alternative to a fine of Kshs 2 million. The High Court however suspended the case against Jeff Koinange and Tony Gachoka, and allowed their petition challenging the constitutionality of criminal defamation in Kenya. The High Court also suspended the fine of 2 Million Kenya Shillings issued against them. Moreover, The High Court ordered for the immediate release of Mr. Gachoka who was imprisoned for failing to raise the 2 Million fine imposed on him by the lower Court.

In 1999, Mr. Gachoka as editor and publisher of 'The Post on Sunday' had published an article titled "Chesoni implicated in Goldenberg cover up: An expose of judicial corruption in Kenya" in which Mr. Gachoka made allegations of high level corruption in the Kenyan judiciary, alleging that the then Chief Justice Zaccheus Chesoni had received a Kshs 30 Million bribe to ensure that the Courts ruled in favour of one of the litigants in a certain case.

The Attorney General instituted Contempt of Court proceedings against Mr. Gachoka and his publication on the grounds that the publications were *sub-judice* and a scurrilous and unjustified attack on the Court which were calculated to bring the administration of justice in Kenya into disrepute and contempt. In the case of *Republic versus Gachoka*, a seven-judge Court of Appeal bench found Mr Gachoka guilty of the charges of Contempt of Court; and sentenced him to the maximum six months' imprisonment without the option of a fine. The "Post on Sunday" was fined Kshs 1 Million, the payment of which allegedly pushed the magazine out of business. Mr. Gachoka would later be awarded Kshs 1 Million for the violation of his fundamental rights and freedoms while he was in prison serving the six-month sentence.

Due to the lack of specific legislation,

Kenya has always relied on the Judicature Act, Chapter 8 of the Laws of Kenya when it comes to dealing with Contempt of Court matters. Section 5 of the Judicature Act gives power to the High Court and the Court of Appeal to punish for Contempt of Court. This new Act has therefore provided a clear guideline with regard to Contempt of Court matters by clearly describing the offence of Contempt, the jurisdiction of the courts in handling contempt and prescribing the punishment for the offence.

Scope of the Act

The Act is of great importance as it seeks to, *inter alia*: (1) uphold the dignity and authority of the Court, (2) ensure compliance with the directions of Court, and (3) preserve an effective and impartial system of justice.

Of importance to note is that the Chief Justice is empowered to make rules of procedure to regulate proceedings and the process of trying an offence of Contempt of Court in the Superior and Subordinate Courts, including transfer of proceedings from a Subordinate Court to a Superior Court, proceedings in camera and prohibition of publication of proceedings, appeals and limitation for appeals.

Any proceedings to try an offence of Contempt of Court provided for under any other written law shall not take away the right of any person to a fair trial and fair administrative action in accordance with Articles 47 and 50 of the Constitution. Proceedings for criminal contempt of court shall not be instituted except by or with the consent of the Director of Public Prosecutions, with the leave of the court or on the motion of a court having jurisdiction to deal with criminal contempt of court.

The offence of Contempt of Court

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however, has a number of defences as prescribed by Section 9 of the Act. Some of the defences are: a fair comment made in good faith, a publication of a fair and accurate report of any judicial proceeding and a true declaration made in good faith among others.

The concept of **strict liability** is also broadly discussed in the Act. Section 10 of the Act defines strict liability in relation to contempt of court as *the rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so*. This means that a person who commits an offence of contempt even without intention will still be guilty of contempt of court. The strict liability rule however, applies only in relation to publication as stated by section 10(2) of the Act.

The Act has further provided for defences to the strict liability rule. Section 12 states that a person who has been charged with the offence of Contempt of Court can rely on any defence available at common law.

Furthermore, a person will not be guilty of Contempt of Court under the strict liability rule if that person has published any matter which interferes or obstructs the course of justice in connection with any civil or criminal proceedings pending at the time of publication. The defence however can only be relied upon if at the time of publication, that person had no reason to believe that the proceedings were pending.

Offences

Section 27 of the Act has outlined the instances in which a person can be found guilty of the offence of Contempt of Court. Some include:

A person who—

- (a) assaults, threatens, intimidates, or willfully insults a judge or judicial officer or a witness, during a sitting or attendance in a court, or in going to or returning from the court;
- (b) willfully and without lawful excuse

disobeys an order or directions of a superior or subordinate court in the course of the hearing of a proceeding;

- (c) within the premises in which any judicial proceeding is being had or taken, shows disrespect with reference to such proceeding, or any person before whom such proceeding is being heard or taken;
- (d) causes an obstruction or disturbance in the course of a judicial proceeding;

Section 28 of the Act goes ahead to prescribe the punishment for the offence. Accordingly, a person who is convicted of Contempt of Court is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both. The Court may also order that the accused person be detained in police custody until the next Court session.

Where the Contempt of Court is committed by a company and it is proved to the satisfaction of the court that the contempt was committed with the consent or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contempt and may, with the leave of the Court be committed to civil jail and in addition, be liable to a fine not exceeding two hundred thousand shillings.

Furthermore, a State Organ, Government Department, Ministry or Corporation can also be charged with the offence of Contempt of Court in respect of any undertaking given to a court by the State Organ, Government Department, Ministry or Corporation. A notice of not less than thirty days must however be issued to the accounting officer to show cause why Contempt of Court proceedings should not be commenced against the accounting officer. The notice must also be served on the Attorney General. If the accounting

officer does not respond to the notice to show cause, within thirty days of the receipt of the notice, the court shall proceed and commence Contempt of Court proceedings against the said accounting officer.

Where it is proved to the satisfaction of the Court that the contempt has been committed with the consent or is attributable to any neglect on the part of any accounting officer, the accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings. A State Officer or public officer cannot however be convicted of contempt of court for the execution of his duties in good faith.

Conclusion

From the foregoing, the Act has brought with it new measures to deal with Contempt of Court. It has outlined the various instances in which a person can be found guilty of the offence of Contempt of Court, prescribed the jurisdiction of the various Courts with regard to dealing with Contempt of Court and the punishment for the offence. The provisions of this Act therefore supersede any other written law relating to Contempt of Court.

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The Bribery Act 2016, an Analysis



By Martin Mbugua
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The Bribery Act (“the Act”) was assented into law on 23rd December, 2016 and effectively came into force on 13th January, 2017.

The Act, generally deals with bribery and not other forms of white collar crimes like fraud and money laundering. The term “bribery” is defined under **PART II** of the Act in an open ended manner to mean the act of giving or receiving a financial or other advantage in connection with the “improper performance” of a relevant function or activity that is expected to be performed impartially.

The Act has a potentially wide territorial reach. For example, Section 15 of the Act provides that a citizen of Kenya, public or private entity commits an offence of offering or accepting a bribe if the act which forms part of the offence takes place in Kenya. The Act also provides an exhaustive list of persons who will be

considered to be “associated persons” including persons performing services for or on behalf of another as an agent, employee or in any other capacity.

The offence of failure to prevent bribery applies to the broadly-defined “private entity”. For the offence to arise, the one who bribed must be “associated” with the private entity, a term which will apply to, amongst others, the organization’s agents, employees and subsidiaries. A Kenyan corporation which “carries on a business, or part of a business” in another country may therefore be guilty of the offence.

Changes Introduced by the Act

Section 18 of the Act has introduced heavier sanctions as potential consequences for both individuals and companies. These sanctions range from fines, imprisonment, disqualification, pay back orders and confiscation orders. An individual found guilty of an offence under the Act shall be liable on conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding ten years. A convicted person may also be liable to an additional mandatory fine if as a result of the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss. The mandatory fine shall be equal to five times the amount of the benefit or loss suffered. The Court in determining the fine to be paid shall not only seek to punish but also to deter similar offences by the same or other private entities.

The Act has also introduced a “potentially unlimited fine” and up to ten years’ imprisonment for individuals who are found guilty of serious offences under Section 5 (bribing), Section 6 (being bribed), section 8 (bribing a foreign public official), section 10 (negligently failing to prevent bribery) and section 18 on unlimited fine for any company

or partnership that is convicted of an offence.

The Act has introduced the concept of disqualification for persons who upon conviction will be barred from holding public office or state office and in case of a director, the position of a director. Juristic persons upon conviction shall be disqualified from transacting business with the national or county government for a period of ten years.

Under the Act, the Court may order the convicted person or entity to pay back the amount or value of any advantage received or property acquired to the government.

The idea of protecting the whistle blowers and witnesses will have a great impact on offenders. Section 21 provides that a whistle blower in a case of bribery shall not be intimidated or harassed for providing information to law enforcement institutions or giving testimony in a court of law. The Act also criminalizes any action in relation to demotion, admonishment, dismissal from employment, transfer, harassment and intimidating a whistle blower or witness. The sanction created is a fine of one million shillings or to imprisonment for a term not exceeding one year or to both such fine and imprisonment upon conviction.

It also amends section 39 of the Anti-Corruption and Economic Crimes Act, by deleting the words “on evidence” and substituting thereof the words “if it is satisfied that there are reasonable grounds to suspect.” This means that the standard of proof required has been lowered under the Act and therefore any form of suspicion by the Ethics and Anti-Corruption Commission allows them to make an ex-parte application to the

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High Court for an order prohibiting the transfer or disposal of or other dealing with property

The Act also amends the Ethics and Anti-Corruption Commission Act, under section 11 (1) (d), by inserting the word “bribery” immediately after the word “corruption” therefore giving discretion to the Commission to investigate and recommend bribery acts to the Director of Public Prosecution.

The Act further amends Section 3 of the Anti-Corruption and Economic Crimes Act, 2003, by inserting the word “bribery” immediately after the word “corruption” which empowers the Chief Justice to appoint special magistrates to deal with bribery offences through a notification in the Kenya Gazette.

Conclusion

Accordingly, the Act has brought with it new measures to deal with bribery

offences; lowered the criminal standard; introduced various duties upon entities and individuals. However, the gravity of the sanctions under the Act and its wide application is key in the fight against bribery. Nonetheless, the Act has not defined key concepts, among the notable ones include ‘part of a business’ which interpretation will be left to the courts to deliberate.

The Concept of Buyer Power



By *Christine Njoki*
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The Competition (Amendment) Act No. 49 of 2016 (“the Amendment Act”) was enacted on the 23rd December, 2016 and came into force on the 13th of January 2017. This Amendment Act seeks to make various changes to the Competition Act (“the Principal Act”) by increasing the

capability of the Competition Authority of Kenya’s to detect and take action upon an undertaking or undertakings found to be engaging in any anti-competitive behavior and introducing specified thresholds for financial penalties.

Notably, the Amendment Act introduced the concept of “buyer power”. The concept has been defined in the Act as “the influence exerted by an undertaking or group of undertakings in the position of a purchaser of a product or service to obtain from a supplier more favorable terms, or to impose a long term opportunity cost including harm or withheld benefit which, if carried out, would be significantly disproportionate to any resulting long term cost to the undertaking or group of undertakings.”

In 1981, a report by the Committee of Experts on Restrictive Business Practices of the Organization for Economic Co-operation and Development (OECD)

defined buyer power as the situation that would exist as a result of the dominance or the strategic advantage of a firm or a group of firms, and thus ability to obtain more favorable terms than other buyers in that market. Generally speaking, buyer power is seen to present itself in three main scenarios. These are:-

- i. The merger of two or more large buyers, into a single buyer.
- ii. The conclusion of joint purchasing agreements whereby a purchaser agrees to buy and the seller on the other hand agrees to sell, under specified terms and conditions.
- iii. The inducing of suppliers who largely depend on the dominant buyers to grant the dominant buyers unjustifiable advantage in the market over the others.

Buyer power can be categorized into two, namely; monopsony power and

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bargaining power. Both types will generally result in the lowering of input prices. An undertaking or undertakings are said to have monopsony power if they have market power in employing factors of production. Usually, there is only one buyer and many sellers in a monopsony. Bargaining power on the other hand is the ability of an undertaking or undertakings to exert their influence over others in a negotiation so as to achieve favorable conditions against them.

Buyer power becomes problematic if the stronger buyer also has selling power. This is because the impact of the buyer's strength will be dependent upon whether the buyer will have seller power in the downstream market. Buyer power also brings about the reduction of innovation

and/or innovation by the suppliers. This is because the suppliers are no longer empowered to realize the profits they would realize, if buyer power was on the minimum or eliminated completely.

Penalty

The penalty to be imposed under the new laws for an undertaking or group of undertakings found to be engaging in the abuse of buyer power shall be imprisonment for a term not exceeding five years or a fine not exceeding ten million Kenya shillings or both. The criterion to be used in the determination of buyer power has also been provided for and it shall be the nature and determination of contract terms, the payment requested for access infrastructure and the price paid to suppliers.

Conclusion

From the foregoing, it is clear that buyer power will especially be important in instances where an undertaking or a group of undertakings will have monopolistic/oligopolistic power, such as when there will be broadly competitive conditions on the supply side of the market and the supply curve will not be perfectly static. This is as a result of the ability of an undertaking or undertakings with buyer power to decrease the purchase prices or stimulate innovation in a given industry.

LAW SOCIETY OF KENYA VERSUS KENYA REVENUE AUTHORITY & HONOURABLE ATTORNEY GENERAL PETITION NO. 39 OF 2017

The Petitioner in this case, challenged the constitutionality of paragraph 11A of the Eighth Schedule of Income Tax Act (hereinafter referred to as the "schedule") which purported to impose an obligation on the Vendor to pay Capital Gains Tax before registration of the Transfer. The Petition was based on the grounds that Paragraph 11A of the schedule is inconsistent with the provisions of paragraph 2 of the schedule as read with paragraph 6(1) (a) of the schedule.

It was also pleaded that paragraph 11A violates the provisions of the Constitution namely; Article 10(1), 10(2), 40(2) (a) and 201 (b) (i).

The High Court held that paragraph 11A of the schedule is unconstitutional and as such, Capital Gains Tax is payable upon registration of the Transfer.



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