



# NR&Co Quarterly

...Legal Briefs



## Table of Contents

Editor's Note .....	1
The Firm .....	2
Legislative Updates .....	3
Case Highlights.....	5
Law Global.....	6
Contributors' Platform.....	8
Acknowledgments.....	12

### Editorial team

Njoroge Regeru  
Sarah Ngachi  
Alfred Muthama  
Ruth Regero

### Contributors

Alfred Muthama  
Sarah Ngachi  
Evans Ngetich  
Grishon Thuo  
David Kariuki  
Jackson Kamenju

### Design & layout:

Grace King'ori

### Publisher

Njoroge Regeru & Company Advocates

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### KARIBU!

## Editor's Note



*Njoroge Regeru*  
Founding and Senior Partner

Welcome all to our second Newsletter of the year 2019. In this quarter we identify the importance of fatherhood and the joy it brings to the male figures of our homes. On our legislative update we note the relevant Bills currently in Parliament whose objectives, amongst others, are to curb the menace of corruption; provide for leave to employed pre-adoptive parents; and permit telecommunication businesses to engage in other enterprises. It is further noteworthy, that a service provider will now be liable to refund a customer whose call is disengaged due to poor connection.

In our case highlights we discuss decisions from the Court of Appeal which have important jurisprudential impact on the commercial sector. For instance, the Court has provided a different interpretation on the words "paid" or "upon payment" with regard to when withholding tax is due. Further, the Appellate Court has reinforced the position that where there is a variation in the facility agreement without the consent of a guarantor, the same discharges the liability of the guarantor.

Additionally, in this quarter, we have introduced a new segment known as Law Global which focuses on legislative development in Africa and the wider world generally. It is worth noting that the African Union is in the process of establishing a free common market for its vast resources. This will result in an increase of more than US \$ 3.4 trillion in gross domestic production.

Lastly, our contributors' platform gives us an in-depth understanding of money laundering and corruption in the extractive industry as well as the need to enact laws to address and hopefully resolve this endemic problem. We have also shed light on the myths and misconceptions of "Huduma namba".

It is our hope that you will enjoy reading this Newsletter and learn something new from its contents.

### Njoroge Regeru & Co. Advocates

Arbor House, Arboretum Drive  
P.O Box 46971-00100 GPO Nairobi

Tel: +254-020-2612531/2613646

020-3586592/2319224,

Cell: 0722 206 884, 0733 608 141, 0752 431 961

Fax: +254-020-2349211, +254-020-2718485,

2375302

www.njorogeregeru.com



THE FIRM

This quarter we celebrate all the men who are fathers or father figures. We rarely get a glimpse on fatherhood, the joy, the challenges, the sensation...being a father. Below are some of the views from the men in the Firm on fatherhood

"Delivery of one's child is one of life's defining moments.

One of the greatest moments of my life was holding the bundle of joy in the delivery room at that first moment when it entered the planet.

The sheer wonderment of new life you've contributed to...it's an awesome moment.

NR

Holding my child for the very first time felt elating; I felt like a co-creator with God.

Just like in the book of Genesis, I looked at what I was a part of, and it was good"

J.K. Mwangi

"Raising my son has been interesting & very fulfilling

It is joyful but can be challenging...it is part of what gives meaning to life

You experience joy, a little anxiety and a lot of imagination when expecting a child...will he/she look like me??

GNT

What have you learnt so far in being a father?

"Be accommodative; learn about each child's temperament.

They are different with different characters; learn to balance each kid.

Each child deserves special attention..."

"Every child has his or her own story"

S.Karuki



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313



RANKED 2018

## LEGISLATIVE UPDATES

In this section we highlight various laws relating to corruption and economic crimes, insolvency, employment and sectional properties among others.

### 1. The Anti-Corruption and Economic Crimes (Amendment) Bill, 2019

The Anti-Corruption and Economic Crimes (Amendment) Bill, 2019 is in its initial stages of legislation. Accordingly, it seeks the public's opinion on the amendment of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 with respect to deterrence mechanisms against persons who engage in corrupt conduct.

In that regard, the Bill intends to prescribe a minimum penalty of a fine not less than Kenya Shillings One Million (Kshs.1,000,000.00) or an imprisonment for a term not less than ten (10) years or to such fine and imprisonment. This is an enhancement from the current penalty provision which prescribes a fine of not exceeding Kenya Shillings One Million (Kshs.1,000,000.00) or imprisonment for a term not exceeding ten (10) years or both such fine and imprisonment; and an additional mandatory fine where, as a result of the conduct that constituted the offence, a person received a quantifiable benefit or any other person suffered a quantifiable loss.

If enacted, the Bill will allow Courts exercise their inherent and unlimited judicial discretion in enhancing consequences arising from corrupt activities.

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

### 2. The Employment (Amendment) Bill, 2019

The principal objective of this Bill is to amend the Employment Act 2007 in order to accord leave to pre-adoptive parents,

that is, persons who adopt children that are not born naturally to them by birth. To this end, the Bill proposes to insert the definition of an "exit certificate" in the Employment Act. The exit certificate is defined as a written authority given to a prospective adoptive parent by a registered adoption society to take the adopted child into the adoptive parent's custody.

The Bill further provides three months leave to the pre-adoptive parent in case of a married female employee, whilst a married male employee shall be entitled to two weeks leave; with full pay from the date of placement of the child. The employee is required to give a written notice to his/her employer within 14 days prior to the date of placement of the child in his/her custody.

### 3. The Sectional Properties Bill, 2019

The principal purpose of this Bill is to provide for the division of buildings into units to be owned by individual proprietors and common property to be owned by proprietors of the units as tenants in common property. It also provides for the use and management of the units and common property as well as address the contemporary challenges associated with ownership of property in a sectional property environment.

Part II of the Bill provides for the process involved from the preparation of the sectional plan by a registered surveyor, approval of building plans by the respective county government, registration of the sectional plans by the Registrar to the issuance of certificates indicating shares in common property. Further, it provides for the rights and liabilities of every owner of a unit as well as the easements in favour of and against the owner of a unit.

Part III provides for the establishment of a Corporation under the name of the owners of the sectional plan. Further, it provides the constitution of its Board of Management and its administrative

functions and powers. Also in section 38, the Bill imposes an obligation upon the developer to insure units prior to their sale and passing of the insurance to the Corporation upon registration of the Sectional Plan.

Part V contains the miscellaneous provisions on termination of the sectional property, dissolution of the Corporation, the right of entry by county government, service of documents and notices, offences and penalties. This Part also lays out the power of the Cabinet Secretary to make regulations. The enactment of this Bill into law shall in effect result to the repeal of the Sectional Properties Act, 1987.

### 4. The Kenya Information and Communications (Amendment) Bill, 2019

This Bill seeks to amend the Kenya Information and Communications Act Cap. 411A to enable persons operating a telecommunication system or providing a telecommunication service to engage in any other business and provides for their separation from the telecommunication business. It also creates an offence where a person provides any service without the relevant license and if convicted, such person shall be liable to a fine not exceeding ten million shillings (Kshs. 10,000,000.00) or to imprisonment for a term not exceeding two years or to both.

The Bill also provides a grace period of six (6) months from its commencement, to ensure compliance with its requirement by persons operating such businesses. Further the Communication Authority of Kenya is granted six (6) months from commencement of the amendments and thereafter to annually report to Parliament on the extent with which the said provision has been implemented. The amendments will provide for a regulation framework for such business, which will also aid in control of anti-competitive practices by the large industries in the sector.

**LEGISLATIVE UPDATES**

The Bill further seeks to amend provisions of the Kenya Information and Communications Act to make provision for quality of service to consumers making calls by compelling licensees in the telecommunications industry to invest in infrastructure that will guarantee quality of service for consumers making calls.

### **5.The Statute Miscellaneous (Amendment) Bill, 2019**

The Statute Miscellaneous (Amendment) Bill, 2019 intends to amend the following laws:

5.1 The Micro Finance Act, 2006 (No. 19 of 2006)

The Act provides that the following activities are prohibited:

- i. Trust operations;
- ii. Investing in enterprise capital;
- iii. Wholesale or retail trade;
- iv. Underwriting or placement of securities;
- v. Purchasing or otherwise acquiring any land (except as may be reasonably necessary for the purpose of expanding the deposit-taking business);
- vi. Purchasing or otherwise acquiring any land

The Bill however proposes to exempt sharia compliant microfinance businesses in Kenya from such provision in so far as it is strictly necessary for their conduct of business.

### **5.1. The Value Added Tax Act, 2013 (No. 35 of 2013)**

The Bill intends to amend the Value Added Tax Act by inserting new provisions under Section 17(5) (b) of the said Act to enable a taxpayer to offset any tax liability due to the taxpayer from any withheld tax.

### **5.2. The Companies Act, 2015 (No. 17 of 2015)**

The Bill seeks to amend the Act by requiring a company to keep a register of beneficial owners whose information shall be contained therein and it shall be lodged with the registrar thirty (30) days after its preparation. It also intends to provide that other than a public company, any amendment of the register shall be lodged with the Registrar within 14 days of the amendment.

Additionally, the Bill provides that companies shall be required to hold annual general meetings once a year, save for single member companies. This period may be extended by application to the Registrar and any company that is in default commits an offence and is liable to a fine not exceeding Kenya Shillings One Hundred Thousand (Kshs.100,000.00).

The Bill also enables directors of a company to allot shares in the company and convert security to shares as authorized by a company's resolution. The Bill further seeks to amend the Companies Act by

reducing the percentage of shares which may be offered for sale from ninety to fifty per cent.

### **5.3.The Insolvency Act, 2015 (No. 18 of 2015)**

The Bill seeks to amend the Act by specifying matters a court may take in granting an approval to lifting of a moratorium. Accordingly, the court will take into consideration: the statutory purpose of the administration; whether the applicant is to suffer any significant loss; legitimate interest of both the applicant and creditors of the company, giving the right of priority to the proprietary interest of the applicant as well as the conduct of the parties.

## CASE HIGHLIGHTS

## 1. Kenya Revenue Authority v Republic (Ex Parte Fintel Ltd) Civil Appeal No. 311 of 2013

This case arose from a dispute regarding the interpretation of the words “paid” and “upon payment” as used in Section 2 as read together with Section 35 of the Income Tax Act, Cap 470. Whereas the Respondents argued that withholding tax is only deducted once the interest has been paid, the Appellants contended that the term “upon payment” under Section 35 (3) as read together with Section 2 meant that withholding tax on interest is payable whether actual payment of the interest is made or not.

On application to the High Court, the Court held that:

*“41. The issue in this case is really whether the applicant must deduct withholding tax on interest claimed as an expense in audited account under section 35 of the Act. As I have pointed, the meaning of “paid” and the language of sections 2 and 35 of the Income Tax Act as a whole do not support the respondent’s position. Sections 35(1) and (3) clearly state that tax is withheld “upon payment” and payment is a necessary prerequisite for the withholding tax to apply.*

*42. I find and hold that the decision made to impose tax on the applicant in this case is without jurisdiction and without mandate of the Income Tax Act and therefore an order of certiorari is appropriate to quash the ultra vires act of the respondent in demanding tax outside its mandate.”*

On appeal, the Court of Appeal noted that the words “paid” and “upon payment” must be interpreted within the context of the Income Tax Act and not in isolation. The Court thus noted;

*“The Income Tax Act has given the word “paid” a technical as opposed to an ordinary definition. Tax law is ever changing, complicated and highly technical. That is why we, with respect disagree with the learned Judge for insisting that “upon payment” must only convey the meaning that money or some valuable thing was delivered. He gave the phrase a very narrow construction. In*

*the context of the Income Tax Act, payment is deemed to have been made even when no money has passed over. We therefore reject the contention that it was not practical to deduct and remit the tax without first actually paying the interest to the contractor. Although section 35(5) requires that where withholding tax is payable, the tax payer must “deduct” and remit the amount so deducted to the Commissioner, the sense in which the word “deduct” is used, as an accounting term refers to the act or process of subtraction of an item or expenditure from gross income to reduce the amount of income subject to income tax. This need not be done physically or practically but as a book entry.”*

The Appellate Court thus upheld the appeal and set aside the decision of the High Court.

## 2. David Harris v Middle East Bank Kenya Limited & 3 others [2019] eKLR

The matter concerns an appeal from the High Court where the appellant was a guarantor to the 2nd respondent for a facility agreement between the 1st respondent and the 2nd respondent, which advanced a loan for a sum of Kshs. 5,000,000.00 to the 2nd respondent. However, a further loan of Kshs. 5,000,000.00 was issued to the 2nd respondent and subsequently additional personal guarantees were issued by the 3rd and 4th respondents, resulting to a total loan of Kshs. 10,000,000.00 being due to the 1st respondent. Consequently, as a result of the latter transaction, the appellant disputed in issuing an additional or second guarantee.

The High Court in rendering its decision found that the 1st respondent had proved their case and that the appellant was only liable to the extent of the initial guarantee that advanced the first loan of Kshs. 5,000,000.00.

The Court of Appeal on considering the same issues raised in the High Court, it established that where there is a variation of a facility agreement without the consent of the guarantor, the variation extinguishes the liability of the guarantor from the

original guarantee agreement. The Court in essence stated that:

*“What this means in effect is that the guarantor may be discharged from a guarantee where there has been a variation of the original facility to which he has not been privy, and has not consented, thereby extending time to pay will result in the guarantor being discharged from the original guarantee agreement.*

*.....In effect, not only did the additional banking facility increase the 2nd respondent’s debt, it also extended the time for which the credit facilities were to be repaid. All this was carried out without the appellant’s consent, and materially charged the entire banking arrangement between appellant on the one hand, and the Bank, the principle debtor, and the guarantors, on the other hand.*

*.....the appellant cannot take responsibility for the liability created behind his back. For clarity, we think that since the appellant was not privy to the transactions, which enhanced the debt and guarantee, he should not be made to suffer for the acts and omissions of the Bank, the principal debtor and the 3rd and 4th respondents.”*

The Appellate Court’s final view was that the conduct of the respondents discharged the appellant from the initial guarantee and further liability charged and created by the said respondents. The appeal was allowed with costs to the appellant.

**LAW GLOBAL**



**THE AfCFTA AGREEMENT IS NOW IN FORCE**

On 29 April, 2019 the African Continental Free Trade Area Agreement (AfCFTA) met its minimum threshold of ratification by 22 African States, resulting to its enforcement on 30th May, 2019 as required by Article 23 of the Agreement. Forming part of the key priorities of Africa’s Agenda 2063, its main objective is to defragment the African economies and market and create a single continental market for the increase of trade and investment on the continent.

It further focuses on the free movement of goods and services as well as the movement of business persons and investments, hence accelerating the establishment of the Continental Customs Union and the African customs union. The same shall enhance competitiveness at the industry and enterprise level through exploiting opportunities for scale production, continental market access and better reallocation of resources.

The Continental Free Trade Area will bring together fifty-four African countries with a combined population of more than one billion people and a combined gross domestic product of more than US \$ 3.4 trillion.

**KENYA’S NEW CURRENCY**

Via Legal Notice 72 of 2019, the Central Bank of Kenya in compliance with Article 231 (4) of the Constitution of Kenya released the new currency notes on 31st May, 2019. The new currency has been effected on the denominations notes of fifty shillings, one hundred shillings, two hundred shillings, five hundred shillings and one thousand shillings notes.

The main features at the front of the currency bear the following: -

- a) An image of Kenyatta International Conference Centre, a skyline image of Nairobi, a rising sun, the Coat of Arms and a dove; and

- b) The signatures of the Governor of the Central Bank of Kenya and of the Principal Secretary of the National Treasury

The primary themes and reverse images of the currency notes are:

The new bank notes shall circulate alongside those previously issued and not withdrawn. However, the old notes will cease to be legal tender commencing 1st October, 2019.

Denomination	Theme	Reverse images
Ksh. 50	Green energy	Windmills Geothermal power plant Solar power panel
Ksh. 100	Agriculture	Maize cobs Tea farm Livestock
Ksh. 200	Social services	Health services Education Athletics
Ksh. 500	Tourism	Beach Wildlife Lion
Ksh. 1000	Governance	Parliament Buildings

**KENYA BANKING SECTOR CHARTER**

The Banking Sector Charter (BSC) was issued pursuant to Section 33 (4) of the Banking Act Cap 488 and Section 48 (2A) of the Microfinance Act No. 19 of 2006 which sections empower the Central Bank of Kenya (CBK) to issue standards and guidelines to be adhered to by institutions in the conduct of their business in Kenya or in any country where a branch or subsidiary of the institution is located. Its effective date was 1st March, 2019.

Its objectives include:

- a) Increase of access to affordable and appropriate financial services to the unbanked and under-served population of Kenya;
- b) Enhancement of the quality of financial services to those already banked yet are negatively impacted by the high prevailing interest rates;

- c) Creation of a roadmap to guide in the development of a more resilient, competitive and dynamic financial system based on the four central pillars of the banking sector’s vision:
  - i) Adoption of customer-centric business models by banks;
  - ii) Risk-based credit pricing;
  - iii) Enhanced transparency and information disclosure; and
  - iv) Entrenching an ethical culture in banks
- d) Ensuring that institutions proactively engage their customers in financial literacy and consumer education drives, to enhance customers’ financial knowledge and skills for them to make informed financial decisions;
- e) Provision of the basis for the sector’s engagement with other stakeholders;



## LAW GLOBAL

- f) Establishment of targets and quantified responsibilities with respect to each objective;
- g) Ensuring institutions develop and submit a time bound plan approved by the Board in compliance with the Charter for CBK's monitoring purposes; and
- h) Ensuring institutions submit quarterly reports to CBK on the progress of their implementation of the Charter by timelines determined by the CBK.

Accordingly, institutions in the banking sector are committed to transform in the areas below:

- a) **Fairness** – Institutions are mandated to implement a risk based credit scoring technique in their loan screening processes. Such technique shall require coordination of efforts with licensed credit reference bureaus. Terms and pricing of products should also be disclosed; key fact statements<sup>1</sup> are thus required to be developed in line with the Risk Management Guideline on Credit Risk Management as well as the Prudential Guideline on Consumer Protection. Additionally, where there is a complaint, such complaint should be acknowledged by an institution within 48 hours of receipt and resolved within 7 working days. Where complaints are not resolved within 7 working days, an institution is required to forward to the complainant updates on the progress of the matter once in every seven days.
- b) **Transparency.** All commercial banks are required to upload their respective internal and external fees for all products on the cost of credit website.
- c) **Financial Literacy.** Institutions are required to facilitate technical assistance to potential and existing customers as well as develop financial literacy initiatives.
- d) **Financial Access.** Business models are required to be innovative, responsive and dynamic to address specific needs of customers.
- e) **Compliance with the BSC.** Banks are required to develop and submit to CBK a time bound plan to comply with the BSC BY 31st May, 2019
- f) **Reporting Mechanism.** In addition to (e) above, each institution is required to submit a quarterly report to CBK on the progress of its implementation of the BSC within 10 days after the end of every calendar quarter.

- g) **Remedial Measures.** Where institutions fail or violate the provisions of the BSC, the CBK may levy monetary penalties as provided for under the Banking Act Cap 488.

For more information visit:

<http://kenyalaw.org/caselaw/cases/view/124993>

<sup>1</sup>Include: type of product, costs, target clientele, risks, rights and obligations of the parties.

# Huduma Namba; Kenya's New Registration Process



By Evans Ngetich

*The writer is an external counsel. He is currently working as a researcher on the NIIMS Case.*

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Between April and May 2019, Kenyans and foreign nationals resident in Kenya were taken through a registration exercise dubbed 'Huduma Namba'. The exercise was a subject of controversy for a while before being obscured by the current demonetization exercise that has dominated the airwaves. Despite the public awareness efforts by the Government of Kenya, Huduma Namba remains enigmatic amongst Kenyans of all walks of life. The conundrum still begs demystification. What is Huduma Namba?

Governments world over are tasked with the responsibility of providing various services to their respective citizens and registered resident foreigners. To fulfill the said mandate, it is crucial for governments to establish respective identities of recipients of governmental services. More so, in such times as these where the global society is highly interconnected.

For the forgoing reason, governments maintain population registers. These

registers contain selected personal information pertaining to each member of the resident population of a country in such a way as to provide the possibility of determining the identity of individual members comprising the population. Besides, they also act as sources of vital statistics in so far as population size and characteristics are concerned.

Identity, in relation to access utilizes three common factors of authentication. These are: something you know (such as a password), something you have (such as an access card), and finally something you are (such as biometrics). Any or all of the said three authentication factors may be incorporated in identity systems. Whilst it has become common practice to combine the said modes, it is generally agreed that a most robust factor of authentication and therefore, identification is based on something you are, that is, biometrics.

The Government of Kenya has been collecting relevant data (including biometrics) from its citizens for over 100 years now. In this regard, it has maintained multiple registration systems of population variously established under distinct legislations and respectively operationalized by multiple agencies albeit without any linkage whatsoever. Resultantly, Kenya's civil registration and identity data has always been partial and disjointed, having been collected without any unified standard. Each collecting institution would set its own standard leaving a challenge of re-usability and verification across all other institutions. This necessitated the setting up of a single identifier standard and a verification exercise.

In 1989, the Government of Kenya conceptualized the development of one national population register as a

single source of truth on the identity of individual citizens and registered foreign nationals residing in Kenya. To that end, the Government commenced efforts to inter-link its civil registration data. It undertook various initiatives that have over the last 30 years morphed and evolved to the development of the National Integrated Identity Management System (NIIMS).

NIIMS is anchored on Executive Order No.1 of 2018 and Section 9A of the Registration of Persons Act, Cap 107, Laws of Kenya. According to the said provisions of the law, NIIMS is essentially mandated to develop a National Integrated Biometric Population Database of information on persons identify for all Kenya Citizens and registered foreign nationals residing in Kenya and to assign a Unique Personal Identification Number (Huduma Namba) to every registrant.

It is envisaged that NIIMS would solve the afore-stated challenges that have bedeviled Kenya's identity system over the years. For instance, it would do away with the unnecessary duplication of efforts by ensuring that the country's identity data is collected, maintained and processed by one institution. More importantly, it would provide a means of uniquely authenticating the identity of children thereby help in curbing trafficking in children and child labor. These are just a few of the many benefits of NIIMS.

The Firm has played, and continues, to play a significant role in ensuring that the aforesaid benefits of NIIMS are realized. To that effect, the Firm is zealously defending Four Petitions that were variously filed in Court, challenging the constitutionality of NIIMS.

# The Resource Curse: Corruption and Money Laundering in the Extractive Industry



*Sarah Ngachi*  
lawyers@njorogeregeru.com  
The writer is a pupil at the Firm. She holds an LLM in Transnational Criminal Justice and International Criminal Law.



*Alfred Muthama*  
lawyers@njorogeregeru.com  
The writer is a pupil at the Firm. He is an expert in International Humanitarian Law having being trained by the ICRC.

Africa is endowed with natural resources ranging from gold, diamond, crude oil, cobalt just to name a few. The desire to control Africa's natural resources has resulted in intra-state conflict between warring parties. Such conflicts have been witnessed in mineral-rich countries such as the Democratic Republic of Congo, Angola, Central African Republic, Nigeria and Sudan. Whereas on one hand, African rulers have fueled such conflicts, on the other hand multinational corporations ("MNCs") involved in the mining of natural resources have been accused of providing arms and financing intra-state conflict.

In his documentary dubbed "The Ambassador" Mads Brügger uncovers the plunder of mineral resources from mineral-rich African Countries. He focuses on Central Africa Republic and uncovers the ease in which one can obtain fake diplomatic status in Africa and the role of government

officials in the extractive industry. Despite the existence of vast quantities of minerals, Africa remains underdeveloped with a large number of its people living below the poverty line and largely unemployed. Inequality in access to basic necessities and the gap between the rich and the poor has largely been associated with corruption. In mineral-rich countries, corruption and money laundering in the extractive industry has resulted in the concept of the resource curse; where Africans are unable to benefit from revenue collected from MNCs involving in mining.

Corruption in the extractive sector is two sided, the supply and demand sides. The supply side is made up of the extractive company whereas the demand side involves bureaucrats and politicians. Corruption in the extractive industry takes the form of circumventing laws relating to licensing, procurement and revenue collection and bribery of foreign public officials to receive

mining concessions. Notwithstanding the type of natural resource, corruption creeps into the mineral-value chain, from extraction to utilization of revenues, and the institutional as well as policy frameworks. The nature of the resource also determines the actors that dominate the specific product market, which resultantly leads to the type of corruption.

Africa's mining sector is dominated by MNCs which deal directly with senior-level politicians. Low oil revenues in Africa are associated with poor governance, lack of economic and social development, lack of respect for basic human rights and increased poverty in the midst of abundance. New entrants in the extractive market tend to deal directly with top political officials in their ventures, thus sidelining public institutions such as investment centers and relevant ministries, in negotiating for mining rights.

Corruption in the extractive industry exists in the following forms<sup>2</sup>:

**Incidental corruption:** This form of corruption takes place in small scale levels where the operations affects local communities directly.

**Systematic corruption:** occurs in large investments producing large rewards and involves a significant portion of public officials.

**Systemic corruption:** is the most tragic as it involves the entire governance system to fraudulent operations. This adversely affects the legal and regulatory systems, making them prone to manipulation and personalization of laws to create opportunities for private wealth accumulation.

<sup>2</sup> Annie Barbara Chikwanha "Combating Corruption in the Extractive Industry in Africa" (October, 2016) Paper 1.

## CONTRIBUTORS' PLATFORM

The presence of these forms of corruption has contributed to the use of bribery and extortion in obtaining extractive strategies and exporting decisions in Africa. The three prevalent conditions that cause corruption to flourish in Africa are monopoly, discretion and lack of accountability, which a concise understanding of them and their dynamics is critical in designing anti-corruption strategies.

**Bureaucratic discretion:** legislation in the extractive industry contains ministerial and/or bureaucratic discretion in issuing mining license and permits, corruption has been defined in neopatrimonial bureaucracies by the unlimited discretion the public officials have in allocating such licenses and permits vis-à-vis the rare consequences for their said decisions. This fuels the growth of corruption as political elites abuse this discretion by plundering and looting their countries' natural resources through various mechanisms, such as signature bonuses, facilitation fees and royalty payments, which get diverted into personal accounts. Since wide discretionary powers and considerable monopoly power attracts gains from public office, restructuring the extractive sector's regulations is important in defining these powers.

MNCs have also been accused of Money-laundering leading to loss of revenue for mineral-rich Africa countries. Money-laundering in the extractive industry takes the form of tax evasion, fraud and illicit financial flows (IFFs). Tax evasion practices also contributed to Africa governments losing contributions from mineral resources due to low institutional capacity to enforce tax compliance. The common trend in developing countries is that MNCs tend to do the accounting for tax payments rather than the governments, because of their complexity. This presents an opportunity for manipulation of revenue payable to governments in the absence of stringent auditing measures

by governments. Money laundering in the extractive industry has resulted in Capital flight, also known as the illicit movement of capital across borders. This occurs through the smuggling of foreign exchange and mispricing of international trade. Bank secrecy and tax evasion tactics, contribute to illegally acquired funds be concealed outside the country of origin. A solution to this may be greatly enforcing transparency in the foreign-exchange system. Trade misinvoicing often occurs due to lack of a system to monitor extraction of minerals. Companies often manipulate the reported values of their transactions to lower the amount of foreign exchange payable to host governments. This is done by reducing the export receipts while simultaneously inflating the import receipts. Under-invoicing and outright smuggling allow importers to evade custom duties and regulations, a clear pointer that there is need to monitor and track extracted volumes and quantities that are exported. Transfer pricing also acts as a convenient route for international companies operating in the extractive industry in Africa maximize their profits while evading their key corporate tax responsibilities. This has resulted to massive loss of revenue to host governments. Countries such as Zambia have been noted to lose \$500 million a year in mining tax revenue due to transfer pricing by international mining companies.

### Strategies of Fighting Corruption and TBML

According to a report by the High Level Panel on Illicit Financial Flows, Africa loses an estimate of US\$50 billion annually to IFFs which equals to 5.7% of Africa's GDP and exceeds public spending on health. In 33 sub-Saharan African countries, illicit financial flows in terms of capital flight is estimated at around US\$505.4 billion for the period between 1970-2010. Net trade misinvoicing contribute an additional US\$ 204.8 billion and unrecorded remittances

of US\$104 billion. According to the Organisation for Economic Co-operation and Development (OECD), 20% of bribery cases analyzed in Africa involved the extractive industry.

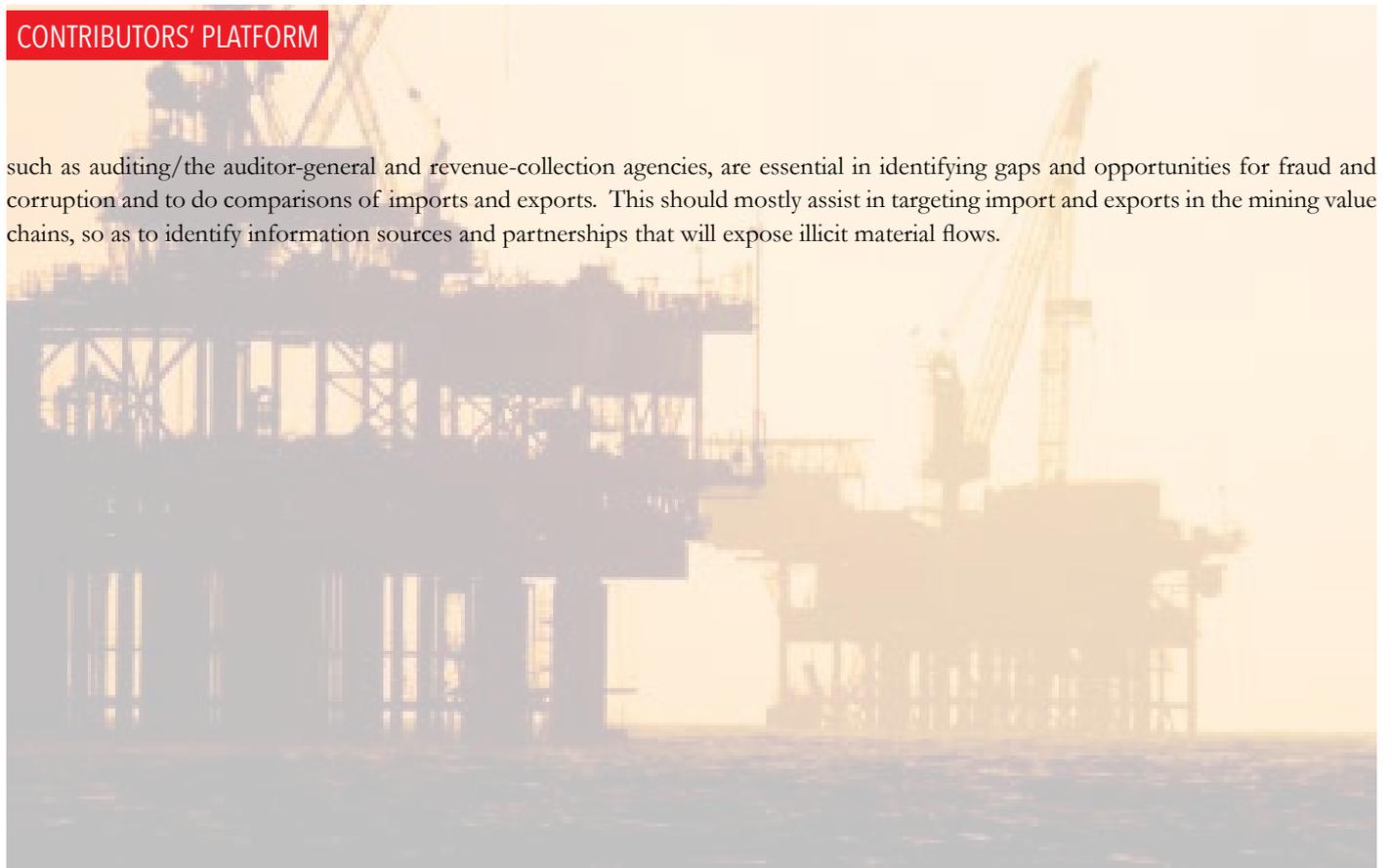
African institutions mandated with curbing corruption have failed to curb corruption and TBML due to poor institutional capacity and the lack of political will in domesticating and implementing anti-corruption and TBML policies. Most of these institutions have lagged behind their mandate as they struggle with capacity constraints. An example is the African Union Advisory Board on Corruption (AUABC), which since its inception has largely concentrated on formulating the rules and procedures of the Board in place. The AUABC has failed to initiate any substantive work on the implementation of the African Union Convention on Preventing and Combating Corruption (AUCPC), which was adopted in July 2003. A major criticism levelled against all anti-corruption institutions in the continent is the preoccupation with 'grand' corruption. Administrative corruption, which affects majority of the poor, however, does not get as much attention. This is despite the fact that it is core to the creation of equitable opportunities, which would enable all to benefit from the effective use of public resources.

At national levels, there is a need to strengthen provisions of national laws. What ails Africa in the fight against TBML and Corruption is not insufficiency of the laws but the lack of political will in implementing those laws. African countries need to ensure implementation of national and international laws they subscribe to and ensure compliance of the laws at all levels of government and by non-state actors.

There is also needed more technical support to public officials in strategic departments,

**CONTRIBUTORS' PLATFORM**

such as auditing/the auditor-general and revenue-collection agencies, are essential in identifying gaps and opportunities for fraud and corruption and to do comparisons of imports and exports. This should mostly assist in targeting import and exports in the mining value chains, so as to identify information sources and partnerships that will expose illicit material flows.



See you next Quarter

#### ACKNOWLEDGMENTS

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

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

Email: [info@njorogeregeru.com](mailto:info@njorogeregeru.com)  
Website: [www.njorogeregeru.com](http://www.njorogeregeru.com)  
Dropping Zone No.8  
Revlon Professional Plaza  
Tubman Road / Biashara Street

