



# NR&Co Quarterly

## ...Legal Briefs

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### KARIBU!

## Editor's Note



Integrity, efficiency, competence and experience are words that describe Njoroge Regeru and Company Advocates. These high attributes can be accurately personified into Esther Kanja. We believe that the staff at the Firm sharpen the course of Njoroge Regeru and Company Advocates and it

is with this pleasure that we begin the second edition of our Quarterly Newsletter for the year 2017 by interviewing the graceful Esther Kanja, our Senior Personal Assistant. Esther Kanja embodies the Firm's profile, she is razor-sharp, industrious and charismatic. This interview will assess her vast experience working in the Firm and also witness her passion, calmness, commitment, altruism and timeless service to the Firm.

The editorial team is glad to have put together quite the literary spread for our readers in this quarter's edition and hope to keep you well informed and entertained. As Kenya gears up for the General Elections to be held in the month of August, a lot of legislation has been passed along with monumental decisions from our Courts.

There has been quite a number of interesting legislation passed this quarter both as amendments and new additions to the Laws of Kenya. Notably, is the newly enacted Movable Property Security Rights Act, 2017 which seeks to facilitate the use of movable property as collateral for

credit. This Act will benefit micro, small and medium-sized enterprises (SMEs) by expanding options for collateral and in turn allowing access to credit.

The Newsletter also analyses amendments to the Proceeds of Crime and Anti Money Laundering Act, the Statute Law (Miscellaneous Amendments) Act as well as the Privatization (Amendment) Act which have made huge waves in the legal field.

We also look into an assortment of recent Court decisions that we believe are imperative in the expanding Kenyan legal system and more specifically the upcoming General Elections.

Lastly, we share an informative contributory note from Mwangi Karume, the Partner in charge of the Corporate, Commercial, Conveyancing (CCC) Department.

Moving forward into the year, Njoroge Regeru and Company Advocates has expanded with the addition of two Senior Advocates, Grishon Thuo and Patrick Karanja, who bring with them a vast array of experience and expertise in the Dispute Resolution and Corporate, Commercial, Conveyancing (CCC) Departments respectively. Patrick Karanja's debut in the Firm's Newsletter is marked by an informative analysis on the procedure for termination of employment agreements.

It is our sincere hope that this quarter's edition brings informative, educative as well as engaging and productive discourse to our readers. We wish you a peaceful and productive 2017 going forward!

  
 Robert Kaniu

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# Follow your Dreams



Esther Kanja  
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*“I draw my inspiration from what I have learnt in life. I have grown stronger with my ordeals and triumphs in life...Knowing that God is there all the time is a great inspiration to me”*

**M**ahatma Gandhi once said “The best way to find yourself is to lose yourself in the service of others.....”

It is in this spirit that we introduce one of NR & Co’s senior most and longest-serving employees, Esther Kanja.

**1. Tell us about yourself; how would you describe Esther Kanja?**

Esther Kanja is a qualified Personal Assistant with fifteen (15) years’ experience in secretarial and administrative assistance. She is also a loving wife and mother to two beautiful girls.

**2. How about your time at NR & Co? How long have you been with the firm and what is your role at the firm?**

My time at NR & Co. has been rewarding. I joined the firm in 2004 and my role at the firm since then, has been to provide high level administrative and executive assistance in the coordination of the Senior Partner’s (Mr. Regeru’s) office ensuring that all communication, planning schedules, appointments and meetings are synchronized with Mr. Regeru’s calendar.

**3. How do you maintain your work-life balance?**

Working with a deadline helps me stay motivated and productive.

**4. Tell us something about NR that few people know.**

NR is able to recognize the strengths in his employees and utilize them to their fullest extent.

**5. You have come across many interesting staff members and clients. What is the one thing you have learnt from interacting with the many that have passed through these doors?**

I have learnt to respect other people’s time.

**6. What are your hobbies? What do you like to do during your spare time?**

My favourite hobby is travelling. I enjoy visiting different places in the country. I mostly spend my spare time with my two daughters.

**7. Where do you draw your inspiration for life from?**

I draw my inspiration from what I have learnt in life. I have grown stronger with my ordeals and triumphs in life. God has also been a great guidance in keeping me focused, sane and whole when I feel not so complete in life. Knowing that God is there all the time is a great inspiration to me.

**8. What is your life philosophy?**

Follow your dreams and keep your passion. Be positive!

*Interview by Alex Najjuka & Christine Wamaitba.*

## LEGISLATIVE UPDATES

Notable amendments and novel Acts introduced in the second quarter of 2017 are as follows:

### 1. STATUTE LAW (MISCELLANEOUS AMENDMENTS) ACT, 2017

The Statute Law (Miscellaneous Amendments) Bill, 2016 was assented into law on 8th April, 2017 (the “Amendment Act”). The Amendment Act contains minor amendments to a number of statutes namely, the Judicature Act (Cap.8), the Advocates Act (Cap.16), the Income Tax Act (Cap. 470), the Bill of Exchange Act (Cap 27) and the Companies Act, 2015.

#### a) The Judicature Act (Cap 8)

The Judicature Act has been amended by stipulating that the retirement age of Judges shall be seventy (70) years. A Judge may however choose to vacate their position after they attain the age of sixty-five (65) years.

#### b) The Advocates Act (Cap16)

Section 23 of the Advocates Act has been amended to the effect that the Law Society of Kenya is required to issue practice numbers to members. Such numbers should be endorsed on all documents prepared by a practicing advocate in order to streamline legal practice and reduce incidences of unqualified persons carrying out legal work.

Moreover, legal documents filed by Advocates in any registry should have the advocate’s stamp, admission number, practice number and signature.

The Amendment Act further acknowledges recent case law with regard to the validity of legal documents prepared by an unqualified person. Accordingly, the Amendment Act provides that a practising Advocate commits an act of professional misconduct if he fails to take out a practising certificate and he is not exempted under section 10 of the Act which provides for officers entitled to act as advocates. However, nothing shall

affect the validity of any legal document drawn or prepared by an

#### c) The Income Tax Act (Cap 470)

The Income Tax Act has been amended to the effect that a person’s wife’s employment, profession and self-employment income rates of tax have been included under Table 1 of the Income Tax Act for purposes of tax computations in the instance one files tax returns with their spouse or as a household.

#### d) The Bills of Exchange Act (Cap 27)

The Act has been amended to include Rwanda and Burundi as member countries under the umbrella of the East African Community member States in section 4 (3) in accordance with the East African Community Treaty.

### 2. PRIVATIZATION (AMENDMENT) ACT, 2017

The Privatization (Amendment) Bill was passed by the National Assembly in February this year and assented into law on 8th April, 2017. The Privatization (Amendment) Act amends the Privatization Act No. 2 of 2005 (“the Principal Act”) and its purpose is to provide for the privatization of public assets and operations, including State corporations, by requiring the formulation and implementation of a privatization programme by a Privatization Commission.

Accordingly, the Privatization (Amendment) Act, 2017 addresses the re-appointment of serving members of the Kenya Privatization Commission upon the expiry of their first term of office subject to favourable performance evaluation.

Moreover, Section 5(1) (d) of the Principal Act has been amended to provide that the members of the Privatization Commission (“the Commission”) shall be appointed by the Cabinet Secretary for National Treasury and shall be approved through a competitive process by virtue of their expertise.

The Act further outlines the procedure in the presentation of privatization proposals to Parliament following approval by Cabinet.

### 3. THE PROCEEDS OF CRIME AND ANTI-MONEY LAUNDERING (AMENDMENT) ACT, 2017

The Proceeds of Crime and Anti-Money Laundering Act, Cap 59B of the Laws of Kenya (“the AML Act”) was enacted on 28th June, 2010 as one of Kenya’s weapons against endemic corruption.

The AML Act primarily provides for various offences such as acquisition, possession or use of proceeds of crime, money laundering, failure to report suspicion regarding proceeds of crime, malicious reporting or tipping off persons involved in the above offences.

A major inclusion in the AML Act, in relation to the Financial Reporting Centre (FRC), is establishing the various offences and penalties to be meted out to anyone in contravention of the FRC’s authority. It is apparent that one of the AML Act’s key purposes was to punish disregard of the FRC’s authority, as the fines under section 24B are akin to the highest imposable for criminal offences under section 16 of the AML Act. Notably, fines shall now be considered as debts due to the FRC and shall be recoverable through a court of competent jurisdiction.

Further to these amendments, the AML Act has been amended to clarify the functions of the Anti-Money Laundering Advisory Board. The Board is now expected to operate as a forum for engagement of the various stakeholders whose consultations are expected to span across anti-money laundering developments, concerns and initiatives.

## CASE HIGHLIGHTS

With the dawning of the eagerly anticipated General Elections before us, the Courts have been vigilant in handling the various disputes brought before them. Of utmost importance have been those that distinctly cover elections, governance and politics in Kenya.

### 1. COUNCIL OF COUNTY GOVERNORS VERSUS ATTORNEY GENERAL & ANOTHER [2017] eKLR

This Petition challenged the constitutionality of section 10 of the Elections Laws (Amendment) Act, 2017 which amended section 28 of the Elections Act, 2012. Section 28 of the Election Act now provides that in a General Election, a political party that nominates a person for an election under this Act shall submit to the Independent Electoral and Boundaries Commission the party's membership list at least 120 days before the date of the election. The Petitioners alleged that this provision limited the freedom to make political choices and the freedom of association under Article 36 (1) of the Constitution of Kenya before the lawful deadline for the conduct of party primaries.

The Petitioners argued that the amended section 28 did not allow persons dissatisfied with the outcome of party primaries or nominations to defect to another political party (within the nomination deadline) as their names will have already been submitted by the earlier political party within the 120 days deadline, hence limiting a genuine right to political party defection and that such limitation is not justifiable.

The Attorney General, the First Respondent, filed Grounds of Objection on 9th March 2017 stating that the Petition offended the doctrine of Constitutionality and that it did not set out with certainty the rights to be violated.

The Second Respondent, the Independent Electoral and Boundaries Commission, in its Replying Affidavit averred that the Petitioner did not specify how their fundamental rights had been limited by the

challenged section, that the said section did not in any manner limit the freedom of association, which includes the right to form, join or participate in the activities of an association.

On 8<sup>th</sup> March 2017, the National Assembly successfully applied to be enjoined in the proceedings as an Interested Party. In its Grounds of Opposition filed on 22nd March 2017, it stated inter alia, that the Petitioner had not made out a case of unconstitutionality of the challenged section, that the Petition lacked merits and that the section did not limit political rights of any person to form or join a political party.

The Court held that the Petition was premised on a clear misinterpretation of the law and the Petitioners failed to demonstrate that the challenged section was unconstitutional or in any manner infringed any provisions of the Constitution. The Petition was therefore dismissed with costs to the Respondents and the Interested Party.

### 2. ROBERT ALAI VERSUS THE HONOURABLE ATTORNEY GENERAL & ANOTHER [2017] eKLR

In this case, Robert Alai, the Petitioner, challenged the constitutionality of Section 132 of the Penal Code, Cap 63 Laws of Kenya. The Petitioner was on 17th December 2014, arraigned before the Chief Magistrate's Court at Kiambu and charged with the offence of undermining the authority of a Public Officer contrary to Section 132 of the Penal Code. The particulars of the offence were that; "while using the open source website Twitter, the Petitioner posted the words *"insulting Raila is what Uburu can do. He hasn't realized the value of the Presidency. Adolescent President. This seat needs Maturity"*.

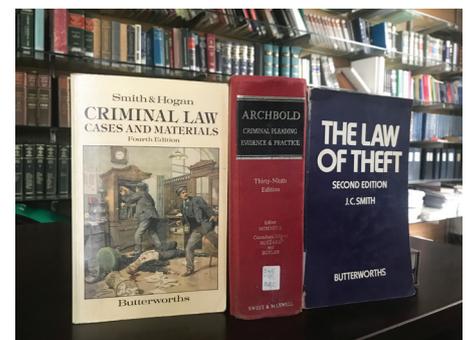
The publication of the defamatory material was calculated to bring into contempt the lawful authority of the President of the Republic of Kenya.

The Petitioner argued that the charge against him was a violation of his constitutional rights and filed a Petition against the Attorney General and the Director of Public Prosecution (the Respondents) seeking orders that: section 132 of the Penal Code be declared unconstitutional and invalid and the continued enforcement of section 132 by the second Respondent against the Petitioner was unconstitutional.

The Second Respondent through a replying affidavit, sworn on 3rd June 2016, deposed that on 15th December 2014, information was received that the Petitioner had posted on Facebook words that were deemed to be an insult to the President.

The Court, while taking into account judicial pronouncements on the right to freedom of expression, stated that section 132 of the Penal Code is inconsistent with the Constitution, in so far as it suppresses freedom of expression and shifts the burden of proof to an accused person thereby denying an accused the right to remain silent which is contrary to the right to a fair hearing.

The Court also having given due consideration to the Petition and taking into account provisions of Article 259 of the Constitution, including advancement of the rule of law, social justice and enforcement of fundamental freedoms and human rights, concluded that Section 132 of the Penal Code violated the Constitution. The Petition was therefore allowed and Section 132 of the Penal Code was declared unconstitutional and invalid.



## INTERLUDE.....

*Q: What did the pony say when he had a sore throat?*

*A: Sorry, I'm a little horse.*

*(<http://www.laughfactory.com/jokes/joke-of-the-day#sthash.5xTBLEPH.dpuf>)*

*A man was lost and walking in the desert for about 2 weeks. He finally stumbled on the home of a missionary. Tired and weak, he crawls up to the house and collapses on the doorstep. The missionary finds him and nurses him back to health. Feeling better, the man asks the missionary for directions to the nearest town. On his way out the back door, he sees a horse. He goes back into the house and asks the missionary, "May I borrow your horse to get me into town?"*

*The missionary says, "Sure - but there is a special thing about this horse. You have to say 'Thank God' to make it go and 'Amen' to make it stop."*

*Not paying much attention, the man says, "Sure, ok."*

*So he gets on the horse and says, "Thank God" and the horse starts walking. Then he says, "Thank God, thank God," and the horse starts trotting. Feeling really brave, the man says, "Thank God, thank God, thank God" and the horse takes off running. Pretty soon he sees this cliff coming up and he's doing everything he can to make the horse stop.*

*"Whoa, stop, hold on!!!!"*

*Finally, he remembers, "Amen!!"*

*The horse stops 4 inches from the cliff. Then the man leans back in the saddle and says, "Thank God."*

*(<http://www.behappy101.com/just-for-laugh-jokes.html>)*



*African parents are only humble when you are teaching them how to operate their smart phones.*

*(<https://www.tuko.co.ke/225776-9-extremely-funny-jokes-2016-laugh-idiot.html>)*

# Analysis of the Unidroit Principles of International Commercial Contracts (2010)\*



By Mwangi Karume  
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## A. INTRODUCTION

International trade has increased over recent decades necessitating the need for a common understanding on the rights and obligations of the parties to an international transaction. Common trade usages and practices may be adopted by the parties but serious conflicts may nonetheless arise owing to different national laws. Accordingly, a uniform commercial law or set of principles is required to eliminate or reduce such conflicts.

In 1994, the International Institute for the Unification of Private Law (UNIDROIT), an independent intergovernmental organization based in Rome, formulated the UNIDROIT Principles (the "Principles") in an effort to harmonize and coordinate private commercial law between States that have acceded to the UNIDROIT statute<sup>1</sup>.

## B. APPLICABILITY AND INTERPRETATION OF THE PRINCIPLES

Principles apply to contracts which expressly provide for their applicability or contracts in which parties have not chosen any governing law.

Such contracts should however have an international element in order for the Principles to apply; they should be international contracts. It is worth noting that the Principles provide a broad interpretation to the concept of 'international contracts' such that contracts which have no international element whatsoever are not regarded as international contracts. In *CJSC Obolon vs. Dania Handel A/S (2011)* the Kyiv Commercial Court of Appeal in Ukraine held that the Principles did not apply in the contract between the Claimant and Respondent because the two were both Ukrainian nationals.

However, in *Bottling Companies vs. Pepsi Cola Panamericana (1997)*, the Supreme Court of Venezuela held that the Arbitration Clause in a contract, which stipulated that the arbitration seat would be in New York, was valid even though the parties were two Venezuelan companies. This was rationalised on the basis that one of the companies to the dispute was in fact a subsidiary of a United States entity.

With regard to interpretation of the Principles, due regard should be had to their international character and their purpose. Accordingly, where a certain issue is not expressly provided for, it is settled in accordance with its underlying general principles.

## C. ANALYSIS OF THE PRINCIPLES

In a nut shell, the Principles provide for general principles of contracts including their formation, validity, interpretation and termination.

They also cater for assignment of rights, transfer of obligations and the law on agency. Moreover, there are certain provisions that are mandatory for parties to an international contract despite their exclusion in the contract.

Below is a summary of the afore-mentioned content:

### 1. General Provisions and Mandatory Rules

The Principles echo the general principle of "freedom to contract" through each and every provision. This freedom is however limited in instances where there is lack of competition such as where a party is bound to transact with a specific party (usually a public body) for public interest purposes.

The Principles further acknowledge trade customs and practices which they embody in certain mandatory rules. As the term suggests, the rules are imperative in any international contract and parties should not derogate from them.

Such mandatory rules include the rules on: good faith and fair dealing; fraud, threat, gross disparity and illegality; price determination; payment for non-performance and modification of limitation periods.

#### a) Good Faith and Fair Dealing

Good faith and fair dealing is imperative in any contract. For instance, parties

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<sup>1</sup> Currently, only sixty three (63) States in the world have acceded to the UNIDROIT statute, four (4) of which are African states namely: Egypt, Nigeria, South Africa and Tunisia.

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to a contract are not bound to reach an agreement after negotiations and consequently, a party cannot be held liable due to failure to reach an agreement.

However, it would be in bad faith if one party actively took part in negotiations without an intention to ever reach an agreement. In such an instance, such a party is liable for the loss incurred by the other party.

### b) Fraud, Threat, Gross Disparity and Illegality in Contracts

Where the above-noted factors come into play, the Principles acknowledge that the aggrieved party has a right of avoidance of the contract. There are however exceptions to the principle such as where there is a waiver of the right of avoidance or where the party entitled to avoid the contract confirms the same after the period of time for giving notice of avoidance has become effective.

### c) Price Determination and Payment for Non-Performance

In instances where one party is to determine the price, the Principles stipulate that such price should be reasonable notwithstanding any contrary term in the contract.

Moreover, payment to an aggrieved party due to non-performance of the other should be of a reasonable amount in relation to the harm occasioned.

### d) Limitation Periods

The Principles further stipulate that the general and maximum limitation period for international commercial contracts is three (3) years and ten (10) years respectively. Such periods may however be modified by the parties on account of the parties' freedom to contract. However, such modification should neither shorten the general limitation period to less than one (1) year nor the maximum limitation period to less than four (4) years. It should also not extend the maximum period to more than fifteen (15) years.

## 2. Form of Contract

The Principles provide that an international contract may take any form. Consequently, contracts may be evidenced in any way unless national law or international instruments impose specific restrictions as to the form of contract or to individual terms. In Kenya for instance, the Law of Contract Act Cap 23, requires all contracts for the disposition of land to be in writing.

## 3. Validity of a Contract

Interestingly, the Principles do not take into account all the grounds of validity of a contract which would customarily be considered in either common or civil law jurisdictions such as capacity, consideration and cause. In that regard, a contract is concluded, modified or terminated under the Principles by mere agreement of the parties, without any further requirement. Notably, the Principles downplay the practical importance of consideration since obligations are often met by both parties and as such a mere agreement to conclude, modify or terminate a contract suffices for such conclusion, modification or termination.

## 4. Interpretation of a Contract

Where a contract is found to be valid, the immediate issue to address would be interpretation of the terms and conditions. The Principles thus provide that in interpreting a contract, the common intention of the parties should be considered and where such intention is not clear, the interpretation of the said contract should be subjected to the reasonable man's test. The said test stipulates that the contract should be interpreted according to a construction a reasonable person, of the same kind as the parties, would give to it in the same circumstances.

The Principles further provide that a contract should be interpreted as a whole rather than in part so as to give effect to all terms of the contract. Where the terms are unclear, such terms should be construed against the party who benefits from them (the *contra preferentem* rule).

Certain issues should also be addressed in interpreting the contract. Such issues include merger clauses and battle of the forms:

### a) Merger Clauses

Where a contract provides for a merger clause, the Principles stipulate that prior agreements cannot contradict the contract. Accordingly, prior agreements can only be used to interpret the contract. The position was taken in *Svenska Petroleum Exploration AB, Government of the Republic of Lithuania, AB Geonafita [2005]* where the High Court of Justice (Queen's Bench Division) noted that the Articles 6.193 to 6.195 of the Lithuanian Civil Code resembled Articles 4.1 - 4.6 of the UNIDROIT Principles with respect to interpretation of contracts. The Court thus considered the pre-contractual negotiations of the parties to determine whether they had intended Lithuania to waive sovereign immunity and to be bound by the arbitration clause of the contract.

The Court held that due to previous drafts of the agreement, which contained terms waiving sovereign immunity for Lithuania and subjecting it to arbitration, Lithuania had waived its sovereign immunity and had agreed to settle disputes through arbitration.

### b) Battle of Forms

The battle of forms occurs where there are two executed standard agreements between the parties such as where there is a purchase order and a supply agreement. In such a situation, the question that arises is thus: which agreement supersedes the other?

The last shot doctrine may be used to solve such as an issue in which case the last set of standard terms agreed upon apply. However, where there are conflicting standard terms and the parties refer to such terms more or less automatically or they are unaware of the conflicting terms, the Principles bring about the knock-out doctrine which stipulates that the

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contract is concluded on the basis of the agreed terms and common standard terms. The knock-out doctrine may however be excluded if notice is issued to the other party of the insistence of the first party's standard terms.

### 5. Assignment of Rights, Transfer of Obligations and Assignment of Contracts

#### a) Assignment of Rights

Where a party wishes to assign its right under an international contract, such a right can be assigned by an agreement between it and the assignee without notice to the obligor (the other party to the contract). However, notice is required in instances of assignment of an obligation which is of a personal character. Accordingly, until the obligor receives a notice of appointment, it is discharged by paying the assignor. Conversely, after receipt of the said notice, the obligor is only discharged by paying the assignee.

On the other hand, assignment of a right to a non-monetary performance is only valid if such assignment does not render the obligation significantly burdensome. The Principles actually provide that where the obligor incurs additional costs due to an assignment, such costs should be borne by the assignor or assignee.

The said Principles also consider assignment of a future right at the time of the agreement provided that such a right can be identified when it comes into existence.

It should be noted that parties may expressly restrict assignment of rights whether of a monetary or non-monetary nature. The Principles thus provide that where a contract restricts an assignment of a right to payment of a monetary sum, such assignment is effective but the assignor is liable to the obligor for breach of contract. In contrast, where a contract restricts the

assignment of a right to performance other than payment of a monetary sum, the assignment is ineffective unless the assignee acted in good faith and had no notice of the restriction. Consequently, the assignor is liable to the obligor for breach of contract.

#### b) Transfer of Obligations

Transfer of obligations may either be by an agreement between the original obligor and a new obligor or between the obligee and a new obligor. The obligee may discharge the original obligor or retain it in case the new obligor does not perform its obligations properly.

#### c) Assignment of Contracts

Unlike assignment of rights, the Principles stipulate that an assignment of a contract requires the consent of the other party. The other party may in turn discharge the assignor or retain the assignor as an obligor in case the assignee does not perform properly. Otherwise the assignor and assignee are jointly and severally liable.

#### d) Plurality of Obligors and of Obligees

##### i) Plurality of Obligors

Plurality of obligors occurs where several obligors are bound by the same obligation towards an obligee. Accordingly, the obligations are joint and several when each obligor is bound for the whole obligation whereas when each obligor is bound only by its share, the obligations are separate.

##### ii) Plurality of Obligees

This occurs where several obligees can claim performance of the same obligation from an obligor. Accordingly, the claims are separate when each obligee can only claim its share whereas the claims are joint and several when each obligee can claim the whole performance or when all obligees have to claim performance together.

It should be noted that full performance of an obligation in favour of one of the joint and several obligees discharges the obligor towards the other obligees.

### 6. Agency

The law on agency is aptly provided for by the Principles with regard to the formation of an agency relationship, the authority conferred and the liability on each party. Accordingly, the Principles provide that an agency contract may be formed either expressly or impliedly or even through automated contracting by the use of electronic data interchange.

With regard to the authority of agents, the Principles provide that agents have the authority to perform all acts necessary to achieve the purposes for which the authority was granted. The authority conferred is hence general authority rather than specific authority.

The Principles further acknowledge that the agency relationship is tripartite, that is, between the principal, agent and third party. Where the agency is disclosed, a legal relationship is created between the principal and the third party. Accordingly, upon breach of the contract, the principal is directly liable. However, where an agent undertakes to become a party to the contract, with the consent of the principal, a direct relationship is created between the third party and the agent. Consequently, the agent is held liable upon breach of the contract.

The agent is also held liable where an agency relationship is undisclosed or where he or she exceeds his or her authority

### 7. Termination of a Contract

Termination of a contract under the Principles may occur due to non-performance by one party or due to an anticipatory breach.

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Termination may also occur upon issue of a notice of termination by one party to the other. Once a contract is terminated, each party is released from its obligations. However, such termination does not preclude a claim for damages for non-performance neither does it affect any provision in the contract for settlement of disputes.

## D. CONCLUSION

Cross-border trading is as natural to humanity as eating, laughing and crying (Perillo J, 1994). The Principles provide a uniform framework for international commercial contracts thus reducing disputes related thereto. The Principles are however of a persuasive value and they do

not override mandatory rules of domestic law. Moreover, the Principles are in certain aspects unique because certain contract law rules in common law and civil law jurisdictions are not necessarily considered in the Principles.

## Procedure for Termination of Employment



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Many employers find themselves in trouble with the law and are condemned by the Employment Court to pay hefty awards for unlawfully terminating the services of their employees – even where there was justification for termination. Many employers are therefore learning the hard way that there is a lot to consider before uttering the dreaded words “you are fired!”

For an employer to safely exercise their right to terminate employment they must ensure compliance with the procedural requirements for fair termination

established under the Employment Act, 2007 and respecting the rights of the employees as enshrined in the Constitution of Kenya, 2010.

As the Employment Court observed in *Mary Chemvenno Kiptui –vs- Kenya Pipeline Company Limited, Case No. 435 of 2013*, **“the industrial Court has now built firm jurisprudence on circumstances within which the employer and employee relationship can be terminated or how the process of summary dismissal can be conducted so as to meet the strict provisions of the law and to avoid making the same invalid.”** The Judge in this case agreed with the decision in *Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Sacco Limited Cause No. 74 of 2013* where it was held that **“whatever reason or reasons that arise to cause an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act. This applies in cases for termination as well as in a case that warrant summary dismissal.”**

Section 41 of the Employment Act, 2007 provides that “Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the

employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

Various decisions by the Employment and Labor Relations Court have now established that Section 41 of the Employment Act is a mandatory provision thus where the employee has not been given notice of intended termination and an opportunity to be heard before the decision for termination is made, whatever the grounds the employer may use to justify the termination, such termination will be held to be unfair and unlawful.

There are three basic requirements for an employer to put in place to meet this threshold. First, the employer should have valid reasons for termination. This may be based on misconduct, poor performance or physical incapacity on the part of the employee. It is upon the employer to prove the grounds. The second requirement is that the employer must notify the employee that they are considering terminating their employment. The Court in *Nairobi ELR Case No. 562 of 2012, Shankar Saklani – vs- DHL Global*, held that **“except for contracts of service to pay a daily wage, the employer must serve a notice and accord the employee a hearing as contemplated in Section 41 of the Act. The only leeway the employer is**

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entitled to under Section 44 (1) is to serve a shorter notice, on account of gross misconduct, than that to which the employee was entitled to under statute or contract.”

The third requirement is for the employee to be given an opportunity to be heard before the decision to terminate their employment is made. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets. The best practice is to also allow for an appeal to the employee within the internal disputes resolution mechanism if dissatisfied by the decision of the disciplinary committee. Where this

procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only.

So then, what happens in the meantime as the employee is being taken through the notification and hearing process? The employer has a right to place the employee on suspension where there is reasonable grounds to suspect an employee to have been involved in misconduct, poor performance or physical incapacity and wishes to remove such an employee from the work place. Suspension allows the employer the opportunity to undertake further investigation without enduring any further commission of more acts

of misconduct, under performance or the conditions leading to incapacity. The suspension period is discretionary on the employer and allows the employer to summon the employee back to work at any time to undertake disciplinary proceedings or upon terms and given by an employer.

### Conclusion

Even in cases of serious breach of a contract or an employee being absent from work, being intoxicated, negligent, abusive, failure to obey lawful orders, criminal arrest, being a suspect in a criminal case, notwithstanding the seriousness of such acts, an employee should be treated in compliance with the provisions of section 41 of the Employment Act with regard to being accorded a fair hearing.

## Analysis of the Moveable Property Security Rights Act, 2017



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The Movable Property Security Rights Act, 2017 (“the Act”) was assented into law on 10th May, 2017. This new law will facilitate the use of movable property as collateral for credit facilities, establish the office of the Registrar of Security Rights and provide for the registration of security rights in movable property.

This Act will also benefit small and medium-sized enterprises which experience difficulty in accessing finance from the formal sector.

### Overview

The Act has repealed the Chattels Transfer Act (Cap. 28) and the Pawnbrokers Act (Cap. 529). It has amended several sections of the Agricultural Finance Corporation Act (Cap. 323), the Stamp Duty Act (Cap. 480), the Hire Purchase Act (Cap. 507), the Business Registration Services Act (Act No. 15 of 2015), the Companies Act, 2015 and the Insolvency Act, 2015.

### The Objects of the Act

The Act is significant as it seeks; to enhance the ability of individuals and entities to access credit using movable assets and to promote consistency and certainty in secured financing relating to movable assets.

### Significant Provisions of the Act

It is important to note that the Act, has brought with it significant provisions.

These provisions are:

#### a) Creation of a Security Right

A security right under the Act is created by a security agreement and provides that the grantor has rights in the asset to be encumbered or the power to encumber it. The security agreement must be in writing and signed by the grantor; it must also identify the secured creditor and the grantor, except in the case of an agreement that allows for the outright transfer of a receivable, it should also describe the secured obligation and the collateral.

#### b) Types of Securities Created

The Act assists persons who do not own real (immovable) property to secure credit by facilitating borrowing against their various types of movable assets. The Act

provides that a security right can encumber the following:-

- i) any type of movable asset, whether tangible or intangible, including future assets (a moveable asset which does not exist or which the grantor does not have rights in or power to encumber at the time the security agreement is made.);
- ii) parts of assets and undivided rights in movable assets;
- iii) generic categories of movable assets;
- iv) all of a grantor's movable assets; and
- v) choses in action.

The Act further defines a tangible asset to mean all types of goods which include: motor vehicles, crops, machineries and livestock whereas intangible assets include: Receivables, deposit accounts, electronic securities and intellectual property rights.

The assets encumbered or to be encumbered ought to be described in the security agreement in a manner that reasonably allows their identification.

### c) Registration of Notices Relating to Security Rights

The Act establishes the Office of the Registrar for purposes of receiving, storing and making accessible to the public

information on registered notices with respect to security rights and the general running of the registry. The Registrar will be appointed by the Cabinet Secretary for National Treasury.

Section 20 of the Act has further adopted a regime of notice filing, under which a single initial notice can be registered, and under which many individual transactions will fall. The initial notice should contain: the identifier and address of the grantor, the identifier and notice of secured creditor, a description of the collateral and the period of effectiveness of the registration.

Section 30 provides that a public registry will be established, permitting searches both by the identifier of the grantor of security, and by the serial number of the collateral. Priority will be determined by the time of lodging the security for registration.

### d) Enforcement of a Security Right

In the event that there is failure to pay or perform the secured obligation, the grantor or secured creditor will exercise any right under the security agreement or that which is provided under any other law.

If there is default with respect to an obligation, the secured creditor should notify the grantor in writing to pay money owing or perform and observe

the agreement. If the grantor does not comply within the period indicated in the notification after date of service of the said notification, the secured creditor will have the right to:-

- i) Sue for any money due or owing under the agreement;
- ii) Appoint a receiver of the income of the moveable asset;
- iii) Lease the moveable asset; or
- iv) Take possession of the moveable asset

### Conclusion

From the foregoing, the Act has introduced numerous advantages by enhancing access to credit facilities using moveable property as collateral which will benefit small and medium-sized enterprises. The Act, however, does not provide any mechanism to verify that a person who registers a notice on movable property in their name is the owner of the property. This could eventually lead to disputes around ownership pursuant to registration.

Further, the Act does not compel any banking institution or other lender to accept movable assets as collateral. The decision on whether to accept movable assets as collateral will remain within the bank or lender's discretion pursuant to a full risk assessment and depending on the availability of funds for this purpose.



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