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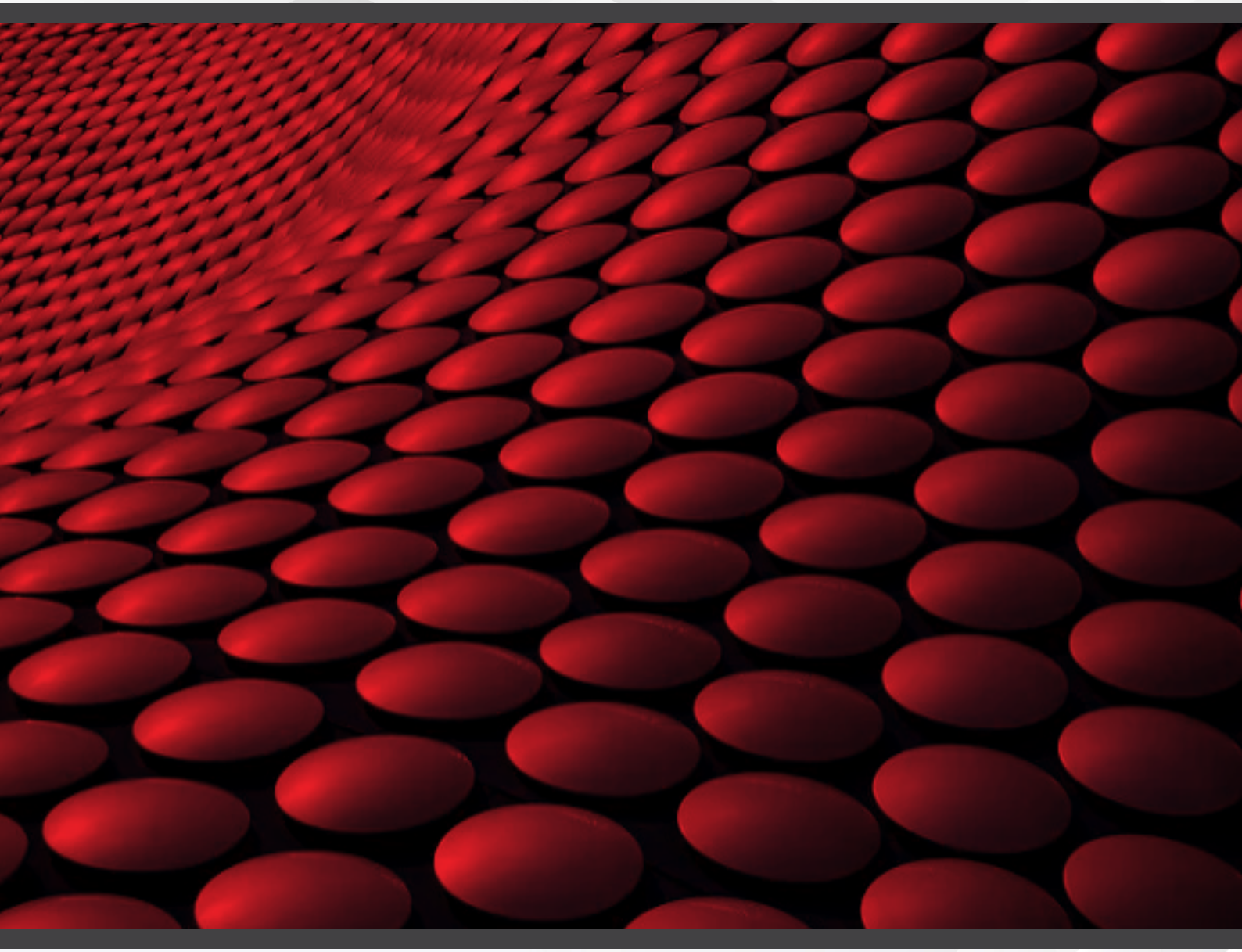

THE SPEAR

September 2022

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IN THIS ISSUE

Data Privacy and Protection : Cookies

To Accept All or To Reject All

In a famous case, Vidal-Hall v Google Inc [2015] EWCA Civ 311, three individuals objected to the collection of information from their browsers by Google without their consent. The three used Apple's "Safari" browser to access the internet between Summer 2011 and 17th February 2012. They claimed that Google collected their private information (namely their browser-usage) without their knowledge or consent by means of 'cookies' and used this information to offer commercial services to advertisers.

The three successfully argued before the English Court of Appeal that even if Google did not know who was using the device at any particular point in time, third party users of the device were likely to access this information by deducing information about their browsing habits from the targeted ads which appeared.

The opposing argument from many web browser service providers in the past was that cookies are linked to a specific device rather than to a specific user, and since a device can have multiple users, the information collected from cookies cannot be linked to a specific individual and so may not be personal data.

Following the three individuals win against Google Inc., the enactment of the European Union General Data Protection Regulation (GDPR) and the embrace of data privacy laws across the globe, many website operators and third party entities have developed policies to regulate the use of cookies.

It is now a notable trend that many websites have cookies policies and visitors must accept or reject the use of cookies in the process of accessing web pages. It is important for users to understand cookies and how they are used to determine whether to issue consent.

Cookies Defined

A cookie is a small text file that is placed onto a user's device when they visit a website, either by the website operator or by a third party with whom the website operator has a relationship.

A cookie stores information that is not personally identifiable about the user's visit. This includes content viewed, language prefered, time and duration of each visit and advertisements accessed.

When the website is revisited by the device, the website can retrieve the information stored on the cookie and react accordingly (e.g., by displaying preferred language). However, cookies are limited in that they can only be read by the application which set them and therefore, website operators cannot track users across different mobile applications.

Information collected by cookies may be used for example, to develop websites by identifying popular and unpopular web pages, to track and create profiles of users' online movements, and to serve online advertising.Because cookies identify a unique computer via its browser, the user's data can be used to track the online movements of their computer and to form a profile of browsing habits linked to that specific computer and, in most cases, the individual using the computer.

The website operator is thus deemed the data controller. On the other hand, third party cookies are sent by a third-party entity separate from the website operator. The third-party entity makes the decision on processing of the personal data and is therefore deemed the data controller. The third-party entity must comply with data privacy laws.

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Cookies and Kenyan law

Kenya now has specific laws on data privacy and protection. The Data Protection Act No. 24 of 2019 is the substantive law and is supplemented by the Data Protection (General) Regulations, 2021, the Data Protection (Compliance and Enforcement) Regulations, 2021 and the Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2021.

The Office of the Data Protection Commissioner is established as the regulatory body responsible for oversight on data privacy and protection matters in Kenya and the implementation of these laws among other functions.

Due to the novelty of these pieces of legislation and the regulator, case law and interpretation by Kenyan courts is yet to take place and the regulator is still making strides to establish itself properly. Cookies are a widely known and accepted concept in the Kenyan information technology landscape but the engagement with the legal system on this concept remains unchartered.

However, it is noteworthy that the creation of a robust data privacy and protection legal and regulatory framework is a step forward, as Kenya is a key player and leader in the technological revolution in East Africa and the African continent at large. This sets a great stage for Kenya to develop its own jurisprudence on cookies among other aspects of data privacy and protection.

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Sectional Properties Act 2020

1. INTRODUCTION.

On 11th December 2020 President Uhuru Kenyatta signed the Sectional Properties Act, 2020 (SPA) into law repealing the Sectional Properties Act, 1987. This was done in conformity with the provisions of the Constitution of Kenya 2010, the Land Act No. 6 of 2012, the Land Registration Act No. 3 of 2012 and the National Land Commission Act No. 5 of 2012.

2. RATIONALE FOR THE ACT.

The SPA seeks to simplify the process of registering sectional properties in Kenya. It provides for, inter alia, the division of buildings into units to be owned by individual proprietors who will have individual titles for their respective units.

The SPA applies in respect of units developed or to be developed on land held on freehold title or on leasehold title where the unexpired residue of the term is not less than twenty-one (21) years and there is an intention to confer ownership.

2.1 Purpose of the Act:

- Division of buildings with shared common areas into sectional units; and
- Addresses the use and management of the units and common property/areas.

2.2 Scope of the Act:

The SPA applies to apartments, flats, maisonettes, townhouses or offices having the effect of conferring ownership, (as long as the intention is to confer ownership to another person/entity) provided that the property is properly geo-referenced and approved by the statutory body responsible for the survey of land.

A sectional unit is defined as a space that is situated within a building and described by reference to floors, walls and ceilings within buildings and the concept of sectional properties entails a sectional unit together with a distinct share of the common area.

3. OVERVIEW OF THE REGISTRATION AND CONVERSION PROCESS

3.1 Preparation and Registration of a Sectional Plan

The first step is the registration of a geo-referenced sectional plan. The sectional plan is prepared by a licensed surveyor from a building plan approved by a county government. The sectional plan must be signed by the surveyor and the owner of the property (or management company or financier in an instance of conversion and the developer is not interested in doing the conversion or has refused to provide the old title.

The registrar can dispense with the submission of the same). The sectional plan must be endorsed by the county government and authenticated by the authority responsible for survey. The sectional plan must clearly indicate the user of the unit.

The lands registrar will not register a sectional plan unless the sectional plan describes two or more units in it. The sectional plan must be accompanied by an application for registration of the corporation and a list of the owners of the units.

3.2 Registration of a Sectional Plan

During registration, the register/deed file relating to the main title is closed and the main title is surrendered to the lands registry. A separate register for every unit in the sectional plan is opened. A certificate of title (freehold) or a certificate of lease (leasehold) is issued for every unit at a fee.

The certificate of title/lease for the unit includes a share in the common property apportioned to the owner of the unit. All the interests against the main title e.g. a charge, are endorsed on all the certificates of title issued in respect of the sectional units.

No more than one unit and no other land except the share in the common property apportioned to the owner of that unit, may be referred to in one registar.

Notwithstanding any other written law, as soon as a sectional plan is registered under the SPA, the title to a unit comprised in the sectional plan, with effect from the date of the registration of the sectional plan, is deemed to be issued under the LRA.

After the register for a unit is opened, all dealings and dispositions regarding the unit shall be in accordance with the LRA.

3.3 Sale of Sectional Units

Developers will be required to deliver copies of the following documents to prospective buyers before the sale of any sectional units. The sale agreement; the by laws for the development; the management agreement i.e in relation to the management of the common areas, the main title for the property or the sectional title for the unit if the same has already been issued; the charge if any; and the sectional plan or proposed sectional plan.

These are mandatory requirements and non- compliance will attract a fine of KES 20M or imprisonment for one year.

3.4 Financed Developers

Where a charge is registered against the main title for purposes of securing financing for the sectional property, the developer must also deliver a notice to the prospective buyer containing the following information;

The charge; the maximum principal amount secured by the charge; the maximum monthly instalments payable; amortization period; term of the loan; rate of interest on the loan or the formula if any for determining the interest rate and any prepayment privileges, if any.

3.5 Conversion of Existing Long Term Leases

The SPA provides that the conversion of existing long term leases in respect of sectional units should be undertaken by the 28th Dec 2022. The conversion process can be initiated by the owner, management co or unit holder or chargee. There will be no stamp duty payable during the process i.e if the same had been done during the initial registration of the subleases.

If conversion is not undertaken by 28th December, 2022, the registrar can register a restriction on the parcel to prevent any further dealings. However, non conversion by the said date does not invalidate/negate any security held by the chargee.

3.6 The Conversion Process

The process is effected by submitting a sectional plan accompanied by the registered long term lease, the original main title (if not available, an indemnity form should be filled) and the registrar will issue a gazette notice stating that conversion of the said parcel is underway.

The registrar will then proceed with the registration of the units and the unit holders will be issued with their certificates of title.

3.7 Registration and the Mandate of the Corporation

The corporations are a creation of the SPA and are not subject to the Companies Act, 2015. The corporation is automatically registered upon the registration of a sectional plan. Section 17 of the SPA requires owners to register a corporation name as follows: "The Owners, Sectional Plan No. _____ (the number given to the sectional plan on registration). The registrar shall issue a certificate of registration of the corporation.

The corporation shall consist of all those persons who are owners of the units in the parcel to which the sectional plan relates and who are entitled to the parcel when the sectional arrangement is terminated under the SPA. The corporation cannot engage in any trading activities. On registration, the by-laws prescribed in the regulation are deemed to be the corporations by laws. However, the same can be changed/improved but the changes can only take effect once the corporation has filed a copy of the changed by-laws with the registrar and the registrar has made a memorandum of the filing on the sectional plan.

Duties of the corporation are default imposed by Section 20 of the SPA. The corporation has a duty to form a dispute resolutions committee to deal with disputes within the unit holders and those between unit holders and the corporation. The corporation can register a caution on a unit holders title for non-payment of the service charge.

The corporation will maintain accounts and file returns. It will also have perpetual succession and a common seal. The voting rights of the owner of the unit shall be determined by the unit factor for their unit.

3.8 Renting of Sectional Units

Before renting out a sectional unit, an owner of the sectional unit must provide the following;

A written notice to the corporation of the intention to rent out the unit and the details of the tenant; An undertaking to be liable for any damage caused to the unit by the tenant; A written notice that the unit is no longer rented out once the tenant vacates the unit.

If a tenant contravenes the developments by-laws and the owner of the unit fails to take necessary action, the corporation is entitled to give the tenant notice to vacate the unit and this is without the consent or need to consult the other unit holders.

4 TERMINATION OF SECTIONAL PROPERTIES

Section 47 of the SPA provides that the sectional status of a building may be terminated by either;

- The unanimous resolution of the corporation;
- Substantial or total damage to the building; or
- Compulsory acquisition

The corporation is mandated to file a notice of termination with the registrar in the prescribed form to effect the termination. Once the sectional status of a building is terminated, the owners are entitled to the parcel of land on which the building is erected as tenants in common in shares proportional to their respective units.

Section 50 of the SPA further provides that the corporation shall automatically stand dissolved upon the termination of the sectional property.

5. OVERVIEW OF THE SECTIONAL PROPERTY REGULATIONS, 2021

Pursuant to Section 59 of the SPA, the Cabinet Secretary gazetted the SPA Regulations, and their objective is to operationalise the SPA by providing a framework and procedures for the registration of sectional plans, outlining the statutory forms to be used for the purposes of the SPA and giving guidance on the conversion of registered long term leases.

The regulations list the different parties involved in the registration and conversion processes and highlight the key roles these parties play in the processes. The second schedule of the Regulations guides the operation of the corporation. Regulation 34 provides that sectional plans and prescribed forms may be submitted in electronic form.

6. PROPERTIES EXEMPT FROM THE SPA

Regulation 22 provides that long-term leases not falling within the categories set out in Regulation 18 are exempt from the requirement to convert to sectional units. Additionally, the following long-term leases are also exempt:

- Where it is expressly provided by agreement that reversionary interest belongs to the developer or lessor or management company as legal owner and not as trustee;
- Large mixed-use developments and phased developments where it is by agreement provided that reversion shall be retained by the developer or to be otherwise held by a management company; or
- Projects of strategic national importance, substantial transactions, and special economic zones, which by their nature, renders it impractical to relinquish reversionary interest.

It is however, important to note the following;

- The exemptions have not been included in the main sections of the SPA but only in the regulations;
- Neither the regulations nor the SPA has defined the term "mixed use development"; and
- There are no provisions on the application for exemption from adhering to the provisions of the SPA Act.

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Cybercrime and Cybersecurity in Kenya

The use of the internet has made the world an ever-increasing interconnected global village. As a result, Kenya has greatly embraced and continues to embrace a digital and liberalized economy that seeks to enhance more and more paperless transactions and business.

Inevitably, there is need for a legal framework to govern computer misuse and cybercrime that is now the new frontier for fraud, crime, terrorism, money laundering etc. Resultantly, President Uhuru Kenyatta signed the Computer Misuse and Cybercrimes Bill, 2018 .

Salient Features of The Act

A. The Act establishes the National Computer and Cybercrimes Co-ordination Committee. This committee has advisory, supervisory and coordinating functions and reports to the Government and the National Security Council on cybercrimes that would affect national security.

B. Gazettement of the National and Critical Infrastructural Establishments . These include but is not limited to;

- Mobile communication infrastructure/systems e.g Safaricom, Airtel, Telkom.
- Internet connectivity gateways i.e. satellites, cable networks, mobile internet networks etc.
- Internet protocol and domains e. g dot ke (.ke), dot go dot ke (. go.ke)
- Data centers e.g (National Integrated Identity Management Systems or Huduma Namba) and email systems and platforms.
- Electoral systems i.e IEBC voter registration database, results transmissions.
- Judicial systems i.e Judiciary e-filing.

This gazettement means that these establishments will be accorded added state protection against any form of attack such as the one witnessed on 11th January 2022 when electricity pylons in Naivasha, Nakuru County were vandalized causing their collapse which plunged the entire country into total darkness as reported by Kenya Power .

C. Criminalization of Cyber Crimes. The Act provides for the offences, investigatory procedures, prosecution of the same offences in courts and the punishments in form of hefty fines and lengthy prison sentences.

D. International co-operation. NC4 has mandate to work with agencies such as Interpol and other countries particularly on extradition of the suspects involved in cybercrimes on account of the interconnectivity of the world through the internet hence the high risk of a cyber-attack in Kenya and outside of it.

Efforts by The Government to Foster Cyber Security

Introduction of Electronic Electoral System

Kenyan elections specifically 1992, 1997 and the bloodiest being 2007 have been characterized by claims of ballot stuffing, doctored voter registration lists and manual verification and transmission of results have always led to questionable results and ultimately violent protests. To cure this problem and curb future cybercrime, the Elections Act No. 24 of 2011 was enacted.

Section 44(1) of the Elections Act No. 24 of 2011 mandates the IEBC to have an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

The Supreme Court in Raila Amolo Odinga & another Independent Electoral and Boundaries Commission & 2 others [2017] eKLR Presidential Petition 1 of 2017 stated that for every election, IEBC should procure the technology at least 120 days before the general elections and the technology shall be simple, accurate, verifiable, secure, accountable, and transparent in accordance with Section 44(3) of the Elections Act and Article 86(a) of the Constitution of Kenya 2010 .

Streamlining of Lands Registry

The Ministry of Land and Physical Planning (MOLPP), the National Land Commission (NLC) and Key Partners in government developed the National Land Information System also known as Ardhi Sasa.

Ardhi Sasa, an online platform, has sought to enable land users to register their transactional documents digitally. At the click of a button, citizens can carry out online transactions, drastically reducing human interactions which are a frequent source of fraud and a definite cause of delays and inconveniences.

Ardhi Sasa has formulated direct relationships by joining up with the Ministry of Lands and the Law Society of Kenya in conducting the proper verification of Titles to properties and ensuring confirmation of the authenticity of Title documents and compliance issues. The platform requires the following -complete and accurate- information to verify the documents;

- a coloured size passport photograph as the account holder's profile picture being the true representation of themselves.
- an advanced electronic signature for execution of documents is stored and adopted and cannot be redesigned by anyone else.
- User's OTP (One Time Password).
- Transactional Advocates current valid practicing certificate.

Legal Notice 130 of 2020: The Land Registration (Electronic Transactions) Regulations, 2020 equally provide for a data privacy statement to ensure integrity and confidentiality of the user, information classification, access control, cryptography, physical and environmental security and monitoring and compliance.

Common Cyber Crimes in Kenya

The common offences provided for under part 111 of the Act are:- unauthorized access, unauthorized interference, false publications, child pornography, computer forgery, computer fraud, cyber harassment, identity theft and impersonation and phishing among others.

Under the Act, any person who operates a computer system or network whether private or public has an obligation to immediately report to the NC4 any attacks, intrusions, and other disruptions to the functioning of the computer system within 24 hours.

The report must detail the nature of the breach, how it occurred, an estimate number of the people affected by the breach, an assessment of the risk of harm to the affected people and an explanation of any circumstances that would delay or prevent the affected persons from being informed of the breach.

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Governing the Freedom of Expression in the Social Media

Kenya has recently enacted the Computer and Cybercrimes Act to provide a clear legal framework for offences touching on use of computer systems. The act provides limitation on the freedom of expression to protect abuse of other rights such as freedom of privacy and human dignity.

This article discusses how the Computer and Cybercrimes Act has used criminal law to limit the freedom of expression and if it has met the threshold.
Article 33 of the 2010 Constitution of Kenya provides for freedom of expression.

The International Covenant on Civil and Political Rights and the 1948 Universal Declaration of Human Rights provide for the freedom of expression to seek, impart or receive information and ideas, in the form of art, orally, in print or any media of his choice.

This freedom like any other right, is inherent right in any democratic state. Both the domestic and international legal framework provide for how the government is supposed to impose limitation on the freedom. The principles to be used in the limitation of freedoms are laid down both under domestic law of Kenya and International law and must be reasonable.

Freedom of expression enables citizens to evaluate their government and speak of its ills and it is through such a freedom that democracy is practiced. It gives everyone the right to express an opinion easily and freely fostering the need for tolerance of the opinion of others.

Legal Framework Governing Limitations

The government is required to be very cautious while interfering with such freedom. It should not limit the freedom for purpose of escaping scrutiny from its citizens and any reason to restrict freedom should only be for the purpose of preventing abuse of the freedom of citizens and maintaining public order.

There are principles that the state must follow in limiting the freedom of expression. These principles are mainly based on reasonability and proportionality. The judicial organs have on several decisions succinctly provided on how the principles should be applied. Madan J stated in the case of Githunguri vs. Republic that rights cannot be absolute and must be balanced against other rights and freedoms together with the general welfare of the community. Justice Holmes in the case of Abrams vs United States stated that when it

came to the question of limitation of freedom of expression, the question in every case is whether the words have been used in such a nature as to create clear and present danger that would result to substantive evil. However, imposition of limitation on the freedom of expression must be imposed by law.

The Computer Misuse and Cybercrimes Act

The Human Rights Committee has stated that the freedom of expression extends to the social media platform. This gives every person the right to freely express oneself on any issue.

Research show that people spend a lot of time of the social media as it is estimated that an average person spends about 118 minutes on the social media in a day. Kenya has over 20 million Internet users, with a significant number of these being active in the social media space especially on popular social networking sites such as Facebook and Twitter.

These sites provide a platform for debate on topical issues and especially politics. Because information can be able to spread to huge number of people within a very short period social media has become prone to abuse of privacy, identity theft and cyber bulling.

This shows that it has a very huge impact regarding its content. This has therefore created the need for studies and research on the effects of social media. This is to protect its users and the general public from any harm that might arise from the social media growth.

In Kenya, there has been huge increase in the spread of ethnic hate in the social media. Those who use these platforms to spread hate or propaganda of war must be regulated.

The Computer Misuse and Cybercrimes Act provides broad provisions on social media use. This was reactive to the fact that Kenya did not have clear laws to control its use. Judge Mumbi Ngugi in Geoffrey Andare vs. Attorney General and another declared Section 29 of the Kenya Information and Communications Act unconstitutional.

The Section provided for criminalization of use Information and Communication and Technology devices for posting grossly offensive items.

The Act provides for several offences such as cybersquatting, unauthorized access, cyber espionage, false publication, child pornography and phishing. It provides for investigations of such crime and provides for means of international cooperation in gathering evidence. However, twenty-six provisions of the Act have been suspended.

This is after a case was filed challenging the validity of several provisions. One of the basis of the case was that the provisions were a violation of freedom of expression. As the court presides this matter, the determination of the case shall be based on the limitation of rights and freedoms.

Conclusion

Whereas the Freedom of expression is limited in some ways, it can be limited further in the social media space. However, the limitations must meet the threshold of the principles provided under Article 24 of the Constitution. The Act is a move towards the right direction, but the state should be cautious not to infringe upon the right.

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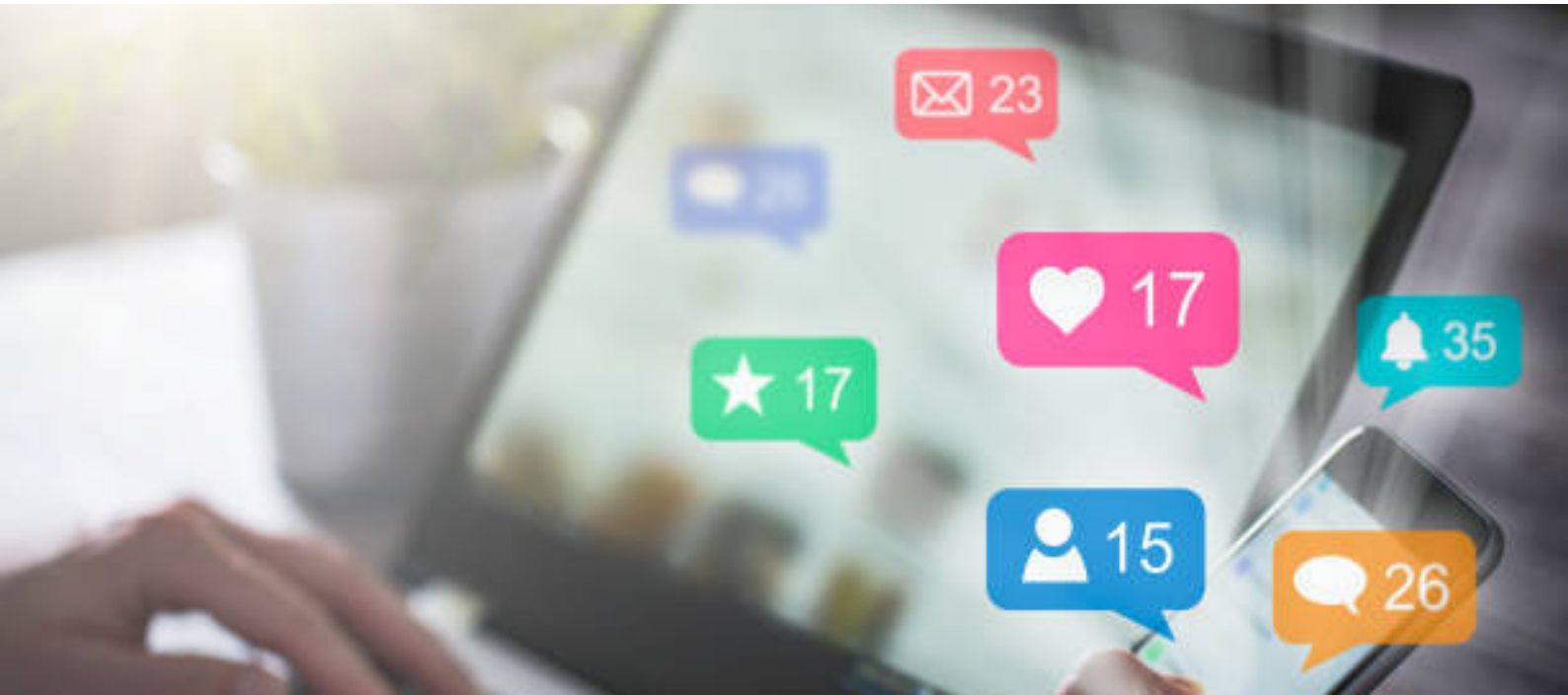

Public Procurement in Kenya and the Available Dispute Resolution Mechanisms

The evolution of the global economy coupled with the need for efficient value and supply chains has necessitated the establishment of systems that caters to and satisfy the needs of the supply chain.

The systems by which acquisition by way of purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods, including advisory, planning and processing in the supply chain system form what is commonly referred to as Procurement.

Procurement takes place in both the private and public sectors. The Private sector procurement is primarily governed by the policies and procedures of a private entity while Public sector procurement is subject to checks and balances in form of statutory provisions.

The rigorous scrutiny in public procurement ensures public funds are not misappropriated under the guise of procuring goods and services for the public. Public procurement and asset disposal by State organs and public entities is guided by the values and principles envisaged in the Constitution of Kenya, 2010 and relevant legislations passed by the Parliament

Public procurement faced numerous challenges stemming from the ineffective statutory and regulatory framework governing the procurement process. These challenges included:

a) Political Manipulation
b) Conflicts of Interest
c) Uncontrolled Contract Variations
d) Overpricing of goods and services
e) Authorization of expenditure level was not structured
f) Lack of fair and transparent competition
g) Inappropriate use of procurement methods

These challenges that faced public procurement in Kenya necessitated the enactment of new legislation that would promote a progressive and transparent way of procuring goods and services by government entities and any other body involved in the public procurement sphere.

Reforms in Public Procurement

The Public Procurement and Disposal Act 2005, was enacted with a view to cure the inadequacies of the system in place, enhance value for money and bring renewed confidence in the public procurement regime.

The 2005 Act and the subsequent Regulations there to were promulgated amidst opposition from those with entrenched interests in public procurement and who had benefited from the fluid state of affairs in the procurement sector. The law was therefore enacted due to external pressure rather than because the key players in the industry wanted the much-needed reforms.

With the promulgation of the Constitution of Kenya, 2010, there was need to align the 2005 Act with the provisions of the Constitution, which then led to further amendments of the Public Procurement and Asset Disposal Act, 2015. The Act established an independent Public Procurement Regulatory Authority as an oversight agency of Government to ensure that procuring entities complied with the law.

The 2015 Act is now further cemented by the Public Procurement and Asset Disposal Act Regulations, 2020, which is the subsidiary legislation to the Act. Despite the large-scale reforms in the way public procurement was carried out, disputes remained commonplace with many procuring entities being accused of illegal and unprocedural procurement practices by actual and prospective bidders. How then are disputes in Public Procurement resolved?

Dispute Resolution in Public Procurement

The Public Procurement Administrative Review Board established under Section 27 of the Public Procurement Act hears and determines tendering and asset disposal disputes. The Primary way of resolving disputes in public procurement is via a Bid Protest system.

A bid protest system accomplishes the oversight function by means of third-party monitoring. Actual and prospective bidders are given authority to challenge the actions of procurement officials before designated fora empowered to remedy violations of the procurement laws/regulations.

There are many reasons why a bidder may want to protest a decision of a procuring entity. Some of the common grounds are as follows:

i. Decision that is not supported by the record or that are factually incorrect, contradictory;
ii. Evaluations that depart from the stated criteria;
iii. Selections that treat bidders differently by overlooking the deficiencies of the successful bidder while finding the protestor's proposal unacceptable for the same or similar deficiencies; Failure to properly evaluate experience;
iv. Non-objective specifications/Terms of Reference (ToRs)
v. Evaluation of bids without adhering to the provision of the Act, e.g., introducing new criteria
vi. Improper termination of procurement proceedings. etc.

A candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by the Public Procurement and Asset Disposal Act or the Regulations, may seek administrative review within fourteen days (14) of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.

Who has locus to bring an action before the Public Procurement Administrative Review Board (PPARB)?

An action and/or request for review before the (Public Procurement Administrative Review Board) PPARB may be instituted by an aggrieved candidate or tenderer, the accounting officer of the Procuring Entity, the successful bidder and any other party as may be allowed by the Board.

Any action and/or request for review must be decided within Twenty-One (21) days and in deciding, the Board may do any of the following:

a. Annul anything the accounting officer of a Procuring Entity has done in the procurement proceedings, including annulling the procurement or disposal proceedings in their entirety;
b. Give directions to the accounting officer of a procuring entity with respect to anything to be done or redone in the procurement or disposal proceedings;
c. Substitute the decision of the accounting officer of a procuring entity in the procurement or disposal proceedings;
d. Order the payment of costs as between parties to the review in accordance with the scale as prescribed; and
e. Order termination of the procurement process and commencement of a new procurement process.

A person who is dissatisfied with the decision of the Board has a right to seek judicial review at the High Court within Fourteen Days (14) days, which application must be decided by the High Court within Forty-Five (45) days. The Act allows for a further appeal to the Court of Appeal within Seven (7) days in the event a Party is not satisfied with the decision of the High Court.

In pursuit of the expeditious administration of justice, the Court of Appeal is allowed Forty-Five (45) days from the date of lodging the appeal, to hear and determine the Appeal. Failure to decide an Appeal within the prescribed timelines re-instates the decision of the Board which shall thus be binding on all parties.

The Statutory timelines provided by the Act are necessary to promote the expeditious disposal of procurement disputes. This is so because too much delay in the determination of these disputes may hinder provisions of critical goods and services.

Conclusion

Public Procurement Law in Kenya is a burgeoning and multi-faceted area of law that will only continue to experience significant growth, reform and development. The creation of robust and detailed legal and regulatory framework governing public procurement in Kenya will only facilitate this growth.

Additionally, jurisprudence being developed by the Public Procurement Administrative Review Board sets a great stage for Kenya to be at the forefront of legal and regulatory framework in Africa in matters public procurement.

This not only promotes transparency and good governance in procurement but also promotes the Principles of Public Finance under Article 201 of the Constitution of Kenya, 2010.

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Tax Law in Kenya

The month of June brings with it a lot of sensitization from the Government for citizens to file their taxes. This year specifically came with a flood of emails and reminders. One would ask why taxes, the simple answer is that, until someone comes up with a better idea, taxation is the only practical means of raising the revenue to finance government spending on the goods and services that most of us demand.

After independence, various Strides have been made in relation to tax law in Kenya. Including, the income tax which was introduced through the Income Tax Management Act enacted in 1953 and subsequently repealed in 1958 and 1965. In 1975, the Income Taxes department was created by an Act of Parliament and was accorded the sole responsibility of charging, assessing and collecting Income Tax in Kenya. Additionally, in 1995, the Kenya Revenue Authority (KRA) was established.

General Types of Taxes in Kenya

Income Tax: Income tax is charged pursuant to Section 3 of the Income Tax Act Chapter 470 of the Laws of Kenya. It is a direct tax that is imposed on income derived from the conduct of Business, Employment, Rent, Dividends, Interests and Pensions, among others. The methods of collecting taxes in Kenya comprise:

Corporation tax - Section 3(2) of the Income Tax Act provides for this form of tax. It is obtained from income earned or accrued from or within Kenya. For resident companies, the income tax rate is 30% of the net profit generated by the company, while for non-resident companies, the rate applicable is 37.5% of the net profit generated.

A company is considered resident if it is either incorporated in Kenya, has its place of effective management and control in Kenya or is declared to be resident by the Cabinet Secretary for the time overseeing matters relating to taxes.

Pay As You Earn (PAYE)PAYE is a method of collecting tax from individuals in gainful employment and earning a minimum Kes. 24,000 per month (previously Kes. 14,000 per month). Gains or Profits includes wages, salary, leave pay, sick pay, commission, bonus, gratuity, travelling allowances and entertainment or other allowances received in respect of employment or services rendered.

PAYE is calculated using a graduated scale, with the highest rate being 25% (previously 30%) for persons earning a minimum of Kes. 57,333 and above (previously Kes. 47,059).

Withholding Tax

Withholding taxes are advance taxes that are deducted in respect of certain incomes including management fees, professional fees, interest charged, dividends, constructions and royalties, among others. The person making the payment is responsible for deducting the tax at source from payments made and remitting the deducted tax to KRA.

The tax is withheld by the party responsible for deducting and remitting the tax to KRA hence, the name withholding tax. The percentage deducted varies between incomes and is dependent on whether the payee is a resident or non-resident individual or company.

The percentage deducted varies between incomes and is dependent on whether you are a resident or non- resident. Withholding tax, therefore, is not an additional tax. Rather, it is a payment of tax in advance on the income of the payee (the party receiving the payment).

Some of the sources of income which are exempted from the payment of Withholding Tax are:

- Dividends received by a company resident in Kenya from a local subsidiary or associated company in which it controls (directly or indirectly) 12.5% or more of the voting power;
- Marketing commissions and residue audit fees paid to foreign agents in respect of export of flowers, fruits and vegetables;
- Interest payments to banks and insurance companies;
- Payments made to tax exempt bodies;
- Local management and professional fees whose aggregate is below Kshs 24,000 in a month; and
- Air travel commissions paid by local air operators to overseas agents.

Value Added Tax (VAT)

Value Added Tax is regulated and governed by the Value Added Tax Act, No. 35 of 2013, Laws of Kenya. Value Added Tax (VAT) is due on the supply of taxable goods or services made or provided in Kenya and on importation of taxable goods or services into Kenya either at a standard rate of 16%, Zero rate or 8%.

There are certain goods and services that are exempt from VAT and these a provided for under the 1st schedule of the VAT Act. VAT is due and payable the earliest of the date:

- when the Goods or services are supplied to the purchaser;
- an invoice is issued in respect of the supply;
- payment is received for all or part of the supply; or
- a certificate is issued by an architect, surveyor or any person acting as consultant or in a supervisory capacity in respect of the service.

There are instances where the Commissioner may appoint a taxpayer to be a withholding VAT Agent in which cases all payments made for supply of goods or services by such person will be less 6% VAT regardless of whether the supplier is registered for VAT or not.

Excise Duty

Excise Duty, popularly known as Sin Tax, was a tax that was targeted at certain products with an aim of discouraging their consumption. Its imposition has however gone beyond the likes of alcohol and tobacco, to bottled water and even some financial services.

The excise duty rate is specific and varies on a case-by-case basis as set out in the First Schedule of the Excise Duty Act, 2015, Laws of Kenya, which regulates and governs excise duty in Kenya.

Customs Duty

Customs Duty is levied upon importation of goods into Kenya. The rates vary between 0%, 10% and 25% as provided by the East Africa Community Common External Tariff (CET). However, Sensitive items Attract duty higher than 25%. The sensitive items are listed in the schedule 2 of the EAC Common External tariff.

Kenya being a part of the East African Community, Customs Duty is levied based on the East Africa Community Customs Management Act (EACCMA) which is uniform in all the EAC countries.

Tax Administration

The government in an effort to harmonise tax administration in Kenya, enacted the Tax Procedures Act, No. 29 of 2015, Laws of Kenya ('TPA'). The TPA seeks to administer over numerous issues including:

- Record Keeping.
- Filing of returns.
- Raising of Assessments.
- Recovery of taxes.
- Tax Objections, and
- Tax Rulings.

It however does not apply where a statute has set out specific procedures to be followed, for instance, the EACCMA has set out the procedure to be followed in the administration of customs payable to the East African Community.

Tax Disputes

Tax disputes are governed by the Tax Procedures Act and the Tax Appeals Tribunal Act, No. 40 of 2013, Laws of Kenya. Section 51(1) of the Tax Procedures Act (TPA) provides that if a Taxpayer disputes a Tax Decision (defined in Section 2 of the Act), the Taxpayer is required to file a Notice of Objection of the tax decision within 30 days of receiving the said decision, with the Commissioner-General of the Kenya Revenue Authority.

Section 51(11) of the TPA mandates the Commissioner-General to consider the Notice of objection and issue an Objection Decision within 60 days of its receipt or the date when he received any additional information, otherwise the Notice of Objection will be deemed to have been allowed.

The Tax Appeals Tribunal is the appropriate forum for a Taxpayer to appeal a Commissioner-General's Objection Decision on a tax objection filed by the Taxpayer, as the Tribunal handles such appeals based on merit only. The appeal should be filed by the aggrieved Taxpayer within 30 days of receiving the Objection Decision, with a right of appeal to the High Court.

Alternative Dispute Resolution is also employed and encouraged in resolving tax disputes. KRA set up an Alternative Dispute Resolution department about 5 years ago to provide both the Taxpayer and KRA with a forum to discuss a tax dispute on a without-prejudice basis and hopefully reach an amicable settlement of the dispute.

If a settlement of the dispute is arrived at, the settlement is only binding on the parties once it is adopted by the Tax Appeals Tribunal. The settlement is therefore subject to the approval of and adoption by, the Tribunal.

It is important to note that the tax reforms process is a continuous one and one that is guided not only by economic factors but by political and social issues as well.

For information on this subject, please do not hesitate to4 contact the lawyers whose details are set out below:

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