

Mwanasheria Mkuu

A Publication of the Office of the Attorney General and Department of Justice,
Edition 3 (July—December, 2018)



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OFFICE OF THE ATTORNEY GENERAL AND DEPARTMENT OF JUSTICE

The Constitution of Kenya 2010, Office of the Attorney General Act No 49 of 2012 and Executive Order No 1 of 2018 outline the key functions of OAG&DOJ:

GOVERNMENT SERVING

- Principal Legal Adviser to the Government.
- Represent the National Government in civil proceedings and matters before foreign courts and tribunals.
- Legislative Drafting Services.
- Negotiate, draft, vet and interpret Agreements and treaties for the Government.
- Policy on Administration of Justice.
- Coordination of Governance, Justice, Law and Order Sector reforms.
- Central Authority on Mutual Legal Assistance.

PUBLIC SERVING

- Promote, protect, and uphold the Rule of Law, defend the Public Interest, Human Rights, and Democracy.
- National Registration Services (Companies, Societies, Marriages, Adoptions, Security Rights and Coat of Arms).
- Public Trustee Services.
- Official Receiver.
- Oversight over the Legal Profession.
- Legal Aid and Legal Policy Management.
- Anti-Corruption Strategies, Integrity and Ethics.
- Political Parties and Elections Policy Management.

VISION

To be the best institution in the region in the provision of public legal services and the promotion of a just, democratic and corruption-free nation.

MISSION

To facilitate the realisation of good governance and respect for the rule of law through the provision of public legal services, protection and promotion of human rights and upholding of ethics and integrity.

DID YOU KNOW (PUBLIC INFORMATION):

The AG has right of audience in proceedings of Public Interest or involving Public Property;

The Office shall be the depository of all laws and local and international documents, agreements and treaties signed for and on behalf of the Government;

The Attorney General shall have custody of the Public Seal of the Republic of Kenya;

A State Counsel is an Advocate of the High Court of Kenya and is appointed by the Attorney General by Gazette Notice;

All State Counsel shall perform the functions of the Office with **COMPLETE LOYALTY AND DEDICATION** and shall not indulge in any act that may affect the sovereignty and interests of the nation;

A State Counsel has a duty to:

- (a) Promote Respect for the Rule of Law and Administration of Justice;
- (b) Treat the court with candour, courtesy and respect and shall not influence court decisions by use of deceptive or reprehensible methods;
- (c) Deal with other lawyers fairly, courteously and in good faith;
- (d) Uphold integrity and reputation of the legal profession and promote fairness, justice, and honesty;
- (e) All State Counsel in any Government Ministry or Department are officers of the Attorney General and are answerable to the Attorney General;
- (f) No Ministry or Department shall engage the services of a consultant to render any legal services relating to the functions of the Attorney General without approval of the Attorney General;
- (g) All Government Ministries, Departments and State Corporations shall seek the opinion of the Attorney General on any matter raising substantial legal or constitutional issues;
- (h) All Government Ministries and Departments shall notify the Attorney General of all material litigation within three days upon the filing of any pleadings;

The Attorney General shall after 13th June of every year, prepare and furnish the President with a report that shall contain:

- (i) Financial statements of the Office;
- (ii) Description of the activities of the Office; and
- (iii) Any other information relating to the functions of the Office.

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Message from the Attorney General

The right of access to information held by the Government, as provided under Article 35 of the Constitution, is addressed in the Access to Information Act, 2016, which makes it almost mandatory for the Government to share information of its activities. My Office is one that is greatly misunderstood due to the complexity of its mandate and activities that transcend the three arms of government, the Executive, the Legislature and the Judiciary.

Mwanasheria Mkuu, now in its third edition, is a platform where all Government agencies and the public get to learn more about the Office, devoid of the legalese that is characteristic of lawyers. It is our shared aspiration and belief that all citizens will continue to be well informed about our services and engage more with us both at the Headquarters and at the Regional offices as they seek our services.

As an Office, we find ourselves open to more public scrutiny than at any previous time in our history. This impacts heavily on the need for us to remain transparent and accountable in fulfillment of our obligation to facilitate good governance and respect for the rule of law, in the provision of public legal services.

I am pleased to report various successes that the Office has witnessed during the current financial year (2018/2019). These include, but are not limited, to the finalization of 887 cases filed against the Government. In international arbitrations, the Government recently avoided a liability from a dismissed case and, the lowering of costs sought as damages against the Government; the International Center for Settlement of Investment Disputes (ICSID) ruled in October 2018 that Cortec Mining Kenya (PTY) Limited, Cortec (Pty) Ltd and Stirling Capital Limited pay the Government of Kenya costs amounting to US\$ 3.6 million.

The Office has enhanced access to justice by reducing the time taken to draw final distribution accounts of estates where, so far, a total of 6,105 files have been finalized and assets of these estates have been transmitted to the respective beneficiaries. The registration of Hindu and Customary marriages commenced on 1st August 2017 and, to date, 523 Hindu priests have been licensed to perform Hindu marriages while The Marriage (Muslim Marriage) Rules, 2017 have already been gazetted.



Justice (Rtd) P. Kihara Kariuki, CBS

On anti-corruption measures to bolster the fight against corrupt practices, the Government established the Multi-Agency Team (MAT) to tackle corruption, which I chair as the Attorney General. Under the MAT framework, the Office of the Director of Public Prosecutions, Ethics and Anti-Corruption Commission, Directorate of Criminal Investigations, Asset Recovery Agency and Kenya Revenue Authority, have been working more closely than ever before to ensure the expeditious investigation and prosecution of cases brought to court. The Financial Reporting Centre and Central Bank of Kenya have been of great help in the supervision of financial institutions to prevent money laundering and terrorism financing through flagging out suspicious transactions.

The war against corruption does not end with criminal proceedings and jail time. We will be going after assets and wealth accumulated through corrupt means. We are tracing assets that thieves think are safely hidden in the names of their spouses, children, friends or corporations. Bank accounts are being frozen and properties are being attached. The Asset Recovery Agency initiated several investigations and successfully identified, traced, seized and preserved assets worth KSh.

1.1 billion from proceeds of crime relating to the National Youth Service cases, amongst other complex financial cases. Further, the Office has enhanced mutual legal assistance engagements with peer jurisdictions to reduce the loss of public funds through the recovery of proceeds of crime and corruption. In December this year, Kenya finalized the inking of the Framework for the Return of Assets from Corruption and Crime in Kenya (FRACCK). This is a framework developed as a collaboration between the governments of Switzerland, the United Kingdom and Jersey, where a mechanism for seizing proceeds of corruption and crime is set out and, where such proceeds are then repatriated back to Kenya to be applied for the benefit of approved public projects. This is an innovative mechanism which signals a deep commitment by the Government in the fight against corruption and the return of illegally acquired wealth. Kenya is in talks with other governments including those of Mauritius and the United Arab Emirates on similar Mutual Legal Assistance arrangements.

Given the need to advance the rule of law and, ensure that Advocates act as beacons of law and order to the rest of society, it has been necessary to ensure that matters relating to the discipline of Advocates are addressed efficiently and effectively. In this regard, the Advocates Complaints Commission (ACC) subjected 404 disputes to ADR mechanism of which 77 were amicably settled and realized over KSh. 17 million on behalf of the complainants. **33** errant advocates were suspended and have been struck off the Roll of Advocates.

We must develop a society that has zero tolerance for theft, impunity and corruption. We who serve the public have a greater burden in the war against corruption than ordinary citizens because, this war is led by example, which we must be to our fellow citizens and to our impressionable youth. We must not only be above reproach but, must be *seen* to be so. We must all do the right thing, even if it will not be applauded or witnessed because, this is the cornerstone of a dignified and honourable society and, for us in public service, it is our duty.

Message From the Solicitor General



Kennedy Ogeto, EBS

The third edition of the OAG&DOJ Newsletter '*Mwanasheria Mkuu*' comes at a time when the Office is preparing to roll out its third cycle Strategic Plan (2018-2022). The Strategic Plan is aligned to the Medium Term Plan 3 (MTP 3), The Big Four Agenda Initiatives, the United Nations Sustainable Development Goals as well as other national development policies and blue prints that are anchored in Kenya Vision 2030.

The Strategic Plan expected to be completed during the 3rd quarter of this financial year has received diverse inputs from the OAG&DOJ's Departments, Semi-Autonomous Government Agencies (SAGAs) and stakeholders. The object of the 3rd generation Strategic Plan, if well implemented, will facilitate or strengthen the Political Pillar of the Kenya Vision 2030 to have "a democratic political system that is issue-based, people-centered, result-oriented and accountable to the public." It is my intention that this Plan is rolled out and implemented immediately so that the public can reap the benefits of a governance system that is a critical pillar of Vision 2030.

This edition also comes at a time when the Office is undergoing structural and mandate changes. This include departments that are in the process of de-linking from the mother OAG&DOJ. These are the National Legal Aid Service, Asset Recovery Agency and Business Registration Services. Executive Order No. 1 of 2018 has seen the realignment of other agencies including the relocation of the National Crime Research Centre

from the OAG&DOJ to the Ministry of Interior and Coordination of National Government. The Executive Order brings on board the National Council for Law Reporting and Auctioneers Licensing Board that were previously domiciled in the Judiciary. Various developments expected to be witnessed include the completion of the OAG&DOJ Circular on legal services as well as the updating of the various departmental Service Charters that outline our obligations to the public and out clients. These will be circulated to all Government Ministries, SAGAs, Diplomatic Missions, Non-Governmental organisations and the public.

Implementation of the Government priority areas in manufacturing; food security and nutrition; universal health coverage; and delivering 500,000 affordable housing will involve negotiation of relevant agreements, signing of agreements/contracts with development partners and contractors, preparation of policies and attending to dispute resolution matters that arise during implementation of programmes. OAG&DOJ will collaborate closely with all stakeholders to ensure this is done in a timely and cost-effective manner.

The OAG&DOJ is key in implementing the Big Four Agenda, as an enabler, facilitator and defender of the same. The office is responsible for developing and proposing amendments to existing legislation to align it to the Big Four initiative as and when required. The Office is also seeking to effectively defend and represent the Government in court and in arbitration proceedings.

Presently, the Office has provided legislative drafting services with respect to the Warehouse Receipt System Bill, 2018; the Fisheries Management and Development Act, 2016; and the Food Security Bill. Others are the Regulations under the Agricultural and Fisheries Authority Act; Amendments to the NHIF Act contained in Statute Law (Miscellaneous Amendments) Bill, 2018; Amendment of Stamp Duty Act to exempt First time homeowners contained in the Tax Laws (Amendment) Bill, 2018; and amendments to the Public Private Partnerships Act contained in Statute Law (Miscellaneous Amendments) Bill, 2018.

The Office has reviewed various contracts in the Extractive and Mining Sector with a view to protecting the country against exploitation while ensuring that the county governments receive a fair share of earnings from natural resources. The Office continually vets all contracts and agreements to ensure they are legally compliant and in conjunction with MDAs negotiates various financing agreements to enable the implementation

of the Big Four Agenda, and renders legal opinions to MDAs in relation to the implementation of the Big Four Agenda. Further, the Office has reviewed various loan agreements and contracts for critical projects whose impact will be significant to the success of the implementation of the Big Four Agenda. These include the upgrading of the Rift Valley Textiles factory to promote the manufacture of garments boosting the manufacturing sector. Within the health sectors, contracts have been reviewed for the supply of Medical equipment for the “Mother and Child - Our Future” Project at the Kenyatta National Hospital; upgrading of various maternal and newborn units in the country; and for the supply of Computer Tomography scanners to 37 public hospitals. There is good progress in the rolling out of the Universal Health Cover through the National Hospital Insurance Fund (NHIF) aimed at ensuring that all Kenyans regardless of their economic status are provided with medical insurance.

The Office is promoting, facilitating and encouraging the conduct of international commercial arbitration; administering domestic and international arbitrations while ensuring that Nairobi is the preferred seat of arbitration in Africa. Through the Nairobi Center for International Arbitration (NCIA), there is proactive cooperation with other regional bodies, providing arbitration facilities, advice and assistance for the enforcement and translation of the arbitral awards. There is also continuous sensitization of the public on ADR with the objective of ensuring that Kenya has a conducive business environment for trade, investment and achievement of the Big Four Agenda by encouraging ease of doing business, enforcement of contracts and promoting the use of ADR mechanism through inclusion of arbitration clauses in commercial contracts by the parties. In this regard, the NCIA has been collaborating with the Judiciary to facilitate the conduct of court-annexed mediation thus encouraging the public to seek alternative dispute resolution as opposed to court litigation process. This has helped reduce the cost of doing business while reducing the backlog in the court system and the time taken to settle matters.

It will be noted from the narrations in this edition that we are engaged internationally in developing laws and mechanisms that cement our regional agenda as we continue to support our national legislative agenda. I have no doubt in the commitment that most of us have to our roles and service to the public.

Litigation: Understanding Advocates Lien

by B. Wasilwa

The Halsbury laws of England defines 'lien,' "*Lien is in its primary sense a right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied. In this primary sense it is given by law and not by contract.*"

An advocate's lien is therefore the right of an advocate to hold client's papers or property in the advocate's possession until payment has been made for legal representation given.

In most common law jurisdictions, the rights of an attorney/advocate have been held to be same as the rights of the solicitor in England. An understanding of common law would thus help in the understanding of advocate's lien in Kenya. In the case of **RE The Resident's Magistrate's court (Nairobi) (1929-1930) LRK 66**, Sheridan, J stated:

An attorney or solicitor's lien is a creature of the Common Law. In the case of re Sullivan vs Pearson, ex parte Morrison, 4 QB (1868) page 153 to 154, Blackburn, J, expresses himself: 'There is no doubt at all that where an attorney has by his labor or money obtained a judgment for his client, he has a lien upon the proceeds of such judgment.' Although advocates in this country may occupy a different point from solicitors in England in many respects, in regard to the matter under consideration, is quite different from the point decided in Rasul Bux vs Dalal, they seem to occupy the same position, in my opinion the words of order (4) 2 of the Kenya Colony Order in Council, 1921, are sufficiently wide to allow the application of the 'common law lien' doctrine in the case of advocates in Kenya.

There are two types of lien available to an advocate, Passive/retaining lien and Statutory lien enforced by way of a charging order.

Passive/ Retaining lien is commonly asserted by advocates. It is also known as possessory or general lien. This gives an advocate the right to hold on to the property until legal fees due has been paid. In **Booth Extrusions vs. Dumbeya Nelson Muturi Harun t/a Nelson Harun & Company Advocates**, Onguto J, stated: -

A review of case law in the context of an Advocate – Client relationship, will reveal that there is the general lien which confers upon the advocates the right to retain all papers, money or other chattel the property of their client which came into possession of the advocates as their clients' advocate until all the costs and charges due to the advocates are paid. The lien is general and not restricted to costs owing in respect to the property which the client is claiming possession. It is simply a retaining lien premised upon the advocate having actual physical possession of the property the subject of the lien.

The general principles of advocate's retaining lien may involve attaching all property, papers and money coming into the hands

of the advocate. However, courts in some jurisdictions have determined that some types of property cannot be retained under a lien. These include, Corporate records; Original court records; Documents delivered to the advocate without the client's authorization; Property held for a specific purpose and Original wills.

The lien does not extend to property beyond the client's interest (See **Mutahi Maseki –v- Imran Nurshad Manji [2005] eKLR** . The retaining lien exists both for charges due in the particular case in which the lienable item came into the advocate's hands and for any general balance due for services unconnected to the matter. The advocate must be in possession of his/her client's property in order to establish lien. There can be no lien if property is received by advocate for a special purpose e.g. money held pursuant to a professional undertaking or under an escrow agreement (See the case of **Waruhiu K'owade & Ng'ang'a Advocates vs Mutune Investments (2016) eKLR**). Generally, an advocate may not be required to surrender the property belonging to the client until an expedited hearing has been held to ascertain the amount of his or her fee. In the absent evidence of discharge for cause, the advocate cannot be compelled to give up a client's file or property, unless he receives adequate security for payment (See **Graham Adler & 3 others vs Musalia Mwenesi Advocates (2015) eKLR**). It is a passive lien in that it is asserted simply by maintaining possession and cannot be actively enforced. The advocate should not withhold over and above the maximum amount of the advocate's claim against the client and if he/she does, then the same amounts to conversion. In the US case of **Fletcher v Davis 33. Cal.4th 61,69 (2004)**, the court stated:

'where an attorney is asserting lien rights less than all funds recovered, the attorney has a duty to promptly take reasonable steps to pay or deliver to the client, the portion

of proceeds that are not in dispute and promptly make a reasonable determination of the amount of fees claimed.

In the case of **Republic vs Lucas M Maitha chairman Betting Control and Licensing Board and 4 others exparte** (2015) eKLR, Odunga, J stated:

A lien is simply security for an advocate's fees and an advocate is not entitled to exercise a right to lien in respect of the whole property when his costs can only be recovered from part only of the property. In other words, the lien ought to be commensurate to the claim for fees and no more.

At what point should an advocate assert this lien? Courts in Kenya have dealt with the issue of when an advocate can exercise lien over client's files, property and/or money. The position is that advocates fees are not due until his/her bill of costs has been served on the client and where it is not settled until it is taxed by the court. An advocate cannot purport to exercise lien where his/her fees has not been determined. The issue was dealt with by Lesiit, J. in the case of **John Karungai Nyamu & Another V Muu & Associates Advocates** [2008] eKLR as follows:

"The matter is very simple. Section 48(1) of the Advocates Act stipulates: "Subject to this Act, no suit shall be brought for the recovery of any costs due to an Advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the Advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause, to be verified by affidavit filed with the plaint for believing that the party chargeable there with is about to quit Kenya or abscond from the local limits of the Court's jurisdiction, in which

event action may be commenced before expiry of the period of one month.

It is clear from the foregoing that an Advocate's fees are not due until his Bill of Costs has been served on the client and where it is not settled, until it is taxed by the court. The client has exercised its rights under Order LII rule 4(1)(d) of Civil Procedure Rules which stipulates thus: "O. LII. r.4 (1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for- (a)..... (b).... (c).... (d) The payment into or lodging in court of any such money or securities." Therefore, the Advocate has no right under any law to hold monies that which have come to him for onward transmission to his client as lien, at least no such law has been cited to the court. What the Advocate is doing by holding onto the Plaintiffs' monies, is irregular and the court cannot condone the same."

In the case of **Simon Njumwa Maghanga vs Joyce Jeptarus Kangongo t/a Chesaro and Co Advocates** (2014) eKLR, Kasango, J. agreed with the decision of Lesiit, J. in the above case.

I agree with the learned Judge's holding that the Advocate's fee only becomes due after the bill of costs has been taxed by the court. Before the bill is taxed, there is no telling how much is due to the Advocate. The position therefore is that an advocate cannot exercise lien over client's money on the basis of a bill of cost that is yet to be taxed. It is improper for an advocate to withhold a client's money on account of fees that is yet to be ascertained through the taxation process. The Advocate should release the client's money to him.

In the instant case, the Advocate did not comply with the court's order requiring her to deposit the money in court. Depositing the money in court would have safeguarded Advocate's interest if she had genuine fears that the Respondent would not be able to pay her fee once the same is taxed. The Advocate disobeyed the court order which, in my view, protected her own interest. No reason has been given why the court should review its earlier order requiring the Advocate to release the money to the Respondent. The mere allegation that the Respondent will not be able to pay the Advocate's fees once the same is taxed is not a legal basis upon which the Advocate should continue holding the client's money. I say so because as already observed, the Advocate's fees only become due upon taxation of the bill of costs. Before taxation, the entire amount belongs to the client.

The Advocate's bill of costs was filed on 5th December 2012. No reason has been given why the same remains untaxed to date. The Advocate should not be allowed to benefit from her own indolence at taxing the bills. Equity only favours the vigilant, not the indolent.

An advocate can therefore only exercise the right to lien upon serving a client with a bill of costs and the bill remains unpaid. And if there is a dispute regarding the bill of costs, then the advocate

should take reasonable steps to have the bill taxed.

Statutory lien/charging lien does not fall under the traditional definition of a lien as it gives an advocate the right to request for equitable interference of the court and claim a charge against the client's property recovered or preserved through the advocate's efforts. **It only applies to secure the payment of money owed for work done concerning the property.** This lien does not cease in the event of the advocate's death and the claim passes to the client's executor/personal representative.

Section 52 of the Advocates Act, Cap. 16 Laws of Kenya provides for charging orders. It provides as follows: -

Any court in which an advocate has been employed to prosecute or defend any suit or matter may at any time declare the advocate entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit or matter, and may make orders for the taxation of the costs and for raising money to pay or for paying the costs out of the property so charged as it thinks fit, and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the advocate Provided that no order shall be made if the right to recover the costs is barred by limitation.

The application of a charging order in Kenya is made by way of chamber summons supported by an affidavit. The court has discretion to grant or not to grant a charging order for enforcement of a charging lien. To obtain this order, a lawyer will have to make a *prima facie* case. The lawyer seeking a charging order must have been retained for purposes of prosecuting a claim seeking to recover a property or defending a claim seeking to preserve property of a client. The order sought should be in respect of property recovered or preserved in proceedings before a court or tribunal. Although not expressly outlined in the statutory provision, there is a longstanding common law requirement that an advocate should prove to the court that the advocate will not be paid unless the statutory charging order is granted.

Remedies Available to Aggrieved Clients

Where an advocate exercises lien over client's property/funds/files and the client is aggrieved, the aggrieved client has the option of making an application to the court by way of originating summons to have the court issue appropriate orders. Order 52 Rule 4 of the Civil Procedure Rules provides as follows:

4. (1) *Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for (a) the delivery by the advocate of a cash account; (b) the payment or delivery up by the advocate of money or securities; (c) the delivery to the applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the applicant; (d) the payment into or lodging in court of any such money or securities; (e) the delivery up of papers and documents to which the client is entitled.*

(2) *Applications under this rule shall be by originating summons,*

supported by affidavit, and shall be served on the advocate.

(3) *If the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and the protection of the advocate's lien, if any, as the court deems fit.*

Appropriation of Property Under Lien to Settle Advocate's Fees

The issue to be ascertained is whether it is permissible for an advocate to appropriate the property or funds under lien to settle his fee. To ascertain this, the following questions have to be answered:-

- (a) What is the meaning of a 'passive lien' and what are the rights of an advocate claiming such lien?
- (b) Do the rights of the advocate include appropriating the property or funds under lien to settle his fees without an order of the court or the consent of the client? If yes, under what circumstances can an advocate be allowed to appropriate property or funds under lien to settle his fee?

The nature of retaining/general/possessory/passive lien Possessory lien is a passive lien in that it is asserted simply by maintaining possession of the property and is not actively enforced. The purpose of a retaining lien is purely to secure payment of legal fees. No other purpose exists. In *Re Taylor* (1891) 1 ch, 590,596, the court stated that in so much however as the lien protects the advocate, the general lien confers **only a right to retain property**. It exists for no other purpose. It is merely passive and the solicitor has **no right of actively enforcing his demand**. The advocate has no right to sell or convert property in his or her possession. This position has been reiterated in the Kenyan case; *Booth Extrusions vs Harun & Company Advocates* (2014) eKLR.

Retaininglienismeanttocause

inconvenience and embarrassment to the client compelling client to settle legal fees. The purpose of the lien is to provide **“leverage over a client and the effectiveness of the lien is proportionate to the inconvenience of the client in being denied access to his/her property.”** The retaining lien shifts the burden of resolving fee disputes from lawyers to clients. A lawyer who has impounded client property having sufficient value need not sue the client to recover the claimed fee. **Rather, it is the client who must sue, settle, or lose the use of the property.**

Opponents of retaining lien have argued that the retaining lien is not a very effective tool of enforcing valid fee claims. There is no customary way of collecting bills by refusing to release client's document's or property. They think that it is for this reason, most comprehensive discussions of fee collection methods for practitioners disregard the retaining lien altogether or note that it is usually of little use. Cordery on Solicitors 1, Issue 5, November 1997, 'Division L, Remuneration'

states that at common law a solicitor has a general lien to retain any money, papers, other property belonging to his client which properly comes into his possession until payment of his costs, whether or not the property was acquired in connection with the matter which the costs were incurred. The solicitor may retain property, other than money, to any value even if it greatly exceeds the amount due, until payment of his costs; but he cannot hold money in excess of the amount due. A solicitor is not entitled to sell property held under a lien or to transfer it into his ownership without an order from the court.

It has been argued that, the assertion of the lien is ethically justified when the client is financially able, but deliberately refuses to pay a fee that was clearly agreed upon and due **(Lucky-Goldstar Int'l. (America), 636 F Supp 1059 (ND ILL 1986).** This is the type of conduct

that constitutes fraud or gross imposition by the client. The court in this case went ahead to provide guidelines for an attorney to apply when deciding whether to invoke a retaining lien.

These guidelines require an attorney to evaluate his [her] interests against the interests of the client and of others that would be substantially and/or adversely affected by the assertion of the lien. The lawyer should take into account (1) the financial situation of the client, 2) the sophistication of the client in dealing with lawyers, 3) whether the fee is reasonable, 4) whether the client clearly understood and agreed to pay the amount due, 5) whether imposition of the retaining lien would prejudice the important rights or interests of the client or of other parties, 6) whether failure to impose the lien would result in fraud or gross imposition by the client, and 7) whether there are less stringent means by which the matter can be resolved or by which the amount due can be secured. But the client must make a clear showing of need, prejudice and inability to pay.

In some jurisdictions such as Ohio, there is what is a special kind of lien known as the right of off set. It is synonymous with counterclaim. Essentially, this is the right of the attorney to apply all the client's funds received by the attorney against the general balance of compensation due from the client for professional services. Some Ohio cases follow this view. An early Ohio case, **Diehl v. Friester, 37 Ohio State 473 (1882)** held that a motion to set off one judgment against another is an appeal to the equitable power of the court, to be granted or refused upon consideration of all the facts. In granting such motion, the claim of the attorney for fees will be respected. The right of an attorney in such a case is not a specific lien upon judgments, but is a right which under certain circumstances a court may protect. The court stated

The court's power to exercise discretion in the allowance of a set-off finds its counterpart in the court's power to exercise discretion with regard to attorneys' fees. If the claim for fees is allowed, then the amount allowed to a defendant as a set-off must be reduced accordingly. The trial court herein refused to take into consideration attorney fees in allowing the set-off to defendant. This action of the court was within its discretion and did not constitute reversible error under the particular facts of this case.

In Kenya, the right of off set is not available to advocates.

Whether an advocate can appropriate client's property/funds under lien to settle his fees and under what circumstances. The purpose of a retaining lien is clear; to retain/withhold until payment is made. No other purpose exists. In my opinion, considering the passivity of a retaining lien, the advocate cannot purport to use property held under lien to settle his legal fees. This may amount to conversion especially where there is a fee dispute. Considering the limitations of a retaining lien, it would appear the advocate can only appropriate property/funds under lien to settle his/her fees under the following circumstances: where there is an agreement between the advocate and the client to that effect and where there is an order of the court.

This leaves advocates with two options; the advocate and the

client ought to reach an amicable settlement of any fee disputes. The advocate ought then to file his Bill of Costs and if the client does not settle, file a suit for recovery of costs as per section 48 of the Advocates Act. In that case, the advocate has the option of attaching the property or funds under lien.

There are very limited circumstances under which an advocate can appropriate property/funds under lien to settle his/her legal fees. It is for this reason; advocates should be encouraged to seek alternative ways of securing their fees. **To avoid cases of professional misconduct, advocates must be encouraged to:** Enter into written fee agreements with clients before taking up instructions; Serve upon the clients and file their bill of costs expeditiously; Be clear on contingency fee agreements, that is, explain to the client if the agreed fees covers everything or not, issues of disbursements etc. and finally, before asserting lien, the advocate must give the client sufficient notice to pay and notice of his intention to assert lien.

CONCLUSION

Advocates have a right to retaining lien over client's document, property and/or funds but an advocate cannot purport to exercise this right unless a bill of costs has been served upon the client and the same remains unpaid after expiry of the payment period specified in the bill of costs. If the bill of costs is contested by the client, then an advocate should expeditiously file the bill of costs in court for taxation.

An exercise of lien by an advocate before the advocate's fee has been determined can be challenged by a client in court. An advocate cannot purport to appropriate property/funds held under lien unless the advocate has express authority of the client or has obtained a court order allowing him/her to appropriate whatever is being held under lien.

Section 53(D) of the Advocates Act, Cap. 16 Laws of Kenya gives the Advocates Complaints Commission (ACC) power to order an advocate to produce to the Commission a detailed fee note for purposes of taxation of the bill of costs provided that where the advocate fails to produce such fee note within 14 days from the date of such order, the Commission may assess the advocate's fee in such sum as it deems fit. Where the advocate claims lien, the Commission may invoke its powers under Section 53(6D) and if the advocate does not comply even after the assessment of his/her fees, then disciplinary action can be taken the advocate. In the alternative, clients/complainants may be informed of the option of filing an application in court under Order 52 Rule 4 of the Civil Procedure Rules.

Taskforce on intersex in Kenya appointed

by M. N-Kimani

In Kenya, there is developing jurisprudence on the plight of intersex person's particularly on the human rights violations they face due to their lack of recognition.

Public discourse on intersex persons began in Kenya in 2007 with the case of Mr. Richard Muasya (*RM v AG et al* [2010] eKLR (Petition 705 of 2007)). An intersex individual who had been incarcerated while awaiting trial for the capital offence of robbery with violence brought the case pursuant to the former Constitution.

RM alleged that his/her dignity as a human being and fundamental rights against inhuman treatment, discrimination on grounds of sex, and rights to freedom of association, freedom of movement, right to fair hearing and protection under the law were violated (para.7). Due to his/her ambiguous gender, the petitioner was unable to secure a birth certificate or national identity card without making a false representation as to the required particulars identifying the person's 'sex' and this was argued to have affected RM's access to healthcare, education, employment, marriage and freedom of movement. A three judge bench held that the term 'intersex' described "*an abnormal condition of varying degrees with regard to the sex constitution of a person,*" but noted that they were not presented with any evidence of the existence of an "*identified class or body of persons known as intersex in [Kenya]*" and therefore were not persuaded that RM could bring a constitutional challenge in the public interest. The judges declined to order the inclusion of a third gender stating that doing so would be a 'fallacy' as "*an intersex person falls within one of the two categories of male and female gender included in the term sex and therefore adequately covered by the law against discrimination and right to legal recognition.*" The court did however find that the strip search the petitioner had been subjected to during his incarceration were "*cruel and brought ridicule and contempt*" and as result constituted inhuman and degrading treatment in violation of the constitution. The Constitution of Kenya, 2010, Article 27(4) states;

The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

Article 27(4) was heavily relied upon in the judgment of the Baby A case. **Petition No. 266 of 2013**, Baby 'A' (Suing through the Mother E A) & another Vs Attorney General & 6 others (2014) eKLR.

Baby A was born intersex, with both male and female genitalia. The hospital marked Baby A's sex as "?" on the birth notification. A determinate sex is required for the Registrar of Births and Deaths to issue a birth certificate and the birth certificate form only includes two options for sex, either male or female. As a result, Baby A could not be issued a birth certificate.

The petitioners, Baby A, through the mother, and The Cradle brought this case to the High Court, claiming that the entry of a question mark (?) in the medical notes denies an intersex child such as Baby A the right to legal recognition and the right to be registered immediately after birth and have a name under Article 7 of the Convention on the Rights of the Child (CRC)¹.

They argued that not having a birth certificate severely limits Baby A's ability to enjoy other rights because a birth certificate is required for medical care, school admission, the issuance of a passport or national identification card and employment. Additionally, they argued that intersex children are often forced to undergo corrective surgery which violates their rights to physical integrity and self-determination. They therefore asked the Court to direct that such surgery should be done only when the child could make an informed decision, and further requested the court to establish guidelines for providing consent for corrective surgery following Article 12(2)2 of the CRC.

Justice Isaac Lenaola, ruling in the case, highlighted the need to interpret Article 27(4) as broadly as possible so as to include intersex persons. This would ensure that there is no discrimination against them and that they are recognized as accruing rights similar to all other citizens. Justice Lenaola did however leave the matter of addition of a third category of sex to the Legislature. Kenyan legislation does not have the definition of the term "sex". The Constitution succinctly states however in Article 45 (2) that

'Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties'.

This may be inferred to assign the meaning of sex as being "male" and "female." The only Act of Parliament that expressly recognizes intersex persons in Kenya is the Persons Deprived of Liberty Act, (No. 23 of 2014). The Statute gives effect to Article 29(f) and 51 of the Constitution. It defines Intersex under Section 2 of the Act as a person

1 Article 7 (Registration, name, nationality, care): All children have the right to a legally registered name, officially recognised by the government. Children have the right to a nationality (to belong to a country). Children also have the right to know and, as far as possible, to be cared for by their parents.

2 Article 12 (Respect for the views of the child): When adults are making decisions that affect children, children have the right to say what they think should happen and have their opinions taken into account.

certified by a competent medical practitioner to have both male and female reproductive organs.

Following this discourse on intersex persons, a Public Petition was presented to the Eleventh Parliament by Honourable Isaac Mwaura (Member of Parliament as he then was) in August 2016, on behalf of **'citizens of Kenya and in particular persons born with gender disorders also referred to as intersex'**. The petitioner brought to the attention of the National Assembly issues and challenges faced by intersex persons and their families in their day to day lives. Pursuant to the House rules, the petition was referred to the **Departmental Committee on Administration and National Security** on the same day for consideration and preparation of a report within 60 days.

Following the report of the Departmental Committee the Attorney General appointed the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya on 8th May, 2017. **The terms of reference of the Taskforce are to—**

- (a) compile comprehensive data regarding the number, distribution and challenges of intersex persons;
- (b) undertake comprehensive literature review based on a comparative approach to care, treatment and protection of intersex persons;
- (c) examine the existing policy, institutional, legislative, medical and administrative structures and systems governing intersex persons;
- (d) recommend comprehensive reforms to safeguard the interests of intersex persons;
- (e) develop a prioritized implementation matrix clearly stating the immediate, medium and long term reforms governing the intersex persons; and undertake any other activities required for the effective discharge of its mandate.

Who is an intersex person? A person born with sex characteristics that cannot be categorised as wholly male or female and who exhibits anatomical, hormonal, gonadal (ovaries and testes), chromosomal and/or secondary sex characteristics which are apparent at birth or manifest at puberty or later in life.

Prior to coining the term Intersex as a scientific and medical term in the early 20th century, medical practitioners in the 18th and 19th centuries used the term hermaphrodite to refer to a person with both male and female reproductive organs. The term hermaphrodite derived from *Hermaphroditos* in Greek mythology is compounded of Hermes and Aphrodite, the gods of male and female sexuality whose son was originally male but later became a divine being combining the two sexes usually with

the head, breasts and body of a female but with the sexual parts of a man.

All definitions of intersex persons have consensus that these individuals are born having physical, hormonal or genetic features that are; neither wholly female nor wholly male or a combination of female and male or neither female nor male. Intersex is “a naturally occurring biological phenomenon”. It is estimated that there are over forty six (46) variations of the intersex manifestations.



Members of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Nyahururu, Kenya for a stakeholders meeting in October 2018.

Progress Report

The Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya chaired by Mr. Mbage Ng'ang'a is currently in the process of preparing its report for submission to the Attorney General. The report is expected to make comprehensive recommendations on immediate, medium and long-term reforms governing intersex persons in Kenya.

The Taskforce has consulted widely with various stakeholders to ensure that the rights of intersex persons are protected and promoted. The Task Force has received presentations from medical professionals, judicial officers, media practitioners, parents of Intersex children amongst other stakeholders. It has also undertaken, comparative research on legislative, policy, institutional and administrative structures and systems governing the interests of intersex persons in Kenya, and practices by other countries regionally and globally.

The Task Force has collected comprehensive data regarding the number, distribution and challenges of intersex persons in Kenya. Between June and September 2018 the Taskforce held broad public consultations in counties to solicit input from all relevant stakeholders in the spirit of public participation. Stakeholders including intersex persons, their families, the various caregivers, medics, academia, government actors and members of the public were given an opportunity to share their views and participate in the data collection process.

China seeks to learn Kenya's legal system

By I. Agum

The Solicitor General, Mr. Kennedy Ogeto has expressed his gratitude to the People's Republic of China for their enormous and continued support in strengthening Kenya's infrastructure reforms and in particular the support accorded to the Office of the Attorney General.

He lauded the cooperation so far entered into between the two Countries noting it had in the past years seen an increase of Chinese investment in Kenya that now called for the establishment of legal mechanisms that also promote and protect Kenyan businesses seeking investment opportunities in China.

The Solicitor General made the statements when he received the Chinese delegation led by Mr. Yuan Shuhong, the Head of the CPC Party and Head of the Ministry of Justice. The Chinese delegation was in Kenya in October 2018 to appraise themselves on the Kenyan legal system and in particular the protection of foreign investments.

“Our governments must continue working towards ensuring beneficial investments by both countries. As a development partner, we take the relationship very seriously and we are highly appreciative of this meeting and getting an opportunity to learn of your legal systems as you learn of ours. It is important that both governments work together and share knowledge,” stated Mr. Ogeto.

Commending the existing bilateral relationship, Mr. Shuhong affirmed, “This is an example of the South- South Cooperation. The frequent visits and cooperation between our two countries have indeed reached unprecedented levels. Both leaders I must state are interested in establishing future strategic cooperation that will benefit the peoples of both states. Kenya is China's biggest trading partner in East Africa while China is Kenya's largest investor today. We have made significant achievements. The SGR has been running very well since it was launched and we are hopefully about the 2nd phase to Malaba will facilitate the industrialization the entire East African region as well as Africa.”

During the meeting Mr. Ogeto emphasized the importance of signing a Treaty on Transfer of Prisoners, noting that there were approximately 70 Kenyans in Chinese prisons and expressed the Government's wish to exchange these for the Chinese held in Kenyan jails. Mr. Ogeto expressed optimism that the two countries would eventually sign the Treaty on the Transfer of Prisoners. Kenya enacted legislation that seeks to regulate the process of Transfer of prisoners in The Transfer of Prisoners Act, No. 22 of 2015, which came into force on 1st January 2016.

The visiting Chinese delegation stated that China was interested in learning how to put in place

mechanisms that promote ethical business while promoting human rights and protection of foreign investments from Kenya.

“We want to learn about the legal frameworks Kenya has put in place for foreign investment protection. I am aware that Kenya has been receiving positive ranking from the World Bank and this is very good news for Chinese investors. We are further interested in learning how your office operates in the areas of law enforcement as well as protection of public interest which is very critical for our new Ministry of Justice in China. In China, we have various sections, Legislative Affairs, Administrative Justice, Administrative Enforcement, Criminal Execution (management of prisons and correctional services); Public Legal Services covering legal aid and arbitration; international Crime and Jurisdictions. China’s law is changing for the better.” Mr. Shuhong affirmed.

The head of delegation made a proposal on behalf of China calling for “closer communication between our respective ministries. We must be in a position to provide legal services and safeguard for the economy for both countries with increased contact between our peoples as many disputes are likely to occur.”



Solicitor General Mr. Kennedy Ogeto presents Mr. Yuan Shuhong, Head of CPC Party and Minister for Justice with an OAG&DOJ animal plaque.

Kenya has several pieces of legislation that guide foreign investment; these include **Kenya’s Foreign Investment Protection Act (FIPA)**, which gives protection to certain approved foreign investments. The Act also defines the rights and obligations of a foreign investor. The **Investment Promotion Act** establishes the Kenya Investment Authority, a body mandated to promote investment in Kenya, implement new investment projects and organize investment promotion activities. Other legislation that govern areas that feed into investments in general include, The Companies Act, (2015), The Economic Processing Zones Act, (2015), The Special Economic Zones Act, (2015) and the Investment policy that is currently being developed.

Elucidating on the different Departments and Divisions found within the Office of the Attorney General and Department of Justice, Mr. Ogeto

reiterated Kenya’s efforts in strengthening the fight against corruption following the operationalization of Mutual Legal Assistance Act.

“The Office of the Attorney General as the Central Authority for Mutual Legal Assistance will continue to support international co-operation in the fight against transnational organized crime, corruption and money laundering. As Government, we must ensure that we remain committed to our international obligations in International judicial cooperation in criminal matters by improving the collaboration between domestic and international competent authorities and using technology for better communication, Mr. Ogeto stated.

The MLA Act recognises Regional and international cooperation as critical tools for any nation to combat transnational crime. Kenya enacted the Mutual Legal Assistance (MLA) Act in 2011. This guides the process for requests for mutual legal assistance to and from Kenya. In March this year Kenya launched the MLA guidelines for use in making requests that are compliant with the laws of the receiving states. This is also in line with internationally accepted practice to issue the guidelines for clarity and efficiency in the processing of the MLAs.

The Chinese Delegation was led by **Mr. Yuan Shuhong**, Head of CPC Party Committee of Ministry of Justice. Others in the delegation included, **Mr. Wu Hao**, Director General, Department of Politico-legal and National Defense Affairs, Ministry of Justice; **Mr. Zhou Yuansheng**, Director General, Department of Lawyers and Notaries, Ministry of Justice; **Mr. Fang Jun**, Deputy Director General, Department of Industry, Transport and Commerce, Ministry of Justice; **Mr. Tuan Liang**, Deputy Director General, International Cooperation Department, Ministry of Justice; **Mr. Yu Hongwei**, Division Director, General Affairs Office, Ministry of Justice. **Mr. Li Xuhang**, Deputy Ambassador to Kenya and Charge d’Affairs and **Mr. Sun Yangbo** from the Chinese Embassy were also present.

The Kenyan Delegation during the meeting was led by **Mr. Kennedy Ogeto**, Solicitor General together with **Ms. Njeri Wachira**, Deputy Solicitor General; **Ms. Stella Munyi**, Director Legal Affairs, Ministry of Foreign Affairs; **Ms. Leah Baraza**, Deputy Chief State Counsel, **Mr. Nicholas Okemwa**, Legal Advisor and Personal Assistant to the Attorney General and **Mr. Mr. Kiptines**, Head of Asia Directorate, Ministry of Foreign Affairs.



State Counsel trained in Communications

By N. Kanyugo.

Five state counsels have received training in communication with a bias on communicating on border security matters. The five were part of the first cohort of 50 government officials from various security related agencies trained under the Security Governance Initiative (SGI) Program, a security partnership program between the Government of Kenya and the United States of America. The Public Affairs Inter-Ministerial Public Affairs training under the Security Governance Initiative (SGI) Program is aimed at strengthening Government communication in the area of Border Management and Security. The 50 technical officers are part of the Public Affairs unit under the Kenya Border Control and Operations Coordination Committee (BCOCC). After the training, the officers will together with the respective ministerial spokespersons collaborate on Border Security Management and are authorized to provide relevant information to the media and stakeholders at the regional offices.

State Counsel who took part in the Public Affairs training between 17th September 2018 and 24th September, 2018 include Ms. Naomi Korir, Mr. Eric Munene, Ms. Muthoni Kanyugo, Mr. Charles Wamwayi and Mr. Derrick Nzioka.

The inter- ministerial technical officers were taken through various subjects not limited to understanding the role of the Public Affairs Officers, Principles of Communication (Including fundamentals of Public Speaking); Public Affairs Policy and Procedures; Writing Effective Public Affairs Products; Effective Public Affairs Planning; Working with the Media; Communicating Effectively on camera as well as Crisis Communications.

Efforts are underway to ensure that several legal officers in key public facing departments are encouraged to participate in the next Public Affairs training scheduled to be held next year.

In July 2015, the Governments of Kenya and the United States of America signed a Joint Country Action Plan (JCAP) on Security Governance

Initiative (SGI). The SGI focus areas in Kenya include, **Border Management**; Police Human Resources Management and, Administration of Justice. The SGI focal point on Border Management aims to assist Kenya secure its borders by developing, approving and implementing an Integrated Border Management Strategy (IBSM) based on four core pillars. These include Strategic Planning; Information Sharing; Public Affairs and Communications and Legal Framework.



Technical officers from various ministries affiliated with Border Security Management in Kenya pose for a photograph during a recent training in Public Affairs and Communications.

BCCOC represents a radical change of government policy in security and management of all points of exits and entry into Kenya. When government introduces a new policy, staff in the agencies mandated to implement the new policy should be equipped with a deep appreciation of the new approach in order to implement it with competence, dedication and morale to achieve the intended purpose.

The Coordinating agencies for Border Management in Kenya include, The Office of the President, Ministry of Defense and The Kenya Defense Forces, Office of the Attorney General and Department of Justice, The National Police Service, National Counter-Terrorism Center, Ministry of Interior and Coordination of National Government. The other agencies are the Directorate of Immigration Services, Kenya Maritime Authority, Kenya Airports Authority, Kenya Revenue Authority, Border Management Secretariat, Kenya Wildlife Services, , and the Kenya Ports Authority.

Understanding the Coat of Arms

By F. Kanyoni

Heraldry is the system of symbols and designed devices that represent individuals and entities that have some special significance in history, in the present and the future. A person or a family may apply for a coat of arms. Schools, corporations, governmental and non-governmental entities, parastatals, churches are among the kinds of entity that can have a coat of arms. It is simply the art of designing, displaying, describing, granting and blazoning arms. **Heraldry**, is the science and the art that deal with the use, display, and regulation of hereditary symbols employed to distinguish individuals, armies, institutions, and corporations. Those symbols, which originated as identification devices on flags and shields, are called coat of arms, armorial bearings. The initial meaning of the term *herald* is disputed, but the preferred derivation is from the Anglo-Saxon *here* ("army") and *wald* ("strength" or "sway").

Heraldry originated when most people were illiterate but could easily recognize a bold, striking, and simple design. The use of heraldry in medieval warfare enabled combatants to distinguish one mail-clad knight from another and thus to distinguish between friend and foe. Thus, **simplicity was the principal characteristic of medieval heraldry.**

A **coat of arms** consists of a shield, supporters, crest and a motto. It is traditionally unique to an individual person, family, government, organisation or business entity. Such displays are also commonly called armorial bearings, armorial devices, heraldic devices or arms.

The Coat of Arms Serves As a Symbol of Unity; a Mark of Identity and Loyalty; a Mark of Authority; a Mark of Jurisdiction and a Form of Decoration.

Coats of arms came into general use by feudal lords and knights in battle in the 12th century. The practice then was that the knight upon his return home usually hung his helmet and shield on a wall and draped them with his cloak. This would later be represented by artists as his "Coat of Arms."

Armorial bearings were first used by feudal lords and knights in the mid-twelfth century on battlefields as a way to identify allies from enemy soldiers. As the uses for the heraldic designs expanded, other social classes who would never march in battle began to assume arms for themselves. Initially, those closest to the lords and knights adopted arms. Then priests and other ecclesiastical institutions, towns and cities also adopted the usage of Coat of Arms. Eventually, by the mid-thirteenth century, peasants and commoners were adopting **heraldic devices**. The widespread assumption of

arms led some states to regulate heraldry within their borders.

By the 13th century, arms had spread beyond their initial battlefield use to become a flag or emblem for families in the higher social classes of Europe, inherited from one generation to the next. Exactly who had a right to use arms, by law or social convention, varied to some degree between countries. In the Germanic regions both the aristocracy and free citizens used arms, while in most of the rest of Europe these were limited to the aristocracy.

The use of arms spread to the clergy, to towns as civic identifiers, and to royally chartered organizations such as universities and trading companies. Flags developed from coats of arms. The coats of arms granted to commercial companies are a major source of the modern logo.

While all the communities of Kenya have their indigenous heraldic systems, as a nation-state Kenya adhered to the British tradition that began in the 11th century of the Common Era. One of many examples of local heraldry in Kenya is the emblem that each new group of circumcised Maasai men chooses to represent themselves as a unit. They wear this symbol on their foreheads in traditional warrior attire.

The present College of Arms is committed to integrating the British system with the indigenous systems in order to participate in a common pursuit among Commonwealth countries that acts as a 'glue' of the Commonwealth. At the same time the College is committed to 'Africanize' and uphold our own traditions while allowing innovation.

The Kenyan College of Arms takes a keen interest in the heraldic systems worldwide. It remains in regular contact with other colleges of arms including the British College of Arms in London. In its attempt to Kenyanize our heraldic devices the College has observed the local innovations in a number of countries. As an independent country, Kenya is self-governing and its College of Arms is also independent of the British Crown. It is estimated that the example set by the College of Arms will be in tandem with other members of the Commonwealth.

Registration of Coat of Arms in Kenya

A person, institution or other bodies in Kenya may obtain a **Grant of Arms** locally. Foreigners who already possess such a Grant issued outside Kenya also qualify to have it registered locally. **The Act makes it an offence for person other than the Grantee to use Arms which have been registered with the College. The Act provides for legal protection and redress in the event of infringement of a registered Grant of Arms.** The Grant of Arms usually expresses the organizations 'premises, correspondence, certificate, contractual documents and uniforms.'

To date many Civic authorities, Ecclesiastic Councils, Academic and Health Instructions', State Corporations and others, have had their Grants registered and granted under the provisions of the Act. Many of the recently established county governments have opted to retain the previous county council or municipal council emblems while others have redesigned their coats of arms to reflect their new status. However, some of the new counties are yet to register their arms or amendments to the previous local government arms. Some counties are using Coats of Arms that have not been registered or do not conform to the standards of armorial bearings or of good graphic design. Because the Coat of Arms is a very important indicator of the personality of a County and is used to identify county property and souvenirs of the county, it is an urgent concern of the College of Arms that the counties finalize their designs and register them. In a few counties we can see conflicts as various offices in the county use different Coats of Arms.

Procedure for registration of Coat of Arms

Presently, the College of Arms and the Solicitor General are jointly reviewing the College of Arms Act with a view to improving the procedure for registration. Any person who desires a Grant of Arms may apply to the College of Arms by filling CA1 Form for local applicants at the Coat of Arms Registry. Local applicants are required to provide six (6) copies of the design together with the blazon and pay an application fee of KSh. 10,000. Foreign applicants are required to fill in a CA2 Form and submit a certified copy of the Grant of Arms and a fee of KSh. 5,000. An applicant will also be required to pay any other sum as the College may stipulate on account of the expenses incurred with regard to the application. The documents should then be submitted to **The Registrar of College of Arms, Office of the Attorney General and Department of Justice**, Sheria House, ground floor, Coat of Arms Section.

Consideration of the application for Coat of Arms The Coat of Arms and blazon is placed before the College Arms for consideration. The College will either approve the application or make recommendations with regard to amending the design and or the Blazon. The College of Arms while considering applications for Grant of Arms ensure that the applicants' design does not contravene the provisions of the National Flag and Emblems Act, Cap. 99 of the Laws of Kenya.

National Flag, Emblems and Names Act, Cap. 99 is an act of Parliament which prevents the improper use, and imitation of the National Coat of Arms, National Flag, Public Seal and other specified emblems. The College of Arms further, takes into consideration the propriety of the design; whether the design resembles that of any other arms registered under the Act or granted by authority in another county, whether the design accords with the principles of heraldry and is of sufficient artistic merit to warrant a grant of arms. The approved Coat

of Arms is then engrossed on **Vellum parchment** by an artist. The Grant of Arms is placed before the College for execution.

The blazon, is the technical description of the Coat of Arms. In the past, blazons have been written in a combination of English and 12th century French. The vocabulary is very archaic and has nothing to do with African tradition or the African environment. The College of Arms is now studying this situation and looking toward adopting new rules for blazons to include African terminology and clear, modern descriptions of all the features of a coat of arms.

Vellum Parchment: Is a specially prepared from the skin of a calf, kid or lamb. It is not leather. Vellum is very durable, smooth and it does not turn yellow with age. It is preferred for engrossment which is the final artistic version of the Coat of Arms.

Grant of Arms: This is a complete Coat of Arms which is engrossed on vellum parchment. The grant is awarded to the applicant by the Chairman of the College of Arms.

It is important to note that the designing and presentation of arms has three notable areas of expertise; attention is mainly on the design of the arms, the drafting of the blazon and the engrossment of the arms on a vellum parchment.

*The college has made strides to maintain a reservoir of referral artists, it is important to note that this is strictly for **referral purposes only**. The fee charged for designing a Coat of Arms is strictly a private arrangement between the applicant and the expert exclusive of the College of Arms official application fees.*

Coat of Arms of the Republic of Kenya

The coat of arms of the Republic of Kenya has two lions to serve as supporters, symbolizing protection holding spears with a traditional Maasai shield. The shield and spears symbolize unity and defense of freedom. The shield has the four national colours. These are black for the people of Kenya; green for the agriculture and natural resources; red for the struggle for freedom and white for unity and peace.



The current Coat of Arms as recognised in the Constitution of Kenya.



The original Coat of Arms for the Republic of Kenya. The Plaque combines the Coat of Arms of the British royal family that suggests that Milners were appointed by the monarch. It is not clear which monarch commissioned the Coat of Arms for Kenya.

On the shield is a rooster holding an axe while moving forward, portraying authority, the will to work, success, and the break of a new dawn. It is also the symbol of Kenya African National Union (KANU), the political party that led the country to independence. The shield and lions stand on a silhouette of Mount Kenya with the foreground featuring key agricultural produce, coffee, pyrethrum, sisal, tea, maize and pineapples. The coat of arms is supported by a scroll upon which is written the word Harambee a Kiswahili word, meaning let us come together.

The Blazon of the Coat of Arms for the Republic of Kenya

On a Maasai shield per fess Sable and Vert, on a fess Gules fimbriated Argent a cock grasping in the dexter foot an axe of the same.

Supporters: On either side a lion Or armed and langued Gules, grasping in the interior forepaw a spear of estate proper, the shafts of the spears gules crossing in saltire behind the shield.

The whole upon a compartment representing Mount Kenya proper containing in the foreground examples of Kenya agricultural produce, coffee, pyrethrum, sisal, tea, maize and pineapples.

The College of Arms is the body mandated to approve Coats of Arms and award Grants of Arms in Kenya. It is established under Section 3 of the College of Arms Act, (Cap. 98) with its membership comprising the Attorney General as the Chairman or a person deputized by him/her and four members appointed by him/her.

The College of Arms Act, (Cap. 98) is administered by a Secretariat within the Department of the Registrar-General.

The members of the College sit when there is business to be transacted. The Registrar General is the Registrar of College of Arms and the custodian of Grants of Arms. The current College was constituted in April 2016. The college of Arms

has tried to uphold the Kenyan heraldic tradition that dates to pre-colonial era and to align them with the traditions of other member states of the Commonwealth. The current college has awarded three grants and has several applications awaiting amendments and engrossments.

Illustrations of Courts of Arms that have previously been registered by the Registrar of Arms:



Registration no. 1: Municipality of Nairobi, Date of grant of Arms, 2 Feb 1950; Date of Registration of grant, 14 Dec, 1970.



Registration no. 5, Municipal Board of Mombasa, Date of grant of Arms, 12 Nov 1953; Date of Registration of grant, 9th Feb 1971.



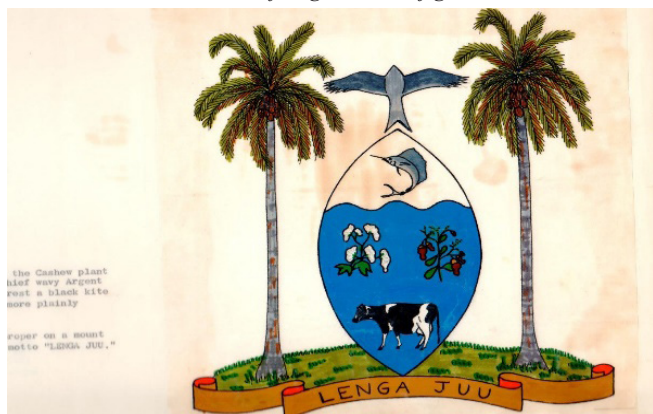
Registration No 56: County Council of Kipsigis; Date of grant of Arms, 24th April, 1972; Date of Registration of grant, 24th April, 1972.



Registration No. 6, Municipality of Kisumu, Date of grant of Arms, 20th March, 1958; Date of Registration of grant, 20th Dec. 1971.



Registration no. 108: Registration of Accountants Board, Date of grant of Arms, 19 June 1978; Date of Registration of grant, 19 June 1978.



Registration no 61, County Council of Kilifi, Date of grant of Arms, 12th Feb. 1973; Date of Registration of grant, 12th Feb. 1973.



Registration no. 66, East African Railways Corporation, Date of grant of Arms, 5th Nov. 1973; Date of Registration of grant, 5th Nov. 1973.



Registration no 7 (Personal Arms), Date of grant of Arms, 20th May, 1965; Date of Registration of grant, 9th Dec. 1974.

Questions on heraldry, heraldic symbols can be sent to the Head of the Coat of Arms Section at [Florence. kanyonyi@ag.go.ke](mailto:kanyonyi@ag.go.ke). Detailed content will be uploaded on the website www.statelaw.go.ke soon.

Ethical Issues for State Counsel By. C. Siranga

Ethics and professional responsibilities are an inherent part of practising law whether in public or private practice and State Counsel in the Office of the Attorney General and Department of Justice are not exempt from the rules and standards that govern professional conduct for advocates in Kenya. These rules and standard are found in the Advocates Act, Cap. 16 Laws of Kenya, the Law Society of Kenya Code of Ethics and Conduct for Advocates, the Law Society of Kenya Digest of Etiquette and Professional Conduct and the traditions of the profession. However, knowing the right path to take is not always clear cut for State Counsel given their dual capacities as representatives of public interest, while simultaneously defending various organs of Government.

The underlying principles on ethical and professional conduct are fundamentally the same for all advocates but the application may pose unique challenges for State Counsel in comparison to an advocate in private practice. State Counsels have significant additional factors to consider such as public interest, public accountability and transparency. They often have to straddle the law and policy and sometimes the law and raw politics divide when they advise government and its agencies.

Some examples in which a State Counsel may find themselves and having to deal with ethical concerns include: A State Counsel being asked to provide legal advice which could be relied upon and made public later on, as to the implications of the decision for immigration personnel to deport a person on the order

of top security officials even after the High Court has suspended the cancellation of his/her passport. Or in the course of investigating an advocate's alleged professional misconduct, a State Counsel is made aware of the corrupt dealings by another government institution or top government official and yet the State Counsel is expected to give advice or defend the government's interests in the matter. This begs the question, should the State Counsel blow the whistle on the government institutions or top government officials since public funds, public business and public interests are at stake?

To help government lawyers confront these ethical challenges and concerns, some countries have developed guidelines for ethical practice for government lawyers. In Australia, the Government Solicitors' Committee of the Law Society of New South Wales published the first edition of the "*Guidance on Ethical Issues for Government Solicitors*" ("the Guide") in 2003 to help government lawyers meet their ethical professional responsibilities. Since the release of "the Guide" the document has been renowned as a valuable resource for lawyers who are employed by all levels of government and also to private practitioners retained by government agencies. In America, the Government and Public Sector Lawyers Division (GPSLD) within the American Bar Association assist public lawyers with responding to ethical issues by offering programs, publications and online resources.

Some of the key principles and topics discussed in the Law Society of New South Wales Guide to Ethical Issues for Government Lawyers and covered by ABA's Government and Public Sector Lawyers Division program include:

Who is the client? Unlike advocates in private practice, the first question for many government lawyers is, "Who is my client?" Because most of a lawyer's ethical responsibilities derive from the duty of loyalty to the client, the identity of the client is primary. The task of identifying a government lawyer's client is not straightforward. For example: Does the State Counsel have a client or a boss? Some illustrations are necessary:

Instructions are usually given by a Cabinet Secretary; but what happens where there is an authorized disclosure of communication between the State Counsel and another Cabinet Secretary or top Government official? Is there a breach of the duty of confidentiality? Also, where legislation or government practice allows individuals to be clients, the relationship with the State Counsel is that of advocate/client with the confidentiality and loyalty inherent in that relationship. What happens where a government agency or official demands for information regarding the matter?

Good Independent Advice: For a government lawyer, the exercise of independent judgment could sometime be difficult seeing that they are both a servant and an agent. He or she may be under so much pressure from his or her client to act in a

certain way.

Confidentiality: A government lawyer's responsibility to maintain the confidentiality of information relating to representation of a client may be affected by developments in statutory law. For example, what is the extent of information that a State Counsel can give in light of the Access to Information Act which enables the public to put all public and private entities to task to explain their actions, policies or decisions upon request?

Model Litigant: Government lawyer should advise their client agencies to conduct themselves as model litigants which means behaving ethically, fairly and honestly in litigation. In Australia most States have a Model Litigant Policy designed to provide guidelines for best practice for government agencies in civil litigation matters.

Conflict of Interest: Because government lawyers usually represent multiple clients, they often face actual or potential conflicts of interest between current or prospective clients. Notably, their situation is "special," and "public policy considerations may permit representation of conflicting interests in some circumstances where representation would be forbidden to an advocate in private practice."

Giving Policy Advice: Professor Charles Wolfram in his book *Modern Legal Ethics* suggests that before examining a government lawyer's conduct, it is important to first determine whether the lawyer was acting in the making of policy or giving legal advice. He noted that policy formulation is a unique discretionary function for lawyers in the public sector that should be outside the ethical regulations restricting attorneys.

External Legal Service Providers: How should a government lawyer or government agencies engage with external legal service providers? The New South Wales State in Australia has guidelines for outsourcing government legal work to assist agencies in deciding when legal work should be contracted out; the tendering process to be followed; and the management of the relationship with the selected external legal service provider.

Certainly, the work of a State Counsel is both interesting and challenging. It calls for high levels of legal knowledge as well as a deep knowledge of the way government, that is, the executive, legislature and the judiciary work. It also requires high level of integrity and excellence. In addition, State Counsel assumes a special responsibility of ensuring their client stays on the straight and narrow path and always respects the rule of law. It is that responsibility which adds a dimension to the job of a State Counsel that is not usually present in the life of an advocate in private practice.

Therefore, the ethical dilemmas and concerns that comes with the job calls for much guidance and capacity development for the State Counsel.

Promoting Transparency and Accountability through Public Participation

By F. Mwakio

The role of the members of the public in the fight against corruption in Kenya has often been under-rated, and at worst ignored. The focus has always been on the Government and institutions mandated to fight the vice, with few questions asked as to who comprises the demand and supply sides. Thus, the finger pointing and clamour has always been for 'others' to ensure Kenya is corruption-free, with the public getting away with no responsibility. As corruption escalates in Kenya, the masses grow angrier and more helpless wondering when 'someone' will do 'something' to quickly arrest the situation!

Truth be told, corruption is a moral issue and is perpetrated at the individual level. It is the individual who decides whether to indulge in the vice, or not. **Institutions, Governments or offices can never be corrupt; it is the individuals within them that are.** Thus, deliberate efforts must be made to ensure every Kenyan understands they have a major role to play in matters corruption, and are capacity-build to take charge of their own development agenda at the grass roots level.

Public participation is crucial for development. The World Bank defines participation as: *"A process in which stakeholders influence and share control over development initiatives, decisions and the resources affecting them."* In Kenya, Article 196 (1a and b) of the Constitution (2010) and Section 8 (f) of the County Governments Act, 2012 amongst others, stipulate the importance of participation which when handled correctly, enhances transparency and accountability. Through the Constitution, Kenyans now have an opportunity to enhance development and service delivery while entrenching governance and accountability.

The National Anti-Corruption Campaign Steering Committee (NACCSC) applies the same concept of public participation when undertaking Social Audit exercises and public reporting forums at the County level. In such exercises, the project/programme sponsors are brought together with the beneficiaries and relevant County and National government authorities, to dialogue on different aspects of the project/programme. After obtaining details of the funding and status of the publicly-funded project/programme, the public is empowered on what to look out for before, during and after completion as far as corruption is concerned. This interactive dialogue is held to empower the community with new information and equip them with skills to regularly hold their leaders to account in usage of public funds.

The underlying principle of this exercise is that the community has every right to be involved in all aspects of development undertaken using tax payers' money. It is only when the public is deliberately involved in programmes and projects within their areas, that they are able to make crucial

contributions which influence their outcome. The leaders are thus forced to become more 'transparent' in their dealings, leading to high accountability.

Effective public participation requires empowered communities. It is important that the public understand what is expected of them in such exercises so that they can participate fully and enrich the dialogue. County governments should allocate a budget for regular civic education for their wananchi at the grassroots level. Indeed, section 99 of the County Governments Act 2012 stresses the importance of civic education whose purpose is to have an informed citizenry that actively participates in society's governance affairs based on enhanced knowledge, understanding and ownership of the Constitution.

The right to information is a fundamental right necessary for the enjoyment of all other rights. Kenyans should be able to freely access information pertaining to the prioritization, funding, procurement, implementation and even evaluation and monitoring of any project/programme undertaken using their taxes. This information, plus deliberate involvement in all phases of these activities, will ensure everything is done transparently.

Kenyans must thus cultivate a culture of demanding for information and involvement in village, sub-ward and sub-county level development committees. When called for 'barazas' and other public forums, Kenyans must deliberately choose to attend and participate in the deliberations. Whether through representation or individually, they must ensure their views and recommendations are considered so that they fully own the whole development process. An informed citizenry will keep its leadership alert and on top of things.

Ultimately, citizen oversight promotes transparency in government and prevents abuse of power. These are the primary steps towards ensuring corruption does not take root at the grassroots level. Fighting corruption is, therefore, not complex and tangible results can be achieved easily, but only when we all accept to play our individual and collective roles. Fighting corruption is both your and my responsibility.

The future of Kenya lies in a citizenry that is proactive, not passive; and in leadership that is transparent and accountable in all their undertakings. Clearly there are a lot of corrupt practices that happen in our localities particularly those involving implementation of public projects and programmes which can be effectively disrupted through institution of a raft of measures like the constitution of Project Management Committees and not condoning theft of materials, among others.

NACCSC reiterates that all is not lost. There is hope that together, all Kenyans shall liberate this great Nation from the dangers of corruption. NACCSC, on its part, will continue working in partnership with all institutions in creating awareness against corruption to effect a lasting change to all Kenyans.

Kenya attends 9th Session of UNTOC By. N. Korir

Kenya has reaffirmed its commitment to the implementation of the Transnational Organized Crime Convention and its three Protocols, the UN Convention against Transnational Organized Crimes; Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children supplementing the UNTOC and Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the UN Convention against Transnational Organized Crime. The Convention lays the framework for combating transnational organized crimes such as terrorism, wildlife crimes, money laundering, and drug trafficking and other forms of emerging crimes such as cybercrime, identity-related crimes, environmental crime, piracy, organ tracking, and fraudulent medicine.

The Government of Kenya made the affirmation during the 9th Session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime held in Vienna, Austria between 15th and 19th October 2018. Kenya as a state party to the Convention has enacted various legislations to enhance its implementation besides establishing institutions to combat transnational organized crime.

Presenting Kenya's submission during the session, Ms. Naomi Korir stated that Kenya remained committed to enforcing anti-money laundering and countering financing of terrorism through its national laws. The government had also taken steps to regulate all financial institutions that lent support to terrorists.

The United Nations sessions was informed that Kenya had signed with some countries, **the Framework for the Return of Assets from Corruption and Crime in Kenya (FRACCK) agreement** which aimed at confiscating assets acquired through corruption and crime in Kenya and stashed in foreign countries. The FRACCK agreement gives the investigative and prosecutorial bodies in the country new instruments and impetus in

the fight against corruption. It also has a provision to allow other nations willing to cooperate with Kenya in the recovery of stolen assets to join.

Kenya further noted that the uncontrolled trade and proliferation in small arms and light weapons continued to cause millions of deaths and injuries world-over. Kenya noted it was imperative to strengthen international cooperation and the sharing of information to combat the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.

"The effective tackling of these challenges also has a direct bearing on countering terrorism," Ms. Korir reiterated.

On the issue of combating human trafficking, Kenya has already put in place a National Plan of Action as well as the National Referral Mechanism Guidelines that will assist victims of trafficking. This is besides signing various Mutual Legal Assistance agreements with different countries to facilitate assistance in combating transnational organized crimes. This has been through joint regional operations where the sharing of data and intelligence remains a critical component in the fight to combat human trafficking, smuggling of migrants and transnational organized crimes.

Meanwhile Kenya has acknowledged that cybercrime in the country is representing a new and worrisome frontier of crime.

"Kenya recognizes the serious threats cybercrimes poses and acknowledges that preventing and combating this menace effectively will contribute to building a peaceful, secure and friendly cyberspace which is a driving engine for social economic development geared towards improvement of wellbeing of the citizenry. We are cognizant of the use of the online platform to radicalize and recruit the youth and students into terrorist organizations. Further, cybercriminals have exploited cyberspace to unlawfully gain access to restricted data. These criminals continue to perpetrate hacking, identify theft and proliferating malicious software," Naomi Korir observed.

Kenya recently enacted the **Computer Misuse and Cyber Crime Act, 2018** whose objectives include to provide for offences relating to computer systems; to enable timely and effective detection, prohibition, prevention, response, investigation and prosecution of computer and cybercrimes. The Act also facilitates internal cooperation when dealing with computer and cybercrime matters and other related crimes.

The 9th session of the UNTOC acknowledged that maritime routes have been used as convenient paths for transnational organized crime. Kenya's position is that secure and safe maritime resources are essential for trade, communication, and job and wealth creation. However, security challenges have escalated with attacks from criminals and terrorists on ports, offshore installations and ships. These attacks are showing increased innovation and sophistication, while significantly endangering crew, ships, cargo, marine life and other investments leading to the existential threat to peace and security.

Kenya raised concern on the use of the refugee camps to commit transnational organized crimes such as terrorism, human trafficking and migrant smuggling noting there was need to address the current refugee and migrant challenges with a view to ensuring safe and orderly migration.

China supports OAG&DOJ By I. Agum

The effect of the fifty year relations between Kenya and China continue to be witnessed in various sectors in the country.

During the 2017/2018 financial year, the Office received support from the Embassy of the Peoples Republic of China in Nairobi to furnish the Attorney General's Chambers, primarily the boardroom and the Office of the Attorney General. The support garnered from the International Law Department (ILD) was donated by the former Chinese envoy Mr. Liu Xianfa and received by former Attorney General, Professor Githu Muigai.

In the 2018/2019 financial year, the support accorded to the Office will go a long way in facilitating operations at the Regional offices. The support given by Chinese Ambassador to Kenya Ms. Sun Baohong was received by the Attorney General Justice (Rtd.) Kihara Kariuki. The support includes ICT Equipment and furniture.



Chinese ambassador to Kenya, Ms. Sun Baohong signs the visitors' book as Attorney General Kihara Kariuki and Charge d'affaires Li Xuhang look on.

At a brief handing over ceremony where the Deputy Ambassador and *Charge d'affaires* Mr. Li Xuhang and Solicitor General Mr. Kennedy Ogeto met with different suppliers, the two leaders pledged to strengthen bilateral relations between the two countries and undertake reciprocal activities aimed at enhancing service delivery.



Solicitor General Kennedy Ogeto presents cheques to various suppliers at the AG's Chambers.

The Place of Victim Protection Act in the Criminal Justice System by D. Sang

The Criminal Justice System has for a long time focused on the offender and neglected to look after the interests of the Victims who are the primary casualties when an offence is committed. The opinion of the victims has not been considered by players in the criminal justice system for ages. However, the situation is gradually changing with the Constitution of Kenya leading in the reform of the criminal justice system.

Prior to the promulgation of the Constitution, the Criminal Procedure Code had been amended to include a whole part that provided for Victim Impact statements. The statements are meant to inform the court of the damage or injury caused by the offender on the victim. Initially, such a platform was not provided to the victims of crime, they could only hope that the court, through testimonies in the trial, could take cognizance of their plight. Though the Criminal Procedure Code seemed to recognise the importance of the victim's involvement in the trial process, the recognition given to victims was minimal and more needed to be done to further ensure that the voice of the victims of crime was heard.

The Constitution led to the enactment of the Victim Protection Act, which was in accordance with Article 50(9). This was legislation that would provide for the protection of the rights and welfare of the victims. The Victim Protection Act, 2014, embodies the protection of the victims as contemplated in the Constitution.

Among the rights accorded to the victims of crime include the right to participate in the trial. The participation is not passive but active. Consequently, the victim can, either by themselves or by the help of a representative, participate in the trial. The Courts have appreciated this right by holding that the victims are entitled to appoint someone to represent them or even participate by themselves. Such a holding by the courts is seen in **Gideon Mwiti Irea v Director of Public Prosecutions & 7 others [2015] eKLR** where Korir

J reaffirmed the right of victims to fully participate in the proceedings.

The Court of Appeal has also weighed in on drumming up support for the rights of the victims to be heard in a trial and in **I P Veronica Gitahi & another v Republic [2016]** eKLR stated as follows:

“Over the years the only practice known in a criminal trial where a victim or a victim’s family would participate in a trial was through an advocate watching brief, only as a passive observer, with no right of audience and could only communicate with the court through the prosecutor... In recent decades, however, in countries with civil law traditions as opposed to those with common law lineage, the victims are fully involved in criminal proceedings...views and concerns may be presented by the victim himself or herself or by a “legal representative” acting in the victim’s behalf, at the stage of plea-bargaining, bail hearing and sentencing, as far as possible to be heard before any decision affecting him or her is taken”.

The involvement also includes the views of the victims being considered during plea bargaining. Plea bargaining would initially, only be between the accused and the prosecution. The process would, therefore almost always neglect the plight of the victims who could have contributed important insight as to the injury occasioned upon them and further, give their views as to what was their view about a plea bargain.

The victims are also able to decide whether they prefer restorative justice instead of going through the trial process. The right is not only enshrined in the Victim Protection Act, but also recognised in the Constitution as a mode through which disputes could be settled. The courts have also recognised and upheld this right in various cases including **Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another [2016]** eKLR.

“The course of justice is not a strait for prosecution-only

remedy. It is a composite of factors, varying according to the case at hand, for the consideration justice of the case. It is a determination for which the interests of justice to the victim, to the society and to the perpetrator coincide The Constitution of Kenya 2010 has entrenched and given constitutional underpinning to reconciliation and restorative justice as some of the methods of justice and alternative dispute resolution.”

Being a bystander in the trial process, the victim was unable to access other rights which at the moment, the victim is now able to access. Such rights include the right to access information at any stage of trial. The information includes where the offender has been incarcerated or any information about their escape.

Recognising that victims may still be in danger even after the offender has been charged, the Victim Protection Act has provided mechanisms through which such victims can be protected. The protection accorded to the victims is throughout the trial process. Where the victims are also witnesses, they may receive enhanced protection. In such cases, the Witness Protection Agency is also involved to ensure the victim remains safe even after the trial is concluded.

The victims in the trial process are also to be treated with dignity. Most of them through unimaginable pain, both physically and psychologically. At such moments, some of them may be stigmatised especially where the offence in question is sexual. To protect such victims, all players in the criminal justice systems are expected to accord such victims the treatment that they would any other dignified member of the society.

It is therefore clear that the role of the victim in the criminal justice system is no longer passive. They are no longer seen as objects who help the republic achieve its objective of deterring crime. They are rather important players whose suffering in the hands of the offender is recognised. To that end, they are given the opportunity to make decisions in the trial process to ensure that they receive justice as the case should be.

Attorney General Meets State Counsels.

Attorney General Kihara Kariuki has reiterated the need for closer cooperation and enhanced team work amongst staff in order to achieve the mandate of the State Law Office and Department of Justice. Addressing state counsel from various sections, the Chief Legal Advisor promised regular interaction with officers so as to develop a mentorship program to benefit younger officers while exchanging ideas on how to improve services at the largest law firm in East and Central Africa.



Attorney General Meets counsel from the Administrator General’s Office (Public Trustee).



He has continued to reassure counsel of his support urging them not to be deterred in their work of advising the government on all legal matters. He has applauded the officers for their commitment and zeal in serving Kenyans from all walks of life observing that the officers remained the unsung heroes in Kenya.

State Counsel from Government Transactions cut a cake to celebrate officers born between October and December.



“You continue to make Kenya proud in all government legal matters, indeed I am proud to work with all of you. I am proud to share your commitment and vision you have for this country,” the Attorney General stated.

Lilian Abishai share cake with Attorney General Kihara Kariuki after the October monthly meeting with state counsels.

The Chief Legal Advisor has further advised that all statements and legal opinions emanating from the Office must be **BOLD** and **GROUNDED** in law.

“You will not make recommendations; as the legal advisor to government, it is our responsibility to

render advice that is bold and backed by law. Your advice must be easy to understand to be appreciated by our clients,” Kihara stressed when he met counsel from various departments during his monthly briefings.

In another meeting with heads of departments, the Solicitor General, Mr. Kennedy Ogeto has cautioned officers against absenteeism from the office. He reminded officers of their duty to serve diligently the people of the country. Mr. Ogeto reiterated the need to observe the Code of Regulations and adhere to the official work hours.



Solicitor General chairs a Heads of Departments meeting in October 2108.

New dawn in the Criminal Justice System in Kenya

By. F. Githumbi

The Constitution of Kenya recognizes the fact that there should be justice to all, by ensuring that the State shall promote access to justice for all persons and that if any fee is required, it shall be reasonable and shall not impede access to justice. The Constitution further enshrines the need for legal aid by requiring that an accused person should be assigned an advocate by the state and at the state expense, if substantial injustices would otherwise result and to be informed of this right promptly.

Given that the criminal justice system is adversarial in nature, representation of the accused person by an advocate remains critical. In the criminal justice system, the role of the prosecutor, backed by the considerable resources of the police, is to represent the evidence to establish the guilt of the accused person. Upon presentation of the evidence, it is up to the accused/defense either to offer contradictory evidence or to argue that the prosecution's case is insufficient. The judges and the magistrates are neutral arbiters who weigh the evidence put before them but do not investigate the facts themselves. Reason and reflection require us to recognize that the overwhelming majority of those accused of criminal offences are from amongst the economically weak and disadvantaged sections of society. Very few of these people know anything about their rights or procedures relating to the police, prosecution and court, or what the services of an advocate ought to entail. It goes without saying then that these people cannot be assured a fair trial unless an advocate is provided for them.

To ensure that the indigent persons, marginalized and vulnerable in the society get proper representation at all stages of the criminal justice chain, the Legal Aid Act No. 2 of 2016 was enacted to give effect to Articles 19 (2), 48, 50 (2) (g) and (h) of the Constitution. The Act under Section 5 establishes the National Legal Aid Service (NLAS), whose critical objective is establishing and administering a National Legal Aid scheme that is affordable, accessible, sustainable, credible and accountable. The Legal Aid Act also enlists criminal matters as affording legal aid and the court is obligated where substantial injustice is likely to result, to promptly inform the accused of the right to have an advocate assigned to him or her; and further inform the Service to provide legal aid to the accused person.

Acting pursuant to Section 42 (b) (c) of the Act, the presiding magistrate in the criminal division Chief Magistrate Court, seating in Milimani, referred David Wafula (not his real) for legal representation by the Service. By the time David was being referred to the Service, he was unrepresented and did not have a file that one could refer to.

Engaging pro bono lawyers is one of the legal aid delivery models provided for in the Legal Aid Act thus David's case was referred to **Evans Kaimenyi** one of the Service's pro bono advocates for representation. Upon receiving instruction from the Service, the Advocate represented the accused person and after several appearances in court the accused was acquitted on 14th September 2018 for lack of evidence. David narrates his experience with the Service.

"I recall on 8th October 2013 while on duty as a security guard in an estate in Karen, a tenant was attacked by unknown people as he was entering his home at about 1:00am. The attackers robbed him and left the tenant with serious injuries. During the attack the robbers ordered us to lie down as they robbed the tenant. Since the robbers had guns, we had to comply with their orders. After the robbery incident, we called the manager of our security company who contacted the police. Upon being informed of the robbery, the police came immediately at the scene. The police requested us to report to Lang'ata police station the following day to record a statement. One day after recording a testament with the police, my colleague and I were arrested and arraigned in court where we were charged with robbery with violence. Since I was unable to raise bail and neither did I have

anyone to stand surety for me, I was incarcerated for 3 months. After being released on bail, I pursued my case for five years without representation because I could not afford to pay an advocate to represent me in the case.

It was not until 2018 when I learnt through a friend of the National Legal Aid Service that was established to specifically offer legal aid services which includes legal representation to indigent persons. By that time, my case had really advanced and the prosecution had closed its case and what was remaining was for the court to deliver its ruling on whether I have a case to answer or not. As I had anticipated, the court found I had a case to answer and put me on my defense.

Knowing the gravity of the case, I made an application before the court to be provided with legal aid. The court granted my application and I was referred to the National Legal Aid Service. The Service referred me to one of their pro bono advocate. I am very grateful to the Service and my advocate who walked with me until I was acquitted for lack of evidence on 14th September 2018 after being in court for 5 years for a crime that I did not commit.

In conclusion, my plea to the National Legal Aid Service is that, it creates awareness for the Kenyan citizens to know the services offered by the Service or where they can seek help in case of a need. It is my belief; if I had an advocate from the day I was arrested, my story would be different since an advocate would have expedited the court process thus it would not have taken me 5 years in court. To other stakeholders in the justice sector like the police, judicial officers and the prison warders, the Service has a duty to sensitize them on their role as envisaged in the Legal Aid Act. On behalf of Wanjiku and majority of voiceless Kenyans, the Service should have a representative at various stages of the criminal justice chain like at the police stations, courts and remands to arrest the situation at the initial stage."

NACCSC conducts Anti-Corruption Workshop

By F. Mwakio

The Government is committed to making corruption as unattractive as possible, with perpetrators expected to face immediate prosecution, with their stolen loot recovered and ploughed back into the economy. This is the Government's commitment to ensure that the message "corruption does not pay" is clearly understood by all Kenyans, the Solicitor General Kennedy Ogeto has stated.

Speaking during the official opening of a five-day workshop for County Anti-Corruption Civilian Oversight Committee members from six counties sponsored by the International Development Law Organization (IDLO) in September 2018, the Solicitor General called on all Kenyans to embrace the fight against corruption and fight the vice from the grassroots level. He also called for the embrace and practice of National Values and Principles of Governance as enacted in the Constitution, saying these would help Kenyans change their attitude, behaviour and practice towards corruption.



Solicitor General Kennedy Ogeto making his opening remarks at the Great Rift Valley Lodge, Naivasha

Speaking at the same function IDLO Country Director Romualdo Mavedzenge pledged support to the campaign against corruption which is aimed at empowering Kenyans to take up an active role in the fight against the vice. He said there was need for concerted effort by all stakeholders to

fight the vice successfully. He called on Kenyans to demand inclusivity in development at the County level for enhanced transparency in utilization of public funds.



IDLO Country Director Romualdo Mavedzenge pledging total support to the fight against corruption in Kenya.

The IDLO Country Director noted that IDLO, an inter-governmental organization, partners with willing governments to ensure access to justice for ordinary wananchi, as well as make sure those mandated to deliver justice, do so. He pledged total support to Kenya and lauded the ongoing Government's efforts in fighting the vice which had culminated in the arrest and prosecution of several implicated individuals.

IDLO had sponsored the five-day workshop for County Anti-Corruption Civilian Oversight Committee (CACCOC) members from the Counties of Nandi, Kiambu, Meru, Garissa, Kilifi and Makeni. CACCOCs are grassroots networks of NACCSC to educate, sensitize and create awareness to all Kenyans at the grassroots level on corruption, and the need for individuals to join in fighting the vice.

NACCSC currently has 30 CACCOCs, and is expected to establish them in all the 47 counties with the support of IDLO whilst rolling out several anti-corruption awareness creation activities countrywide over the next two financial years, to enjoin as many Kenyans as possible to play an active role in the fight against corruption.



Group photograph of the workshop participants drawn from six Counties.

Kenya Appears at State Parties Conference of the ICC

By I. Agum

Kenya has welcomed the efforts by the International Criminal Court (ICC) Prosecutor to institute investigations and take action on those found culpable of professional misconduct on matters regarding Kenya.

Kenya stated that it expected more transparency and openness on the details and nature of investigations carried out. It called upon delegations of State Parties to the Rome Statute to consider and adopt the proposed amendments to Article 70 that aim at deterring misconduct by court officials.

“The allegations against the former prosecutor should not be swept under the carpet. Kenya urges the Office of the Prosecutor to refer the allegations to an external impartial and neutral entity to conduct an open and transparent audit of these allegations.” The Solicitor General and Head of the Kenyan delegation, Mr. Kennedy Ogeto made the remarks early December 2018 at the 17th Session of the Assembly of States Parties to the Rome Statute that took place at the International Criminal Court in The Hague, Netherlands.

Mr. Ogeto observed that a justice system steeped in bureaucratic morass, non-transparent processes and decisions that were not impartial would suffer the ignominy of rejection no matter its high sounding objectives.

Kenya demanded that the implementation of the Statute by all organs of the Court ought to be conducted in the most fair, equal and transparent fashion in order to foster trust, credibility and legitimacy in the system. Kenya alluded to the decade long trial of Jean Pierre Bemba calling for clear and determinate statement of Charge by the office of the Prosecutor as well a rigorous evaluation of evidence by the Trial Chamber so as to protect the liberties of the accused person and ensure that trials were not unduly prolonged.

Kenya observed that similar lessons could be drawn from the cases in Kenya where, even the judges of the Court themselves were critical of the Prosecution’s conduct. This, Kenya noted was manifest in the prosecution’s investigative techniques that ignored evidence in a criminal trial that supported the idea that the defendant was not guilty while the quality of some of the evidence submitted presented substantial and fundamental integrity and ethical questions.

The Solicitor General reiterated that co-operation with the Court remained a central obligation of every state party by virtue of membership. Kenya has previously discharged this obligation notably during the pendency of situations touching on the country. Kenya has granted unfettered access to the former and current Prosecutor of the ICC, staff members of the ICC, Registry Officials, Defense Counsel, Victims’ Counsel and their respective

investigators. The Government also endorsed the establishment of an ICC field Office to enhance cooperation and assistance on all matters regarding Kenya.

Mr. Ogeto told the International Court that Kenya continued to operate under the rule of law, and acted in accordance with constitutional and judicial edicts despite criticism. He informed that Kenyan courts had in the past made decisions affecting the arrest and surrender of certain individuals accused of offences under Article 70 of the Statute, decisions the Executive had no choice but abide by, regardless of whether it agreed with them or not.

“It is worth noting that the country’s Judiciary remains one of the most independent judiciaries in the world with a supervisory role over the actions of other organs of government, including the Executive,” Mr. Ogeto stated of the country’s judiciary.

In the same vein, Kenya urged the International Court to live up to the requirements of the principle of complementarity that the Rome Statute imposes. It argued that rather than increase its docket with cases that could be dealt with more efficiently and effectively at the national level, the Court should instead concentrate on creating synergies with countries for domestic prosecution of these cases.

On the issue of the execution of arrest warrants from the International Court, touching on Heads of States, Kenya aligns itself with the African Union position that a Head of State enjoys immunity from prosecution based on customary international law. Kenya argued that this was the clear intent of Article 98 of the Rome Statute and should not be defeated or countered by other provisions of the same Statute.

During the early December meeting, Kenya raised its objection to any increase in the ICC budget for the year 2019 stating that the increase was not merited. It instead called for better use of resources including an interrogation of all activities of the Court especially in the preliminary examinations and cases.

“Kenya is convinced that keeping cases alive despite the apparent flaws in the manner they were investigated and are being prosecuted not only amounts to a misappropriation of funds but also a travesty of the Rome Statute system,” the Head of the Kenyan delegation, Mr. Ogeto stated.

The Head of delegation urged delegations at the meeting to “scrupulously engage each other, learn from our past mistakes and build a Court that is a better fit for purpose and one that can take its place as the premier international criminal judicial system.”

Legal Concerns on the Blue Economy By, L. Hayanga, A. Chepseba and N. Kanyugo

The World's first Sustainable Blue Economy Conference (SBEC) took place in Nairobi, Kenya between the 26th November 2018 to the 28th November 2018. The conference co-sponsored by the Republic of Kenya, the Republic of Canada and the People's Republic of Japan attracted more than 16,000 delegates from all over the world.

Kenya hosted the Conference for several reasons. Water resources (ocean, lakes, rivers as well as marine resources) are central to the delivery of the 2030 Agenda for Sustainable Development. The 14th Sustainable Development Goal is to "*conserve and sustainably use the oceans, seas and marine resources for sustainable development*," a goal that the Government of Kenya is implementing.

Deliberations at the conference focused on how to harness the blue potential or blue capital to improve the lives of all leveraging on latest innovations, scientific advances and best practices to build prosperity while conserving our waters for future generations. Areas of interest included discussions on climate change, ocean acidification, overfishing and marine pollution, plastics, marine security, marine economic activity including oil and gas as well as illegal unreported unregulated fishing.

The principal thematic areas of particular interest included smart shipping, transportation and global connectivity; employment, job creation and poverty eradication; management of urban and coastal infrastructure; sustainable energy, mineral resources and innovative industries. Food security through sustainable fishing activities, conservation of marine life, and sustainable economic activities formed a critical component especially for counties located at the Coast. It was observed that waste management remained crucial for the achievement of a pollution-free Ocean.

The conversations spanned around new technologies and innovation, financing, challenges, potential opportunities, priorities and partnerships, women and youth in the Blue Economy. They contributed immensely towards a shared understanding of the elements of the concept, principles and building blocks of a sustainable blue economy.

As a key enabler, The Office remains vital in the formulation of Laws, policies and regulations that allow for the protection and sustainable use of natural resources from the oceans, seas and by facilitating Ministries, Departments and Agencies.

The Office provides legal advisories to the government on all local and international agreements and treaties as well as negotiating, drafting and vetting the same. Such instruments include the United Nations Convention on the Law of the Sea (UNCLOS) Treaty commonly known as the Law of the Sea. UNCLOS governs and regulates the use of marine resource as well as provides for measures to ensure the same is sustainable and of benefit to all. Kenya is a party to this Treaty. It is important to reiterate The Office continues to play a key role in championing for the enhancement of capacity building and transfer of marine technology to harness resources found in the sea. Kenya, has not fully realized her potential and lags behind in exploration and exploitation of her sea resources.

Through The Office, Kenya argued for the full implementation of Part XIV of the United Nations Convention on the Law of the Sea (UNCLOS) on the development and transfer of marine technology. This is to ensure that the African continent equally benefits from the economic and commercial activities presented by maritime resources. Maritime security, safety and regulatory enforcement remain important in the defense of national interests in border security management and through this Kenya will be able to harness properly the potentials offered in the Blue Economy.

The three-day event culminated in the *Nairobi Statement of Intent on Advancing Global Sustainable Blue Economy* whose focus will be to among others, promote action-oriented global strategies that places people and the blue economy resources at the

center of sustainable development as a contribution to the realization of the UN 2030 Agenda for Sustainable Development and the SDGs. It will also encourage collaboration for sustainable partnerships and projects in the various sectors of the blue economy for economic growth, poverty alleviation and conservation of the resources for the present and future generations through a multi sectoral approach. It is further expected to promote mobilization of resources both the public and private sectors for access to technologies and innovations as well as capacity building among local, national and international stakeholders for the full realization of the potential of the blue economy.

Pertinent to the promotion of inclusivity, the Nairobi Statement of Intent on Advancing Global Sustainable Blue Economy will promote the role of women in the blue economy by identifying barriers and opportunities to further empower women and encourage their role in positions of leadership. It will foster the strengthening of science and research to generate and disseminate evidence-based knowledge and information on advancing the sustainable blue economy to inform decision-making while raising awareness and ensuring stakeholder participation in policy and decision-making.

Going forward, the sustainable Blue Economy is a new world of economic development that will steer both the governments and private individuals into partnerships towards achieving a sustainable economy for all. Indeed, several counties are coalescing together to as a single regional bloc to develop an integrated approach to utilize the aquatic resources holistically and reap optimal returns from the Blue Economy.

Currently, Kenya is involved in an arbitration case at the International Court of Justice with Somalia over a disputed sea area. The Office has previously, submitted before the United Nations Commission on the Limits of the Continental Shelf (UNCLOS), (the body that facilitates the implementation of the United Nations Convention on the Law of the Sea in respect of the establishment of the outer limits of the continental shelf beyond 200 nautical miles) for sustainable use of marine resources. The blue economy offered an opportunity to promote synergies and collaboration between governments in ensuring sustainable use of marine resources.

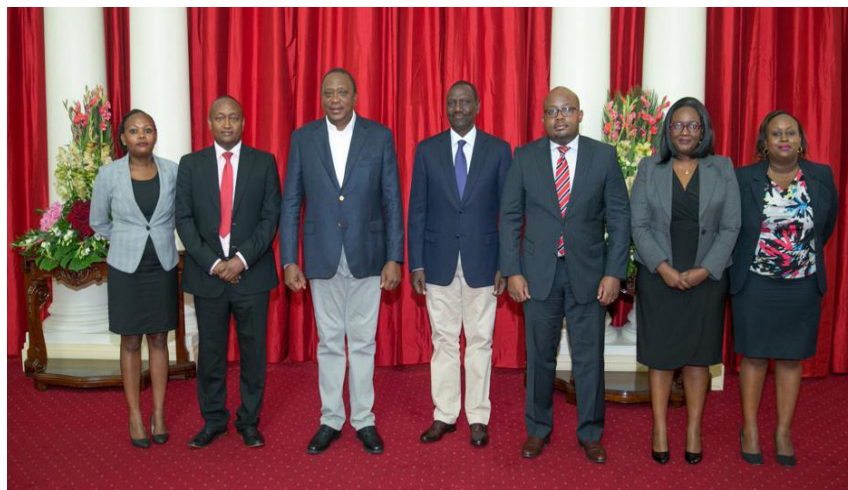
Reforms in the Ease of Doing Business in Kenya By S. Mwakio and B. Osicho

Kenya has yet again improved in the latest Ease of Doing Business ranking, this time 19 places, finishing 61st in the 2010 Ease of Doing Business Index that surveyed 190 economies compared to last year's position 80.

Doing Business captures several important dimensions of the regulatory environment as it applies to local firms. It provides quantitative indicators on regulation for starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, enforcing contracts and resolving insolvency.

Business Registration Service (BRS) mandates as envisaged under the Business Registration Service Act, 2015 covers the following indicators starting a business, getting credit, protecting minority investors and resolving insolvency. From these, Kenya greatly improved on:

1. **Getting Credit:** Kenya strengthened access to credit by introducing a new Secured Transactions Law creating a unified secured transactions legal framework, and establishing a new unified and notice-based collateral registry.
2. **Protecting Minority Investors:** Kenya strengthened minority investor protections by increasing disclosure requirements, regulating the approval of transactions with interested parties and increasing available remedies if said transactions are prejudicial, increasing shareholders' rights and role in major corporate decisions and requiring greater corporate transparency.
3. **Resolving Insolvency:** Kenya made resolving insolvency easier by facilitating the continuation of the debtor's business during insolvency proceedings, providing for equal treatment of creditors in reorganization proceedings and granting creditors greater participation in the insolvency proceedings.



Officers from the Business Registration Service (BRS) are honored by His Excellency President Uhuru Kenyatta for being instrumental in some of the reforms that led to the improvement in the 2018 ease of doing business ranking.

The World Bank Report, Doing Business 2019, ranks Kenya at position 7 among the 10 most improved economies in the Doing Business Index, a strong statement of confidence by the world about Kenya's economic outlook. BRS together with its strategic partners and stakeholders strive to improve this ranking to position 50 by the year 2020.

BRS has not only adopted the concept of "moving data to people" but also "putting people first" and serving the people in a

better, faster and in a more responsive manner. BRS's mission is to make the business sector competitive by streamlining and automating the business registration processes, in line with international best practices and global trends to ensure quality delivery of services.

On matters relating to the Companies Registry, Kenya's ranking improved from 62 in 2018 to 11 in 2019. This was as a result of various factors including the country's commitment to strengthening minority investor protections by increasing disclosure requirements, regulating the approval of transactions with interested parties and increasing available remedies if said transactions are prejudicial, increasing shareholders' rights and role in major corporate decisions and requiring greater corporate transparency. Further, the Companies Act holds directors liable in related party transactions valued at 10% or more of a company's assets and that cause damages to the company. Directors involved in prejudicial transactions are now required to pay damages, disgorge profits and may be disqualified from holding similar office for up to five years.

Key to note is that in the recent past, the Government of Kenya (GoK) has been making some significant steps to stem the tide fight against corruption. As the first country to sign and ratify the UN Convention on Corruption (UNCAC), the country has been under an extra juridical obligation to pave the way in terms of its implementation.

At the 2016 London Anti-Corruption Summit, Kenya made commitments in fighting corruption which included, firstly setting up a public central register of company beneficial ownership information in line with the companies regulatory framework. Secondly was to ensure that the international and domestic law enforcement agencies have full and effective access to beneficial ownership information for companies and other legal entities registered with their jurisdiction.

The Public Central Register will aid transparency to reduce fraud and corruption which is a drain on the economy and a risk to business. It will further reduce the cost and complexity of due diligence and risk management while increasing the stability of financial markets. The spillover effect of this will enable better allocation of capital by investors

and facilitate competitiveness in business environments by ensuring that government and commercial contracts go to the company best suited for the job. The BRS commissioned a process that led to the amendment of the Companies Act, through the Companies (Amendment) Act, 2017. This came into force on 3rd August 2017 with the objective of introducing the concept of a Beneficial Ownership Register. This is in accordance with the **Financial Action Task Force (FATF)** recommendations on transparency of beneficial owners, the **Open Governance Partnership Action Plan II** and the **Kenya Country Statement at the London Anti – Corruption Summit**.

The Service continues to conduct public participation to sensitize the citizenry on the concept of beneficial ownership. The Act has defined “beneficial owner” to mean the natural person who ultimately owns or controls a legal person or arrangements or the natural person on whose behalf a transaction is conducted, and includes those persons who exercise ultimate effective control over a legal person or arrangement. Uniting ownership and control under the banner of beneficial ownership allows BRS to represent the complex reality of corporate structures and the multiple corporate interests a person might have.

On the Insolvency Act 2015, Kenya’s ranking improved to 38 places from 95 in 2018 to 57 in 2019. This was precipitated by Kenya’s commitment in making the resolution of insolvency easier by facilitating the continuation of the debtor’s business during insolvency proceedings.

The reforms sought to have the approval by creditors for sale of substantial assets of the debtor to ensure that creditors protect their charge during sale of assets. It also gives the administrator an option of continuing or disclaiming contracts entered into by the company before administration commenced. It gives an individual the right to access information so as to understand the debtor’s financial status. This enhances transparency in information sharing between the debtor and creditors. Further, it incorporates division of company creditors into

classes for purpose of voting on the reorganization plan so that each class of creditors has a say and more so, that the interests of secured creditors are protected during voting. The reforms also provide a mechanism through which an individual creditor can challenge a decision of the insolvency representative to approve all claims if the decision affects the creditor’s rights.

On the Collateral Registry (Movable Property Security Rights), Kenya’s ranking improved 20 places in the ease of doing business ranking from 29 in 2018 to 8 in 2019. This improvement is largely due to the enactment of the Movable Property Security Rights Act, 2017. As a result of this Kenya strengthened access to credit by introducing a new secured transactions law ‘The Movable Property Security Rights Act, 2017’ which creates a unified secured transactions legal framework, and establishes a new unified collateral registry. This new law facilitates the use of movable property as collateral for credit facilities, establishes the Office of the Registrar of Security Rights and provide for the registration of security rights in movable property.



Participants at the Workshop on Beneficial ownership information in Mombasa in August, 2018.

Implementation of the Movable Property Security Rights Act, 2017 has seen the establishment of an electronic collateral registry on the e-Citizen platform. There is a revamped movable collateral regime, with an electronic register to enhance increased secured transactions in Kenya. It has aided in boosting access to credit by enabling businesses, especially SMEs, to leverage the value of movable assets they hold to access credit. It has further enabled businesses utilize the various forms of movable assets they already have, in a clear, consistent and predictable way. The Electronic Collateral Registry has to date, seen the registration of over **170,000 Initial Notices** being lodged by various lenders with secured amounts in different currencies as operated by financial institutions to the tune of Kshs. 9 trillion, US\$ 20 Billion, 91 million Euros and 1 million British pound.

The Collateral registry provides a broader and fairer access to credit. It allows lenders to accurately evaluate risks and improve portfolio quality while at the same time preventing over-indebtedness because lenders can assess an applicant’s total indebtedness and thereby calculate a borrower’s capacity to service debt. The registry ultimately ensures stability in the financial sector.

As one of the key regulators of the business industry in Kenya, the Business Registration Service under the Office of the Attorney General and Department of Justice continues to play a central role in ensuring that Kenya provides a good environment for MSME’s to thrive for better economic development.

This being a fairly new law BRS continuously offers training on the new law and the use of the electronic register. Sensitisation workshops have been conducted in Nairobi, Mombasa, Kisumu, Nakuru and Meru. Individualised trainings (**upon request by several financial institutions**) have also been conducted on the use of the electronic registry.

State Counsel honored by President

During the 2018 JAMHURI DAY celebrations, President Uhuru Kenya recognised various state counsels who have rendered distinguished and outstanding services to the nation in various capacities and responsibilities. The awards are contained in Gazette Notice No. 12770 dated 11 December 2018.

The State Counsels awarded and decorated include,

1. *Njeri Wachira Mwangi, Moran of the Order of the Burning Spear (M.B.S.)*
2. *Mcharo Pauline Wambui, The Order of the Grand Warrior of Kenya (O.G.W.)*
3. *Bitta Emmanuel, The Order of the Grand Warrior of Kenya (O.G.W.)*
4. *Christine Kusa, The Order of the Grand Warrior of Kenya (O.G.W.)*
5. *Sheila Mammet, The Head of States Commendation (H.S.C.) Civilian Division*
6. *Timothy Kihara, The Head of States Commendation (H.S.C.) Civilian Division*
7. *Munyi Victor, The Head of States Commendation (H.S.C.) Civilian Division*
8. *Charles Wamwayi, The Head of States Commendation (H.S.C.) Civilian Division*
9. *Gitiri Jeniffer Wangui, The Head of States Commendation (H.S.C.) Civilian Division*
10. *Ondieki Canain Miyogo, The Head of States Commendation (H.S.C.) Civilian Division*
11. *Manyeki Mark Gakuru, The Head of States Commendation (H.S.C.) Civilian Division*
12. *Gathuma Kenneth Njugu, The Head of States Commendation (H.S.C.) Civilian Division*
13. *Kamande Dinah Wanjiku, The Head of States Commendation (H.S.C.) Civilian Division*
14. *Osicho Beatrice Achieng, The Head of States Commendation (H.S.C.) Civilian Division*

Also recognised is Ms. Caroline Amondi who received the best jurist award during the 2018 Pro bone Lawyer of the Year Award held recently. Ms. Amondi, the current Director of the National Legal Aid Scheme received the award for her work in promoting Public Sector Access to Justice.

Rationale for Law Reform Agencies or Commissions, by A. Otieno

Micheal Tilbury³ argued that the exact import of the term law reform was notoriously difficult to define. It can refer, widely, to any beneficial change or proposed change in the law or, more narrowly, to the process by which such a change is attempted or accomplished. Both of these senses are relevant to the history of law reform in Kenya.

Law Reform generally is the process that makes law good, and good law better. This is achieved by first examining its form and its ability to progressively serve the purpose for which it was enacted and then through revision, codification and consolidation, making the substance and form of the legislation better. In order to gain a clearer meaning of the ambit of law reform and the law reform agencies, it is necessary to discuss some concepts.

The term **Law Revision** is used to refer to statutory amendments that make no change at all to the substance of the law. They make the law more accessible, simpler to understand and may include minor editorials to the law, but without changing its meaning. **Consolidation** is the bringing together of statute law in a number of different instruments into a single, new, legislative instrument. Consolidation re-packages, but does not substantively change the law. There may be some scope to change the language of the law, or make the most minor and technical changes to its effect, for instance to avoid absurdity. But the fundamental objective is to have a neutral impact on the substance of the law. 'Law revision' and 'consolidation' may in certain instances run concurrently, with the

aspect of revision being undertaken during the process of consolidation.

Revision, in some jurisdictions such as the United Kingdom, is reserved for the wholesale consolidation of the laws of the jurisdiction, undertaken as a single exercise. In other Commonwealth jurisdictions like Uganda, consolidation or revision are functions conferred on law reform agencies.

There is another, slightly different sense in which the word '**revision**' is used. In a small number of jurisdictions, the law reform agency is charged with publishing as-amended versions of Acts. In Kenya, this role is exercised by the National Council for Law Reporting through delegated powers from the Attorney General effected through Legal Notice Number 29 of 2009. In addition to publishing, the Council also undertakes publication of laws in Kenya. The Law Revision Department of the Uganda Law Reform Commission publishes from time to time the complete Revised Edition of the Laws of Uganda; that is, the full text of all the primary legislation of Uganda in its amended form.

³ See Michael Tilbury, *A History of Law Reform in Australia in The Promise of Law Reform at 18-39* [Brian Opeskin and David Weisbrot eds. *The Federation Press*, 2005]. See also Agnes Mgeyeka, *Participatory Approach in Law Reform*, *The Law Reformer Journal*, *The Law Reform Commission of Tanzania*, vol 2, number 1, April 2009; and M.D. Kirby, *Reform the Law: Essays on the Renewal of Australian Legal System* (1983), Melbourne: Oxford University Press, pg. 7

As with consolidation, these functions do not change the substance of the law. Similarly, in the Republic of Ireland, the Law Reform Commission of Ireland is responsible for publishing revised Acts; that is, administrative consolidations of Acts in their amended form since 2006 (plus some earlier Acts).

Law Reform is therefore all about the substance of the law primarily aimed at improving the law in significant ways. It is distinct from the revision or consolidation of the law, which are about the form of the law. The Kenya Law Reform Commission (KLRC) is currently involved in a long-term ambitious version of law review and consolidation where KLRC has engaged in a wide-ranging statutory law revision project to review all national legislation in order to determine whether some or all of the provisions are obsolete, spent or otherwise incompatible with the Constitution of Kenya. A similar form of review and consolidation of laws is also being undertaken in South Africa.

Consolidation, revision and the repeal of obsolete statutes are all functions of some law reform agencies, but they are to be distinguished from law reform, even though the term ‘law reform’ is sometimes used more broadly to include all of the functions of law reform agencies.⁴

With the foregoing in mind, the leading justification for the existence of the concept of law reform is the simple proposition that **“the law, like any other human creation has defects, some of them serious. It is in constant need of improvement.”** Some of the broad defects that law reform seeks to address may include: the need to re-align institutions fashioned in the past that no longer, meet the demands placed on them by growing populations, that increasingly function in a globalized economy; Technological developments that may create opportunities but spawn problems that humanity has not previously encountered; Societal attitudes and values that may have changed in a manner that needs to be reflected in the law; and Old laws that simply need to be refreshed to modernize their language and remove obsolete provisions.⁵

Since the whole body of the law stands potentially in need of reform, there should therefore be a standing agency of appropriate professional experts to consider reform continuously. Law reform commentators generally agree that law reform as a function should repose in a Commission with at least seven distinguishing characteristics that would guarantee the continuous reform of laws. These are: it should be permanent, authoritative, full-time, independent, generalist, consultative and implementation-minded.

4 The Commonwealth Secretariat “Changing the Law; A practical guide to Law Reform, 2017 at pages 11-19 “Law Reform and Reformers”

5 See Brian Opeskin, *Law Reform in a Federal System*, Melbourne University JD Programme Guest Lectures, April, 2001.

BREXIT and its consequences: Anglo – East African Relations in a Post EU Referendum World By. B. Lamenya

On 23rd June 2016, the United Kingdom (UK) experienced a moment of unexpected and seismic change. By a relatively small margin, the British electorate voted by approximately 52 per cent to 48 per cent in support of leaving the European Union (EU). The referendum result represented what is considered as the most epochal shift in UK foreign policy since the Suez Crisis of 1956. This shift is seen as having the potential to set in train a series of changes that could, in theory, threaten the integrity of the entire project of European integration’ as the world knows it.⁶ This historic move is riddled with immense uncertainties as there is no modern precedent for a state voluntarily exiting from a regional integration arrangement characterized by complex legal and economic integration.

Consequences of Brexit to Africa Some scholars have argued that due to the complexities involved in the formalities of Great Britain’s exit from the European Union, the country will *‘over the next two years, be so preoccupied with the logistical elements of its divorce from the EU that it will have little time, energy or ability to remain globally engaged’*.⁷ Within its territory, ‘one word, recession continues to dominate conversations within banks, economic research houses, and supranational institutions all predicting that growth in Britain will shrink during this period of turbulence.

UK’s current geo-political narrative currently revolves around Brexit begging the question, where does this leave the rest of the world and more, where does this leave Africa and Kenya? Scholars and researchers posit that Brexit will have a ‘creeping’ effect on Africa, the impact will not be felt instantly, but over time, the effects will be evident. A research by Barclays opines that ‘Britain’s economy may bear the brunt of the fallout from the UK’s decision to leave the European Union, Africa is set to be an unexpected victim.’ The research carried by Business Insider in 2017 note that ‘Brexit’s economic impact on Africa, and particularly sub-Saharan Africa, could be profound and incredibly damaging to the continent’s burgeoning development.’ This prediction places Africa’s development at risk at the wake of Brexit, raising the question whether Africa is able to cushion itself from regression of its development.

The Research by Barclays identifies seven key reasons why Sub-Saharan Africa’s growth is at risk from Brexit. These include, Brexit could harm global demand for goods, particularly hitting African economies that are focused on the export of raw materials. This would lead to “slower growth and

6 <https://reader.chathamhouse.org/brexit-and-its-consequences-anglo-japanese-relations-post-eu-referendum-world#introduction>

7 <https://www.chathamhouse.org/publication/brexit-and-its-consequences-anglo-japanese-relations-post-eu-referendum>

wider current account deficits.” Arguably, weaker global demand is expected to lead to a decline in key commodity prices further undermining the African economy, that is reliant on exporting minerals, ores, and other commodities. The possible exception has been the price of gold, which has been boosted by market uncertainty since the referendum. Two of the world’s 10 biggest gold-producing nations are in Sub-Saharan Africa.

The research argues that tourism figures may dwindle with a reduction or cancellation on African safaris and other nature tours. The basic argument here is simple, if the Brits and other Europeans are suffering through economic hardship, an African holiday could be far less affordable. The ripple effect of a depression in Britain and Europe is expected to see increased unemployment leading to a reduction in the amount of money sent back to Sub-Saharan African countries. There will be fewer “economic opportunities for African migrants in the UK and Europe, and hence less workers’ remittances to home countries.” If things get really bad, aid from UK and European governments is also expected to “dry up,” robbing Sub-Saharan African countries of vital funding for infrastructure projects and other economically beneficial plans. While Brexit is causing heightened uncertainty and, in some respects, increased risk aversion, these factors are likely to increase financing costs and shrink capital inflows into sub-Saharan Africa. Notably, earnings on sub-Saharan investments into Europe and the UK are expected to be lower. These considerations are expected to impact on many of the sub-Saharan Africa’s developed nation, including Kenya and South Africa.

The geopolitical dynamics of Africa are constantly changing. While Brexit is anticipated to have the mentioned effects on sub-Saharan African countries, the reality has been that Africa over the last decade, has been looking East with regard to trade, investment, foreign aid and other opportunities of co-operation such as sports, arts, science and technology. The Chinese “footprint” is vast over many African nations with a lot of infrastructural projects being financed and constructed by the Republic of China. Africa has looked to countries such as Japan and Israel for various technological developments, advancements and training. The automotive industry in Africa is dominated by Japanese cars not only due to their affordability but also their suitability for the African market and terrain. Indeed, Africa’s development is not entirely pegged on its Western relations, but the dynamics of its relations with the Eastern-world may provide some form of ‘shock absorbers’ or ‘cushioning.’

Interestingly, the dynamics of the Brexit effect may vary across African states with Anglo-phone countries, mainly former British colonies, experiencing higher impacts of Brexit due to decades of post-colonial relations; as opposed to Franco-phone and Luso-phone countries which maintain good relations with their former colonial

masters (France, Belgium and Portugal) which are still part of the European Union. The latter’s trade and investment relations may still remain intact and actually experience minimal effects of Brexit. The Commonwealth factor can also not be ignored. It is argued that the UK is pouncing on the organisation’s analysis showing the advantages of trade between Commonwealth countries due to its common language and legal systems.’ The Great Britain is turning to its Commonwealth former colonies to enhance its trade and other relations while affirming its position as a strong international player in the international system. However, skeptics have countered this hopeful perception observing that ‘Britain’s trade with Commonwealth nations lags so far behind than with its European Union neighbours that a straight replacement is impossible’.⁸ They further argue that ‘the conservative Eurosceptic notion that the Commonwealth can somehow replace Europe as the UK’s chief trading partner is, ultimately, more emotional than rational.’⁹

An opinion carried in the Irish Times posit that many lessons can be drawn and learnt from historical events.

‘When the UK joined the European Economic Commission (EEC) in 1973, it was feared that free trade with the Commonwealth would cease altogether. Territories marked red on the old imperial map might profitably have aligned themselves with the UK as they shared a language, a legal system and a queen. But, in an abrupt betrayal, Britain turned its back on its allies overseas. Trade did not of course cease, but still it was a fine way for the UK to treat its loyal subject nations.’¹⁰

Commonwealth nations had to learn from this turn of events, resulting to them forging new allies and charting their own course in as far as trade and other relations was concerned. Five decades later, the narrative has significantly changed for Commonwealth nations with the sprouting of various Regional Economic Blocks and Regional Economic Communities which have been useful allies for not only trade but other matters of regional importance such as security and regional integration. Great Britain now has to contend with finding its place in the Commonwealth amidst all the new developments.

It is fair comment to state that the world is watching with baited breath to witness how events unfold post-Brexit in terms of alignments and re-alignments. The Irish Times indeed holds a cynical view on British re-alignment in the Commonwealth:

⁸ <https://www.capitalfm.co.ke/business/2018/04/britain-hoping-brexit-boost-commonwealth-summit/>

⁹ <https://www.irishtimes.com/opinion/commonwealth-may-yet-be-a-saviour-for-the-united-kingdom-1.2750570>

¹⁰ <https://www.irishtimes.com/opinion/commonwealth-may-yet-be-a-saviour-for-the-united-kingdom-1.2750570>

*'The problem for right-leaning Eurosceptics, however, is that their nostalgic vision of empire is not shared by the UK population. Few people in Britain today have reason to admire the Commonwealth. The Commonwealth's governing principle that people get along better than governments remains a magnificent Anglo centric concept based on ideals of respect, civility and a dignified Anglo-patriotism. But, even if the Commonwealth helps sustain the myth of Britain's importance, cutting loose from the continent simply to rebuild a Brexit fantasy version of the empire is deluded. Benefits no longer flow like milk and honey from Great Britain to its dependencies: as Britannia's mantle became more and more threadbare, the old loyalties changed.'*¹¹

With specific reference to Kenya, a former British Colony, some of the effects of Brexit will particularly be evident in key industries such as tourism, trade in horticultural commodities such as tea, coffee and flowers; as well as on Foreign Direct Investment (FDI). In terms of its relations dealing with defense, the status quo will most likely be maintained given that even in the midst of a recession, national security strategies are never compromised as this remains at the helm of a nation's survival.

¹¹ <https://www.irishtimes.com/opinion/commonwealth-may-yet-be-a-saviour-for-the-united-kingdom-1.2750570>

Recommendations for Kenya As the Great Britain tries to examine the effects of Brexit, Kenya too ought to re-evaluate its Foreign policy with regard to its relations with the United Kingdom, with the aim of deepening and strengthening (where possible) the relationship. This could entail negotiating new contracts, Memoranda of Understanding (MoUs) while also initiating new areas of cooperation. It ought also to re-evaluate and diversify its foreign policy with regard to the European Union as a whole and the individual countries therein. There is need to increase cooperation with the Eastern world particularly with the aim of expanding trade and investment opportunities for Kenya in those countries. This would essentially involve exploring new markets for Kenya's products. Further, Kenya ought to focus on increasing its technological advancements to enable it manufacture raw materials and export finished products rather than primary products as has been the practice. Building synergies with the East African Community (EAC) on strategies of dealing with post-Brexit Britain and European Union with the aim of not only maintaining, but also enhancing already established markets and areas of international cooperation remains a critical aspect of regional development and integration. It is through these that Kenya can further build on the strategies of market diversification and cooperation not only with other Regional Economic Communities in Africa such as COMESA, SADC and ECOWAS, but also with the others in Asia like the ASEAN Economic Community.

Kenya holds discussions with UAE on Mutual Legal Assistance, By I. Agum

The Governments of Kenya and the United Arab Emirates are set to enter into various legal agreements that will strengthen the criminal justice systems between the two countries. Kenya is seeking to negotiate and execute Treaties on Mutual Legal Assistance, Transfer of Prisoners and Extradition while enhancing cooperation on exchange of information and repatriation of assets.



Judge Abdul Al Blooshi Director of International Cooperation in the Ministry of Justice and Solicitor General Mr. Kennedy Ogeto sign documents prepared during the first round of negotiations between United Arab Emirates and Kenya.

This has been necessitated by an escalation in transnational organized crimes involving criminals operating in more complex manners and in multiple countries leading to the establishment of legal cooperation in the prevention, investigation and prosecution of transnational crimes between the two countries.

Speaking during the opening session of the first round of deliberations in December between the two governments, Kenya's Solicitor General Mr. Kennedy Ogeto called for the strengthening and enhancing of the Kenya/ UAE relationship so that they could execute bilateral agreements in Mutual Legal Assistance, Extradition, Transfer of sentenced persons and repatriation of assets in the future.

The Solicitor General led the Kenyan delegation visiting the United Arab Emirates while Judge Abdul Rahman Murad Al Blooshi, Director of International Cooperation in the Ministry of Justice received the Kenyan delegation to the talks.

The Office of the Attorney General is the Central Authority for Mutual legal assistance in Kenya whose functions are to receive, accede and ensure the execution of Mutual Legal Assistance (MLA) requests as established under Section 5 of the Mutual Legal Assistance Act. Mutual legal assistance is used by law enforcement agencies in the conduct of investigations, prosecutions, judicial proceedings, consultations and service of overseas processes. It also used in conducting investigative interviews in criminal investigations as well as facilitate the freezing and confiscating property acquired from proceeds of crime and obtaining evidence to be used in civil asset recovery investigations and proceedings.

To date, Kenya has entered into bilateral agreements on Extradition and Mutual Legal Assistance with the Peoples' Republic of China, Italy, Rwanda, and the Federal Council of Switzerland. Kenya also has agreements such as the Framework for the Return of Assets from Crime and Corruption in Kenya (FRACCK) signed amongst United Kingdom, Jersey, Switzerland and Kenya. The United Arab Emirates has presently signed close to 52 MLA Treaties with different countries.

Going Beyond The Call of Duty: A State Counsel's Experience

By. A. Chesaina.

Before going to court, I sit at my desk drafting an objection and some grounds of opposition to a matter I have no instructions to. The clients we represent may never answer my plea for instructions. I have my work cut out. I ask God for the umpteenth time, for a miracle. Boldly, I hold my head high and feign sheer prowess.

I work at the Labour and Industrial Claims Section of the Civil Litigation Department at the Attorney General's Office. With the promulgation of the new constitution the Employment and Labour relations court, a specialized court, was formed. This has witnessed immense jurisprudence on labour law in Kenya. The Government being the largest employer in Kenya plays a big role in disposal and ensuring justice is met in this court. With these new changes though, there has been an increase in the number of cases filed in this court since inception. As an advisor to government and a defender of public interest, our Office's role in ensuring justice in the courts is unquestionable. With this in mind I realized that we have a challenge in promoting the necessary culture, talent and motivation to support the legal structures in the country. Therefore, how does the Office improve on its capacity and flexibility to respond to these changes.

The Attorney General's Office should not just be merely an office but more so **'The Office.'** The mandate of the newly appointed Attorney General and Solicitor General should be to create a dramatically new paradigm to the legal profession. The vision of the Office of the Attorney General and Department of Justice is to be the best institution in the region in provision of public legal services and promotion of a just democratic and corruption free nation. In Malcom Gladwell's book *"Outliers"* Mr. Gladwell defines an **outlier** to be 'something that is situated away from or classed differently from a main or related body.' With this definition, the State Law Office, constitutionally known as the Office of the Attorney General fits this title.

The Office of the Attorney General is the advisor to Government and in implementing this role we need to partner with all Government entities to oversee the rule of law in its mandate. The life of a state counsel is one of dedication, service, eloquence, patriotism under the national values. When I look at Article 230 (5)(b) of the Constitution which calls for the civil service to attract and retain highly qualified people in its wake. I see these qualities in my colleagues: eloquence, selfless, patriots, learned, dedication. Amid rumors of incompetence and compromise against state counsels, they are left demoralized.

In one of the Employment and Labour relations open day a speech read out for the Attorney General read

"My office is currently expanding its research capacity to be better equipped in dealing with new legal matters as the legal jurisdiction expands. We need to constantly invest in the quality of law that we practice; we continue to build partnerships and are also engaged in enhancing our capacity by attracting senior professionals while encouraging young minds to join the legal profession and serve the public with dedicated service."

To be able to achieve what the Attorney General stated, the office needs to appreciate the counsels and train them. A good example is by looking at the Acts and habits of Paul Oneill at the helm of the world's largest producer of aluminium, ALCOA. Paul O'neil was the Chair and CEO of the American Company ALCOA from 1987 to 1999. At the beginning of his tenure, O'neil encountered significant resistance from the Board of Directors due to his stance on prioritizing worker safety. By improving ALCOA's safety record, the company's market value increased from \$3 Billion in 1986 to \$27.53 Billion in 2000.

So what am I saying: to improve public legal services, to prosecute cases successfully in court, in order to save on the taxpayer, The State Law Office needs to invest in its staff, **ALL ITS STAFF.** To achieve key stone habits and status similar to those of ALCOA we need to inculcate habits of successful organizations so that state counsels go beyond the call of duty. With this we shall see development in new jurisprudence, dedicated service and attraction of new legal minds.

Adoption of Nairobi Centre for International Arbitration (Arbitration) Rules 2015

By A. Mwaniki.

In recent years, it has become increasingly common for parties involved in commercial transactions to include an arbitration clause as their chosen dispute resolution mechanism within the terms of the contract. Arbitration is the commercial parties' first choice for dispute resolution in view of obvious benefits to be accrued such as the clear policy of finality of arbitral awards, speed of resolution of dispute, party autonomy as well as confidentiality of arbitral proceedings.

In adopting the arbitral rules to govern the arbitration proceedings between parties, the arbitration clause (which in essence constitutes the arbitration agreement between the parties) typically provides that arbitral proceedings are to be governed by the arbitral rules of particular institutions. The Nairobi Centre for International Arbitration (NCIA) is one such institution, which has developed the NCIA Arbitration Rules 2015 for use by parties involved in commercial transactions.

The NCIA Arbitration Rules 2015 ('the Rules') are procedural rules that apply where parties have agreed to arbitration pursuant to the Rules, typically by incorporating the Rules in their arbitration agreements. The Rules set out the basic procedural framework for arbitral proceedings and fundamentally authorize the NCIA to assist the parties and the arbitral tribunal in the administration of the dispute.

The Rules are universally applicable, being suitable for all types of arbitrable disputes. They offer a combination of the best features of the civil and common law systems. This include offering maximum flexibility for parties and tribunals to agree on procedural matters; speed and efficiency in the appointment of arbitrators, including expedited procedures. They are also a means of reducing delays and counteracting delaying tactics; have emergency arbitrator provisions; tribunals' power to decide on their own jurisdiction. They also offer a range of interim and conservatory measures; Tribunals' power to order security for claims and for costs and special powers for joinder of third parties and consolidation among others.

The NCIA Model Arbitration Clauses

The Rules provide the parties with an arbitration clause to adopt in the agreement committing to submit to Arbitration in the event a dispute occurs.

The bare-bones model clause recommended by NCIA states as follows:

Any dispute, controversy or claim arising out of or in connection to this contract, or breach, termination or invalidity thereof shall be settled by arbitration in accordance with the Nairobi Centre for International Arbitration Rules.

The Rules further provide for a model clause for parties to a contract without an existing Arbitration clause intending to commence an arbitration under the NCIA Arbitration Rules or parties to a contract with an existing arbitration clause intending to substitute the clause in the contract for a clause making reference to the NCIA, may adopt. The clause states as follows:

The parties hereby agree that any dispute, controversy or claim arising out of or in connection to the contract dated, or breach, termination or invalidity thereof shall be settled by arbitration in accordance with the Nairobi Centre for International Arbitration Rules.

The NCIA model clauses provide the minimum essential elements for an enforceable arbitration clause and its adoption by the parties to a commercial transaction is advantageous in the efficient and effective settlement of a dispute once it occurs.

The Rules regulate the procedure from appointment of arbitral tribunal to the administration of the arbitration including the issuance of award. Parties who agree to submit their dispute to arbitration in accordance with the rules effectively incorporate them into the arbitration agreement.

The parties who adopt the NCIA Arbitration Rules have available to them a well-trying and tested set of arbitral rules which provide for the various factual situations which may arise in arbitration. This is clearly an advantage. There is a mechanism in the rules to challenge and, if necessary, remove arbitrators. Suppose for instance, that there is a challenge to an arbitrator, on the grounds of lack of independence and impartiality; or suppose that the arbitration is to take place before an arbitral tribunal of three arbitrators and the defending party is unwilling to arbitrate and fails or refuses to appoint an arbitrator. The Rules provide for such situation.

Administration: Parties who adopt the Rules have the advantage of access to trained staff who administer the dispute. The NCIA staff will ensure that the arbitral tribunal is appointed, advance payments are made in respect to fees and expenses of the arbitrators are deposited at the Centre, time limits are observed and generally ensuring that the arbitration runs as smoothly as possible. If the arbitration is not administered in this manner, the work of administering it would have been left to the arbitral tribunal itself. This would disadvantage the tribunal especially where the particular arbitration is of an international nature and the arbitrator is not a resident of the seat for arbitration (Nairobi, Kenya). Administrative work may also in some instances detract the arbitral tribunal from their principal responsibility of resolving the dispute between the parties.

Speed: Adoption of the Rules enable parties to a dispute resolve it in a fast and efficient manner. The rules provide for tight time limits for the exchange of the parties' pleadings, the main hearing and the publication of the final award. These time limits guide the tribunal and the parties to resolve the dispute swiftly, even though non-compliance with a given deadline is not fatal and the parties are free to agree a more flexible timetable.

Parties to an arbitration have a choice as to the form and manner in which they would wish to resolve the dispute. Institutional arbitration offered by the NCIA is suitable if parties want a proper degree of supervision. NCIA highly recommend the adoption on the NCIA Model clause by parties involved in commercial transaction.

Legal Aid in Civil Matters,

By F. Githumbi

Access to justice is central to the rule of law and integral to the enjoyment of basic human rights. It promotes social inclusion and underpins development in general while contributing to poverty reduction in particular. The setting up of National Legal Aid and Awareness Programme (NALEAP) even before the promulgation of the 2010 Constitution was a demonstration of the Government's recognition of the fundamental importance of access to justice as a component of the rule of law and a priority area in judicial reforms. Article 48 of the Constitution provides for the State to ensure access to justice for all persons: All persons include people faced with both criminal and civil cases.

The Legal Aid Act, 2016 was enacted to give effect to Article 48 among other Articles in the 2010 Constitution. Section 35 of the Act provides that,

"The Service shall offer legal aid services to the following cases; civil, criminal, children, constitutional, matters of public interest or any other type of case approved by the Service."

This is a significant improvement from the experience where the state-funded legal aid was limited to criminal cases only and especially to persons facing the offence of murder. The changes introduced by the Constitution and the Act now mean that legal aid is available on an expanded list of civil, criminal and constitution cases and in all instances where substantial injustice would occur. However, the Act also highlights civil cases that do not qualify for legal aid services.

In seeking to fulfill its mandate and recognition of the legal, socio-cultural and economic realities in Kenya, NLAS employs a combination of strategies for a sustainable and responsive legal aid system. These strategies include; provision of legal representation through *pro bono* lawyers, provision of legal advice, awareness creation, promotion of the use of ADR mechanism, the use of paralegals and law students as well as self-representation.

One of the lessons learnt from piloting the programme (NALEAP)

was that there was considerable demand for legal aid in children and family cases with no corresponding supply in terms of legal representation, hence the need to build the capacity of clients to self-represent. In self-representation, a party to a suit appears in court in person. The litigant pursues and/or defends of his/her legal rights in a court of law or before a tribunal without engaging an advocate.

NLAS through *Mwanasheria Mkuu* brings the success story of Ms. Celestine Nekesa (not her real name) a self-representing client.

"It all started one day when I had Ksh.100 in my hand and wondered if I could get my daughter some milk or buy her fruits. I decided to buy milk that week and fruits the following week. However, questions still run into my mind why I allowed my one and a half year old daughter to suffer yet the father was a man of means. That prompted me to seek justice for my daughter. Since I did not know where to start, in February 2013 I approached a friend of mine who referred me to National Legal Aid & Awareness Programme (NALEAP) now National Legal Aid Service (NLAS).

At NLAS I was received very well and the first intervention I received was an attempt to amicably settle the matter out of court through mediation, one of the Alternative Dispute Resolution mechanism. The father of my child was summoned for a mediation session unfortunately the mediation session was unsuccessful. After the mediation session failed, I was informed the next step was to file a child maintenance case in court seeking the court to compel the father of my daughter to discharge his parental responsibility towards the minor. Being a lay-man the mention of court scared me stiff especially when I was informed, I would be representing myself in court.

After the training, I was confident enough to file my case in court. Five months after instituting the case against the father of my daughter, we recorded a consent where the father of my daughter voluntarily agreed to pay child maintenance of KSh.10,000 monthly pending the hearing of the main suit. When he defaulted, I filed a notice to show cause and asked the court for attachment of his salary for the maintenance and the arrears accrued. After hearing the evidence from both side, the court ruled in my favor. I immediately served the order for attachment of salary to the father of my daughter's employer for enforcement. To date I receive the KSh. 10,000 per month from the father of daughter's employer directly deposited to my bank account without any delay. When my daughter attained school going age, I moved court for the review of the maintenance case so that the father may cater for school fees which was ruled in my favour.

As I share my story today, my daughter is seven and a half years and going to grade 2 in January 2019. Very soon I will be moving to court for hearing of the main suit to settle the matter and for closure. It is my belief and trust that the court will rule in my favor.

I am a living testimony that you can represent yourself in court and still be able to get what is needed for your child since the court is not biased. It considers all facts just to make sure they do not miss anything and put the best interest of the child first. It is not easy; you just do not have to give up. Today, I draft my documents on my own, get them commissioned then take to the Court's registry and file. For me this is an achievement and I give credit to NLAS.

My encouragement is to the indigent persons, the vulnerable and marginalized, that they should not give up in seeking justice for the voiceless and defenseless in this case the children."

Kenya Inks FRACCK Agreement with Jersey

By I. Agum

The Government of Kenya has inked a Framework for Return of Assets from Corruption and Crime (FRACCK) Agreement with the Government of Jersey that will see the repatriation of KSh. 516 million of illicit proceeds ploughed back into the country. The agreement will also see Kenya strengthen her collaboration with other countries in an effort to prevent, identify and provide for restitution mechanisms of illicit financial flows and the proceeds of corruption.

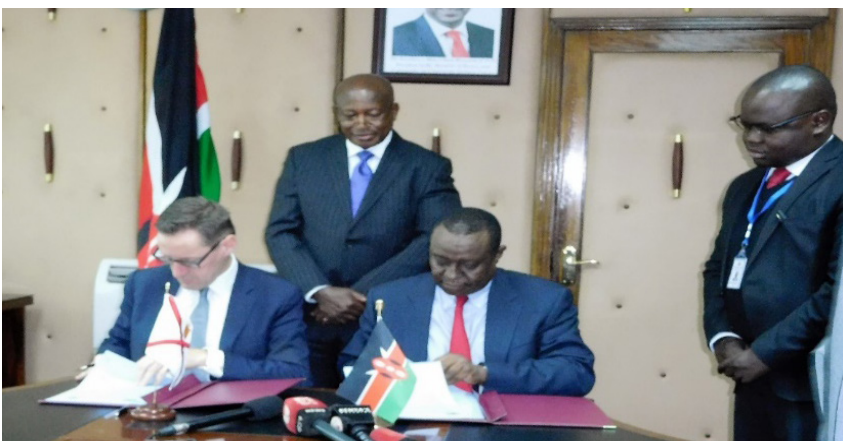
The FRACCK Agreement was signed early December by Attorney General Justice (Rtd) Kihara Kariuki on behalf of Kenya and Minister for External Affairs, from the Government of Jersey, Senator Ian Gorst.

During the brief signing ceremony at Harambee House, the Government of Jersey confirmed that measures to forestall the transfer and harbouring of illicit wealth from different countries had already been put in place in Jersey. Jersey further confirmed that it was custodian of close to 1.7 Trillion dollars available for foreign direct investment to support Africa's development agenda.



Attorney General Justice (Rtd) Kihara Kariuki and Minister of External Relations, Senator Ian Gorst exchange signed agreements.

Kenya and Jersey first agreed to a Mutual Legal Assistance (MLA) request in 2007 during investigations into the Anglo Leasing cases. The request was instrumental in the freezing of suspects' funds held in Jersey banks where approximately 3.5 million Sterling pounds was successfully frozen. At the time, the Government of Kenya received documents and evidence that were used in the prosecution of suspects implicated in the Windward Limited Case.



National Treasury Cabinet Secretary Henry Rotich and Minister of External Relations, Senator Ian Gorst signs a Memorandum of Agreement between Kenya and Jersey on Financial Cooperation.

Kenya has established the requisite authorities to implement the Anti-Money Laundering- Combating the Financing of Terrorism controls (AML/CFT) through the Financial Reporting Center (FRC) for financial intelligence and the Assets Recovery Agency (ARA) for the recovery of illicit assets. This is in line with the Financial Action Taskforce recommendations for financial intelligence in the fight against money laundering and counter-financing of terrorism which have improved Kenya's capacity in the prevention and detection of illicit proceeds and assets.

The Government of Kenya has committed to continue to provide the widest Mutual Legal Assistance in Criminal Investigations, Prosecutions and Judicial Proceedings in criminal matters while supporting international co-operation in the fight against transnational organized crime, corruption and money laundering.

"Our respective Governments' cooperation in the timely sharing of financial intelligence and subsequent recovery of assets is critical in the fight against corruption and money laundering. Cooperation, particularly with regard to financial intelligence on Political Exposed Persons, and other Kenyan citizens holding accounts within the Jersey financial system, will be crucial as Kenya continues with the war on corruption," Kenya's chief legal advisor, Kihara Kariuki assured the Jersey authorities.

During the signing ceremony, Kenya and Jersey committed to explore areas of collaboration matters related to Double Taxation while finalizing the Final Asset Recovery Agreement that is part of a wider international FRACC. The two countries also signed a Memorandum of Understanding on Financial Cooperation. National Treasury Cabinet Secretary Henry Rotich and Senator Ian Gorst of Jersey signed on behalf of their respective governments.

In March 2017, The Government of Jersey and the Government of the Republic of Kenya signed a preliminary Asset Sharing Agreement that would ensure that stolen funds are returned to Kenya in a transparent manner. This Asset Sharing Agreement is also in line with an initiative to develop a broader framework for asset recovery and repatriation and use the same for appropriate developments projects that will benefit the citizens.

Kenya hosts 1st East African Regional Legal Aid Networks Conference

By F. Githumbi, A. Wainaina and C. Amondi

Access to justice is a critical component of the rule of law and development. The promotion of access to justice is recognized as one of the sustainable development goals (SDGs) adopted by the United Nations.

Since the coming into force of the SDGs in January 2016, partnerships of governments, the private sector, the civil society, the academia and citizens both nationally and internationally have been formed to champion the realization of Goal 16.3; to

“Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”.

Even though the East African Community of Kenya, Uganda, Tanzania, Rwanda, Burundi and South Sudan, have identical constitutional guarantees on the right of access to justice, these Member States are not at par on the key pillars that are critical for the realization of full access to justice. This is attributable to, among other factors: high poverty and illiteracy levels; high levels of unemployment; and lack of sound policy, legislative and institutional frameworks for effective delivery of legal aid.

The Government of Kenya with the support of the Internal Development Law Organization (through its Africa Initiative Program), the National Legal Aid Service (NLAS), the Paralegal Support Network (PASUNE), the East African Committee on Judicial Education (EAJEC) under the auspices of the East Africa Community (EAC) Secretariat held the inaugural East African legal aid regional conference in Nairobi, between 5th and 8th November, 2018.

The conference themed *Understanding approaches to Legal Aid in enhancing access to Justice and harnessing the engagement with formal and informal justice systems in dispensing justice* brought together experts in the legal aid field from the East African Region. The conference sought to identify challenges, gaps and capacity needs of African States that require intervention to establish effective state-funded legal aid schemes; Stimulate renewed commitment by countries to undertake policy review and development, legislative and regulatory measures to facilitate the establishment and administration of effective state-funded legal aid schemes.

It also sought to share experiences, lessons learned and international best practices, in the establishment and administration of state-funded legal aid schemes and the development of frameworks for peer support, including mechanisms for implementing inter-country reviews to track progress. The conference also explored ways of enhancing collaboration and cooperation between Member States and non-state agencies engaged in legal aid services within the region as well as identify modalities to facilitate knowledge transfer and the sharing of information among stakeholders in the justice sector on the interface between the rule of law, judicial

training and legal aid and explore the various institutional frameworks for the creation of linkages between the formal and informal justice systems.

The inclusion of access to justice in the development goals is an acknowledgement by Governments that access to justice as a component of the rule of law and development is essential for sustainable development at the national and international level. The Bill of Rights provides the necessary impetus for the development of a legal and institutional framework for the promotion of access to justice. In particular Articles 48 and 50 obligate the State to ensure access to justice for all. The Legal Aid Act was enacted in 2016 leading to the establishment and administration of the National Legal Aid Service to offer affordable, accessible, sustainable, credible and accountable legal aid service to the vulnerable. Relatedly, the Office of the Attorney General is also keen on working towards a Reparations Policy and Regulations with the objective of operationalizing the Victims Compensation Fund to especially compensate victims of historical injustices as well as other injustices.

Drawing from the shared experiences from South Africa, Malawi and Vanuatu/Pacific region, participants proposed mechanisms to promote policy dialogues on regulatory and institutional reforms and funding for legal aid services as well as strategies for ensuring effective and quality legal aid delivery systems. It was observed that the best legal model aid for legal aid must take into account specific national and regional realities, including the resource situation, the human resource capacity, regional reach and the role of other actors and paralegals. The identified model must identify stakeholders and use evidence-based approaches that take into account actual numbers, win hearts of the politicians, establish

synergies to facilitate mobilization of resources and avoid overreliance on donor support but must also be backed by statute or the constitution.

Various models in place include Kituo cha Sheria, a legal aid NGO who use pro-bono lawyers and paralegals, mobile platform technology for legal aid services such as M-Haki. The NGO also uses community and prison based paralegal justice centres while partnering with the Judiciary to implement alternative justice system project that have instrumental in resolving property disputes arising from the post-election violence of 2007/8.

In Malawi the Legal Aid Bureau use civic education and awareness, village mediation and paralegal projects to provide legal aid. The National Legal Aid Coordination Committee monitors provision of legal aid services at the national level while donor communities support the bureau to sign corporation agreement with state and non-state actors in provision of legal aid. Camp court sit in prison centres where paralegals participant by helping through explanations or clarifying issues to the court but not to defend a suspect.

In Uganda, legal aid innovations include pro bono duty counsel in magistrates court, justice for children programs, public private partnership with local government, use of information management systems, barefoot law project and student law clinics. To enhance funding in legal aid service delivery, the council allocates budget for legal aid. Fund mobilization is also done through crowd funding software to collect money for legal aid from the community.

In South Africa the Legal Practice Act, 2014 entrusts the Legal Practice Council with the responsibility of establishing a self-regulatory framework for paralegals working in

community advice organizations. The Government of South Africa has begun the process of drafting a bill to regulate paralegals.

Court of Appeal judge Philp Waki acknowledged that the concept of access to justice remained wide. The Judge highlighted the impediments to access justice in Kenya noting there was need to commence the implementation of Court Annexed Mediation. The Task Force on Alternative Justice System encouraged the use of ADR and as it established the small claim court that exclude advocates from their proceedings in order to expedite cases.

In Kenya, before the adoption of the Constitution of Kenya 2010, the legal aid service delivery model was largely spearheaded by civil society organizations. The Law Society of Kenya operated with minimal state interventions since the old constitution did not guarantee the right to legal representation at the public expense. This has since changed with the enactment of the Legal Aid Act 2016 that provide for legal aid services in both criminal and civil matters. The National Legal Aid Services administers the national legal aid scheme while courts have a duty to inform the Service to provide legal aid to an accused person where appropriate.

Like Kenya, Zimbabwe also has a state led model of legal aid service delivery. The Legal Aid Act, 2016 established the Legal Aid Directorate and the Legal Aid Fund but the provision of legal aid remains subject to the discretion of the director who considers different means to test and availability of resources to provide legal aid. There have been concerns over the independence of the director since he is subject to policy direction by the Minister responsible for legal aid matters. It was noted that the director could only use government appointed lawyers and would not appoint independent lawyers. Judges would only recommend to the director to provide legal aid to indigent persons.

The Legal Aid Fund can be financed through parliament appropriations, donations and contributions, contribution by beneficiaries and reduction from final award. Legal aid service provision in Tanzania is largely provided by civil society organizations as well as by the Tanzanian Law Society and the Law Clinic of University of Dar es Salaam. Application for provision of legal aid is in accordance with internal rules of service providers. In criminal matters, judges and magistrates may certify cases for legal aid. During the plenary discussions, Justice Kathurima M’Inoti noted that the Tanzanian model was largely concerned with regulation of legal aid service providers and but not on the obligation of the state to provide legal aid in civil and criminal matters. The Judge called for increase in public private partnerships as the only viable way of ensuring sustainability of legal aid services observing that non-state actors had a crucial role to play especially in the context of underfunding of state funded legal aid schemes.

The participants from different member states resolved to establish a regional network of legal aid service providers to be known as East African Legal Aid Network with the overall goal being to promote and protect the right of access to justice through legal aid.

Legal Challenges Affecting Wage and Benefit Administration in Kenya

By A. Chesaina

Remuneration is the aspect of work that has the most direct and tangible impact on the day to day lives of workers and their dependents. In most employment relationships, remuneration is obtained in the form of wages paid for the work that is performed. It is defined in Article 1 of the Equal Remuneration Convention 1951 (No. 100) as the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.

Wages and salaries are a key aspect of the quality of work and a major component of household income. The 2008 *ILO Declaration on Social Justice for a Fair Globalisation* calls for policies in regards to wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection. Section 18(2) of the Employment Act defines wages depending on the nature of employment.

Under the law, every worker is entitled to receive full payment for work done. Full pay includes wages, which are payments made on an hourly, daily, weekly or piecemeal basis. Full pay may also be in the form of a salary, which is a fixed payment made on a monthly basis for professional or office work. The amount of full pay cannot be less than the standard minimum rate which is set forth in the Employment Act.

However, exceptions may apply in the following situations: **Piecework** is paid at the end of the month in proportion to work completed. A **casual worker** is generally paid at the end of each day, unless the worker requests otherwise. If employed for a period exceeding a month, payment is due at the end of each month. Workers employed for an indefinite length of time, payment is due at the end of the agreed contract, or at the end of the month. In case of summary dismissal, wages are paid up to the date of dismissal.

In addition to wages, every permanent worker is entitled to a housing accommodation or housing allowance. The rates for housing allowances are found in the current Year's Wage Orders, which are available at the Government Printer.

Deductions from Wages Other than the statutory deductions, an employer is general Is not allowed to make any deductions from an employee's wage. However there are several exceptions. If the worker is absent from work without leave, the employer can deduct wages equal to the amount of time when the worker did not work. An employer may deduct any contributions by a worker to his or her retirement or provident fund. If a worker damages/loses goods or money at the workplace, the employer may deduct the value of the lost goods or money from the worker's wages. Salary advances or loans can be deducted from a worker's wages.

On the date of payment, the employer must give each worker a pay slip stating all earnings due and any deductions made for that pay period. All wages must be paid in Kenyan shillings. However, a worker can request in writing that the employer pay wages either by cheque or by crediting the wages to the worker's bank account. When a worker is absent, the employer with permission from the worker may pay the wages to another person appointed by the worker. Generally, payment of wages is on a

working day and during working hours. Wages must be paid at or near the place of employment, or at a place agreed between both parties. This place of payment cannot be in a place where intoxicating liquor is sold or available for supply, except for parties employed to work in such an establishment.

Law on wages The Labour Institutions Act, No.12 of 2007 provides for Minimum Wages. Part VI of the Act consists of the wages council and the fixing of wages and terms and conditions of service. Labour Institutions, provide for their functions, powers and duties and other matters related to them. This part empowers the Minister of Labour to establish the Wages Councils. Generally there are 2 wages known as a **general wages council** and an **agricultural wages council** (Section 43 (1)). This part also constitutes a wages board (Section 43 (2)).

The Wage Councils and Boards are empowered to investigate remuneration and terms and conditions of employment in various sectors and report the findings and recommendations to the Minister. Based on the findings the Minister is empowered by the same Legislation after considering the recommendations to make a Wage Order determining the minimum wage and other conditions of employment for employees in any sector and area of the country. The Regulation of Wages Orders (for general and agricultural industry) are then published by Government Gazette (Section 46) setting the Minimum Wages and conditions of employment (Section 47).

The Labour Institution Act, Sections 43 (1) and (2), allows the Minister of Labour to establish wage councils which gives in proposals on minimum wages and conditions of employment. Further Sections 46 (1), (2) (a) and 47(1) (a) empowers the Minister to publish wage orders which sets the minimum rates of remuneration. The wage councils and boards are tripartite bodies involving representatives from Federation of Employers, Organization of Trade

Union and Government and chaired by an independent legal person - Section 44(3). Section 43(5)(b) allows wage council to consist of trade union representatives who are also party to the recommendations made to the Minister for fixation of minimum wages (Section 44(3)).

Up-ratings in Minimum wages may be set by collective agreements between employers and Trade Unions (Labour Relation Act, Section 57 (1) and (2)). Once such collective agreements are registered by the Industrial Court they become enforceable and binding to all involved parties for the period of the agreement (Section 59). In addition, Section 43(5) mentions that adjustments are done by the Minister of Labour after considering the recommendations from the tripartite Wage Boards as provided by the Labour Institutions Act, although the Minister still is empowered to make other adjustments without considering the recommendation of the councils.

Section 44 (5) of the Labour Institutions Act, 2007 provides that in the performance of its functions a wages council shall take into consideration (for recommendation) factors affecting both employers and employees. For employers, economic factors considered include; requirements of economic development, productivity levels, desirability of attaining and maintaining a high level of employment and the need to encourage investment. Others include; ability of the employer to carry on their businesses successfully, the operation of small, medium and micro-enterprise, the cost of living, the alleviation of poverty, the minimum subsistence level and the likely impact of proposed conditions of employment on current employment or the creation of employment. For the employees, emphasis is put on their needs and that of their families, the general level of wages in the country, cost of living, social security benefits and the relative living standards of other social groups. Section 44(5)(a)(b) mentions the general level of wages in the country, social benefits and the

relative standard of living of the other social groups, cost of living. Economic factors and economic development as well.

Minimum Wage Compliance is regulated via Section 61 of Labour Institution Act, and Section 87 (1) of the Employment Act which stipulate that a person who disobeys any provision of the Acts which includes failing to adhere to guidelines on minimum wages and conditions of employment is a criminal offence-and shall be liable to penalty of KES 50,000 or 3 months imprisonment or both, together with payment of the amount that is due the employee (difference between minimum wage and the actual wages-Section 48 (3)).

Section 16 of the Employment Act, 2007 provides for an individual aggrieved about the wages to file a complaint with the labour officer and this complaint will be considered as a complaint filed under Section 87. Section 87 provides that besides fines or imprisonment to non-compliance to Minimum wage, the employee is granted payment of the amount that is due to him. Section 49 of the Labour Institutions Act, 2007 Notwithstanding any provision of any written law, a labour officer may institute proceedings on behalf of and in the name of an employee for the recovery of a sum due from an employer to an employee by reason of the failure of the employer comply to.

Protection of wages and benefits In Kenya, the main institutions charged with addressing wage protection issues are the labour inspectorate and the court system.

The Labour Inspectorate: At the forefront of protection of wages and benefits are the labour inspectorates. In Kenya, they derive their authority from the law. In the Occupational Health and Safety Act, they are known as health officers whose function is to inspect workplaces to determine whether there are any materials or chemicals that are hazardous to the health of the workers there. In the Employment Act, they are labour inspectors. For example, section 54 of the Act gives the labour inspector powers to investigate workplaces regarding the use of child labour. Section 16 of the Employment Act, 2007 provides for an individual complaining about the wages to file a complaint with the labour officer and this complaint will be considered as a complaint filed under Section 87. Section 87, allows labour officers to lodge complaints to the Industrial Court on behalf of Claimants.

The Courts form a last line of defense in wage related cases. The courts determine the merits of wage cases, enforce the rights of workers to receive the wages they are owed. The Court is given powers to adjudicate over all cases of employment and labour relations involving employers, employees, employer's organizations and trade unions. A claimant will institute a claim in the Industrial Court by filing a statement of claim or memorandum of claim. The memorandum/statement of claim outlines the particulars of the parties and reasons for the cause of action. It sets out the grievances, any attempts to settle the problem out of court, submissions of the parties and prayers being sought from the Industrial Court. The memorandum/statement of claim must be accompanied by a verifying affidavit sworn by the Claimant before a Commissioner for Oaths. Any supporting documents must be filed with the claim. The Respondent will be required to file a reply to the memorandum of claim upon service. The reply to the memorandum of claim must also respond to the grievances and include submissions and orders sought for dismissal of the claim.

If a person is aggrieved by the decision of the Industrial

Court, a right of appeal lies in the Court of Appeal. The rules of the court are prepared in consultation with all stakeholders in the labour industry namely Federation of Kenya Employers (FKE) and Central Organization of Trade Unions (COTU).

Wages and the role of the Salaries and Remuneration Commission (SRC) Prior to establishment of SRC, wage determination in Kenya was a diverse process that involved many institutions and actors. These included; Parliament (PSC); Judiciary (JSC); Teachers Service Commission Remuneration Committee; State Corporations Advisory Committee (SCAC); and the Armed Forces Remuneration Review Board. Thereafter, Permanent Public Service Remuneration Review Board (PPSRRB) was established in November 2003 via Gazette Notice No. 7941. This was in recognition of the need for a central body to continually review and harmonize remuneration in the entire public service. This led to establishment of SRC in 2011. The SRC was established under Chapter 12, Article 230 (1) of the Constitution of Kenya, 2010 to rationalize remuneration and benefits in the entire public service; **set and regularly review the remuneration and benefits of all state officers; and advise the National and County governments** on remuneration and benefits of all other public officers.

The SRC takes into account the following principles in performing its function as outlined in Article 230 (5); ensure that the public compensation

bill is fiscally sustainable; ensure that the public services are able to attract and retain the skills required to execute their functions while recognizing and appreciating productivity and performance. SRC also considers transparency and fairness as well as equal remuneration to persons for work of equal value (Section 12 (1) of SRC Act, 2011).

Kenya has about 737, 200 public sector employees. The employees are spread across the Teaching Service, Civil Service, Parastatals, Constitutional Commissions, Independent Offices and the Disciplined Services. The wage bill components comprises of the basic/base pay, allowances and benefits. The Commission before undertaking Job Evaluation exercise advised on wages to institutions on a case to case basis.

A wage analysis was carried out for each institution based on the set parameters that include affordability/sustainability; comparability; and equality. The importance of Job evaluation is to determine comparable and relative worth of jobs indicated under the scope of work; provide criteria for classifying jobs; provide a rationalized, harmonized and equitable job-grading structure; and provide a salary survey and recommend a salary structure.

Wage Determination Approaches In Kenya, wages and other terms and conditions of employment are determined through, the Minimum Wage Regulation (LIA-43); Collective Bargaining

Agreements (LRA/EA/LIA); Administered Approach in the Schemes of Service and finally through the Flexible/Near Market Approach or Pattern Bargaining.

Minimum Wage Regulation (LIA-43) is an important criterion in the payment of wages that prevents the exploitation of weak, un-informed or isolated groups of individuals. Minimum wages in Kenya are specified as part of a national wage policy set in place before independence and guided up to 2007 by the Regulation of Wages and Conditions of Employment Act, (Cap. 229). The Act has since been repealed and the minimum wage fixing mandate is now regulated under Sections 43(1) and (2) of the Labour Institutions Act.

Collective Bargaining Agreements (CBAs) are developed through a negotiation process involving employers and/or their representatives (trade unions) on the terms and conditions of workers. CBAs usually involve staggered long-term contracts, conditions of employment, fringe benefits and union membership drives. The requirements for voluntary negotiations and collective bargaining are provided for in the Employment Act, (2007), Labour Institutions Act, (2007), and Labour Relations Act, (2007). Kenya's industrial relations machinery provides for collective bargaining between employers and workers' representatives (trade unions).

Flexible Wage Fixing is an approach that is mainly applicable in the non-unionized segment of the private sector. Under the flexible/near market approach, wages and other terms and conditions of employment are fixed through minimum wage regulation, direct negotiations between individual employees and the management, and discretion of the company's board of directors or as may be outlined in the company's human resource policy.

Administrative Reviews (Scheme of Services) refers to wage determination process where wages and other terms and conditions of employment are determined via Schemes of Service and periodic reviews by ad hoc taskforces, committees and commissions appointed by the Government. This approach is applicable in the public sector, specifically central government.

Civil Litigation: Government Wins KSh. 8 Billion as Judgment Set Aside By K. Onyiso

On 6/12/2018, the Court of Appeal sitting at Eldoret set aside the judgment of the Environment and Land Court, Eldoret, that had awarded Kshs. 3,736,070,381.23 to the estate of one Thomas Kipkosgei as compensation for the loss of 546 acres of land and the estate of one William Kimngeny Kshs. 4,132,942,326.49 for the loss of 604 acres of land. The Judges also set aside the award to the estates of the sum of KSh. 500,000,000 as mense profits.

The three judge-bench comprising of Judge E.M. Githinji, J. Mohammed and J. Otieno Odek, set aside in entirety, the judgement of the Environment and Land Court dated 15th April 2018 which initially was Civil Appeal no. 51 of 2016 consolidated with Civil Appeal no. 58 of 2016.

The Petition

Nathan Tirop Koech and Zacharia Kimutai Kosgei as the administrators of the estate of Thomas Kipkosgei Yator (deceased) together with Ezekiel Kiptoo and Ernest Kibet as the administrators of the estate of William Kimngeny Arap Leting (deceased) sued the government for unlawful subdivision of land. The administrators through their Advocate Mr. J. Kipnyekwei instituted a petition in the Environment and Land Court Eldoret being Elodoret Environment and Land No 1 of 13 claiming that government officers had unlawfully sub-divided and allotted to third parties the deceased persons parcels of land subsumed in land parcel I.R. 17542 (L.R. 10492).

Sued on behalf of the government included the Chief Land Registrar, Registrar of Titles, Ministry of Lands, Director of Survey and the National Land Commission who were represented by Senior Principal State Counsel Mr. K.O Onyiso and Mr. Wabwire. The National Land Commission (NLC) was represented in the matter by Messers B.P Ochieng and Biko.

The respondents contended that they were registered proprietors of Land Reference No. L.R. 17542(L.R. 10492). Further that the Government of Kenya, through the appellants fraudulently, unlawfully and without the procedure laid down for compulsory acquisition of land, acquired and sub-divided portions of the suit property and allotted it to various individuals and public entities without the knowledge and consent of the registered proprietors. It was further contended that due to illegal acquisition and fraudulent sub-division of the suit property, the appellants were liable to compensate the respondents the value of the illegally and unconstitutionally acquired portions of the suit property.

In a petition dated 12th February 2013 and amended on 29th September 2014, the respondents filed Petition No. 1 of 2013 at the Environment and Land Court as administrators of the Estate of Thomas Kipkosgei Yator and William Kimngeny arap Leting.

On 28th June 1965, five individuals: Mr. Thomas Kipkosgei arap Yator, Mr. William Kimngeny arap Leting, Mr. Nathaniel Chelugui, Mr. Noahn Kimngeny and Mr. Cherwon arap Maritim, purchased the suit property (L.R. No. 17542-L.R. No. 10492) measuring 3,236 acres (Less 26 acres road reserve) from Mr. Jacobus Hendrick Engelbrecht for Kshs. 360,000/=. The purchase sum comprised the purchasers' own savings and a loan from the then Land and Agricultural Bank. The quint (5) fell in arrears in repaying the loans and they made a decision to sell a portion of the suit property measuring 51.49 Ha (126 acres) to Huruma Farmers Company Limited. The proceedings of the sale were applied in offsetting the entire debt and owing to the Land and Agricultural Bank.

On 7th August 1976, they applied and obtained the consent of Turbo-Soy Land Control Board for the purpose of sub-dividing the same. The land was supposed to be sub-divided among the said persons. They surrendered the grant to the Chief Land Registrar for this purpose. However, the Chief Land Registrar and other government officials failed to sub-divide the land in their favour but instead sub-divided the same in favour of third parties. This, they alleged, was a violation of their right to property for which they claimed damages.

The government opposed the petition. It was the government's position that the said administrators were not entitled to compensation due to several reasons. Firstly, the alleged owners had sold part of the suit land to third parties. They had further sold part of the land to squatters calling themselves Huruma Farm. At the same time, the alleged owners had surrendered part of the suit land to the government for public utilities such as roads, sewerage and Police Rifle Range while other parts of the suit land were compulsorily acquired by the government and the same had received full compensation from the government.

In suit papers, the 5th respondent, the National Land Commission argued that the dispute should have first been dealt with by the Commission before being brought to the regular courts as the claim was founded on the historical injustice. It argued that pursuant to Article 67(2) (e) of the Constitution, NLC was the suitable forum to investigate the claims in the petition.

NLC further submitted that the 2010 Constitution had provided a specific mechanism for addressing historical land injustices and the trial court erred in not giving an opportunity to the NLC as the body mandated to investigate and handle historical injustices similar to the claims raised in the Petition. The appellants countered that nowhere in the Petition was the phrase "historical injustice" alluded to but instead the petitioner's claim was founded on violation of Section 75 of the retired Constitution and not grounded on historical claims.

High Court Judgement

The Petition was heard by Justice Antony O. Ombwayo, who upon hearing the parties to the petition by way of affidavit, site visit and submissions, delivered judgement dated 15th April 2016. The judge held that the government had violated the

petitioners' rights to property and awarded the estate of the deceased persons compensation. The judge made several declarations. A declaratory order holding that that proprietary interest in 546 and 604 acres of land comprised in Land Parcel I/R No. 17542, L.R No. 10492 otherwise known as Eldoret Municipality Block 15/1 land Eldoret Municipality Block 3 (King'ong'o) be absolutely vested in the petitioners respectively s co-owners. A declaratory order holding that the respondents' seizure of the deceased estates property other than by way of compulsory acquisition, without consent or compensation was unconstitutional. An order of mandamus to compel the respondents to jointly and or severally pay; the Estate of Thomas Kipkosgei arap Yator KSh. 3,736,070.381/23 billion fair compensation for loss of 546 acres of the land, the estate of William Kimngeny arap Leting Kshs 4,132,942,326.49 billion being fair compensation for the loss of 604 acres of the suit land and compel the appellants to jointly and or severally pay the 1st to 4th respondents' mesne profits in the sum of Kshs 2,690,603,339/= billion for the loss of the suit land for over 30 years. However, the court was inclined to award a nominal figure of Ksh.500,000,000 as mesne profits.

Court of Appeal Judgement

The government was aggrieved by the judgment of the High Court and hence appealed to the Court of Appeal. The Court of Appeal appraised the judgment of the High Court and held that the Judge erred in several areas. Accordingly, the judge did not interrogate various letters that were produced in evidence showing that the suit land had been sub-divided and re-subdivided, sold, surrendered to the government and compulsorily acquired with the knowledge and consent of the original owners. Thus, the titles issued by the Commissioner of Lands were perfectly legal.

The Court further held that the Judge did not properly evaluate the evidence on record. They noted that had the judge relied on the evidence, he would have discovered that the administrators deliberately failed to produce all evidence that would have helped him determine liability. This deliberate omission the three judges ruled, bordered on suppression of evidence. This meant that the administrators had failed to prove their case on a balance of probabilities as required by law.

On the damages awarded, the Judges faulted the Valuation Report by Afriland Valuers Ltd. They argued that the Judge should not have relied on it but instead should have exercised an independent mind to determine whether the report was reasonable. They faulted the judge noting that he should have undertaken an analysis of the report to determine its accuracy, quality, appropriateness, the relevance of the data used, enquiries made and suitability of methods and techniques employed. These omissions on the part of the Judge rendered the report worthless. The judges stated in their judgement,

"The first valuation report valued the suit land at Kshs. 21,000,000,000 (Twenty-one billion) and the second report tabulated loss of user in the sum of Kshs 2,690,603,339.30. Counsel submitted that

the judge erred in failing to interrogate the expertise and the qualification of the valuer. The two valuation reports lacked material particulars; the valuer did not show how the said sums were arrived at and no reasons were given to support the figures and sums mentioned; there was no value for comparable land; and the loss of user report does not show how the average income was arrived at."

The Judges also held that the award of mesne profit in the sum of KSh. 500,000,000 was erroneous. It had neither been pleaded nor proved thereby setting it aside. They stated,

"On the issue of mesne profits, the trial judge awarded the sum of KSh. 500,000,000/= as compensation for loss of user while the respondents had sought KSh. 2,690,603,339/= billion. A claim for mesne profits is a claim akin to special damages. It must be pleaded and proved. The respondents did not plead the sum of KSh. 500,000,000/= awarded by the trial judge as mesne profits. They also did not satisfy the trial court that they ought to be awarded the sum of KSh. 2,690,603,339/=pleaded in the amended Petition as mesne profit."

The judges contended that the valuation report by the respondents did not realistically apply the formula as enunciated by the Privy Council. They observed that the respondents were not entitled to KSh. 2,690,603,339/= as mesne profits nor were they entitled to KSh. 500,000,000/=. In their ruling, the judges were of the view that the Onus was on the respondents to prove that they were entitled to mesne profits and further prove the specific amount they were entitled.

The judges further observed that the Constitution did not define what historical injustice constituted. They noted,

"Section 15(2) of the National Land Commission Act as amended by Section 38 of the Land laws (Amendment) Act No. 28 of 2016 defined historical injustice. Section 15(3) (e) of the NLC Act as amended introduced a limitation period of five years for claims related to historical injustice. A claim on historical injustice should not be entertained after a period of five years from the date of commencement of the Land Laws (Amendment) Act."

It was the considered view of the judges that a court had jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC had been seized of the matter. Article 67(2) e) of the Constitution provided that the NLC could investigate "present or historical" land injustices. The judges felt that if the NLC had an initial and exclusive mandate, it would mean that all present cases on land injustices would only be handled by the NLC and not courts of law. This would prima facie render the Environment and Land Courts redundant. Section 15(3) (b) of the NLC Act permits the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary court system.

National Legal Aid Service (NLAS)

The National Steering Committee (NSC) for the National Legal Aid and Awareness Programme (NALEAP) with the mandate to facilitate access to justice for all and create an enabling environment for the establishment of a national legal aid scheme in Kenya was established through Gazette Notice No. 11589 of 2007. The Programme transitioned to the National Legal Aid Service under the Legal Aid Act, No. 6 of 2016, in 10 May 2016. Its mandate is to provide and fund legal aid services in Kenya through a Legal Aid Fund; establish and administer a national legal aid scheme; encourage and facilitate the settlement of disputes through alternative dispute resolution.

National Committee on Implementation of National Humanitarian Law,

Established in 2001, The National Committee was reconstituted on 10 June 2016. Its mandate is to coordinate and monitor implementation of IHL in Kenya, advise the government on IHL instruments that need to be ratified, review existing legislation and recommend amendments where necessary, recommend new legislation where applicable, advise on administrative measures required, coordinate, monitor and evaluate dissemination and undertake or commission research on IHL and make appropriate recommendations to the government.

Witness Protection Agency (WPA)

A body corporate established under the Witness Protection Act, (Cap. 79 Laws of Kenya) which came into operation on 1st September 2008 vide Legal Notice No. 110/2008 dated 19th August, 2008 as amended by the Witness Protection (Amendment) Act, 2010. The object and purpose of the Agency is to provide the framework and procedures for giving special protection, on behalf of the State, to persons in possession of important information and who are facing potential risk or intimidation due to their co-operation with prosecution and other law enforcement agencies.

National Council for Law Reporting

Kenya Law Reports is a public body established under the National Council for Law Reporting Act (Act No. 11 of 1994). The mandate of the Council is to publish the Kenya Law Reports which contain the judicial opinions of the superior courts of record and which are the official law reports of the Republic of Kenya; to revise, consolidate and publish the official Laws of Kenya; to issue such other related publications and to undertake such other functions as may be conferred by law.

Auctioneers Licensing Board (ALB)

Established in 1997 under an Act of Parliament to consolidate and amend the law relating to auctioneers, to provide for the licensing and regulations of the business and practice of auctioneers, and for connected purposes.

In the next issue:

1. Conversations with former Attorneys General of Kenya.
2. Reflections: The 1st African Registrar General.
3. Civil Litigation: Defending Public Interest in LAPSSET.

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SEMI AUTONOMOUS GOVERNMENT AGENCIES ASSOCIATED WITH THE OFFICE OF THE ATTORNEY GENERAL AND DEPARTMENT OF JUSTICE

Kenya Copyright Board (KECOBO)

Is established under the Copyright Act, 2001 (Cap 130). Its mandate is the overall administration and enforcement of copyright and related rights in Kenya. Its mission is to promote the growth of creative industries through effective administration and enforcement of copyright for socio-economic development in Kenya.

Kenya School of Law (KSL)

Is established by the Kenya School of Law Act, No. 26 of 2012 to provide legal education and professional training as an agent of the Government and specifically to train persons to be advocates under the Advocates Act, provide continuous professional development for all cadres of legal profession, provide paralegal training, develop curricular and training manuals, undertake research and offer consultancy services.

Council of Legal Education (CLE)

Is a public body corporate established under the Legal Education Act No. 27 of 2012 with the mandate to promote legal education and training. The Council licenses legal education providers; harmonizes Legal Education programs; Recognizes and approve qualifications obtained outside Kenya for purpose of admission to the roll of Advocates, administer Bar Examination as prescribed under section 13 of Advocates Act and advice Government on Legal Education and Training.

Nairobi Centre for International Arbitration (NCIA)

Is established under the Nairobi Centre for International Arbitration Act (No. 26 of 2013). Its mandate is to promote international commercial arbitration in Kenya and the use of other alternative disputes resolution (ADR) mechanisms through administration and training so as to enhance the ease of doing business through enforcement of contracts.

Kenya Law Reform Commission (KLRC)

Is established by the Kenya Law Reform Commission Act, 2013 with the mandate to keep under review all laws and recommend reform(s) to ensure conformity to the letter and spirit of the Constitution; to provide advice, technical assistance and information to the National and County Government legislation; formulate by means of draft Bills or otherwise, proposals for reform of National or County legislation; and to advise National and County Governments on the review and reform of their legislation.

Assets Recovery Agency (ARA)

Is established under the Proceeds of Crime and Anti-Money Laundering Act, Cap 59 B of the Laws of Kenya and is one of the principal institutions within the criminal justice system implementing the Anti Money Laundering and Counter Financing of Terrorism (AML/CFT) framework in Kenya. Its principal mandate is identification, tracing, freezing, seizing and confiscation of all proceeds of crime. The Agency is an integral institution against money laundering, terrorist financing and transnational organized crime.

Victim Protection Board (VPB)

Is established vide the Victim Protection Act, 2014 and mandated to advise the Cabinet secretary on inter-agency activities aimed at protecting victims of crime and the implementation of preventive, protective and rehabilitative programs for victims of crime.

National Anti-Corruption Campaign Steering Committee (NACCSC)

Is established under the State Law Office and Department of Justice vide gazette notice No. 6707 dated 19 September 2014 mandated to undertake a nationwide public education sensitization and awareness creation campaign aimed at effecting fundamental changes in the behavior, attitudes, practices and culture of Kenyans towards corruption.

Business Registration Service (BRS)

Is established under the Business Registration Service Act, No. 15 of 2015. It is responsible for the general implementation of policies, laws and other matters relating to the registration of companies, partnership and firms, individuals and corporations carrying on business under a business name, bankruptcy, hire purchase and chattels transfers.