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Efficiency of process

The Judiciary of Kenya has increasingly been embracing the use of technology to increase efficiency in litigation and reduce costs. For instance:

a) Since March 2020, the Judiciary has adopted virtual court proceedings except in rare cases where in-person attendance before a judicial officer cannot be dispensed with. The Magistrates' Courts and the High Court conduct their sessions through Microsoft Teams while the Court of Appeal uses GoTo Meeting for its virtual sessions.

b) In July 2020, the Judiciary rolled out an electronic filing system to replace the hitherto filing of paper pleadings and documents at the various court registries.

Over the years, the Judiciary of Kenya has introduced other measures and initiatives aimed at increasing its efficiency. Such measures include:

a) Continuous recruitment and engagement of additional judges, judicial officers, and judicial staff.

b) Establishing additional court stations.

c) Institutionalisation of performance management for judges, judicial officers, and judicial staff.

Where parties and their counsel abide by the court's directions and timelines regarding the filing of pleadings, documents, and skeleton arguments, the courts are largely efficient in the dispensation of justice.

Through its Blueprint for Social Transformation through Access to Justice, the Judiciary aims to ensure that trials do not take more than three years in the court system and that appeals are resolved within one year of filing.

Early judgment procedures

A litigant can apply for and obtain early judgment through:

a) judgment in default of entering appearance or filing a defence;

b) judgment on admission; and

c) summary judgment.

Judgment in default may be entered against a defendant who, even though served with summons and substantive claim, fails to enter appearance within the stipulated timelines. In applying for judgment in default, the plaintiff will be required to prove proper service of the summons and claim upon the defendant.

Where a defendant admits to the plaintiff's claim, the plaintiff can, upon filing the substantive suit, apply for judgment on admission without waiting for determination of the other issues. The plaintiff will be required to demonstrate that the admission in question is plain, obvious, and unequivocal.

For liquidated claims where the defendant's pleadings do not raise any triable issues in response to the plaintiff's claim (i.e., where there is plainly no defence to the plaintiff's claim), the plaintiff can apply for summary judgment to be entered against the defendant.

Integrity of process

The Judiciary of Kenya observes the rules of natural justice. Article 50 (1) of the Constitution of Kenya provides that **every person** has the right to have any dispute that can be resolved by application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. As such, all litigants are allowed an adequate opportunity to present their case, and the judicial officer hearing the case or making the decision is required to be impartial.

Article 160 of the Constitution further provides that in exercising judicial authority, the Judiciary shall not be controlled or directed by any person or authority. Rather, it should only be subject to the Constitution and the applicable law.

The Constitution of Kenya mandates all public institutions, including the Judiciary of Kenya, to be transparent and accountable in the performance of their mandate. As such, in accordance with the Bangalore Principles, any person exercising judicial power is required to ensure that they act in a manner that re-affirms the faith of the people in the integrity of the Judiciary.

The Judiciary of Kenya has various checks and balances to ensure the integrity of the judicial system and address allegations of ethical violations by judicial officers and staff. Some of the strategies implemented by the Judiciary to ensure judicial integrity include:

a) Establishment of a complaints handling mechanism domiciled in the Office of the Judiciary Ombudsman.

b) Conducting periodic audits and evaluations to identify areas of vulnerability.

c) Partnering with local and international institutions to share best practices in combatting corruption in the Judiciary.

d) Implementation of the Judicial Code of Conduct through a structured training programme.

e) Implementation of e-processes such as e-filing, transcription, case tracking systems, electronic record keeping and enterprise resource planning to minimise human intervention and reduce opportunities for corruption.

f) Strengthening judicial independence.

Privilege and disclosure

At the point of filing their respective pleadings, parties are required to file the list of witnesses, witness statements, and bundle of documents they will rely on in support of their respective cases. A litigant under the belief that the opposing party has possession or control of documents relevant to the case can apply for discovery of documents.

Privilege

Kenyan law recognises and protects various types of privilege, including the following.

Legal professional privilege (Section 134 of the Evidence Act)

Unless with the **client's express consent**, an advocate is prohibited from disclosing any communication made to him/her in the course and for the purpose of his/her employment, by or on behalf of his/her client, or to state the contents or condition of any document with which he/she has become acquainted in the course and for the purpose of his/her professional employment.

However, legal professional privilege does not protect:

a) any communication made in furtherance of any illegal purpose;

b) any fact observed by an advocate in the course of his/her employment as such, showing that any crime or fraud has been committed; or

c) someone without a formal legal professional qualification performing the functions of a legal adviser (e.g., an accountant or legal aid officer).

Legal professional advice only arises where there is an advocate-client relationship or where such a relationship is at least conceived. The mere fact that the person to whom the communication is made happens to be an advocate, therefore, will not in and of itself be sufficient to establish the privilege.

The privilege against self-incrimination (Section 128 of the Evidence Act)

A witness in legal proceedings may refuse to answer questions the answers to which may incriminate him/her by exposing him/her to subsequent criminal proceedings. Article 50 (2) (l) of the Constitution of Kenya provides that every accused person has the right to a fair trial, which includes the right to refuse to give self-incriminating evidence.

Privilege of judicial officers (Section 129 of the Evidence Act)

No judicial officer shall, except upon special order of some court to which he/she is subordinate, be compelled to answer any questions as to his/her own conduct in court as a judicial officer, or as to anything that came to their knowledge in their capacity as a judicial officer. However, the judicial officer may be examined as to other matters that occurred in their presence while acting as a judicial officer.

Privilege of communications made during marriage (Section 130 of the Evidence Act)

No person shall be compelled to disclose any communication made to him/her during marriage by the other spouse. Additionally, such person shall be prohibited from disclosing such communication without the consent of the person who made the communication except in suits between the parties to the marriage.

Privilege of official communications (Section 132 of the Evidence Act)

No public officer shall be compelled to disclose communications made by any person to him/her in the course of his/her duty when he/she considers that the public interest would suffer by the disclosure.

Evidence

Kenya's legal system is adversarial, i.e., parties collect and present their evidence before an impartial judge or magistrate who considers the evidence and renders a decision.

The court may, on an application by a party or on its own motion, issue any orders or directions as may be necessary in all matters relating to the: admission of documents; delivery and response to requests for documents; and discovery, production, inspection, impounding and return of documents.

The court may also issue witness summons to persons (third parties) whose attendance is required for purposes of testifying or producing documents. The expenses of such witnesses are to be met by the party applying for the summons.

Failure to comply with summons on the appointed date may result in the issuance of a warrant of arrest or an order for attachment of the property of the non-compliant witness.

Costs

Section 27 of the Civil Procedure Act grants the court or the judge the power to attribute costs. The general rule is that costs should follow the event unless the court or judge, for some **good reason**, directs otherwise. Put differently, the party that succeeds in the action should get the general costs of the action. No criteria exist for determining what amounts to a good reason that would justify a departure from the general rule. However, it is widely accepted that public interest litigation does not fall within the general rule on attribution of costs. In such cases, parties are normally ordered to bear their own costs.

An award of costs does not function to penalise the losing party. Rather, it acts as compensation to the winning party for the trouble taken in prosecuting or defending a claim.

In deciding whether to award costs, the court may take into account any of the following non-exhaustive circumstances: the subject of litigation; the conduct of the parties; the circumstances leading to the institution of the claim; events leading to the termination of the proceedings; the stage at which the proceedings were terminated; the relationship between the parties; public interest; and the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution.

A defendant is permitted to apply to the court to direct a plaintiff to provide security for costs expected to be incurred in defending the claim (Order 26 Rule 1 of the Civil Procedure Rules). Kenyan courts have crystallised the following as the principles that govern applications for security for costs:

a) *an order for the payment of security for costs is always at the discretion of the court*, to be exercised judiciously and only upon being satisfied, on evidence, that the defendant will be impeded in recovering costs should the suit be dismissed (see *Cancer Investments Ltd v Sayani Investment Ltd*, High Court (Nairobi) Civil Case No. 854 of 2004. See also *Saudi Arabian Airlines Corporation v Sean Express Services Ltd*, High Court (Nairobi) Civil Case No. 79 of 2013 at para. 29);

b) *applications for security for costs should be made as promptly as possible and should not be made too late or too close to the trial*, and may be refused unless there is a reasonable explanation for the delay (*Cancer Investments Ltd v Sayani Investment Ltd*, High Court (Nairobi) Civil Case No. 854 of 2004 at p. 3);

c) *foreign nationality or residency of a plaintiff is only one of many factors for consideration and, accordingly, not necessarily decisive of applications for security for costs* (*Moses Wachira v Neils Bruel & 2 Others*, Civil Appeal (Application) No. 188 of 2012 at paras 22–23); and

d) *an order for security for costs should not be used oppressively*, e.g., to discourage or stifle a genuine claim (see *Sir Lindsay Parkinson & Co. Ltd v Triplan Ltd* [1973] 1 Q. B. 609. See also Article 48 of the Constitution of Kenya, 2010).

Litigation funding

The historic prohibition against third parties from funding litigation in unconnected claims is yet to be phased out in Kenya. As such, third-party funding has not yet taken shape in Kenya's litigation and arbitration scene.

Rules governing the practice of law in Kenya prohibit agreements in the form of **champerty** (the funding of a person in a lawsuit on the condition that the subject matter of the action is to be split with the funder) and **maintenance** (a stranger supporting litigation without a legally sufficient reason).

As regards advocates, champerty is also prohibited under the Law Society of Kenya's Code of Standards of Professional Practice and Ethical Conduct on the rationale that an advocate with a financial interest in the outcome of a case is unlikely to provide objective and independent service to a client.

It is legal, though uncommon, for parties to take out insurance policies to cover legal and associated costs.

Class actions

Collective actions or class actions are permitted under Order 1 Rule 8 of the Civil Procedure Rules. Several parties having a similar interest in any proceedings against a common defendant or defendants may commence proceedings in a representative capacity.

Participation in collective actions is on an opt-in basis. Put differently, any party on whose behalf the class action is brought must apply to the court to be joined to the proceedings. Therefore, the parties commencing a class action are required to notify persons with a similar interest in the proceedings of the existence of said proceedings. The notification can be through personal service or, as is commonly the case, through an advertisement in a daily newspaper with nationwide circulation.

Interim relief

Courts have wide-ranging powers to grant interim relief on the application of a deserving party. Usually, the party applying for interim relief will be required to demonstrate that a right recognised under the law has been violated and that, but for the court's intervention, the offending party is likely to perform or refrain from performing certain acts.

The most common types of interim relief issued by Kenyan courts are injunctions (prohibitory or mandatory) and conservatory orders (for cases falling within the realm of public law). Interim relief can be obtained at an *ex parte* stage to subsist pending the

determination of the application or, where extended, to subsist pending the determination of the underlying suit or proceedings. As is required in *ex parte* proceedings, a litigant applying for *ex parte* interim relief is required to make full and frank disclosure of all the facts relevant to the proceedings.

A litigant applying for an interim injunctive relief will be required to:

a) establish their case at a *prima facie* level. To demonstrate a *prima facie* case, an applicant should adduce evidence that shows the infringement of a clear and unmistakable right, and the probability of success of his/her case at trial;

b) demonstrate the risk of irreparable injury if the injunction is not granted; and

c) allay any doubts as to point b) by showing that the balance of convenience is in favour of granting the injunction.

Where interim relief is required on an urgent basis, an applicant can move the court under a Certificate of Urgency. The Certificate of Urgency should provide reasons why the application for interim relief should be considered in priority of other matters and why the court should intervene forthwith. For meritorious applications, the duty judge will normally certify the matter as urgent and grant some sort of relief maintaining the *status quo* pending the *inter partes* hearing of the application for interim relief. Following the *inter partes* hearing, the interim relief may, where necessary, be extended to subsist pending the determination of the substantive suit.

Enforcement of judgments/awards

Enforcement of domestic judgments

Following the determination of an action either through trial, at the *ex parte* stage, or through settlement, the successful party applies for a decree, which can be enforced through various modes.

Where the decree-holder holds a money decree against the judgment debtor, it can make an oral application for execution of the decree at the time the judgment is rendered.

Under Section 38 of the Civil Procedure Act, a court may, upon application by a decree-holder, order that the decree be executed by:

a) delivery of any property specifically decreed;

b) attachment and sale of property;

c) sale without attachment of any property;

d) issuing a garnishee order;

e) arrest and detention in prison; or

f) appointing a receiver.

Enforcement of foreign judgments

The procedure for enforcing a foreign judgment depends on whether the country where the judgment originates from has a reciprocal enforcement arrangement with Kenya. Judgments originating from the reciprocating countries designated in the Foreign Judgement (Reciprocal Enforcement) Act are enforced on application by the judgment creditor to the High Court of Kenya to have the judgment registered. The application for registration must be made within six years of the pronouncement of the judgment. The application for registration should be accompanied by:

a) a certificate in the form set out in the Schedule to the Foreign Judgement (Reciprocal Enforcement) Act or to the same effect issued from the original court under its seal;

b) an authenticated or duly certified copy of the judgment; or

c) an affidavit deponing, *inter alia*, that, as at the date of the application, the judgment has not been satisfied, or as the case may be, the sums or items of moveable property in respect to which the foreign judgment relates remain unsatisfied, and that the foreign judgment can be enforced by execution in the country of the original court and can be registered in its entirety or in respect of certain parts of its provisions.

Once the High Court satisfies itself that the application for registration satisfies the stipulated criteria, it shall then order that the foreign judgment be registered. An application for registration may be denied where the court determines that:

a) it has been wholly satisfied; or

b) it could not be enforced by execution in the country of the original court.

The following countries are listed in the Schedule to the Foreign Judgement (Reciprocal Enforcement) Act as reciprocating countries: Australia; Malawi; the Republic of Rwanda; Seychelles; Tanzania; Uganda; the United Kingdom; and Zambia.

Where Kenya and the originating country do not have a reciprocal enforcement arrangement, any foreign money judgment can only be enforced in Kenya as a common law claim. This will entail the following.

The judgment creditor will lodge a Plaint at the High Court of Kenya setting out its claim against the judgment debtor. Under Kenyan law, the Plaint is to be accompanied by various documents, including a verifying affidavit, a list of witnesses, witness statements, and a list and bundle of documents. More importantly, the judgment creditor will be required to annex a certified copy of the foreign judgment. Any document, including the foreign judgment, that is not in English will have to be translated into English, with the translation copy being authenticated by a stamp, seal and signature of a judicial officer.

Upon filing, the judgment creditor will be required to serve the Plaint and accompanying documents upon the judgment debtor. The judgment debtor will have the opportunity to challenge the validity of the foreign judgment. Such challenge can be mounted on the grounds that the foreign judgment sought to be enforced is contrary to public policy or is not final or conclusive. A foreign judgment may be deemed inconclusive where:

a) it has not been pronounced on the merits of the case;

b) it has not been delivered by a court of competent jurisdiction;

c) it is founded on an incorrect view of international law;

d) it has been obtained through fraud; or

e) the judgment debtor's rights to natural justice were infringed upon.

Once the High Court of Kenya recognises the foreign judgment, it shall be enforced as if it were a judgment issued by Kenyan courts.

Enforcement of foreign arbitral awards

Kenya is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Section 36 (2) of Kenya's Arbitration Act provides than an international arbitral award shall be recognised and enforced pursuant to the provisions of the New York Convention.

A successful party in an arbitration may apply to the High Court in Kenya for recognition and enforcement of a foreign arbitral award. Such an application should be made within six years from the date of the award.

For a foreign arbitral award to be enforced in Kenya:

a) The award has to be in writing and signed by the arbitral tribunal.

b) The parties to the arbitration agreement must have had capacity to contract and the agreement must be valid under the laws of the foreign country.

c) The award must deal with disputes that fall within reference to the arbitration.

d) The award must state the juridical seat of the arbitration.

e) The award must be dated.

f) The award must be published, i.e., issued or released to the parties.

g) The party against whom the award was delivered must have been given proper notice of the appointment of the arbitrator or of the arbitration proceedings.

h) The applicant must provide the original arbitration agreement and the award or certified copies thereof. Where the arbitration agreement and award are written in a language that is not English, certified translated copies must be availed to the court.

i) The award must be conclusive and binding upon the parties. It must not have been set aside or suspended by a court of the state where or under the law of which the arbitral award was made.

j) The award must not be contrary to Kenyan public policy. The High Court of Kenya declined, on public policy considerations, to enforce an award in *Tanzania National Roads Agency v Kundan Singh Construction Limited* (2013) eKLR. The court found that the arbitral tribunal had applied English law as opposed to the laws of the Republic of Tanzania, which is the set of laws that the parties had contracted to apply to the dispute.

k) The award must not have been induced by bribery, fraud, undue influence or corruption.

Cross-border litigation

Kenyan courts generally grant freezing or injunctive orders against assets that are present within the jurisdiction.

Kenyan courts are cautious in extending their jurisdiction to foreign sovereign countries when granting freezing injunctions in support of foreign proceedings where there is no reciprocal enforcement arrangement between Kenya and the foreign state. In such cases, a parent suit will need to be filed in Kenya to establish the jurisdiction of Kenyan courts to issue orders over the subject matter in question.

Where a foreign court seeks judicial assistance in Kenya for the examination of witnesses, carrying out local investigations, and examining or adjusting accounts, the foreign court should issue a letter of request or *commission rogatoire* to the High Court explaining the level of assistance sought.

In principle, Kenyan courts abhor concurrent proceedings involving the same parties and same subject matter. However, as at the date of this submission, Kenyan courts are yet to issue an arbitration anti-suit injunction. The closest remedy they have issued is a stay of proceedings pending reference to arbitration under Section 6 of the Arbitration Act.

International arbitration

Kenya has signed 21 bilateral investment treaties with various countries, 12 of which are currently in force. The bilateral investment treaties stipulate that disputes arising from or related thereto between the Government of Kenya, on the one hand, and investors of the foreign state, on the other hand, are to be settled through international arbitration under the auspices of the International Centre for Settlement of Investment Disputes ("**ICSID**").

Kenya is a signatory to the ICSID Convention, having become a contracting state in 1967. Kenya has had the following three claims brought against it since becoming an ICSID contracting state: *World Duty Free Company Limited v Republic of Kenya*; *WaIAm Energy LLC v Republic of Kenya*; and *Cortec Mining Kenya Limited, Cortec (Pty) Limited & Stirling Capital Limited v Republic of Kenya*. The Cortec and WaIAm claims against the Republic of Kenya were dismissed in their entirety.

In line with international best practice in international commercial arbitration, Kenyan courts only allow limited judicial intervention in arbitration proceedings. Section 10 of the Arbitration Act provides that the court shall not intervene in matters governed by said Act except in the limited instances provided for under the Act. The Act allows for judicial intervention in various instances where parties fail to agree on particular issues. The limited instances of judicial intervention are:

a) Issuance of interim measures of protection where necessary (Section 7).

b) Determination of number of arbitrators where parties fail to agree (Section 11 (1)).

c) Appointment of arbitrators where parties fail to agree on the appointment procedure (Section 12).

d) Issuance of an order for stay of legal proceedings where the dispute falls for resolution through international arbitration (Section 6).

e) Determination of an application to set aside an arbitral award (Section 35).

f) Determination of an application for recognition and enforcement of a foreign arbitral award.

g) Determination of an application challenging the appointment of an arbitrator (Section 14 (1)).

h) Assisting the arbitral tribunal in taking evidence (Section 28).

i) Determination of the question of jurisdiction of an arbitral tribunal (Section 17).

Kenya currently has one arbitration centre, the Nairobi Centre for International Arbitration (the "**NCIA**"), which conducts and administers both domestic and international arbitrations. The NCIA is established under the Nairobi Centre for International Arbitration Act, 2013 (the "**NCIA Act**"). The NCIA has its Arbitration Rules and Panel of Arbitrators. The NCIA Arbitration Rules, 2015 (as amended in 2019) largely mirror those of the London Court of International Arbitration.

The NCIA Act establishes a court known as the Arbitral Court with exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with the NCIA Act or any other written law. Decisions of the Arbitral Court in respect of matters referred to it are final.

Kenya's Arbitration Act governs both domestic and international arbitrations. However, enforcement of international awards is governed by the New York Convention (see "Enforcement of foreign arbitral awards" above).

Mediation and ADR

Article 159 (2) of the Constitution of Kenya, 2010 mandates courts and tribunals, in the exercise of judicial authority, to promote alternative forms of dispute resolution, including mediation, reconciliation, arbitration and traditional dispute resolution mechanisms.

Furthermore, Article 189 (4) requires national laws to provide procedures to be followed in settling intergovernmental disputes through the use of alternative dispute resolution mechanisms.

In 2015, the Judiciary of Kenya implemented court-annexed mediation (i.e., mediation conducted under the umbrella and supervision of the court) to encourage parties to resolve disputes through mediation even where there are viable alternatives. The project necessitated various legislative and policy reforms to set up and entrench mediation as a formal avenue of dispute resolution.

Upon filing a case, it is forwarded to the Mediation Deputy Registrar to assess whether or not it is suitable for mediation.

If, upon screening, a case is determined to be suitable for mediation, the Mediation Deputy Registrar notifies the litigant of the decision to have the case referred to mediation. The Mediation Deputy Registrar will then appoint a suitable mediator from the Judiciary's pool of accredited mediators to handle the case. Parties are also free to agree to have a specific accredited mediator appointed to handle their case. The appointed mediator will schedule a date and time for the initial mediation session, which date and time shall be communicated to the litigants.

Subject to merited extensions, mediation proceedings are to be concluded within 60 days from the date of reference to mediation.

If, upon conclusion of the mediation, parties reach an agreement, the mediator prepares a Mediation Agreement with the participation of the mediating parties. The Mediation Agreement is then signed by the parties and placed before the judge for adoption of the agreement as an order of the court. At this stage, the agreement is final and binding upon the parties and can be enforced as a normal decree of the court. To the extent that the Mediation Agreement will be a consent agreement between the disputing parties, an appeal cannot be preferred against an order adopting the Mediation Agreement as an order of the court.

Where no agreement is reached following mediation, the matter is referred back to the court to proceed in the usual manner.

Except for limited instances relating to criminal acts or child abuse, communication exchanged during the mediation process is regarded as confidential. As such, said communication will be inadmissible as evidence in present or future litigation.

Regulatory investigations

Kenya has several authorities/agencies tasked with regulating various sectors of the economy. The decisions of the regulatory agencies are appealable to specific tribunals and the High Court.

Of relevance is the Competition Authority of Kenya ("**CAK**"), which is mandated under Section 7 of the Competition Act, 2010 to promote and safeguard competition in the national economy and protect consumers from unfair and misleading market conduct.

In May 2024, the High Court set aside a decision of the Competition Tribunal, which had ordered Majid Al Futtaim Hypermarkets Limited ("**Carrefour**") to amend all its supplier contracts on grounds of abuse of buyer power. The decision of the Competition Tribunal traced back to a complaint by one of Carrefour's suppliers that the supermarket had unfairly applied and collected rebates, refused to accept deliveries, transferred labour costs, and shifted commercial risk to the supplier. CAK investigated the supplier's complaint and determined that Carrefour had abused its buyer power. As a result, CAK imposed various financial penalties and ordered a raft of remedial action to be undertaken by Carrefour. Carrefour challenged CAK's finding at the Competition Tribunal, but its appeal was deemed unsuccessful. Carrefour further appealed to the High Court.

The High Court upheld the finding of CAK that Carrefour was guilty of abuse of buyer power in its dealings with the supplier. However, the court set aside the finding of CAK to the effect that Carrefour had to amend all its supplier contracts, including those that did not form the subject of the dispute before CAK. The court held that this was an unconstitutional finding to the extent that the other suppliers were not accorded a fair hearing having not participated in the proceedings.

At the time of this submission, CAK is conducting public participation in respect of various proposed amendments to the Competition Act, with the key amongst them seeking to remove "abuse of power" provisions and replace them with "abuse of superior bargaining position". The rationale behind the proposed amendments is to net in contractual relationships falling outside the scope of retailer-supplier relationships.

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