Lawyers have a huge role to play in regulatory bodies PAGE 18

Why you may not dispose of that property without your spouse's consent PAGE 26

NLC's mandate extends to private and community land PAGE 37

The Advocate

The LSK Magazine | Volume 1, Issue 3 | March - June, 2015

Emerging trends:

Opportunities await Lawyers in extractive industry

Lawyers fete cleric for unrivalled human rights bravery

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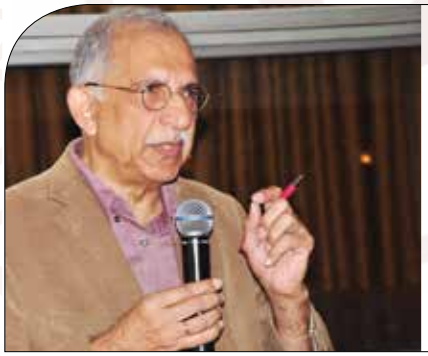
VOX POP

"Young lawyers are more likely to learn pillars of the profession by spending their compulsory pupillage period under the watch of senior practicing lawyers," High Court Principal Judge Justice Richard Mururu Mwongo said during the LSK Annual Cocktail at The Intercontinental Hotel, Nairobi.

"Lawyers as guardians of the law must conduct themselves in such a manner that they will maintain the highest ethical standards," LSK Vice President Ms. Lilian Renee Omondi during the swearing in of advocates of the High Court of Kenya

"Offering pro bono legal services is noble and practicing lawyers should strive for it towards assisting the disadvantaged to access justice and giving back to society," High Court Judge Hon. Lady Justice Jessie Wanjiku Lesiit during the Law Society of Kenya (LSK) Legal Awareness Week

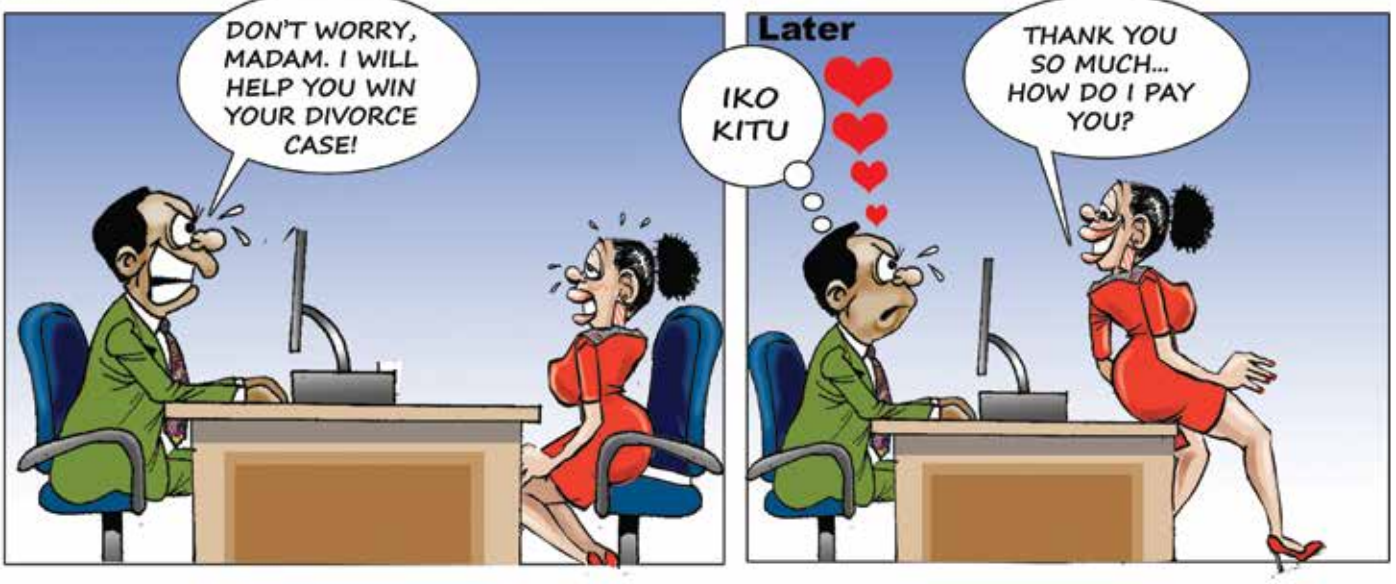
"We laud the Law Society of Kenya for championing and upholding the Rule of Law. We also recognize its efforts to be a globally respected Bar Association," US envoy Mr. Robert Godec during the LSK Annual Cocktail at the Intercontinental Hotel, Nairobi



"Lawyers have a duty to keep the Government on toes over the Rule of Law. Lawyers took the baton to champion for multi-party democracy under the regime of former President Moi," Senior Counsel Mr. Pheroze Eruch Nowrojee said when addressing newly admitted advocates at the Six Eighty Hotel in Nairobi.

WA-AKILI

By Stano



The emerging trends in the legal profession

The evolution of the legal profession has been fuelled by the significant legal reforms implemented over the years. The Constitution of Kenya 2010 ushered the dramatic ripple effect in the judiciary including the vetting exercise in response to public demand for integrity, transparency, independence and competence in the Judiciary. The new Constitution consequently unleashed the enactment of new laws as a consequence to implement the new governance structures of devolution which required the participation and vigilance of the Bar.

The 1949 governing legislation has been reviewed with the enactment of the Law Society of Kenya Act, 2014.

From a small Bar composed of pioneer British and Indian lawyers to a eleven thousand strong membership with a changing demography of more young lawyers, the Law Society of Kenya gained two constitutional seats in the membership of the Judicial Service Commission influencing the appointment of judicial officers, in addition to representation in a number of institutions performing quasi-judicial functions.

Changing landscape of the legal practice

The legal profession is in the midst of a dramatic transformation. The top challenges include economic turbulence on the practice due to societal and economic changes; adaptive technology; compliance and ethical issues; and continuing professional development. Clients continue to demand efficiency and responsiveness from their lawyers for less cost. Clients expect their lawyers to focus more on the outcome and less on time spent on a legal matter.

As the trail blazers and pioneers of the legal profession gets older, there is emergence of a large group of young professionals in the age group of between 20 to 35 years who now form the majority of the members of the Law society of Kenya.

The legal profession faces unprecedented economic pressures from accountants, realtors, financial advisors, and others – and the Internet is making it easier for them to compete.

Competition is also emerging from global legal service providers, as the doors to transnational practice by lawyers widen.

To reposition themselves, many legal professionals are adapting to Multi-disciplinary Practices requiring that they take up training and courses that complement legal education.

As the trail blazers and pioneers of the legal profession gets older, there is emergence of a large group of young professionals in the age group of between 20 to 35 years who now form the majority of the members of the Law society of Kenya. While the young professionals has brought with it vibrancy, the accompanying conduct with respect to the traditional tenets of the profession has witnessed dramatic erosion.
These are terrifying times for those having difficulty accepting and dealing with change. In a fast-paced, discontinuous change environment, the bar, law schools and law firms must recalibrate to emerging trends.

Going forward the focus areas for the Bar shall be: Law Firm Structure and Billing, Law Firm Marketing, Work-Life balance and Technology vis-à-vis the Practice of Law, Cross Border legal Practice, Educating and Training New adaptable Lawyers.

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I take this opportunity to wish you good health and God's blessings this year. As we get back to our busy rosters, let us remember the less fortunate by taking up pro bono briefs. In other jurisdictions like Uganda, it is a mandatory requirement for an advocate to demonstrate a definite number of hours engaged in offering legal services for free before issuance of a practicing certificate.

We are trained to serve, and serve we will diligently

Spotting from the title above, the person elected to head the Society is no longer a Chairperson but a President. This is in line with the practice adopted by all Bar Associations across the globe.

LSK Act 2014

The Law Society of Kenya Act, 2014 came into force on 14th January 2015. Some of the highlights of the new law include an enhanced mandate of the Law Society of Kenya (LSK); reformed electoral processes of the Council of the LSK; the governance structure of the organization and the establishment of branches (established by statute)

Society

Spotting from the title above, the person elected to head the Society is no longer a Chairperson but a President. This is in line with the practice adopted by all Bar Associations across the globe. The title "President" reminds me of an anecdote by the President of the Republic of Uganda, His Excellence Hon. Yoweri Museveni, during a courtesy call on him by The East African Law Society (EALS) in the year 2009. After the President of EALS introduced the President of the Uganda Law Society, President Museveni reminded the audience that, for proper edict and to avoid muddle, all the Presidents (from the Bar Associations of East Africa) in the hall should be referred to as presidents with a small letter "p". On the other hand reference to his presidency should be with a capital "P". I hope this will comfort those of us who may be worried of the change of title.

New Council

On more serious matters, in order to address the demographics of the Society and to benchmark the leadership of the Society with certain positions in the Judiciary, the qualifications and membership of the Council has been reviewed. For a member to be eligible for election as a President and Vice-President, they need to have practiced law for 15 years and must have been a Council member. The composition of the Council has also changed. This is geared towards the realization of parity in representation. Other than the three Council members (one of whom must be of 25 years' standing) who are to be elected from the entire membership of the Society, there shall be four advocates elected to represent the upcountry regions, three advocates to represent Nairobi and one advocate representing the Coast region.

Unless we resolve to improve and maintain professional standards, LSK may not play the pivotal role that it has played over the years.

Secret Ballot

Although, the Council elections of 2012 and 2014 were conducted by way of secret ballot, the repealed Act did not provide for such method. The new Act makes it mandatory for elections to be conducted by secret ballot. Such elections are to be supervised by a body to be proposed by the council and approved by the general meeting of the society.

New Branches

Lastly, the Act has established eight branches namely, Nairobi, Coast, Rift Valley, North Rift, West

Chief Justice Dr. Willy Mutunga (left) with LSK President Mr. Eric Mutua

Kenya, South West Kenya, Mount Kenya and South Eastern. The Council of LSK will give directions as to when the branches are to hold elections. The Act grants to the branches a statutory mandate to deal with issues of practice within their respective jurisdictions.

This therefore means that the LSK must fund the core activities of the branches. It is as a result of this reality that several general meetings of the Society have made resolutions for the construction of the International Arbitration Centre (which contains other income generating facilities) in order to raise reserves to sustain the head office secretariat and the branches.

Unless we take such steps in order to increase treasuries, an increment of annual subscription shall be inevitable.

I do not wish to say much on the International Arbitration Centre since some members have filed suit to challenge the project.

Filing suits

Filing suits against the LSK is not a novel thing. History tells us that there will always be lawyers who will antagonize, alienate and malign their professional body for political and bigoted interests. I say this because, I have no doubt in my mind that although there are those members who have raised unpretentious concerns about the financing of the undertaking, majority of those behind the suit are motivated by other considerations. For those members who are genuine, I wish to assure them that the project has been run and is being run in a prudent, farsighted and transparent manner. The Committee of Mwaniki Gachoka Advocate is addressing the issue of a Special Purpose Vehicle and shareholding.

Corrupt Judiciary

On practise matters, the Council has noted with a lot of fretfulness that corruption and ineptitude have crept back to the Judiciary. The high number of grievances from members that we receive at the Secretariat demonstrates this. We shall soon be conveying to the Judicial Service Commission (JSC) names of the 15 Judicial Officers who top the list. Additionally, we shall prepare specific complaints against certain Judicial Officers for corrective action. We are also alarmed by the fact that despite increased staffing of Judges and Magistrates, the time taken to complete cases remains the same.

Professional etiquette

Professional competence, ethical conducts and integrity in the Bar have deteriorated. Coupled with this is the lack of respect and decorum among professional colleagues. Unlike in the past, there seems to be laxity and a casual approach to this calling. As much as this may be a reflection of the wider society that we live in today, I wish to remind us that once we elect to be lawyers, we must be prepared to acknowledge that the legal profession is a noble with certain norms and traditions.

In event one is not prepared to abide by the ethos of the profession, they may not fit in the fraternity. We cannot be said to complain about the Judiciary when the Bar is gravitating towards malady. There must be sedateness in the manner of dress, how we address courts and colleagues, attend to clients and handle briefs. A Committee headed by Mr. Chacha Odera, Advocate is reviewing the Code of Conduct for Advocates that we hope is going to address some of the concerns.

Democratic space

Unless we resolve to improve and maintain professional standards, LSK may not play the pivotal role that it has played over the years.

On practise matters, the Council has noted with a lot of fretfulness that corruption and ineptitude have crept back to the Judiciary. The high number of grievances from members that we receive at the Secretariat demonstrates this. We shall soon be conveying to the Judicial Service Commission (JSC) names of the 15 Judicial Officers who top the list.

Guided by its statutory mandate, the Society has played and continues to play a very critical role in shaping policies in the country. I keep reminding critics of LSK that more than any other profession; members of LSK paid the heftiest price in the fight to expand democratic space and in achieving constitutional and legal reforms that the country now enjoys.

Dictatorial trend

Lawyers lost their lives, were detained, jailed and others risked their lives, families and businesses in defending the Rule of Law.

After the dethronement of Kenya African National Union (KANU), the leadership of the Law Society resorted to constructive engagement with a view to guiding the political class, Government institutions and agencies in enactment of legislation to protect democratic gains, which had been realized through near bloodshed. With the current dictatorial trend by the Government of the day, it is critical that we build a strong LSK that is capable of defending constitutionalism, democracy and the Rule of Law.

This we may not achieve unless we reflect upon our standards and ethics.

Eric Kyalo Mutua OGW,
President, Law Society of Kenya

LSK Council member Mr. Allen Gichuhi delivering a lecture on litigation at a CPD seminar in Nairobi.

Even lawyers have teething problems before they stabilize

By Allen Gichuhi

There is no greater joy than making your maiden appearance in court after your admission to The Bar. You had previously silently watched your seniors make their arguments in court, analysed their litigation styles and oratory skills. Their lessons were ingrained in your subconscious inspiring you to aspire to follow in their footsteps.

Sloppy advocacy

I recall my maiden court appearance was filled with trepidation and anxiety when I appeared before Honourable Hannah Okwengu (as she then was) on 24th February 1997. She had a reputation of being firm and would not suffer sloppy advocacy. Fortunately, I argued the application with confidence, verb and vigor. Truth be told, I was beset with a serious dose of butterflies in my stomach and beads of cold sweat were trickling down by neck.

Over the years, I have learned from my mistakes and developed my passion for litigation. There is no greater joy and satisfaction than achieving a just result for your client. Litigation is not about a legal battle of attrition but a quest for justice for the client and upholding the Rule of Law. Do not fail to advocate for Alternate Dispute Resolution (ADR) as majority of the clients seek a just and expeditious solution to a problem.

David and Goliath

As an adjunct lecturer at the Kenya School of Law, I always exhort the young lawyers to be confident and never be intimated in court. Be like David when he brought down Goliath. You must have faith in your client's case that is premised on sound legal research. Remember, once you have a reputation for thoroughness every senior advocate would want to poach you on account of your excellent litigation skills.

There is no greater tragedy than going to court ill prepared as you will do a great disservice to your profession and client. Good cases are easily lost because of lack of proper preparation.

Legal surgeon

When I first started off as a young advocate, my seniors would always instil this pearl of wisdom - always ensure that you read the respective Statute and applicable law before you begin drafting any pleading. Beware of complacency that tends to dull your creativity and focus. Do not blindly follow a precedent. I usually draw an analogy between a litigation lawyer and a surgeon operating on a patient. We should act like a legal surgeon with your client being the patient requiring a legal operation that will cure the legal affliction.

When you get your first brief, always understand the problem. If it is beyond you appreciation and comprehension do consult your seniors. Seek a mentor(s) who can reliably guide you on the right path. Be creative and think outside the box. Litigation is a like a game of chess. Legal strategy is the cornerstone to success. Make sure you diarise all the deadlines you have to meet.

Make proper use of your office hours. Avoid spending time on social media during office hours. This only distracts you and impairs your concentration.

Kenya Law Reports has a wonderful data base on case law. Do subscribe to the Kenya Law Weekly e-Newsletter. Do participate in activities that enhance your professional growth.

Bar and Bench

When I started off as a young lawyer, I became an active member of the Milimani Working Committee bringing together members of The Bar and Bench. The members would engage in useful discussions on how to improve the administration of justice. This is a wonderful opportunity for you to network and improve your skills.

Take an active part in the Committees of the Law Society of Kenya (LSK). Over the last 18 years I can proudly look back in time and point out that I have participated in various activities that enhanced the practice of law. For instance, in the last one year I contributed to the following areas the Practice Directions of the Commercial and Land Divisions of the High Court. Recently, I was part of the team that drafted the Court of Appeal Practice Directions. I have highlighted the recent achievements to demonstrate that my passion for reform was instilled from when I first started off as a young lawyer. The genesis of professional growth starts from the day you are admitted to The Bar.

Practice Directions

Be familiar with the various Practice Directions. I have observed with concern that many lawyers, young and old, do not bother complying with the latest Practice Directions and proceed to file pleadings that are inelegant and deficient. A witness statement is prepared without any cross-reference to a single document and yet this is your Evidence in Chief. What later happens is that the court will force you to comply with the Directions at extra cost. You end up wasting time and money.

When filing submissions, please look at the Court of Appeal Practice Directions that give an excellent guide. I am glad that my personal contribution on how submissions are to be filed was taken on board. Remember to be polite and concise in your submissions. I have seen submissions that are rude and abusive. That is professionally unethical.

Finally, let the pursuit of excellence be your mantra and do have a cup of tea with a senior after court.

Mr. Gichuhi is a Council Member of the LSK, litigation partner in Wamae & Allen Advocates and Convenor of the LSK Court Users and Litigation Committee.

A lawyer should spearhead negotiations on payment of royalties to the community and advise in setting up structures on the use of the same

Opportunities await Lawyers in extractive industry

By Hanningtone Amol

The 'millennium bug' struck the globe towards the expiry of the last century with some projections of a catastrophic end to humanity.

There are also optimists who predicted the extinction of human challenges like common ailments, poverty and child mortality. The challenge of global warming was also highlighted and experts warned that Africa would bear the brunt of changing climatic patterns. What no one forecast was that 'The Dark Continent' would eventually discover virgin natural resources such us oil, natural gas, titanium, coal and other underground treasures. In the absence of the forecast, the learned friends failed to prepare for the blessings that accompany such fertility.

In Kenya, lawyers have stuck to the traditional practice areas and only interact with these natural resources either when they take proceedings to challenge land acquisition processes or when carrying out conveyancing procedures. The bulk of instructions flowing from exploration of the natural resources are undertaken by foreign lawyers and sometimes by non-lawyers.

Local content

The Constitution envisages that local content must be taken into account in the exploration and use of natural resources. Local community should have a say in the use of resources based on their land and lawyers have the duty and opportunity to devise ways of ensuring local communities benefit from the resources. Steps such as incorporation of community trusts, setting up structures for negotiations with the explorers as well as formulating policies on local content are all opportunities to lawyers.

For instance, a lawyer should spearhead negotiations on payment of royalties to the community and advise in setting up structures on the use of the same. Similarly, a lawyer should formulate formidable means through which the community can hold stake in the exploration.

This could include setting up of a legal entity through which the community enters into a joint venture with the explorer for better and effective realization of the benefits of the resources. Managing such a community trust requires various skills, mainly finance and legal and the role of the lawyer remains salient throughout.

Communal holdings and trusts

With the local content firmly established in the exploration process, more opportunities are presented to the lawyer. The local content may require that provision of unskilled or semi-skilled labour be left to the community as well as provision of housing for the 'foreign' workers. It could also require that the community be given priority in supplying exploration sites with locally available supplies, food as well as transportation.

It is the role of lawyers to ensure legal documents secure these rights and also set up legal mechanisms for execution. Given that communities are generally big in population and resources unevenly distributed, the lawyer should come up with an effective vehicle through which each member of the community can get a chance to participate in the project as well as derive direct or indirect benefit. Decisions on whether to form a trust or limited liability company, to have individual shareholding or trusteeship can be arrived at after sound legal advice.

Fair labour practices

Lawyers have a duty to ensure



employment laws are followed and local labourers involved in exploration activities are fairly compensated. The lawyer is expected to advise the community on fair labour practices, rights to form trade unions as well as negotiate on their behalf for proper working conditions and terms.

Environmental health

The counsel is expected to advise the local community on their right to a healthy and clean environment, ensure that proper environmental impact assessments as well as socio-economic impacts of the projects are established forehand.

The lawyer will be instrumental in agitating for the rights of the local community and enforcing standards, where necessary by litigation. Getting equipped with basic concepts such as acceptable noise levels, acceptable smoke levels as well as waste disposal procedures are the key to a lawyer effectively addressing the environmental health of the local community.

Resettlement of project affected persons

Where the exploration or development of the site requires relocation of local community, the lawyer will supervise the process and ensure fair compensation and due process in the acquisition of the properties and relocation of the affected persons.

The long held notion that communities will be short changed every time a major project is brought to the grass root thrives on lawyer's non-participation or reluctance to assist communities. Indeed, had lawyers taken the fore front in fighting for the rights of communities, such projects would proceed smoothly for the benefit of both the investor and community without unnecessary and long litigation witnessed in most cases. The lawyer will tactfully devise a complaint mechanism and dispute resolution procedure which involves the community, investor and the local administration.

A lawyer will be expected to muster the complex tax regime and advise his client accordingly on the applicable taxes. While there are tax consultants dealing with these matters, their advice cannot replace the time-tested legal opinion arrived at after review and internalization of the applicable laws.

Legal compliance

Counsel also has an opportunity to working with investors to ensure that the projects run smoothly and comply with the local laws.

The lawyer will carry out comprehensive review of the laws affecting the project, list the permits and licenses required as well as the legal procedures applicable. The lawyer will also advise on the legal risks involved in the project and propose mitigation measures.

As the project progresses, the lawyer may carry out legal audits periodically to ensure that the operations of the investor and the entire project comply with the law.

Contracts and legal documentation

It is natural that the investor will deal with various service providers including consultants, labour unions and suppliers. The investors will also be dealing with governmental authorities as well as financiers and its target clientele. These engagements range from simple contracts to multi-complex contracts which require differing skills in preparation. A lawyer will be required to remain on top of the business and produce water tight legal and contractual documents which protect the rights of the investors. It is a pity that in most projects locally these documents are either prepared by foreign lawyers or by other non-legal professionals who have amassed experience in such projects.

Tax compliance

The old adage that tax and death are the surest things in the life of a man remains true to this day. The lawyer must be alive to the fact that at some stage his client will be required to remit taxes. These may be PAYE deducted from employees, income tax or VAT returns. A lawyer will be expected to muster the complex tax regime and advise his client accordingly on the applicable taxes. While there are tax consultants dealing with these matters, their advice cannot replace the time-tested legal opinion arrived at after review and internalization of the applicable laws. Absence of informed and reasoned advice on tax compliance can be catastrophic to an investor.

Carbon trading and fair trade

With the heightened focus on global warming, lawyers are now expected to take leading roles in negotiating for their clients in carbon trading and fair trade market forum. Investors involved in exploration of natural resources are particularly concerned about the impact of their activities on the environment and will be glad to obtain reasoned legal opinion on possible legal mitigations. A lawyer will therefore pay close attention to the carbon trading market as well as other opportunities presented by local authorities on mitigating such risks.

Personal injury claims

Exploration activities are industrial in nature and more often pose physical injuries to workmen. Counsel is expected to advise and ensure that there are comprehensive and adequate insurance policies to cover for such foreseeable risks. When they occur, the lawyer will be instrumental in negotiation for amicable settlement and where necessary to litigate and have the matter determined.

Dispute resolution

In every commercial or civil engagement there is the lurking possibility of a conflict occurring. For this reason modern contracts will include a clause of dispute resolution. The trend has seen most contractual parties moving away from court room litigation and shifting to arbitration, mediation, adjudication as well as structured/executive negotiations. It is upon local lawyers to find their place in the alternative dispute resolution methods envisaged for the disputes arising from the project.

Mr. Amol is an Advocate of the High Court of Kenya
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Barclays Bank of Kenya Chairman, Mr. Francis Okomo Okello (left), New Faces New Voices Network Kenya Director Andia Chakava (centre) and NSE Vice Chairman Bob Karina(right) after signing the MOU that signaled the launch of a series of forums targeting the Chairpersons, CEO's, Company Secretaries and senior directors which will focus on aspects of diversity and firm performance.

Capital market is a gold mine for advocates

By Mary Njuguna

Macroeconomic indicators are pointing to the fact that Kenya's economy is on a steady rise.

This economic growth is reflected by an upsurge in stock exchange activity, increased demand for long term funding for private enterprise, proliferation of more sophisticated financing options, prominent focus on infrastructure development and a greater leaning towards the capital market to match long term funding needs.

The growth of the capital market sector in Kenya is not mutually exclusive to development of legal practice areas and legal practitioners are encouraged to strategically position themselves as the economy is elevated to another level.

Capital markets law is itself an interesting area of law that is constantly in flux. It is an inter-marriage between contract and corporate law on the one hand and land law, trust law and administrative law on the other, and this is by no means exhaustive.

Legal opinions

One of the key transactions in the capital markets sphere which many Kenyans know well is an Initial Public Offering (IPO). These kinds of transactions together with other capital raising transactions such as bond and rights issues require the services of legal practitioners on various fronts.

Lawyers are required to undertake legal due diligence to ensure that the company is in line with its statutory obligations, prepare or review the legal documentation required in a public offering such as the information memorandum (which constitutes the contract between the issuer of the securities and the investors), the legal opinion required as part of the information memorandum as well as ancillary legal advice that may be required by the issuer on aspects of the transaction.

Initial Public Offering (IPO)

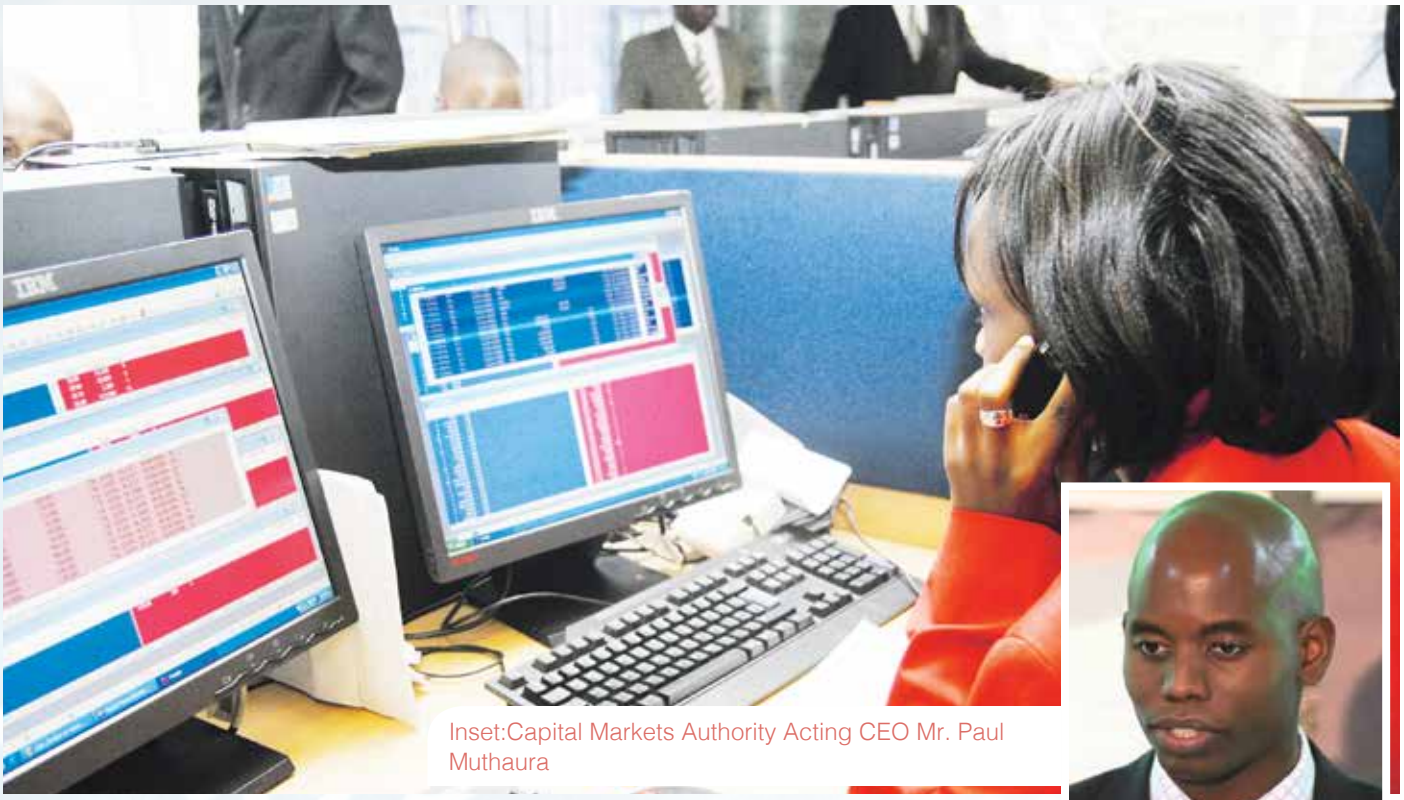
Lawyers and certified public secretaries also play a critical compliance advisory role to their clients operating within the capital market and provide valued services advising issuers and licensed persons on corporate governance issues and compliance with ongoing obligations.

With the creation of a Growth and Enterprise Market Segment of the Nairobi Securities Exchange, many small and medium sized companies (which employ approximately 80 percent of the labour force and contribute about 40 percent of the Gross Domestic Product (GDP) now have easier access to listing on the Exchange in order to benefit from more visibility, share price discovery and access to capital market funding opportunities. These entities require services of lawyers to aid in the listing process in much the same way as companies undertaking public offerings such as IPOs do.

The growth of the capital market sector in Kenya is not mutually exclusive to development of legal practice areas and legal practitioners are encouraged to strategically position themselves as the economy is elevated to another level.

Merger and acquisition

Merger and acquisition activity involving listed companies has increased and together with this, corporate restructurings for strategic reasons. Another area closely related to the capital market is private equity and private placement of products many of which bear features similar to products which are approved for issue to the public by the securities regulator.



Inset:Capital Markets Authority Acting CEO Mr. Paul Muthaura

In the course of advisory engagements with the issuer, lawyers are best placed to engage regulatory bodies on the proposed application of their respective regulatory frameworks to aspects of planned transactions. Other ancillary legal support is required in the preparation of service level agreements between players in capital market transactions and also conflict resolution in administrative tribunals, courts and other dispute resolution channels.

Conveyancing lawyers

The capital market landscape is colourful. From real estate investment trusts, derivatives and asset backed securities to global depository receipts, Islamic financial products and exchange traded funds. With the introduction of the regulatory framework for real estate investment trusts (REITS) in 2013, the opportunities for conveyancing lawyers in REITS transactions abound. With regard to the derivatives market whose products are founded on contract law, lawyers will be pivotal in advising clients on the creation of derivative contracts and managing legal risks.

For instance, the financing gap for infrastructure development through public private partnerships, calls for a bold venture into securitization of assets in place of other traditional capital raising avenues. Creation of the various agreements, special purpose vehicles, public offering and asset transfer documentation will call for legal services. So too will the structuring of exchange traded funds and global depository receipts to allow for trading of foreign listed securities in the Kenyan market.

Legal minds

Regionally, capital markets integration has become a reality with the approval by the East Africa Community (EAC) Council of Ministers of several Council Directives aimed at establishing common standards for licensing, approval of public issues, and regulation of an integrated East African capital market.

Also in place is a regional framework for the simultaneous issue of corporate bonds across each of the East African jurisdictions. For the lawyer, this means advising clients on a cross border basis and hence wider exposure to the entire East African market.

In the dynamic and fast evolving sector that is the capital market, creativity and innovation is commonplace. This results in out-of-the-box structuring options for businesses and hence in the need for robust transaction advice offered to issuers by accountants, tax consultants and undoubtedly legal practitioners. In the course of advisory engagements with the issuer, lawyers are best placed to engage regulatory bodies on the proposed application of their respective regulatory frameworks to aspects of planned transactions. Other ancillary legal support is required in the preparation of service level agreements between players in capital market transactions and also conflict resolution in administrative tribunals, courts and other dispute resolution channels.

The Kenyan capital market is calling forth creative legal minds to venture onto a road less travelled and lend support to the growth of this country's economy. It has been said that 'your current safe boundaries were once uncommon frontiers'. May this ring true for Kenyan legal practitioners in the near future as they describe their bearings in the sea of capital markets law.

Ms. Njuguna is an advocate of the High Court of Kenya and Head of Corporate Approvals at the Capital Markets Authority.

The immidiate former East Africa Law Society (EALS) President Mr. James Aggrey Mwamu addressing the annual regional conference in Kigali, Rwanda.

Why regional lawyers must reap from modern practice trends

The paradigm shift in the East African lawyer must occur in our thinking, culture and way of doing business.

By James Aggrey Mwamu

There has been substantial growth of law firms and lawyers in East Africa but more needs to be done in the face of global challenges and international law firms.

In order for East Africa to progress from its political freedom to its economic freedom, a critical mass of substantial East African business law firms are required that can deliver teams of African lawyers who can competently advise large national and international clients on solving their most important and difficult legal challenges in Africa.

In East Africa (EA) - especially the three traditional Common Law countries - the major areas of legal practice over the past two decades has entailed family law adoptions, child custody, marriage, divorce, insurance, banking, financial commercial and business.

Others include patents & trademarks, civil law, criminal law, damages, contracts, transportation law, foreign claims, estates, Government relations, labour relations and accident claims.

Emerging practice trends

Over the past five years, there has been teutonic shift as some of the common practice areas have been affected by enactment of various legislations or multi-disciplinary conglomerates that have sprouted across the region with a sharp eye trained on the premium and blue chip legal services. This means that traditional lawyers and law firms have to reconsider their ways and strategies of doing business to suit the modern trends.

The evolutionary trends for growth of law firms have been sharing resources and cooperation. The second stage of development is specialization which grows through depth and focus. The third phase is diversification which develops through collaboration and finally geographic expansion.

Changing practice dynamics

All the big law firms like Allen and Overy, Baker and Mackenzie, Fresh Fields, Day Jones and Clifford from the West currently operating in Africa passed through the traditional practice stages. Law firms from East Africa may not necessarily follow these trends but there is a need for growth towards creating a niche by sharing resources, specialization, and diversification to be able to compete with the best in the world.

The growth of the regional economies coupled with the discovery of oil and gas means that East African commercial law firms that want to ensure their long-term competitiveness should focus on helping their nation's quest for global competitiveness, growing their capabilities for high-value, sophisticated legal work and preparing to sustain profitability in more competitive markets. The failure by regional law firms to appreciate the changing dynamics in practice will lead to the stagnating of law firms and losing out on lucrative businesses that would remain in the hands of the bigger, better organized and sophisticated law firms from the west.

Capturing bigger markets

Needless to say such competitive edge can only be achieved by learning how to acquire the capabilities you need, growing the client relationships the firm needs and developing a new business model suitable for our times.

These business models must not necessarily be borrowed from the

East African Court of Justice in session

Over the past five years, there has been teutonic shift as some of the common practice areas have been affected by enactment of various legislations or multi-disciplinary conglomerates that have sprouted across the region with a sharp eye trained on the premium and blue chip legal services. This means that traditional lawyers and law firms have to reconsider their ways and strategies of doing business to suit the modern trends.

West which operates in highly developed economies that are light years ahead of us but must be innovated, designed and created to suit our standards and needs in East Africa. The starting point must be firms across East Africa and Africa linking together to share resources and cooperate as a way of strengthening bases with a view to capturing larger and bigger markets.

Legal industry captains

The paradigm shift in the East African lawyer must occur in our thinking, culture and the way of doing business.

The captains of the legal industry must adapt the change and build bridges across the regions. The bridges will assist in tearing down the barriers and prejudice that hinders fostering stronger linkages with one another. This will require leadership in our law firms that understand that a diverse workforce which embodies different perspectives and approaches to work will bring true value in terms of variety of opinion and insight. The leadership must further recognize both the learning opportunities and challenges that the expression of different perspectives presents for law firms whether big or small. This will in turn result it in building an organizational structure that creates an expectation of high standards of performance from everyone in the firm.

The result of good leadership in our law firms will lead to an organizational culture of openness, with a well articulated and well understood mission and vision with refined, egalitarian and non bureaucratic structures that will foster growth not just regionally but internationally.

The key to success in becoming bigger and larger is in promoting exchange of ideas and sharing constructive challenges from any employee with valuable experience. The leadership ability to retain the organization's efficiency control systems and chains of command while reshaping the change resisting mindsets is very crucial in our times.

Hardnosed lawyers

The discovery of oil, gas and huge mineral deposits coupled with huge interest of the Western and Eastern powers in East Africa must begin to sound the alarm bells in ears of every East African lawyer. The new scramble for Africa has just begun. This time not with guns but with much more sophisticated moves of infrastructural development and digital migration. They are not accompanied by missionaries preaching the word of God but with well, trained and hardnosed lawyers from much larger law firms from the West ready to do business and catch the next flight home.

Are East African lawyers going to wallow in the miasma of complaints, self-pity theatrics and small time games that take us nowhere? It is time to rise up and take our place in history as East Africa lawyers.

Mr. Mwamu is the immediate former President of the East Africa Law Society and a current member of the Council of the Law Society of Kenya

Conflicting laws recipe for misuse by foreign mining firms

Presently, communities do not receive any royalties from minerals found in their land

By Pauline Vata

Policy gaps in the extractive industries have exposed Kenyans to massive economic exploitation by foreign mining firms.

The problem is compounded by legal and policy vacuums in the extractive industry which could undermine oil and gas revenue collection and accountability as well as preside over human rights violations. Regionally, oil exploration is faced with a lot of secrecy and only top Government officials' in-charge of the portfolio know the intricacies of the production sharing contracts. This has left a lot of room for exploitation and corruption from both the Government and multinationals.

Community royalties

Lack of information to the affected communities has become a worrying trend. Presently, communities do not receive any royalties from minerals found in their land - they sign away their land rights without adequate compensation or alternative resettlements. In essence, resource extraction leaves communities poorer as opposed to uplifting their livelihoods. Community participation and consent is also a far cry, the Government has done little to prepare affected communities of these multi trillion projects, further to this, the local content legislation has still not be implemented.

Currently, Tullow oil estimates that 77 percent of Turkana has oil. The natural resources explorations have interfered with the nomadic community as land which was traditionally used for grazing is under oil exploration.

Ironically, the over 85,000 residents still live in poverty and lack information on income generated from extractives in their land. Communities have still not adequately benefited from employment opportunities. Time and again we hear of riots at Tullow oil exploration wells in Turkana and that Memorandums of Understanding (MOU's) signed by the company and local leaders do not yield much result.

Legal Framework

The current legal framework is confusing to say the least. We have the Petroleum Act of 1986 which does not have any clause on royalties or benefit sharing agreement with communities, nor does it propose anything on royalties except those to be paid directly to the Government.

Then comes the Community Land Bill (Senate bill 2014), which proposes that natural resources found in community land shall benefit the community according to investments accrued from the project. In essence, it does not give an exact percentage on how much communities will benefit.

There is also a proposed Senate Bill on benefit sharing where the benefit sharing arrangement proposes that the community will get 40 percent of the County Government share - the arrangement is quite complex and requires a bit of mental mathematics.

Currently, Tullow oil estimates that 77 percent of Turkana has oil. The natural resources explorations have interfered with the nomadic community as land which was traditionally used for grazing is under oil exploration.

The Mining Bill of 2014 gives Cabinet Secretary the mandate to determine what is to be paid as royalties. We have Article 71 of the Constitution which states that all agreements relating natural resource exploitation requires ratification from the Government.

With such conflicting laws on natural resources Kenya is likely to follow suit its neighbors' "resource curse"

Lastly, when it comes to corporate accountability the domestic legal frameworks available are implemented in a discriminatory manner. International law is not legally binding to the multinationals and only act as "soft law".

The Extractive Industries Transparency Initiative (EITI) could be a possible remedial process but Kenya is still not a member State despite numerous oil explorations in the country.

This has left communities exposed to unprecedented human rights violations.

Ms. Vata, an Advocate of the High Court of Kenya, is the acting Executive Director of the Economics and Social Rights Centre (Hakijamii).

By James Mangerere

Early mediation can save suit parties more than just money

Mediation is the smart alternative to arbitration and litigation. Litigation is like the weather, everyone complains about but no one actually does anything about it.

Almost 100,000 cases towards resolution of assorted disputes are filed in courts annually across the country.

After millions of shillings in advocate's fees, expert fees, millions of lost hours, and thousands of destroyed relationships, about 50 percent of the cases are settled out of court without trial.

When a dispute arises, our first instinct is to say "see you in court". Instead, we should make mediation our first choice and arbitration or litigation our last resort.

For starters, mediation is the alternative to litigation. It is a process that brings people together in direct negotiation to resolve a dispute with the help of a neutral third party.

The process is informal and allows the parties to express their opinions about the issues, consider alternative creative solutions and reach results they want directly with each other instead of doing it in court.

The best time to start mediation is when the dispute first arises, before positions have hardened when accusations are being thrown back and forth at each other.

The mediation process is completely voluntary. If the mediation is not successful, the parties still have the right to go to court. It is private - no one outside the parties needs to know that there is a dispute.

Mediation is confidential and the parties are free to suggest solutions and options that are different from what they would demand in a lawsuit.

They can offer options without fear of their being used against them if the dispute ends up in court.

Mediation is faster, less emotionally stressful, and much less expensive compared to courtroom litigation.

Best of all, the parties decide their own future, not a Judge or court room full of strangers - the parties create their own settlement to their satisfaction.

Advocates and the mediator can offer alternatives for them to consider, but the parties themselves work together to reach a workable agreement that meets their needs for the future. When this happens, positive long term relationships can be preserved.

While there is no guarantee that mediation will solve every problem, there is an extraordinary record of success where it has been used.

If 50 percent of all filed lawsuits are settled before trial, doesn't it make more sense to try to settle them at the outset before incurring huge legal costs and totally destroying relationships?

There is a big difference between mediation and arbitration. In arbitration, the parties select a neutral arbitrator from a list kept by the Chartered Institute of Arbitrators (Kenya) branch or other institutions or any other arbitrators of the party's choice.

They present their cases to the arbitrator like in a mini-trial and the arbitrator makes a decision (award) in favor of one of the parties.

The parties are bound by that decision, unless there has been some breach of the rules by the arbitrator. The parties have to rely on the arbitrator being neutral and unbiased.

Members following presentations on mediation at a CPD Seminar in Nairobi.

Nevertheless, sometimes a party may feel that a finding by the arbitrator was so outside the expected outcome that they are never satisfied in believing the decision was unbiased.
Mediation is different from arbitration as it lets the parties decide their own outcome and settlement.

One of the best mediation methods is called Early Stage Facilitative Mediation. This method works well if the parties decide to mediate right away, before filing a suit in court and before each side has established their "demands." If they cannot agree on a settlement after a good-faith negotiation with the help of a neutral mediator, they can still go to court.

In Facilitative Mediation, the mediator helps the parties to clearly define the real issues in the dispute and works to help them develop alternatives to their original hard and fast demands. This helps each side reach settlements that are satisfactory to them both and chances are that they will be much more likely to live up to their settlement agreement. But most importantly, the parties can preserve their business relationships for the future.

Sometimes, mediation makes business relationships better because problems have been discussed face to face and resolved to the benefit of each side.

Facilitative Mediation can be done faster and at lesser cost than going to court or arbitration. Less time is spent away from running the business. Stress levels are lower because the parties are in charge of the outcome - not some stranger like an arbitrator or a Judge.

Mediation is the smart alternative to arbitration and litigation. Litigation is like the weather, everyone complains about but no one actually does anything about it. With some luck, and with the insistence of people and business, we can change our society from one in which the first instinct when confronted with a dispute is to hire an advocate and file a suit to one where the first instinct is to negotiate a "win/win" solution to the satisfaction of all parties.

Is it possible to change our cultural emphasis on confrontation style of handling problems to a more cooperative, collaborative approach? If we could make the change, litigation might be left to those hard-to-settle cases where there is bad faith or just a vast difference in approach or irreconcilable ill-will between the parties.

Facilitative mediation is an effective and less costly alternative to litigation that can give parties significantly better outcomes than any court or arbitration could award.

It is a process that brings parties together in direct negotiation with each other with the help of a neutral third party. Unlike litigation or even arbitration, it is informal, and there are no cumbersome court rules.

The best time to start mediation is when the dispute first arises, before positions have hardened, when accusations are being thrown back and forth

It is private as no one outside the parties needs to even know there is a dispute. It is also completely voluntary, confidential and if the mediation is not successful, the parties can still go to court. It's confidential.
The parties can suggest solutions and options that are different from what they would demand in a lawsuit.
A very important difference between facilitative mediation and litigation is that mediation focuses on the future not the past. In litigation most of the money and time is centered on proving a cause of action that will satisfy a Judge of one party's liability.

Facilitative mediation is faster, less expensive, less stressful, and more likely to result in both parties honoring their settlement agreements preserving positive long term relationships that a lawsuit would destroy.

At the heart of the mediation process is the examination of the needs and interests behind the positions or demands people make.
The whole purpose of facilitative mediation, is that the parties create their own settlement to their satisfaction and neither advocates nor Judges, arbitrators, or the mediator.
The mediator can offer alternatives for them to consider, but the parties must be satisfied that they have reached the best workable agreement to meet their needs by themselves.
In this nation and economy, it makes sense to start changing our culture from expensive and destructive litigation habits to one where direct cooperation yields successful and mutually satisfactory solutions without litigation.

We need to make facilitative mediation the "people's choice as mediation is anchored in our constitution and other local laws.
Lawyers can be mediators or they can be trained on how to represent their clients in a mediation session. "Are we ready for that challenge?

Mr. Mangerere is an advocate of the High Court, Master Mediation Trainer and President of the Mediation Training Institute International (East Africa).

Lawyers have a huge role to play in regulatory bodies

In Kenya, and indeed most parts of the world, Governments have set up Statutory bodies to monitor and ensure that certain industries operate and conduct business in a manner that conforms to the country's laws, Government policy and public expectations.

The immidiate former Industrial Property Tribunal Chairman Mr. Moses Kurgat making a presentation during a CPD seminar on Statutory bodies.

By Mohamed Abdi Sallah

A regulatory body authority is a professional body that is established by a Statute of Parliament and whose primary activity and legal mandate is to protect the public.

They exercise a regulatory function that is imposing requirements, restrictions and conditions, setting standards in relation to any activity and securing compliance or enforcement.

Majority of regulatory authorities regulate the financial services industry. The aim is to protect customers and the public, ensure the industry remains stable and promote healthy competition between financial service providers.

Central Bank of Kenya

The biggest regulatory authority is the Central Bank of Kenya (CBK) which is responsible for the prudent regulation and suspension of banks, building societies, credit institutions, forex bureau and agency banking.

CBK and other authorities subject industry players to certain requirements, restrictions and guidelines, institutions and the public and corporations with whom they conduct business with.

In Kenya, and indeed most parts of the world, Governments have set up Statutory bodies to monitor and ensure that certain industries operate and conduct business in a manner that conforms to the country's laws, Government policy and public expectations.

Kenya's vibrant economy, ever growing and upcoming industries have necessitated the need for Statutory watchdog bodies whose role is to ensure a delicate combination of Government regulation and free-market operations.

Through various Acts like CBK Act Cap 491, Insurance Act Cap 487 among others, numerous Statutory bodies have been formed to carry out watchdog activities.

Legal practitioners

The role of legal practitioners has not yet been fully defined in assisting and enacting the

Kenya's vibrant economy, ever growing and upcoming industries have necessitated the need for Statutory watchdog bodies whose role is to ensure a delicate combination of Government regulation and free-market operations.

Statutory bodies from meeting their objectives. In most cases, lawyers and advocates are limited to the customary legal officer role within the organization structure. The key job description is to offer legal advice and guidance.

However, across the world there has been an increased primary role for lawyers in running Statutory regulators. Lawyers have been given an increased opportunity and consequently expanded roles because their legal background ensures the regulator itself plays an important role in developing and implementing new policies and laws.

Previously, the regulators would only give suggestions and participate on the sidelines but now with legal practitioners at the helm they formulate, develop and initiate relevant laws and play significant role in their implementation.

Capital Markets Authority

For example, at the helm of the Capital Markets Authority (CMA) is Mr. Paul Muthaura who is an Advocate of the High Court of Kenya. The CMA is known in East Africa and the larger continent as a vibrant, innovative and active regulator that ensures capital markets are run in a manner that complies with the law and meets public expectations of safeguarding investor interest by seeking their investments thus increasing investor confidence.

It is important to note that the Mr. Muthaura led CMA has not yet had any major hiccups like those associated with past administrators who oversaw the closing down and subsequent negative effect of the collapse of some brokerage firms.

Even though the regulatory authorities serve to monitor different economies and industries this does not mean that only professionals from those areas are the only ones able to run them.

Statutory regulators primary objective is to ensure that industries adhere to Government regulations and policies, comply with laws and safeguard public interest. The objectives can easily be met by a trained and qualified legal practitioner.

The lawyers can be essential in policy development initiators, management of relationships with policy and program partners in both private and public sectors. With legal practitioners at the helm of the regulatory body, authorities can ensure effective and strict adherence to policies and laws, while also being responsible for identifying new and emerging issues developing expertise to address them, and often providing litigation support based on their specialized expertise.

Lawyers can be supported by industry specific team of professionals from a range of disciplines including economists, finance experts among others.

Let us expand our opportunities and evolve the legal practice thus making it identical in to secondary areas while at the same time polishing and improving our primary areas of litigation and drafting.

Mr. Sallah is a Partner at Abdi and Bashir Advocates

Tread carefully on anti-tetanus vaccine

By Diana Omondi

The recent controversial tetanus vaccine has sparked a myriad of public debate and outcry countrywide leading to fresh insights at reproductive health rights.

The tetanus jab has always been mandatory for expectant mothers during the ante-natal clinics and one cannot help but wonder, "what is so different with this one anyway?"

The Catholic Church alleged in October last year that the vaccination campaign by the United Nations Children's Fund (UNICEF) ,World Health Organization (WHO) and the Government that focused on eliminating neonatal tetanus, a deadly infection that infants can contract through birth in unsanitary conditions, may be a clandestine sterilization campaign. The controversy centered on a specific hormone, beta-human chorionic gonadotropin (beta-HCG), which plays a role in both normal human reproduction and pregnancy.

However, when given at high doses along with a triggering agent, the human body can treat the hormone as a harmful substance – priming the body's response against the hormone and resulting in infertility and miscarriage.

Clandestine sterilization

Meanwhile, the WHO and UNICEF denied that the campaign was a clandestine sterilization program but focused on eliminating the deadly disease. The anti – tetanus campaign kicked off in October 2013, with the second and third rounds of immunization leading to vaccination of hundreds of women. Back and forth exchanges coupled with differing opinions and conflicting laboratory results necessitated fresh tests to either clear the Government on its stand that the drug is not laced with birth control substances that could sterilize women, or vindicate the Catholic Church, which is of the view that this is indeed the case.

Sterility is unfortunate but forced sterility is a draconian situation that most Africans cannot even begin to fathom. It is inconceivable, incomprehensible, in fact mind boggling to say the least. Therefore, if organizations were launching a secret sterilization campaign, this would violate international law under the Rome Statute, which states that "forced sterilization" is a crime against humanity. This goes to the very heart of infringing on an individual's reproductive health rights.

Any form of forced sterilization is unlawful, immoral and must be condemned as Article 46(1) (b) of the Constitution gives consumers of medical services the right to information necessary to gain full benefits from services.

Catholic Bishops

Moreover, the program, should the Catholic Bishops' allegations be true, may violate a clause prohibiting the persecution of "any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law" due to the program's limitation to only 59 regions. Reproductive healthcare became a matter of necessity rather than luxury with increased cases of unlawful abortions, homosexuality and surrogacy.

Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. It therefore, implies that people have the capability to reproduce and freedom to decide if, when and how often to do so.

Implicit in this last condition are the rights of men and women to

The Government has a mandate to protect every Kenyans reproductive right as a matter of obligation. These are rights which should not be tossed around with reckless abandon, there should be unwavering surety.

Health workers immunizing children with doses of polio vaccine.

GLANCE BOX

Article 43(1) (a) of the Constitution stipulates that every person has the right to the highest attainable standard of health which includes the right to healthcare services including reproductive healthcare.
Article 21(2) which stipulates that the State shall take legislative, policy and other measures to ensure progressive realization of reproductive health rights.

The United Nations 1996 International Conference on Development (ICPD) defines reproductive rights to include the right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so. The right to attain the highest standard of reproductive health and the right to make decisions concerning reproduction free of discrimination, coercion and violence.

be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility which are not against the law.

The awaited preliminary results of the tetanus vaccine were released and alas the tetanus vaccine was thus declared 'safe'.

However, three out of the 59 samples of the tetanus toxoid tested positive for a pregnancy-sustaining hormone, beta- HCG. Whether the samples collected were from the field or the Government central stores are impertinent, the crux of the matter was that three of the samples were laced with the beta- hCG hormone.

Why should even one of the samples be laced with the hormone? Every individual's reproductive health is vital and should be protected as a matter of right!

Sovereign power

Article 1 of the Constitution stipulates that all sovereign power belongs to Kenyans and they may exercise such powers either directly or through their democratically elected representatives. The Government has a mandate to protect every Kenyans reproductive right as a matter of obligation. These are rights which should not be tossed around with reckless abandon, there should be unwavering surety.

Meanwhile, attention shifts to the fate of the many that have already been given the vaccine in the three rounds of vaccinations that began in October 2013. The second round was done in March 2014 while the latest round was concluded recently.

As at present further inquiries are to be carried out on the three samples laced with the beta- HCG hormone.

Kenya is not the only country asking questions as Nicaragua, Mexico and Philippines are among countries that have raised the red flag over the use of the tetanus vaccine. In 1995, the Catholic Women`s League of the Philippines won a court order halting a UNICEF anti-tetanus program because the vaccine had been laced with B-HCG. The Supreme Court of the Philippines found the surreptitious sterilization program had already vaccinated three million women, aged 12 to 45. B-hCG-laced vaccine was also found in at least four other developing countries.

So could the Church and the Kenya Catholic Doctors' Association be right to question the safety of the drug? Furthermore, could we be making the same mistake by making a rush decision to implement a vaccine whose implications are unclear?

Ms. Omondi is a lawyer pursuing the Advocates Training Programme at the Kenya School of Law.

Consider youth in health rights decisions

By Faith Simiyu

Health and human rights issues are flip-sides of the same coin. Indeed, attaining and enjoying the highest standards of health; including Sexual Reproductive Health and Rights (SRH&R); is one of the most fundamental rights of every human being.

Global interest towards the right to health, including sexual and reproductive health, has manifested itself in various international Treaties and Conventions over the years. Gradually, SRH&R have not only been embraced as common concerns of both developed and developing countries; but have also become global objectives and commitments. These commitments have echoed the fact that for sexual health to be attained and maintained, the sexual rights of all persons must be respected, protected and fulfilled. Similarly and implicit in the said commitments, is the recognition that the attainment of reproductive health and rights, must tacitly if not explicitly, involve measures to secure the rights of men and women, including youths and adolescents.

Unsafe abortions

The commitment to SRH&R becomes more primal in consideration of the fact that the youth and adolescents remain vulnerable and exposed to a myriad of health challenges that include unplanned pregnancy, unsafe abortions, sexual transmitted infections (STI's), drug abuse and HIV/Aids among others. Accordingly, given the fact that over half of the world's population comprises of young people below the age of 24 whilst 75 percent of Kenya's population comprises of youths and adolescents under the age of 30, the need to protect SRH&R of youth and adolescent is precipitated.

Fundamental rights

Kenya's policy and legislative framework recognizes the centrality of the youth and youth related issues including health. Specifically, Article 21(3) and Article 55 of the Constitution inter alia provide that all State organs and public officers must not only address the needs of the vulnerable in society including the youth, but must also concurrently take measures to secure their fundamental rights that include; the right to health. Similarly, the Kenya National Youth Policy, Sessional Paper No 3 of July 2007, reiterates and prioritizes the need for enhancing, improving, establishing and promoting youth capacity and skills in health management; including sexual and reproductive health. This necessarily entails improving the technical and institutional capacity of youth organizations to enable them to effectively advocate and promote health programs for the youth.

Legislation

In retrospect, despite the policy and legislative intents of the Government, access to and availability of quality health services as well as participation of the youths and adolescents in health policy decision-making remains a mirage. For a majority of youths, the difficulty in claiming their SRH&R and adequate healthcare is due to lack of proper policy, resources and institutional frameworks. Health planning processes lack transparency, and the youth population is often left out in the legislative process.

The result is insufficient policies that specifically cater for the SRH&R of youths and adolescents in Kenya. Kenya largely lacks specific legislations on youth SRH&R. The net effect is that the youth and adolescents remain vulnerable and exposed to a myriad of health challenges that include unplanned pregnancy, unsafe abortions, sexual transmitted infections (STI's), drug abuse and HIV/AIDs etc. In fact, it is estimated that more than 30 per cent of all AIDS reported cases in Kenya are of youths and adolescents below the age of 30.

To exacerbate the situation, youths and adolescents account for only 0.42 percent of the development index whilst only 12 per cent of health facilities in Kenya remain youth or adolescent friendly. Certainly, given the immediate statistics, the need to secure and advance the SRH&R of the youths and adolescents in Kenya is crucial. Presently however, the quagmire that is SRH&R of youths and adolescents legislation remains a debate that needs to be reignited!

Mothers at the Pumwani Maternity Hospital in Nairobi.

Ms. Simiyu is the Chairperson, Department of Private Law, School of Law, Jomo Kenyatta University of Agriculture and Technology, Karen Campus and a Partner at Simiyu, Opondo, Kiranga & Company Advocates faithsimiyu@gmail.com or faithSimiyu@fsimiyuadvocates.co.ke

When conciliation as a legal remedy falls short

Law! What do I care about the Law? Ain't I got the power? -Cornelius Vanderbilt

By Irene Ndegwa

January 2015 has been a month racked with many hallmark moments. One moment that stood out was a television interview that confirmed that the law has become a mere scarecrow... which the birds of prey have made their perch and not their terror. A national media station hosted one Member of Parliament in studio for a live interview.

The segment which was aptly titled "tongue untied" was starring a man whose tongue is anything but silver and he rode in, smelling of the sweet scent of victory, dressed to the tee and wearing a smirk for days to complete his ensemble.

He had just been pardoned by the National Cohesion and Integration Commission (NCIC) for charges of hate speech leveled against him last year. His penance? To issue official apologies in the mainstream and social media, and with a slap on the wrist he was scot free.

Supreme Court in session

The Mheshimiwa

The Mheshimiwa in true form and style did not disappoint.

He gave good television. Between glaring and glowering at the cameras and the hapless television anchor, for fifteen minutes (fifteen minutes that I will sadly never get back), he huffed and puffed and never once showed any contrition or shame.

He defended his utterances and blamed you and I for having such myopic "perceptions" that we could not grasp the gist of what he had intended to say. Dastardly Kenyans! Obviously aware that the viewers were not able to wrap their heads around the idea of getting off with a mere apology, he succinctly quoted the relevant sections of the law, including our sacrosanct Constitution, while educating us on conciliation and alternative dispute resolutions mechanisms.

We were regaled with tales of how in 2010, one politician was let off with a mere warning to cease fire from the NCIC and that the NCIC Act was not intended to punish offenders but be conciliatory. Now in high gear, Mheshimiwa warned us not to "catch feelings" when certain words are uttered and defended his "religious right" to continue to utter certain words and have a twitter handle Genesis 17:14.

"Even in the name of cohesion, even in the name of reconciliation, even in the name of integration, do not take away my religious rights." he demanded.

Rich and powerful

Of course Mheshimiwa can continue to utter and publish certain words and phrases because after all the law allows for conciliation and settlements and two-faced apologies. Oh yes, Mheshimiwa. The law has ensured that a certain genre of persons, namely the rich and powerful, when in dire straits will be given the opportunity to kiss and make up.

Having realized that the law is indeed a mere perch, Mheshimiwa announced that he will be offering legal advice to other fellow miscreants caught up in this thorny issue of hate speech on how to shake off that monkey. Apologise shingo upande and move on.

There is definitely a time and place for pardon and conciliation for the sake of the integration and cohesion of a family, a community, a nation.

Those fifteen minutes of live television bear witness that it was neither the time nor the place because while there was a pardon, there was no conciliation.

Mheshimiwa, I think I have 'caught feelings'.

Ms. Ndegwa is an Advocate of the High Court of Kenya

National Cohesion and Intergration Commission Chairperson Francis Ole Kaparo (second right) in discussion with Commissioners

Creative ways to make your home glitter after dark

By Hosea Omole

Outdoor living has become the in thing in landscape design. With it comes the need to extend the function and enjoyment of the outdoor rooms into the night. Thus, landscape lighting is no longer as simple as a few fixtures along the front path and a couple of down lights tucked in the trees.

It is an art. It unlocks a creative way to showcase your home and property after dark. Properly placed lights can dramatize trees, highlight favorite shrubs and accent statuary, fountains and flowerbeds. Like any creative work, the options are endless.

Landscape lighting also enhances your night time safety and security. Strategically placed fixtures can help detect and deter detect trespassers. This not only makes you feel safer, it also contributes significantly to the value of your property.

Landscape lighting also enhances your night time safety and security. Strategically placed fixtures can help detect and deter detect trespassers. This not only makes you feel safer, it also contributes significantly to the value of your property.

What's more? New, energy efficient lighting technologies and lower voltages have made landscape lighting safer, less expensive and more fun. Home owners now have a wide range of techniques, styles and fixtures to choose from. Here are a few helpful tips to guide you in creating a brilliant nighttime landscape.

Plan

The first step in designing any landscape lighting is to determine what you want the lights to do for you. Try and figure out the kind of mood you wish to create. Do you want to a subtle romantic environment or a more vibrant and dramatic atmosphere? What about safety and security? These are some of the questions you will need answered before you get started.

Determine where you need lighting for specific functional and aesthetic purposes. Try and pick out key focal points that you want to highlight and frame in your scheme. You could, for instance, decide to illuminate your facades and architectural features from below or bring out your best textures by spotlighting sections of your interesting wall finishes.

Whatever you do, remember that balance and subtlety are critical in landscape lighting. It is much easier to over-light an area than to under-light. A good landscape lighting scheme should imitate starlight and moonlight, the softer the better.

In addition, unless they have a decorative theme, lighting elements and fixtures should be concealed from direct view as much as possible. Colored lighting can add drama and beauty. This should however, be carefully controlled as too many colors will give your night landscape a carnival-like feel. It may be a good idea to consult an expert to help you draw up a lighting plan. This will guarantee superior results and help you avoid costly mistakes.

Lighting techniques

Terms like down lighting, up lighting, spread lighting and silhouetting may sound overwhelming when you are new to landscape lighting. There is however, no cause to break a sweat trying to master all of them. Select a few that will best bring out your theme and focus on how best to execute these ones.

The net would be a perfect place to start your research as you will find numerous resources that break down most of these techniques into easy-to-understand sketches. Don't be afraid to try out something new. It will pay off by giving your night time landscape that unique character that will set it apart from everyone else's.

Properly placed, lights can dramatize trees, highlight favorite shrubs and accent statuary, fountains and flowerbeds.

Types of fixtures

The beauty of landscape lighting today is the wide range of fixtures available. LEDs (or light emitting diode) lights are revolutionizing the art of landscape lighting. Technology in this field is changing rapidly and more energy efficient and brighter LEDs seem to appear every other month. They are dimmable, waterproof, can tolerate impacts, and they last longer than any other kind of light source.

Incandescent lighting uses the old-fashioned tungsten filament bulbs. They are energy hungry and will need replacement every so often especially when they are used extensively or in severe climates. The florescent bulbs on another hand are extensively used in commercial landscape applications. Their diffused light however makes them ineffective for spotlighting. They are also are less weather resistant.

Whichever type of fixture you choose to go with, select ones which are durable in the outdoor conditions. The best fixtures should guarantee you a good level of energy efficiency and should blend in well with the rest of your landscape concepts.

Mr. Omole is a Landscape Architect and can be reached at hoseaomole@gmail.com

The lack of a specific definition of the term 'spouse' is likely to cause practical difficulties in determining whether or not spousal consent was obtained for a property transaction as the authenticity of the consent also comes into question.

Why you may not dispose of that property without your spouse's consent

By Ken Ashimosi

The enactment of Land Act, 2012(LA) and Land Registration Act, 2012(LRA) created statutory rights to spouses and obligations to matrimonially owned land.

Recently, President Uhuru Kenyatta assented to the Matrimonial Property Act 2013 (MPA) which endeavours to elaborate property rights especially in a matrimonial setting.

The rights accruing from MPA and the LRA, creates spousal rights as overriding interests over property which subsist whether or not such interests have been registered or not - Section 28 of the LRA is clear on its definition and elaboration of the overriding interest.

The LRA does not go further to define matrimonial property but the LA defines a matrimonial home as any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.

Matrimonial home

The MPA defines a matrimonial home as any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property - meaning it is not limited to the family home as defined under the MPA.

The spousal rights created under each of the three legislations basically means that no disposition of land affecting matrimonial property shall pass unless the spousal rights have been catered for as appropriate.

The guidelines for disposition of land as provided for by the Commissioner of Lands blankly provided that every disposition of land in Kenya shall be accompanied by a spousal consent.

The term 'spouse' has not been specifically defined in the new laws. However, its ordinary definition could be inferred from the definition of the term 'marriage', which has been defined as a "civil, customary or religious marriage".

Spousal consent

The lack of a specific definition of the term 'spouse' is likely to cause practical difficulties in determining whether or not spousal consent was obtained for a transaction and the authenticity of the spousal consent also comes into question because the Land Act places an obligation to the lender, assignee or transferee to inquire whether the spouse or spouses have consented to that disposition.

The same seems to be partly cured by the MPA, which defines spouse as husband and wife but regardless of the above; the Land Registration Act goes further to state that a charge over a matrimonial home shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.

GLANCE BOX

The MPA and LRA highlights are:

- Spouse deemed owner though not on title - where land is held in the name of one spouse, but the other spouse has contributed to the productivity, upkeep or improvement of the land, the contributing spouse shall be deemed to have acquired an ownership interest in the land.

- Sale or charge void, if spousal consent not obtained – Dispositions, including sale, transfer, lease and charges of any land or a dwelling house held in the name of one spouse shall require the consent of the other spouse.

A lender or purchaser is now under a duty to inquire whether the consent of the other spouse or spouses has been obtained. If the spouse undertaking the disposition misleads the lender or purchaser or other transferee as the case may be, the sale, transfer, charge, lease or other disposition shall be void, at the option of the spouse who did not consent to the transaction.

Mr. Ashimosi is a Partner at Ashitiva & Company Advocates

In 1971, Dr. Njoya studied Political Science at the Woodrow Wilson School of Public Affairs of Princeton University and received a Doctorate of Philosophy (Honours) from Priceton seminary in 1976.

Lawyers fete cleric for unrivalled human rights bravery

By Harold Ayodo

Dr Njoya was defrocked thrice for using the pulpit to champion for a multi-party State during Former President Moi's regime

Nairobi, Kenya: The Law Society of Kenya awarded Reverend Dr. Timothy Njoya with The Father John Anthony Kaiser Human Rights Award.

The retired minister of the Presbyterian Church of East Africa was awarded during a colourful LSK Annual Dinner Dance at the Intercontinental Hotel in Nairobi following his fight for democracy.

The Chief Justice Dr. Willy Mutunga, Court of Appeal Judges, Judges of the High Court, Magistrates and Advocates from East Africa graced the occasion.

The British High Commissioner Mr. Christian Turner and Judges and Magistrates Vetting Board (JMVB) Chairman Mr. Sharad Rao were also among the dignitaries.

High Court Judge Lady Justice Jacqueline Kamau who read the citation said Dr. Njoya spoke out clearly and strongly against oppression in Kenya and far beyond.

"He (Njoya) stood up as a courageous person and never heeded threats to his own safety," Lady Justice Kamau said.

The Lady Justice said that due to his forthrightness on issues of corruption, autocracy, injustice' and democratization, Dr. Njoya was defrocked by the church thrice.

The man of the collar was first excommunicated in 1979 and 1984 for criticizing the one-party State.

Dr. Njoya was further defrocked from 1987 to 1988 for the sermon he delivered on October 5, 1986 in which he called on Kenyans to reclaim their God-given sovereignty by dismantling the one-party autocratic State and writing a new Constitution.

"Dr. Njoya re-launched the debate of multiparty democracy and pluralism on January 1, 1990 before he paid the price with broken bones and being defrocked once again," Lady Justice Kamau said. According to the citation, The State thrice 'killed' him and thrice he rose -on Labour Day in 1997 for calling Harambee the ideology of the Kikuyu Middle Class (which was neither middle but an intellectual simpleton), on Saba-Saba Day in 1997, and on Budget Day in front of Parliament in 1999. "Those disturbing images on our television sets will forever remain in our memory," said the citation.

The Rev. Dr Njoya was born on April 7, 1941 to peasant parents in Ngoru village, in the then Nyeri District, Central Province of Kenya. He overcame adversity and obtained an East Africa Certificate of Theology from St. Paul's College in 1966 before graduating with a Diploma in Theology from Makerere University, Uganda.

In 1971, Dr. Njoya studied Political Science at the Woodrow Wilson School of Public Affairs of Princeton University and received a Doctorate of Philosophy (Honours) from Priceton seminary in 1976.

In 1998, he was Dr E. Johnson Scholar-inn- Residence at the University of Toronto, Canada and obtained a Doctorate of Divinity.

Rev. Njoya receiving the award form Chief Justice Dr. Willy Mutunga and LSK President Mr. Eric Mutua

Dr Njoya has received global recognition through the awards like The 2012 Ford Foundation Champion of Democracy, 1995 E. H. Johnson Trust Fund Award as world's most outstanding theologian and Church Leader and The 2001 John Humphrey Award for Human Rights and Democracy.

As a leading opponent of government injustice, when asked why he was so adamant in his views, he replied "Humans were created in God's image, therefore they deserve dignity and respect; oppression and injustice are foreign to God's Kingdom principles."

The Rev. Dr Njoya has several publications to his credit including several articles in international journals as well as chapters in several published books.

Chief Justice Dr. Willy Mutunga (left) with newly admitted advocate Mr. Philip Kiptoo

What you need to know as a young lawyer

By Beth Michoma

As I begin my third year of legal practice, I pride myself in learning from my mistakes and of those before me in this esteemed profession.

Accordingly, I have decided to provide some advice that I have crafted from personal experience and that of others. Congratulations! You are an advocate, you have passed law school and have finally been admitted to The Bar. What lies ahead is a game of intellect and wit where only the strongest survive and become great advocates.

Here are nine points that are very important to your career progression.

Get involved: I cannot reiterate how important it is for young lawyers to be involved with their respective Bar Associations and International Bar Association programs. They include Annual General Meetings, Special General Meetings, annual dinners and cocktails and conferences.

Always remember the oath you swore when being admitted to The Bar - to uphold the Rule of Law and seek justice.

There is nothing as sad and devastating as an ignorant lawyer. During the above mentioned events, new skills and paths are developed. It is also important to note that the events are primarily networking occasions that should be made good use of. This diligence separates a successful young lawyer from an unsuccessful one.

Know thyself: Not every lawyer can become a famous litigator or an educator as there are those who are gifted in these particular niches. Always conduct a SWOT analysis (strengths, weaknesses, opportunities and threats) for your legal career and utilize your strengths and unique traits and apply the same to your career path.

It is good to listen to advice but do not try to be someone you are not. In this profession, it is very easy to disappear into the crowd. Always remember that all advocates have different paths - do not try and fit into a mold, stand out.

Find your niche: Create a niche for yourself. I find it easier to accomplish this by having a broad understanding of as many areas of the law as possible. Some of the benefits of practicing law in a niche market include constant work and the ability to focus on a particular area of the law.

Dare to venture into an area of practice that has yet to be discovered. It goes without saying that the fewer advocates who practice in a particular area the lesser the competition.

Find and utilize your mentor: There is no pressure to seek a mentor out of law school, but it is never too soon to be on the lookout for one who will suit your career path and goals. It is difficult to succeed in any career without a teacher, advisor and advocate.

The most important quality of a

mentor should be respect. The young advocate should respect this person as an advocate and most importantly as an individual.

Accept the unexpected: As much as we always have career goals, sometimes the unexpected deters the young lawyer from their path. Take this in stride and examine the curve and how it will affect your path then move forward.

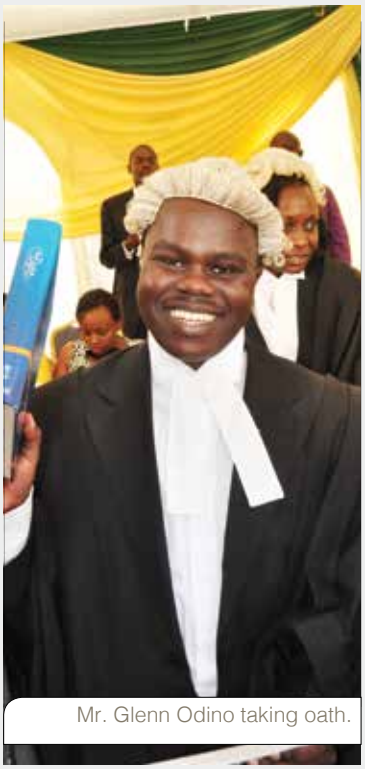
Fees should not be the ultimate result: Always remember that behind every case is a person to whom you are their only lifeline - treat clients with integrity and honesty.
As a young lawyer, it is also your duty to give back to the community by taking up Pro bono cases and participating in legal awareness weeks.

Never stir up litigation: to quote Abraham Lincoln "A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket?

A moral tone ought to be infused into the profession which should drive such men out of it."

Balance and proportionality: There will always be files and cases to read and analyze each more important than the last. An efficient advocate is one who creates a balance in their life between work and social life. Remember you cannot do a good job if your job is all you do.

There is no substitute for hard work: If you want to be a phenomenal lawyer, work hard towards this goal. No client has ever hired a lazy advocate who likes shortcuts knowingly. Approach the practice of law with dedication and enthusiasm after all it is your chosen career.


Mr. Glenn Odino taking oath.

Always be efficient there is nothing that shows laziness such as obvious grammatical errors and half-hearted researched opinions and case law.

This level of inefficiency and laziness actually leads to a lawyer being the laughing stock of the court and opposing counsel. My last bit of advice is always remember the oath you swore when being admitted - to uphold the Rule of Law and to seek justice.

Ms. Michoma is an Advocate of the High Court of Kenya

Not every lawyer can become a famous litigator or an educator as there are those who are gifted in these particular niches. Always conduct a SWOT analysis (strengths, weaknesses, opportunities and threats) for your legal career and utilize your strengths and unique traits and apply the same to your career path.

Physical and electronic gender based violence escalating

Those sharing on social media videos of women publicly stripped by rowdy men should suffer just like the actual perpetrators of the crime.

By Brian Migowe

Gender based violence and more particularly against women is on a steady increase countrywide.

Recent statistics from the Gender Violence Recovery Centre puts the percentage of gender based violence against women at 90 per cent.

The percentage includes either physical or sexual violence on women and girls as some perpetrators share on social media videos of women being publicly stripped by rowdy men.

However, similar cases have affected men and boys, although the figures are relatively low – perhaps many cases are unreported following the fear of societal ridicule and stigmatization.

Some of the causes of gender based violence are inter alia culture, which has been cited as the leading cause of violence against women.

Some men still subscribe to outdated traditions of battering women as a way of allegedly inflicting discipline.

However, much of the behaviour is founded on archaic traditions that ought to have evolved with the changing times.

Financial security has also been said to be a factor as the role of a man was traditionally established as that of a leader and a provider.

This societal creation is subject to debate and in some cases where a man fails to establish authority, he ends up resorting to physical violence and abuse.

Alcohol and drug abuse have also led many men into violence against women even as several institutions are in the fore front fighting gender based violence.

Some of the non-governmental organisations include the Federation of Women Lawyers (Fida), Kenya National Human Rights Commission and Amnesty International-Kenya.

The organisations have come up with programs committed to preventing the violence by working towards increasing access to justice and integrated support services.

They also work at increasing public awareness on gender based violence even as the Government pays little attention in ensuring perpetrators are apprehended and charged.

The stringent provisions of the Sexual Offences Act of 2006 are also yet to be implemented towards containing the vice.

The Security (Amendment) Act 2014 can be said to be one of the much needed laws in ending what is now becoming a dynamic crime.

It provides heavy penalties for the gangs that recently disgraced women by stripping them in public.

It also provides for a jail term of up to 20 years for those found guilty of abusing the decency of their victims by subjecting them to humiliation through public stripping.

The recent incidents of women being stripped in Nairobi and cases of girls molested has given rise to a new dimension and outlook to gender based violence.

The electronic violence against women through sharing videos on social media of women being stripped by rowdy men is unbecoming.

The time is no doubt ripe for Kenya to introduce an electronic violence law against men and women.

For starters, electronic violence is when someone uses data or Information and Communication Technology (ICT) to cause mental, emotional or psychological distress to someone else.

It may include online harassment, cyber stalking, hacking online accounts or tracking electronic devices.

Therefore, the victims of public stripping - apart from being deprived off their human dignity - faced unquantifiable amount of mental, emotional and psychological distress through the videos shared from mobile phones of the perpetrators to the social media.

There are many fronts to this fight, but one common thing is that we all want to end gender based violence.

Hence, in the fight, punitive punishment should be accorded to those who perpetrate the crimes by causing the actual stripping and those that aid the perpetrators by spreading the videos on social media. This law will protect men, women and children from the exploitative and irresponsible use of social media.

Mr. Migowe is a lawyer currently undergoing the Advocates Training Programme (ATP) at The Kenya School of Law

Airport authority should worry about legal lacuna on laser illumination

The Kenya Civil Aviation Authority (KCAA) should come up with a guide on reporting unauthorized laser illumination.

By Jessica Pekke

Laser illumination of aircrafts is a growing concern for not only developed nations but the world at large.

Locally, the growing aviation industry stands hampered, if laser emitters are perpetually left unregulated.

Laser illumination could be experienced while flying over an area with an outdoor laser show or from laser beams targeted at an aircraft with or without a deliberate intention.

Medically, laser effect on eyes depends on the wavelength, laser power and duration of the exposure.

Within the cockpit, laser pointers of 5mw can easily distract a pilot up to 3,700 feet and unexpected laser light could startle pilots either at night or during takeoff and landing.

As the light increases in brightness, it interferes with vision and causes a glare making it difficult to see through the windscreen.

Flash blindness

If exposed to laser light for long, temporary flash blindness may be experienced and after images could occur and may persist for some time after illumination.

It has been scientifically proven that laser effects on visibility could happen with low powered lasers.

Laser power varies depending on light emitted, beam divergence, visibility and colour of the beam.

Infrared or ultraviolet laser beams are invisible and have no visual effects on pilots unless at high powers.

For starters, eyes are sensitive to color and green and yellow beams are more distractive to the eye compared to blue and red light of the same wattage.

Air space zones protect areas around airports and other sensitive airspace from the hazards of safe but too bright laser light exposure.

Unauthorised illuminations

Light radiance in laser free zones above and around runways should not be more than 50 nano watts per square centimeter.

Critical flight zones cover 10 nautical miles around the airport and the light limit should be five microwatts per square centimeter.

As for normal flight zones, the light irradiance must be less than 2.5 milliwatts per square centimeter.

Consequently, the Kenya Civil Aviation Authority (KCAA) should come up with a guide on reporting unauthorized laser illumination.

It should entail time of occurrence, flight number, type of aircraft, radial distance and location where laser illumination took place, name and telephone number of officer to whom the incidence was reported.

Through the same guide, KCAA should come up with a policy on broadcasting laser illumination caution and inform operators and other stakeholders of the incidence in real time.

Moreover, flights operating in the area within which the unauthorized laser incidence took place need to be notified as well.

Lasers technology has advanced greatly and high powered emitters are easily accessed and purchased in electrical shops or over the internet.

Laser illumination may disrupt takeoff and landings, degrade a pilot's performance, interfere with crew coordination and air traffic control services.

KCAA should c
ome up with a law that prohibits the use of laser in airspace zones and impose penalties for pointing lasers into cockpits.

Ms. Pekke is an advocate of the High Court of Kenya

Research before picking that anti-aging treatment

By Dr. Pranav Pancholi

Emily, a 44 year old diva is completely with it as her whole skin care regime is figured out. She knows what serums to use for her skin, what moisturisers and the kind of sun screen to use. Her makeup is always impeccable and for her there is no excuse to look unpresentable. From matching shoes to the perfect handbag, when you see her walking down a lobby in an upmarket mall you will turn your head, regardless of gender and wonder… "Wow!! Who is this? What`s her secret".

Ultimate skin

Women have since time immemorial been in the search for everlasting beauty. Cleopatra was the first to use lactic acid to keep her skin soft and supple. Since then wizards, herbalists, Ayurveda therapists, waganga and now doctors are looking to provide women with that perfect combination of the ultimate skin regime. Women like Emily go to deep lengths to do whatever it takes to look good and keep looking good. Everyone wants to know the secret to keeping their skin soft, supple and vibrant.

Who is the best person to turn to? Doctors trained in cosmetic medicine are the best bet. They are able to provide the latest up to date information on products to use and what else will help keep skin looking radiant.

There are three basic anti-aging product categories which include:

Over the counter products

Although these do tend to work up to a certain extent as they are not of medical strength, their values in the anti-aging world are limited.

They normally tend to work as long as they are used and they stop working as soon as you stop using them. However, the myths about over the counter products are that if it is more expensive it is better. Less expensive products can sometime have a better efficacy. It all boils down to ingredients and not packaging or the texture of a cream. Moreover, just because a friend swears by a product, it does not necessarily mean that it will work for you as well. Different people have different skin types and reactions to products. Multiple ingredients do not necessarily make the product better. Some creams may claim to have packed a variety of potent ingredients to make it super potent – this is not always the case.

Cosmoceuticals

These are prescription grade anti-wrinkle creams prescribed by a doctor. A cosmetic doctor is able to guide on what ingredients make a cream more efficacious for your skin type and what will suit you the best - depending on a multitude of factors. Although over the counter products may have the same ingredients as cosmoceuticals, they will be found in a lower concentration than in prescription strength creams. Some of the ingredients to look out for include hydroxyl acids, retinol, ascorbic acid, ubiquinone, tea extracts, grape seed extracts and niacinamide.

Injectable products

These include the much hyped Botox and dermal fillers. So what is so different about these injectable treatments? Are they safe? Are there any long term side effects?

Do they cause cancer?

Injectable treatment normally gives the best anti-aging results. They are more cost effective and result orientated than anti-aging creams. Botox has actually been used since the 1960s for medical procedures and has over 50 medical uses.

It has also been cleared by the Food and Drug Authority (FDA) and in the year 2011 over 10 million Americans used Botox. There are no long term side effects to date. Side effects include pain, redness, swelling at the injection site and a lid droop that is temporary. There are some doctors that inject Botox in the lower half of the face. This is not the best practice and leads to the plastic looking face and the inability to smile. The treatments are best performed by an experienced injector that specialises in cosmetic or aesthetic medicine.

Injectable treatment normally gives the best anti-aging results. They are more cost effective and result orientated than anti-aging creams. Botox has actually been used since the 1960s for medical procedures and has over 50 medical uses.

A doctor who performs these procedures daily is more likely to deliver a satisfying result with minimum or zero side effects. Do your research wisely before you have your first injection. It is, however, one of my personal favourites.

Dr. Pancholi is a Fellow of the American Academy of Aesthetic Medicine, American Academy of Dermatology and Member World Society of Anti-Aging Medicine. He is also a Cosmetic Dermato-surgeon at M.P. Shah Hospital and Avané Clinique, Yaya Centre Fourth Floor, Nairobi. 0727734300/0720600248

Attorney General still powerful despite changing roles

By Francis Osiemo

The role played by the office of the Attorney General (AG) was one of the contentious issues in the heated discussions in the run up to the referendum of the Constitution of Kenya, 2010.

The main concerns were allegations of misuse of the power of Nolle prosequi, an unsatisfactory record in prosecuting high-level corruption, and a general disregard for the law under the former constitution.

Prosecutorial powers

The Constitution has now transferred prosecutorial powers to the office of the Director of Public Prosecutions (DPP) established under Article 157. However, the AG is still the principal legal adviser of the Government in legal proceedings.

Under article 156(5), the constitution introduces a new role for the office of the AG by providing that the AG may sit in legal proceedings as a friend of the court. In Article 156(6), the AG is responsible for promoting, protecting and upholding the Rule of Law and defending public interest.

This provision addresses previous allegations levelled against the office of the AG of disregarding the law due to perceived political pressure. The provision ensures that since the AG is responsible for representing the Government in legal proceedings, he/she shall uphold the Rule of Law.

Article 2(2) buttresses Article 156(6), of the Constitution by providing that all powers and claims have to be exercised as provided by the supreme law.

Constitutional committees

In fulfilling the role as the protector and promoter of the Rule of Law, the current AG Prof. Githu Muigai sits in various constitutional committees and commissions.

For starters, he sits in the Advisory Committee on the Power of Mercy in line with Article 133(2)(a) of the Constitution. The Committee has the responsibility of determining how the power of mercy is exercised.

Secondly, the Attorney General nominates a member of the Salaries and Remuneration Commission (SRC) under Article 230(d)(ii) of the supreme law. The SRC reviews and advises the Government on the salaries and benefits of State and public officers.

Security Council

Thirdly, under Article 240(2) (f), the AG is a member of the National Security Council that is charged with the responsibility of handling national security issues.

The Attorney General Prof. Githu Muigai

The AG also exercises his role of upholding the Rule of Law in several ways. For instance, he prepares and tables Bills before Parliament in consultation with the Commission for the Implementation of the Constitution (CIC).

School of Law doesn't have to be that money focused

Lawyers being admitted to the Bar

By Peter Joseph Keya

First they came for the Socialists, and I did not speak out – Because I was not a Socialist. Then
they came for the Trade Unionists, and I did not speak out – Because I was not a Trade Unionist.
Then they came for the Jews, and I did not speak out – Because I was not a Jew. Then they came for me – and there was no one left to speak for me (emphasis added) - MARTIN NIEMÖLLER (1894 – 1984)

The above statement has never been any more relevant than it is applicable to prospective Advocates. Upon admission to The Bar, a new Advocate, relieved for this feat, quickly shifts focus to grapple with challenges facing newly admitted Advocates. There have been increased concerns by young lawyers on the role that the profession can play in addressing hurdles faced after admission.

The legal profession - as noble as it may be considered - seems inured to the predicament of the prospective members of the Law Society of Kenya (LSK). The Society seems to focus more on its members and membership accruing automatically on admission. Under Section 41 (h) of the Law Society of Kenya Act, 2014 the Council is empowered to make Regulations relating to the recognition and regulation of paralegals. Having appreciated the need to recognise and regulate paralegals, it should not be far-fetched for the Society to take more interest in its prospective members. Through this, the Society will not only eliminate the feeling by those who make it to its membership that it was not there to speak for them but also to mentor and mould them towards a seamless transition.

Auction profession

Apart from providing members to the Boards created under the Kenya School of Law Act and the Legal Education Act, the LSK does not seem to have a significant stake in issues relating to its prospective members. Most of the powers relating to admission under the Statutes have been vested in the Chief Justice (CJ) who is empowered to make Regulations. In my respectful opinion, the Society should have more, say as the members upon admission automatically join it.

The Kenya School of Law is a public legal education provider responsible for the provision of professional legal training as an agent of the Government. Whereas the intention to come up with the School may have been good, the structures in the recent past suggest that the approach was either not thought out clearly or it defeats the very essence of its existence.

If the essence was to regulate members joining the profession then the parameter used currently appears to be focused on financial might. I stand to be corrected but nevertheless, argue that pegging the profession on financial might is akin to auctioning the profession to the highest bidder. In addition, it is unjustifiable for Government to render its services through the Kenya School of Law at a premium with the knowledge that the Advocates Training Program (ATP) is an inevitable hurdle without which previous efforts and struggles through the university would have gone to waste.

This is with particular focus on the majority of students who do not come from financially empowered backgrounds having struggled with the help of loans from the Higher Education Loans Board (HELB) through university. The Kenya School of Law has been regularly increasing its fees without due regard and notice to students who watch helplessly as their careers fizzle over lack of funds.

There are those who have deferred to look for money to join the program only to find the fees increased whenever they are ready to join. Section 5 (b) of the Kenya School of Law Act empowers the School to charge reasonable fees and liaise with appropriate bodies to extend loans and other assistance to needy students.

Overlapping mandates

The existence of many Statutes relating to the legal profession seems to perpetrate the confusion as mandates overlap between the different bodies created to operate independent of each other. The recent amendment to the Legal Education Act introduced through the Statute Law Miscellaneous Amendments Act has not only reduced the number of LSK representatives to the Council of Legal Education but also introduced a mandatory pre-bar examination by the School.

From a financial perspective, this is yet another financial hurdle to be surmounted by prospective members of the Society. The Legal Education Act empowers the Council to consult, collaborate and co-operate inter alia with the LSK. Moreover, the Society may also attend the Council as an expert in matters relating to the functions of the Council.

My submissions

It is my submission that the Society has an obligation and should take interest towards its prospective members on the verge of joining it. Among issues to be addressed is that any fees charged or increased by the Kenya School of Law is preceded by an elaborate and accessible funding component – particularly to students from public universities.

Alternatively, public universities should stop offering law as part of their courses (just like they do not offer training for pilots) so that students from secondary school are not given false hope into a career they may never progress in as it is clear that to be a lawyer you need sufficient funds.

Mr. Keya is an Advocate of the High Court of Kenya

A lawyer was cruising in his Mercedes Benz S Class along the Thika Super Highway while singing to himself, "I love my Merc and I adore my Merc." Focusing on his car, not his driving, he veered off the road and smashed into a tree. He miraculously survived, but his car was written off. "My Merc! My Merc!" he sobbed.

A Good Samaritan drove by and cried out, "Sir, sir, you're bleeding! And my God, your left arm is gone!"

The lawyer, horrified, screamed "My Rolex! My Rolex watch!"

A newly admitted advocate was desperate for a matter to litigate and was delighted to be appointed by the court to represent a murder suspect pro bono.

The Judge ordered, "You should confer with the accused in the hallway, and give him the best legal advice you can."

After 30 minutes, the lawyer re-entered the courtroom alone and took the front seat.

When the Judge asked where the accused had gone, the lawyer replied, "You asked me to give him good advice. I found out that he was guilty, so I told him to take off."

An accountant man caught embezzling millions from his employer went to a renowned lawyer seeking representation. He didn't want to go to jail and his astute lawyer told him, "Don't worry. You'll never have to go to jail with all that money." And the lawyer was right. When the man was convicted to 30 years in prison, he didn't have a coin left.

A middle aged woman walks into the post office and meets a smartly dressed man in a dark coloured suit at the counter meticulously placing "Love" stamps on bright pink envelopes with hearts all over them. He then takes out a designer perfume bottle and starts spraying scent all over them.

Her curiosity growing, she walked to the man and asks him what he is doing. The man replied, "I'm sending out 1,000 Valentine cards signed, 'Guess who?'" "But why?" asks the woman. "I'm a divorce lawyer," the man replies.

CHAMBER BREAK

A lawyer, businessman and banker were gathered by a coffin containing the body of their friend. In his grief, banker said, "In my family, we have a custom of giving the dead some money to ensure they have something to spend over there."

They all agreed that this was appropriate and the banker opened his wallet, took out Sh5, 000 and dropped into the casket before the businessman did the same. The lawyer took back the Sh10, 000, wrote an open cheque for Sh25,000 and dropped it inside the casket.

A newly admitted advocate employed as an associate was sent to represent a long-term well-paying client accused of robbery with violence in Mombasa. After days of trial, the case was won, the client acquitted and released.

Excited about his success, the young associate sent an SMS to the Managing Partner: "Justice prevailed."

The Managing Partner replied in haste, "Appeal immediately."

A seasoned ambulance chasing lawyer was on vacation in a rural farming town. While walking through the market, a car was involved in an accident before a large crowd gathered. Going by instinct, the lawyer was eager to get to the injured, but he couldn't get near the car. Being the swift sort, he started shouting loudly, "Let me through! Let me through! I am the son of the victim."

The crowd made way for him. Lying in front of the car was a donkey.

"You are a cheat!" shouted a lawyer to her opponent.

"And you're a liar!" screamed the opposition.

Banging his gavel loudly, the Judge interjected, "Now that both lawyers have been identified for the record, let's get on with the case."

My love-hate relationship with holding briefs

By Victoria Kariithi

This thing called "holding brief," you either really hate it or you don't really hate it as much as you'd like to.

As a pupil, I really hated it. As a practicing advocate of the High Court, I find that I don't really hate it as much as I'd like to.

Asking advocates to hold my pupil master's brief wasn't such a bad experience until I met that advocate. You know the one who makes you really hate the holding brief experience? That's the one!

Instructions

I began to really hate this thing called "holding brief." Upon my recent admission as an advocate of the High Court, I was determined to do all in my power never to reject any 'kindly hold my brief' request. However, to 'never reject' was quite an injudicious decision.

I remember arriving in court, scanning the surroundings for an approachable advocate. I spotted one or so I thought. Carefully approaching this advocate, I held out the instructions. Before, I could even present my request, he said these four words in a cold snappy voice, 'I don't hold brief.' Then he continued to blankly stare ahead into nothingness or somethingness, I couldn't really tell. At no point in our interaction, did he even look at me.

How did he know I was approaching him? I guess he had eyes on the side of his head. This was not good at all, as it was 8.59am and our case was the first on the cause list. I was very offended. Out of that offence, I decided to stare at him in disbelief.

Five seconds later, my staring was rudely interrupted by the terrifying thought that in about two minutes, the Judge will walk in, the case will be called out and there will be no one to enter appearance on my pupil master's behalf.

My experience ended well as a nice advocate took pity on a desperate pupil and the brief was held. After this first 'rejection,' I got a few more 'rejections' and I began to really hate this thing called "holding brief."

Upon my recent admission as an advocate of the High Court, I was determined to do all in my power never to reject any 'kindly hold my brief' request. However, to 'never reject' was quite an injudicious decision.

Litigation experience

I am now attending court, excited at the litigation experience and I am quite smug. So, here I am squeezed in between a bunch of senior counsel, when someone taps my shoulder. I turn back and this court clerk requests me to hold his brief.

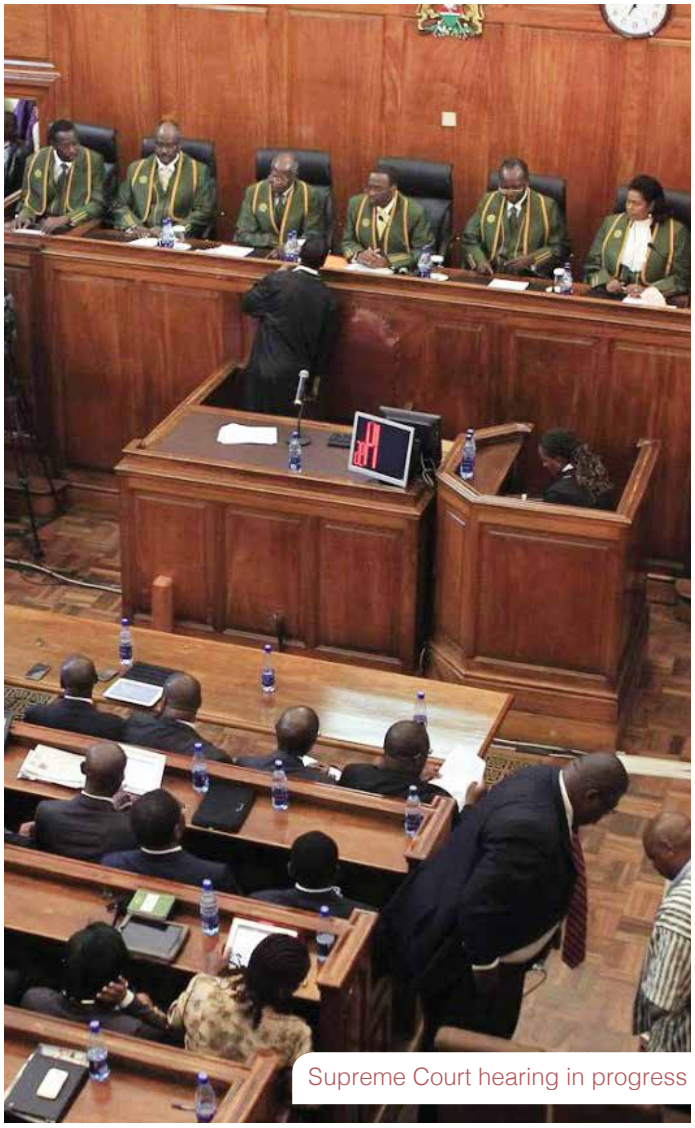
I ask for the instructions and the matter is called out. I stand up in a panic, introduce myself and try to read the instructions but the clerk's handwriting is indecipherable. So, I turn back to ask him who I am I holding brief for. By this time the Magistrate is starting to get irritated. He informs me (as he whispers loudly) that I am holding brief for so and so, for the Plaintiff. Opposing Counsel then stands up to introduce himself. Guess what? He is representing the Plaintiff. I turn back at the clerk who sheepishly apologizes.

Still whispering loudly, he informs me that he does not have the case file and that it is the Defendant that I am representing.

The Magistrate is now quite irritated. But she was very understanding; not as understanding as the Magistrate who a few months later ordered me to sit down, liaise with the court clerk and sort myself out (this order wasn't given politely, yelling was involved) or the Judge who ordered that there would be no further adjournments and that I should proceed with the matter.

That is when I realized that my decision to 'never reject' a request to hold brief, was aiding in the ruining of my good reputation. In fact, it was making me look like a fool. I modified this decision. Instead, I wasn't going to reject well written/proper instructions to hold brief given to me in court before 8.55am. This thing called "holding brief," the rejection and/or embarrassment that comes with it, have helped me get a thick skin, and has made my journey as an advocate quite interesting.

What do you think about this thing called "holding brief?" Is it a good or bad thing?



Supreme Court hearing in progress

Ms. Kariithi is an Advocate of the High Court of Kenya
Mwanyumba Kariithi Consulting

As a pupil, I really hated it. As a practicing advocate of the High Court, I find that I don't really hate it as much as I'd like to. Asking advocates to hold my pupil master's brief wasn't such a bad experience until I met that advocate.

LSK President Mr. Eric Mutua (left) addressing the media at the NLC offices. NLC Chairman Dr. Swazuri Mohammed looks on.

NLC's mandate extends to private and community land

Lawyers craft laws and assist courts to interpret the laws

By Caroline Khasoa

However, following our busy schedules, we may not keep abreast with all new laws and regulations coming hot on the heels of a new Constitution.
Chapter Five of the Constitution covering Articles 60 – 72 brought into place transformative structural, legal and regulatory framework of land administration in the country.
The Chapter created the National Land Commission (NLC) under Article 67 with a clear mandate on all land (both public land and private land) countrywide.

National Land Commission

It is unfortunate that the public has been misled to only focus on Clause (a) of Article 67 which provides that the NLC is to manage all public land on behalf of the National and County Governments.
The rest of the Clauses covering all forms of land ownership like public, private and community have not been given adequate publicity and civic education.
I humbly draw the attention of lawyers involved in land transactions to the provisions in Article 67, which provides the roles of the NLC as *inter alia*.

NLC and County Land Management Boards (CLMBs) are addressing land disputes in areas like Lamu, Nyakinya and Karen which the Commission has dealt with and the findings are in the public domain.
One day, I had a two-hour heated discussion with a colleague on the role of the NLC in administration of private land. We read Article 67 (b) to (h) five times before she was convinced that the NLC is also mandated to administer private land as well as community land.
Section 39 of The Land Registration Act 2012 is very clear on the role of the County Land Management Boards (CLMBs). It provides that:
"The Registrar shall not register an instrument effecting a transaction unless satisfied that any consent required to be obtained in respect of the transaction has been given by the relevant County Land Management Board on the use of the land, or that no consent is required." (Reference with Article (67) (h) and Section 3.
In addition, the CLMBs perform the roles of NLC enshrined in Article (67) as stated above. Other references are contained in Sections (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19) of the Land Act, 2012.

Public participation

Public participation has completely changed the way a contract is concluded. This has brought a challenge that no matter how much legal jargon one uses, we are no longer able to certainly know whether the contract will be completed or stopped due to failure or inadequate public participation.
For example, your client buys two acres of land from "A" to put up a shopping complex, proceed with due diligence and get necessary approvals from the National Environmental Management Authority (NEMA), county planner , public health, town engineer and other relevant officers.

Once you start construction, your neighbor raises a complaint that they were not consulted while another group says that there was no public participation. Your client then asks why you as a lawyer did not get for him/her a "Public Participation Compliance Certificate."
Therefore, there is need for a Government office to issue an official certificate called "Public Participation Compliance Certificate"
In my view this is the only way to guarantee a client that the contract may sail through. However, any certificate can be challenged by any party to the Commission/ CLMB, Tribunal or Court.

The question that remains unanswered and that the Law Society of Kenya must assist Advocates to unravel is which institution will provide the Public Participation Compliance Certificate in land transactions if land contracts must retain legal sanctity of completion?"
The jury is out; my suggestion is that we urgently need a Public Participation Law to address the issues of Public Participation.
The NLC has Gazetted the land transaction forms in Gazette Notice dated 24th October 2014 and is working on Land Use Guidelines to be published in due course.
Finally, I urge you to contact your County Land Management Boards for effective and fast land disputes resolution towards expeditious settlements.

Ms. Khasoa is a Council Member of the Law Society of Kenya (LSK) and Secretary of the Kakamega County Land Management Board (National Land Commission)

NLC MANDATE

a) To manage public land on behalf of the National and County Governments
b) To recommend a national land policy to the National Governments.
c) To advise the National Government on a comprehensive program for the registration of title in land countrywide.
d) To conduct research related to land and the use of natural resources, and recommend to appropriate authorities.
e) To initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress;
f) To encourage application of Alternative Dispute Resolution (ADR) in land conflicts.
g) To assess tax on land and premiums on immovable property in any area designated by law; and
h) To monitor and have oversight responsibilities over land use planning throughout the country.
In Article 67((b) – (h) the word land is used denoting all land and not just public land.

By Caroline Katisya

Kenyans' rights must not be denied even with mineral resources boon

Extractive industries pose harm to the environment through oil spills, ground water pollution, hazardous waste, harmful air emissions, fires and degradation of natural resources.

Kenya has substantial reserves of oil, natural gas and other assorted mineral resources within its territory.

The resources are vested in the National Government by virtue of Article 62 of the Constitution which defines minerals and mineral oils as public land vested in the Government in trust for the people of Kenya.

Under the Article, we highlight the scope of community rights over mineral resources under the Constitution and ongoing legislative reform.

The term community refers to indigenous, marginalized and minority people as most mineral resources in the country are found in less developed areas.

Article 63 of the Constitution vests community land in communities identified on the basis of ethnicity, culture or similar community interest. The lands include community forests, grazing areas, fish landing areas, shrines, ancestral lands or land communally used by hunters and gatherers.

Article 40 of the Constitution respects individual and joint ownership of property and protects against arbitrary deprivation. These constitutional provisions guarantee communities the ownership and control of their lands.
Separately, the Mining Bill 2014 and Energy Bill 2014 recognize the National Government's ownership of sub-surface mineral resources but require extractive industries to first obtain the consent of the owner/occupier of the land required for exploratory or extractive activities.

Article 40(3) of the Constitution provides for prompt payment in full of just compensation where deprivation of property is necessary for public interest or public purpose albeit in compliance with the due process set out in the Land Act.

Article 40(4) also provides for just compensation to be paid to those without title to land but are occupants in good faith. This will apply to communities whose land is un-adjudicated.

The Community Land Bill was developed pursuant to Articles 63(4) and 66(2) which require Parliament to enact legislation for the alienation of community land and to ensure investments in property benefit local communities and their economies. The Bill establishes committees to manage and administer community land and provides for restitution and compensation for historical land injustices.

Right to Equitable Sharing of Benefits

Article 174 of the Constitution provides for equitable sharing of local and national resources countrywide. The Natural Resources (Revenue Sharing) Bill, Community Land Bill, the Energy Bill and Mining Bill 2014 propose different benefits sharing formula between the National Government, the affected County Government and the local community - Parliament and the Executive need to harmonise these laws.

The Natural Resources (Revenue Sharing) Bill establishes a Benefit Sharing Authority which will recommend and oversee the county and local community benefit sharing agreements with project proponents. It sets up local and county committees which will identify priority projects for the investment of the revenues and oversee their implementation.

The proposed local content regulations must be designed to benefit the communities most affected by the extractive activities by providing employment opportunities, contracts for the supply of goods and services and technical knowledge transfer.

Right to Information and Public Participation

Article 174 of the Constitution confers on all persons the right to self-governance and public participation in the exercise of the powers of the State and decisions affecting them.

Public participation is a value

Article 63 of the Constitution vests community land in communities identified on the basis of ethnicity, culture or similar community interest. The lands include community forests, grazing areas, fish landing areas, shrines, ancestral lands or land communally used by hunters and gatherers.

and principle of governance under Article 10 of the Constitution. Communities must give free, prior and informed consent (FPIC) to exploration projects in their locality. The community further has a right to information on the scope of the project and contractual arrangements under Article 35 of the Constitution.

It is important for the community to bestow social legitimacy and license to the project. As other countries have learnt, sidelining communities results in delays, sabotage and conflicts.

Community Human Rights

Article 174 of the Constitution protects and promotes the rights of minorities and marginalized groups. Article 56 behooves Government to take affirmative action to uplift marginalized peoples economically, politically and socially.

Chapter Four confers an array of rights on communities including the rights to life, clean environment, economic and social rights. Kenya has ratified several international conventions on the environment and human rights which are part of the Kenyan law by dint of Article 2 of the Constitution.

Extractive industries pose harm to the environment through oil spills, ground water pollution, hazardous waste, harmful air emissions, fires and degradation of natural resources. Under the Constitution rights are owed both vertically by the State and horizontally by all persons.

Therefore, there is need to conclude ongoing policy development and legislative reform concerning mineral resources, which must balance the National Government's ownership of mineral resources on behalf of all Kenyans and the need to create a stable investment environment for the sustainable development of these resources, together with community rights and interests safeguarded by the Constitution.

Ms. Katisya, CPS (K) is an advocate of the High Court of Kenya.

"The directory which also lists the Advocates Remuneration Order is one of its kind in this side of the sub-Sahara," Mr. Mwenesi says. He says that the upcoming regional edition shall have contacts of stakeholders inter alia arbitrators, auctioneers and auditors.

Regional lawyers' directory in the works

Nairobi, Kenya: A local company is in the process of producing a legal directory with contacts of law firms in the region.

The Blue Media Images Ltd Project Coordinator Wilberforce Akidiva Mwenesi told The Advocate that the publication targets to complement the East Africa Community (EAC) integration.

"The legal profession plays a pivotal role in the EAC integration as regional Bar Associations ensure that their Governments uphold the Rule of Law," Mr. Mwenesi says.

Mwenesi says that the East African Legal Directory will strive to include majority of the contacts of law firms in the region.

"We will caste our nets wider to ensure that every member State is covered towards ensuring easier and more efficient reach to lawyers by clients in the region," Mr. Mwenesi says.

According to the Project Coordinator, the growth in membership of the East Africa Law Society (EALS) to over 15,000 is an indication of a growing legal profession in East Africa.

It is not the first time for Blue Media Images Limited to publish a legal directory as the company produced its pioneer edition featuring Kenyan law firms last year.

"The first edition entailed contacts of nearly 70 percent of law firms in Kenya…we were unable to cover all firms as we had only three months to produce," Mr. Mwenesi says.

Mr. Mwenesi assures that the second edition will strive to incorporate several law firms across East Africa.

According to Mr. Mwenesi, legal directories assists to disseminate information to the public, is a communication tool and publicity forum.

"It complements websites for Bar Associations like the Law Society of Kenya (LSK) by listing information and up to dated contacts on lawyers and other stakeholders," Mr. Mwenesi said.

He explains that the directory is an information source on the current location, telephone numbers and also lists specialization areas of law firms.

"The directory which also lists the Advocates Remuneration Order is one of its kind in this side of the sub-Sahara," Mr. Mwenesi says.

He says that the upcoming regional edition shall have contacts of stakeholders inter alia arbitrators, auctioneers and auditors.

"We are also burning the midnight oil to ensure that our web site www.lawdirectory.co.ke is up and running by April this year," Mr. Mwenesi says.

He says that law firms that want to feature in the publication to send their profiles to him to come up with a draft sample artwork and before he reverts for approval before publication.

Blue Media Images Ltd Project Coordinator Mr. Wilberforce Mwenesi

According to the Project Coordinator, the growth in membership of the East Africa Law Society (EALS) to over 15,000 is an indication of a growing legal profession in East Africa

Mr. Mwenesi says that emails can be sent to wilber@bluemediaimages.com or lawdirectory@bluemediaimages.com.

The emails can also be sent to the Blue Media Images Business Development/Special Projects Manager Mr. James Shinali on shinali@bluemediaimages.com.

Mr. Mwenesi and Mr. Shinali can also be reached on +254 0703 283 660; +254 0702 764 333; 0725 918 836 or +254 0726 590 724.

Tale of a drama queen in court, and her living dead husbands

By Patrick Ochieng Ochieng

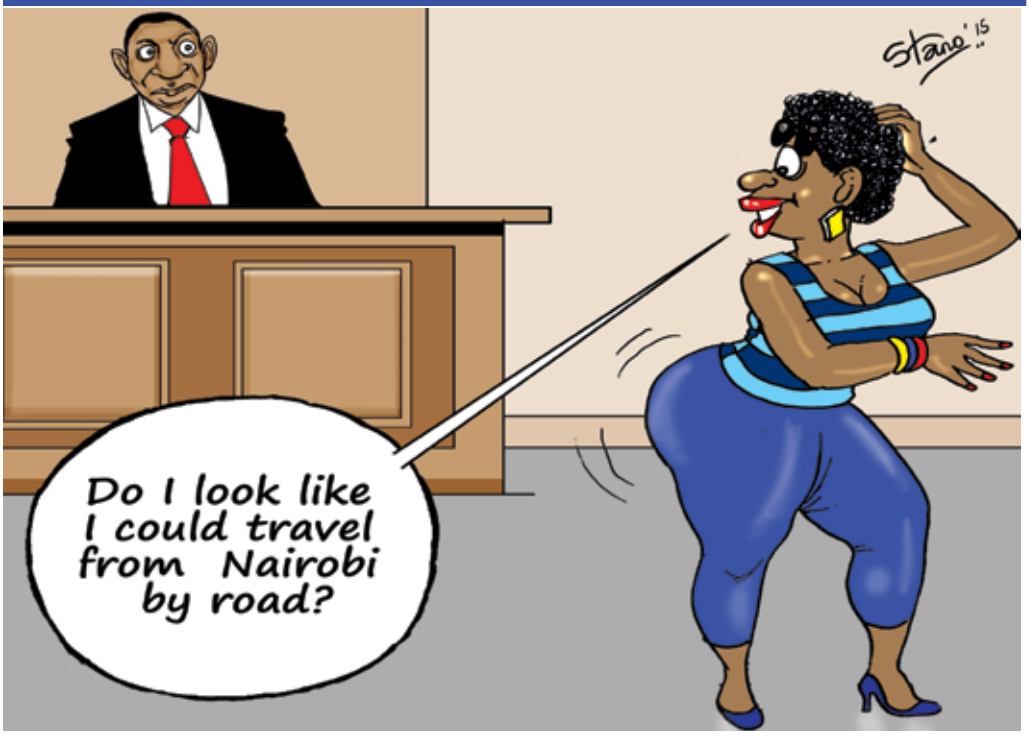
The clink clank of bangles on Lindah's wrist fills the silent court room as she lifts a Bible and says in her sing-song voice:
'I swear by the almighty God that everything I say shall be the truth, the whole truth and nothing but the truth. So help me God.'

Done, she gazes around, uncertain on how to proceed. She fired her Lawyer at the last hearing.

The Magistrate still remembers her from the almost comical exchange at the last session, two months ago. The Respondent in the case; had asked for an adjournment. His Advocate had been unwell, and was not in attendance.
'What do you expect when you hire sickly lawyers,' Lindah had quipped, earning a warning from the court. When matters had moved to the issue of costs for the day, she had demanded fifteen thousand shillings on the spot, as her costs.

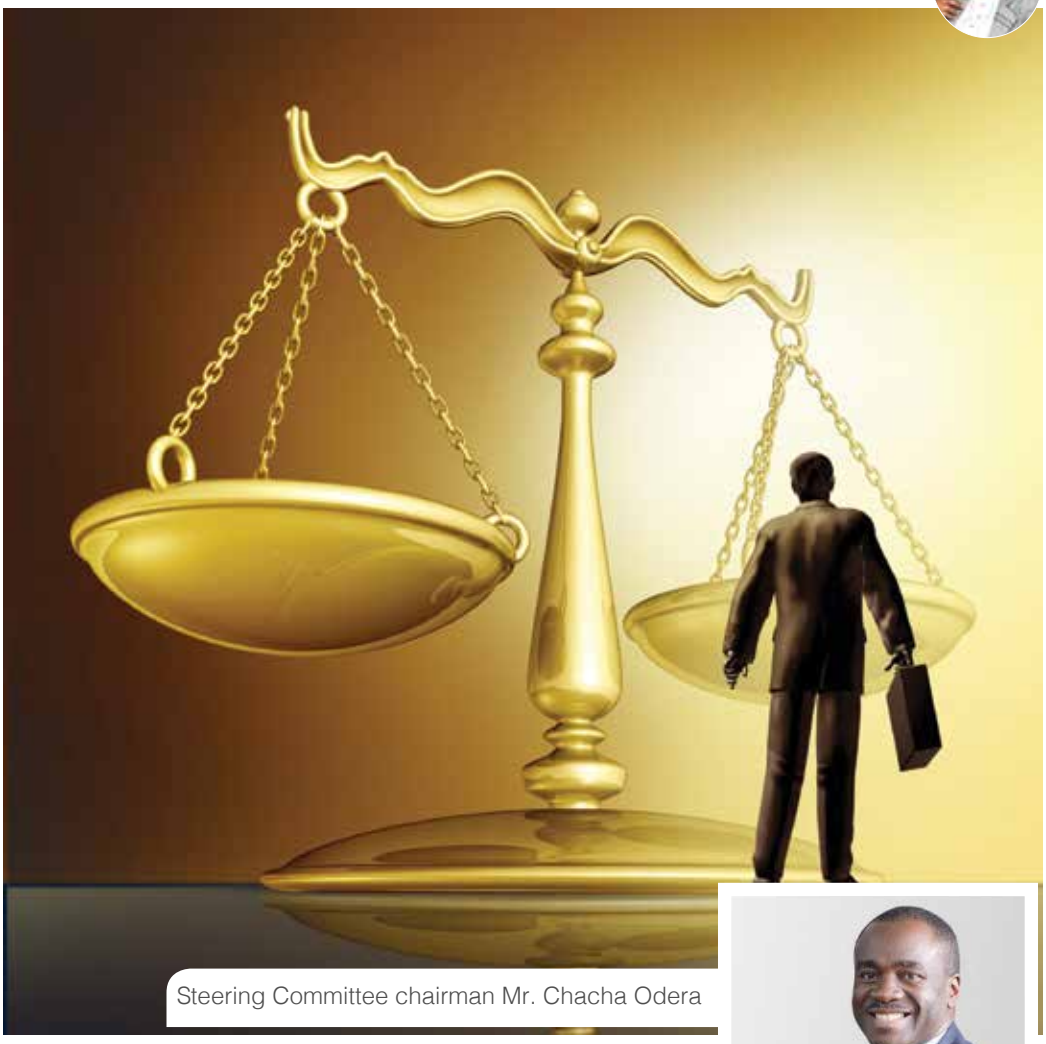
'And how have you arrived at that amount? ' the court had asked.
'My air ticket from Nairobi cost me 10k and the taxi to this dusty place another 5k,' she'd said gesturing condescendingly at the court room, with a sweep of her hand. Asked to produce her air ticket, she'd pursed her lips, widened her eyes and said it was in her hotel room in Kisumu. Pressed further, she'd thrown her head back and said: 'do I look like I could travel from Nairobi by road?' Reluctantly the court had awarded her five thousand that day. Now Lindah was back in all her glory and arrogance.

Tossing her braids back with a flick of her head, and pushing her dark glasses up her forehead, she says 'My full names are Lindah Musungu; Lindah with an 'h' at the end.' She then narrates how 'Tony Musungu', her husband of three years, was always on safari, leaving her alone in their big cold house. 'It's cruel! Other people also go on safari, but they are not away from their houses that long.'
'Who else resides in the big cold house?' Her husband's Advocate, an overweight man in an ill fitting, crumpled suit asks her, when she completes her testimony.



Her gaze shifts from the Advocate, to the Magistrate and finally rests on a middle aged woman in a flower patterned cotton dress and a matching headdress, seated in court.
'And who might that woman you are looking at be?' The Advocate asks, looking over his shoulder.
'My mother!'
'And you are telling this court that it is this mother of yours who resides with you in your matrimonial home?'
She nods.
'All the time? '
Another nod.
'Has your husband objected to it?'
'But she is my mother! And I told Tony, if my mother could not stay with us, I would leave!'
'You mean your mother resides permanently in your matrimonial home?' the Magistrate asks; peering from the top of her glasses.
A nod, again.
'And how would you feel if your husband brought his mother to permanently reside with you?' the magistrate says.
No response.
'Do you recognize this document?' the lawyer asks, walking up to her. Suddenly sweat beads speckle her forehead, and her neatly manicured fingers begin to shake.
'Are you OK?' the Magistrate enquires.
Now Lindah is silent, her head lowered.
'You will answer the question.'
'He died; he died a long time ago.'
'Could you first tell the court what document this is? Is this not a certificate of marriage between yourself and a Mr. Lichuma?'
'He died!' She shouts; her eyes blazing.
'You are under oath here,' the Advocate warns.
'Lichuma died long ago. Only then did I marry Musungu.'
The Advocate whispers something to his assistant, who bows and walks out.
'Your Honor Mr Lichuma in flesh and blood,' the Advocate announces, as a lanky man in a plaid jacket walks in with his assistant.
'You have come to ruin my daughter's life you drunk,' the middle aged woman in a patterned headdress screams shooting up. She tries to grab at the man, who dashes to the front.
'Orderly! You will remove this woman from my court. This is not a market place. And you; can you confirm this is Mr. Lichuma?'
Lindah just stares ahead biting her lower lip.
'Are you married to this man?' the magistrate asks.
Lindah nods, tears rolling down her cheeks.
'And the certificate before the court was issued by the Registrar?'
'Yes.'
'And there has never been a termination of your marriage to Lichuma?'
Now it is the lanky man in a plaid jacket that is nodding.
'As far as I'm concerned, that man is dead,' Lindah shouts, pointing at Lichuma.
'You better start getting used to travelling by road,' the Magistrate quips, as Lindah dismounts the witness box.

Mr Ochieng is an Advocate of the High Court of Kenya
www.pochiengochieng.co.ke



Steering Committee chairman Mr. Chacha Odera

Reviewing lawyers' code of conduct

A Steering Committee chaired by Mr. Chacha Odera has already been set up to oversee the process.

By Mercy Wambua

The legal profession in Kenya has since 1982 been guided by a very brief Digest of Professional Conduct and Etiquette. The Digest which was last revised in the year 2000 does not address current and emerging ethical issues within the profession.

The Law Society of Kenya (LSK) has several other pieces of legislation and regulations governing the conduct of advocates. For instance, the Advocates (Remuneration) (Amendment) Order(2014), The Advocates(Marketing and Advertising)Rules (2014), Law Society of Kenya Advocate's Dress Code(Revised 2013) and The Advocates(Continuing Professional Development) Rules 2014 among others.

Advocates' conduct

The Rules governing conduct of advocates countrywide largely remains unwritten posing a great challenge to enforcement of high ethical standards in the profession, which in turn affects service delivery to the citizenry.

The profession has experienced enormous growth in membership coupled with various dynamic changes in the market over the last two decades.

Article 46 of the Constitution of Kenya 2010, guarantees consumers the right to quality services, hence the need to develop a comprehensive Code of Conduct that will be able to guide advocates concerning their professional conduct and etiquette of the profession.

LSK in its Strategic Plan for 2012 -2016 recognized the need to develop a comprehensive Code of Conduct.

Disciplinary Tribunal

The LSK Advocates Disciplinary Tribunal increasingly receives a high number of complaints over professional misconduct. Lack of a comprehensive Code of Conduct can be greatly attributed to the increased cases of professional misconduct as the Rules of conduct largely unwritten.

Currently, the Law Society of Kenya has embarked in the process of developing a Code of Conduct for the legal profession - the aim of the process is to set standards for professional conduct of lawyers pursuant to the provisions of the Advocates Act Cap 16 Laws of Kenya. To achieve this Law Society of Kenya will employ a participatory process and a Steering Committee chaired by Mr. Chacha Odera has already been set up to oversee the process.

The Committee will also map out the procedures, content and scope of the Code of Conduct, carry out stakeholder forums with a view to collecting member' views on the Draft Code of Conduct before coming up with the final Code of Conduct.

International principles

Ten international principles on conduct for the legal profession will greatly inform the scope of the Code. They include the Principle of independence, Principle of honesty, integrity and fairness, avoidance of conflict of interest and observation of confidentiality/

takings given in the course of practice, respect to the freedom of clients to be represented by the lawyer of their choice, treating clients' interest as paramount, accounting promptly and faithfully for and prudently holding property of clients or third party that comes into the lawyers trust, carrying out work in a competent and timely manner and the entitlement to a reasonable fee for work done provided that an advocate shall not charge an unreasonable fee.

Ms. Wambua is the Law Society of Kenya (LSK) Deputy Chief Executive Officer (Compliance and Ethics)

Where we go wrong with the Companies Act

The Companies Act is the mainstay of corporate law practice

By Mugambi Nandi

It follows therefore that a casual acquaintance with the Act is not sufficient to prepare a corporate lawyer for the arduous task of structuring and advising clients on complex, and sometimes not so complex, corporate deals. This article contains some of the provisions in the Act which I have, in the course of my career as a corporate lawyer, found to be esoteric.

The Companies Act envisages the incorporation of five types of companies, namely Unlimited Companies, companies Limited by Guarantee and having a share capital, companies Limited by Guarantee and not having a share capital, Public Companies (not to be confused with being listed on a securities exchange) and Private Companies. Other than Private, qua private, Companies, the other types of companies are public and require at least seven shareholders.

I was therefore surprised to learn recently that the Registrar of Companies has over the years adopted the practice of registering companies Limited by Guarantee as private companies.

Private Company

It will surprise a few that the Act provides that a private company may have only one director as long as that director is also not the company secretary. I recall a time I had to reproduce Section 177 for the Registrar to accept incorporation documents where the proposed company had only director. When faced with that problem, one may consider incorporating a private company with two directors and thereafter procuring the resignation of one director in order to avoid arguments with the Registrar.

Tacked in sections of the Act is the requirement for "special notice" in respect of certain resolutions. In accordance with section 142, notice of intention to move such a resolution must be given to the company not less than twenty-eight days before the meeting at which it is to be moved. Resolutions for the appointment of a new auditor, removal of a retiring auditor, removal of a director and the appointment of a director who has attained the age of seventy require special notice.

Speaking of the appointment of directors, the Act provides that a motion for the appointment of two or more persons as directors of a public company must not be made by a single resolution. Each director's appointment must be voted on individually unless a unanimous resolution to vote by single resolution has first been passed. Of course the logic is to make sure that an undesirable or unqualified person does not get voted in through an omnibus resolution, or the converse.

Annual General Meetings

I have seen, with dismay, notices of Annual General Meetings (especially of public companies) that have the confirmation of the minutes of the previous annual general meeting as an item on the agenda.

I hold the view that this is incorrect for two legal reasons and at least two practical ones. It is not farfetched to say that members of a public company may be being different from one meeting to the next, or they may not remember what transpired at the previous one. On legalities, the matters that are to be discussed at an annual general are a closed list, and all other business outside the list is considered "special business".

The second legality is that Section 145 empowers the Chairman to authenticate the minutes. The ideal practice is to have the minutes of the Annual General Meeting approved at the subsequent board meeting, and thereat signed by the Chairman.

I have also seen many a notice with the item "approval/adoption of accounts" by shareholders. There is no statutory requirement for shareholders to adopt or approve accounts, unless the Articles of the company specifically require it.

The Act merely requires the directors to "lay before the company in general meeting" copies of the accounts and reports. Unless a manifest error were to be pointed out, members must "receive" the accounts and reports as prepared by the directors and confirmed as true and fair by the auditors. If the shareholders are unhappy with the accounts and reports, their recourse is to remove the directors from office and appoint new ones.

Dividends declaration

The declaration of dividends is another issue that can sometimes be confusing. The important thing to note is that the directors have power to declare an interim dividend in the course of the financial year of the Company. At the end of the financial year, the directors can only recommend a final dividend to the shareholders, who have the right to approve or reject, but not to reduce or increase it.

One of the questions new practitioners grapple with is whether any form of return is filed whenever a transfer of shares takes place.

Due to exigencies of commercial transactions, a practice has developed where an "interim return" is filed as soon as share transfers are effected, as part of meeting conditions precedent to completion or to facilitate the issuance of an unqualified legal opinion. Other than that, movements in shares since the last return are reported through the next annual return.

When directors allot shares, as they are often entitled to (subject to any pre-emptive rights of existing shareholders), a Return on Allotment is supposed to be filed within sixty days of the allotment.

This discussion is by no means exhaustive, and we hope to explore other topics in future editions.

Mr. Nandi is a Managing Partner, KN Associates LLP

Employees whose rights have been violated now have a better chance of obtaining remedies. In the same light, if an employer has followed the substantive and procedural provisions of the law, then the Industrial Court will not interfere with decisions of the employer.

Teachers on strike

Industrial Court not biased, but firm in law enforcement

By Stephen Wandeto Muriuki

Article 162 (2) (a) of the Constitution of Kenya 2010 settled the longstanding supremacy tussle between the High Court and Industrial Court.

The Constitution establishes an Industrial Court with the same status as the High Court with jurisdiction to hear and determine labour matters.
Parliament then enforced the Constitutional provision by enacting the Industrial Court Act 2011.
The main constitutional mandate of the court is inter alia to enforce labour rights founded on Article 41 of the Constitution.

Of importance to the current debate about the court, is the claim that it tends to lean towards protecting the rights of employees against those of employers. The court has therefore been described as a 'pro-employee' court.
During a seminar discussion for the Judges of the Industrial Court, Justice Riika described the role of the court as:-

"The role of the industrial court is to promote industrial harmony and regulate the relation between employers and their employees between trade unions and employer organization and resolve disputes arising from these relations. The court goes about mediating the boundaries of rights and obligations of employers and employees in accordance with equity, good conscience and the substantive merits of the dispute. The primary objective is to attain social justice by upholding fair work practices"

The court therefore, has an obligation to protect both employers and employees. The trend evident in the judgments emanating from the Industrial Court is the vigilant enforcement of the provisions of labour laws especially the Employment Act.

Take the case of the Kenya Union of Domestic Hotels Education Institutions Hospitals and Allied Workers vs Pwani University College, the Court declined to reinstate an employee to his former position since the relations between the employer and employee had broken down irretrievably. The claim of the union claim was dismissed with no orders as to costs save for compensation to the employee.

Separately, in the case of Kenya Hotels and Allied Workers Union v Voyager Beach Resort, the Industrial Court observed that the union had not met the minimum threshold for recognition under the Labour Relations Act. The union had not recruited a simple majority of the employees working for the respondent.
In John Willice Opot v Starehe Boys Centre, the Court considered the question of an employee who had been dismissed for engaging in politics. It held that engaging in politics was not a valid reason for termination under Section 46 of the Employment Act nor did it constitute gross misconduct under Section 44 of the Act.

Distinctly, in Aviation and Allied Workers Union v Kenya Airways and 3 others, Kenya Airways declared employees who were members of the union redundant. The main issue for determination was whether the redundancy process was conducted in accordance with Section 40 of the Employment Act. Consequently, the court determined that the redundancy was not carried out as prescribed by the law.
The above analysis of emerging precedents from the industrial court clearly demonstrates that the court will be concerned with one thing - firm enforcement of the law.

The evident trend in judgments from the Court is the vigilant enforcement of labour law provisions - especially the Employment Act.

Employees whose rights have been violated now have a better chance of obtaining remedies. In the same light, if an employer has followed the substantive and procedural provisions of the law, then the Industrial Court will not interfere with decisions of the employer.
The court attempts to weigh the balance of power between employers and employees however, one does not trace the so called 'pro-employee' philosophy in the pronouncements so far made by the court.

Mr. Muriuki is an advocate of the High Court of Kenya

CSR is best way for firms to secure their future

As lawyers, we shall continue to be called upon to advise our corporate clients on the emerging areas of CSR.

By Robert Asewe

Chief Justice Dr Willy Mutunga advises clients at the LSK Legal Awareness Week.

Corporate Social Responsibility (CSR) has been the subject of considerable debate, commentary and research.

Over the years, the concept has continued to grow in importance and significance and I often get interesting definitions about what we understand as CSR.
Most tend to equate CSR with philanthropy. But is CSR really just philanthropy?

The European Union, for example, believes that it is a "concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with stakeholders on a voluntary basis.
The World Business Council on Sustainable Development (WBCSD) adopts a more integrated definition and defines CSR as the continuing commitment by business to contribute to economic development while improving the quality of life of the workforce and their families as well as the community and society at large.

Personally, I define CSR as business taking direct responsibility for managing its environmental and social impact through transparency and integrating stakeholder concerns in its business processes and architecture.
I must emphasize that shareholders and employees are not the only stakeholders herein. Wider stakeholder groups include investors, consumers, regulators, local communities and interest groups like NGOs.

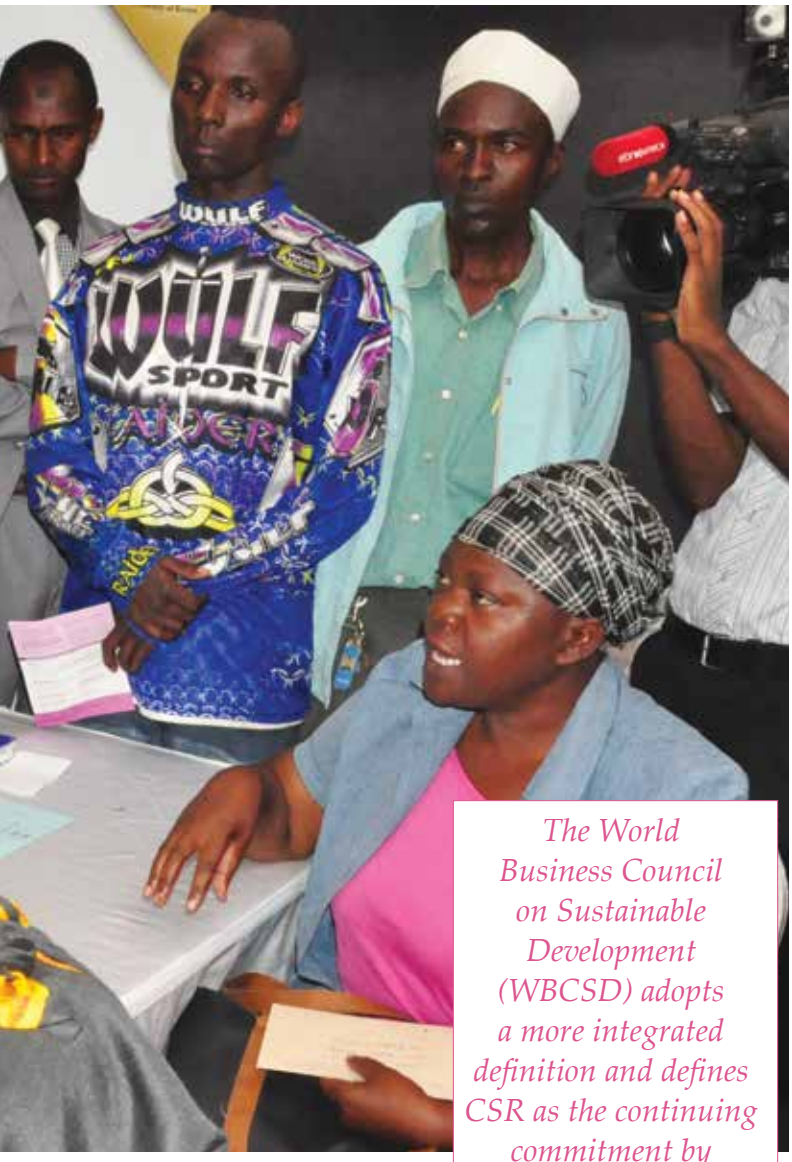
CSR has over the years elicited sharp debates between supporters and detractors in equal measure. The case against CSR begins with the late Milton Friedman (1962) - an American Economist who taught at the University of Chicago for more than three decades. He was the recipient of the 1976 Nobel Prize in Economic Science. The Economist (November 23, 2006) has described him as "the most influential economist of the second half of the 20th century."

Friedman argued management has one responsibility- maximize the profits of its owners and shareholders. He argued that social issues are not the concern of business people but a preserve of the free market system. If the free market system couldn't resolve social issues, then government and legislation were to do the job.

Advocates for CSR argue that it is in a companies' long term enlightened self interest- to be socially responsible. They argue that successful future companies will be those that take action now to become socially responsible. They assert that industries that embrace emerging CSR trends will reduce government regulation since responsible business makes everyone happy.

Others opine that businesses have the resources and they should try to make the world a better place. They have the capital (financial and intellectual) and should be given an opportunity where the free market systems in conjunction with government and legislation have failed. Their mantra is "proactive is better than reactive". I concur. In fact, I view CSR as a risk management and innovation tool.

Between 2nd and 3rd December 1984, the world watched in horror as one of the world's worst industrial disasters occurred at Union Carbide India Limited (UCIL) - a pesticide plant in Bhopal India. A toxic gas leak had



resulted in massive loss of life and suffering. UCIL was 51 percent majority owned by Union Carbide Corporation (UCC) - an American company.

The investigation reports published by media outlets such as the British Broadcasting Corporation (BBC) indicated that the company suspected sabotage by an employee.

The reports also indicated internal oversight failures by the company. For instance, it was reported that staff reductions and lower levels of training for those handling the most dangerous gases was prevalent. Investigations further revealed that all plant supervisors had allegedly been taking a break at the same time when the incident occurred. Plant operatives are reported to have altered log files to cover any evidence of negligence that could be attributed to them.

The World Business Council on Sustainable Development (WBCSD) adopts a more integrated definition and defines CSR as the continuing commitment by business to contribute to economic development while improving the quality of life of the workforce and their families as well as the community and society at large.

Litigation ensued and the Indian Government passed the Bhopal Gas disaster Act that gave it the right to represent all victims. The company paid $470 million and was directed to finance a 600 bed hospital for the medical care of survivors which it promptly did. The company CEO Mr. Warren Anderson admitted moral liability.

Over 30 years later, the tragedy still haunts those involved. In August 2009, an Indian court issued a warrant of arrest for Anderson. This news was met by celebrations by thousands of Indian protesters outside the court. Attempts to extradite Anderson have been futile. Americans argue that although the charges warrant extradition, the Indians had not proven Anderson knew about the circumstances or intervened in a way that led to the disaster.

The Bhopal disaster has over the years fueled the emerging notion that neglect of CSR obligations may lead to directors' liability.

The UCIL had a corporate responsibility to ensure that it had sufficient internal capacity to ensure safety of employees and a social responsibility to protect the community and environment from adverse effects of its operations. Such liability may be criminal or civil. This has firmly embedded CSR as a corporate governance issue.

Currently, smart businesses are embracing CSR not only as a risk management strategy but also as a tool for innovation. Globally consumers are demanding affordable goods and services that are ethically produced or sourced. They are demanding that companies provide them with goods and services that add value and make business sense.

Take the case of Safaricom. Whereas M-pesa was initially a CSR project by the telecom company to bank the unbanked, it is today one of Safaricom's leading sources of revenue. For the financial year ended March 31, 2014, M-pesa generated a whoping Sh26.56 billion turnover from the previous year's Sh21.84 billion, a 21.6 per cent increase. M-pesa revenues accounted for 18 per cent of the Sh144.67 billion that Safaricom made in the last financial year. Mpesa has inspired a new generation and form of money transfer and payment solution globally. Apple has just released its own version called apple pay. Equity bank through its subsidiary Finserve plans to roll out its thin sim mobile money service.

Responsible business is now a critical aspect of commerce and commercial transactions. The global economic meltdown has brought sharp focus on business. Countries around the world have begun enshrining strict corporate ethics codes and regulations to inspire and ensure responsible business.

As lawyers we shall continue to be called upon to advise our corporate clients on the emerging areas of CSR. Although industries such as transport, apparel, mining and automotive are initiating steps to reduce their carbon emissions, another set of businesses are rethinking their business models. They are looking at social challenges as opportunities to develop innovative products to address social challenges. In the process, these companies are legitimizing their license to operate and as a result - securing their financial future.

As a profession we must define what CSR means to us. We must make a contribution to this evolving business concept. Our roles in legal auditing, product liability advice, consumer protection and development of business law and corporate governance rules will be greater. We must advise Kenyan companies to rethink their approach to community investment. Donations and grant programs must now be more strategic, innovative and entrepreneurial. Community investments - I believe - should be treated as research and development platforms for new products, new markets and new business models.

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Corporate governance must focus on profitability and how to stay there

Lack of independent leadership makes it difficult for boards to respond to failure in the top management team

By Harriette Chiggai

An argument has been advanced time and again that the governance structure of any corporate entity affects the firm's ability to respond to external factors that have some bearing on its performance. In this regard, it has been noted that well governed firms largely perform better and that good corporate governance is of essence.

Corporate governance in Kenya is now gaining recognition with very little work in the area even in the well regulated institutions and sectors. A good example is the failure of a number of State Corporations on poor governance related issues.

One of the most important roles of corporate governance is to ensure that strategic decisions are made in the interest of those with a stake in successful outcomes. Boards have increasingly become more focused on corporate shareholders, but a shift may be beginning to occur.

Policy Setting

One of the many important roles played by corporate boards and executive committees is to establish and enforce policies deemed necessary for the effective operation of the firms.

An organization's corporate board must be intimately involved with establishing a clear definition for the organization's purpose and desired outcomes.

A company's executive team is directly accountable to the board of directors.

This requires that major corporate decisions and results tracked against the corporate goals should be vetted, if not by the full board, then by the board's executive committee. Key strategic actions, such as mergers and acquisitions, major new market entries, exiting markets, closing plants, or changing the diversification mix or pricing position, are examples of decisions that require the oversight of corporate governance.

Capital Investment

It is the responsibility of the corporate board to review and understand the financial statements of the company and to guide the prudent investment of funds to maximize net income and returns. Corporate boards must be vigilant regarding the strategic impact of new requirements for internal controls.

They must also review and understand product portfolio and support the executive management team, offering strategic oversight regarding adjustments to the product mix, approving or shifting capital investment to product categories with the most potential to maintain and grow revenue streams and manage expenses.

Accountability to Stakeholders

From a governance perspective, accountability, while often focused on stock shareholders, can sometimes become something not considered.

As stock prices and quarterly dividends have taken center stage, long-term investments are often set aside. Critical aspects of corporate governance responsibilities, such as infrastructure investment, plant retooling, workplace safety or disaster planning, have often been ignored or delayed past safe time parameters.

Most investors look at the general management of a firm, in the event a firm is in need of financial assistance, the interested lender will have to do a risk analysis of the firm, which is based on its liquidity ration and overall risk assessment based on the company history and its management.

In the corporate world today a company`s success will not only be gauged on reporting high profits but also how well the balancing of various interest of the stakeholders is practiced. Values of honesty, integrity, transparency and fairness in treatment of the stakeholders of a company are important in the running of the company.

Well run companies are guaranteed to survive in the competitive world as investors prefer to put their money in corporation that practices good corporate gover-

nance. Some of the good principles of sound corporate governance include fair treatment of all classes of shareholders and disclosure and transparency.

Others are values of honesty and integrity should be concretized in the company and all employees, managers and directors should share these values and practice them for the well-being of the company and relationship with other stakeholders such as bankers, supplier's customers should always be respectful.

Defined Roles within the Management

Good governance enhances well defined roles between the Directors and the management. A clear demarcation of these roles will propel the objectives of the firm whilst avoiding and disconnect and unnecessary ambiguity that may drag the operations of the firm behind. As a result, there shall be a well managed firm which works to achieve its objectives with few wrangles.

Key strategic actions, such as mergers and acquisitions, major new market entries, exiting markets, closing plants, or changing the diversification mix or pricing position, are examples of decisions that require the oversight of corporate governance.

The stock market is driven by perception. It is that which is perceived that lures or attracts the stock buyers and brokers. When a firm is doing well, and has the right management or the appointed board is viewed as competent, persons with exemplary track record and persons of high integrity, market exudes confidence in dealing with the particular firm.

Conclusion

The relevance of corporate governance cannot be overemphasized since it constitutes the organizational climate for the internal activities of a company. It brings new outlook and enhances a firm's corporate entrepreneurship and competitiveness.

Lack of independent leadership makes it difficult for boards to respond to failure in the top management team. Good corporate governance is very important for sustainable development, not only for the individual company, but also for the economy as a whole.

Therefore, the quality of governance should be continuously improved and good governance should be promoted. However, what is not measured cannot be improved. Hence, there is a need for a model to measure the quality of corporate governance.

Most attempts to measure the quality of corporate governance focus on compliance-related issues. Numerous rating models also seem to focus on the inputs of governance, such as the composition of boards and the separation of the CEO and chairman roles.

However, they do not pay sufficient attention to the quality of information, decision-making processes, nor link the effectiveness of governance to output measures such as the brand image, employee and customer satisfaction indices, or profitability and value creation. Also, most measures fail to deal with learning and development in governance.

Second, is that the quality of the information that the board gets is a key determinant of its effectiveness. Whether relevant and timely information, presented in a context, with the benchmarks and alternatives identified, assumptions understood and stress-tested, or whether the potential effects of various alternatives on different stakeholders have been taken into account, would have a significant impact on the quality of the board's decision.

Third, the impact of a board's decisions on output measures should be evaluated.

Governance is important for the sustainability of value creation. If the model that aims to measure effectiveness of governance does not evaluate the linkages to output measures - not only financial performance, but also lead indicators such as customer, employee, or other stakeholder satisfaction - it would be missing an important dimension.

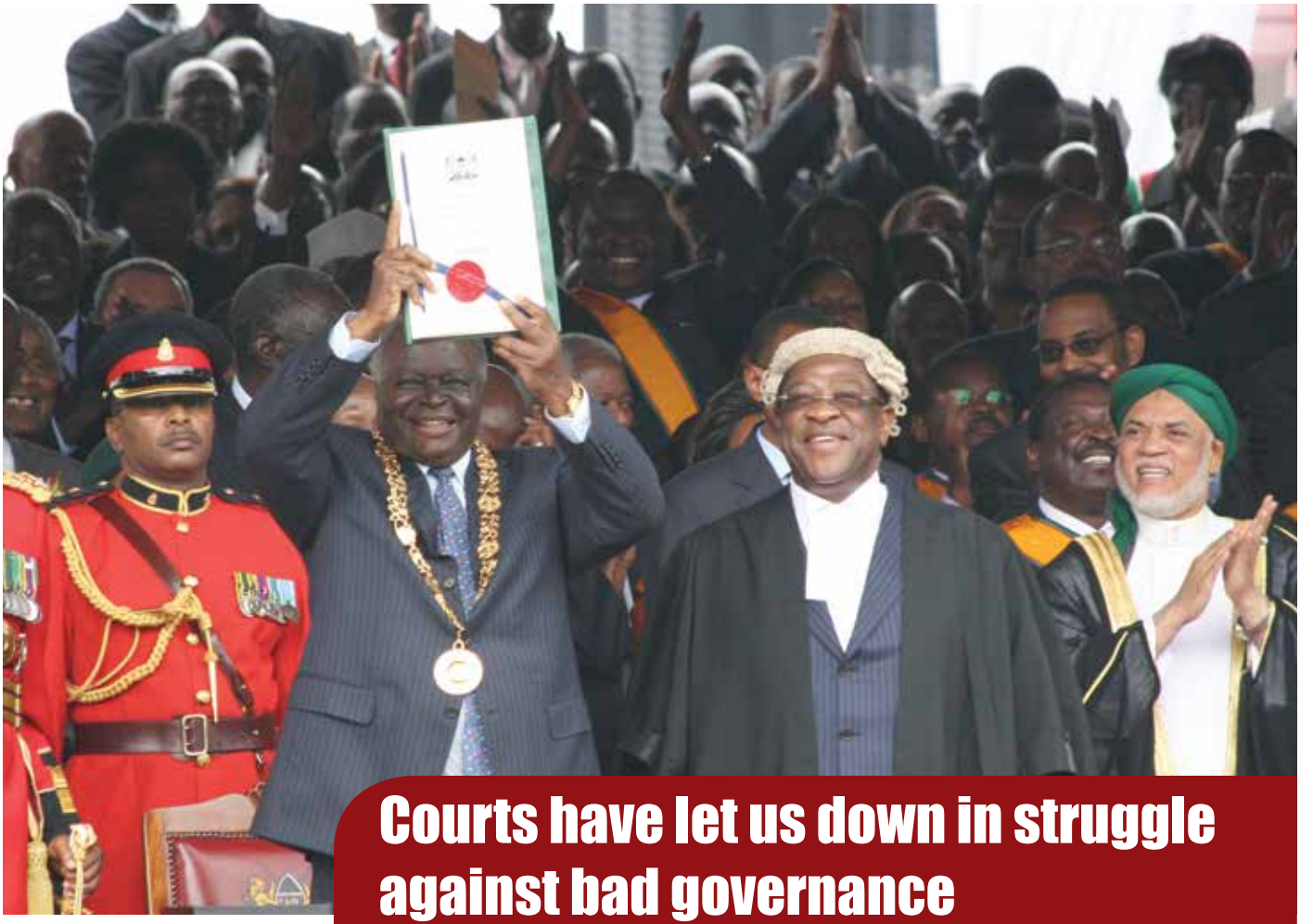
Boards should also be focusing not only on the business results, but also how business results are obtained. As an outstanding performance could sometimes be due to excessive risk-taking, resulting in a relatively good performance during a particular period, it may not be sustainable.

Such an elaborate evaluation of management proposals requires an open and transparent culture, where members are encouraged to challenge assumptions and evaluate alternatives.

Also, as there is a time lag between decisions and their impacts, the board's performance should be evaluated over a period of time, not at a specific time.

Finally, the purpose of measuring the effectiveness of governance should be to improve it continuously. Therefore, assessing how a board learns and invests in developing its own performance should be an important dimension of any business model.

Ms. Chiggai is an advocate of the High Court of Kenya and East Africa Law Society (EALS) Council Member.



Courts have let us down in struggle against bad governance

Provisions of Chapter Six of the Constitution have been relegated to a political question to be decided by voters in the ballot.

By John Mwariri

Our forefathers took up arms to fight the British Colonial Government to acquire self-rule, better governance and prosperity.

On gaining self-rule, the work of the independence government led by the founding President Jomo Kenyatta was pretty curved out - to guard and consolidate the gains of self-rule.

What followed however was a culture of bad governance epitomized by marginalization, corruption, poor public service delivery, insecurity and poverty. This culture was later perfected by successive Governments of President Moi and Kibaki occasioning great misery to most Kenyans.

Dissatisfied with the leadership, Kenyans fought with their sweat, flesh and blood for reforms, in a struggle that spanned decades. Many people lost their lives - mostly in their youth - , many promising careers were ended abruptly and great destinies shuttered. It was the struggle for second liberation. The crowning of it was Kenyans giving themselves a Constitution with a whole Chapter (Chapter Six) devoted to leadership and integrity.

It is important to consider this historical background highlighting our struggle for good leadership, predating independence in order for us to understand why Chapter Six of the Constitution is so important. In fact, the Chapter is so important that it is considered the heart and soul of our supreme law.

Caesar's wife

A closer look at the provisions of this Chapter is enough witness of the qualities of leaders that we have all along struggled and longed for - those whose conduct both at personal and public level is taintless. In fact, like Caesar's wife, Kenyans expected those to be entrusted with the management of public affairs to be beyond reproach.

Article 73 of the Constitution is exclusive that the authority assigned is a public trust that is to be exercised in a manner that demonstrates respect to the people, brings dignity to the office and promotes public confidence in the integrity of the office.

Those entrusted with exercise of public power by the nature of the offices they occupy are further enjoined to exercise objectivity, impartiality, to maintain a great level of honesty, discipline and accountability.

While the special role of the courts is appreciated - especially in the interpretation of the law and as the vanguard of the will of the people - serious concerns arise from demonstrable lack of will by the courts to breathe in more life to Chapter Six of the Constitution.

Failed courts

Firstly, the courts have failed to appreciate the constitutional nature of Chapter Six of the Constitution. This does not come out clearly than in the International Centre for Policy and Conflict Case in which the eligibility of Uhuru Kenyatta and William Ruto to seek the highest offices in the land was challenged, noting that they faced criminal charges at the International Criminal Court (ICC) at The Hague. The High Court in dismissing the petitioners case stated that the matter before it boiled down on whether the duo was eligible to seek elective position, a matter which was within the exclusive ju-

risdiction of the Supreme Court.
My contention is that the High Court misdirected itself in treating the matter as an election dispute than a question of non-compliance with Chapter Six of the Constitution a matter which the court could have dealt with.

The High Court was further mandated by virtue of Article 165(3) (d) (ii) read together with Article 258 to give audience to the petitioners as the matter before it related to interpretation of the Constitution including whether the offering of the duo to seek political office was consistent with the Constitution.
The High Court hence failed to give a substantive thrust to the provisions of Chapter Six in failing to consider whether the honour, integrity and confidence bestowed on public office under Chapter Six and by Kenyans would be eroded if the duo offered themselves for public office.

Good governance

Secondly, is the fact that the provisions of Chapter Six of the Constitution have been relegated to a political question to be decided by voters in the ballot. In the above case, the court stated that in making a decision on the eligibility of persons seeking state office, it is important when doing so not to affect the right of the public to make political choices.

In a similar case challenging the eligibility of the Late Homa Bay Senator Otieno Kajwang' to seek elective position, High Court Judge Justice Isaac Lenaola stated that presupposing he found Kajwang' not fit to hold office, he would be hesitant to disqualify him and would leave the same for the people of Homa Bay to decide in free and fair elections. The question that pegs then is whether the provisions of Chapter Six are subject to the provisions of Article 38(2) on free and fair elections.
The struggle for good governance still continues and the war probably this time will have to be fought in the corridors of justice.

Mr. Mwariri is a lawyer

Devolution Cabinet Secretary Ms. Anne Waiguru (centre) during the launch of The Socio-Economic Atlas of Kenya.

There's something for everyone in Kenya's unique devolution

By Chrispin Owiye

The concept of devolution is no longer new in Kenya's present constitutional dispensation. It has hitherto gained root in the governance structure albeit with considerable implementation turbulence.
It is noteworthy, that whereas devolution is a word commonly uttered in work places, the streets and village paths, its essential features are seldom understood.
Essentially, devolution is one of the four facets of decentralisation of power, the others being delegation, deconcentration and decongestion.

Devolution, just like many buzzwords used in the constitutional and development discourse, takes different expressions and meanings across time and space. Some of the various forms of devolution include federalism as in the USA, confederalism as in Switzerland and provincialism as in South Africa.

Devolution defined

Quintessentially, Kenya is in its own category of devolution whose parameters have not been tested elsewhere in the world.
Devolution has been defined as a creation or strengthening financially or legally of sub-national units of government, the activities of which are substantially outside the direct control of the Central Government.
In the United Kingdom (UK), devolution has been defined to mean the delegation of Central Government powers without the relinquishment of the supremacy by the central legislature.

Article 174 of the Constitution captures tangible benefits that can be reaped from adoption and functioning devolution.

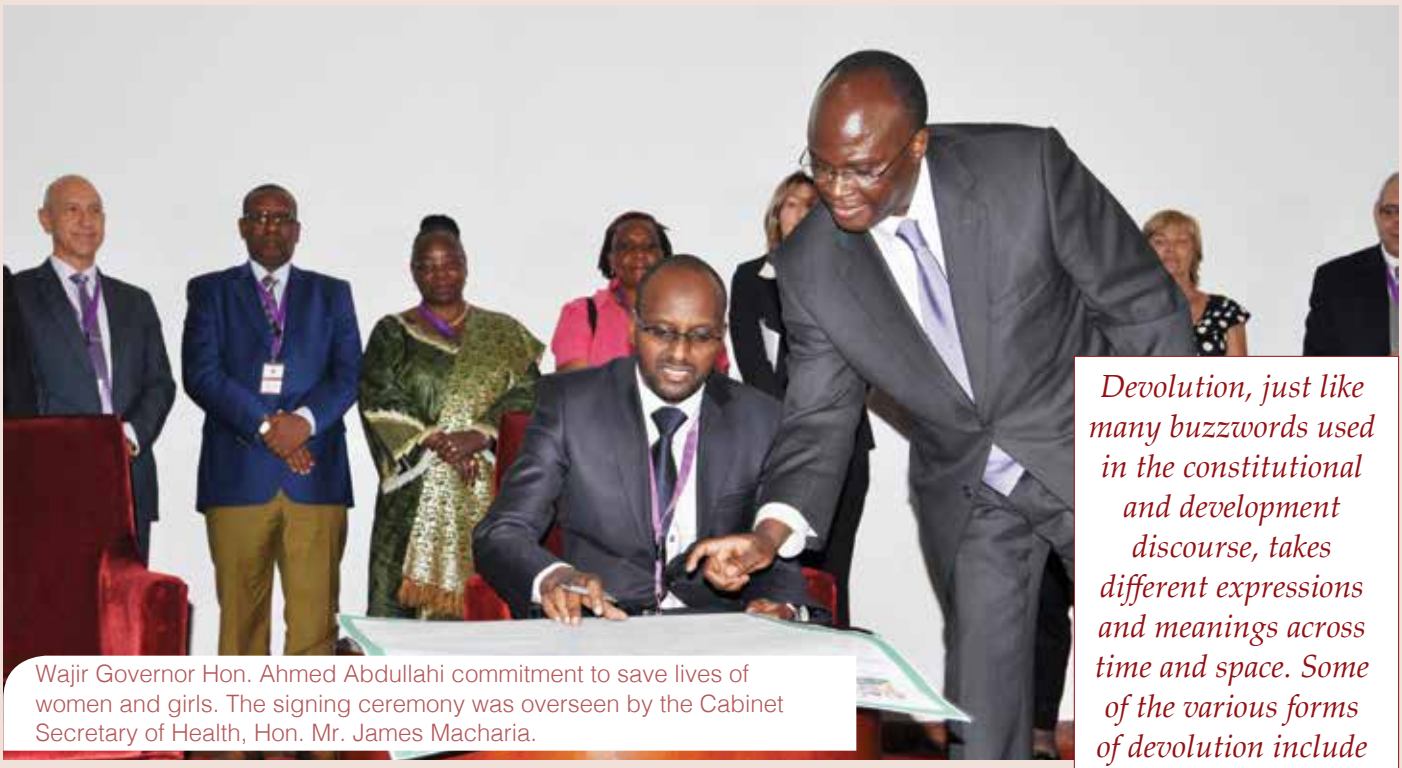
Devolution should be distinguished from federalism, the latter being the division of supremacy between the Central/Federal Government and the sub-central consisting of States as is the case in the USA and Nigeria. In federalism, the powers are so entrenched that the Federal Government on its own motion or a combination of effort of States cannot amend the parameters of the respective tiers of Government.

With the benefit of hindsight, and in appreciating its sui generis nature, devolution in Kenya can be described as the constitutional arrangement that creates the decentralization of executive and legislative powers between the National and County Governments.
Under this arrangement, powers of both the County and National Government are derived directly from the people to whom State organs and the officers are answerable.

Devolution certainly has immense benefits. A perusal of Chapter Eleven of the Constitution and particularly the objectives of devolution under Article 174 captures the tangible benefits that can be reaped on the adoption and functioning of devolution.

Democracy and accountability

First, devolution results in a democratic and accountable exercise of power. Essentially; this is what amounts to sound democratic governance. Through devolution, greater political representation of diverse political, ethnic, religious and cultural groups in structures and processes of decision making is realised. Devolution is expected to respond to the failures of a centralised system with its notorious drawbacks such as clientism, patronage, lack of accountability



Wajir Governor Hon. Ahmed Abdullahi commitment to save lives of women and girls. The signing ceremony was overseen by the Cabinet Secretary of Health, Hon. Mr. James Macharia.

Devolution, just like many buzzwords used in the constitutional and development discourse, takes different expressions and meanings across time and space. Some of the various forms of devolution include federalism as in the USA, confederalism as in Switzerland and provincialism as in South Africa.

and the primitive and underserved running of the State like a private enterprise.

Secondly, devolution promotes equitable social economic development. It also ensures the provision of proximate and easily accessible services.

Thirdly, devolution ensures self-governance by the people. The participation of the people in the exercise of powers of the State and in making decisions affecting them is one other benefit of devolution.

In this vein, devolution is praised as a means of recognizing the right of communities in managing their own affairs and in furthering their development. Devolution therefore, enables active participation beyond the right to participate in elections giving the citizenry more avenues necessary in voicing their concerns without undue restriction and or limitation.

Trias politica

Fourthly, once the apparatus of devolution come alive, there is protection of the interests and rights of minorities and marginalised communities.

The fifth benefit of devolution is informed by the historical underpinnings in Kenya. It is the quest for equitable sharing of national and local resources throughout Kenya.

Sixthly, devolution offers greater avenue for checks and balances of the various arms of Government and effectively promotes separation of powers as between Government operative arms under the doctrine of trias politica.

It has also been popularly opined that devolution purposes to foster national unity by recognizing diversity. This is however, debatable and is worth pondering given Kenya's two year experience in a devolved system of governance.

Lastly, devolution has been lauded as capable of affording an allowance for experimentation since the devolved structure in place gives relative freedom to the sub-national Government to come up with innovative structures to aid in the development of the local people.

But the concept of devolution is not without criticism and as such must not be viewed as the only means to good governance and the ultimate panacea to the faults of a centralised Government. Certain demerits are associated with devolution that robust structures must be put in place to mitigate them.

Overlapping roles

The stalling of decision making process where there is overlapping of roles and concurrent functions between the central and sub central units is one disadvantage that may ensue. The difficulty in co-operation and intergovernmental relationships has been apparent in devolution in most countries. Kenya's first shot at devolution soon after independence was marred with complex and confusing administrative structures.

Following the promulgation of the Constitution of Kenya 2010 and the subsequent implementation of the same, there have been witnessed strenuous intergovernmental relations that are absurd.

Devolution has the potential of promoting local elite capture. In the past two years of implementation of the devolution scheme in Kenya, there have been reports of the County Governments misusing funds which has led to what is popularly referred to as devolved corruption.

Devolution has also been criticized as a recipe for duplication of efforts and wastage of resources. It means that there will be a replica of the administrative operation over the number of sub central units. Locally, devolution has been cascaded into 47 Counties. This makes Kenya – administratively - one of the most devolved countries globally. Just to mention, South Africa has nine provinces while the UK has only three units.

By and large, devolution seems to be a good thing. With proper structures in place, a robust legal policy on implementation and enforcement and an honest political good will, Kenyans can for sure reap the sumptuous fruits of devolution. No doubt Kenyans must remain vigilant to realise the benefits of devolution.

Mr. Owiye is the Independent Electoral and Boundary Commission (IEBC) Manager in charge of Investigation and Prosecution

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MISSION

The vision of the Law Society of Kenya is to empower our members and promote good governance and the just rule of law.

OBJECTIVES

- To maintain and improve the standards of conduct and running of the legal profession in Kenya.
- To facilitate the acquisition of legal knowledge by members of the legal profession and others.
- To assist the government and the courts in matters affecting legislation and the administration of justice in Kenya.
- To protect, represent and assist members of the legal profession in Kenya in respect of conditions of practice and otherwise.
- To protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law.

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