The Advocate

The Advocate LSK Magazine Vol 1 Issue 15- Annual Conference Edition 2023

Anti-Money Laundering:
The Uncomfortable Agent – The Lawyer's Role in Balancing Competing Interests

Climate Change:
From Theory to Action, The Role of the Legal Profession in Climate Justice

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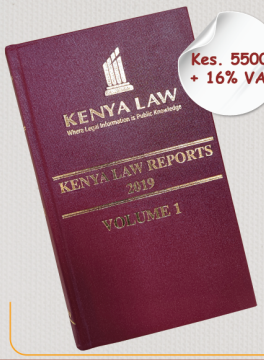

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- Land law
- Family law
- Law of succession
- Various aspects on jurisdiction

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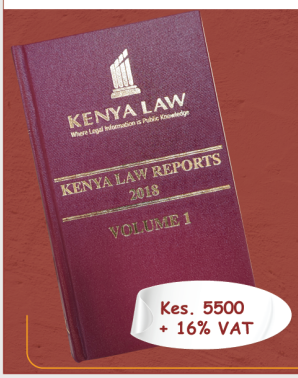

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- Land law
- Medical law
- Law of succession
- Various aspects on jurisdiction

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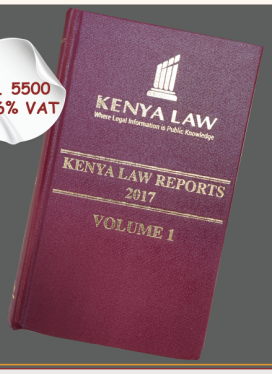

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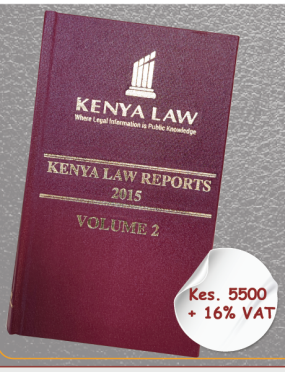

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The Kenya Law Review Journal is a peer reviewed publication of the National Council for Law Reporting. The journal is a platform for the scholarly analysis of Kenyan Law and interdisciplinary academic research on the law. The journal is published bi-annually and strives to establish itself as the reference of choice for both international and local readers in discussions on Kenyan law.

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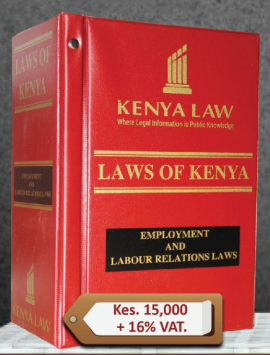
EMPLOYMENT AND LABOUR RELATIONS LAWS



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This Volume Contains:

- County Assembly Services Act, 2017 (No. 24 of 2017)
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- Employment Act, 2007 (No. 11 of 2007)
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- Fair Administrative Action Act, 2015 (No. 4 of 2015)
- Kenya Defence Forces Act, 2012 (No. 25 of 2012)
- Labour Institutions Act, 2007 (No. 12 of 2007)
- Labour Relations Act, 2007 (No. 14 of 2007)
- National Employment Authority Act, 2016 (No. 3 of 2016)
- National Police Service Act, 2011 (No. 11A of 2011)
- Occupational Safety and Health Act, 2007 (No. 15 of 2007)
- Public Service Commission Act, 2017 (No. 10 of 2017)
- Retirement Benefits Act, 1997 (No. 3 of 1997)
- Work Injury Benefits Act, 2007 (No. 13 of 2007)

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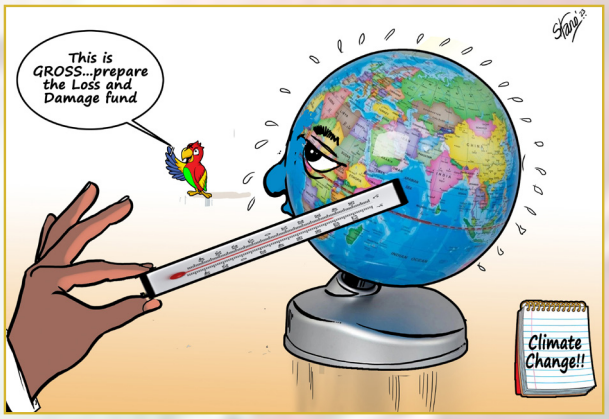

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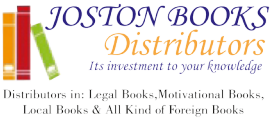


Vox Pop

Advocate Magazine, Annual Conference Edition 2023

"The sheer number of the victims of this 'silent epidemic' in our communities should move us to stop and say enough is enough! All of us must fold our sleeves and join the fight to get rid of Gender Based Violence (GBV) in our communities and protect victims.

However, fighting to protect the victims of SGBV is not often an easy task. This is because the reality is that we are living in a society where victims, and not perpetrators, are often still blamed for incidents of GBV.

Just last month, we launched the Judiciary's Sexual and Gender-Based Violence Court Strategy through which we are working towards establishing specialised trauma-informed SGBV courts. In July, we launched the Judiciary's Sexual and Gender-Based Violence Court Strategy through which we are working towards establishing specialised trauma-informed SGBV courts." **Hon. Justice. Martha Koome, EGH Chief Justice of the Republic of Kenya during the inauguration of the Maunguja Resource and Gender Based Violence Protection Centre in Mombasa.**

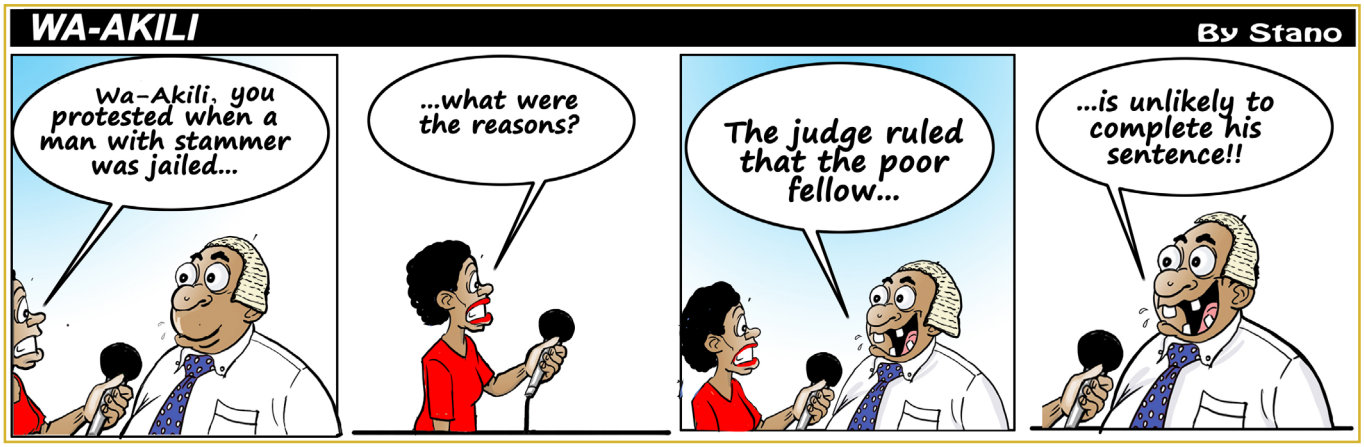
"As the Law Society of Kenya, we stand firm in our commitment to upholding the rule of law and defending the democratic principles that our nation was built upon. The Constitution of Kenya guarantees the right to freedom and security of the person, as well as the right to a fair and speedy trial. These rights must be upheld and protected for all citizens without discrimination. We call upon the relevant authorities to respect and uphold the rule of law, ensuring that any arrest and detention are conducted in accordance with the law... Members of the Public seeking legal assistance from the ongoing persecutions can reach the Society through the following toll free number **0800-720434** or email help@lsk.or.ke" - **Eric Theuri LSK President, in a Press statement on, Return of the Dark Days of Repression.**

We are excited today as we sign a Memorandum of Understanding (MOU) with the Office of the Nairobi Senator. The MOU will solidify our commitment to provide legal aid and *pro bono* services, legal education & aid clinic, development of information materials, content creation on legal sensitization, radio, TV shows, law reform and resource mobilization amongst others"- **Florence W, Muturi, Secretary/ CEO of the Law Society of Kenya during the signing of the MOU between the Office of the Nairobi Senator at the LSK offices.**

"There is need for reconstitution of the committee on e-filing to include various stakeholders including representatives from the Law Society of Kenya to enable seamless management of the e-filing challenges faced by Advocates such as the hitches in Kisumu, Mombasa and the persistent lack of power and consistent internet in Homabay." - **Faith Odhiambo, LSK VP during a meeting with the Chief Justice on how to enhance the effectiveness of Administration of Justice.**

"...I represent you as one of the four upcountry representatives. I also serve you on the Council the Audit Committee and also on the Editorial Committee. I believe you have received your LSK journals in your inboxes; have you? Yes... Good; wonderful. That committee (Editorial Committee) is part of my work for you as part of our labour of love for our members." – **Prof. Michael Wabwile, Council Member and Convener of the Editorial Committee during the LSK AGM.**

"Courts have on enough occasions held that procedure is as good as the substance. Duty bearers must not only abide by the written Law but also the spirit thereto. We hope that in due time the Courts will yet again rubber stamp this position in the cause filed against lifting the Moratorium banning logging in the Country. We must refuse to put the cart before the horse and complain when it doesn't render performance."- **Gichohi Waweru Advocate, PIL Committee Member-Counsel for LSK ELC Petition No. E0001/2023.**



Message from the CEO

> Lawyers play a delicate yet crucial role in maintaining the balance between diverse interests.

It is yet another year where we converge for the Law Society of Kenya Annual Conference, 2023, better known within our circles as the *Advocates Annual Migration*. We have reverted to our tradition of holding the Conference in the month of August.

This Year's Conference will focus on *"Climate Change: From Theory to Action, The Role of the Legal Profession in Climate Justice,"* and the sub-theme *"Anti-Money Laundering: The Uncomfortable Agent, A Lawyer's Role in Balancing the Competing Interests."*

I commence by reiterating the words of the late Kofi Annan, *"On climate change, we often don't fully appreciate that it is a problem. We think it is a problem waiting to happen."* Climate Change has been a topical area of discussion for years, with the impact being felt each day. The legal profession should and must catalyze the change required, to safeguard our planet for generations to come. As a profession, we need to take action, to mitigate the effects and remedy the causes. It is our duty to propel the discussion! It is our duty to demand action! The Law Society of Kenya has demonstrated its commitment, having attained conservatory orders, in the lifting of the moratorium for logging activities in forests. The negative impact of Climate Change threatens our economic and social rights, as enshrined in the Constitution.

The sub-theme of the Conference seeks to explore the uncomfortable realm of anti-money laundering. Advocates play a delicate yet crucial role in maintaining the balance between diverse interests. During the Conference, we will examine the impact of our decisions on financial integrity, societal wellbeing vis-à-vis the sacrosanct duty of an Advocate and the sanctity of the legal profession. With distinguished speakers and expert panelists, we anticipate to learn from one another and forge a collective path, towards sustainable solutions.

I extend my deepest gratitude to all the guests, speakers, moderators, our members and the Secretariat staff, who have contributed to the success of this Conference. Your enthusiasm, insight and dedication has infused this event with energy and purpose. I additionally acknowledge the invaluable support of our sponsors and partners, whose commitment underscores the importance of the topics dissected.

In conclusion, this Conference is not merely a fleeting event; it's a call to action that resonates beyond these walls. Let the knowledge shared, the connections forged, and the ideas sparked be the seeds that grow into meaningful change. The Law Society of Kenya remains steadfast in its commitment to fostering an environment where legal professionals can drive positive impact, address pressing issues, and champion justice in all its dimensions.

Thank you for being a part of this remarkable journey. Together, let us continue to shape a future where the legal profession stands as a beacon of hope and progress, both for our Society and our planet.

Florence W. Muturi
Secretary/ Chief Executive Officer
Law Society of Kenya.

President's Dispatch

> The conference showcased the legal profession's potential as a driving force in effecting positive change, not only within our judicial systems but also within the broader social and environmental spheres.

Greetings to all esteemed members, distinguished guests, and participants,

It is with immense pleasure and honor that I address you in the pages of this annual conference magazine. The Law Society of Kenya's 2023 Annual Conference was an extraordinary event, a testament to our shared commitment to advancing the legal profession and addressing critical global challenges.

Under the theme "Climate Change: From Theory to Action, The Role of the Legal Profession in Climate Justice," and the sub-theme "Anti-Money Laundering: The Uncomfortable Agent, A Lawyer's Role in Balancing the Competing Interests," we embarked on a journey of exploration, collaboration, and enlightenment. The conference showcased the legal profession's potential as a driving force in effecting positive change, not only within our judicial systems but also within the broader social and environmental spheres.

The discussions held during this conference were both thought-provoking and transformative. We examined the legal community's responsibility in combating climate change, understanding that the decisions we make today profoundly impact the world we leave for future generations. Our engagement with the intricate challenges of anti-money laundering emphasized the delicate equilibrium lawyers must maintain between ethics, legality, and societal welfare.

I extend my sincere gratitude to all the experts, scholars, and practitioners who shared their insights and experiences, enriching our understanding of these complex subjects. Your contributions have undoubtedly left an indelible mark on our collective understanding and will guide our actions moving forward.

I would also like to extend a special word of thanks to our sponsors whose support played an integral role in making this conference a resounding success. Your commitment to advancing legal excellence and fostering a more just and sustainable world is truly commendable.

As we move beyond the conference halls and into our daily practices, let us carry the spirit of this event with us. Let us remain vigilant in our pursuit of justice, equality, and environmental responsibility. Let the connections we've forged and the knowledge we've gained inspire us to be agents of positive change within our profession and our society.

This magazine stands as a testament to our collective efforts and a reminder of the transformative power of unity and knowledge. May it serve as a source of inspiration and motivation as we continue to navigate the ever-evolving landscape of law and justice.

Thank you once again for your unwavering dedication, and I look forward to the continued growth and success of the Law Society of Kenya.

Eric Theuri
President, Law Society of Kenya.

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Anti-Money-Laundering and the Need for a Direct Stakeholder Engagement in the Quest for Self-Regulation

By Bosire Geoffrey Bonyi

Dick the Butcher, in the celebrated William Shakespeare's play "The Second Part of Henry the Sixth, with the Death of the Good Duke Humfrey," suggests that the first thing to be done, in the quest to resolve the perceived societal problem, is to kill all lawyers. Even though these antiques are merely symbolic, it is beyond peradventure that many people don't like the legal profession but for the fact that they cannot live without it. Cognizant of this fact, it will be tragic if the profession commences an onslaught against its fundamental tenets like the principle of confidentiality and advocate-client privilege communications, without which, we have no profession. Unless we rethink and strategize on how we will self-regulate, we shall strangle ourselves to appease the gods, whose intentions have always been laid bare for everyone to see.

On 16th March 2023, I attended the Stakeholder Engagement on Anti-Money Laundering Guidelines for Legal Practitioners at Emara Ole - Sereni Hotel in Nairobi. During that discourse, there was a consensus that a lot needs to be done to avert the foreseeable challenge posed by the draft guidelines, i.e. treating all legal practitioners as suspects and tasking them with a lot of unnecessary obligations which might not achieve any of the desired goals.

A lot of issues came afloat during the engagement. Key among them was the hurry for the profession to self-regulate on proceeds of crime and anti-money laundering issues to avoid being caught up with statutory restrictions akin to what the government had proposed in the amendments to the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) which sought to list advocates as reporting agents. For a moment, let us overlook the external pressure mounted on the profession from both local and international quotas and assess the need to find internal solutions. This assessment will accurately identify the problem at hand and crystallize viable solutions.

First, we need a data-driven action plan. The Law Society of Kenya must, at the preliminary stage, spearhead a systematic and statistical process that will help in resolving this issue. It will be a sweeping inference to say that all lawyers engage in this vice. Equally, all lawyers cannot be treated as suspects of this crime. For us to understand the need, we need statistics on how many lawyers engage in this crime, how many have been indicted so far, how they do it and the extent this is tainting the profession. We even need a comparative assessment of cases that involve lawyers and non-lawyers. Once this information is disclosed, we can appreciate the need and agree on the way forward. Self-regulation without this critical information can be likened to a bunch of thieves, seated somewhere trying to agree on their *modus operandi*. Put differently, it is possible that a majority of these culprits are not lawyers. It will be wrong to denounce and add legally binding obligations to the entire profession merely because of a perception, ill-will and suspicion.

Secondly, we need a multidisciplinary stakeholder discourse to analyze and conclusively dissect the need for self-regulation. In throwing a wild guess, which is probable, it could be that this problem is not within the profession, and the attention should be shifted to onboarding the Law Society of Kenya as "partners in solution" and not "partners in crime". Under this facet, there are several state agencies and departments that must be involved. They include the Directorate of Criminal Investigation (DCI), the Office of the Director of Public Prosecution (DPP), the Office of the Attorney General & Department of Justice (OAG&DOJ), the Assets Recovery Agency, the Finance Reporting Centre, the Judiciary and other relevant bodies. We need a direct conversation aimed at identifying a collective approach devoid of any malicious attempt to curtail the practice of law. I should be quick to warn that we should exclude critics from the West who have been coercing the government into mindlessly adopting some of these draconian laws. The solution must be unique to the problem within the profession.

Thirdly, these illicit transactions are not intraspecific within the legal profession. It must be borne in mind that nothing stops many other professions from being agents of this vice. Instead of rushing to obscurely task ourselves with a lot of obligations, there is a need to agree on regulations that bar clients engaged in this vice from corrupting the profession and not baring the profession from optimally offering legal services. This is by adding

more obligations to the clients as opposed to the lawyers. We instead make it difficult for these clients to use the professionals than restrict operations of lawyers. For instance, some obligations like setting of maximum limits for cash transactions that clients can undertake to restrict direct cash payments into the account; accounts staff monitoring whether funds received from clients are from credible sources, in my view, are auxiliary to the problem and are adding an unnecessary burden to the profession. What if these obligations are placed on the clients? Huge transactions that are termed as suspicious are not only reserved for legal practitioners. It is therefore not right to encourage legal professionals to be treated as suspects, merely because they have clients with deep pockets and or engage in huge transactions.

Fourth, understanding the cross-border nature of transactions relating to proceeds of crime and money laundering offences *vis-à-vis* the practice of law, will add tremendous value if this problem is addressed through a regionally concerted effort. It is therefore imperative that we engage the membership of the East Africa Law Society and form a purposeful partnership. This will also bolster the need to have a collective bargain in regulating the practice of law regionally and a standardized way of operation.

Fifth, it must be kept in mind that we are self-regulating against that which is set out as a crime. The regulations must be set out in a manner that will shield legal professionals from unnecessary witch-hunts, malicious prosecutions and other politically instigated persecutions. In other words, the regulations should be more inclined to protect the membership from unnecessary disclosures of client's information, as this will violate the confidentiality and trust bestowed on lawyers. These suggestions should not be interpreted to mean that they are meant to cover up crooked professionals misusing the trust afforded to them. Instead, they should be received in good faith to arrive at a standard solution while safeguarding the membership from persons keen at making the operation of an honestly hard-working professional difficult.

Finally, after the full awareness within the profession and full disclosure of the impact of these guidelines, an opportunity should be given to the members to vote to ratify the guidelines. This will enhance the democratic space and foster a healthy debate among the professionals in a quest to enact these binding guidelines.

The Author is an Advocate of the High Court of Kenya and Managing Partner, G. B. Bosire and Company Advocates. Contacts; wakilibosire@gmail.com

Advocates and Anti Money Laundering Law: Goodbye to the Burden of Proof?

By Peter Joseph Keya.

As the world strives to combat money laundering, the legal profession in Kenya continues to be perceived as an unwanted cog. The intention of promoters of the legislation has not been shy of accusing the advocates of aiding money laundering under the pretext of client privilege. Advocate Client privilege is not new to the profession. It is the very foundation of the profession. Section 134 of the Evidence Act precludes an advocate from disclosing any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for his professional employment, or to disclose any advice given by him to his client in the course and for such employment. The limitation to this provision relates to communication made in furtherance of any illegal purpose and any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client. Thus, an advocate requires the express consent of their client to make such disclosure. It is, therefore, not a surprise whenever there is protest by the profession whenever this privilege appears to be watered down.

The Proceeds of Crime and Anti-Money Laundering Act No.9 of 2009 was enacted by Parliament to provide for the offence of money laundering and to introduce measures for combating the offence, to provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime, and for connected purposes. Section 18 of the said Act deals with client advocate relationships. The provision preserves the communication of privileged information between the advocate and client from the obligation to disclose secret or such other information relating to the client that the advocate would ordinarily not disclose. Such disclosure is otherwise possible if a Judge of the High Court permits, upon an application being made to an investigation under the Act. The provisions of section 18(1) of the Act shall only apply in connection with the giving of advice to the client in the course and the professional employment of the advocate or in connection and for any legal proceedings on behalf of the client.

Among the many reasons proffered against watering down the advocate-client privilege concerning the role of lawyers, this article focuses on the effect it has on the burden of proof. This article posits that allowing advocates, by way of legislation, to readily disclose their client's transactions offends the role of the existing crime prevention bodies, such as the investigators and the prosecutors, from discharging their burden of proof. It is foolhardy to imagine that an advocate's interaction with their client can be distinguished. An advocate, when dealing with his client, just like a Judge or Judicial Officer or President, cannot shed off the advocate part and adopt any capacity beyond that of advising the client. This relationship is inviolable, just as between a Catholic Priest and a church member during confession, or a doctor and patient. It is the discretion of the advocate, when exercising professional judgment, to know whether they are furthering an offence and thus know if it is necessary to disclose.

> It is no surprise that under our constitutional architecture, which has been termed as progressive, the right to a fair trial is unlimited under Article 25.

This position is informed by the fact that under Article 50 of our Constitution, everyone is entitled to a fair trial. This right includes a presumption of innocence, the right to be informed, with sufficient detail to answer it, to choose and be represented by an advocate, right to remain silent, to be informed in advance, of evidence the prosecution intends to rely on, and to refuse to give self-incriminating evidence. In the same breadth, an arrested person, under Article 49, has a right to remain silent, to communicate with an advocate and not to be compelled

to make any confession or admission that could be used in evidence against the arrested person. It is no surprise that under our constitutional architecture, which has been termed as progressive, the right to a fair trial is unlimited under Article 25.

From the foregoing, the place of an advocate in the criminal justice system in so far as an arrested or accused person is concerned remains fundamental. The constitution does not distinguish between the various crimes, be it murder or an economic crime. It is, therefore, a surprise that there should be concerted efforts to distinguish the role of an advocate in different offences. It is evident that the law is so defensive of an arrested or accused person, and as part of the said defence elevating the role of an advocate. It is, therefore, unconventional that the law should allow the advocate, to be the one to snitch on a client by operation of law, despite the client enjoying all the constitutional protections.

The article argues that there has been a tendency, at least in the eyes of some members of the public, that law enforcement agencies appear to abdicate their mandate for the investigation of crimes. This can be manifested in the manner in which accused persons are expected to voluntarily assist in incriminating themselves. It is unsurprising that despite the lack of any deadline to arrest a person, suspects are quickly arrested, and arraigned in court as per the law, only for a request for continued detention to be made before the court, to allow for investigation. In some instances, after a dragged-out legal process, the charges are dropped or withdrawn altogether. In other instances, the accused persons are charged afresh. Such occurrences do not inspire confidence. Inevitably, any suggestion to allow an advocate to disclose activities relating to their client can only be construed as converting an advocate into a *fait accompli* in incriminating their clients and condoning the complacency of those charged with investigating offences. This will negate the need for investigations as the evidence will readily be available from the source. In turn, the burden of proof would have shifted to the advocate as against his client.

It is appreciated that amongst the profession, we have miscreants who willingly enable criminal activities of the clients. These profession members should be dealt with individually as permissible under the law.

In conclusion, it is understood that the profession, just as the society, is dynamic and perhaps the advocates will, one day, rally themselves to volunteer for their clients' criminal activities. Until then, shall advocates weather the storm?

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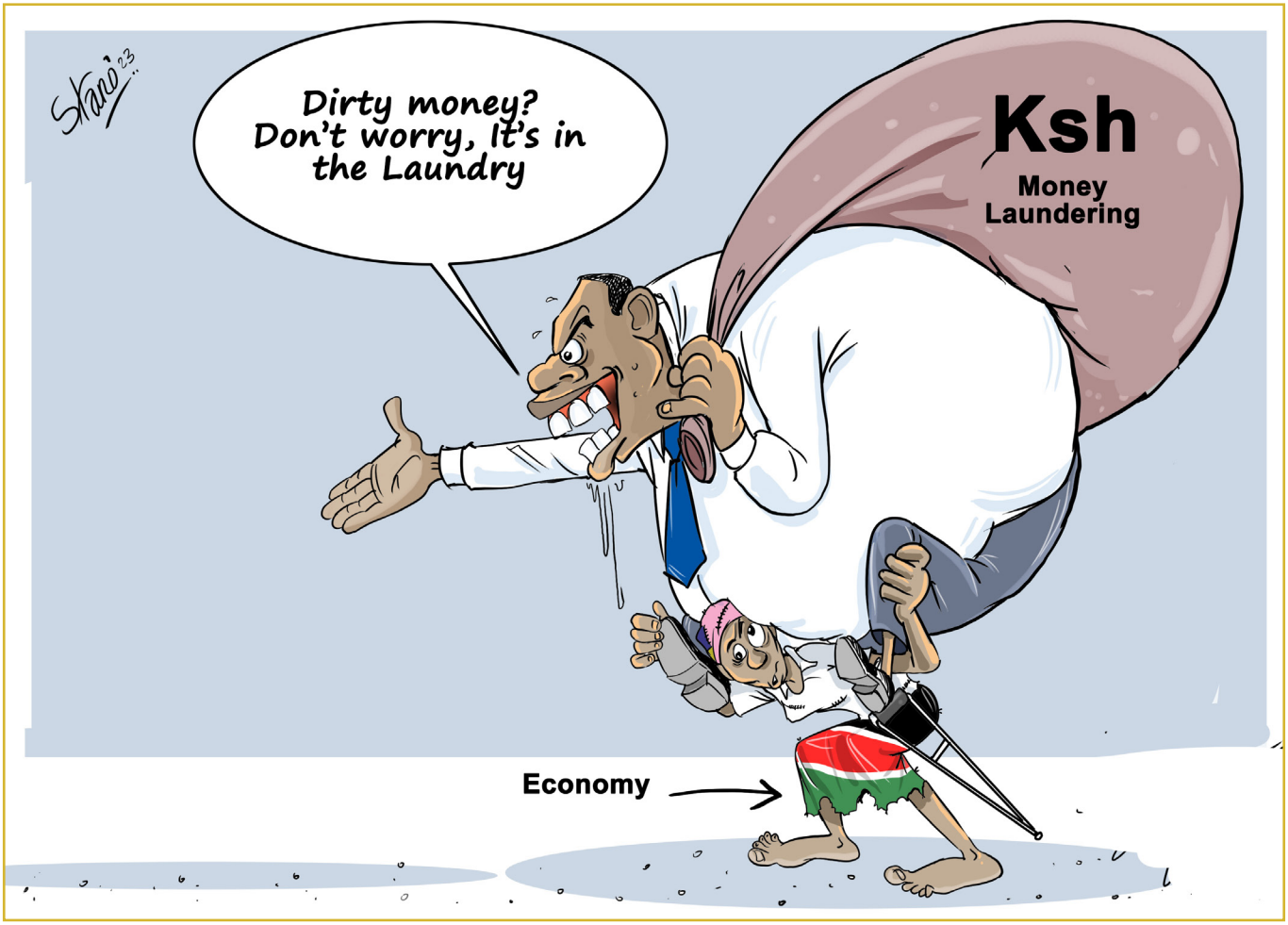

Anti-Money Laundering: The Uncomfortable Agent - The Lawyer's Role in Balancing Competing Interests

By Maureen Ngetich

Introduction

Money laundering has become a pervasive global issue, enabling criminals to legitimize their illicit proceeds and evade the justice system. Governments and regulatory bodies worldwide have recognized the urgent need to combat this problem, leading to the establishment of stringent anti-money laundering (AML) regulations. However, enforcing these regulations requires a delicate balance between protecting the integrity of the financial system and preserving individuals' rights. In this article, we explore the crucial role of lawyers in this complex landscape, as they navigate the ethical and legal challenges that arise while striving to maintain this balance.

The Rise of Anti-Money Laundering Regulations

Money laundering involves making illegally obtained funds appear legitimate, disguising their illicit origins. It is often linked to organized crime, corruption, and terrorism financing, undermining the stability and security of nations.

Money laundering regulations in Kenya came about as a response to the global recognition of the pervasive threat posed by illicit financial activities. Kenya, like many other countries, realized the importance of implementing effective measures to combat money laundering and its associated crimes, including terrorism financing, corruption, drug trafficking, and organized crime. The country has recognized the importance of international standards, legislative frameworks, cooperation with international partners, and robust regulatory oversight in combating money laundering effectively. By implementing these measures, Kenya aims to protect its financial system, preserve its integrity, and contribute to the global fight against financial crimes.

The cornerstone legislation in Kenya for combating money laundering is the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), enacted in 2009. POCAMLA provided a comprehensive legal framework to prevent, detect, investigate, and prosecute money laundering offences. It established the Financial Reporting Centre (FRC) as the national agency responsible for receiving, analysing, and disseminating suspicious transaction reports to relevant law enforcement agencies.

AML Guidelines for the Legal Profession in Kenya

The Law Society of Kenya (LSK), in collaboration with the FRC, has gone further and developed the Anti-Money Laundering and Countering the Financing of Terrorism (AML-CFT) Guidelines for the Legal Profession in Kenya.

The guidelines set out the AML-CFT obligations of lawyers in Kenya. These obligations include:

- Identifying and verifying the identity of their clients
- Maintaining records of client transactions
- Reporting suspicious transactions to the FRC
- Training their staff on AML-CFT

The LSK AML-CFT Guidelines are a valuable resource for lawyers in Kenya. They provide clear guidance on the AML-CFT obligations of lawyers and how they can comply with them.

The Role of Lawyers in the Fight against Money Laundering

Lawyers are central in the AML framework, acting as gatekeepers to the financial system. They facilitate legal transactions, advise clients, and represent their interests. However, this role can sometimes place them in uncomfortable positions, torn between their ethical obligations to uphold the rule of law and the need to protect their client's interests.

To effectively navigate the delicate balance between reporting AML activities and protecting client interests, lawyers can take several steps:

1. Client Confidentiality versus Disclosure Obligations

Client confidentiality is a fundamental principle of legal practice, ensuring trust between lawyers and their clients. Lawyers must maintain the utmost discretion and protect sensitive information. However, this duty is not absolute and must be balanced with their obligations under AML laws. The AML regulations impose obligations on lawyers to report suspicious transactions, even if doing so breaches client confidentiality. This creates a tension between maintaining professional privilege and fulfilling their legal duty to prevent money laundering.

To strike a balance, lawyers must navigate complex guidelines and exercise professional judgment. They must diligently assess the legitimacy of their clients' transactions while remaining vigilant for red flags indicative of money laundering. By effectively managing this delicate equilibrium, lawyers can fulfil their AML obligations while upholding the trust and confidentiality expected in their profession.

2. Managing Conflicts of Interest

Conflicts of interest can arise when lawyers represent clients involved in transactions that may raise AML

concerns. Lawyers must diligently asses their clients' sources of funds and the nature of their business activities. They have a responsibility to conduct due diligence, ensuring that they are not inadvertently facilitating money laundering or other illegal activities.

To mitigate conflicts of interest, lawyers must maintain independence and act as objective advisors. They should implement robust client intake procedures, conduct thorough risk assessments, and continuously monitor client activities. By doing so, lawyers can navigate these conflicts and fulfil their professional obligations while contributing to the global fight against money laundering.

3. Ethics and Professional Responsibility

The legal profession holds high ethical standards, emphasizing the duty of lawyers to uphold justice and the rule of law. In the context of AML, lawyers must ensure they are not complicit in money laundering schemes. They should refuse to participate in transactions they suspect to be illicit, regardless of the financial gain involved.

Professional bodies such as the LSK and regulatory bodies provide guidelines and training to assist lawyers in maintaining their ethical compass. Continuing education and awareness programs are crucial in equipping lawyers with the necessary knowledge and tools to identify and respond appropriately to money laundering risks.

4. Collaboration with Regulatory Authorities

Lawyers also have a role in collaborating with regulatory authorities and sharing information to combat money laundering effectively. They can act as a bridge between clients and regulators, facilitating open dialogue and cooperation. By providing regulators with valuable insights and suspicious transaction reports, lawyers contribute to protect the financial system's integrity.

Conclusion

The fight against money laundering requires the collective effort of governments, regulatory bodies, and legal professionals. Lawyers play a pivotal role as gatekeepers to the financial system, balancing their ethical obligations with the need to prevent money laundering. By maintaining client confidentiality, managing conflicts of interest, upholding ethical standards, and collaborating with regulatory authorities, lawyers can effectively navigate the complexities of AML regulations.

As the battle against money laundering intensifies, the legal professionals must remain vigilant, adapt to evolving threats, and continually enhance their knowledge and skills. By doing so, they can ensure that the financial system remains secure and that justice prevails, striking the delicate balance between protecting the rights of individuals and safeguarding society against the harmful effects of money laundering.

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Anti-Money Laundering: The Uncomfortable Agent, A Lawyer's Role in Balancing the Competing Interests

By Casmir Augustus Obiero

Introduction

Money laundering has become a global issue with significant economic and security implications. It fuels organized crime, terrorism, and corruption, undermining the stability of financial systems and eroding public trust. As an integral part of the legal and financial sectors, lawyers have found themselves uniquely, often caught between their duty to their clients and their responsibility to prevent money laundering. This article will explore the Kenyan legal system's approach to anti-money laundering (AML) and compare it to other select legal systems, examining the lawyer's role as an uncomfortable agent in balancing these competing interests.

Kenyan Legal Framework on Anti-Money Laundering

Kenya has made substantial progress in developing a comprehensive AML framework. The Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) of 2009 provides the legal basis for combating money laundering in the country. POCAMLA establishes the Financial Reporting Centre (FRC), which is responsible for receiving and analyzing suspicious transaction reports (STRs) and ensuring compliance with AML regulations.

Lawyers in Kenya, like other professionals in the financial sector,

have specific responsibilities under POCAMLA. They are considered "reporting institutions" and must undertake customer due diligence (CDD), maintain records, and report suspicious transactions to the FRC. Failure to comply can result in substantial fines and imprisonment.

Balancing the Competing Interests: The Role of Lawyers

The lawyer's role in the AML process can be a delicate balancing act, navigating the tension between client confidentiality, legal professional privilege, and the obligation to prevent money laundering. The following are some of the challenges and dilemmas lawyers face in this context:

1. Client Confidentiality and Legal Professional Privilege

Client confidentiality and legal professional privilege are deeply ingrained principles in the legal profession. They are essential for fostering trust between clients and their lawyers and safeguarding the right to a fair trial. However, these principles can conflict with a lawyer's AML obligations. Reporting a suspicious transaction may breach client confidentiality, while refraining from reporting could lead to non-compliance with AML regulations.

Kenyan law tries to strike a balance by exempting lawyers from reporting suspicious transactions in specific situations. For instance, lawyers are not required to report information obtained while determining a client's legal position or providing legal advice. This exemption aims to preserve legal professional privilege while still maintaining the effectiveness of AML efforts.

2. The Risk of "Tipping Off"

Another challenge lawyers face is the risk of "tipping off" clients about a suspicious transaction report (STR). Tipping off occurs when a person informs someone who is the subject of an STR, potentially compromising an investigation. It is a criminal offence under POCAMLA, punishable by fines and imprisonment.

To mitigate this risk, lawyers must be cautious when dealing with clients and avoid inadvertently disclosing information that could suggest an STR has been filed. This requires a delicate balancing act, ensuring the client's interests are protected while complying with AML obligations.

3. Impact on the Lawyer-Client Relationship

AML obligations can strain the lawyer-client relationship. Clients may feel betrayed or mistrustful if they suspect their lawyer has reported them to authorities, even if the lawyer is legally obligated to do so. This mistrust can undermine the lawyer's ability to represent their client effectively.

To address this issue, lawyers must be transparent about their AML obligations and explain the potential consequences of non-compliance to their clients. By fostering a clear understanding of the legal requirements, lawyers can help maintain trust and strengthen their relationships with clients.

Comparing Kenyan AML Framework with Other Select Legal Systems

1. The United States

In the United States, AML obligations for lawyers are less stringent compared to Kenya. The USA PATRIOT Act, enacted in response to the 9/11 terrorist attacks, expanded AML regulations for financial institutions but did not impose similar obligations on lawyers. Instead, the American Bar Association (ABA) adopted voluntary guidelines to address money laundering concerns. These guidelines encourage lawyers to implement risk-based AML measures, conduct due diligence, and report suspicious activities, but they do not carry the force of law.

This more lenient approach towards lawyers in the US can be attributed to the strong emphasis on attorney-client privilege and the desire to maintain the independence of the legal profession. However, critics argue that the voluntary nature of the ABA guidelines may not adequately address the risks of money laundering through the legal sector.

2. **The United Kingdom**

The United Kingdom has a more robust AML framework for lawyers, similar to Kenya. The UK's Proceeds of Crime Act 2002 (POCA) and the Money Laundering Regulations 2017 impose mandatory obligations on lawyers to conduct due diligence, maintain records, and report suspicious transactions. Failure to comply can result in significant penalties, including fines, imprisonment, and professional sanctions.

Like Kenya, the UK recognizes the importance of balancing AML obligations with legal professional privilege and client confidentiality. Lawyers are exempt from reporting suspicious transactions if the information is protected by legal privilege. However, this exemption does not apply if the lawyer knows the client is seeking advice to facilitate criminal activity.

Conclusion

The lawyer's role as an uncomfortable agent in the AML process is a complex and delicate balancing act, requiring them to navigate the competing interests of client confidentiality, legal professional privilege, and the prevention of money laundering. The Kenyan legal system has made significant strides in enacting robust AML regulations while preserving the sanctity of the lawyer-client relationship.

Comparisons with other legal systems, such as the United States and the United Kingdom, demonstrate the different approaches countries have taken to address the challenges lawyers face in fulfilling their AML obligations. As money laundering continues to evolve, the legal profession and regulators need to adapt and maintain a balance between upholding professional principles and protecting the integrity of the financial system.

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Anti-Money Laundering: The Uncomfortable Agent, a Lawyers Role in Balancing the Competing Interests

By James Karanja, Abdullahi Ali and Owino PH Onyango

1. Introduction

Lawyers are at risk of being exploited by criminals to launder money. The OECD Global Anti-Corruption and Integrity Forum claims that white-collar crimes are often concealed through complex legal structures and financial transactions facilitated by 'professional enablers' of such crimes, including lawyers. The UN FACTI Panel stresses that Lawyers and law firms often abuse their legal professional privilege to assist criminals in money laundering and other criminal conduct and that self-regulation by the legal profession is an insufficient backstop to the problem.

The proper limits of advocate-client confidentiality are a hotly contested and very emotive issue by many lawyers and legal scholars. It is important to note that the advocate-client privilege is crucial in fostering public trust and confidence in the administration of justice. This advocate-client privilege has historically been developed through common law on grounds of public policy: that, adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defence of litigation compels a full disclosure of the facts by the client to his advocate. However, the nature of the work of an advocate (lawyer) as a trusted ally and confidant of clients often exposes lawyers to conflicts between their obligations to governmental authorities. The reality remains that actively or passively, lawyers may become complicit through negligence, or initiate economic crime with devastating effects on developing economies.

After the central role lawyers and law firms played in the global scandals of *Panama* and *Paradise* Papers, many jurisdictions included lawyers as reporting institutions in their money laundering legislation in compliance with the Financial Action Task Force (FATF) Recommendations. These efforts were brazenly resisted in Kenya for several years until the passing of the Proceeds of Crime and Money Laundering (Amendment) Act (POCAMLA) in January 2022, which added advocates, notaries and other independent legal professionals as designated non-financial professions subject to the reporting requirements of the Act and in respect of specified financial transactions involving their clients. The reporting obligations are highly restricted mainly towards financial transactions and information regarding the establishment of legal entities and thus do not cover the broader realm of criminal and civil law practice.

As responsible citizens and officers of the court, lawyers must not be willing participants in the commission of crimes and are legally and morally obliged to undertake client due diligence checks, maintain client records and report suspicious transactions where they suspect anyone of assisting in the planning or execution of a crime. However, in this lies a fundamental question: to what extent can lawyers maintain their fundamental duty of professional privilege while required by law to report suspicious transactions involving the commission of money laundering or terrorist financing offence?

2. Balancing AML obligations with professional privilege

AML and suspicious activity reporting is an excellent asset in the fight against money laundering. The nature of legal work is confidential, and therefore, if lawyers act as reporting institutions, this will be crucial in alerting authorities about potential illicit activities. By identifying such money laundering red flags, lawyers would play a significant role in stifling the criminal attempts to camouflage illicit funds, and this obligation should not be wished away.

> However, the advocate has a primary obligation to inform his client of any potential conflict in his obligations to the client and the government and advise the client of his obligation to report to the authorities before proceeding with any action in respect of the matter they consider to be reportable under the law.

As part of AML practices, lawyers and law firms should implement robust Know Your Customer (KYC) procedures to verify customer identity (Section 45). KYC is an essential and effective pillar of AML measures through verifying the identity of clients, understanding the nature of the client's business, comprehending the reasons for their transactions, and knowing where their money originates. In addition,

advocates are obliged by POCAMLA to establish and maintain customer records (Section 46), maintain internal reporting procedures for suspicious transactions (Section 47) and register with the Financial Reporting Centre (Section 47A).

The POCAMLA (2022) also limits the advocate-client privilege but does not go far enough to protect Kenyan Advocates who receive information about a crime already committed by the client. The UK's Proceeds of Crime Act 2002, draws a more precise line as to when privilege can be broken and the specific instances in which the exceptions apply. It provides that a legal adviser who suspects a client is engaged in money laundering activities is exempted from disclosing and reporting where his knowledge came to him in privileged circumstances (the privilege reporting exception). However, where the information is communicated to the legal professional to further a criminal purpose (the crime/fraud exception), then the privilege reporting exception does not apply, and the legal professional is required to make a disclosure and report.

Some would argue that placing advocates as reporting people disincentives clients from disclosing sensitive, material information as their advocate may be compelled to disclose such information to regulators. This will then affect the performance of an advocate's role of representation due to failure of full disclosure and therefore inhibiting the right to legal representation as guaranteed under the Constitution. However, the advocate has a primary obligation to inform his client of any potential conflict in his obligations to the client and the government and advise the client of his obligation to report to the authorities before proceeding with any action in respect of the matter they consider to be reportable under the law.

The law of evidence limits advocate-client privilege under section 134 of the Evidence Act. In this regard, the law provides for advocate-client privilege except to the extent that the communication made by a client to an advocate is in furtherance of an illegal purpose-including money laundering.

However, this prohibition is for the protection of the client and not of the advocate. All the advocate gets is the privilege of non-disclosure. The client's protection is not absolute, however, as there are instances stated in the *proviso*, where the advocate may be required, for the stated compelling reasons to disclose such communication or content and condition of documents.

Moreover, the LSK's Code of Standards of Professional Practice and Ethical Conduct (SOPPEC) sets out the limits of confidentiality of advocate-client communication to include instances where unlawful conduct has occurred where the Advocates' client account is used for money laundering and financial transactions.

3. Moving forward

In the changing legal and regulatory landscape, Kenyan lawyers must adapt to the added scrutiny of being a reporting institution under the POCAMLA and take preventive measures to avoid exposure and unforeseen liabilities. We venture to posit that, considering the above, lawyers are pivotal in the fight against money laundering as they act as crucial gatekeepers to the financial system. Lawyers could thus be more balanced in their role to clients and the authorities by:

- The Law Society of Kenya (LSK) providing continuous training to advocates on how to identify and report suspicious activities to increase the chances of detecting money laundering practices.
- Lawyers establishing robust internal AML procedures within law firms that would enable lawyers to undertake thorough due diligence on new clients, including their source of funds, before on boarding clients.
- The LSK partnering with investigative and financial institutions to develop a knowledge base on an enhanced ability to detect money laundering patterns and identify potential risks more frequently.
- Privilege reporting being introduced where lawyers are incentivised to anonymously flag and report client accounts when there is reasonable suspicion to conclude that a client is potentially involved in money laundering.

When lawyers fulfil their responsibilities and adhere to ethical guidelines, they contribute to the overall effectiveness of AML efforts by combating money laundering and preserving the integrity of financial systems.

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Ethics vs. Interests: The Dilemma of Anti-Money Laundering for Lawyers in Kenya

By Frankline Otieno Mokaya (Otieno Mokaya Esq.)

Money laundering is a global problem that poses a risk to the integrity of the legal profession. It is not uncommon for lawyers to find themselves caught between their ethical obligations and financial interests when representing clients involved in money laundering activities. This is particularly true in Kenya, where the legal profession grappled with this issue for some time. In this article, we will explore the dilemma of anti-money laundering for lawyers in Kenya and how they can balance their ethical obligations and financial interests when representing clients.

The Legal Framework in Kenya

In Kenya, anti-money laundering regulations are primarily governed by the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2009, which aims to detect and deter money laundering activities. The AMLA requires lawyers to conduct due diligence on their clients and report any suspicious activities to the Financial Reporting Centre (FRC). Failure to comply with these requirements could result in hefty fines or imprisonment. The law applies to all lawyers, law firms, and legal practitioners in Kenya.

Other critical pieces of legislation in Kenya's anti-money laundering framework include the Proceeds of Crime and Anti-Money Laundering Regulations of 2013, which provide for the implementation of the AMLA by prescribing guidelines for identifying, reporting, and preventing money laundering activities. These regulations also require banks and other financial institutions to report transactions that exceed a certain threshold to the FRC. In addition, the Terrorism Prevention Act (TPA) of 2012 criminalizes the financing of terrorism and provides for penalties and forfeiture of property for those involved in terrorist financing activities.

By ratifying all of the United Nations (UN) Conventions on combating Money Laundering and the Financing of Terrorism, Kenya has taken up an international duty to improve its anti-money laundering measures and to combat financing of terrorism. This means that Kenya is committed to cooperating with other countries in the international fight against money laundering and financing of terrorism. Furthermore, Kenya is expected to maintain and enforce its anti-money laundering laws and to provide information and support to other countries in the global fight against these crimes.

On one hand, lawyers must comply with anti-money laundering regulations, which require them to report suspicious activities to the authorities, even if it means losing their client.

The Ethical Dilemma

The AMLA provisions conflict with the legal profession's ethical obligations of confidentiality and client loyalty. Lawyers are bound by the Advocates Act to keep their client's information confidential unless they have the client's consent or are compelled by the court to disclose the information. This creates a dilemma for lawyers who must balance the competing interests of complying with the law and protecting their client's interests.

On one hand, lawyers must comply with anti-money laundering regulations, which require them to report suspicious activities to the authorities, even if it means losing their client. On the other hand, they must maintain confidentiality and protect their client's interests, even if they suspect their clients are involved in money laundering.

The Role of Lawyers in the Fight Against Money Laundering

Lawyers play a crucial role in the fight against money laundering. They are in a unique position to identify and report suspicious transactions. As gatekeepers of the financial system, they have access to sensitive information about their clients' financial activities, which gives them a unique perspective on the risks of money laundering.

However, the reporting obligations imposed on lawyers by the AMLA pose significant challenges to their professional duties. Lawyers are ethically obligated to protect their client's interests and maintain confidentiality. Reporting a client's suspicious financial activities could lead to reputational damage and financial loss, not only for the client but also for the lawyer.

The Way Forward

The lawyers' dilemma in the fight against money laundering is complex and multifaceted. There is no one-size-fits-all solution to this problem. However, lawyers can take proactive steps to navigate the dilemma effectively.

Establish Internal Compliance Programs

Law firms can establish internal compliance programs that enable them to conduct due diligence on

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their clients discreetly and report suspicious activities to the FRC without compromising their clients' interests. These programs should include procedures for identifying and reporting suspicious transactions, conducting risk assessments, and training staff on anti-money laundering regulations.

Advocate for More Transparency in the Legal Profession

Lawyers can advocate for more transparency in the legal profession by calling for the establishment of a central registry of beneficial ownership information. This would make it easier to identify the true owners of assets and companies and help in the fight against money laundering by making it harder for criminals to hide behind complex corporate structures.

Compliance with AMLA Requirements

Compliance with AMLA requirements is not optional, and lawyers who fail to comply risk facing legal consequences that could ruin their reputation and damage their clients' interests. Lawyers must, therefore, take proactive steps to ensure that they comply with the law while protecting their clients' interests. This includes conducting due diligence on their clients, reporting suspicious activities to the FRC, and establishing internal compliance programs.

Conclusion

The fight against money laundering is a complex issue that requires a multifaceted approach. Lawyers have a crucial role in this fight, but they must balance their legal and ethical obligations with the need to protect their client's interests. While navigating this dilemma is challenging, lawyers can establish internal compliance programs, advocate for more transparency in the legal profession, and comply with AMLA requirements to protect their clients' interests while upholding the law.

As the legal profession in Kenya continues to grapple with the issue of money laundering, it is essential that lawyers take proactive steps to ensure that they comply with the law while upholding their ethical obligations. By doing so, they can protect their client's interests, maintain their integrity, and contribute to the fight against money laundering activities.

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Guardians of Transparency: Exploring the Legal Framework in the Deterrence Against Money Laundering

By Roselyne Keya

Analyzing the legal framework is crucial for lawyers and law firms because it allows them to understand how it affects their role and obligations when safeguarding the integrity of their profession. Lawyers can improve their experience and knowledge of money laundering prevention and detection by being familiar with the relevant laws, rules, and regulations.

Anti-money laundering (AML) refers to the laws, regulations, rules, and principles that are in place to prevent funds and assets from predicate offence into the economy. While predicate offence is a criminal activity that sets the foundation for another serious crime, money laundering, it produces funds or assets that may then be used to conceal the illegal source and make it appear as though it was genuinely acquired. Examples of predicate offences include fraud, prostitution, avoidance of taxes, trafficking of humans, trafficking of drugs, and corruption. Governments have a lot of power to stop money laundering. The power is usually exercised through a legal framework that is important in protecting the integrity of the economy; by making it difficult for criminals to enjoy their ill-gotten funds and properties without detection.

Kenya is identified as a high-risk country for money laundering mainly because of her strategic location, acting as a gateway between East and Central Africa, Europe, the middle East, and Asia. Furthermore, Kenya has a long history of corruption which further intensifies her susceptibility to financial crimes that may affect the credibility of its economic system. Consequently, the international community urged Kenya to put strong measures to help in combating money laundering and terrorist financing so as to protect the nation's economy against criminal activities and to boost investors' confidence.

To address the raised concerns, Kenya enacted the Anti-Money Laundering framework (the Proceeds of Crime and

Anti-Money Laundering Act (POCAMLA) in 2009. The POCAMLA is the most comprehensive anti-Money laundering legislation in Kenya that aims to ease the process of identifying, tracking, freezing, seizing and confiscating benefits from illegal activities. A key outcome of this act is section 21 that established the Financial Reporting Center (FRC) that is an independent institution whose mandate is to identify proceeds of crime and combat money laundering and financing of terrorism by sharing information with law enforcement agencies for investigation, prosecution and promotion of best practices.

Reporting institutions, such as financial institutions and designated non-financial businesses and professions, are required to report suspicious transactions to the FRC. The FRC has powers to impose civil penalties for non-compliance with the Act while criminal penalties are imposed by the relevant law enforcement agencies. The Act does not specify the criteria which reporting institutions can use to determine suspicious activities. Reporting institutions are required to continuously monitor all complex, unusual, suspicious, large or such other transactions as may be specified in the regulation. Reporting institutions are subject to criminal liability if they fail to comply with the provisions of the act.

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One of the most notable amendments of the POCAMLA 2009 was the 2017 amendment that strengthened the powers of the Financial Reporting Centre (FRC) and expanded the categories of reporting institutions to include casinos, real estate agencies, accountants, non-governmental organizations, and other businesses deemed vulnerable to money laundering. There was an attempt to include advocates as reporting institutions, requiring them to report client transactions. However, the advocate-client confidentiality rule which prevents advocates from disclosure of communication obtained in the course of representation of clients to third parties as protected by Section 134 & 135 of the Evidence Act CAP 80 and the Code of Ethics and Conduct of Advocates precluded Advocates from the category of Reporting institutions.

> Kenya is identified as a high-risk country for money laundering mainly because of her strategic location, acting as a gateway between East and Central Africa, Europe, the middle East, and Asia. Furthermore, Kenya has a long history of corruption which further intensifies her susceptibility to financial crimes that may affect the credibility of its economic system.

The most recent amendment for lawyers was in the year 2022 which introduced section 2 that sought to increase the definition of "Designated Non-Financial Businesses and Professions" (DNFBPs) to include lawyers and law-firms. The amendment further made changes to section 48 of the POCAMLA on the obligations of reporting. According to the amendments lawyers and law firms were required to act as reporting institutions under the POCAMLA. It therefore subjected lawyers and their employees to criminal liability if they failed to comply with the provisions of the Act. It required advocates to apply the Know Your Client rule when dealing with Clients.

The inclusion of Lawyers and Law-firms as reporting institutions contradicted the provisions of Section 134 & 135 of the Evidence Act and also Section 18 of POCAMLA. However, *vide* the orders issued on 12th January 2022 in Nairobi High Petition No. E005 of 2022 *Mwaura Kabata vs Hon Attorney General & Others, Hon. Justice J A Makau*, issued conservatory orders to halt the operationalization of section 2(c) (i) and 14(b) of the (Amendment) Act, 2022. The outcome of this matter will determine the extent of disclosure requirements for advocates regarding client funds.

Another important AML development is the increased adoption of financial technology (fintech) and digital payment systems, which have brought both opportunities and challenges for lawyers. With the recent technologies, financial transactions are now faster and more accurate, while at the same time criminals have adopted new money-laundering strategies. As a result, lawyers need to be familiar with technological changes. They must adopt digital payment systems in their financial transactions which will help them monitor transactions for money laundering compliance.

The implication of the recent amendments for lawyers and law firms are twofold: Firstly, they now face new compliance obligations and potential reputational risks. Compliance requires implementing internal controls, conducting due diligence, and training personnel to identify and report suspicious transactions. This imposes an increased administrative burden and costs on law firms, especially smaller ones with limited resources. Non-compliance can damage their reputation and lead to client loss and disciplinary actions.

Secondly, to mitigate AML risks and ensure compliance, needs the adoption of best practices. This includes developing tailored AML policies and procedures, conducting thorough due diligence on clients, implementing transaction monitoring systems, providing continuous professional development and regular training to stay updated on the latest AML laws, regulations and technological advancements, establishing a culture of compliance, and collaborating

with other professionals. By adhering to these practices, lawyers and law firms can minimize risks, demonstrate ethical standards, and maintain client trust. A proactive approach to AML compliance safeguards against legal consequences and preserves the integrity of the legal profession.

Another development in AML is international cooperation and collaboration which have recently become more important. Kenya has not been left behind in international cooperation against ML. This has been witnessed by the signing and ratification of the UN conventions on the fight against money laundering and terrorist financing. Further, Kenya is an active member of regional body referred to as the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG). The ESAAMLG is an associate member of the Financial Action Task Force (FATF). Knowledge of AML international standards is especially important to lawyers that engage in cross border transactions and those representing international clients.

In conclusion, Kenya's strategic position makes it vulnerable to money laundering and terrorist financing. Kenya's importance in the global economy has made other governments pressurize her into taking appropriate actions to defend her economy and boost confidence among investors. In compliance, Kenya enacted a comprehensive AML legislative framework in 2009 (POCMLA).

As a result, we have witnessed new trends and developments in AML that have negatively and positively affected lawyers and law firms. They include the subsequent amendments of the POCMLA, technological advances such as fintech and digital payment systems, and international cooperation in the areas of Money Laundering (ML) and Terrorist Financing (TF). The recent trends and developments in AML legislation in Kenya present both challenges and opportunities for Advocates and their employees. Lawyers are required to be familiar with the AML legal framework and to stay afloat with the current trends in ML and TF.

Is Legal Privilege and Confidentiality Under Attack?

By Caroline Kamau

> "It is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour a full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged.... if a lawyer were unable to confer with his client without such surveillance and receive confidential instructions from him, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective".

The importance of legal privilege and confidentiality cannot be overemphasised because it is necessary for the effective representation of a client by an advocate. In *Campbell v. U.K, 233EHRR137* the court held that:

> One of the concerns raised by ABA being that the requirement to disclose information was likely to breach the attorney-client confidentiality.

The privilege conferred on the advocate-client relationship is now being weighed against the overriding objective of fighting severe crimes globally. One can argue that the war against terrorism and transnational organised crimes can largely be blamed for the diminishing protection of the advocate-client privilege and confidentiality. In *Michaud v. France* (2014) 59EHRR9, the European Court of Human Rights considered the issue of whether the obligation to declare suspicion by lawyers (as imposed by French legislation and Bar Association guidelines) violated Article 8 of the European Convention on Human Rights that provided the right to respect private life. Mr Michaud argued that the declaration to be made by the lawyer infringed on the professional privilege and confidentiality of lawyer-client relations. In arriving at its decision, the court looked at the concept of necessity, which it found to be critical in determining when to breach privilege. According to the judges, necessity implied that the interference corresponded to a pressing social need, particularly, that it was proportionate to the aim pursued. The court noting that there were two clear instances that would permit interference; where lawyers acted for clients in financial or property transactions or as trustees and, in transactions concerning defined operations. In the court's view, the legislation specified that lawyers were not subject to the obligation to report where the activity in question was related to legal advice or court proceedings. Consequently, the obligation to report suspicious transactions did not go to the very essence of the defence rule which underlay legal professional privilege. The court further observed that the legislation had introduced an additional layer of protection for lawyers because lawyers transmitted suspicious transaction reports (STRs) to the Bar Association and not to *Tracfin* (the equivalent to Kenya's Financial Reporting Centre (FRC)). The judges argued that the Bar Association comprised of lawyers bearing a similar obligation to report suspicious transactions; hence, they would filter any STR and ensure that legal privilege was not breached. Based on this, the court concluded that the obligation to report a suspicious transaction did not present a disproportionate interference with lawyers' professional privilege and that there had been no violation of Article 8 by France.

In Kenya, the legislative framework concerning advocate-client privilege and confidentiality in the context of the Proceeds of Crime and Anti-Money Laundering Act, 2009 (POCAMLA) includes:

i. Sections 17-18 POCAMLA
ii. Sections 134 Evidence Act
iii. Standards 90-94 of the Law

Society of Kenya's (LSK) Code of Standards of Professional Practice and Ethical Conduct, 2016

POCAMLA and LSK's code of standards are drafted in similar language which makes it clear that the aim of the interference with legal privilege and confidentiality is to fight money laundering and other financial crimes. With that in mind, it can be argued that the determination in *Michaud's case*, on the first limb, is at home in Section 18(1) and 18(2) of POCAMLA. Section 18(1) protects professional secrecy and legal privilege attached to advocate-client communication of privileged information which cannot be affected by Section 17 which seeks to override all secrecy obligations. In line with *Michaud's* decision, Section 18(2) protects legal privilege in respect of giving legal advice and engagement of an advocate for any legal proceedings. In the two instances, the legal privilege attaches and once attached, it can only be waived by the client according to the code of standards. The High Court in *Manani Lilan & Mwetich Co. Advocates v Veronica Sum* [2022] eKLR examined the provisions of sections 134, 136 and 137 of the Evidence Act vis-à-vis the advocate-client privilege and held that 'the advocate/client privilege binds an advocate not to be compellable to disclose a client's affairs without express authority or consent of their client. An advocate cannot therefore be compelled to breach the said requirement either by court or any other person. The waiver/lifting of the same can only be done by the client'. Interestingly, section 18(4) of POCAMLA echoes this decision as it stipulates that an advocate is not under any obligation to disclose information pursuant to an order issued by the High Court under Section 18(3) of POCAMLA if by so complying and making a disclosure, the advocate would breach the exceptions in Section 18(2).

Kenya's legislative framework, however, fails on the second limb of *Michaud's case* because, under POCAMLA, suspicious transaction reports are made directly to FRC. Meanwhile, LSK is relegated to a supervisory role to ensure that FRC directives, rules and guidelines are adhered to by advocates. The unique nature of the advocate-client relationship makes it necessary for the legal profession to be treated differently regarding reporting requirements as envisaged in POCAMLA. This is because even the slightest piercing of privilege, no matter how well-intentioned, would undermine the fundamental principles of the rule of law. Hence there is a need for a report filtering by the LSK. The LSK code of standards safeguards legal privilege which can only be breached if an advocate knowingly aids or abets money laundering, for example, where the advocate's client account is being used to 'provide cover' for criminal activities. Suffice it to say, the LSK code of standards is not soft on advocates because it requires advocates to conduct customer due diligence and verify the identity of the client, the source of the funds, maintain proper records of all transactions as well as keep records for at least seven years. These 'Know Your Customer' requirements are borrowed from POCAMLA. The code of conduct even advises that where there is reasonable cause for concern about a client's instruction, an advocate ought to decline instructions. Though the LSK code of standards are for regulating the profession, there is an argument to be made in favour of advocates in Kenya reporting suspicious transactions directly to LSK as opposed to FRC, as advanced in *Michaud's case*. This would only require LSK to be effective as a profession regulator and ensure all advocates comply.

Perhaps it is this reporting requirement with its inherent problems that has led the American Bar Association (ABA) to continue to resist the inclusion of lawyers as part of the professionals who are required to make suspicious transaction reports to government agencies under the proposed Enablers Act. The law was introduced by legislators in 2021 as part of the United States efforts to fight corruption and illicit financial activities but subsequently, it was blocked by the Senate in 2022. One of the concerns raised by ABA being that the requirement to disclose information was likely to breach the attorney-client confidentiality.

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A Lawyer's Client Account and the War on Money Laundering

By Paul K. Kamau

A lawyer's client account inspires confidence that the proceeds held therein will not be disclosed carelessly. From South Africa, Hamman and Koen point out that there is something sacrosanct about an attorney's trust account. Yet, they say, because of the high trust it enjoys, the account can be transformed easily into an instrument of crime. Stephen Schneider notes from a report of the FATF in 2002 that the secrecy afforded to the lawyer's dealings with his client is a likely vehicle of crime, especially money laundering. Despite several efforts to tinker with the rule of legal professional privilege, notably by the ECJ, it would appear, as Yasin points out in his book: *Lawyers Legal Privilege and Money Laundering*, the position remains that set out centuries ago in *Lee v Markham* that although a lawyer could be called, there was no obligation to answer any questions regarding dealings with a client in the lawyer's professional capacity.

The importance of legal professional privilege in any democratic jurisdiction cannot be overstated. In the English case of *Ventouris v Mountain*, for instance, the Court of Appeal held that legal professional privilege existed to protect the public interest in ensuring that litigants or potential litigants could seek and obtain confidential advice in respect of actual or contemplated litigation and that litigation could be prepared and conducted. The Kenyan position on legal professional privilege is anchored on S.134 of the Evidence Act, which insulates lawyers from disclosing information coming to their knowledge from their clients under their professional engagement. The rule is not superfluous because, as a US court observed in *United States v Upjohn*, the principle's rationale is to ensure that any communication made frankly between an advocate and a client cannot be used against the client. This, in turn, motivates clients to be franker with their lawyers.

As observed in *Ojienda & Ano. vs EACC in 2015*, the Kenyan version of legal professional privilege leaves room for compulsory disclosure of information where the same in furtherance of an illegal purpose or the commission of a crime (See also *Manani, Lilan & Mwetich v. Sum*, 2019). Case law in Kenya so far indicates that the courts have been unwilling to allow criminals and corruption suspects to hide behind the rule of legal professional privilege but then, this is not an area that has been exposed to robust litigation or prosecution.

> As the anti-corruption war gathers steam (or loses it), it remains to be seen how the country's judiciary will balance the two competing interests protected by legal professional privilege;

The legal space has evolved over time since the decision in *Lee v Markham*. What about the emergence of real existential threats like terrorism and wanton looting of public resources?

Whereas it may not be proper to regulate lawyers' trust accounts with abandon, clearly a line has to be drawn in the sand for lawyers to act responsibly true to their calling of fidelity to the law. That responsibility if not obtainable by self-regulation may as well be imposed by fiat.

As the anti-corruption war gathers steam (or loses it), it remains to be seen how the country's judiciary will balance the two competing interests protected by legal professional privilege; that of a fair trial on the one hand and the public interest of prosecution and conviction of offenders on the other, in this case corruption suspects without undue misuse of the principle as a façade. After all, the judiciary is the final arbiter of all competing legal rights.

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Money Laundering and the Legal Profession: Should Lawyers be Reporting Institutions?

By Ogonda Jack

Are legal practitioners in Kenya partners in or against crime? There is no doubt that the legal profession should assist in the fight against financial crimes such as money laundering and terrorism financing. Money laundering is the process by which proceeds from criminal activities are disguised to conceal their illicit origins. The Financial Action Task Force on Money Laundering (FATF) describes money laundering as "the processing of criminal proceeds to disguise their illegal origin to legitimize the ill-gotten gains of crime."

This insidious act is an offence under section 3 of the Proceeds of Crime and Anti-Money Laundering Act 2009 (POCAMLA). It has potentially devastating economic, security, and social consequences. Money laundering is a propellant for terrorists, smugglers, drug dealers, illegal arms dealers, fraudsters, corrupt public officials and others to operate and expand their criminal enterprises. The government of Kenya has taken significant steps to curb money laundering because it diminishes tax revenue and thus indirectly harms honest taxpayers.

The National Money Laundering and Terrorism Financing Risk Assessment Report of 2021 assessed the overall money laundering threat of Kenya as medium with a potential for increase in the future. Saccos, the legal profession, and motor vehicle dealers were assessed as posing a significant impact on Kenya's national Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT). The report found that these sectors had relatively weaker frameworks for money laundering and terrorism financing oversight. More notably, the money laundering vulnerability was assessed as high with a score of 0.85. Lawyers were not designated as reporting institutions and the practical mechanisms or the advocates to report suspicious transactions without breaching the advocate-client privilege were not adequate at the time.

Given the above findings, the report considered the FATF recommendations requiring lawyers, notaries, other independent legal professionals and accountants to undertake customer due diligence and know their customer processes when they prepare for or carry out transactions for their clients concerning a number of activities. As a result, the report recommended designating lawyers and motor vehicle dealers as designated non-financial businesses or professions (DNFBPs) for the purposes of Anti-Money Laundering and Countering the Financing of Terrorism reporting requirements.

Since the release of the 2021 report, lawyers have been designated as reporting institutions under DNFBPs. Section 2 of POCAMLA defines DNFBPs to include advocates, notaries and other independent legal professionals who are sole practitioners, partners or employees within professional firms. Further, the same legislation designates the (LSK) as a supervisory body with the obligation to report to the Financial Reporting Centre any suspicious transaction that it may encounter during the normal course of its duties.

> This loophole has been the bone of contention between the legal profession and the relevant government regulatory bodies responsible for stemming money laundering in the country.

The money laundering and other offences outlined in sections 3, 4 and 5 of POCAMLA apply to lawyers who act for their clients in various transactions. Therefore, a lawyer may be liable under the said provisions if they are aware their client gained the money through criminal means. The knowledge requirement under sections 3 and 4 of POCAMLA discourages lawyers from inquiring about the source of their client's funds to escape criminal responsibility. It follows that as long as lawyers do not ask questions about the sources of their client's funds, they may not be responsible for the offences of money laundering and the acquisition, possession or use of proceeds of crime under POCAMLA.

This loophole has been the bone of contention between the legal profession and the relevant government regulatory bodies responsible for stemming money laundering in the country. Although lawyers are designated as reporting institutions under POCAMLA, the

Law Society of Kenya obtained conservatory orders on 12th January 2022, in *Nairobi High Court Petition No. E005 of 2022 Mwaura Kabata vs Hon Attorney General & Others*, stopping the operationalisation of sections 2(c) (i) and 14(b) of the Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2022. A section of the legal profession opposed to designating lawyers as reporting institutions argues that it would result in the unjustified prosecution of lawyers for involvement in money laundering while acting in their legal capacity.

The (LSK) vehemently opposed the National Assembly Bill No. 39 of 2021 which sought to designate lawyers as reporting institutions under POCAMLA. The Departmental Committee on National Planning held a stakeholder engagement on the Proceeds of Crime and Anti-Money Laundering (Amendment) Bill, 2021. The committee noted on 2nd December 2021 that all stakeholders except the Law Society of Kenya were in support of the amendment to designate legal professionals as reporting persons for purposes of POCAMLA.

The LSK opposed the impugned amendments arguing that they offend Article 48 and 49(1) of the Constitution in so far as it requires an advocate to report suspicious transactions. Additionally, the LSK pointed out that designating lawyers as reporting persons would chiefly affect the well-settled principle of advocate-client or legal professional privilege applicable to advocates. Critics of the impugned amendments argue that they seek to waste away the noble concept of advocate-client privilege.

While lawyers have legitimate concerns regarding these amendments, there should be a balance between the need to prevent money laundering allegedly rampant in the profession, and preserving the fundamentals of the advocate-client relationship. The legal profession can simultaneously maintain the confidence of the client to disclose information to the advocate and reduce the risk of being misused for money laundering and financing of terrorism activities.

With more than 12,000 lawyers practising in both the private and public sectors, the Kenyan lawyer is an important part of the fight against money laundering and should be a reporting entity. The resistance to designating lawyers as reporting entities is not unique to Kenya. The government regulatory bodies in countries such as the USA, France, and the United Kingdom faced similar resistance in the initial stages of implementing the policy. Perhaps Kenya can borrow a leaf from the legal profession in South Africa where attorneys are recognised among the accounting institutions with duties to report suspicious transactions to the Financial Intelligence Centre. South African attorneys also have duties to conduct customer due diligence and to keep records of all transactions carried out on behalf of their clients.

The legal profession in the United Kingdom has made significant steps to comply with the Anti-Money Laundering regulations targeting lawyers. For instance, British legal professionals reported 2660 suspicious activity reports in 2017/2018 and 2774 in 2018/2019. These reports relate majorly to conveyancing, company trust formation and the holding of money in client trust accounts. The reports are known as "defence against money laundering reports" because they provide lawyers with a future defence against principal money laundering offences. Objections to the designation of lawyers as reporting entities in the UK are more about compliance costs and personal risk management than the breach of advocate-client privilege.

Kenya can pick a few essential lessons from South Africa and the UK regarding the implementation of the reporting obligations. The case of South Africa demonstrates that legal professional privilege can co-exist with the obligation to prevent the legal profession from being used as a conduit for money laundering and terrorism financing. However, it will be difficult for small firms or sole practitioners to comply with the reporting obligations considering the attendance costs. This is an area that can still be explored by all stakeholders to achieve the objective of precluding money laundering and terrorism financing without making the attendant obligations onerous and oppressive. It is possible to reconcile the anti-money laundering obligations with legal professional privilege. The Financial Reporting Centre, the LSK and other stakeholders should work with legal practitioners to ensure they have sound knowledge of their role in helping the government combat money laundering.

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The Proceeds of Crime and Anti-Money Laundering Act, No 9 of 2009: an Affront to Advocate-Client Privilege

By Felix Okanga

Halsbury's Laws of England 3rd Edition Vol 3 observes that the employment of counsel places him in a confidential position, and imposes upon him the duty not to communicate to any third person the information which has been confided to him as counsel, and not to use either such information or his position as counsel to his client's detriment. Confidential communications passing between client, solicitor, barrister in a professional capacity for the sake of obtaining legal advice, such as cases for the opinion of counsel and his advice thereon, are privileged from disclosure.

The privilege which exist between an advocate and his client has been zealously guarded by the courts as long as history of the law goes. So important is the privilege between the advocate and his client that it has found an explicit protection in the Evidence Act, CAP 80 Laws of Kenya (the Act). Section 134 of the Act expressly prohibits an advocate from disclosing any communication made to the advocate in the course of his employment to a third party unless with the client's express consent. The protection is extended to contents and condition of any document with which the advocate is acquainted in the course and for the purpose of his professional employment.

Section 134 of the Act serves three very important purposes. Firstly, it protects the client from any prejudice likely to be suffered by reason of the information shared between him and the advocate even beyond the advocate-client relationship. Secondly, it makes the advocate not a compellable witness for purposes of any proceedings that touches on the privileged information. Thirdly, success of the legal profession is dependent on the trust and honesty of the client towards his advocate. The client must be assured and completely confident that their communication with the advocate will not be used in a manner that is adverse.

The Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009 (POCAMLA) designates advocates among the reporting institutions with the compulsory requirement to monitor and disclose transactions to the Financial Reporting Center established in Section 21. Section 44 of POCAMLA effectively makes advocates and law firms state agents and spies by requiring them to monitor complex ongoing transactions and report to the state through the Financial Reporting Center.

Further, section 24 of POCAMLA gives the Financial Reporting Center unfettered powers to enter and inspect premises of reporting institutions, including law firms, and ask questions on any documents within the premises and make copies of the documents notwithstanding that such documents are protected by advocate-client privilege.

Section 24(e) of POCAMLA empowers the Financial Reporting Center to instruct reporting institutions to provide it with such other or additional information or additional documents to enable the center to properly undertake its functions or take such steps as may be appropriate to facilitate any investigation undertaken or to be undertaken by the Centre, including providing documents and other relevant information.

The provisions of POCAMLA as applicable to advocates, their law firms and their staff raises very fundamental issues that put the legal profession at crossroads. Firstly, it raises ethical issues since mandating advocates to spy on their clients' transactions and by extension avail to the Financial Reporting Center privileged documents without prior consent of the client, advocates are compelled to act contrary to the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct that makes unauthorized disclosure of client information professional misconduct.

Secondly, it is an affront to protection accorded to the information shared between an advocates and his clients under statutes such as the Evidence Act and indeed the POCAMLA itself at Section 18. Advocates find themselves in conflicting situations on whether to comply with their obligations as a reporting institution designated under POCAMLA at the expense of legal proceedings for breach of advocate-client privilege as protected under the Evidence Act.

Thirdly, the other fundamental issue arising is the place of independence of the BAR. An independent Bar is an integral hallmark of a free society and indeed the rule of law. Independence of the BAR guarantees everyone that they will enjoy their constitutionally guaranteed rights to legal representation (fair hearing) and access to justice.

The duty of the legal professional to keep confidential information received from the client as well as such advice given to the client is an indispensable feature of the rule of law and essential to public confidence in the administration of justice. It

enhances the public's trust in the legal profession and facilitates full and honest communication between the advocate and the client.

The legal profession should remain free and independent from the state's pervasive manifestations. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the BAR and through those members, legal advice and services generally. Preserving the rule of law through access to justice and legal representation should never be taken for granted. Advocates cannot and should not be used by the state as informants.

The legal profession just like the judiciary should serve to keep the government in check in exercise of its constitutional powers hence it is imperative that the boundary between the state and the legal profession should never be blurry as it would be if the profession became an extended limb of the government through designation as a reporting institution.

In any event, there already exist sufficient safeguards to ensure that advocates' services are not obtained to carry out or to further criminal activities such as money laundering. Such statutory safeguard is found in Section 134 of the Evidence Act that takes away privilege from information made in furtherance of criminal activities.

Regulation of the legal profession is bestowed upon the Law Society of Kenya as established in the Law Society of Kenya Act, No 21 of 2014. For a free legal profession and independent BAR, regulatory role of the Law Society of Kenya should not be usurped by the state through back ended legislations like the POCAMLA.

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The Role of Law Firms as Financial Reporting Centres: The Dilemma Between Confidentiality and Transparency in Curbing Money Laundering

By Francis Mwaura

On October 2, 2021, the International Consortium of Investigative Journalists (ICIJ) published a treasure trove of thousands of leaked documents dubbed the 'Pandora Papers' implicating a list of powerful individuals around the world including the family of then Kenya's President Uhuru Kenyatta only referred to as client 13173. These individuals were linked to the Shell Companies created by a Panamanian law firm known as Aleman, Cordero, Galindo & Lee or Alcogal.

According to The Economic Times in an article titled *'Panama Law Firm Heavily Implicated in 'Pandora Papers'* the revelation, in one of the most damning financial exposés since the Panama Papers a few years back in 2016. The ICJ enumerated 14,000 offshore entities in Belize, the British Virgin Islands and Panama created with the help of Alcogal to stash money away from public scrutiny for some 15,000 clients since 1996. The firm characteristically distanced itself from the matter.

Money laundering is one of the oldest crimes in history. It entails the concealment of the source of money usually from illegal activities by introducing it to the financial system with the overall effect of benefitting its recipients. However, this can have serious implications on the global financial system since the proceeds can be used to finance illegal activities such as corruption, terrorism, human trafficking and a host of other illegal activities not forgetting its effect on inflation in general.

We cannot deny the important role which the law plays in the furtherance of provision of financial services. According to 'The Financial Sector Assessment: A Handbook' chapter nine, the legal infrastructure plays a key role in the operation of financial services, as well as in the efficient intermediation of capital inflows and domestic savings. The legal framework that empowers and governs the regulator and the rules for the regulation of the various markets form the cornerstone of the orderly existence and development of the financial markets. At the top of this infrastructure are lawyers.

In recognition of this critical role that lawyers play in the provision of these critical services, a number of attempts have been put forward towards including them as financial reporting agents in the fight against money laundering. The Law Society of Kenya is one such organization whose Anti-Money Laundering Guidelines for Legal Practitioners recognize the potential risk that its members face in the facilitation of money laundering and financing of terrorism in the course of representing their clients.

As a result, an advocate or law

firm can be involved knowingly or unknowingly in money laundering and/or financing of terrorism activities thus exposing them to legal, operational and reputational risks. It is therefore important that advocates have the necessary tools, knowledge and guidance to enable them avoid the risks associated with money laundering and terrorist financing in dealings with their clients and to enable them handle cases of money laundering and represent their clients effectively.

However, there is push back by the learned professionals who cite that the move would be in direct contravention of 'advocate-client privilege.' According to an article by the Business Daily on 19 May 2023 titled *'Lawyers dirty money stalemate tests IMF's Sh321 bn Kenya Plan,'* the refusal by Kenyan lawyers to be financial reporting agents risked the country being 'grey listed' by the FATF, the global watch dog on money laundering and financing of terrorism as one of the countries without proper safeguards against illicit financial flows.

The writer goes on to add that the country has until September to comply with the requirements after which it risks being black listed like South Africa after it failed to address all of its shortcomings in money laundering and the financing of terrorism that the taskforce identified in a 2019 evaluation of the country.

The implications of a country such as Kenya being implicated are far worse. For starters, upon being black listed, the country would not receive its much needed relief in form of loans and grants from the IMF. This would mean heavier taxing of its citizens to meet the deficits and avoid default. Secondly, by being black listed, the country would essentially be considered a 'high-risk zone' for attracting foreign investment.

The main contention by the opposers of this proposal is the mandatory requirement to report suspicious transactions and keep detailed records of transactions above $10,000 which is equivalent to Kshs 1,000,000 and above. This is the critical dilemma since a majority of clients especially those interested in properties transact in millions of shillings.

The once sacred profession revered for secrecy is no longer so, as the law would potentially cause money launderers to flee from these lawyers and with them 'lucrative' business dealings. This also puts lawyers in a category of the high society customers such as Politically Exposed Persons (PEPs).

It shall be interesting to watch what happens in future since as things stand currently, no side is budging. However, should the stalemate persist, then Kenya risks to lose more than just money. Whether or not that happens, only time shall tell.

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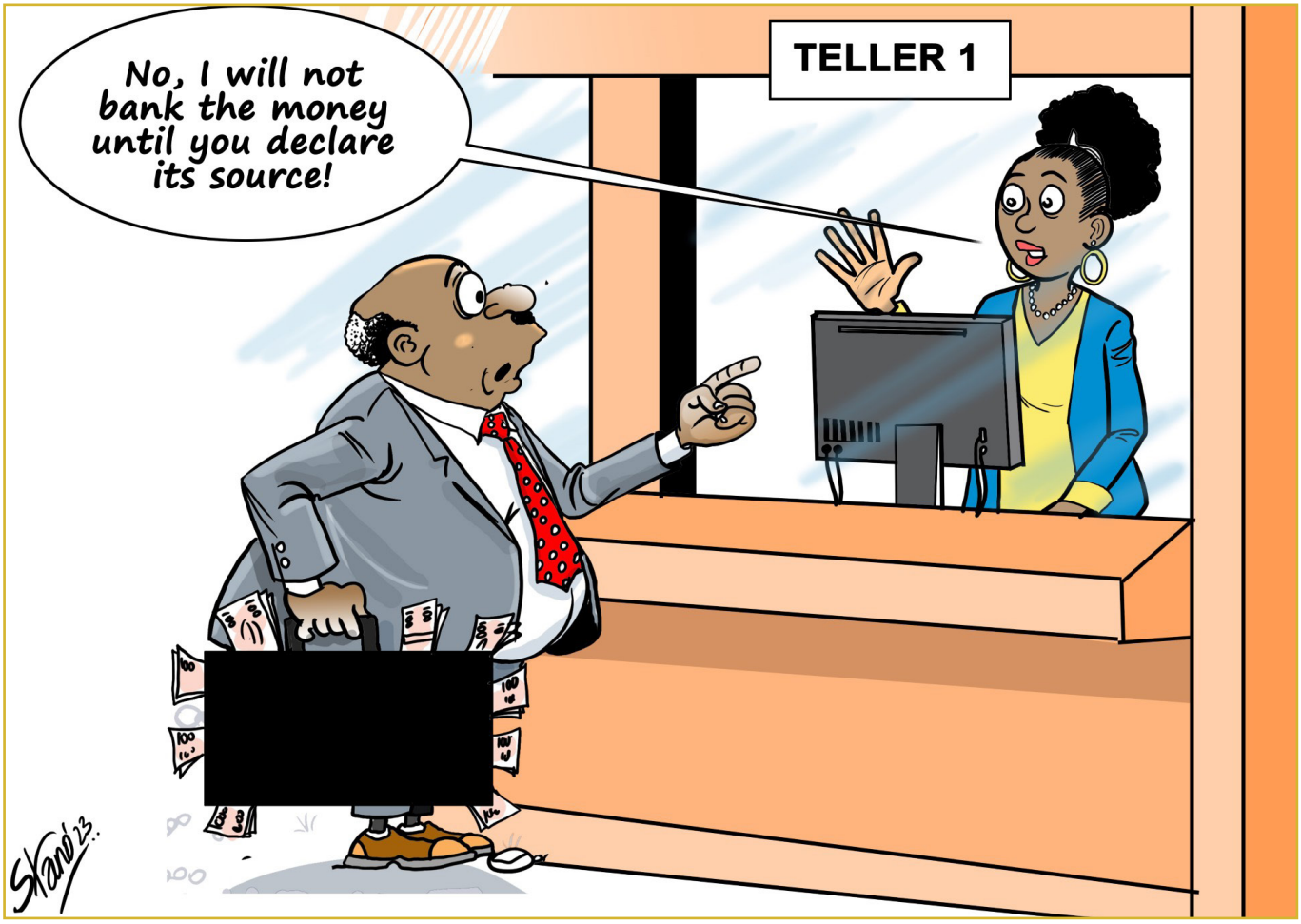


The Role of Lawyers under POCAMLA; Custodians or Perpetrators

By Mwongela Mbiti

> "Lawyers could play a vital role in cooperating with regulatory bodies and law enforcement agencies in the fight against money laundering by sharing information, responding to requests for assistance, and working together to ensure compliance with AML regulations"

In 2021, Kenyan legislators enacted an amendment to Section 44 of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) to designate advocates, notaries and other independent legal professionals as reporting entities for dirty cash dealings. Of course, this amendment received passionate and spirited opposition from lawyers including those serving as Members of Parliament. As it turned out, there was a hidden hand of the International Monetary Fund (IMF) following the country's commitments to secure KES. 321 billion and whose disbursement date had been pushed—partly due to delays by Kenya to finalize regulations to enlist lawyers as reporting agents by the end of June 2021.

There has been a global concern that either lawyers have become enablers of money laundering and terrorism financing or have been exploited by criminals to facilitate illegal activities, including transnational crimes and illicit financial flows. Undeniably, money laundering poses a significant threat to the global financial system, allowing criminals to clean and hide huge illicitly obtained funds and perpetuate criminal activities.

Money launderers seek to legitimize the proceeds of crime through transactions involving the least amount of inspection while affording a minimal risk of detection. As organized crime becomes more sophisticated, there are huge amounts of money involved and therefore an increased need for professional services that were not traditionally used in money laundering. Particularly, lawyers are among those identified as preferred agents for laundering illegally obtained money.

Banks and financial institutions were traditionally known to afford confidential services that allowed for the concealment of illegally obtained money. The fact that customer confidentiality is also closely guarded in the financial sector, especially with regard to banking activities, has not thwarted the imposition of reporting requirements because the procedures are legitimately within the authority of its regulators.

Designating financial institutions with reporting responsibilities is the norm among the anti-money laundering (AML) procedures in many jurisdictions and is endorsed by the Financial Action Task Force (FATF). Placing similar obligations upon legal professionals appears problematic, however, because, unlike financial institutions, lawyers are independent professional advisors. Lawyers place a high significance on the confidentiality of their dealings with clients which is by law privileged and view intrusions by the state as threatening to the integrity of the profession.

The lawyer's role in this context and especially as a reporting entity is fraught with challenges and requires a delicate balance between competing interests. Lawyers often find themselves in a unique position when it comes to combating money laundering. On one hand, they serve as trusted advisors to clients, advocating for their interests and ensuring their rights are protected. On the other hand, lawyers have a professional and ethical obligation to prevent money laundering and report suspicious activities involving their clients to the appropriate authorities.

One of the primary challenges lawyers face in the realm of AML is the duty of client confidentiality and legal privilege. Lawyers are bound by strict professional codes of conduct that safeguard the confidentiality of client information. This confidentiality is essential to maintain the trust between lawyers and clients, enabling open and honest communication. However, when faced with potential money laundering activities, lawyers must navigate the delicate balance between maintaining client confidentiality and fulfilling their obligations to prevent illicit financial transactions.

The Kenyan bar's opposition to the Proceeds of Crime and Anti-Money Laundering Amendment Act (2021) was based on the waiver of the advocate-client privilege that the listing of the advocates and their employees, who are not advocates, including accountants, clerks and cleaners, as reporting agents of the Financial Reporting Centre (FRC) presented. The fear, as captured by the Law Society of Kenya, is that the reporting requirements would turn law offices into 'junked police stations'.

Upon petitioning the court, LSK obtained temporary orders suspending the Implementation of section 2(c) and section 14 (b) of the Amendment Act pending hearing and determination of the suit. This notwithstanding, there is a general consensus that lawyers have an obligation to support the state in its quest to seal deficiencies in curbing illicit financial transactions and money laundering and therefore the conversation continues.

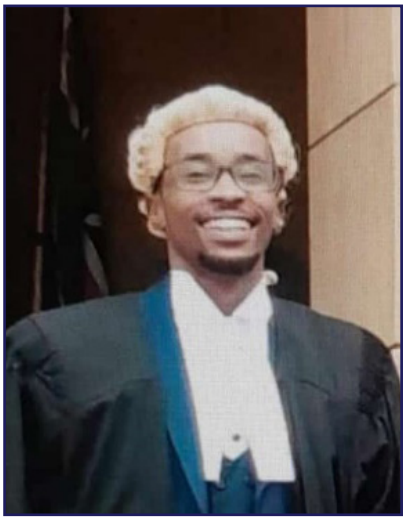
The LSK's commitment to AML efforts is however not doubtful. In 2020, LSK put in place Anti-Money Laundering guidelines for use by the legal profession in Kenya in the application of POCAMLA and related legislation in the conduct of their professional practice and in their dealings with their clients. The guidelines speak to *inter alia*, due diligence, transaction monitoring, suspicious activity reporting and large cash transactions in accordance with the FATF recommendations on AML and Countering the Financing of Terrorism (CFT).

Lawyers could play a vital role in cooperating with regulatory bodies and law enforcement agencies in the fight against money laundering by sharing information, responding to requests for assistance, and working together to ensure compliance with AML regulations within the legal and ethical boundaries to avoid compromising their professional obligations and the best interests of their clients.

Anti-Money Laundering measures have placed lawyers in a critical position where they must balance competing interests. While lawyers are duty-bound to protect client confidentiality and advocate for their interests, they also have an obligation to prevent money laundering and report suspicious activities. Striking the right balance requires a nuanced approach, where lawyers conduct thorough due diligence, navigate reporting obligations carefully, and collaborate with regulatory bodies to combat money laundering effectively. By fulfilling their roles ethically, lawyers can contribute to a robust AML framework that safeguards the integrity of the financial system while respecting the rights of their clients.

The Author is an advocate of the High Court of Kenya and a governance practitioner. He comments on general governance issues in the local dailies.

Walking On the Razor's Edge: FATF, Cap 59B and Regulation of Lawyers' AML Compliance Obligations



By Nganga Louis

> Consequently, provided legal professionals confine their representation to the four corners of the law, they have no duty that supersedes that to their clients.

Introduction

Streamlining Anti-Money Laundering (AML) compliance obligations has been a thorn in the flesh for legal practitioners and state competent authorities for decades now. Much discordance exists between jurisdictions, some of which have taken a soapbox strategy to governing AML, KYC (Know Your Client) and initial and ongoing client due diligence (CDD) by practitioners. Other jurisdictions have preferred a *laissez-faire* approach, allowing legal practice regulators, Self-Regulating Bodies (SRBs) the exclusive mandate to establish AML compliance frameworks as they see fit and affording professionals the latitude to determine how best to meet their obligations with regards to the spectrum of duties that constitutes AML compliance.

The Financial Action Task Force (FATF) Recommendations are the foundation of all AML compliance measures globally. The Recommendations, under which the FATF Risk Based Approach (RBA) Guidance for Legal Professionals (2019) were recently updated in February 2023. The Guidance empanels legal practitioners to "identify, assess and understand" pertinent risks and implement appropriate risk mitigation measures. In Kenya, section 18 of the Proceeds of Crime and Anti-Money Laundering Act, (POCAMLA, 2009) is at odds with the protections afforded to legal professionals and recognized by FATF Recommendations and RBA Guidance.

This article embarks on its intended course with three objectives in mind. First, the article exposits the instances within the existing AML framework of governance that ring-fences lawyers from the more onerous standards required of banks, investment

managers, audit professionals and accountants. Second, this article rallies for the express recognition of the inevitable reality that legal professionals cannot and should not be designated non-financial businesses, and third, it posits that the regulation of AML compliance is best left to SRBs.

Legal Professional Privilege and AML Obligations

First, under the entirety of the FAFT framework, legal professional privilege, a subset of the constitutional right to select legal counsel voluntarily is sacrosanct. The recommendations explicitly exclude the legal profession from the more exacting obligations placed on designated professions and institutions, in the Interpretive Note to recommendation 23, which categorically states that:

Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report suspicious transactions if the relevant information was obtained in circumstances where they are subject to professional secrecy or legal professional privilege.

It is for each country to determine the matters that would fall under legal professional privilege or professional secrecy.

One of the most important qualifications within the entire FATF framework states unequivocally, that all AML and CDD obligations must be considered "with due regard to the resources available". Although the Guidance does not allude to this fact, what is appropriate is by all means a highly subjective decision taking into account the size and scope of the operation, the geographical reach of practice or specific susceptible practice areas (which are provided for in regulation 22 of the FATF Recommendations). Characteristically, lawyers do not ordinarily have at their disposal the quantitative capacities of accountants, neither does the overwhelming majority of the legal profession have the compliance capacity of even a small bank. It makes perfect sense that the threshold and obligations for legal professionals should reflect these shortcomings, and appreciate that banks, auditors and accountants are inherently better placed to function as *alter egos* of competent authorities.

The Guidance repeatedly declares that it is neither binding nor exhaustive. In effect, relative to other relevant professions, the legal practitioner's role is very limited, and the regulation of AML compliance is best left to legal practitioners' self-regulatory bodies (SRBs). Consequently, provided legal professionals confine their representation to the four corners of the law, they have no duty that supersedes that to their clients.

To comply with recommendations 22 and 23 of the FATF regulations, countries do not need to issue laws or enforceable means that relate exclusively to lawyers, notaries, accountants and the other designated non-financial businesses and professions, so long as these businesses or professions are included in laws or enforceable means covering the underlying activities (Interpretive Note to Recommendations 22 and 23).

In this, the FATF itself has expressly recognized that if lawyers were to be deemed reporting institutions' proxies, advocate-client privilege would be watered down to the point of being useless. Equally persuasive is the argument that the legal profession exists as series of interdependent and interconnected networks, particularly in the representation of corporate clients. To yoke legal professionals with additional reporting obligations would essentially deprive clients of their constitutional privilege to legal counsel, and to the ancient protection of anonymity that comes with the incorporation of a legal entity that is separate and distinct of its owners or management.

In Kenya, the relevant provision of the POCAMLA, 2009 concerning legal professional privilege, section 18 is the subject of ongoing judicial determination, however without qualification, privileged communications have a historically immutable protection from the vigilance of the competent authorities that are legal professionals' would-be antagonists in the AML compliance tug-of-war. Accordingly, competent authorities should totally abandon any idea that lawyers are required to be proxies, *alter egos* or *de facto* agents of reporting entities. The Guidance is an authoritative guide for legal professionals declaratory of the reality that AML compliance obligations should never be weaponized to water down the constitutional right that clients have to select legal representation voluntarily.

A Case for Jurisdictional Streamlining

Because of the patent juridical discordance between FATF's RBA Guidance and Recommendations and section 18 (3) POCAMLA, achieving the intended aim of the FATF Recommendations, which is compliance, by legal professionals, is today analogous to walking on the edge of a razor. Evidently, the need for a tailor-made approach centres on the differences between the tenor and effect of section 18 and the protections in FATF Recommendations and RBA Guidance and the rights of clients as consumers of legal professional services, who have the constitutionally entrenched expectation of impartial counsel.

Conclusion

In sum, the need for tailor-made approaches to streamline the role of legal practitioners within AML compliance congregates on juridical differences between the FATF Recommendations and Cap 59B, which threaten the constitutional right of clients to counsel of their choosing and the privilege that attaches to advocate-client communications. Invariably, at the heart of compliance is an understanding of risk. Certain actions are naturally more susceptible to ML activities; however, compliance

does not need to be fashioned into a weapon that is adverse to the practice of law or financial intermediation. If this were to occur, competent authorities, would paint the legal profession into a corner, requiring onerous levels of reporting or vigilance from lawyers, who are at the same time bound by law to protect client confidences and to pursue the legitimate aims of their clients to the best of their ability.

The FATF Guidance is not binding and empanel lawyers to have in place robust AML risk appraisal, mitigation systems within their existing client engagement systems to achieve substantial compliance with the Guidance and Recommendations. Admittedly, "there is no one size fits all approach" and from the foregoing, it is clear that the FATF framework as it stands insulates the legal profession from additional reporting obligations in respect of AML compliance, and that under the existing system governing legal professionals it is impossible to be impute legal practitioners to agency of competent authorities.

In the Kenyan context, legal professional obligations for AML are governed by section 18 of POCAMLA, 2009 and a suitable AML governance framework is one that protects legal professionals from the necessarily more onerous obligations imposed on banks, audit professionals and accountants. It is ample time that SRBs are granted the statutory powers to regulate AML compliance for legal profession in Kenya. Ultimately, a fair interpretation of section 18 of POCAMLA reveals lawyers cannot and should not be deemed proxies for competent authorities.

The Author is an Advocate of the High Court of Kenya.

Anti-Money Laundering: The Uncomfortable Agent, A Lawyer's Role in Balancing the Competing Interests

By Wendy Muganda

Introduction

Money launderers seek to legitimize the proceeds of crime through transactions involving the least amount of inspection while affording a minimal risk of detection. The Proceeds of Crime and Money Laundering Act of 2009 provides for the definition of "money laundering". The aforementioned sections highlight the tenets of money laundering offences. There are instances where lawyers have been used as a machinery to 'clean' money by facilitating legal transactions. Trade Based Money Laundering (TBML) has also played a major role in making lawyers as enablers of money laundering.

Lawyers' Role in Money Laundering

The definition of TBML as described by the Financial Action Task Force (FATF) Report 2006 has been adopted internationally. This definition was reiterated by the US as that which "involves the exploitation of the international trade system for the purpose of transferring value and obscuring the true origins of illicit wealth."

FATF acknowledges the fact that it focused mainly on the use of financial systems and physical movement of cash by criminals as a means of laundering illicit funds. However, with technological innovation and development of international trade, criminals have exploited the nature of international trade systems through TBML.

This new trend has prompted criminals to engage professionals like lawyers to convert proceeds of crime due to the legitimacy of the professional services they provide. Lawyers are susceptible to potential liability for money laundering. It is therefore perceived that proper safeguards are necessary if lawyers are to indemnify themselves whilst balancing effective client representation.

FATF Recommendations 22 and 23 urge FATF members to adopt legislation that impose Customer Due Diligence (CDD), Suspicious Transaction Report (STR) and No Tipping-Off (NTO) obligations on lawyers engaging in services such as trusts and conveyancing. These requirements have been a major concern for the legal profession amidst balancing client privilege.

Lawyers as Reporting Agents of Money Laundering

An understanding of the UK, US, and Kenyan jurisdictions is significant to appreciate why client privilege is the core of the legal profession.

"This definition was reiterated by the US as that which "involves the exploitation of the international trade system for the purpose of transferring value and obscuring the true origins of illicit wealth."

For example, in the US, there was a major concern for lawyers when a recommendation was made to make lawyers reporting agents. The International Bar Association indicated that Israel which is regulated by the Bar's Ethics Rules met the standards as recommended by FATF recommendations but did not go beyond that.

The FATF Recommendation 22 requires countries to ensure that financial institutions and Designated Non-Financial Businesses and Professions (DNFBPs) implement measures to prevent misuse of the financial system and non-financial businesses and professions by Politically Exposed Persons (PEPs) and to detect such potential abuse if and when it occurs. Lawyers are one of the DNFBPs. It is on this backdrop that some countries have implemented the reporting obligations on lawyers.

In the UK, lawyers are required to file SAR to the Solicitors Regulatory Authority, which is the main body that regulates the legal profession. This obligation is mandatory and has consequences including but not limited to being disbarred and possible penal sanctions. The legitimacy of placing additional responsibility upon lawyers due to the role they play as an intermediary in money laundering is not only recognized in the U.K. Following the U.K. standards, the European Commission proposed amendments to the Money Laundering Directive in response to the current trend in money laundering. South Africa and Tanzania have also adopted a similar approach as the UK.

The premise underlying the protection of clients' confidences is to encourage full disclosure of one's situation in order for a lawyer to offer the best possible representation. The fear that a lawyer may divulge confidential information has the obvious implication that clients may become unwilling to fully disclose information to their counsel.

Some of the recommendations to balance the interest between client privilege and money laundering reporting obligations are to ensure the legal profession is regulated by the Bar in terms of imposing regulations on how to handle clients suspected of money-laundering. Further, it is recommended that the existing enforcement institutions are strengthened not to impose policing duties on lawyers. It is also recommended that transactions considered being at a high risk such as conveyancing to be carried out by lawyers only.

The Author is an Advocate of the High Court of Kenya.

A Snippet of The Anti-Money Laundering Laws and the Legal Profession in Select Jurisdictions

By: Bernard Kibet Sang

> "Lawyers are heavily involved in the formulation and review of anti-money laundering laws and regulations hence fostering good will and co-ordination between lawyers and the government to combat money-laundering."

The Proceeds of Crime and Anti-Money Laundering Act (Cap. 9 of 2009) (POCAMLA), whose main object is to provide for the offence of money laundering and introduce measures for combating the offence, provide for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime and for connected purposes, has brought forth mixed reactions among legal practitioners in Kenya.

Recommendation 22 of Financial Action Task Force (FATF) Recommendations of 2013 informed the amendment of POCAMLA to include Section 48. FATF Recommendations of 2013 recommended the inclusion of lawyers as Designated Non-Financial Businesses and Professions (DNFBPs) obligating lawyers to, *inter alia*, conduct thorough due diligence in accepting briefs and report suspicious transactions.

Consequently, the Proceeds of Crime and Anti-Money Laundering (Amendment) Act, 2021 amended Section 48 of POCAMLA to include "advocates, notaries and other independent legal professionals who are sole practitioners, partners or employees within professional firms". Prior to the inclusion of Advocates as reporting agents under Section 48 of POCAMLA, there had been continued opposition against the said inclusion by the legal profession. In fact, there had been several failed attempts by the National Assembly at amending POCAMLA to include advocates as reporting agents.

Section 48 of POCAMLA has attracted concerted opposition by Advocates against the reporting obligations on Advocates who have, for a long time, been fully protected by advocate-client confidentiality, as contradicting the duty of an advocate to protect the client information. While advocate-client confidentiality is not absolute, the IMF argues that requiring Advocates to report will lead to excessive reporting, otherwise known as 'crying wolf'. Excessive reporting fails to identify what is relevant information for action by the relevant investigative agents. There already exists an obligation on various institutions such as banks to report. By including advocates, there is a risk of creating excessive reporting.

South Africa

In South Africa, an attorney is obligated to submit to the Financial Intelligence Centre a cash threshold reporting in respect of all cash transactions in excess of the prescribed threshold of R25,000. It is interesting to see how this obligation plays out and the success or otherwise of this obligation as lawyers, engage in transactions in excess of the cash threshold of R25,000 with the same client.

The United Kingdom

The United Kingdom has adopted strict measures to enhance the role of lawyers in the prevention of money-laundering. Unlike Kenya, lawyers in the UK are shielded by legislation against reporting obligations. Sections 330(6) (b) and 10 of the Prevention of Crime Act of 2002, absolves a lawyer from reporting confidential client information. Lawyers are heavily involved in the formulation and review of anti-money laundering laws and regulations hence fostering good will and co-ordination between lawyers and the government to combat money-laundering.

United States of America

In the USA, anti-money laundering law comprises a number of legislations designed to coordinate the efforts of government agencies and industries considered vulnerable to money-laundering while attacking the steps taken to disguise tainted funds. Although lawyers in the USA do not have direct reporting obligation, Section 1957 of Money Laundering Control Act has been interpreted to imply that liability would only accrue if a person has knowledge. Since the USA is an advanced legal system, in 2013, FATF report acknowledged the steps employed in the USA to prosecute lawyers for money laundering.

The Parting Shot

The intention of Advocate-client confidentiality is to encourage open communication between advocates and their client for the purpose of effective representation. With the reporting obligation, Advocates' ability to effectively represent clients is at risk as the foundation of the legal representation, is threatened. This article gives a recommendation on self-regulation within the profession in the fight against money-laundering. An independent body could be established with the sole responsibility of receiving money-laundering reports from Advocates in Kenya. Unless a clear balance is established between an advocate's reporting obligation and the protection of the sanctity of the profession, the obligation imposed on advocates as a reporting entity will continuously be resisted by the legal practitioners.

Criminalizing Inchoate Acts in the Shakahola Massacre

By: Dr. Charles A. Khamala,

> "When a person, intending to commit an offence, begins to put his intention into execution...by some overt act, but does not fulfill his intention... to commit the offence, he is deemed to attempt to commit the offence."

In May 2023, Good News International Church founder, pastor Paul Mackenzie Nthenge, was accused of inciting over 600 cult members to starve to death, "to meet Jesus." By mid-June, 318 corpses, mainly children, were exhumed from shallow mass graves at the 800-acre Shakahola Forest in Kilifi County. Kenya's Defence Forces are searching for hundreds more. For nearly two months, Shanzu's Magistrate Court denied Mackenzie, his wife and 16 accomplices, bail pending investigations. He is suspected of murder, torture, aiding suicide, abduction, radicalisation, crimes against humanity, child cruelty, fraud and money laundering. Mackenzie dismisses accusations of "encouraging" his followers to starve themselves as a "matter of intimidation" and time-wasting. Aside from alleged assaults and strangulations, considering that his

victims starved themselves to death, does apocalyptic preaching constitute criminality? To liberals, state criminal punishment is only justifiable to prevent individuals from *wrongfully* causing harm to others. However, Joel Feinberg defends principled reasons not to criminalize *all* wrongful and blameworthy conduct. For him, immorality is a necessary, but not a sufficient, reason for criminalization. Additionally, a *harm* requirement provides the most plausible solution to wrongful conduct that is eligible for punishment. Is increasing *risk* of harm, without actually harming, criminalizable?

Attempts, Incitement and Conspiracies

Consummare is Latin for "to sum up" or "to finish." By criminalizing non-consummate acts, whether attempts, incitement or conspiracies, Kenya's Penal Code deters individuals from furthering incomplete acts taken towards committing crimes. Yet, because such proscribed conduct does not cause harm on each and every occasion on which it is performed, liberal theory encounters problems. While all jurisdictions, whether common law or civil law, include instances of inchoate offences, they are applied differently. Section 388(1) of the Penal Code provides that: "When a person, intending to commit an offence, begins to put his intention into execution...by some overt act, but does not fulfill his intention...to commit the offence, he is deemed to *attempt* to commit the offence." Similarly, all jurisdictions prosecute "incitement." Kenya proscribes it as a substantive offence (section 391), or as counselling another's crime (section 22). Group criminality addresses "joint common purpose" (section 21) or "conspiracy" (section 393). Douglas Husak poses the following question: "In virtue of what characteristics do given examples qualify as genuine instances of non-consummate legislation?"

The Mental Approach

Joshua Dressler claims that:

> When a wrongdoer intentionally commits a crime it is ordinarily the result of a six stage process. First, the wrongdoer conceives of the criminal idea. Second, she thinks about it in order to determine if she should proceed; Third, she fully forms the intention to go forward. Fourth, she makes preparations to commit the crime, as by obtaining the necessary means for its commission. Fifth she begins to commit the offense. Sixth, she completes her actions by successfully attaining her criminal end.

Because the relevant mental state is the aim, objective, and/or purpose of the accused, therefore when conduct is criminalized, before it reaches the sixth and final stage we may say that an actor has committed an inchoate or incomplete or imperfect offense." Commenting on the Shakahola massacre, Interior Cabinet Secretary Prof. Kithure Kindiki said "(it) is very easy to fit Makenzie's behaviour to the crimes of genocide" under "the International Crimes Act of 2008, which criminalizes genocide, crimes against humanity, extermination and other crimes." In practice however, attempts usually occur after an agreement to commit an international crime is carried out; the very act criminalized by conspiracy. Yet, it is doubtful that such agreements could constitute a "substantial step" in commencing the execution of a crime. Nonetheless, a party can attempt an international crime, even if the end is unsuccessful. Shakahola's survivors may be victims of attempted atrocity crimes.Deriving customary international law rules on inchoate crimes from domestic standards to resolve the "conspiracy"/"criminal organization" conflict, is problematic. Dressler would ask whether such secondary offenders, planners or inciters *intended* their preaching be used to procure hunger and result in demise. Did Mackenzie intend his followers' deaths? Does an attempt become mitigated from an international crime because of the sponsor's less malevolent intention? For Husak, such *defendant-relative* inchoate conceptions are objectionable. First, since the act could be complete, relative to one defendant and incomplete, relative to another, even though both have committed the same crime. Second, since the end or objective of the accused may have been successfully obtained even though she has committed a nonconsummate, rather than a consummate, act.

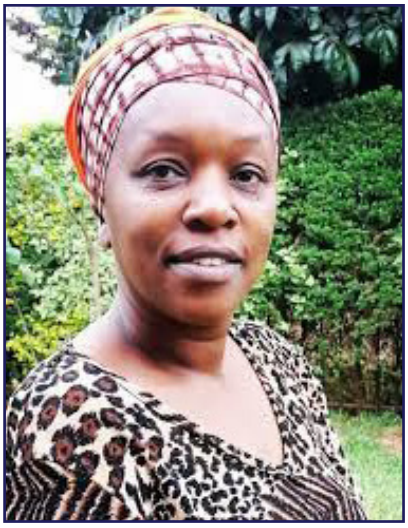
The Act-Type Approach

Husak advocates focus on act-types. Arguably, one "principle to protect permissible conduct from criminal liability might be called the *causal* requirement." Because "nonconsummate offenses are designed to reduce the risk of nonconsummate harm," and further because "an obvious question in endeavors to justify such legislation is whether the proscribed conduct... really creates risk of that harm. Ultimately, this determination is empirical." Therefore "'[c]ommon sense' indicates that persons who perform an act-token...with the purpose to bring about a consummate harm...increase the probability that that harm will actually occur." However, in reality "any empirical evidence of a causal connection between the proscribed act and a consummate harm is bound to reveal that the degree to which the risk is increased by tokens of the proscribed act is not evenly distributed throughout the population of offenders." When are individuals culpable for creating circumstances giving rise to nonconsummate cases? For example, exposing others to pornography does not necessarily incite sex crimes.

Similarly, "[s]uppose...that a person... is no more likely to cause consummate harm after performing a proscribed act-token?" Husak concludes that "[i]n order for the punishment to be justified in terms of the desert of the particular offender, he should be afforded the opportunity to show that his act-token did not increase the risk that the consummate harm would occur." Most Shakahola autopsies indicate that Makenzie's flock either starved to death, strangled their children, or were assaulted by blunt objects. Witnesses were undoubtedly terrified. Assume that the ex-cab driver's starvation ritual had benign intentions and victims consented. Is voluntary starvation by adults necessarily criminal? Under sections 388(2) and (3) of the Penal Code, it is immaterial not only whether deaths were prevented, but also whether it is possible for doomsday worshipers to meet Jesus by starving to death. On Husak's act-type approach, "attempts *per se* are not a crime; attempts are criminal only when what is attempted itself is a crime...the same is true for inchoate offense and conspiracy. No one should be punished for conspiring to do something (or soliciting for something) unless the something he conspires to do (or solicits) is a crime." Fasting is no crime. Rather, believers mortify their flesh to repent sins by participating in Christ's passion. To analyse how indoctrination precipitated homicide-suicide violence, President William Ruto therefore appointed a Commission of Inquiry to investigate the Shakahola Tragedy and Taskforce to review the legal and regulatory framework governing religious organizations. Procedurally, Mackenzie is entitled to an opportunity to rebut the "common sense" assumption that financing, counseling or inciting low-level enforcers necessarily increased risk of violence. The prosecution always bears the burden of proving that such cause and effect relation obtained between the accused pastors as superiors and their enforcers as subordinates, resulting in intentional, indirect co-perpetratorship. Because actual perpetration in collective crime is difficult to prove, therefore the prosecution is often tempted to develop a theory based on possession of knowledge to infer *constructive* guilt. Conspiracy can be defined so broadly, that everyone who was at a location where a fundraising was conducted to support humanitarian aid may be accused of procuring a militia group. Recognizing the need for an international standard for attempts, conspiracies, and incitement to violate customary international law could assist the prosecution of criminal organizations. Alternatively, incorporating inchoate crimes into customary international law could facilitate human rights and genocide prosecutions under domestic law using universal jurisdiction in other states, if Kenya opposes prosecution.

The Author is an Advocate of the High Court of Kenya; Senior Lecturer, Africa Nazarene University Law School.

Threatened Witnesses' Safety Assured in Criminal Proceedings



By Jedidah W. Waruhiu

The phenomenon of witness protection may sound alien to those with little fidelity to the criminal justice system. Its effectiveness has more often than not been doubted and its impact in terms of reforms in the criminal justice system termed cosmetic.

Witness protection is recognized as a fundamental human right, by various instruments of both International and National law, in the administration of justice. Article 50 of the Constitution of Kenya, under the Bill of Rights, not only provides for the protection of identity of witnesses and vulnerable persons in the interests of fair hearing before a court or tribunal, but also for enactment of legislation providing for the protection, rights and welfare of victims of offences.

The protection of victims and witnesses is of importance also in regard to prosecution of serious violations of human rights and of international humanitarian law. In some countries, actors involved in committing organized and serious crimes may also be responsible for human rights violation.

Kenya boasts of being the only country in Africa apart from South Africa of having a robust and functional witness protection legislation and protection programme. The Witness Protection Act,2006 (as amended by Act No.2 of 2010) established the Witness Protection Agency and outlined its mandate, powers, staffing, the Witness Protection Programme, the protection measures available to threatened and

intimidated witnesses and the role of Advisory Board.

The object and purpose of the Agency is to provide special protection, on behalf of the State, to persons in possession of important information and who are facing potential risk or intimidation due to their co-operation with prosecution and other law enforcement agencies.

Great strides have been made since inception of witness protection in the criminal justice system. More and more witnesses have had courage to come out and give testimony in serious crimes such as murder, terrorism and economic crimes. In all criminal justice systems the process of investigating and prosecuting criminal offences depends largely on the information and testimony of witnesses. As such, witness protection measures and programmes have been developed over time to ensure that evidence is preserved and heard during court proceedings.

Funding remains a challenge because of the heavy financial capital involved in protecting witnesses and providing for their daily upkeep together with their dependents. The Government has continued to support the Agency in meeting its financial obligations. However, the budget allocation is still inadequate to sustain the large number of witnesses in the programme.

The stable entrenchment of witness protection over time has therefore raised faith in the administration of justice in Kenya. The Agency will continue to work closely with other players to promote the rule of law and improve the criminal justice sector.

The Author is the Director/ Chief Executive of the Witness Protection Agency.

ADVOCATES' PRACTICE STANDARDS CAMPAIGN ALERT:

Masqueraders, Quacks, Impersonators and Unauthorized/Unqualified Persons

Who is an Advocate of the High Court of Kenya?

01

A person duly entered to roll of Advocates and has a practicing certificate for the current year.

You can check the practice status of such an advocate on **online.lsk.or.ke** by clicking on ***Search Advocate*** and entering the name of the advocate. If the Advocate has a valid practicing certificate(PC), it will be **Active**. If not, it will be **Inactive**.

In case an advocate is practicing without a PC, please report to the director practice standards by email to compliance.or.ke or send a letter to LSK Secretariat.

Practicing without a valid Practicing Certificate is professional misconduct tantamount to disciplinary proceedings.

Who is a quack or Masquareder?

02

This is a person who pretends to be an advocate.

They can equally be identified by the above process. If a person is not entered in the LSK Portal, the person is a masquerader and criminal proceedings should ensue.

PLEASE NOTE THAT THE SEARCH ENGINE IS ACCCESSIBLE ON https://online.lsk.or.ke/

0110 459 555 | **compliance@lsk.or.ke**

B. CLIMATE CHANGE

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5. Climate Change and the Role of the Legal Profession in Climate Justice
6. Climate Change: From Theory to Action, The Role of the Legal Profession in Climate Justice
7. Climate Change: From Theory to Action, The Role of the Legal Profession in Climate Justice
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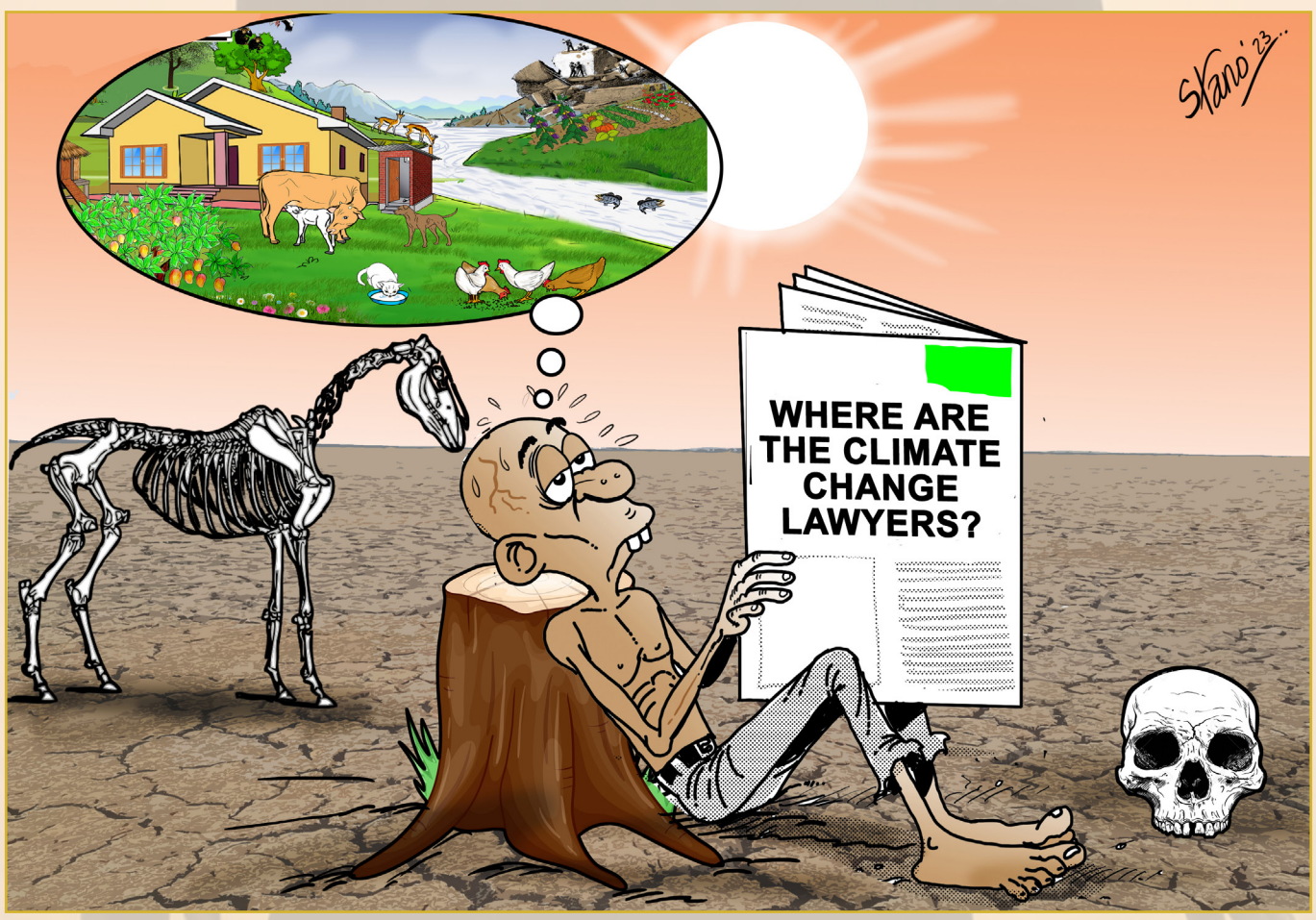

Carbon Trading as a Roadmap to Net Zero by 2050 or a Pyramid Scheme Meant to Dupe Developing and Vulnerable Countries

By Beth Michoma

Floods, drought, global warming, rising sea levels, and erratic weather patterns are all indicators of an ailing planet. The current climate crisis has mainly been caused by ever-increasing amounts of carbon dioxide, methane, nitrous oxide and other greenhouse gases emitted into the atmosphere. These greenhouse gas emissions are released into the atmosphere as a result of our everyday activities including the burning of fossil fuel, deforestation, livestock farming and the use of fertilizers that contain nitrogen.

Climate change is the main threat to the survival of human, animal and plant life in the 21st Century. It is thus imperative that the effects of climate change are reversed to prevent increased temperatures or global warming.

The recognition by countries, companies and individuals of the dangers posed by climate change has been the foremost driver of the adoption of multilateral agreements and such as the Kyoto Protocol and Paris Agreement, that are geared towards climate action.

The key to embracing climate action and tackling climate change is the reduction of greenhouse gas emissions.

Countries have committed themselves and their legal and natural citizens to abide by the terms set out in the Kyoto Protocol and Paris Agreement on reducing greenhouse gas emissions. Further, most countries and entities have committed to Net Zero by 2050.

The Kyoto Protocol (Kyoto Protocol to the United Nations Framework Convention On Climate Change)

The Kyoto Protocol was adopted on 11 December 1997 but entered into force on 16 February 2005. Currently, 192 countries are parties to the Agreement. The Kyoto Protocol binds parties to their commitment to ensure that they limit and reduce greenhouse gases. In particular, the Kyoto Protocol binds industrialized countries to limit and reduce greenhouse gases (GHG) emissions following agreed individual targets.

The Paris Agreement

The Paris Agreement is a binding international agreement on climate change adopted by 196 parties at the UN Climate Change Conference (COP21) in Paris, France, on 12 December 2015. The Agreement entered into force on 4 November 2016. The fundamental goal of the Paris Agreement is the increase in the global average temperature to well below 2°C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels. The goal can only be achieved with the reduction and removal of greenhouse gas emissions. Based on the agreement countries have committed to reducing greenhouse gas emissions by communicating action plans through their Nationally Determined Contributions (NDCs).

Net zero by 2050

Net zero is the cutting of greenhouse gas emissions to zero. To keep global warming to no more than 1.5°C as called for in the Paris Agreement, emissions need to be reduced by 45% by 2030 and reach net zero by 2050. It is against this backdrop that countries and entities have signed on to reach net zero by 2050.

The Key to tackling climate change is to put into action programs that address the reduction and removal of greenhouse gases, including the use of renewable energy and investing in projects that cut emissions. In addition, the apparent project used to cut greenhouse gas emissions is the use of carbon offsets.

Carbon Trading: Does it contribute towards the reduction of greenhouse gas emissions?

A majority of Countries and companies have committed themselves to the reduction of greenhouse gas emissions and have chosen to embrace and implement programs to mitigate the damage caused by climate change.

However, as Countries and companies immerse themselves in creating clear-cut programs to mitigate climate change, there has been a deliberate push to establish carbon markets to trade in carbon offsets. Carbon markets are a vital component in ensuring that greenhouse gas emissions released into the atmosphere do not exceed acceptable and prescribed levels.

Carbon markets are a trading system in which carbon credits are sold. In a nutshell, Companies or individuals may purchase carbon credits to offset their greenhouse gas emissions from entities that remove or reduce greenhouse gas emissions. One carbon credit offsets one ton of carbon dioxide, and once a carbon credit has been traded, it can no longer be used. Both the Kyoto Protocol and Paris agreements give leeway to countries and companies to offset their emissions by purchasing carbon credits.

There are two types of carbon markets, and these are compliance and voluntary markets. Compliance carbon markets are broadly regulated due to international or national regulatory systems and requirements. The underlying gravitas of the compliance market is the clear caps by regulation on the acceptable levels of greenhouse gas emissions that can be released into the atmosphere by various sectors. The caps ensure that countries can achieve their Nationally Determined Contributions (NDC) under Article 4 of the Paris Climate Agreement.

Thus, it is essential for countries need to set acceptable and prescribed limits on greenhouse gas emissions and further designate an authority to track the carbon footprints of entities within their jurisdiction to track if emissions went beyond the acceptable limits. If a company, for instance, exceeded the prescribed limits as stipulated in law, then they would have to purchase carbon credits to offset their carbon emissions.

The Kyoto Protocol has provided for the Clean Development Mechanism (CDM). The CDM counts on carbon credits generated by projects run to reduce emissions in developing countries and is used by industrialized countries to meet part of their emission reduction targets.

A further example of a compliant carbon market, is the emissions trading systems (ETS). The European Union launched its ETS in 2005. The ETS operates on a cap and trade system where the entities are issued emissions permits detailing the permitted emissions. If the entity exceeds the permitted emissions, they must purchase carbon credits. China, in 2021, launched the world's largest ETS so far that covers around one-seventh of global carbon emissions from the burning of fossil fuels.

Whilst most Countries and Regional Blocs are establishing ETS, Africa is lagging behind. Africa has been largely designated as the future powerhouse and Kenya is at the center of the transformation. However, in as much as Kenya is relatively quick to ratify the implementation of Climate action agreements, implementation is slow. One of the blueprints of the Kenyan Government is to ensure that the country is an economic powerhouse through manufacturing. Manufacturing leads to accelerated levels of greenhouse gas emissions in the atmosphere. Unfortunately, the regulatory framework to cap such emissions is inadequate. The inadequacy of our regulation and the lack of a developed ETS leaves the Country at a precarious place on climate degradation.

Carbon markets may also be voluntary, where carbon credits are traded voluntarily. The current supply of carbon credits traded voluntarily comes from private entities or Governments who are in the business of engaging in projects that reduce or remove emissions. The participants in the voluntary carbon markets are primarily corporations and individuals who seek to offset their emissions or have sustainability targets to reach, such as the Net Zero by 2050. The ability to participate in the Voluntary Carbon Market regardless of the entities or individual's geographical location or business is attractive.

For instance, on 14th June 2023, an auction on carbon credits took place in Nairobi. The credits auctioned came from projects that avoid emissions by using sustainable technologies or removing carbon from the atmosphere. More than 2.2 million tonnes of carbon credits were traded.

Whilst carbon markets are crucial to tackling climate change, the potential for human rights abuses and fraud in the trading of carbon credits is emerging. For instance, there has been a marked increase in human rights abuses against indigenous people violently dispossessed of their forested land by governments and entities as the reduction and removal of the emissions may be traded as carbon credits for profit.

Further, there has been an increase in greenwashing by entities and double-counting of greenhouse gas emission reductions to maximize profit. Added to the lack of carbon trading policies in most countries, the market is open to the exploitation of loopholes.

Moreover, Carbon trading, whilst innovative, is akin to throwing money at the climate crisis. Industrialized countries and economies will have the purchasing power to offset their emissions while continuing to expand and further pollute at will. On the other hand, developing and vulnerable countries that contribute to less than 10 percent of the emissions have limited capacity to purchase carbon credits, and thus, their development will be stagnant. Further widening the economic gap between developed and developing countries.

It is prudent to remember that carbon offsetting does not necessarily forestall the health crisis in developing and vulnerable countries due to pollution.

Conclusion

The planet is at the precipice of a series of catastrophic events if climate change mitigation is not urgently addressed. Though multilateral agreements such as the Kyoto Protocol and Paris Agreement are in place, implementation is slow. Carbon markets dealing with the sale of carbon credits are critical to the reduction of greenhouse gas emissions as long as integrity in the process is maintained.

There is an urgent need for African and developing Countries to seal all the regulatory loopholes to ensure that they do not fall victim to corrupt and unequal systems of carbon trading.

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Climate Change and Human Rights: Climate-Induced Displacement in Kenya Introduction

By Andrew Njuguna,

Climate change is not only an environmental crisis but also a profound threat to human rights, particularly in vulnerable regions like Kenya. This article explores the legal dimensions of climate-induced displacement in Kenya, shedding light on the adequacy of existing legal frameworks in safeguarding the human rights of affected individuals and communities. As climate change accelerates, it exacerbates the challenges faced by communities grappling with poverty and inequality. The intersection between climate change and human rights necessitates a comprehensive examination of the legal mechanisms to address these pressing issues.

By delving into climate-induced displacement, this article analyzes international human rights instruments and Kenyan laws about the protection and resettlement of those affected. Additionally, it investigates by evaluating constitutional provisions, statutory laws, and initiatives aimed at climate change management and conservation.

Understanding climate-induced displacement and its causes in Kenya

Climate change has brought about a range of adverse impacts in Kenya, leading to the displacement of communities and individuals from their homes and traditional lands. Understanding the dynamics of climate-induced displacement and its underlying causes is essential to address the challenges of those affected.

One of the primary causes of climate-induced displacement in Kenya is the increased frequency and intensity of droughts. As climate change alters rainfall patterns, prolonged dry spells have become more frequent, particularly in arid and semi-arid regions like Turkana, Marsabit, and Mandera. These droughts deplete water sources, destroy crops and pasturelands, and diminish livestock productivity, forcing communities to abandon their homes in search of more habitable areas.

> There is a need for improved capacity building among government agencies, civil society organizations, and other relevant stakeholders to ensure that legal provisions are effectively translated into action.

Another cause of climate-induced displacement is desertification, which affects regions such as Baringo, Isiolo, and Kitui. The degradation of land through deforestation, unsustainable agricultural practices, and soil erosion exacerbates the spread of deserts, making areas uninhabitable. Communities that rely on agriculture and livestock as their primary sources of livelihood find themselves displaced as their lands become arid and unproductive.

Furthermore, extreme weather events like floods and storms pose a significant risk, especially in low-lying areas such as the Tana River and parts of Nairobi. Heavy rainfall, river overflow, and inadequate infrastructure exacerbate flooding, destroying homes, infrastructure, and agricultural lands. These devastating events force people to abandon their residences, seeking refuge in safer areas.

In addition to environmental factors, social and economic vulnerabilities amplify the impact of climate-induced displacement. Poverty, inequality, and limited access to resources make specific communities more susceptible to the adverse effects of climate change. Marginalized groups, including indigenous peoples and pastoralist communities, often bear the brunt of climate-induced displacement due to their limited adaptive capacity and dependence on fragile ecosystems.

Climate-induced displacement in Kenya is driven by environmental, social, and economic factors. Droughts, desertification, and extreme weather events devastate communities, forcing them to abandon their homes and seek safer environments. It is essential to address the underlying causes of climate change, develop sustainable land management practices, and empower vulnerable communities to build resilience and adapt to a changing climate. By doing so, we can mitigate the impacts of climate -induced displacement and ensure the protection and well-being of those affected.

Legal Framework on Climate-Induced Displacement

In response to the growing challenges of climate-induced displacement in

Kenya, various legal frameworks have been established at the international, regional, and national levels. Analyzing these legal frameworks is crucial to assess their effectiveness in addressing the complex issues surrounding climate-induced displacement and protecting the rights of affected individuals and communities.

At the international level, several human rights instruments recognize the rights of individuals displaced by climate change. The Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights affirm the right to an adequate standard of living, including housing, food, and water. Additionally, the United Nations Framework Convention on Climate Change acknowledges the importance of protecting and promoting the rights of vulnerable communities affected by climate change. However, these instruments primarily focus on general human rights protections and do not specifically address the unique challenges posed by climate induced displacement.

At the regional level, the African Charter on Human and Peoples' Rights is particularly relevant. It emphasizes the right to development, which includes the right to a clean and sustainable environment. The African Union's Policy Framework for Pastoralism in Africa recognizes the specific vulnerabilities of pastoralist communities, which are often disproportionately affected by climate change and calls for their protection and support. These regional frameworks provide a foundation for addressing climate-induced displacement within the African context.

Domestically, the Constitution of Kenya, adopted in 2010, establishes a framework for protecting the rights of individuals and communities affected by climate-induced displacement. It guarantees the right to accessible and adequate housing, the right to a clean and healthy environment, and the right to fair compensation in cases of involuntary displacement. These constitutional provisions lay the groundwork for ensuring the protection and well-being of climate-displaced individuals.

Kenya has also enacted specific legislation and policies to address displacement and resettlement in the context of climate change. The Land Act of 2012 recognizes the rights of individuals and communities affected by displacement and mandates fair and just compensation for land acquisition. The Act also provides for the establishment of mechanisms to address disputes arising from displacement and resettlement processes.

Furthermore, the National Climate Change Action Plan, launched in 2013, outlines strategies and actions to address climate change impacts, including displacement-related ones. It emphasizes the need for integrated approaches that consider the social, economic, and environmental dimensions of displacement. The Action Plan highlights the importance of early warning systems, risk reduction measures, and community engagement in addressing climate-induced displacement.

Despite these legal frameworks, challenges persist in effectively addressing climate induced displacement in Kenya. Implementation gaps, limited resources, and coordination issues often hinder the full realization of legal protections. There is a need for improved capacity building among government agencies, civil society organizations, and other relevant stakeholders to ensure that legal provisions are effectively translated into action.

Moreover, while existing laws and policies provide a foundation for addressing climate induced displacement, there is a need for more comprehensive and specific legislation to address the unique challenges faced by climate refugees and internally displaced persons. This includes developing legal mechanisms to aid and protect those displaced by climate change, and ensuring access to essential services, social support, and opportunities for sustainable livelihoods.

In conclusion, the legal framework addressing climate-induced displacement in Kenya is a crucial step towards protecting the rights of affected individuals and communities. International, regional, and national instruments provide a foundation for addressing the challenges of climate-induced displacement. However, gaps in implementation, resource constraints, and the need for more comprehensive legislation remain significant obstacles. Strengthening the legal framework, enhancing capacity, and fostering multi-stakeholder collaboration is essential to effectively address climate -induced displacement and ensure the protection and well-being of those affected.

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Climate Change and it's Effect on the Progressive Realization of Economic and Social Rights

By Sharon Muriuki

Introduction

Climate justice is the framing of global warming as an ethical and political issue, a shift from the environmental and physical nature of it (UNEP 2023). Climate justice as a concept was preceded by climate change which is the long-term shifts in temperatures and weather patterns observed in the world as a consequence of human activities since the 19th century (UN, 2023). Climate change has brought with it climate emergencies, climate refugees and climate justice litigation. By-products of climate change include droughts, disasters, conflicts and gender imbalances. Economic and Social Rights (ESRs) include the right to health, work, food, housing and education. The progressive realization of economic, social and cultural rights is provided under Article 2 of the International Covenant on Economic, Social and Cultural Rights (OHCHR, 2023), which obligates every State Party, including Kenya, that ratified it on 1st May 1972, to allocate the maximum of its available resources to achieve the full realization of these rights. The Human Rights Measurement Initiative, HRMI, uses the low and middle-income standards to calculate how well a country uses its resources to ensure people's economic and social rights are fulfilled. It has also measured risk categories related to climate change, particular geographic locations and internally displaced people identified by various international organizations as being more at risk of climate change induced changes.

How the ESR rights are affected

Climate change affects the quality of land and water on which these rights are premised. Food security has been an issue in Kenya for decades, with droughts and flooding destroying farmlands leading to loss of yields and low nutritional foods, creating nutrition gaps and malnourishment. Housing provision challenges range from low-quality housing, expansion of slums and total lack of abodes for a large part of the population. Climate change affects water supply, sanitation and its management. Climate change-induced factors such as forest fires, forest degradation, and expansion of farmlands are affecting the water supply in most communities which rely on rivers, lakes, ponds and rainfall for hydro provisions. Water access-related conflicts have pitted communities against each other and created human-wildlife conflict. Families may stop sending their children to school due to resource access constraints such as the search for water, food and land disputes. This is likely to limit or end school attendance affecting access to education, its quality and the opportunities that a good education provides. Families are also more likely to sell their lands and other assets to send their children affecting the universal application of other rights such as the right to food, housing and employment. Moreover, many Kenyans rely on small-scale farming, fishing and livestock rearing as a living. Such activities have reduced profitability and longevity due to drought, crop failure and general economic downturns when many consumers cannot buy the product. Internationally, the quality of low-grade produce keeps many farmers out of global trade. The health of the individual, society and nation is affected by low-quality food, unsafe drinking water and the economic inability to afford quality healthcare services and educational opportunities due to poverty and constrained budgets.

> Further afield, the use of international legal systems may be explored. Such systems include regional courts such as the EACJ and the African Court.

a. Way forward Use of available national and international legal systems and laws

On the face of it, the Environment and Land Court hears more *'land;* matters than *'environmental justice'* issues. Maybe it's time to activate the *'environment'* header through climate litigation and climate justice. *Section 23* of the *Climate Change Act 2016* provides that every person can apply to the Environment and Land Court for orders on prevention, stopping and discontinuation of acts harmful to the environment, compelling public officers to act and compensation from violation of climate change duties and responsibilities. It is, therefore, possible to frame issues on the basis of rights such as human rights, animal welfare, transportation

and manufacturing in the realm of climate change litigation and subsequent justice. Apart from the ELC, the High Court and the ELRC and the magistrates' courts, quasi-judicial bodies such as NEMA, Tourism and Sports tribunals can play a role in enforcing climate justice duties. Further afield, the use of international legal systems may be explored. Such systems include regional courts such as the EACJ and the African Court of Human and Peoples' Rights.

b. Use of alternative dispute resolution and green justice mechanisms

Parties should be encouraged to amicably resolve climate justice issues from the local level for example, by engaging concerned institutions and communities, which are usually on the receiving end of climate change consequences. Local communities should be encouraged to be greener and less grey, by taking care of the environment, including less sub-division of agricultural land, less deforestation and more afforestation and control of livestock grazing land.

c. Career growth in the legal sector and pursuing climate justice and environmental crimes education

Legal professionals must keep learning and applying their education in resolving climate-change-anchored disputes by enrolling for further education at postgraduate level and free courses offered by local and international bodies on climate justice litigation, human rights enforcement and environmental and marine crimes as well as joining divisions in the IBA and other international law organizations. It also calls on law faculties to structure courses that address climate justice and methodologies of climate litigation at all levels of tertiary education.

Conclusion

Human rights are inalienable, indivisible, interdependent interrelated and universal. The effects of climate change affect Kenyans in equal measure and affect the realization of human rights. The legal profession should always strive to provide the empirical application of climate justice and enforce these rights through education, negotiations and continuous checks on the enforcement of Article 2 of the International Covenant on Economic, Social and Cultural Rights.

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Climate Change and The Law: A Perspective

By Bore Sammy

Climate change is causing a rise in global average temperatures at an increasingly rapid rate. Kenya is not spared from this unfortunate crisis as the world continues overdependence on fossil fuels and the overproduction of greenhouse gases. In Kenya, as in many other countries, climate change has a devastating impact on food security, natural disasters, access to water, forest conservation, health, energy, and transport. The need to reduce our carbon footprints cannot be overstated. The legal profession can play a crucial role in mitigating this crisis. There is no single foolproof pathway to solving climate change. This article highlights the various approaches that can be used in the legal profession to curb the scourge of climate change.

The Law and the Climate

Kenya's legal framework to attain a sustainable climate entails, primarily, the Constitution, which, under Article 42, guarantees the right to a clean environment. The Climate Change Act of 2016 & the Environmental Management and Co-ordination Act of 1999 are statutes enacted to bolster this objective, the latter of which establishes the National Environment Management Authority (NEMA) to implement and safeguard environmental policies in the country. A sustainable climate is also among the primary objectives of the Kenya Vision 2030 Program. Internationally, Kenya is party to multiple climate-based treaties, mainly the Paris Agreement and the United Nations Framework Convention on Climate Change (1994). The collective objective of all these laws is to avert an escalating probability of climate disaster by preventing harmful artificial interference with the global climate system.

Lawyers and the Climate:

Climate justice goes beyond a lawyer's choice of cases and clients. It is in essence a public interest matter

rooted in human rights. From a broad perspective, it is high time for members of the legal profession to employ a climate-conscious holistic approach in their day-to-day ventures. A good start would be a shift away from big corporate clients who cause social harm. Lawyers should gallantly turn down lucrative briefs and contracts that, in the long term, undermine a sustainable green, livable future. On the policy level, there needs to be strong advocacy by lawyers to have more green public spaces. The recent rise in carbon trading opens a door for lawyers to lend their skills towards formulating a comprehensive legal framework to regulate it. Carbon trading is the buying and selling of permits carbon credits that allow the holder to emit a certain amount of carbon dioxide and other greenhouse gases. Concordantly, lawyers should push the government to stop purchasing gasoline-powered vehicles and instead switch to electric cars as the standard means of transportation used by public officers. Additionally, the legal profession must institute policies that will see fewer flights and long drives for the members. A good example would be the incentivizing of more virtual attendance at meetings and workshops. A special resolution too, can be adopted by the Law Society of Kenya to commit each member to a pledge to eliminate carbon emissions within a projected timeline soon. Law schools can also be encouraged to offer students diverse career paths and guidance away from mainstream law practice to greener alternatives. Lastly, lawyers can lend *pro bono* services to climate-conscious inventors. These are inventors whose inventions boost green infrastructure, particularly in carbon capture technology, low-carbon food production and soil conservation. Lawyers can help them navigate the patenting, trademarking, and copyrighting processes to safeguard their innovations and to ensure they can put them to good use. The legal services can extend to franchising, distribution, and technology transfers.

THE WAY FORWARD:

The legal profession is an optimal platform for members to step up and rise above the climate crisis. All these methods can result in rapid and far-reaching changes needed to mitigate carbon emissions. If we are all united in the goal, spirit, and purpose of defeating this crisis, a sustainable, breathable and livable future is guaranteed for future generations.

Climate Change and the Role of the Legal Profession in Climate Justice

By Apollo Mwangi

Introduction

Climate change is a global challenge that has become more pressing in recent years. It affects every aspect of our lives, from the air we breathe to the food we eat. It is a threat to the planet's natural resources and has implications for the sustainability of human life. The legal profession plays a crucial role in addressing climate change, from developing climate policies and regulations to representing those affected by climate change in legal proceedings. This article examines the role of the legal profession in climate justice, discussing the significance of the profession in implementing measures to mitigate climate change.

Climate change and its impact

Climate change is an occurrence that has arisen due to the increased concentration of greenhouse gases in the atmosphere. Human activities such as deforestation, industrial activities, and transportation have led to the emission of these gases, which trap heat in the atmosphere, leading to global warming.

The impact of climate change includes rising sea levels, more frequent natural disasters, and changes in precipitation patterns, which affect the availability of water resources. Climate change has also led to species extinction, food shortages, and the displacement of populations. Even in Kenya, climate change is already causing significant damage to the country's economy, agriculture, and livelihoods.

The legal profession and climate justice

The legal profession has a vital role in addressing climate change. The profession is instrumental in shaping climate policies and regulations, which are essential in mitigating the effects of climate change. Climate policies outline the necessary measures to reduce greenhouse gas emissions, promote the use of renewable energy, and promote sustainability. Legal professionals can contribute to these policies by drafting laws and

regulations that promote sustainable practices and holding corporations accountable for their actions. Climate policies and regulations are necessary for the transition to a low-carbon economy.

Furthermore, the legal profession can promote sustainable practices within the legal sector. Law firms and legal professionals can adopt environmentally sustainable practices, such as reducing waste, promoting energy efficiency, and using sustainable materials. This can help reduce the carbon footprint of the legal sector and promote sustainable development.

The legal profession can also help to address climate change by representing those affected by climate change in legal proceedings. These proceedings can include lawsuits against corporations that have contributed to climate change or those that have failed to address climate change. For example, lawsuits have been filed against fossil fuel companies for their role in contributing to climate change. These lawsuits seek damages for the harm caused by the companies' actions and aim to hold them accountable for their role in contributing to climate change.

Legal professionals can advocate for their client's rights and push for accountability for climate change's effects on vulnerable communities. This role is critical in promoting climate justice, which involves addressing the disproportionate effects of climate change on marginalized communities.

The significance of climate justice

Climate justice is a crucial aspect of addressing climate change. Climate justice seeks to address the disproportionate impact of climate change on vulnerable communities and promote equitable and sustainable development. The effects of climate change are not felt equally across the globe, and marginalized communities are often the most vulnerable to these effects.

These communities are typically located in areas that are susceptible to natural disasters, have limited access to resources, and are more exposed to the effects of climate change. Climate justice involves ensuring that these communities are not disproportionately affected by climate change and that they have access to resources to mitigate the impact of climate change. Legal professionals play a vital role in promoting climate justice by advocating for the rights of vulnerable communities and holding those responsible for the effects of climate change accountable.

The importance of collaboration

Addressing climate change requires a collaborative effort between various stakeholders, including policymakers, corporations, and the public. The legal profession can act as a bridge between these stakeholders, bringing together different perspectives and promoting collaboration. Legal professionals can use their knowledge and expertise to facilitate dialogue and promote stakeholder cooperation. Collaboration is necessary to implement effective climate policies and regulations, which require the involvement of all stakeholders.

Conclusion

Climate change is a significant challenge that requires a coordinated effort to mitigate its effects. The legal profession plays a crucial role in addressing climate change, from developing climate policies and regulations to representing those affected by climate change in legal proceedings. The legal profession can also promote climate justice by advocating for the rights of vulnerable communities and holding those responsible for the effects of climate change accountable. Collaboration between stakeholders is necessary to implement effective climate policies and regulations, and the legal profession can facilitate this collaboration. By working together, we can mitigate the effects of climate change and create a sustainable future for future generations.

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Climate Change: From Theory to Action, The Role of the Legal Profession in Climate Justice

By Casmir Augustus Obiero

Introduction

Climate change is a defining crisis of our time, posing significant risks to ecosystems, economies, and human well-being. As the world grapples with the challenges of mitigating and adapting to climate change, the legal profession has a critical role in promoting climate justice. This article will explore the Kenyan legal system's approach to climate change and compare it with other select legal systems, highlighting the role of the legal profession in transitioning from theory to action in the pursuit of climate justice.

Kenyan Legal Framework on Climate Change

Kenya has made commendable strides in addressing climate change through legislation, policy, and strategic measures. The Climate Change Act of 2016 provides the primary legal basis for climate change mitigation and adaptation efforts in the country. The Act establishes the National Climate Change Council, which is responsible for coordinating and overseeing the implementation of climate change policies, strategies, and actions.

The Climate Change Act also provides a framework for integrating climate change into development planning. It requires national and county governments to mainstream climate change into their development policies, plans, and budgets. Additionally, the Act promotes public participation, transparency, and accountability in climate change governance, emphasizing the importance of involving all stakeholders in the decision-making process.

Role of the Legal Profession in Climate Justice

The legal profession has a critical role in advancing climate justice, both locally and globally. Lawyers, as the guardians of the rule of law and justice, can contribute to climate justice through various means, including litigation, policy formulation, and advocacy. The following are some of the ways the legal profession can promote climate justice:

1. *Climate Change Litigation*

Litigation has emerged as a powerful tool for holding governments and corporations accountable for their contributions to climate change. By bringing lawsuits against entities responsible for greenhouse gas emissions or inaction on climate change, lawyers can help establish legal precedents, influence policy, and enforce existing climate change laws.

In Kenya, climate change litigation is still in its infancy. Still, recent cases like the Lamu Coal Plant case demonstrate the potential for using the courts to challenge environmentally harmful projects. As the impacts of climate change become more pronounced, the legal profession in Kenya will likely play a crucial role in shaping the country's climate change jurisprudence.

2. *Climate Policy Formulation and Implementation*

Lawyers have a significant role in the development and implementation of climate change policies. By participating in policy formulation and providing legal expertise, lawyers can help ensure that climate change laws and regulations are comprehensive, enforceable, and aligned with international best practices.

In Kenya, the legal profession has contributed to developing crucial climate change legislation, such as the Climate Change Act and the National Climate Change Action Plan. By continuing to engage with policymakers and stakeholders, lawyers can help Kenya meet its national and international climate change commitments.

3. *Advocacy and Public Awareness*

Raising public awareness and fostering a culture of climate action are essential components of climate justice. Lawyers can use their skills and expertise to educate the public, businesses, and governments on the importance of addressing climate change and the legal mechanisms available.

In Kenya, the legal profession can play a critical role in building public awareness and promoting climate change education, as well as advocating for more robust climate change policies and enforcement measures.

Comparing Kenyan Climate Change Framework with Other Select Legal Systems

1. *The European Union*

The European Union (EU) has been a global leader in climate change policy and legislation, setting ambitious targets for greenhouse gas emissions reduction and promoting a transition to a low-carbon economy. The EU's comprehensive legal framework on climate change includes the European Green Deal, the 2030 Climate and Energy Framework, and the Emissions Trading System (ETS).

The legal profession in the EU has played a pivotal role in shaping climate policy, providing legal advice, and representing clients in climate change litigation. Notably, the Urgenda case in the Netherlands, where a court ordered the Dutch government to increase its emissions reduction targets, has set a precedent for climate litigation across Europe.

2. *Australia*

Australia, heavily reliant on fossil fuels, has faced significant challenges in developing a cohesive climate change policy. However, recent years have shifted towards more ambitious climate action, with states and territories implementing their own renewable energy targets and emissions reduction strategies.

Australian lawyers have been active in climate change litigation, such as the landmark case of *Gloucester Resources Limited v Minister for Planning*, where a court rejected a coal mine project on climate change grounds. The legal profession has also been involved in policy formulation, advocacy, and legal advice on climate change matters.

Conclusion

The legal profession has a vital role to play in the pursuit of climate justice, both in Kenya and globally. From litigation to policy formulation and advocacy, lawyers can contribute to the development and enforcement of climate change laws, holding governments and corporations accountable for their actions and inaction. By transitioning from theory to action, the legal profession can help ensure that climate justice is not merely an abstract concept but a tangible reality for current and future generations.

As climate change continues to pose unprecedented challenges to ecosystems, economies, and human well-being, it is incumbent upon the legal profession to rise to the occasion and use its expertise to shape a more just, sustainable, and climate-resilient world. Comparisons with other legal systems, such as the European Union and Australia, demonstrate the power of the law in driving climate action and the potential for the legal profession to contribute to meaningful change. By embracing its role in climate justice, the legal profession can help secure a better future for all.

Climate Change: From Theory to Action, the Role of The Legal Profession in Climate Justice

> "Building climate resilience in as low carbon a manner as possible will ensure that Kenya contributes to the goals of the Paris Agreement and the Sustainable Development Goals"

By Paula Gatheru

PREFACE

"Building climate resilience in as low carbon a manner as possible will ensure that Kenya contributes to the goals of the Paris Agreement and the Sustainable Development Goals" (Former Cabinet Secretary; Ministry of Environment and Natural Resources). Article 10 of the Constitution provides for sustainable development, (which is directly linked to climate justice) as a national value in governance.

The legal profession has a key responsibility in upholding climate justice through participation in policy decisions (public participation and a fundamental pillar in governance as per Article 232 of the Constitution and the Climate Change Act), taking part in implementation programmes and awareness strategies on climate change. This includes participating in the annual Public Engagement Strategy published by the Climate Change Council and assisting in the implementation of Gender Action Plans.

The recent COP 27 summit (27th Conference of the Parties to the United Nations Framework Convention on Climate Change) resulted in the formulation of the Sharm-el-Sheikh implementation plan, which is a commitment to limit global temperatures to 1.5 degrees Celsius above pre-industrial levels. Emphasis was made on climate mitigation, enhancing climate resilience through strengthening ecosystems and enhancing climate technology.

Climate justice touches on facets such as climatic financing, adaptation and mitigation strategies, oil and gas issues, and aggressive strategies (at

the local, national and international levels). The critical components of climate justice include; air quality, heat vulnerability, toxic emissions and food production, which are interlinked to climatic conditions.

A healthy environment as a form of climate justice.

Climate change is a variation that occurs in the natural climate a while as a result of human activities that significantly alter the concentration of greenhouse emissions. Significant examples of such human activities include industrialization, deforestation and improper waste management (a highlight in the COP 27 summit, whereby there was a call to formulate sound waste management strategies). Such human activities affect the right to a clean and healthy environment, which is safeguarded in Article 42 of the Constitution. Article 42 is a pillar in conservation, adaptation and mitigation.

Every citizen is obligated to protect the environment for the benefit of future generations.

Article 70 enumerates this obligation through the enforcement of environmental rights. Under this Article, an interested party may lodge a claim before the Environmental and Land Court where there has been an infringement of adaptation and mitigation measures towards climate change.

The remedies available in such a claim would be compensation to victims, specific performance (where a public body or its officials may be compelled to perform given duties) or an injunctive order to prevent the continuance of a harmful act. This is one way the legal fraternity fulfills its mandate towards addressing climatic injustice.

Legal professionals are called to combat climate injustice through litigation, policy formulation and enactments, community sensitization events in line with statutory parameters (to be discussed further) and offering requisite legal support to relevant stakeholders.

The Climatic Condition in Kenya(forest cover, environmental conservation and measures to mitigate against vulnerability)

It is worth noting that African countries have very little to do with climate change, yet they are the most affected by its effects. This was the analysis from a report by Africa Renewal on Sustainable Development Goals. It explains that these countries have a large population of vulnerable communities who largely depend on the environment for their livelihoods (pastoralist communities and crop farming). Agriculture also drives the economy of many countries on the continent. In Kenya, agriculture contributes around 33% of the national GDP. According to a report by Concern Worldwide, climate change could force millions of people globally into poverty by 2030.

This means that climate change affects food security, economic development and livelihoods. To reduce vulnerability, key adaptive strategies include crop rotation, irrigation, building the capacity of land managers in climate change adaptation and water harvesting (to combat flooding), which are long-term plans towards climate change resilience.

Kenya currently has a tree cover of 7.4%, and the desired goal is 10% (according to a report by the National Environmental Management Agency). Maintaining an adequate tree cover and updating land use plans under climate scenarios serves to combat the harmful effects of greenhouse emissions and disruption of natural stimuli due to unsustainable human activities. It equally addresses intergenerational climate injustice.

From theory to practice (Climate Change Action Plans) and the call to professionals.

Adjusting to the effects of climate change can be done through mitigation and adaptation. Mitigation refers to the measures taken to control gas concentrations by reducing current and future emissions. In contrast, adaptation refers to adjusting human systems to address the expected climatic conditions, which may, in turn, affect beneficial opportunities.

An ideal example would be the Judiciary's greening initiative which was implemented in the construction of Shanzu and Kahawa Law Courts through the installation of solar panels (a renewable source of energy). In other court stations, there have been steps towards environment-friendly waste management.

The Climate Change Council established under the Climate Change Act is the conceptual point in the enforcement of strategies as it creates the regulatory mechanisms. The Act currently provides for the Climate Change Fund (to finance action plans). The national agencies that aid in the enforcement of action plans are discussed hereunder.

They include the National Drought Management Authority, which gave rise to the Drought Disaster and Contingency Fund (a massive contributor to climate change resilience), National Environmental Management Agency (which ensures that public and private entities adhere to climate change obligations and monitor greenhouse emissions). Additionally, there is the National Environmental Management Authority Adaptation Fund (which consists of Kenya Wildlife Services, the Ministry of Environment, Kenya Forest Research Institute and the County Government of Kajiado) to advance research and the National Adaptation Plan further. All these agencies serve as a form of long-term planning which is an action plan to combat climatic injustice that was listed in a report released by UNEP in October 2022.

These action plans are within the purview of the National Adaptation Plan of 2015 -2030. Additional government adaptive sectoral plans

to maintain forest cover and other natural habitats are listed herein. The Wildlife Conservation and Management Act, 2013 establishes the Natural Wildlife Strategy, which provides for conservation strategies. They include the gazettement of Conservation Areas in Kenya and Establishment of the County Wildlife Conservation and Compensation Committees. Moreover, most counties have a County Adaptation Plan and the County Integrated Development Plans.

The formulation of draft sentencing guidelines by the National Council on the Administration of Justice is another fundamental way the legal profession contributes to wildlife conservation. They provide a guided approach towards sentencing in wildlife and environmental conservation-related cases. These conservation measures mitigate against harmful human activities that affect our forests and wildlife.

The Water Act of 2016 is another statutory parameter that governs the use of natural resources, especially in industrial production. It provides for the Water Management Strategy, which is an action plan that serves to conserve groundwater and manage water resources. This, in turn, supplies industries with water, enhances efficient energy management and the use of combined power to mitigate against toxic emissions.

The highlighted sectoral adaptive plans are some of the ways the legal fraternity can partner with government agencies, public benefit organizations, county governments, research institutions and the community to uphold climate justice. Additionally, proper implementation of ecosystem plans and enhancing the climate technology development aid in disaster management. It equally reduces the adverse effects of greenhouse emissions.

Conclusion.

Climate justice is a global responsibility in which public participation, policy implementation and social cohesion are essential in enforcing action plans. Legal professionals are part of a larger initiative to give life to the United Nations Framework Convention on Climate Change, the Climate Change Act, 2016, The National Adaptation Plan and uphold Article 42 of the Constitution of Kenya 2010.

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Climate Change: The Imperative for Legal Professionals in Kenya to Take Action

By Frankline Otieno Mokaya (Otieno Mokaya Esq.)

Climate change is no longer an abstract concept but a harsh reality already impacting the planet and humanity. The devastating effects of climate change have been felt across the world, and Kenya is no exception. Kenya has experienced recurrent natural disasters such as flooding, landslides, and drought, which have resulted in the loss of lives, displacement of communities, and destruction of property. Climate change is a global challenge requiring concerted effort from all sectors, including the legal profession.

In this article, we will explore the imperative for legal professionals in Kenya to take action on climate change. We will examine the legal framework around climate change in Kenya, the international legal instruments and conventions on climate awareness and climate change, and the role of the legal profession in climate justice.

Legal Framework on Climate Change in Kenya

The Constitution of Kenya provides a solid legal framework for addressing climate change. Article 42 of the Constitution recognizes the right to a clean and healthy environment for all Kenyans. The Constitution also imposes a duty on the government to take measures to mitigate climate change and its effects. The Climate Change Act of 2016 further provides a legal framework for addressing climate change by developing policies, plans, and strategies.

Under the Climate Change Act, the National Climate Change Council is mandated to provide oversight and coordination of climate change interventions in the country. The Act also establishes the Climate Change Fund, designated to finance climate change interventions in the country. The National Climate Change Action Plan provides a roadmap for implementing climate change interventions in the country.

The legal framework in Kenya also includes sectoral policies and laws that address climate change. For instance, the Energy Act of 2019 provides for the development and implementation of renewable energy policies and plans. The Forest Conservation and Management Act of 2016 provides for the conservation and management of forests to mitigate the effects of climate change. The Water Act of 2016 provides for the management and conservation of water resources to address the effects of climate change.

International Legal Instruments and Conventions on Climate Change

Kenya has ratified several international legal instruments and conventions on

climate change. The Paris Agreement, which Kenya ratified in 2016, provides a framework for global cooperation in combating climate change. The agreement aims to limit global temperature rise to below 2 degrees Celsius, pursue efforts to limit the temperature increase to 1.5 degrees Celsius and enhance adaptive capacity and resilience to climate change.

The United Nations Framework Convention on Climate Change (UNFCCC) is another international legal instrument on climate change that Kenya has ratified. The convention aims to stabilize greenhouse gas concentrations in the atmosphere at a level that will prevent dangerous human interference with the climate system.

Role of the Legal Profession in Climate Justice

The legal profession has a significant role to play in ensuring that climate justice is achieved. Climate justice is about creating a fair and equitable society that considers the needs of the present and future generations. It is about ensuring that vulnerable communities are not left behind in the fight against climate change. Legal professionals can contribute to climate justice in the following ways:

Advocacy for Policies and Laws

Legal professionals can use their skills to advocate for policies and laws that promote sustainable development and mitigate the effects of climate change. They can lobby the government to adopt policies and laws that promote renewable energy, energy efficiency, and sustainable transport. They can also advocate for policies that protect vulnerable communities from the effects of climate change, such as flooding and drought.

Legal professionals can also provide legal advice on developing change policies and laws. They can review existing policies and laws and provide recommendations for improvement. They can also provide legal opinions on the legality and constitutionality of proposed policies and laws.

Representation of Vulnerable Communities

Legal professionals can represent vulnerable communities that are affected by climate change. They can legally represent communities that face displacement due to flooding, drought, or other climate change-related disasters. They can also represent communities adversely affected by climate change policies and laws.

Legal professionals can also represent environmental groups and other organizations that advocate for protecting the environment. They can file lawsuits against corporations and governments that violate environmental laws and regulations.

Promotion of Awareness and Education

Legal professionals can promote awareness and education on climate change. They can organize workshops and training sessions to sensitize the public on the effects of climate change and how to mitigate them. They can also work with other stakeholders, such as NGOs, community-based organizations, and the government, to create awareness campaigns around climate change.

Legal professionals can also use social media and other digital platforms to promote awareness and education on climate change. They can engage with the public on social media and create educational content such as blog posts, podcasts, and videos.

Conclusion

Climate change is a global challenge that requires collective action from all sectors. The legal profession has a significant role to play in ensuring that climate justice is achieved. By advocating for policies and laws, representing vulnerable communities, and promoting awareness and education, legal professionals can significantly contribute to the fight against climate change. Let us all join hands and take action to ensure a sustainable future for the present and future generations.

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Climate Change: The Role of Lawyers and The Law Society of Kenya

By Cheruiyot Hillary Biwott

Introduction

According to Roscoe Pound and other scholars, lawyers are social engineers. Social engineering connotes that laws are used to shape society and regulate people's behaviour while balancing competing interests. On the issue of climate change, the law and the lawyers have a pivotal role to play in engineering solutions and interventions necessary to deal with the climate crisis.

Despite the devastating effects of climate change globally and locally, there seems to be a disproportionate appreciation of the need for action from all actors, private and public. It is commendable that the Law Society of Kenya has made climate change the central theme for the 2023 Annual Conference. The rallying call on the need for a shift from theory to action and the role of the legal profession in climate justice aptly fits the climate crisis globally and locally.

But some say, what do lawyers have to do with climate change? They may even see this as a misnomer, given the general understanding that climate change matters are the responsibilities of governments, NGOs and international organizations. In November 2022, Environment and Land Court Judge, Justice Anthony Ombwayo, called on Kenyans to take advantage of the Climate Change Act and seek legal redress for the climate change crisis. The judge noted that courts were handling more litigation on land matters than environmental conservation issues because the public had not been sensitized on their right to file environment-related suits. The judge, therefore, encouraged LSK and community-based organizations to be solution agents by seeking remedies through legal action, for climate-related matters.

Lawyers are taking action

In the recent past, several law societies and bar associations globally have made commitments to climate change. In 2021, United Kingdom's Law Society demonstrated its commitment to action by publishing its Climate Change Resolution to support solicitors to develop a climate-conscious approach to legal practice. Some of the critical actions in the UK Law Society Resolution are-

(a) Supporting solicitors to be fully informed on how they can act to mitigate the climate crisis;
(b) Developing, disseminating and publicizing educational tools and resources to support solicitors in their provision of advice on the impacts of climate change;
(c) Engaging climate-change-related legislative, regulatory and policy reform on climate change; and
(d) Collaborating with others for the most significant impact in addressing the climate crisis, including clients, regulators, bar associations, other professional bodies, and legal networks focused on climate change.

Pursuant to the Resolution, the UK Law Society issued guidance on the Impact of Climate Change on Solicitors in April 2023, a first of its kind by a professional legal organization. The Guidance highlighted some of the professional duties arising from climate legal risks which include the duty of care, the duty to warn, the duty to disclose and the duty to uphold service and competence levels. This demonstrates the increasing role of lawyers and bar associations in tackling climate change issues.

According to the Law Council of Australia Climate Change Policy (2021), there are emerging novel and complex questions of law from multiple legal areas, from occupational health and safety, to planning and development, to insurance, to water rights, among others. As such, the legal questions and challenges emerging require a new set of approaches, skills, and frameworks. The Policy recognizes that specific industries and sectors will require tailored legal advice to meet the increasing climate-change-related challenges and opportunities.

In 2019, the American Bar Association passed a resolution, most of which was addressed to government bodies but with a section devoted to lawyers. Lawyers were urged to engage in *pro bono* activities to support the reduction of greenhouse gas emissions and adapt to climate change while advising their clients on the risks and opportunities of climate change. The interventions by the bar associations is a demonstration of the severity of the climate crisis and the need for action by all, more so, lawyers and the legal community.

What can Lawyers and Law Society of Kenya (LSK) do?

a) *Advocacy and capacity development* Lawyers are agents of law reform, either through legislative intervention, advocacy, alternative dispute resolution or via court process. Section 3 of the Climate Change Act sets out one of the purposes of the Act as to facilitate capacity development for public participation in climate change responses through awareness creation, consultation,

representation and access to information.

The Climate Change Act is currently under review and this presents an opportunity for LSK and its members to interrogate the proposed amendments and propose additional measures to deal with the climate crisis.

b) *Integration of climate change-related topics in law school curriculum*

Section 21 requires the Climate Change Council to advise the public agencies responsible for regulating universities and tertiary institutions curricula on integration of climate change into their curricula. It is the role of LSK to work with the Climate Change Council to advise the Council for Legal Education on the interventions required to mainstream climate change in the training for lawyers at the Kenya School of Law. LSK also has a role in engaging law schools across the country's universities to ensure that climate change is integrated in the training curriculum of lawyers.

Given the increasing interest by lawyers to focus their practice on environmental matters and climate change, there is need for capacity development in universities and law schools. In addition, LSK should tailor-make specific climate change courses and training through its continuing professional development (CPD) programmes.

c) *Partnership with the Climate Change Council*

Section 25 of the Act establishes the Climate Change Fund as a financing mechanism for priority climate change actions and interventions. In addition to other purposes, the Act states that the Fund can provide grants to civil society and other stakeholders. Given that LSK plays a critical role in dispensing justice, LSK should consider submitting proposals to access funds from the Climate Change Fund. The funding proposal can focus on legal education, legal aid and the development of policy and legal interventions.

d) *Setting up a climate change committee*

LSK has, over time, created committees to focus on specific areas of law and practice. Given the progress that the bar associations in Australia, the USA, and UK, among others, have made, there is a need for a specific committee of LSK to champion climate change and provide direction to members.

e) *Reducing LSK's carbon footprint*

It is commendable that the application process for practicing certificates for lawyers has now been digitized. Before this, lawyers across the country were required to submit hard copy applications documents for processing of practicing certificates. The practicing certificates were also in hard-copy versions. For over 20,000 members, this was such a cumbersome process, with tonnes of paper used. With the digitization of the process, LSK's carbon footprint has significantly reduced.

There is still more room for improvement. For example, the Advocates Magazines and Journals need not be printed in hard copies and posted to all members. The globe has gone digital, so should LSK. Hard copies can only be printed on request by members, and for a fee.

f) *Public interest litigation*

As was said by Justice Ombwayo, there is more litigation on land matters (private) than environmental matters (public). This is because most of the suits are filed to protect private property. LSK should encourage lawyers to take up, on some *pro bono* basis where necessary, environmental matters that affect the general population. LSK can do this in partnership with other bodies, including professional organizations, communities and governments.

Conclusion

Climate change is real, and it's devastating consequences have already been seen in the unpredictable weather patterns, frequent droughts, diseases, among others. This year's Annual Conference should come up with concrete steps and resolutions on how LSK and its members can take action on climate change.

The Author is a member of the Law Society of Kenya, the Institute of Certified Secretaries and the Chartered Institute of Arbitrators. He specializes on governance, dispute resolution and leadership development.

Climate Change: The Role of Legal Profession in Climate Justice

By Abincha Mogambi

On 30th June 2023, Finland's minister for economic affairs Vilhelm Junnila, resigned, amid a new furore over comments he made previously in parliament where he said a solution for the current climate crisis is to give more abortions to African women.

He called the concept "climate abortions".

"It would be justified for Finland to shoulder its responsibility by promoting climate abortions. Climate abortion would be a small step for a person, but a giant leap for humanity,"

Equally Late June, this year, the President lifted the ban on tree

logging.

The government defended move to lift the logging ban in government forests imposed six years ago, saying that it will create jobs for the youth. Notably as well the shamba system was lifted.

During an address in June this year at the Global Citizen Festival in Paris, President Ruto said the country was committed to planting more trees and increasing forest cover.

Environmentalists argue that the move by the government will lead to deforestation and have a negative impact on the environment

Friends of the Environment are calling for the reinstatement of the logging ban in state forests.

The ban, which was put in place by the previous government in 2018, aimed to stop illegal logging and raise Kenya's forest cover to 10%. Currently, the country's forest cover is estimated to be around 7%.

The lifting of the ban on tree logging by the government will have immediate

Climate change leading to rising sea levels, extreme weather events, and the loss of biodiversity, which can have severe impacts on the natural environment. Additionally, it can cause food and water shortages, increase the spread of diseases, and lead to displacement and migration of populations, which pose significant social and economic challenges.

The return of the controversial shamba system in Kenya has raised concerns among conservationists about the country's commitment to tackle climate change

A series of failed rainy seasons in northern Kenya has sharpened competition among herders, farmers, and conservancy owners for land and water, according to a report by Crisis

The government had at the beginning made an ambitious pledge to ramp up clean energy and phase out fossil fuels for electricity by 2030. However, some experts have raised concerns that the current devastating drought in Africa severely undermines hydropower, and unless deliberate efforts are made to increase geothermal and solar power, the President's new goal may be difficult to achieve

Besides the government has now engaged in a deliberate effort to sabotage and frustrate it by lifting logging. Every person should be concerned about the impact on the country's forests and the climate.

Climate change has been an ongoing phenomenon throughout Earth's history. However, it has become a major topic of concern in recent decades due to the rapid changes and potential human impact on the climate. The origin of climate change can be traced back to natural causes such as volcanic eruptions, changes in Earth's orbit and solar radiation, and the release of greenhouse gases from the oceans.

However, the current global warming trend is primarily caused by developed industrial western countries with huge machinery emitting carbon and other wastes to the atmosphere .one wonders why the Finish minister and other western countries feel that Africa is responsible. These activities have led to a significant increase in carbon dioxide concentrations in the atmosphere. The importance of addressing climate change lies in the potential consequences it poses to the planet and human well-being.

The legal profession has a critical role to play in promoting climate justice. LSK should immediately petition the president to reverse the lifting of logging as well as petition the biggest emitters of carbon to give their remit their contributions so as to enable planting of tress to obtain the minimum forest cover and waste management etc .Lawyers and legal professionals should work together to advocate for strong climate policies and regulations, hold polluters accountable, provide legal advice and education, and innovate to address climate by ways. Today the 2nd August 2023 the environment and land court was able to freeze the decision by the president to lift ban on logging Justice Oscar Angote ruled that the exercise should stop pending hearing of case filed by LSK. Although, however this may appear to be a win, the LSK needs to bring in the public as well as the international community. and petition the president on this matter alongside the litigation process.

African countries are some of the most vulnerably affected by climate change and need the support of developed countries to mitigate its effects. The Paris Agreement compels the western countries including Finland to meet emissions targets, and China is taking stronger climate action than these western countries. This is a concern for vulnerable countries.

The Paris Agreement reaffirms that developed countries should take the lead in providing financial assistance to countries that are less endowed and more vulnerable to the impacts of climate change.

Overall, Kenya's laws and policies on climate change such as climate change Act 2016, The National Climate Change Response Strategy 2010. The National Climate Change Action |Plan 2013-2017, national Adaptation plan 2015,Renewable Energy Policy 2019, Forest Policy 2015 reflect its commitment to addressing the challenges posed by climate change and ensuring sustainable development for its citizens.

However, proponents of climate change skepticism argue that the earth's climate has always been and will always be changing naturally, with or without human influence. They also argue that the evidence supporting human-caused climate change is not conclusive, and that the models used to predict the impacts are unreliable. Proponents of climate change skepticism often receive funding from industries that may be negatively impacted by policies to reduce carbon emissions and often use this funding to influence public opinion and government policies. They also argue that policies to reduce

carbon emissions may have negative economic impacts, such as increased energy costs and job losses in certain industries.

Other economies, particularly developing countries, may argue that their economic development is a higher priority than environmental protection. They may resist policies that limit their use of fossil fuels or restrict their economic growth. Some may see climate change as a problem that wealthier countries caused and therefore should take responsibility for, rather than demanding developing countries to make costly changes to their infrastructure and ecology.

The Kenyan legal system has been used to hold corporations accountable for their contribution to climate change in the following ways:

The Climate Change Act, 2016 establishes the National Climate Change Council, which has the power to impose climate change obligations on private establishments. This means that companies can be held liable for climate change damages.

The law permits citizens to sue public and private entities that frustrate efforts to mitigate and reduce the impacts of climate change. Analysts argue that this new law could make companies liable for climate change damage.

There has been limited litigation in the area of climate action in Kenya. However, citizens are becoming more empowered to take up action to enforce their environmental rights. A recent notable case is *Save Lamu & 5 others v. National Environmental Management Authority (NEMA) & another*. In this case, the petitioners challenged the decision of NEMA to issue an environmental impact assessment license for the construction of a coal-fired power plant in Lamu County.

However, as the threat of climate change becomes more recognized, the trend is toward recognizing the need for action to mitigate it. Many businesses, governments, and individuals are recognizing that taking action to reduce carbon emissions can actually lead to economic benefits in the long run, such as lower energy costs, increased investment in clean energy, and job creation in green industries. It is hoped that such realizations will enable the climate change skeptics to recognize the importance and urgency of the issue.

Perhaps I should conclude that the nonetheless biggest challenges is that all of us should hold the Western countries responsible. But we must also mitigate our issues within the existing legal framework for climate justice which will be a win for all.

The Author is an Advocate of the High Court of Kenya and compliance consultant.

Igniting Kenya's Electric Vehicle Surge: A Law Reform Rally for Strong Regulatory Measures

By Thuranira Gatuyu

The world is rapidly warming, and the consensus is clear: human activities, notably the burning of fossil fuels for transportation and energy, are the primary drivers of climate change. As Kenya grapples with the impacts of this global crisis, it is becoming increasingly imperative that we transition to cleaner, more sustainable modes of transport. The adoption of electric vehicles (EVs) offers a promising pathway.

Globally, the transportation sector accounts for about 14% of total greenhouse gas emissions. In Kenya, the impact of transport emissions is starkly visible in our bustling urban areas, where dense traffic emits a cocktail of pollutants, degrading air quality and contributing to global warming. By transitioning to electric mobility, we can significantly cut our carbon emissions, making our cities cleaner and more livable while taking a significant step towards meeting our commitments under the Paris Agreement.

As vehicle ownership is poised to rise in Kenya, the transition to cleaner transport modes is not a luxury but a necessity. A surge in electric vehicles can help Kenya meet its Nationally Determined Contributions (NDCs) under the Paris Agreement. EVs produce zero tailpipe emissions, contributing to cleaner air. Furthermore, given Kenya's rich renewable energy resources, especially geothermal and wind, EVs could be powered with low-carbon electricity, significantly reducing the country's carbon footprint.

Building an enabling ecosystem, the Kenyan Government, development partners, and private stakeholders can consider working together to build the ecosystem required to help EVs scale. Mckinsey & Company, a consultancy, has proposed four primary categories of enablers that could be considered in accelerating EV uptake to include scaling electricity and charging infrastructure; innovating local production and supply chains; considering regulatory mechanisms; and financing assets, assemblers, and infrastructure.

Kenya, like many Sub-Saharan Africa countries, faces many unique challenges in the electrification of transport, such as unreliable electricity supply, low vehicle affordability, and the dominance of used vehicles. However, it is critical that the continent is not left behind as the rest of the world transitions. Failure to create an enabling ecosystem for electric transport could see the region becoming a dumping ground for old Internal Combustion Engine (ICE) vehicles, setting back the continent's carbon-emission-reduction goals as the vehicle standards continue to grow.

Kenya, a regional trailblazer in the digital revolution and renewable energy adoption, can set the pace in sustainable development and climate action once again. All that is needed is the political will to take bold legislative and regulatory steps to catalyze the shift to electric mobility.

The transition to electric mobility should be part of a broader climate strategy that includes enhancing energy efficiency, expanding renewable energy, and protecting and restoring our forests and ecosystems. Addressing the challenges that abound will require robust legislation and regulation. To make this vision a reality, a comprehensive regulatory framework must be put in place, which could include the following six aspects:

1. **Incentives for EV Adoption:** Financial incentives, such as reduced import duties, tax rebates, and fee exemptions, could be offered to potential EV owners to jumpstart the market and level the field with conventional vehicles.
2. **Building Requirements:** Building Code should be reviewed to mandate the installation of EV charging infrastructure in new residential and commercial buildings, ensuring growing charging accessibility as the stock of buildings expands.
3. **Safety and Consumer Protection Regulations:** Specific safety standards for EVs and their associated infrastructure are essential to protect users. Consumer protection regulations, particularly concerning battery warranties, resale value guarantees, and transparency in EV pricing and charging costs, are equally crucial.
4. **Standardization of Charging Infrastructure:** Setting standards for charging equipment would ensure interoperability, allowing any EV to be charged at any station, enhancing user convenience and

avoiding a fragmented charging landscape. The standards should prevent vehicle-specific charging ports as that would not go along with curing the range anxiety of drivers on the road.

5. **Regulations for Utilities:** With the rise in EVs, there would be an increased demand for electricity. Regulations must guide utilities in managing this additional load, encouraging the integration of renewable energy sources, and structuring pricing for EV charging.
6. **Emissions Standards:** Strict emissions standards would further promote the shift to EVs. By progressively tightening these standards, it becomes less viable to sell highly polluting vehicles, nudging consumers and manufacturers towards EVs.

To successfully facilitate the transition to electric vehicles, various Kenyan statutes require careful review and potential amendments. The Traffic Act, Cap 403, which regulates all road transport activities, would need to be updated to account for electric vehicles, including new regulations regarding safety, charging, and maintenance. The Energy Act 2019 may need to be reviewed to incorporate provisions for the expansion and regulation of EV charging infrastructure. The Roads Act would be reviewed to have the Road Authorities consider EV infrastructure in roadside stations while constructing or maintaining the roads under their respective mandates.

The Public Finance Management Act, 2012 and Tax laws could be amended to provide for financial incentives and subsidies for EV buyers and manufacturers. The Climate Change Act, 2016, which provides a regulatory framework for enhanced response to climate change, might require a more explicit mention of electric mobility as a key mitigation strategy. Lastly, the Environmental Management and Coordination Act, 1999, should be revisited to include standards and regulations specific to EV waste management, specifically regarding battery disposal and recycling.

Policy and legislative measures alone will not be sufficient. There is a need for a concerted effort from all stakeholders. Automakers should be incentivized to assemble and eventually manufacture EVs locally, creating jobs and fostering the development of a new industrial sector. Financial institutions should provide affordable green financing options for potential EV owners.

Innovative financing models, such as carbon credits for charging infrastructure, are already being launched globally. The world's first validated and registered carbon offset program for EV chargers was announced in 2020 by SCS Global Services, Electrify America, and Verra. Research institutions should focus on developing context-specific solutions, such as 'Made in Kenya' EVs suited to local driving conditions.

The transition to electric mobility is not just a matter of environmental stewardship. It is also a compelling economic opportunity. The global EV market is projected to reach $802.81 billion by 2027, and Kenya, with its strategic location and burgeoning tech sector, is well-positioned to be a leader in this space.

Some governments in sub-Saharan Africa have started to announce electrification targets for vehicles and incentives for EV adoption, such as Rwanda's announced tax exemptions for EV sales. This highlights the growing regional awareness and commitment towards greener transportation solutions.

The legal profession will be pivotal in the transition to electric vehicles. Lawyers, through their advisory role, can help shape public policy, draft legislation, and guide regulatory frameworks that promote EV adoption. As the architects of contractual agreements, they can help devise innovative financing models, support the establishment of charging infrastructure, and protect consumers' rights in the EV market. They can also facilitate public-private partnerships necessary for developing a robust EV ecosystem.

Moreover, lawyers can play a significant role in ensuring compliance with emissions standards and other environmental regulations, directly contributing to the fight against climate change. With their unique skill sets, lawyers are well-positioned to drive the transition to sustainable mobility, facilitating Kenya's journey towards a greener future.

The journey to electric mobility is a marathon, not a sprint. But with robust legislation and regulation, alongside active participation from all stakeholders, Kenya can move from the slow lane to the fast track, leading Africa's charge into a cleaner, electrically-powered future. The era of electric vehicles is dawning. Let's plug in and move forward for our environment, our health, and our future.

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The Key Steps to Lawyering that Makes a Difference in the Era of Sustainability

By Loise Wangui

The sustainability landscape is broadly defined as including environmental, social and governance (ESG) issues. It is expanding and becoming increasingly diverse, complex and risk-laden. New laws, regulations and changes in the way investors, regulators, customers, employees, and the public view environmental and social issues are having broad implications for organizations and their supply chains. Together, these trends are fuelling demand for ESG-focused legal services and even new legal practice areas dedicated to ESG matters. Managing an organisation's legal considerations now means thinking about these ESG issues. When done right, it goes beyond ticking boxes or compliance to consciously contributing to a better planet, people, and good governance.

As law students, we are taught that law structures society. Hardly, if ever are we taught how to use the law to restructure society in a sustainable way. This means that despite ESG and climate change issues dominating headlines across nations in the recent past, many lawyers still fail to recognize the urgency to equip themselves and their clients to navigate the complexities of transitioning to the low carbon future or even capture the opportunities for new scope of work, at hand.

Encouragingly, some lawyers, both in-house and in the public practice, have already been thinking about the impact of climate change, especially in corporate advice to clients. These lawyers, regardless of their specialties or the stage of their careers, hunger to use their professional skills and develop new ones to address climate change and other environmental and social threats.

Climate change is a justice issue and lawyers must understand their unique positioning and duty to advise and warn clients on emissions cuts and effects of climate change regulations on asset valuations. ESG risks are now one of the major threats facing businesses, and they could have a significant impact on their long-term performance, profitability, and lives of billions of people for decades to come. It can therefore be argued that, if law is the heart of the legal practice, then sustainability may well be its soul, moving lawyers toward a legacy of conscious commitment vital to transform society.

This article highlights some practical steps that lawyers can take to equip themselves for the evolving role of legal practitioners in the new era of sustainable development.

1. **Keep a step ahead of regulation.**

   Lawyers must anticipate the shifts in societal expectations on which corporate reputation and regulations are founded. The global reach of operations, supply chains and financial markets means that taking ESG-related action may soon be mandatory. This has already happened in certain jurisdictions like the US and EU which have increasingly mandated regulations relating to circular economy, supply chain due diligence, climate disclosure, assurance, and greenwashing.

   With a clear understanding of current and anticipated law and policy, lawyers can ably advise and challenge executives on decisions that may not only go against the spirit of current laws, but also against the letter of future laws. After all, today's best practices and landmark judgments are the precedents on which tomorrow's legislation will rest. Lawyers must also proactively advise clients on their obligations to address climate change. This would include adding binding clauses to supplier contracts, thus committing organisations to climate-change goals.

2. **Guide businesses through the ESG maze**

   In the past, most of the legal work around ESG issues such as equality, supply-chain ethics, employee well-being, pollution etc. has been about helping businesses mitigate reputational and financial risks or avoid litigation. Progressively, this approach is changing, and lawyers should advise businesses on how to turn some of the identified ESG risks into opportunities.

   As businesses transition through various stages of ESG maturity, they will be looking at their lawyers to reflect their values by operating more sustainably and combat climate change by adopting practical measures and policies to reduce the climate impact of their business, tackle emerging sustainability challenges, and be transparent about their ESG

actions.

By the nature of their training, lawyers possess the logic and creativity required to deal with the intricacies of ESG issues. Legal experts are therefore expected to play a pivotal role in supporting corporate boards and management through the complex transition to sustainable products, services, and processes.

3. **Set your own sustainability commitments.**

Stakeholders' focus is expanding to include the environmental and social practices of companies' entire value chain, including suppliers. As a result, businesses require certain sustainability commitments from their suppliers of goods and services as a prerequisite to forging a working relationship. For example, telecoms giant Vodafone now uses an ESG scorecard when selecting its legal service providers. At the same time, pharma company, Novartis, withholds 15 percent of fees from law firms that do not meet contractually agreed diversity and inclusion targets.

To meet their climate and other ESG commitments, consumers of legal services are asking more of their legal teams. An increasing number of Request for Proposals (RFPs) are incorporating a section on the legal service providers' ESG commitments on topics ranging from the firm's climate emissions (leased office space and employee travel) to various diversity, equity, and inclusion metrics (including partnership composition and the diversity of the firm's vendors and suppliers).

Additionally, with the bulk of the legal workforce being young and with a keen interest in working in environments that care about people and the planet, questions about the law firm's commitment to ESG become critical as this generation considers career transitions. Law firm leadership must therefore want to start getting their own firm's ESG house in order. In-house counsel, on the other hand, must help their organizations set, commit, and integrate to ESG targets. Executed properly, ESG presents a real opportunity for lawyers and law firms to serve existing clients better and attract new ones, retain talent and lead with purpose.

4. **Close the Skill Gap.**

The shift to a sustainable economy driven by the economic impacts of climate change, demand for more transparency, increased expectations for corporate accountability, climate-related risk management, and the ambitious targets set by governments to reduce emissions and fight climate change, fuel the demand for employees to be reskilled or upskilled to meet the needs of the future.

Lawyers may have gone to law school, but a degree of understanding about ESG risks, including climate risk and the related legal implications, become critical to enable sound advice to clients on specific impacts of these risks to asset values, return on investments, and financing. For example, commercial lawyers should understand how companies with climate-stranded assets are going to be less attractive to investors. Investment lawyers must advise on long-term investments considering climate risks. Property lawyers who fail to discharge their climate duty of care will be exposed to claims for professional negligence in the future. The Law Society can support lawyers to be fully informed about how they can mitigate the impacts of ESG risks, including the climate crisis, by offering guidance, educational tools and resources to help the legal profession meaningfully navigate the complexities that ensue.

5. **Step up *Pro Bono* Services.**

The impact that the legal services industry can have in a society through *pro bono* work is immeasurable. All lawyers can do more to improve access to justice in their communities. Lawyers can start by exploring ways to encourage the proactive involvement of lawyers in their firms and build a positive *pro bono* environment in their workplace. While some law firms decide to take on a few special cases during the year, others have instituted their own *pro bono* legal departments dedicated to certain programs. Then other law firms have *pro bono* as part of their core institutional values and have established internal objectives for their lawyers who are expected to take on *pro bono* work.

It is also possible for law firms to take a firmer and broader stride by taking on specific ESG-oriented *pro bono* cases, especially with medium and small sized enterprises. Overall, through *pro bono* work, law practitioners can effectively demonstrate that they are not only professionally capable of assessing and advising their ESG-conscious clients on their regulatory concerns and needs, but that they also mirror their efforts in promoting their social ideals by offering their legal services to improve and support the communities within which they operate.

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Legally Justified Climate: Dissecting the Multifaceted Role of the Legal Profession in Climate Justice

By Venessa Olivia Lwila

For decades, climate change has been the fulcrum of global interventions and interactions from a scientific perspective. Its oxymoron is best demonstrated by the fact that the impacts of climate change significantly, if not only, affect the countries least responsible for its contribution. This is not a 'by chance' rhetoric from political deliberations arising from the lens of colonialism. For instance, according to the International Energy Agency (IEA) Africa, the second largest continent accounting for several third-world countries insofar as the economic index is concerned, today, accounts for less than four percent of global emissions and almost zero percent of historical emissions.

Demystifying further, impacts of climate change have affected the most vulnerable society members including women and children. To thus establish the significance of climate justice, we are called upon to perceive it from a human rights based approach. It calls for no delink between human rights and development affecting climate action.

Climate justice has been defined as "a set of rights and obligations, which corporations, individuals, and governments have towards those vulnerable people who will be in a way significantly disproportionately affected by climate change." It conceptualizes that while climate change is a global crisis, its effects are unevenly distributed. In this same vein, the blame for the creation of the crisis is asymmetrical.

In recognizing this, climate justice strives to address fair, just and equitable distribution of the impacts of the climate change burden together with the mitigating measures. It calls for responsibility so that those causing the crisis are held accountable and those most affect are adequately supported.

Legislation in Kenya has demonstrated that the country is on the right trajectory to champion the implementation of mitigation measures against the effects of climate change. Article 70 of the Constitution, for instance, safeguards and calls for the enforcement of environmental rights. In line with Article 72 of the Constitution, the Climate Change Act of 2016 was enacted to provide for a regulatory framework for enhanced response to climate change as well as provide for mechanisms and measures to achieve low carbon climate development.

Kenya is also a signatory to several treaties including but not limited to the UN Framework Convention on Climate Change 1992, the Kyoto Protocol 1997, the Paris Agreement 2015, and the African Charter on Human and People's Rights 1981. In that retrospect, what is the role of the legal profession towards achieving climate justice?

Firstly, the legal profession must recognize that climate justice affects the most vulnerable people in the Kenyan context. Women, children, marginalized communities, and persons living with disabilities as well as those living in abject poverty would be highly affected when disaster strikes. Greta Thunberg said, "Those who will suffer the most from the climate and environmental crisis are the ones who are already the most vulnerable, socially and financially. And that tends to be women living in the global south. We cannot have climate justice without gender equality." This is because climate disasters tend to limit general access to services and health care, increased maternal and child health risks, prone to vector-borne diseases and the inability to access any health-related services.

Against that background, the legal profession must ensure that those responsible for the climate crisis take full charge of the mitigation measures. This can be done by lobbying for policy reforms and ensuring that implementation of the same is purposed to achieve climate justice. By working collaboratively with the August House, legislative action is invited to hold companies accountable for the toxins emitted in the environment and the damage caused. This should be inspired by recognizing the rights of the indigenous communities and protecting the environment that could be easily ostracized by the objects of the companies involved.

In the policy and legislative implementation, a framework is then needed to make provision for climate finance. Climate finance covers the investment needed to switch to net zero carbon emissions or less polluting energy, transportation and industrial systems. Climate finance mitigates against human and environmental costs of climate change by building resilience to the consequential adaptations of climate change. Its concept arrests disasters by setting aside funding to curb them. It is built along the yardstick of transformational and inspirational change.

The legal profession is also invited to provide education and training on the impacts of climate change. It is called upon to set up drives and initiatives that will foster climate change literacy so that communities are made to understand the impacts of climate change and formulate proper adaptation mechanisms or solutions to deal with them or reduce the impact. As agents of change, such

communities will be empowered and assist the country at large in creating proper adaptation apparatus.

Filing suits is another pinnacle avenue that the legal profession will continually embody. Holding parties accountable for the negative impacts on climate change brings a cost implication on the responsible party. For instance, the Owino Uhuru Settlement in Kenya was awarded compensation by the Environment and Land Court sitting in Mombasa on the basis that the community's right to life, a healthy environment, the highest standard of health, clean and safe water had been impeded by the Government and two companies.

In another ongoing legal battle, two communities in Baringo County have filed a petition seeking to hold the Government accountable since they were displaced by floods in Baringo. They are seeking to compel the government to compensate them for the loss and damage that they have suffered due to the floods where water levels have arisen over the years. They are holding the Government accountable for failure to implement adaptation strategies that would have mitigated their plight, such as early flood warning systems.

It is intended that if adverse orders are granted against such parties, they will implement better policies towards their establishments while taking care not to injure the inhabitants affected by the industry.

As demonstrated, the role of the legal profession is a vast arena. As cliché as it sounds, let us all champion a better tomorrow by creating an impact in any way possible. It starts with individual activism, from planting a single tree to creating awareness within your environment. After all, it takes a pinch of salt to bring out a meal's deliciousness. The ultimate goal is to mitigate the negative impact of climate change, ensuring that *isiturambe!*

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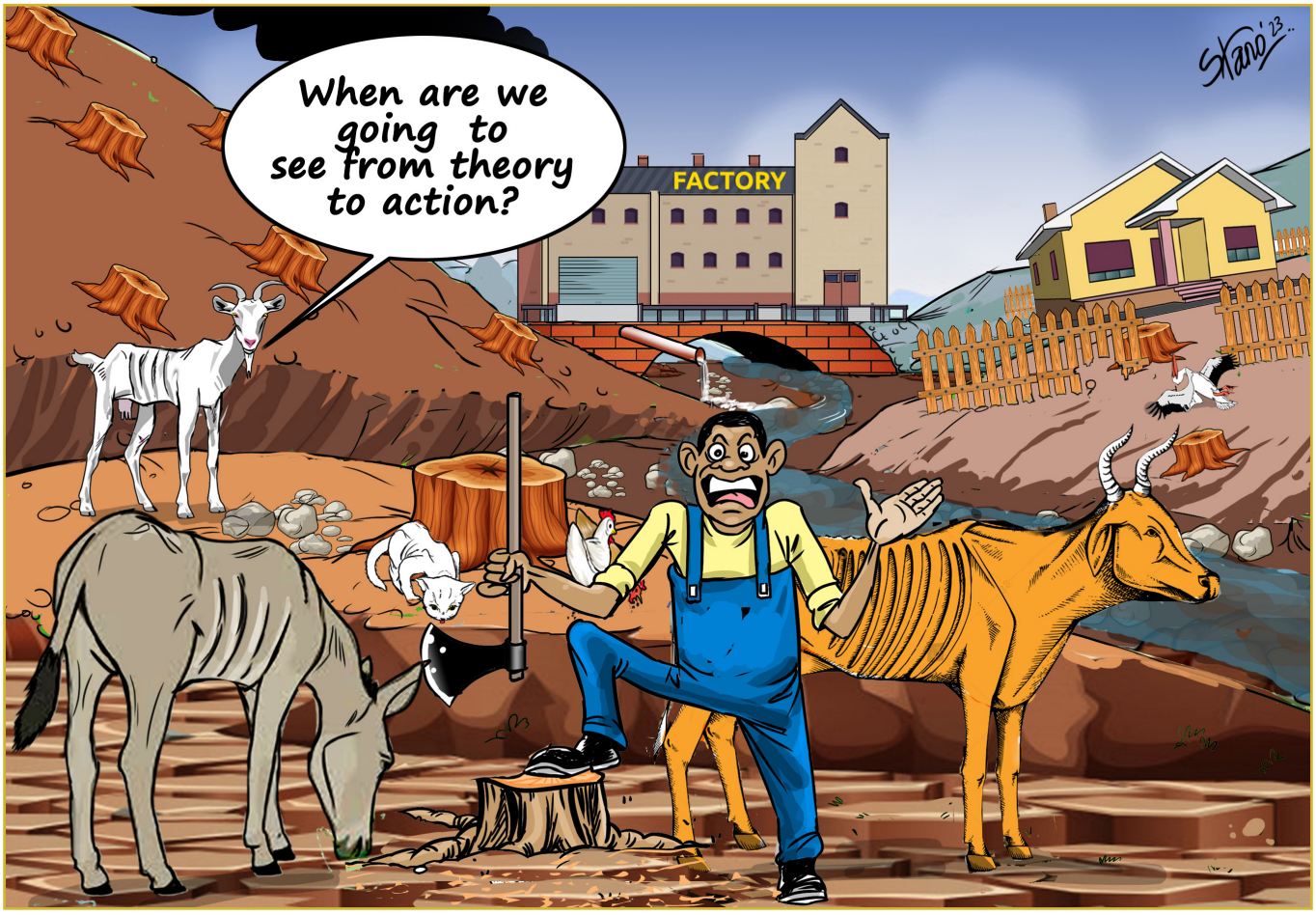

Murky Waters of Lake Turkana: Water Rights and the Quest for Climate Justice

Irfan J. Kassam

Weird waters, says the National Geographic Society, about the alkaline and saline nature of Lake Turkana. As weird as it may be, Lake Turkana is a vital water resource for its indigenous people. A report by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1997 termed the lake 'a world heritage site' being the oldest Salt Lake on earth. Despite its high levels of salinity and alkalinity, the lake supports transport, fishing and water usage for daily activities. But Lake Turkana is a victim of climate change that is contributed by human activities and unprecedented weather fluctuations. Specifically, dam development projects on River Omo in Ethiopia make Lake Turkana susceptible to downstream effects. River Omo waters drain into the lake and is one of the main sources of the lake. However, following the inception and speedy progress of the Gilgel Gibe Dam project series (mega hydroelectric dams project) by the Ethiopian Government on River Omo, the lake has suffered significantly reduced water inflow over the years since 2005. Salt concentration in the lake has dramatically increased, sometimes making the water almost undrinkable and the biodiversity of the lake is endangered.

While dams are touted as renewable sources of energy, their outcomes, coupled with those of climate change, do leave a trail of environmental damage and, water and food insecurity to the local communities' dependent on the lake for survival. Amidst starvation and drought in the Turkana basin, a recent study in 2021 by the United Nations Environment Programme (UNEP) revealed that due to climate change, water levels in some parts of the lake have been dangerously increasing, leading to flash floods destroying homes and livestock.

Climate change is not a new concept anymore. The world, in the 19th Century, began to realize the harmful impacts human activities had on the environment and the economy. From banking crises to hyperinflation and to oil shocks, states suffered economic recessions due to their short term development goals that put future generations at risk. These activities, and many others, had a snowballing effect leading to the current concerns over global warming and climate change. The discovery added to the codification of International Environment Law that introduced the concept of sustainability as the foundation for cooperation in the protection and conservation of the natural environment for future generations. The Rio Declaration on Environment and Development of 1992 further grounded the principle of sustainable development, stating the elaborate role of states in reducing and eliminating unsustainable patterns of production, and consumption to promote appropriate demographic policies. Within this context, lie water resources whose usage, conservation and management have been regulated by a host of international and national laws. The right to water, as a socio-economic right, has been established in the United Nations Universal Declaration of Human Rights 1948 and further harnessed in the International Covenant on Economic, Social and Cultural Rights of 1966.

In Kenya, the Constitution 2010 recognizes water as a fundamental right providing for its clean and safe access in adequate quantities. The Water Act of 2016 also provides for the right to access water in adequate quantities and to reasonable standards of sanitation. But water as a natural resource is vested and held by the National Government in trust for the people of Kenya. This provision places the obligation on the government and its state agents to regulate the use, management and development of water resources. The right to water is essentially progressively realized. Progressive realization of rights can only be achieved by moving beyond the bare minimum requirements of water rights. This includes, among others, the recognition of sustainable development as a core principle in promoting progressive realization.

A categorical analysis of Rio declaration reveals that application of sustainable development is two-fold; substantive and procedural. Principles 3 to 8 lay down the substantive elements of sustainable development. The substantive elements provide the essential provisions of sustainable development by including other related principles of international environmental law such as equitable utilization and inter-generational equity. The procedural elements of sustainable development are provided in Principles 10 and 17. Principle 10 provides that public participation in decision making process and access of justice should be facilitated when dealing with environmental issues,

while Principle 17 provides for Environmental Impact Assessment (EIA) for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority. These provisions therefore push states to consider the challenges likely to be faced by the general public.

Lawyers have and can continue to be instrumental in promoting the right to water, especially for the indigenous people. It is noteworthy that efforts have been made to shed light on the dire situation of the Lake Turkana people through representation, the *Friends of Lake Turkana Trust (FLTT) v Attorney General* (2014) eKLR is illustrative but this remains the only significant effort this far. FLTT argued that the Kenyan government had violated the right to life and dignity of the indigenous people by agreeing to purchase power from Ethiopia supplied by the Gil Gibe Dam. FLTT alleged that, "by agreeing to purchase 500MW of electricity from the Government of Ethiopia, the Respondents are acting in a manner that will deprive the members of the affected communities their livelihood, lifestyle, cultural heritage and attachment to Lake Turkana, in violation of Articles 26, and 28 of the Constitution". The court was however of the opinion that since there was no concrete evidence on the environmental impacts caused by the dam to the lake, the government of Kenya had not violated the rights of the indigenous communities. The argument on lack of concrete evidence has been critiqued and tied to the inefficient EIA conducted by Ethiopian Government in 2006. The EIA was too narrow in its approach disregarding the downstream effects on the Lower Omo basin and the Lake Turkana basin. The EIA has been discredited by several studies that show the vivid impacts caused by the dam.

In spite of the perpetual water challenges, it is not all doom and gloom for the Lake Turkana people. Climate justice, envisioned in the United Nations Framework Convention for Climate Change (UNFCCC), demands responses to climate change that are coordinated with social and economic development in an integrated manner to avoid adverse impacts. As advocates, we have a moral duty to reflect on the best interest of the societal values and to uphold the constitutional provisions stipulating the national values on human rights and dignity, social justice, protection of the marginalized, good governance and sustainable development. There is a need for lawyers' robust involvement in the policy making in relation to water governance which will help to identify the risks and propose of mitigating factors. Lawyers can also engage in active education programmes to create awareness on the negative impacts of climate change on vital water resources. Through public participation in EIAs and legal representation, lawyers can voice their expertise and raise important environmental considerations that need to be made before states embark in development projects. Finally, through effective implementation of existing laws and regulatory framework, Kenya can eventually make strides in enforcing water rights and promoting the welfare of the indigenous people.

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ROLE OF THE LEGAL PROFESSION IN CLIMATE JUSTICE

By Joyce Kihara

Introduction

The vagaries of climate change are a perennial challenge that no one seems to have a solution for the long haul. This is mainly ascribed to the fact that it requires the collective responsibility of everyone but is mainly left to environmental activists and NGOs. Climate change and environmental degradation can be attributed to many factors, including manufacturing resulting in increased greenhouse gas emissions, destruction of forests, use of harmful chemicals among others. Despite the blame on the causes of climate change being placed on the global north, the worst consequences are felt by the global south. Climate change has made it more difficult for the poor to escape poverty as they have to deal with increased competition for the scarce resources.

Some of the significant climate change impacts include changing weather patterns, rising sea level and more extreme weather events. Due to the shared global challenges of climate change, SDG 13 provides for an urgent call for all nations to combat climate change and its impacts. The Paris Agreement was passed to limit global temperature rise to below 2 degrees. The Agreement requires all countries to take action relating to the mitigation and adaptation of the effects of climate change while recognizing their different situations and circumstances. In coming up with solutions to climate change, it is important to interrogate the legal and policy framework and how it impacts

access to justice and realization of human rights by citizens, particularly vulnerable groups. The solutions must also map out all stakeholders and outline the obligations of all actors including the legal profession.

What is the role of the legal profession in climate justice?

Lawyers and the law play an increasingly important role in dealing with the issues surrounding climate change due to international negotiations and subsequent changes in national legislations. Most of the legal amendments have profound effects on both the people's lives and the national economy as they create legal frameworks to limit pollution, protect forests, improve energy supplies and limit the impacts of extreme events on vulnerable people. Some of these legal measures include the ban of plastic bags which led to the closure of many businesses selling or manufacturing plastic bags, reclaiming of government forests irregularly grabbed causing displacement of people and the enactment of the Climate Change Act, 2016 which establishes the climate change directorate and includes County Governments' contribution to climate change actions. These changes have brought about varied reactions such as legal action against the Government and other humanitarian crisis such as displacement of people, armed conflict, increased unemployment among others.

1. **Access to justice**

Climate change contributes to mounting competition over scarce land and natural resources which results to increased conflicts. The country has over the years seen an increase in conflicts between farmers and pastoralists over land, access to water and natural resources which have threatened peace and stability particularly in the rural areas. Advocates play a facilitative role in not only educating people about their rights but also in access to judicial and quasi-judicial processes. Advocates should be well versed with the different institutions established by the Environmental Management and Coordination Act (EMCA) 1999 and their roll in dispute resolution.

The use of these quasi-judicial mechanisms may lead to expeditious resolution of conflicts thereby enhancing access to justice. The Constitution has further provided for the establishment of the Environment and Land Court which has jurisdiction to determine disputes relating to environmental planning and protection, climate change issues, land use planning, title, tenure, boundaries, rates, rents, valuation, mining, minerals and other natural resources. Advocates should be able to properly advice their clients on where they can litigate environmental matters.

2. **Public interest litigation**

Environmental PIL began by the late, Wangari Maathai, testing this by filing a suit in the High Court in an attempt to protect public land on which construction of a private property was to be made. Although the suit failed for lack of *locus standi*, it formed a basis upon which PIL would thrive for the future. Upon the promulgation of the Constitution of Kenya in 2010 one of its key reforms was the expansion of doctrine of *locus standi* and the removal of previous challenges that inhibited access to justice for the poor and marginalized persons in society.

Advocates are called to be human rights champions and prioritize the most climate vulnerable groups to ensure that no one is left behind. Through taking up PIL matters, advocates ensure that traditionally excluded groups such as women, children, persons with disability, the elderly and other vulnerable groups are included in decision making as they bear the biggest brunt.

3. **Advocate for policy change on environmental matters**

In order to deal with the impacts of climate change, there is need to review the current policy and regulatory framework on environmental matters and evaluate its efficacy and propose reforms areas. As the legal think tank, advocates are required to conduct research on policy approaches that will enable the country maneuver the challenges of climate change. This entails strengthening the regulatory framework and institutional capacity for climate resilient development and improves governance of land and other natural resources with a focus on enhancing land rights and sustaining peace. It is important for the country to invest in people-centered laws and institutions to promote transformative action plan and have a by-in from the citizens due to public participation and inclusion. Legal reforms should incorporate customary, informal and indigenous justice systems to protect bio diversity and promote sustainable use of natural resources.

4. **Access to information**

Hardly a day goes by without reports and news in the media highlighting the ravages of climate change in the country and the world over. Unfortunately, it mainly focuses on the gloom and doom and rarely provides for solutions that citizens can undertake to curb the effects of climate change. There is a huge disconnect in the dissemination of information relating to the Government's actions in dealing with climate change. Timely and accurate provision of information on impending disasters is very important in disaster management as it mitigates loss of life, reduce panic and direct people on how and where to get essential services. Advocates can bridge the gap of information flow through advising their clients to adopt eco-friendly developments and projects such as the use of green energy, recycling and water harvesting technologies. It is vital for advocates to guide their clients on the legal requirements for the environmental impact assessment and approvals needed to ensure their development projects are friendly to

the ecology.

Conclusion

In the words of the UN Secretary General Antonio Guterres, *"climate change is the defining issue of our time and we are at a defining moment. From shifting weather patterns that threaten food production to rising sea levels that increase the risk of catastrophic flooding, the impacts of climate change are global in scope and unprecedented in scale. Without drastic action adapting to these impacts in the future will be more difficult and costly."* Therefore, we all have a role to play as we are all affected directly by climate change. As advocates, we should strive to be change actors and use our influence in advocating for legal and policy approaches that address justice issues brought about by climate change. We should not use the legal and judicial system to intimidate or silence critics and activists through lawsuits and criminal prosecutions where our clients are at fault. As defenders of the Constitution, we should always look at the greater good even when it means losing some clients.

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The Gaps in the Strategic Plan (2018-2022) of the Ministry of Environment and Forestry

By Prof. Hassan Nandwa

Kenya experiences perennial natural calamities which manifest in droughts, floods, earthquakes and tremors; although, there are other disasters in waiting such as the expansion of the rift of the Great Rift Valley. All these phenomena are associated with climate change and its global effects.

It is imperative that we take stock of our properties and environment after every calamity or disaster for better planning and building preparedness capacities in our community, specifically, the need to assess the impact of these calamities on the wild life.

For instance, the droughts that were experienced in the Northern Part Kenya late last year and early this year, we saw media coverage of carcasses of wildlife due to the drought. However, nobody endeavored to assess the magnitude of that loss and to understand the trends of those animals to adopt to such harsh climatic changes.

The early warning mechanism if put in place by the local, national, regional and international authorities need to be enhanced and improved to involve community and public participation to ensure local ownership of the environmental problems associated with the climate change. Dissemination of information to the public through both mass and social media, convening workshop and conferences for public awareness cannot be overemphasized.

The indigenous mechanisms for adopting to environmental changes such as local species of crops such as cassava, potato, arrowroots, maize, sorghum, millet, different types of beans have been neglected in favor of efforts of cross-breeding and foreign crop species for quantitative increase in the yields and harvests per hectare.

There is need for more investment in research to identify the indigenous species of crops that will quickly adopt to the devastating effects of climate change. A look at the annual budget for 2023-2014 reveals that the country has not recognized the impact of climate change on our food security. If Kenya will fail to take measures in this regards to improve farming for its food security, it will become the ready and secure market for other countries with better vision and mission.

Our forefathers used to rely on the nature as an early warning mechanism for calamities such as droughts, floods, wars and predicting or forecasting the future disasters. We have now the weather forecast and meteorology departments using the modern science and yet we are not able to predict the calamities that befall us from time to time. Is it now appropriate to revisit our indigenous and traditional system for early warnings such as the behavior of animals and plants?

The barking of dogs and other animal and birds' sounds, shedding leaves by trees, developing of shells by the fish, are all related to climate changes capable of being a basis for creating community resilience against the effects of climate change.

The phenomenon of increased number cockroaches and rats' resistance to many pesticides, in both residential and commercial dwellings, is evident of environmental pollution and natural adaption mechanism worth to be researched for community resilience building.

This is a call on researchers to pay attention to these areas and on the Government and the Civil Society Organizations to provide funds to address these research gaps for the purpose of protecting the environment and enhancing food security.

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The Nexus Between Blockchain Technologies and Climate Change

By Wendy F Muganda

According to Ariel Markalevich, blockchain is a way to organise and store data. In the literal sense, consider blocks of data joined together to form a chain. Blockchain is a digitally distributed, decentralized ledger that helps to verify and trace multistep transactions. While it might be associated with digital currencies such as *Bitcoin*, *Ethereum* and *Stable Coins*, it is also employed in other major industries because of its features such as increased security of data, efficiency and speed of conducting transactions, traceability of transactions, automation such as the use of smart contracts and transparency. The United Nations Environment Programme (UNEP) is advocating for the same technology to be used in accelerating the transition to clean energy and fight against climate change in developing countries. The UNEP estimates that global temperatures are bound to rise by at least 2.7°C by the end of this century.

The Paris Agreement which was adopted by 196 Parties at the UN Climate Change Conference (***COP21***) in Paris, France, highlighted key components of the fight on climate change with corresponding provisions on emissions trading (e.g., transferable mitigation outcomes) in Article 6; the tracking of mitigation efforts in Articles 4 and 13 (e.g., enhanced transparency framework); and guidance on climate finance flows in Articles 9 and 13. There is no doubt that blockchain technologies have been beneficial to various industries. One fundamental benefit of Blockchain is the element of decentralization which makes them highly secure and more resilient against accidental failures/ attacks. Therefore, data remains available even if a large portion of the network is offline. It is acknowledged globally that the use of distributed ledger technologies has a major effect on climate due to the high volume of energy used in mining data, with the most common form of energy being electricity.

To understand the nexus between climate change and the use of blockchain technologies, it is important to note the difference between permissioned and permission-less blockchains. Permissioned blockchains limit the parties who can transact on the Blockchain, allow only-read access to the information and limit who can add blocks to the blockchain. For example, the financial industry uses some permissioned blockchains such as *R3 Corda* and *Quorum*. On the other hand, permission-less blockchains are open to everyone. For example, *Bitcoin* and *Ethereum* transaction logs are accessible to anyone online. Anyone can make data entries and can easily enter or leave the network without any identity authentication.

It is acknowledged globally that the use of distributed ledger technologies has a major effect on climate due to the high volume of energy used in mining data, with the most common form of energy being electricity. However, the level of energy consumption is dependent on the type of Blockchain (i.e., permissioned or permission-less) and the type of consensus mechanism. The Proof of Work (PoW) consensus mechanism in permission-less Blockchains, for instance, leads to high energy consumption. Permissioned Blockchains, however, generally utilize less energy because less participants have the right to add new blocks to the blockchain.

To address this challenge, there are several recommendations on using alternative consensus mechanisms like Proof of Stake (PoS) and Delegated Proof of Stake (DPoS), which consume less energy and offer improved scalability. These said consensus mechanisms not only reduce the environmental impact of blockchain technology but also enable more efficient and secure platforms for climate change solutions.

That notwithstanding, blockchain can still be used to offer sustainable climate change solutions. In the recently held *COP27*, it was agreed that to launch a new 5-year work program to promote climate technology solutions in developing countries. In this with this mandate, it is proposed to have proper monitoring mechanisms and transparency in climate finance. Climate finance refers to the flow of international and national public and private funds towards activities that reduce or mitigate greenhouse gas emissions or facilitate adaptation of communities and their resilience to the impacts of climate change. There are several efforts of linking digital technology applications to environmental sustainability that have not been mentioned in this article.

After the *COP27*, Kenya was identified as Africa's top destination for agri-tech investment. For instance, a company known as Apollo Agriculture uses satellite imagery of farms

and machine learning to guide with credit decision making. It also helps farmers diversify to high-yielding crops, providing access to wholesale orders on its checkout app. The Kenya Climate Innovation Centre also supports entrepreneurs looking to tackle climate change through technology by offering financing and capacity building.

The Kenya Climate Change Act of 2016 and the National Climate Change Action Plan (NCCAP) 2018–2022 provide guidance for low-carbon and climate resilient development. It is not clear whether there the objectives set out in the said Action Plan have been met. Kenya needs to formulate substantive laws that govern blockchain technologies to facilitate climate finance in combating climate change. Blockchain will enable the tracing of climate finance so that all participants in a project can follow (almost in real time) the flows from a donor to the recipient via a universal ledger. Applying smart contracts to such a network will add a second layer of transparency to the process which set the conditions for the execution of transactions. Their underlying functions can be displayed in code and viewed by all participants. This way, every participant can forecast the agreed funding processes. This would, therefore, allow for overall tracking of international donor funding.

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Paradigm shift: An analysis on the role of the legal profession in promoting climate justice.

By Nellys Koyoo

The law is a powerful tool that can be utilized by the community not just in bringing the offenders to book, but also in ensuring that our rights are protected and realized. These include environmental and climatic rights.

The very continuation of human life on earth is threatened by climate change-a global monster. It stems from human activities including burning of oil, coal and natural gas to generate energy, cutting down trees, as well as operations in industries that release poisonous gases into the atmosphere, particularly carbon dioxide. The sea level rise, more frequent and extreme heat waves, droughts, floods, as well as wildfires are some of the repercussions of climate change. In order to address the climate issue and advance climate justice, the legal profession must play an integral part.

Climate Justice is the fair and equal allocation of the costs and rewards associated with climate change adaptation and mitigation. As a result, individuals most impacted by the effects of climate change, such as low-income communities and indigenous peoples, should be involved in the decision-making process and deliberations on how to address the crisis. Additionally, it is important to give them the tools and assistance they need to adapt to the current changes and lessen the impact of climate change on their local communities.

Whether they are aware of it or not, lawyers are involved in climate change cases worldwide. They lubricate, lobby, pass laws, and pursue legal action. They are responsible for the buying and selling of fossil fuel-fired power plants, obtaining funds for an energy-to-waste facility, and other activities. On behalf of their clients, they aim to negotiate and shape future climate regulations in both the public and private sectors.

Lawyers participate in the creation of climate laws and advance and reach agreements on the legal definitions of climate change in agreements and other non-legislative forums. They offer advice on how shifting regulatory landscapes could affect and open doors for clients' enterprises and interests. They participate in the adjudication and arbitration of disputes relating to climate change. In each of these situations, lawyers are representing their clients and are also professionals who are dedicated to upholding the rule of law and the public interest.

The legal profession has a role to play as far as promotion of environmental justice is concerned. This can be achieved in a number of ways as illustrated below:

Advocating for stringent climate policies and regulations at the local, national, and international levels is one of the legal profession's key responsibilities. This may entail collaborating with governmental and non-governmental groups as well as other stakeholders.

Additionally, lawyers can represent clients who are directly impacted by climate change, such as people or towns that are being forced to relocate due to sea level rise or severe weather. They can assist these customers in seeking restitution for the harms they have endured as a result of climate change through compensation or other means.

Similarly, the protection of future generations' rights in the face of climate change is another crucial role for advocates to play. This may entail developing legislative frameworks

that acknowledge future generations' rights to a stable climate and a healthy ecosystem. It may also entail promoting laws that give ecosystems and natural resources' long-term sustainability top priority.

Furthermore, advocates can play a significant role in informing people on the effects of climate change and the need for immediate action even as they go about lawyering. In order to increase public understanding of the problem, this may entail creating public awareness campaigns, reaching out to local schools and other community organizations, and collaborating with media experts and journalists.

Courts also have a fundamental role to play as regards climate justice. Courts provide a forum where those who have claims can have them addressed by the court and the court will adjudicate on the same and grant appropriate remedies. Courts accessibility, the hallmark of the judicial arm of the government will serve to strengthen litigation on matters climate justice. Similarly, courts must hear and decide on justiciable climate change claims in order to fulfill their obligation.

The legal community must therefore play a significant part in tackling the climate catastrophe and advancing climate justice. Together, the legal community can contribute to securing a just and sustainable society for all.

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LAW SOCIETY OF KENYA

DESIGNATED DEPARTMENT CONTACT DETAILS

In a bid to improve on service delivery to members, the Law Society of Kenya has allocated each department a direct contact line. For any queries, members are encouraged to reach out to the relevant departments through the phone numbers below:

- CPD - 0110 677 188
- Compliance & Ethics & Practice Standards - 0110 459 555
- Finance - 0110 380 838
- Member Services - 0111 671 458
- PIL & Parliamentary - 0111 231 010

The Secretariat will continue to support and serve members, as we strive to improve on responsiveness and efficiency.

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The Role of Lawyers in Environmental Protection in Kenya: Opportunities and Challenges

By Prof. Hassan Nandwa

Kenya being a developing country has negligible contribution towards the global warming leading to devastating effects of Climate Change.

However, Kenya finds herself on the right tract having enacted the Environmental Management Act which established the National Environmental Management Authority and with the Environment and Land Court entrenched in the Judiciary with the status of the High Court of Kenya without taking away the jurisdiction of the Magistrate Courts to hear the disputes which fall within their pecuniary limits.

This paper examines the Kenyan legal framework to identify the opportunities and challenges by applying the descriptive methodology.

The enactment of the Environmental Management and Co-ordination Act and the establishment of the Environment and Land Court besides the 2010 Constitution provide for Public Interest Litigations. These are great opportunities at the national and international levels to hold the Developed Countries responsible financially. This can be seized by lawyers to protect the environment by advocating for environmental friendly policies and regulations.

The major challenges in environmental law litigation are corruption and erosion of morals leading to unethical practices. This defeats the objectives of litigation in addition to the legal technicalities specifically the doctrine of *res judicata* which precludes parties from reinstating the disputes; yet, the effects and impacts of climatic change may not be predictable at the time of initiating the development projects in addition to lack of financial resources.

The research calls upon lawyers to identify themselves with the society environmental challenges and to be active agents of environmental protection.

Opportunities

We have several opportunities to protect our environment in Kenya in the process of achieving sustainable development in line with the African Union Agenda of 2063 and the United Nation's Sustainable Development Goals:

a) The Constitution of Kenya, 2010 provides for Environmental Rights in the Bill of Rights and therefore providing for legal framework for their protection and enforcement.

b) Kenya enacted the Environmental Management and Co-ordination Act of 1999 Cap 387 laws of Kenya; which Act established the mechanism for management of the environment and co-ordination between various agencies in respect to the environmental and several regulations therein are a great opportunity for lawyers. The Act requires a mandatory Environmental Impact Assessment for any project before its implementation.

   This is a precaution measure aimed at subjecting development projects to the environment needs and to ensure that those projects are managed in a sustainable manner that protects the needs of the current and future generations. Some countries do not have specific Environmental Laws and therefore lawyers try to navigate the issues of environmental protection through the Land Law legislations which makes it difficult to impose precautions on developers for environment protection.

c) Presence of the Environment and Land Court with the same status of the High Court of Kenya is another opportunity lawyers ought to explore for environmental protection. As much as the Magistrate Courts have the jurisdiction to entertain dispute related to the environment and land so long as they do not infringe on their pecuniary jurisdiction, the Environment and Land Court plays a big role in determining the disputes related to the Environment by virtue of their specialization and requisite expertise. The Judges in these Court are dedicated to the Environment matters only and their continuous Professional Development programs equip them well to hear and determine the Environmental disputes in light of the modern fast changing issues and developments.

   Many Countries do not have such Courts and the Environmental disputes are determined by the ordinary court which may impede development of jurisprudence in this area.

d) Universities that offer Law Programs in Kenya both Public and Private offer Environmental Law as one of the electives. Lawyers who graduated more than ten years ago did not get a

chance of learning Environmental law. This is an opportunity that Organizations which are Environmental Oriented may offer incentives for students to study Environmental Law just like the International Committee of Red Cross promotes and advocates for the International Humanitarian Law.

Challenges

There are many challenges on the path of Environment Protection in Kenya just to name a few: -

a) Corruption; it is the deadly disease that can destroy the society in its entirety; the Environmental Impact Assessment requirement can be reduced to a mere formality by corrupt Experts, a corrupt Judicial Officer can make the Environmental litigation mockery to the detriment of the whole society.

b) Multiplicity of Laws governing Environmental matters make it difficult to master the law on Environment in Kenya; besides the Constitution and the Environment Management and Coordination Act there are other laws regulating matters pertaining to Environment namely:
   i) The Climate Change Act (2016)
   ii) Agriculture Act (2012)
   iii) Forest Management and Conservation Act (2016)
   iv) Fishery Management and Development Act (2016)
   v) Mining Act (2016)
   vi) Energy Act (2019)

c) Since the Environmental phenomena are developing and some impacts may not be accurately predicted in the Impact Assessment Report, the doctrine of *Res- Judicata* which precludes parties from reopening matters that have already been heard and determined by the Court may be an obstacle towards Environmental Protection.

d) Lack of adequate case law since the discipline is relatively new.

We therefore call upon lawyers to seize these opportunities and actively practice in this area.

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Tackling Climate Change – Reducing Green House Gas (GHG) Emissions in the Maritime Sector

By Ashley Toywa

The shipping industry plays a significant role in combating GHG emissions in accordance with the 1997 Kyoto Protocol and in compliance with the United Nations Framework Convention on Climate Change, 1992 (UNFCCC). The International Maritime Organisation (IMO) indicated that by 2050 maritime trade could increase between 40% and 115% in comparison to 2020 levels. Currently, about 99% of the energy demand from the international shipping sector is met by fossil fuels, with fuel oil and marine gas oil comprising as much as 95% of the total demand. IMO therefore flagged that GHG emissions associated with the shipping sector could grow between 50% and 250% by 2050 in comparison to 2008 emission levels. Clearly this broad range of projected GHG emissions flags a level of uncertainty in terms of how the sector will evolve over the next 30 years.

The IMO adopted the initial Strategy for the international shipping industry's reduction of GHG towards achieving the goal set in the 2015 Paris Agreement. The Paris Agreement's goal were to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and also pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels.

The IMO-Marine Environment Protection Committee (MEPC 80) session held in the United Kingdom from the 3-7 July 2023 revised the initial IMO GHG Strategy (the author was privileged to have attended that session). The revised strategy aims to significantly reduce GHG emissions from international shipping. The new targets include a 20% reduction in emissions by 2030, a 70% reduction by 2040 (compared to 2008 levels), and the ultimate goal of achieving net-zero emissions by 2050.

The author notes that the IMO adopted a further raft of measures for implementation in two parts. The first part is a technical element which will be a goal-based marine fuel standard regulating the phased reduction of marine fuel GHG intensity. The second one is an economic element in form of a maritime GHG emissions pricing mechanism. The development of the measures will continue at the IMO and will, according to the agreed timeline, be adopted in 2025 and enter into force around mid-2027.

Apart from the IMO initiatives, the International Tribunal for the Law of the Sea (ITLOS) on 12 December

2022 received a request from the Commission of Small Island States on Climate Change and International Law ("the Commission") requesting ITLOS to render an advisory opinion on two main legal questions in respect to what the specific obligations of State Parties are to the United Nations Convention on the Law of the Sea (UNCLOS), including under Part XII (Protection and Preservation of the Marine Environment):

a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere; and

b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification.

Similarly, the United Nations General Assembly (UNGA), on the 29 March, 2023 adopted resolution A/RES/77/276 in which, referring to Article 65 of the Statute of the Court, UNGA requested the International Court of Justice (ICJ) to provide an advisory opinion clarifying the obligations of States in respect of climate change. On the 18 July 2023 under press release 2023/42, the Court authorized the African Union to participate in the proceedings.

The ICJ has been asked to consider not only what States are legally required to do under international law to avert further climate change both now and in the future, but also to assess the legal consequences under these obligations when governments, both through what they do and fail to do and the resulting significant harm to the climate system and other parts of the environment.

The author avers that, whilst the ICJ and ITLOS (hearing scheduled for 11 September 2023) advisory opinions are not directly binding, they provide an authoritative interpretation of international law which under customary international law confers *jus cogens* and *erga omnes* obligation and application on State parties. The outcome of the advisory opinions and the IMO measures are expected to significantly achieve stabilization of GHG concentrations in the atmosphere at a level that would prevent dangerous interference with climate system.

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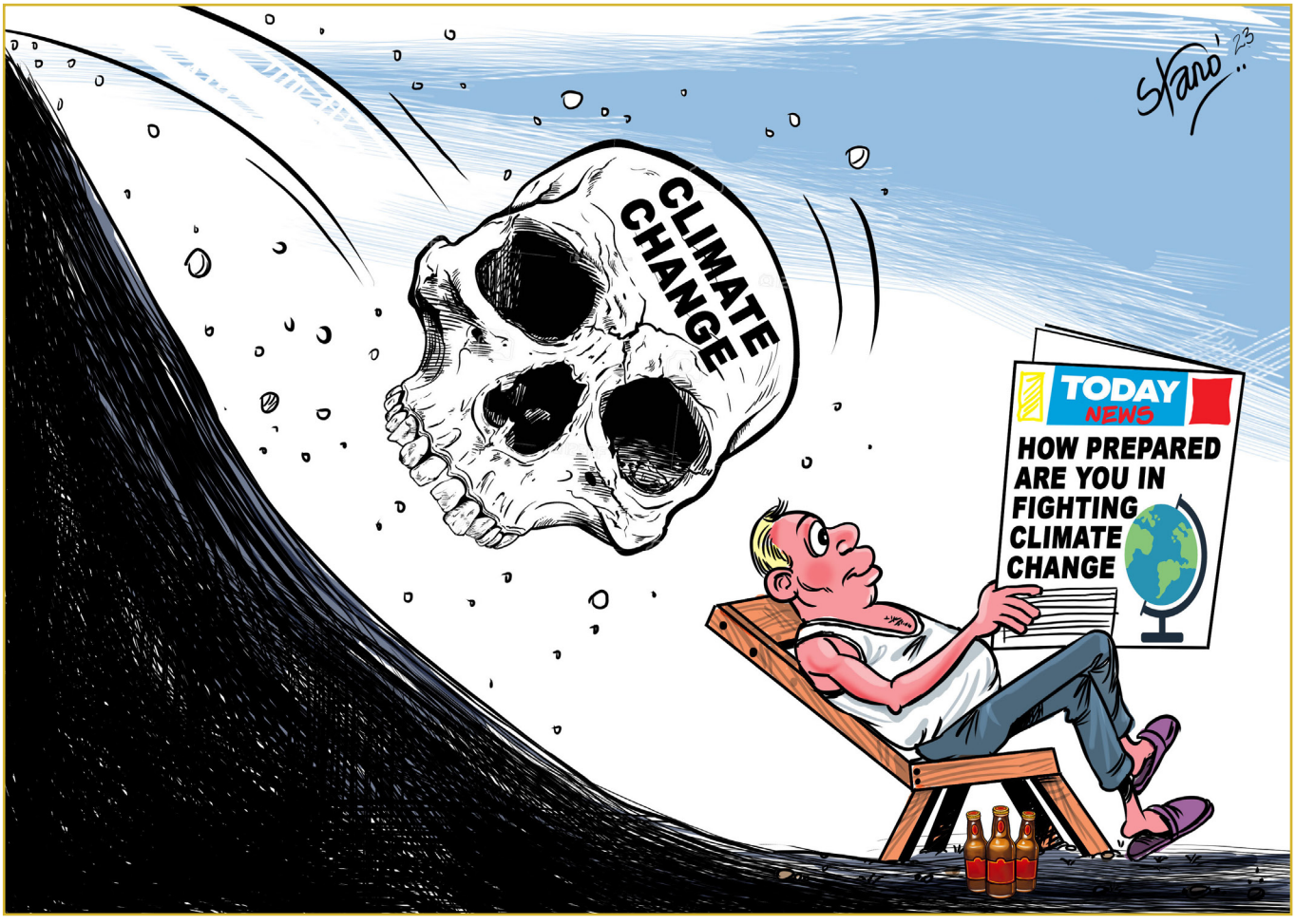


Chamber Break

Strange Laws Around the World

1. **It's illegal to pass wind in a public place after 6pm on Thursdays in Florida**

   One weird law, that's since been long-forgotten, is that it's illegal to pass wind in Florida after 6pm on a Thursday. It's never really been enforced in Florida but it was probably written in the 1800's. It's not clear why this ever became a law, or a rumoured law in the first place. There's probably a good opportunity here for an aspiring lawyer to practise their debating skills, though (see our skills advice for aspiring lawyers) – the law states that it is outlawed to 'annoy the community' or 'corrupt the public morals', both of which are naturally very open-ended statements demanding some level of subjective interpretation. Would passing wind certainly annoy the community, or would some members exhibit a more comedic response? Discuss (30 marks).

2. **In Samoa, it's illegal to forget your wife's birthday**

   You will get more than the silent treatment from your wife if you forget her birthday in Samoa. It is unclear how long your sentence would be (it's been implied that the first offence may only culminate in a warning), but maybe some time apart for you to think about how to make it up to her wouldn't be too bad.

3. **It's a legal requirement to smile at all times except at funerals or hospitals in Milan, Italy**

   What's with the long face? In Milan, the law compels you to smile. It's prescribed by a city regulation from Austro-Hungarian times that was never repealed. Historian Andrea Santangelo recalls this rule as stemming from the suggestion of one Luigi Fabio. Exemptions included funeral goers, hospital workers or those at the bedside of an ill family member. For everybody else there is no excuse for being glum, the alternative being a fine. Not that there is too much to be unhappy about in Milan for visiting tourists, who flock to the city in great numbers every year.

4. **It's illegal to let your chickens cross the road in Quitman, Georgia**

   Simply put, the law wants owners to have their chickens under control at all times.

   Georgia likes to ensure the safety and sacredness of their chicken because in Gainesville Georgia, you eat fried chicken with your bare hands. Keep your forks away from them. The law describes chicken as a "culinary delicacy sacred to its municipality." Perhaps this is why chicken deserves a specific transport safety law. Part II, Chapter 8 specifically states: 'It shall be unlawful for any person owning or controlling chickens, ducks, geese or any other domestic fowl to allow the same to run at large upon the streets or alleys of the city or to be upon the premises of any other person, without the consent of such other person'. Quite the mouthful – and much less entertaining than a subgenre of jokes which comes to mind.

5. **It's illegal not to walk your dog at least three times a day in Turin, Italy**

   Dog owners in Turin, Italy will be fined up to €500 if they don't walk their pets at least three times a day, under a new law from the city's council. Italy considers itself an animal-loving nation and in many cities stray cats and protected by law.

   To enforce the law, Turin police would rely largely on the help of tipsters spotting cruel treatment by neighbours. Turin has the most stringent animal protection rules in the country – they even ban fairgrounds from giving away goldfish in bags. We can certainly appreciate the sentiment to protect animal welfare with these ones (as obscure as they may seem).

By Declan Peters

Will you one day smile?

Cut each tree
Plant none in return
Let the saw slice each forest
But, when our land
Shall turn arid
And hunger and dust our harvest
Will you smile?
Burn plastics and polythene...
Cough fumes from the vehicles' back box
Let the industries sneeze their toxic pukes
But, when our rain
Shall turn acidic
And cancerous rays pinch our skin
Will you smile?
Creature of clay and wit
Return nature's smile and you'll smile
Greed is the path of slipperiness
Leading to a muddy granary of tears
Spare the stinging shrubs, they're our herbs
Forests and reeds inhabit our gods
The sunbird and weaverbird stay here too
Creature of love and volition
Make your will today and protect your mother
For nature is our mother
Who harms nature, harms his mother,
harms our mother
And who harms a mother, harms
himself and all

By Bonface Nyamweya

A Kenyan ***poet and novelist***. Moreover, he is a law student (LLB) at the University of Nairobi and is an intern at the National Council for Law Reporting (Kenya Law).

THE NEW KENYA LAW CASE LAW DATABASE - KEY FEATURES AND CAPABILITIES

Nelson K. Tunoi

Advocate of the High Court & Senior Law Reporter at Kenya Law

INTRODUCTION

Kenya Law embarked on a project to develop a new case law database in order to improve the quality and accessibility of legal information in Kenya. The new database is based on a customer-focused quality policy that aims to provide accurate, timely, and accessible legal information to users.

The database has been designed to be adaptable to the needs of different users, and it will enable Kenya Law to deliver additional products and services to its users. This will provide a better user experience for users and will also improve the business processes around reporting of case law. The database has made it easier for Kenya Law to track and manage cases, and it will be practical and convenient to produce reports on the development of Kenyan jurisprudence.

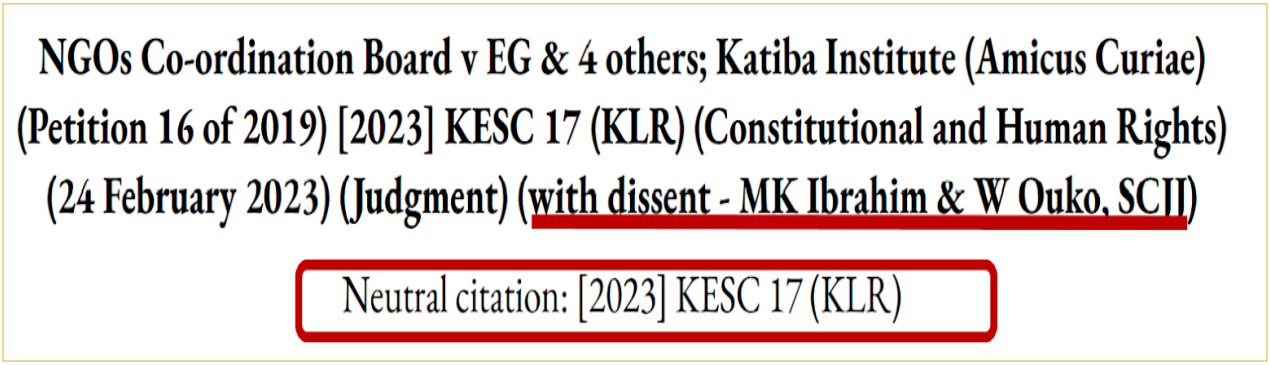
SALIENT FEATURES

a) Medium-Neutral Citation (MNC)

The Medium Neutral Citation (MNC) means the allocation of a unique identifier for referencing and allows for the specific citation of cases. This is an automated task within the system that assigns a unique MNC to a decision. The rationale for this allocation is to ensure that all cases are uniquely identifiable and are distinguished across the various available platforms online, especially where the parties are the same. This is in line with the international reporting standards.

The figure below shows a case with the neutral citation allocated to it.

Figure 1: Example of a case with the medium neutral citation (MNC).



b) Standardized Formatting

The extensible mark-up language (XML) is a mark-up language and file formart for reconstructing arbitrary data. It defines a set of rules for encoding documents in a formart that is both human-readable and machine-readable. Court decisions are normally published in various formats, some with paragraphs and others without. The variation of the publishing style necessitates the use of extensible mark-up language (XML) to format and present decisions online in a standardized and structured manner. Even in instances where judicial decisions contain footnotes, the system

is able to capture them accordingly and has made it easy for a reader/user to cross-reference. This has greatly improved the user experience.

Figure 2: Example of a standardized formatted case.

19. Emphasizing absence of jurisdiction to charge the arrears, counsel cited Owners of the Motor Vessel *"Lillan S" v Caltex Oil (Kenya) Limited*[4] and argued that the Respondent has not shown any law permitting it to collect the fees in arrears. To fortify his argument, he argued that Article 210 of the Constitution provides that no taxation may be imposed, waived or varied except as provided by legislation. He argued that the license fees is a form of taxation and that the Respondent as a state organ is subject to Articles 10 and 47 of the Constitution. Further, he argued that the Respondent's decision to lock access to the online payment was declared unconstitutional by the court in Petition No. 8 of 2020 which decision the Respondent never appealed against. Also, he submitted that the finance act relied upon by the Respondent does not provide for payment in arrears and cited *Saqib Shahbaz & 2 others v Kenya Revenue Authority & 2 others*[5] in support of the proposition that taxation legislation must be interpreted strictly.

[4] [1989] e KLR.

[5] [2021] e KLR.

20. Counsel submitted that to the extent that the payment of arrears lacks statutory backing, then its an illegality and cited *Macfoy v United Africa Co. Ltd*[6] in support of the proposition that a nullity is a nullity and nothing can stand on nothing. He also cited *Holman v Johnson*[7] cited in *Susan Wakuthii Kibata & another v Elizabeth Njoki Murage*[8] for the holding that no court will lend its aid to an illegal act. He argued that since the Respondent's actions were declared illegal, they cannot be allowed to stand. He further relied on *Mistry A. Singh v Serwana Wofioviva Kulubwa*[9] which held that a court cannot enforce an illegal contract. He argued that the Respondent breached Articles 10 and 47 of the Constitution, so, it should not benefit from its illegal actions.

[6] [1961] 2 ALL ER 1169 at 1172.

[7] [1775-1802] ALL ER 98.

[8] [2017] e KLR.

[9] [1963] EA 408.

21. Additionally, counsel submitted that public participation flows from the sovereign will of the people in Article 1 and it is a key pillar in the objects of devolution under Article 174. He argued that once a court finds that there was no public participation, it is obliged to strike down the decision and cited *Robert N. Gakuru and others v Governor, Kiambu County and 3 others*[10] which held that public participation applies both at the National or County Government level and it applies to the process of legislative enactment, financial management and planning.

[10] [2014] e KLR.

c) Hyperlinking of Cases and Statutes

Cases and statutes cited within decisions processed on case law database are hyperlinked for ease of referencing. When a user clicks on the hyperlinked cases and statues, they open in a new tab to avoid interrupting the user experience. The hyperlinking has also helped in identifying and flagging "lost jurisprudence" that had not been previously reported.

Figure 3: Illustration of how cited cases and statutes are hyperlinked within a decision.

88. That is not to say that where there is evident abuse of discretion by such bodies, when there is arbitrary behaviour, malice, caprice, and disregard for the principles of natural justice, the courts can sit back. As held by the Court of Appeal in *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR, the courts have a duty to intervene where the exhaustion requirement would not serve the values enshrined in the *Constitution* or law.

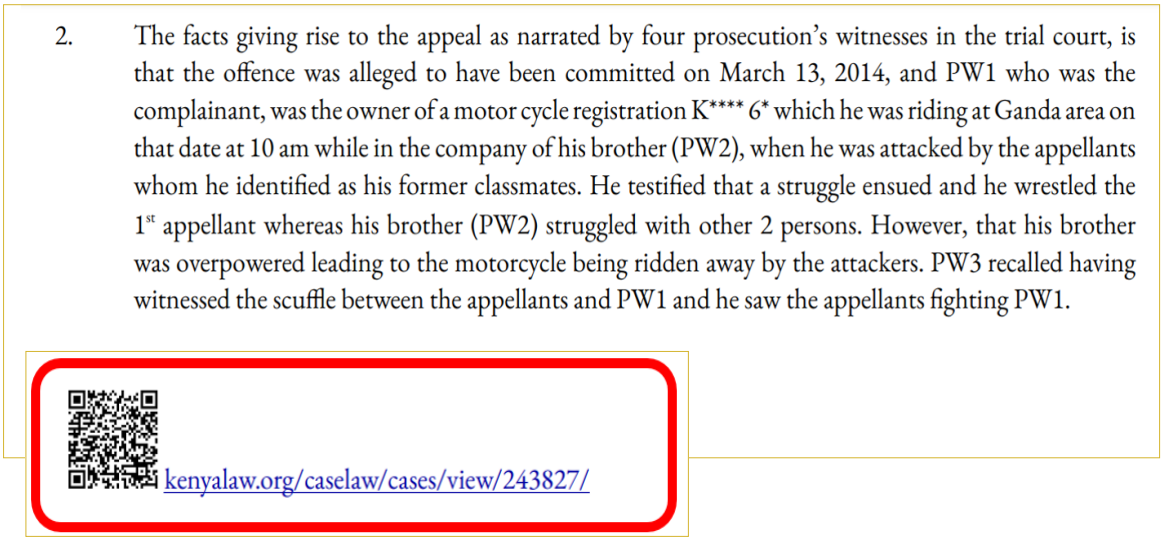
89. That said, in the present case, I agree with the majority that the *NGO Coordination Act* does not contemplate the reservation of a name to be one of the decisions that are appealable under section 19 of the *NGO Coordination Act*. There are no substantive provisions for the approval of names under the *NGO Coordination Act*, rather the name reservation process is governed by regulation 8 of the *NGO Coordination Regulations, 1992*. This is unlike the *Companies Act*, No 17 of 2015 which has the entire part v containing sections 48 to 68 dedicated to regulating the choice of names and the reservation process for companies. It is evident that section 19 of the *NGO Coordination Act* is intended to deal with substantive decisions of refusal or cancellation of registration.

90. The appellant was not dealing with the registration of the proposed NGO but with the question of whether the name(s) that the 1st respondent sought to reserve for the proposed NGO were acceptable. The contested decision to refuse to reserve the name was made solely administratively and in accordance with the *NGO Regulations* rather than the *NGO Coordination Act*. It therefore did not attract the dispute resolution mechanism provided for under section 19.

d) QR Codes

The new case law database incorporates the inclusion of QR codes on all pages of the PDF downloads of decisions from the superior courts of record. The QR codes are accompanied by a link to the case. This is to ensure quick access and authentication of the source document (decision) from the Kenya Law website.

Figure 4: Illustration of the QR Code and link of the case at the bottom of the page.



2. The facts giving rise to the appeal as narrated by four prosecution's witnesses in the trial court, is that the offence was alleged to have been committed on March 13, 2014, and PW1 who was the complainant, was the owner of a motor cycle registration K**** 6* which he was riding at Ganda area on that date at 10 am while in the company of his brother (PW2), when he was attacked by the appellants whom he identified as his former classmates. He testified that a struggle ensued and he wrestled the 1st appellant whereas his brother (PW2) struggled with other 2 persons. However, that his brother was overpowered leading to the motorcycle being ridden away by the attackers. PW3 recalled having witnessed the scuffle between the appellants and PW1 and he saw the appellants fighting PW1.

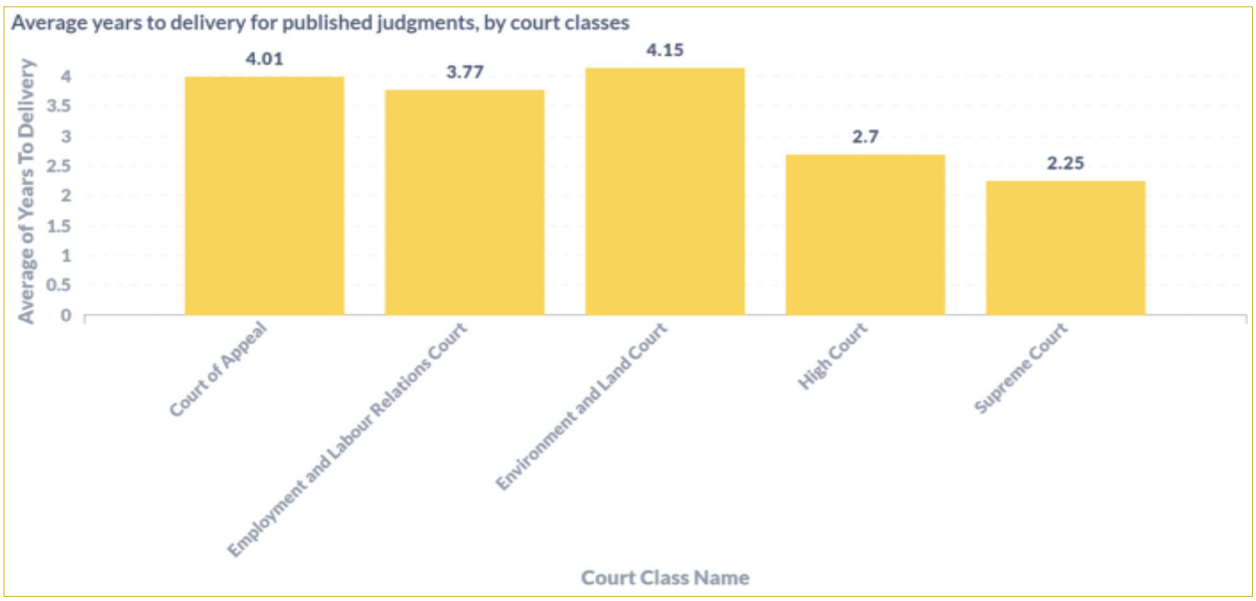
kenyalaw.org/caselaw/cases/view/243827/

e) Data Analytics

Business intelligence (BI) analyticscan be used to answer questions about the past, present and future, and to make predictions about what will happen. The new case law database has the BI analytics enabled and this allows for the generation of various reports - for example one can generate reports showing the trends of outcome of appeals; the courts that are the busiest across the counties; prevalence of certain offences across the country; the average lifespan of a case (i.e. from filing to judgment); the judges who are most likely to dissent; etc.

Furthermore, there is the automatic generation of periodic and customized reports that provide analytical information in various representations including but not limited to data visualization, online analytical processing, graphs, charts, percentages, visualized maps and hierarchical lists.

Figure 5: Illustration of the average time taken (in years) to deliver decisions in Kenya.



f) Case Law Database Capabilities

The case law database has various capabilities that enhances legal research. These include metadata extraction; the pop-up of definition and/or interpretation of non-English terms and abbreviations by "mousing-over" the content; ability to aggregates case law or law reports into thematic areas; the creation of collections consisting of the Law Reports (KLRs) and Case Digests – meaning the availability of both the print and online digital copies; high quality and consistency in presentation (front-end); the standardization of online and print content i.e. the online content (front-end) will look and feel similar to the print publications.

The case law database is also able to produce the same document on different formats (for web, print pdf, in-design, XML, etc.).

Draft volumes of the Law Reports can be produced at any time in the course of the year. Similarly, different products can be produced within the system, e.g. the weekly newsletters, lists and digests, etc.

CONCLUSION

The launch of the new case law database is a step in the right direction to enhance legal research and ensure that legal information is processed in a timely, accurate and accessible manner. The system also helps in the tracking and reporting on law reform issues and differences in judicial reasoning emanating from the courts.

The hyperlinking of statutes and cases within the decisions published will ease referencing while conducting legal research. From the data analytics point of view, judicial officers will benefit from the reports generated by the system to enrich performance metrics. The judicial officers are also benefiting from the CaseBack Service, where they are able to appreciate the determination of decisions emanating from their appealed decisions.

Figure 6: Sample of Judicial Officer report

Byram Ongaya
Delivered from 01 Jan 2023 to 31 Aug 2023
106 decisions

EMPLOYMENT AND LABOUR RELATIONS COURT

#	Case Number	Citation	Date of Delivery	Date Received	Reception Interval	Date Published
		August, 2023 (8 decisions)				
1	Cause E922 of 2021	Kenya Engineering Workes Union v Electro Technologies Limited (Cause E922 of 2021) [2023] KEELRC 1931 (KLR) (4 August 2023) (Ruling)	2023-08-04	2023-08-04	0 minutes	2023-08-09
2	Cause 1107 of 2015	Shiakamiri v National Council for Persons with Disabilities (Cause 1107 of 2015) [2023] KEELRC 1932 (KLR) (4 August 2023) (Ruling)	2023-08-04	2023-08-04	0 minutes	2023-08-09
3	Appeal E148 of 2022	Ncekei v Koleta Farm Limited (Appeal E148 of 2022) [2023] KEELRC 1934 (KLR) (4 August 2023) (Judgment)	2023-08-04	2023-08-04	0 minutes	2023-08-09
4	Petition E143 of 2023	Hussein & another v Governor, County Government of Mandera & 2 others (Petition E143 of 2023) [2023] KEELRC 1882 (KLR) (4 August 2023) (Ruling)	2023-08-04	2023-08-04	0 minutes	2023-08-07
5	Petition E032 of 2023	Makokha v National Police Service Commission & 3 others (Petition E032 of 2023) [2023] KEELRC 1881 (KLR) (4 August 2023) (Judgment)	2023-08-04	2023-08-04	0 minutes	2023-08-07
6	Judicial Review E017 of 2023	Republic v Cooperative Bank of Kenya Limited & 2 others; Kenya Union of Water and Sewage Employees (Exparte Applicant) (Judicial Review E017 of 2023) [2023] KEELRC 1880 (KLR) (4 August 2023) (Judgment)	2023-08-04	2023-08-04	0 minutes	2023-08-07
7	Cause 655 of 2018	Maina v Brava Food Industries Limited (Cause 655 of 2018) [2023] KEELRC 1933 (KLR) (4 August 2023) (Ruling)	2023-08-04	2023-08-04	0 minutes	2023-08-09

Beyond the mandate of publishing legal information and making it accessible to the public, Kenya Law continuously seeks to address issues that stakeholders face in the field of legal research, hence the development of the current case law database to address those needs.

Figure 7: Sample of Court of Appeal report - July 2023

Court of Appeal at Nairobi
Delivered from 01 Jul 2023 to 31 Jul 2023
99 decisions

#	Case Number	Citation	Bench	Date of Delivery	Date Received	Reception Interval	Date Published
		July, 2023 (99 decisions)					
1	Civil Application E185 of 2021	Director General, National Employment Authority v Al Hujura Agency Limited (Civil Application E185 of 2021) [2023] KECA 957 (KLR) (28 July 2023) (Ruling)	DK Musinga, A Ali-Aroni, JM Mativo	2023-07-28	2023-07-31	3 days	2023-08-04
2	Criminal Appeal (Application) E022 of 2023	Gichane v Republic (Criminal Appeal (Application) E022 of 2023) [2023] KECA 956 (KLR) (28 July 2023) (Ruling)	S ole Kantai	2023-07-28	2023-07-31	3 days	2023-08-04
3	Criminal Appeal 113 of 2021	Wambui (Criminal Appeal 113 of 2021) [2023] KECA 955 (KLR) (28 July 2023) (Judgment)	AK Murgor, S ole Kantai, PM Gachoka	2023-07-28	2023-07-31	3 days	2023-08-04
4	Criminal Appeal 21 of 2022	Kimani v Republic (Criminal Appeal 21 of 2022) [2023] KECA 953 (KLR) (28 July 2023) (Judgment)	MSA Makhandia, S ole Kantai, PM Gachoka	2023-07-28	2023-07-31	3 days	2023-08-04
5	Criminal Appeal 42 of 2020	Gitau v Republic (Criminal Appeal 42 of 2020) [2023] KECA 951 (KLR) (28 July 2023) (Judgment)	AK Murgor, S ole Kantai, PM Gachoka	2023-07-28	2023-07-31	3 days	2023-08-04
6	Criminal Appeal 97 of 2021	Odhiambo v Republic (Criminal Appeal 97 of 2021) [2023] KECA 949 (KLR) (28 July 2023) (Judgment)	AK Murgor, S ole Kantai, PM Gachoka	2023-07-28	2023-07-31	3 days	2023-08-04

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