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— LAW LLP —



Q1 2022 Newsletter

Introduction

As the world steadfastly adjusts to our “new normal” and tries to blend it with the normal we once knew and sometimes long for, KN Law LLP is pleased to share our first quarterly review of 2022.

In the midst of the constant developments in the legal world since January, we have taken commendable strides; from steady growth of our portfolio, to successful resolutions of cases and great learnings along the way.

Our newsletters at KN Law LLP are largely driven by topical newsworthy legal issues. We provide insights on topical legislative, legal and policy changes in Kenya, as well as other relevant jurisdictions as they develop.

In this quarterly review, we will share an overview of periodical briefings covering the various legal, judicial and statutory changes in Kenya.



Two years ago, who would have thought that the digital space would become so core to our operations and livelihoods? Who would have thought it would be possible to successfully attend a court session via Microsoft Teams? Would you have imagined being able to work from home or anywhere and get your goals achieved?

The 1st quarter of 2022 has been quite the eventful one; so much has happened, and we are at pains of where to begin this newsletter; but here we go..

We're sure you've heard about the stereotype of lawyers and their brevity - remember the 943-page ruling that was issued by the Supreme Court of Kenya? We think that was quite brave, don't you?

Introduction

That ruling definitely kills the stereotype. On a light note and interestingly, did you note that there was no reference in it to Lucky Dube's song? We presume this was probably on account of copyright concerns.

In other news though, it may appear Kenya's Apex Court is neither aware of, nor a subscriber to the "Plain English Movement", and we dare say no one can stop it. It is about time the school of thought that "a word will not suffice where two or even three can take its place" was finally laid to rest. We expect that this movement will lead the willing and drag along the unwilling.



No one can refute that the 21st century is indeed the digital century, and Kenyan law is finally adjusting to this reality. We have seen the Data Protection Regulations come into force this 1st quarter of the year with the Central Bank Act being amended to regulate digital lenders.



A discussion paper on a central bank backed digital currency has also been published by the Central Bank of Kenya. With so much talk around the world around block chain and crypto currencies, this exciting development appears to signal a shift in mindsets and policies. Of course, this will also impact regulatory sentiment over public utility of the "new" currencies locally and regionally.

Introduction

We suspect that this shift is driven by the increased public awareness of the utilities of these technologies, and their role in shaping the future.

Obviously so, the world has never been this interconnected before. A classic example is the incident that happened at the recently held 94th Academy Awards (The Oscars 2022). A “perceived” joke quickly became a global discussion around health awareness on a medical condition affecting thousands of women.

It became a question of “what would you have done, who would you rather be?”. For a moment, not even the Russian war in Ukraine and the rapidly shifting geopolitics appeared to matter.



The Year of the Tiger is off to quite an interesting start and we're excited to see what's ahead

We could go on and on, but we will stop here and let you indulge in the KN Law LLP Quarter 1 Newsletter. We hope this publication provides much needed legal perspective and insights to an already exciting start to 2022.

Enjoy your read!

About KN Law LLP

KN Law LLP is a boutique corporate and commercial law firm operating in Nairobi, with a regional reach across several jurisdictions. We have proven expertise and experience in providing legal advisory services to local and multi-national corporates and high net worth individuals. We offer our clients innovative, efficient and practical legal solutions. Through a team of highly trained, skilled and experienced lawyers, we ensure that our service offering to clients not only meets but continually exceeds expectations.

We see ourselves as partners with our clients, ensuring we understand their business and their needs in order to provide effective and pragmatic legal solutions.

We are committed to achieving our clients' objectives in the most practical and cost-effective way while delivering high quality legal services.



At KN Law LLP, we offer you:

-  A team of experienced lawyers and support staff who have big firm and corporate experience
-  The flexibility and personal attention of a medium sized firm
-  An enthusiastic, energetic and professional approach.





Looking To Invest In Kenya?

Here Is What You Need To Know

With so many emerging business opportunities in Kenya, Nairobi has become the sweetheart of potential investors. Being one of the most attractive business destinations in Africa and with the East African Community growing beyond borders, this is the best time to make that investment decision.



So, what do you need to know before you invest?

In this think piece, we share our sentiments gathered over the 1st quarter of 2022.

Earlier this year, KN Law LLP formed part of the contributing team in the **Chambers Global Publication on investing in 2022** spotlighting the law and practice when investing in Kenya. In the Publication, we highlighted the regulatory framework for foreign direct investments (FDI) and the prevailing economic, political and business climate in Kenya.

Since the production of the publication, there have been other developments which would be of interest to a potential investor. In the financial services sector, the Central Bank of Kenya (CBK) issued a discussion paper on CBK Digital Currency, aimed at looking for an alternative payment system to cash and mobile or online banking among other objectives. It is expected that the digital currency will reduce the cost of cross-border payments and enhance interoperability. Another development was, the enactment of the Central Bank of Kenya (Amendment) Act 2021 and the Digital Credit Providers Regulations 2022, which are aimed at regulating the sub-sector and increasing transparency in digital financial services. The Amendment Act and the Regulations require mandatory registration by digital credit providers and also require them to comply with the provisions of the Data Protection Act and the Consumer Protection Act.



Some of the attractive attributes of Kenya include its continued review of business regulatory frameworks that make it seamless for investors to conduct business within and around the country. Kenya also has a robust telecommunication infrastructure that greatly enhances efficiency of business conduct.



Another contributing factor to the attractiveness of the country is the elimination of various compliance requirements for foreigners. Relying heavily on the "Big 4 Agenda", which is anchored on infrastructure and the growth of the manufacturing sector, food security and affordable housing, Kenya has seen a significant increase in foreign direct investment. This can be attested to by the growth of the real estate sector, increase in the uptake of commercial real estate by international brands, the soon to be opened Nairobi Expressway, and the return of the Kenya Safari Rally, among so many other highlights.



Having taken an all-round approach to positively positioning the country, the country has embraced environmental, social and governance (ESG) parameters to ensure sustainability in the conduct of businesses in the country. Specifically, the ESG Disclosures Guidance Manual 2021 issued by the Nairobi Securities Exchange has standardized the ESG information that should be reported on by listed companies.



Foreign direct investment (FDI) plays an integral role in any effective economic system, and Kenya's keenness to stamp itself as a primary destination for business and leisure can be felt across the globe. FDI is a catalyst for development there has been significant progress in enhancing and changing policy and regulations in the business environment.



As such, with ease of setting up and running businesses in Kenya, there has arisen a need to address the lack of a 'national tax policy'. Over the years there have been numerous changes made to the tax laws in Kenya. This lack of consistency and predictability tends to be driven by the revenue collection goal. In most cases tax measures introduced do not take into account the unique factors that may be affecting a sector or industry. It is not uncommon to see a tax initiative introduced in one budget cycle and withdrawn in the next.



The Country's proposed Budget having been read just over a week ago also sheds light on the direction of the government as regards proposed changes within the licensees of the Capital Markets, the products under the investment classes in the Retirement Benefits Act, insurance for passengers in two wheelers (motorbikes) and three wheelers (tuk tuks), changes to the Kenya Revenue Authority's name and having some tax laws with no expiry, make for an interesting debate to the Finance Bill 2022.



Indeed, the future is looking bright for Kenya as an ideal investment destination

and here at the KN Quarterly, we will keep you abreast of the developments.

Kenya And Digital Currency

The phrase “digital currency” has been making quite the rounds globally, and closer home, the phrase has become quite common, albeit little understood. The rapid adoption of digital technology in finance has led to the fast rise of digital currency globally due to advancements.



Kenya And Digital Currency

So, what is a digital currency?

Digital currency simply means electrical forms of money that are stored, exchanged and managed over the internet. This currency operates independent of a central authority and has similar uses to traditional currencies. Digital currencies include cryptocurrencies, central bank digital currencies (CBDC) and stable coins.

In a recent KN [article](#), we looked at the practical applications of cryptocurrency in lending, smart contracting, and the capital markets.



What Do Digital Currencies Mean for Kenya?

In order to decipher what this “new” currency means for our country and region, it is important to understand Central Bank Digital Currencies (CBDC’s).

These are digital forms of a country’s regular currency that are also managed and regulated by the central bank. The banking regulator issues electronic coins or accounts the same way it prints and issues cash. These coins are backed by the complete trust and recognition of the government.

Cryptocurrencies are digital currencies whose records are kept on and transactions verified by a distributed network of computers rather than a central bank.

While cryptocurrencies have volatile values, stable coins stabilize their value by tying it to an asset, commodity, or currency. This steadying effect may also be achieved through software control of the stable coin’s supply. It is important to note that in 2021, Kenyans were ranked 5th globally in cryptocurrency adoption.



What does Kenyan law say about digital currency?

Currently, the law does not say much about these currencies, but this may not be the case for longer; especially when some reports estimate that more than USD 300Mn in cryptocurrency assets are transferred across Africa monthly.

The High Court recently held a cryptocurrency to be a security under the mandate of the Capital Markets Authority (CMA). This means CMA would be right to ask a prospective issuer of digital currency, for example through an initial coin/token offering (“ICO”), to comply with the rules on raising debt.



Kenya And Digital Currency

Looking at cryptocurrency purely as an asset class, it is expected that the CMA will enhance its regulatory and oversight function through appropriate regulations or guidelines which will clarify how ICOs or crowdfunding through cryptocurrency should be done.

The Central Bank of Kenya (CBK) oversees and regulates payment systems, payment service providers, and licenses money transfer services. CBK is mandated to ensure these products and platforms are safe and efficient for their users. CBK may therefore argue that the nature and uses of digital currencies lie within its mandate. Whether CBK can practically oversee digital currencies, especially cryptocurrencies, remains to be seen. Additionally, such oversight may not be welcomed by users who value their privacy and minimal government involvement.

What is the future of Digital Currency for Kenya?



In Kenya, our authority, the Central Bank of Kenya, while acknowledging the currency, says it still does not support cryptocurrency transactions as they are not yet regulated. However, in the recent weeks, CBK has called for public for comments on the interesting subject of central bank digital currencies (CBDCs), in order to determine their potential use in Kenya.

CBK, like many of its peers worldwide, is considering establishing a CBDC and it envisions a digital CBDC which would be a liability on CBK's balance sheet and an asset to its holders. This CBDC would be a legal tender and exchangeable for a pre-set amount of Kenya Shillings. CBK's objectives for the CBDC are to reduce transaction costs, simplify payments across platforms, and improve the efficiency of cross-border payments.

CBK must mitigate against risks such as the reduction of credit in the market due to transfers of deposits from commercial banks to the CBDC, and cyber-attacks against the CBDC platform. Just in 2021, globally, cyberattacks are estimated to have led to the direct theft of USD 3.3Bn and cryptocurrency scams led to losses in excess of USD 7.8Bn. CBK is currently collecting the views from the public on CBDC and it will be interesting to see how this develops.

We expect that digital currencies as an asset class will be regulated sooner rather than later. Mauritius pioneered this type of regulation in December 2021, and South Africa is currently looking to follow suit. We expect any legal framework established will, at minimum, identify regulated uses of digital currency and regulate digital currency service providers ("DCSPs"). Well thought out regulation would also address technical requirements for issuing digital currency to the public, governance structures and risk management for issuers and DCSPs, necessary disclosures of information, rights of cryptousers and how these should be protected.

Digital currency regulation, if well implemented, should provide comfort on the safety of their use to the public, and financial institutions who may eventually have to deal in digital currencies.

Exemptions to the application of the Sectional Properties Act

Introduction

It is no hidden fact that with the rise in ownership of sectional properties across the country, the issue of the viability of the implementation of the Sectional Properties Act, 2020 would come up.

The Sectional Properties Act 2020 sought to sub-divide buildings into units to be owned by individual property owners, whilst common property will be owned jointly by the proprietors as tenants in common.

In 2020, President Uhuru Kenyatta repealed the Sectional Properties Act of 1987 when he signed into law the Act of 2020. This signified the simplification of the registration of properties in Kenya and provided for the division of buildings into units owned by individuals who would then have title deeds for their individual properties in the buildings.

This gave property owners a sigh of relief and sense of ownership seeing as many landlords today own units in sectional properties, yet have no proof of ownership (title deeds).

However, following the enforcement of the Sectional Properties Act, 2020 ("the Act"), concerns were raised and exemptions were considered and published within the Sectional Properties Regulations of 2021 ("the Regulations").

Which properties are eligible for exemption?

The Act applies to ownership of units in a building such as offices, apartments, flats, and townhouses. The Regulations exempt the following



01

Where the Developer or Management Company (ManCo) Holds the Reversionary Interest as Legal Owner

The right of the developer to retain the reversionary interest is a beneficial provision where the cost of infrastructure is high and the developer's title is either a freehold title or leasehold for a term above 99 years.

It incentivizes developer participation in infrastructure development as they retain the underlying economic value that can later be sold. Provisions such as a Right of First Refusal in favor of the unit owners, typical in countries like the UK, may help in ensuring that unit owners' rights are protected during the sale of the underlying interest.

This clause however appears to be a catch all-clause which makes all developments eligible for the exemption once it is provided for in the agreement. This is indeed current practice with the reversionary interest transferred to the "ManCo" upon registration of all leases.

The Regulations may have been looking to cure the time lag prior to transfer of the reversionary interest. A potential way to address this, without the uncertainty, is by setting timelines for the transfer of reversionary interest after the first unit is transferred to a third party purchaser.

02

Mixed Use and Phased Developments

This exemption targets master planned communities with multiple uses such as the Two Rivers Development where due to the cost of infrastructure, it is not feasible that the development is complete within a finite time.

03

Projects of National Importance

The likely beneficiaries of this exemption are government projects, including the Affordable Housing Program as one of the Big 4 Agenda

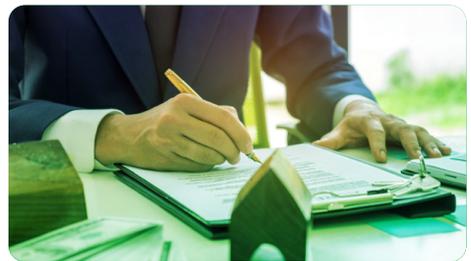
items, and industrial parks as part of Vision 2030 housed within Export Processing Zones.

What does exemption mean?

Upon the grant of an exemption, registration will proceed under the current practice of subleases with some customary completion documents being a registered lease and head title with the sub-lease entry (in the case of the Registered Lands Act properties, a Certificate of Lease).

If the interest is to be transferred to a "ManCo", additional documents include the "ManCo's" Certificate of Incorporation, Articles of Association and a Share Certificate, in respect of the purchaser's interest in the ManCo.

Rates and rent will be payable on the main title and not for the specific unit. Under the current practice of subleases, rates and rent are usually factored in the service charge payments as determined by the developer or "ManCo".



How can one apply for an exemption?

The Act and Regulations do not provide for a formal procedure for an exemption application but only set out the instances where an exemption applies.

Are there any anticipated challenges?

Within 2 years from December 28, 2020, the Act requires conversion of long-term leases. Since there is no procedure in place for exemption applications, the purpose of this provision may not be achieved in light of the time lapse before publishing of the Regulations and the expected operation delays.

It would be important that these exemptions:

- ⚖️ Are also introduced in the Act;
- ⚖️ Are clearer as to what constitutes a Mixed Use Development in terms of minimum acreage or diversity;
- ⚖️ Provide for a formal procedure and timelines for an exemption application to ensure the integrity of the Act's objectives for a unified titling system and to provide necessary assurances for the end purchasers.



Case Law review on Real Estate

In our Quarter 1 Newsletter, we provide a sample overview of real estate judgements and the implications going forward.



Case 1 Uasin Gishu Arts Society v National Land Commission and Uasin Gishu County Government

Brief

This is a case in which the Uasin Gishu County Government forcefully acquired control of a property that had been allocated to the Uasin Gishu Arts Society of Eldoret. It emerged that the society had applied for a renewal of the lease on the land that it had been given through a grant that lapsed in 2008. As per county regulations, the National Land Commission (“NLC”) invited the public to apply to lease the property. However, to the society’s shock, and despite the protests of the society, the county government went ahead to take over control of the land.

The Decision

After the proceedings, it was concluded that the holder of a leasehold title, who had complied with the terms of the lease, held a legitimate expectation that such lease would be renewed. Where such legitimate expectation arises, the Commissioner of Lands cannot breach it by issuing a lease to another person.

Significance

Where property is developed in accordance with the terms of the lease but not where the property is undeveloped or held speculatively, a right of extension of or renewal of a lease term exists.

Case 2 Bhajjee v Nondi

Brief

There arose a dispute between the two parties over a property under adjudication. The case was filed at the Environment Land Court (ELC) but the Court of Appeal went ahead to allow an appeal because the ELC had no authority to hear the case at the time.

The Decision

Land adjudication is the process of determining the existing rights and claims of people to land under the Land Adjudication Act (Cap 284). The Act contains dispute resolution mechanisms which should be exhausted before moving to court. Additionally, the Act requires a party who wants to move to court to obtain the prior written consent of the relevant land adjudication officer.

Significance

Except with prior written consent of the relevant land adjudication officer, no case can be filed in court in respect of land under adjudication. Additionally, consent obtained after the case is filed, cannot regularize the case.

Case Law Review on Real Estate

Case 3 In the Estate of Barasa Kanenje Manyo

Brief

This was a case where parties bought land belonging to a deceased person from the son of the deceased. The parties then sued in the parties in the succession case to protect their interests.

The Decision

A Grant is only effective from the date of the making of the Grant, and does not act retrospectively.

That a person is a surviving spouse or child of the deceased does not make them a personal representative of the deceased. Accordingly, any transaction in respect of the property of a deceased person before a Grant is confirmed is a nullity in law, and a criminal offence of unlawfully interfering with the estate of the deceased.

Significance

Before buying property from the survivors of a deceased person or which is subject to probate or administration proceedings, you must request for a Confirmed Grant in respect of the estate. Failing to do so means that the transaction is void and you will only be able to pursue the person who sold you the land to either recover the land or any purchase price paid.

Case 4 Attorney General v Zinj Limited

Brief

A petition was presented to the Supreme Court regarding the issue of the government permitting a grant of lease to 3rd parties. The petition challenged the Court of Appeal's decision to partly set aside the decision of the Environment and Land Court to award damages for unlawful acquisition of land and the violation of the Petitioner's right to property.

The Decision

Except through a compulsory acquisition procedure, the government cannot illegally deprive a person of part or all of their property by granting a lease to another person.

Significance

Where the government intends to compulsorily acquire land, it must notify the owner and any other person claiming through the owner. The notice must be clear that the intended acquisition is for a public purpose. The government is required to promptly pay in full just compensation to the owner. If this process is not followed, the owner has the right to seek compensation from the government.

Case Law Review on Real Estate

Case 5 Erick Otieno v Chigwell Holdings

Brief

This is a case presented in court by residents of an urban estate who accused the developer of the property they live on of violating their rights to the provision of clean and safe water and designated play areas within the estate. The residents of an estate claimed this was contrary to marketing brochures they relied on when buying the properties and their constitutional rights.

The Decision

The developer was found to have violated the residents' constitutional rights to human dignity, the duty to act in a child's best interests, as well as the right to reasonable standards of sanitation and clean and safe water.

Significance

Developers selling off-plan properties should be careful with the information they share in their marketing material, which can create legitimate expectations on the part of the buyers. Developers should be careful to ensure the developments align to the marketing material and approved physical development plans. Additionally, developers need to consider the interests of residents by ensuring developments cater to the needs of the residents which include playgrounds, and hygienic living conditions which include the provision of clean and safe water.



We would like to hear from you



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