NR & CO. QUARTERLY

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EDITOR'S NOTE

Dear Reader,

As we settle into our routine, and get well into the new year, Njoroge Regeru & Company Advocates invites all to read the first edition of our quarterly legal briefs for the year 2022. This edition is packed with exciting stories, articles and legal information. The right to privacy, data protection and elections are the key focus of this edition.

We begin by highlighting the Still I Rise International School, founded by the Still I Rise Foundation, and the Firm's contribution thereto as part of the Firm's Corporate Social Responsibility (CSR).

The 'Huduma Namba' and the Huduma Card has been a point of national interest and public interest litigation with previous editions of our newsletter covering cases such as: **Republic v Joe Mucheru & others (2021) eKLR and Nubian Rights Forum & others v Attorney General (2020) eKLR.** In this quarter we address the Huduma Number Bill, 2021 in our legal updates. We also address other key Regulations that were approved this quarter such as the Central Bank of Kenya (Digital Lenders) Regulations, 2022 and the Nairobi International Financial Centre Regulations, 2021.

On to the case highlights, we discuss the case of **Commissioner of Domestic Taxes v W.E.C. Lines (K) Limited [2022] KEHC 57 (KLR)** in which the High Court analysed the VAT Act, 2013 and the VAT Regulations, 2017 in determining whether persons who paid VAT for zero-rated goods are entitled to tax refunds.

On matters beyond the Kenyan border, we look at the impact made by more countries ratifying the African Continental Free Trade Area Treaty (AfCFTA) as well as the Democratic Republic of Congo (DRC) joining the East African Community. In celebrating International Women's Day, we highlight extraordinary women in a segment we have dubbed the 'Leading Ladies of the Skies and Beyond.'

As elections draw closer, it becomes important to know how your personal data is being used. We therefore have an article on Data Protection - titled **'Data Protection 101'** - by Wangu Gatonye and Naomi Ngugi, in light of the approval of the Data Protection Regulations, 2021, - the General Regulations, Complaints Handling and Enforcement Procedures Regulations and Registration of Data Controllers and Data Processors Regulations. We also have two articles on Elections; one by Maryanne Ochieng, titled **'Critique of the Elections Amendment Bill, 2022'** and the other written jointly by Nondi Jimmy and Agnes Ega on how organizations can create policies to deal with the political environment in the work place.

As the adage goes, all work and no play makes Jack a dull boy. Our team therefore prepared a little crossword based on our theme of data protection (clue: the answers lie in the Article on Data Protection). All the best and no cheating!

Kendi Murungi

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The Firm

Still I Rise!

Access to education remains a basic human right. It is however marred with unfortunate inequalities and challenges, more so for children in urban informal settlements.

Still I Rise International School was established and is run by the Still I Rise Foundation. The Foundation's key objective is to offer free and quality education to needy students in informal settlements. The Foundation has set up the school in the Mathare Slums, with more than one hundred and fifty (150) students, teachers, and support staff.

It is the first of its kind on the African Continent! Still I Rise International School educates the students under the International Baccalaureate (IB) Diploma Programme for free. The students at the school therefore receive an international education without the international school price tag. They are able to compete on even ground with other students from around the world without worry, this means a great deal to the students.

The Firm visited the school as part of its CSR program. The choice to visit the school was informed by the interest shown in the school's activities and a need to interact with the children. The Firm remains supportive of programs that seek to instil knowledge, confidence, hope, and a sense of self-worth. In particular, the Still I Rise programme offers an opportunity to their students to be put in an environment that enables them to rise to their potential regardless of their background.

Nelson Mandela once said that "Overcoming poverty is not a task of charity, it is an act of justice. Like slavery and Apartheid, poverty is not natural. It is man-made and it can be overcome and eradicated by the actions of human beings. Sometimes, it falls on a generation to be great. YOU can be that great generation. Let your greatness blossom."
We are truly grateful to have been granted the privilege of interacting with these children of unfathomable power and capability.

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Legislative Update

This quarter we discuss the various Bills and Regulations on matters registration of personal data, digital lenders and the International Financial centre.

Huduma Bill, 2021

The Huduma Bill, 2021 (the "Bill") was published on the 3rd December, 2021. The main aim of the Bill is to create a cohesive ecosystem in identification of persons in Kenya. Currently, there exist two systems of registration, namely the foundational system and the functional system. This Bill therefore seeks to reform the identity ecosystem and create a link between the functional and the foundational systems.

The foundational systems are civil registrations meant to provide general identification for official purposes and are found in documents such as, national identification cards, birth certificates, and refugee identity cards. These systems, although containing all the personal data details, have little to no utility in functional areas. Functional system registries vary in that they are for the registration of a particular service or transaction such as health cards, passports, driving licenses all of which relate to a particular agency providing certain services.

The Bill therefore proposes to adopt the foundational identity system model which would establish the National Integrated Identity Management System (NIIMS) as the primary database for both the functional and foundational data of all citizens and resident individuals in Kenya. It would therefore be the database of voters, taxes, social services, among others. The proposed purpose of consolidating all information into a single database is to have one record which can provide opportunities for fiscal savings, development of the digital economy and enhance public and private sector service delivery.

The (NIIMS) is guided by the principles of Digital Object Architecture which includes three components namely:

- NIIMS database;
- Huduma Namba; and
- Huduma Card.

The Bill therefore sets out the process of registration through mass registration and then continuous enrolment and updating of personal data. After enrolment all those registered will be assigned a unique Huduma namba and issued with a Huduma card. The procedure provides that there shall be registration of births and enrolment of newborns. Upon death the Huduma namba shall be retired and the card revoked. Furthermore, the data contained under the NIIMS database will be utilized in issuing passports.

Affected registries will therefore include: registration of birth and death, national identity registry, passport (immigration registry), tax registry (Kenya Revenue Authority), transport registry, refugee registry, voter's registry, marriage registry, national health insurance registry and national pension registry.

The Bill sets out the data protection safeguards that will be accorded to NIIMS and adopts principles of international best practice. The Principal Secretary will be designated as the data controller for NIIMS, with a mandate to ensure data privacy rights of the enrolled persons, thus incorporating provisions of the Data Protection Act. The Bill provides for offences relating to NIIMS and designates NIIMS as a computer system protected under the Computer Misuse and Cybercrime Act.

The Bill also provides for administration of the Act, with the Principal Secretary (for matters relating to registration of persons, immigration and citizen services) to be responsible for proper administration of the Act and the Cabinet Secretary (for matters relating to registration of persons, immigration and citizen services) empowered to make regulations to implement the Act. The Bill also establishes a co-ordination committee to provide collaboration between the various government Agencies.

The Central Bank of Kenya (Digital Credit Providers) Regulations, 2022

On 18th March, 2022 the Central Bank of Kenya (CBK) Digital Credit Providers Regulations (the 'Regulations") was gazetted pursuant to the Central Bank of Kenya (Amendment) Act, 2021, which was discussed in previous editions of this Newsletter. The regulations apply to institutions licensed under the following:

a. Banking Act Cap 488;
b. Microfinance Act No. 19 of 2006;
c. Sacco Societies Act No.14 of 2008;
d. Kenya Post Office Savings Bank Act Cap 493B; and
e. Those who provide credit services; or
f. Any entity whose digital credit business is regulated under any other written law.

Those who wish to carry out the digital credit business are required to apply to be licenced by the CBK. The regulations provide the requirements for registration in the form of an application accompanied by company documents and descriptions of how the credit service system operates. This includes descriptions of how the delivery channels operate or the information and communication technology system operate.
The applicant must also provide their policies and procedures on Anti-Money Laundering and Combating the

Financing of Terrorism (AML/CFT) as well as those of data protection.

Successful applicants will be issued with a license, however, this may be suspended or revoked if the licensee:

a. Contravenes any licensing conditions;
b. Fails to pay annual fees;
c. Is found to have given false information during the licensing process;
d. Ceases to carry out the business of a digital credit provider;
e. Goes into liquidation or is issued with an order for its winding-up;
f. Violates anti-money laundering laws or combating the financing of terrorism laws; or
g. Contravenes any other related laws.

Any amalgamation or transfer of assets and liabilities for digital credit providers must first be approved by the CBK.

The Regulations provide that digital credit providers must have at least one registered place of business in conformity with the Companies Act No. 17 of 2015. They are also required to strictly ensure that customer information is kept confidential and may only allow access to such confidential information with the consent of the customer.

The exchange of information between the digital credit providers and licensed credit reference bureau(s) is permissible where this is reasonably required for discharge of their functions. However, this information is limited to the extent of determining whether or not to extend credit services to a customer.

The Regulations provide that digital credit providers may only extend credit facilities subject to their terms and conditions. Customers must be notified of these terms and any variations to these terms must be communicated to customers at least thirty (30) days before these variations take effect. There is also an obligation on the digital credit providers to assess the credit worthiness of customers before advancing credit facilities.

The Regulations put in place a limit for Digital credit providers in relation to recovery from customers in respect of non-performing loans. The Regulations go on to create standards and practices to be adhered to when engaging in debt collection from customers. These clauses along with others mentioned in the Regulations facilitate the principles of consumer protection. This is done by requiring digital credit providers to have a mechanism to handle customer complaints.

Finally, the Regulations provide for administrative sanctions that may be imposed against digital credit providers who violate the provisions of the CBK (Amendment) Act and these Regulations. It will therefore be important for organizations which are regulated by these Regulations to take the necessary steps and be complaint.

The Nairobi International Financial Centre Regulations, 2021

The Nairobi International Finance Centre (NIFC) has been established to attract businesses to Nairobi and provide them with the conditions to flourish in Kenya and in the East African region.

The National International Financial Centre Act, 2017 (the "Act") was established to provide a legal framework to facilitate and support the development of an efficient and competitive financial services sector that is on the global scale. The Centre would then generate a high level of national savings and investments.

The Act provides that the Cabinet Secretary for National Treasury and Planning may make regulations for the better carrying out of the purposes and objectives of the Act on the recommendation of the NIFC Authority.

The object and purpose of the Regulations is to:

a. Provide a definition of what makes up a qualified activity in this business zone.
b. Provide a list of qualified activities under Schedule 1 of the Regulations.
c. Provide the procedure to gain certification to carry on qualified activities in the NIFC.
d. Provide the information and reports that the Certified Firm is required to provide to the Authority for reporting purposes.
e. Provide the process that the Authority shall take if there is need to investigate a certified firm.
f. Provide the process the Authority shall take in the event that they need to supervise a Certified Firm.
g. Provide the Authority with disciplinary powers that are to be used if the Authority considers that a Certified Firm, or person has contravened any laws or regulations.
h. Provide the process that the Authority will use in exercising their disciplinary powers.
i. Provide the schedule of fees and the categories of fees for the firms or individuals that wish to partake in the NIFC.

The NIFC aims to focus and provide investment opportunities for enterprises that contribute to the growth of the economy. This includes financial institutions, asset managers, insurance companies, private equity, venture capitals and investment firms. It also will focus on fintech companies, those involved in green finance and digital finance. Therefore, firms that wish to become NIFC firms can apply for certification with the NIFC Authority.

case Highlights

This quarter, we highlight the following key case on Value-Added Tax:

Commissioner of Domestic Taxes v W.E.C. Lines (K) Limited [2022] KEHC 57 (KLR)

This was an Appeal by the Commissioner of Domestic Taxes to the High Court having been dissatisfied with the ruling of the Tax Appeals Tribunal. Brief facts of the Appeal are that:

The Respondent is a Kenyan limited liability company and the exclusive local and shipping agent of WEC Lines BV ("WEC BV") a company incorporated in the Netherlands pursuant to an Agency Agreement dated 1st January, 2009 (hereinafter "the Agency Agreement"). WEC BV's business consists of maritime transportation of containerized goods to, from or through territories and operates vessels calling at various ports in those territories.

On various dates, the Respondent made VAT refund applications amounting to KES 6,440,624.00 for the income period February 2015 to January 2018 to the Commissioner on the basis that it was offering zero rated services to WEC BV being exported services and supply of taxable services to international sea or air carriers on international voyage or flight. After considering the applications, the Commissioner, in its letter dated 18th April 2018 informed the Respondent that it had rejected the same after reviewing the Agency Agreement because from the said Agreement, the Respondent is paid a commission and that the services offered by the Respondent include but not limited to solicitation of business, customer service, booking, documentation, quotation of rates, collection, administration and forwarding of claims. The Commissioner further cited Regulation No. 13 of the VAT Regulations, 2017 in concluding that the Respondent's supplies do not qualify as exported services and as such was taxable at 16%.

The Respondent formally objected to this response through its letter dated 17th May 2018 and the Commissioner in turn rendered its objection decision on 25th May 2018 ("the Objection Decision") where it reaffirmed its earlier decision of rejecting the refund claims. The Commissioner insisted, inter alia, that only services provided to the vessels themselves and not its owners were zero-rated.

The Respondent was dissatisfied with the Commissioner's Objection Decision and lodged an appeal at the Tax Appeals Tribunal ("the Tribunal"). The Tribunal heard the parties' arguments and submissions and, in their decision, framed two issues for determination: -

a. Whether the provisions of the VAT regulations, 2017 supersede the provisions of the VAT Act, 2013 and;
b. Whether the Respondent's services are zero-rated for VAT and if so, whether it was entitled to a refund.

The Tax Appeals Tribunal ruled in favour of the Respondent and found, inter alia, that the Respondent is registered for VAT and made zero rated supplies and is therefore entitled to the VAT refunds. The Tribunal allowed the Respondent's Appeal and set aside the Commissioner's Objection Decision.

It is on this premise that the Appellant filed its Memorandum of Appeal at the High Court where the Court noting this was a second Appeal and was therefore only limited to matters of law, was faced with addressing the following issues:

a. Whether the VAT Regulations, 2017 are applicable and were in conflict with the VAT Act, 2013; and
b. Whether the marketing, customer care and post landing services offered by the Respondent were used and consumed in Kenya and whether these services were being offered to third parties, customers and/or importers as the consumers.

On the first issue, the Court emphasized its affirmative duty to give effect not only to the Constitution but also to clear provisions of statute. The Court further held that the VAT Regulations, 2017 ceased to have any effect immediately on the 8th day after publication since they were not tabled before the National Assembly. The Commissioner could therefore not apply them to the Respondent's case as they were at the time null and void.

On the second issue, the Court analysed Section 2 of the VAT Act, 2013 which defines "services exported out of Kenya" as 'a service provided for use or consumption outside Kenya'. The Court noted that it matters not whether that service was performed in Kenya or outside Kenya. The determining factor is the location where that service is to be finally used or consumed. WEC BV, a company incorporated in the Netherlands stands to benefit from the services offered by the Respondent as stated above and it follows that the services offered by the Respondent to them were exported services that were not consumed in Kenya and thus were zero-rated for purposes of VAT.

In the upshot the Court found and held that the Tribunal did not err in its determination that the Respondent, having made zero-rated supplies, is entitled to VAT refunds due to it. The Commissioner's appeal lacked merit and was dismissed with costs to the Respondent.

INTERNATIONAL UPDATES

This quarter we look at developments in trade involving our neighbours and the continent at large. We therefore focus on the trading blocks, both regional and continental.

Tanzania and Cape Verde (Cabo Verde) ratify the African Continental Free Trade Agreement (AfCFTA)

Africa has a population of roughly 1.2 Billion people. Africa therefore has the potential, if there was economic integration, to have a unified trading block. The members of the African Union (AU) established the African Continental Free Trade Agreement (AfCFTA) (the "Agreement") set to be implemented beginning of 1st January, 2021. Of the fifty-five (55) member states of the AU, all have signed the Agreement save for Eritrea.

On 17th January, 2022 Tanzania fulfilled the formal requirements to adopt the Agreement after ratifying the same and the said ratification being approved by Tanzania's parliament. Cape Verde, also known as Cabo Verde (an island off the West African Coast), also ratified the Agreement on 5th February, 2022. This means that, so far, forty-one (41) countries have ratified the Agreement. Somalia is set to be the next country to ratify this Agreement and is at the final stages of ratification.

Democratic Republic of Congo joins the East African Community

On 29th March, 2022 the Democratic Republic of Congo became the seventh (7th) member of the East Africa Community ("EAC") joining Kenya, Uganda, Tanzania, Rwanda, Burundi and South Sudan. With a population of about ninety (90) million people and vast resources, this is a huge step towards regional integration and opportunity in the continent.

The process to join EAC, three (3) years in the making, requires extensive review. Foreign States wishing to join the East African Treaty [which establishes the Community] require a determination on the level of conformity a State has achieved with regard to the set criteria for admission and the principles set out under the Treaty. These include: democracy, observance of human rights and geographic proximity as well as inter-dependence between the applying State and the member States. The EAC is driven by the desire to have regional integration within the East Africa region.

Leading Ladies of the skies & beyond

On 8th March, this year, we celebrated the International Women's day though an infamous incident that happened the previous day attempted to mar the celebrations. Yet like a phoenix, we all rose from the ashes and reminded all that despite the challenges we face, despite the many times we are forced to be acquainted with the ground, despite our faults, despite the societal stereotypes, we remain a force to be reckoned with, we remain a mountain that simply cannot be moved, our strength remains an irksome lingering thought to misogynists and our existence is a constant reminder that every time we are threatened with a storm we look the devil straight in the eye and the devil is reminded that...we are the storm.

There are numerous women who unapologetically break and continue to break barriers. Here are such women: -

Kenyan Pilot lands plane amidst tough weather conditions

Captain Ruth Karauri on Friday 18th February, 2022 landed a Kenya Airways (KQ) Boeing 787 at London's Heathrow Airport amidst a raging storm 'Eunice'. Simply put, this was a big deal because, according to a senior KQ pilot, the normal cross-wind landing speed is 33 knots; Storm Eunice had speeds ranging above 70 knots, well above the comfortable wind speed. Ms. Karuri therefore had to apply great skill and care in landing the plane using a cross-wind technique. For some, landing Planes in tough weather conditions is expected. However, the we must remember that, "This world needs more than good works. It needs good news. Good works come out of the good news."- Mark Driscoll

Ms. Karauri attributed the successful landing on her training at Kenya Airways and the support of her first officer Ayoob Harunany. Kenya's Law on Civil Aviation is heavily regulated by the Kenya Civil Aviation Authority (KCAA) which has the primary mandate of enforcing safety and security standards. Depending on whether you see this as a triumph of the institutions training our pilots or a triumph of the pilots themselves it is all good news.

A video of this landing was widely hailed on social media and can be found on YouTube.

Kenya's first Astronaut

Kenya has its first Astronaut! Her name is Wanjiku Chebet Kanjumba and her career progression to her current occupation is quite an interesting one. So...let's get into it.

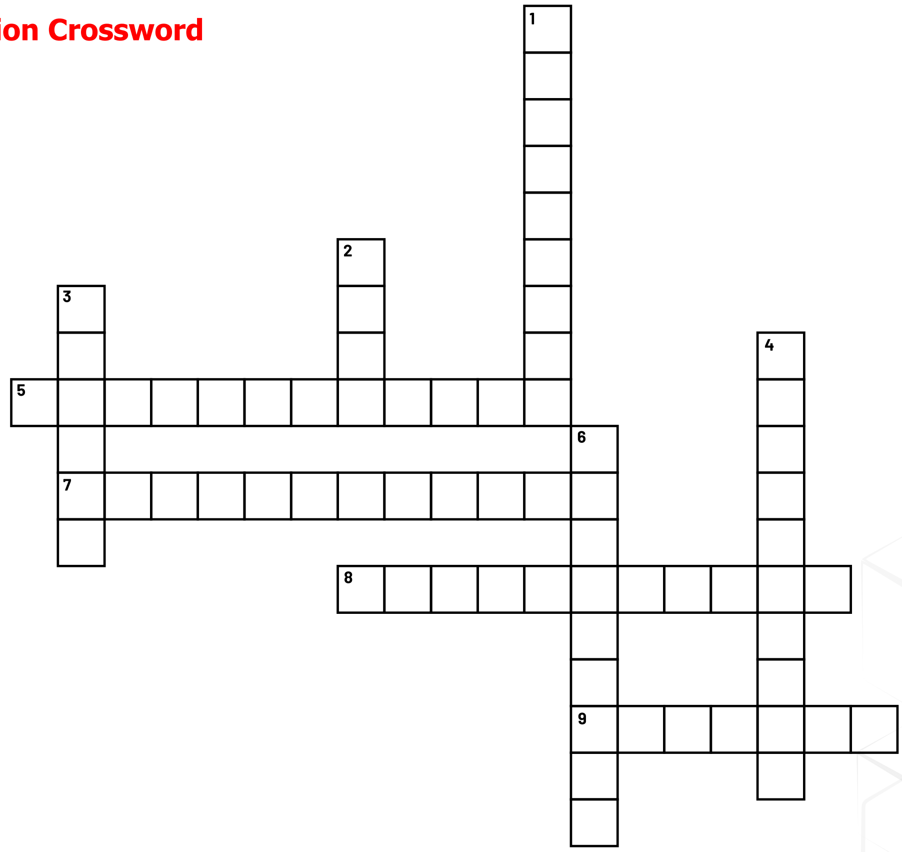
Ms. Kanjumba's fascination with all things space led her to take up a Bachelor's Degree and a Master's Degree in aeronautical engineering at Embry-Riddle College in Florida, USA. Her passion further led her to enrolling in the prestigious NASA programme, Project Polar Suborbital Science in the Upper Mesosphere (Project PoSSUM) Scientist Candidate Intense Training. Quite a mouthful, but this made her the first Kenyan Woman to undergo the training and graduate.

The motto she lives by is "Don't regret" which allowed her to dare to dream and take up these different opportunities that were offered to her. Although, she might not be chosen to go to Space, at the moment, she would be okay with that especially after the rigorous training that she survived.

It is important to note that Kenya has established the Kenya Space Agency whose focus is on coordinating, nurturing and developing the Kenyan Space Sector to maximise the utilisation of space and opportunities in six (6) major areas. These areas are; agriculture, disaster management, security, communication, urban planning and resources' management. The Agency goes as far as holding development training for University students as well as empowering young girls through space education and mentorship. In the event the Kenya Space Agency begins a space programme, it will already have its first Astronaut in Wanjiku Chebet Kanjumba.

iNTERLUDE

Data Protection Crossword



Across

5. Inserting entries in a register
7. The person in charge of the Office of the Data Protection Commissioner Kenya
8. A formal (often written) request for permission to do something or to get registered.
9. An identifiable natural person whose Information has been collected and is to be processed.

Down

1. An infraction or a failure to follow the provisions of the law
2. Information collected for processing.
3. Unauthorised access to collected information.
4. a person who determines the purposes for which and the means by which personal data is processed
6. Processes personal data on behalf of the Data Controller

2. data 3. Breach 6. processor 4. controller 7. commissioner 9. subject 1. violation 8. application 5. registration

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DATA PROTECTION 101

The right to Privacy is guaranteed under the Constitution of Kenya, 2010. Parliament therefore enacted the Data Protection Act No. 24 of 2019 and subsequently approved the data protection regulations which include:

a) Data Protection (General) Regulations, 2021
b) Data Protection (Complaints Handling & Enforcement Procedures) Regulations, 2021
c) Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2021

With the Office of the Data Protection Commissioner (ODPC) being fully operational and the regulations now in force, individuals and organizations alike must familiarise themselves on the new law and its impact.

Below is a brief Frequently Asked Questions (FAQ) on what you need to know on matters relating to data protection.

1. What is Data?

Facts or information that is collected, recorded and stored so that it can be processed by the use of a computer.

2. What is Personal Data?

Personal data is any information relating to an identified or identifiable natural person. An identifiable natural person is a person who can be identified directly or indirectly, by a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity. Furthermore, the identified or identifiable natural person who is the subject of personal data is known as a data subject.

3. What/ Who is a Data controller?

A Data Controller is a natural person, a legal person, public authority, agency or other body which, alone or jointly with others, determines the purpose and means of processing of personal data.

4. What/ Who is a Data Processor?

A Data Processor is a natural person, a legal person, public authority, agency or other body which processes personal data on behalf of the Data Controller.

Both Data Controllers and Data Processors are required to register with the Officer of the Data Protection Commissioner (ODPC).

5. How to ask/request a Data Controller or Data Processor for your information?

A data subject has a right to access their personal data in the custody of a Data Controller or Data Processor.

It should also be noted that it is possible for the Data Subject to withdraw their consent at any time to the effect of halting processing of their data by a Data Controller or Data Processor.

6. What is a Data Protection Impact Assessment?

A Data Protection Impact Assessment means a detailed assessment of the impact of planned processing operations on the protection of personal data, and the risks and safeguards put in place.

7. What is a Data Breach?

A personal data breach is when a breach of security occurs, and it leads to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or to access to, personal data transmitted, stored or otherwise processed.
The data breach thus exposes confidential, sensitive, or protected information to an unauthorised person.

8. What to do when your Data Rights are violated?

If aggrieved by a decision of any person under the Data Protection Act (DPA), one may lodge a complaint orally or in writing with the ODPC in accordance with the DPA.

Once the complaint is lodged, the ODPC will proceed with an investigation and upon conclusion of the investigations make a determination. This written determination should state: the nature of the complaint; a summary of the facts and evidence adduced; the decision and reasons therefore; the remedy to which the complainant is entitled; and any other relevant matter.

The remedies may include: -

a. issuance of an enforcement notice to the respondent that will require the person to take various steps so as to ensure compliance;
b. issuance of a penalty notice, where a respondent fails to comply with the enforcement notice, imposing an administrative fine not exceeding five million shillings (K.Shs.5,000,000.00) or to imprisonment for a term not exceeding two (2) years, or to both such fine and imprisonment.;
c. dismissal of the complaint where it lacks merit;
d. recommendation for prosecution; or
e. an order for compensation to the data subject by the respondent.

9. Are there exemptions to the provisions relating to processing of data?

The DPA provisions relating to processing of data do not apply where: -

a) processing is by an individual in the course of a purely personal or household activity;
b) processing is necessary for national security or public interest;
c) disclosure is required by law or court order; or
d) processing is the publication of a literary or artistic material

10. What are some of the Data Protection related Offences?

They include: -

- processing personal data without registering with the ODPC;
- failing to renew one's certificate of registration while continuing to process personal data after the expiry of the certificate;
- providing false or misleading information for the purpose of registration
- unlawfully disclosing any personal data as a Data Controller or Data Processor *[attracts a a penalty of three million shillings (K.Shs.3,000,000.00) or a maximum prison sentence of ten (10) years]*

A CRITIQUE

OF THE ELECTIONS (AMENDMENT) BILL, 2022

A brief background is that the presidential elections in 2007 were highly contested. In an effort to establish the cause of the election debacle, the famous Kriegler Commission was instituted. The main mandate of the Kriegler Commission was inter-alia to examine the 2007 elections from different angles and make possible recommendations for electoral reforms. Among the recommendations made by the Kriegler led commission was the introduction and adoption of electoral technology in the voting and electoral process for free and fair elections.

In the circumstances, technology was gradually introduced in the subsequent elections. The period leading to the 2013 and 2017 elections saw major amendments to the Election laws. The Elections Act No. 24 of 2011 (the "Elections Act") introduced section 39 (1C) which provides for electronic transmission of Presidential election results from various Polling Stations and Constituency Tallying Centres (CTC) to the National Tallying Centre (NTC), tallying and verification of the results received at the CTC and NTC and publication of the polling result forms on an online portal maintained by Independent Electoral and Boundaries Commission (IEBC). The objective of the amendment was to prevent manipulation of the presidential election results and to ensure that the same conforms to the requirements of the Constitution of Kenya, 2010 which provides for ingredients of a free and fair election as accurate, verifiable, secure, accountable and transparent.

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On 28th January, 2022, the leader of Majority in the National Assembly, Amos Kimunya, tabled the Elections (Amendment) Bill, 2022 (the "Amendment Bill"). This Amendment Bill seeks to amend various provisions of the Elections Act. For the purposes of this article we assess the proposed amendment to section 39 (1C) and (1G) of the Elections Act on determination and declaration of results.

The objective of section 39 (1C) is to provide for the flow of election results for a presidential election from the presiding officer to the IEBC. Section 39 (1G) provides for the IEBC to establish a mechanism for the livestreaming of results which the Amendment Bill seeks to delete.
In the foregoing, the Presiding Officer shall be required, for the purposes of a presidential election, to: -

- electronically transmit the image of the results in the prescribed form to the Constituency Tallying Centre (CTC);
- collate in the prescribed form and deliver the results in person from the polling station to the Constituency Tallying Centre (CTC);
- The Constituency Returning Officer shall then: -
- electronically transmit in the prescribed form the tabulated results of a Presidential election and deliver the tabulated results in person to the National Tallying Centre (NTC); and
- IEBC shall then be required to tally, verify and declare the results of the Presidential election from the polling stations.

Since the release of the Amendment Bill, there have been diverse opinions on what the Bill is meant to achieve, some have argued that doing away with live streaming of results is denying Kenyans their right to access to information. It is in light of this that the Parliamentary Committee on Justice and Legal Affairs (JLAC) tabled a report in parliament to delete the proposed section 39 (1C) of the Amendment Bill to further amend and substitute this section as follows:

"Section 39 (4) For purposes of a presidential election, the Commission shall -

a. electronically transmit and physically deliver the tabulated results of the election, in the prescribed form, from a polling station to the constituency tallying centre and to the national tallying centre;
b. tally and verify the results received at the constituency tallying centre and the national tallying centre; and
c. publish the polling result forms on an online public portal maintained by the Commission."

The JLAC in taking note of views from the public was cognisant of the fact that in the High Court case of Nairobi Katiba Institute & 3 others -vs- the Attorney General & 2 others [2018] eKLR declared the then sections 39(1C), 39(1D), 39 (1E), 39 (1F) &39 (1G) of the Elections Act constitutionally invalid.

As for the provision in the Amendment Bill to delete section 39 (1G) the proposed amendment now provides: "section 39 (6) The Commission shall establish a mechanism for the live-streaming of results as announced at polling stations." The requirement for the Electoral Commission to livestream final results has therefore been reintroduced by the JLAC proposed amendment to the Amendment Bill.

According to the Katiba Institute v Attorney General case (mentioned above) this requirement of results being transmitted in the prescribed form is an essential safeguard intended to guarantee verifiability, transparency and accountability of the election results transmitted from polling centres to the constituency and tallying centres.

In the Supreme Court case of Raila Amolo Odinga & another -vs- Independent Electoral & Boundaries Commission & 2 others [2017] eKLR the presidential elections results were nullified by a majority decision of four (4) against two (2) dissenting. The Supreme Court established and held that IEBC failed to conduct the Presidential elections in a manner that complied with the governing principles as set out in the Constitution and that there was failure in the process of relaying and transmitting results.

In conclusion, whether the proposed amendments will pass or not is a wait and see kind of situation. However, as the Amendment Bill approaches the final stages in parliament before it is either approved or rejected this issue will continue to be one of significant interest.

Surviving an Election Season for Business Enterprises & Entrepreneurs

Election period is here and for some businesses its effect can be almost as bad as a recession. Employees are sometimes distracted, overwhelmed, and perhaps this may affect their interactions at the work environment. Business morale may fluctuate and productivity, competence, quality, and sales can also decrease. Economic development and investments thrive where there is continuity and are greatly affected by uncertainties.

The Constitution of Kenya 2010, necessitates that the electoral system be subject to the principle that citizens must be given the freedom to exercise their political rights. Therefore, business owners and employers alike must pre-empt the challenges that may come about during the election period.

Setting rules is a more realistic way to help survive an election season. There are no laws preventing a business from establishing policies regarding employee conduct and politics. There are areas where businesses need policies regarding political activities in the workplace:

a. Use of company resources and brand
b. Employee relations
c. Customer and vendor relations

Although, codes of conduct mainly address issues in regards to smoking, grievances, dress code, among others. The policy could include language that prohibits the use of company equipment and supplies, vehicles, and space for political purposes. It should also spell out how employees should behave towards each other, and to their vendors and customers alike whether they agree or disagree politically.

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Businesses need policies that prohibit employees from using or implying the use of the company brand or company endorsement in their support for any candidate, either directly or indirectly. These policies can have long-term consequences and must be strictly enforced to protect the business. Notwithstanding the aforesaid, having policies is not adequate if employees do not know them. Therefore, there is need for trainings and communication of these policies to the employees.

If handled correctly, policies can be good for morale, good public relations, and can help employees focus on their jobs. Productivity would go up because employees can get their views out safely and with equality.

As an employer, your purpose is to establish expectations and to maintain a collaborative, positive workplace where employees do not feel intimidated or harassed. Inform employees they may be subject to discipline if there is any conduct that may be considered harassment, such as pressuring a co-worker to support one particular candidate or party over another.

The Election Offences Act, 2016 provides that every person shall be guilty of the offence of undue influence who directly or indirectly, by himself or by any other person on his behalf, makes use of or threatens any force, violence or restraint, or any temporal or spiritual injury, damage or loss, or any fraudulent device, trick or deception, for the purpose of or on account of:

a. inducing or compelling a person to give or refrain from giving their vote, whether to a particular candidate or not, at an election; or
b. otherwise impeding or preventing the free exercise of the franchise of an elector or voter; or
c. inducing or compelling a person to refrain from becoming a candidate or to withdraw if they have become a candidate; or
d. impeding or preventing a person from being nominated as a candidate for an election or from being registered as a voter.

In conclusion, elections are cyclical therefore a little preparedness can go a long way creating stability amidst the uncertainty and anxiety that surrounds this period. It is vital to recognise and acknowledge that employees have a life and community outside of work and that these two intersect or end up in conflict.

In the words of Pope Francis, ***"Politics is the most important of civil activities and has its own action, which is not that of Religion."***

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