

Kaplan & Stratton

Legal Bulletin

Devolution - Emerging Issues

Tax Matters

Devolution has brought about two tiers of taxation; through the national government and the county government. With the assumption into office by County governments a turf war over tax has emerged between the county government and the national government.

The power to impose taxes by both levels of government is contained in Article 209 of the Constitution of 2010. It provides that the national government may impose income tax, value added tax, customs duties, excise tax and other duties on import and export goods. County governments may only impose property rates and entertainment taxes. They may also charge for services that they provide such as garbage collection and water supply. Both levels of government may also impose any other taxes as authorized by an Act of Parliament. There cannot be any imposition of tax except as provided by such legislation.

The county government can raise property rates by enacting a county law or regulation. Such a 'money Bill' can be drafted from the recommendation of the relevant committee, after considering the views of the county executive committee member responsible for finance to the county assembly. Article 196 of the Constitution provides that all County business must be done publicly and should facilitate public participation and involvement in legislative matters.

Article 209 (5) offers a proviso to revenue-raising; that it must not be prejudicial to national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour. Pursuant to Section 15 (1) and Section 88 of the County Governments Act, stakeholders have the right to petition the county assembly or county government to amend or repeal any of its legislation. Section 90 also provides a

referendum mechanism triggered by the raising of a petition duly signed by at least 25 % of the registered voters.

Conflict with Parastatals

Devolution has caused friction between the county government, national bodies and parastatals. A case in point is the Tea sector. Tea and other natural resources are sources of revenue that many county governments intend to tap on. The county government however has no authority to demand or collect cess or any other tea levy. According to the Section 18 of the Tea Act, Cap 343, it is only the Minister (now Cabinet Secretary) of Agriculture who upon the recommendation of the Tea Board of Kenya, can impose cess (the ad valorem levy). Pursuant to Section 19, this cess is to be divided as follows: 50% to the Tea Board for inter alia – remuneration, disbursements, research and advertising; 40% to the Tea Research Foundation and 10% for the development of infrastructure for the tea industry. The President has tasked the Kenya Parastatal Review Taskforce to review the direction to be taken by Parastatals *vis-a-vis* Devolution. Regardless of their findings and recommendations, cess is revenue solely for the Tea Board of Kenya.

Tax collection

Section 27 of the County Governments Public Finance Management Transition Act No 8 of 2013 authorizes clerks to collect revenue. Section 31 declares that the Act shall stand repealed from 30th September 2013. There is an on-going debate on the mode of revenue collection after the said date. It has been canvassed that either KRA should be the sole tax collector and duly distribute the funds between the national and county governments accordingly or the county governments should collect all tax and forward the national revenue to KRA. If the latter, the county government will be paid an agency fee for collection services.



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Conclusion

Only an Act of Parliament can extend county taxation to items other than property rates and entertainment tax. Any revenue from commerce in the counties is collected by the national government and a percentage allocated back to

counties. County governments can raise property rates which can be contested in the form of a petition and to a larger scale, a referendum. County governments do not have legal authority to charge any levies on natural produce or resources ■

Merger Control - Thresholds



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The long awaited thresholds for merger control have recently been published by the Competition Authority (in the form of guidelines). Whilst these have not been formally passed into law, the regulator appears to be actively applying these when exercising its powers to exclude transactions from merger control. The move to refine the previous (very broad) change of control test previously applied to Kenyan M&A under the Competition Act is a very welcome development. In essence, the new guidelines distinguish between merger transactions which will not be considered for exclusion i.e. requiring the prior approval of the Competition Authority, and, transactions which may be considered for exclusion – in each case on the basis of prescribed turnover thresholds.

Mergers will not be considered for exclusion if:

- Undertakings have a minimum combined turnover threshold of KES 1 billion and the turnover of the target undertaking is more than KES 100 million;
- In the health care sector, undertakings have a minimum combined turnover threshold of KES 500 million and the turnover of the target undertaking is more than KES 50 million;
- In the 'carbon based mineral sector' i.e. oil and gas sector (but not downstream retail), the value of reserves, rights and associated exploration assets to be held as a result of the merger exceed KES 4 billion. (If the merger involves pipelines and pipeline systems which receive oil and gas from processing fields belonging to, and passing through the metres of the target undertaking, merging parties are required to obtain approval notwithstanding that the value of the reserves is less than KES 4 billion).

Mergers which meet the following criteria will be considered for exclusion:

- Undertakings which have a minimum combined turnover threshold of between KES 100 million and KES 1 billion;
- In the health care sector, where the combined turnover threshold is between KES 50 million and KES 500 million;
- In the 'carbon based mineral sector' - if the value of reserves, rights and associated exploration assets to be held as a result of

- the merger is below KES 4 billion.
- Other excluded undertakings / undertakings not included above.

In these circumstances, applicants may request the Authority to be excluded from merger control. There is no prescribed form of application. The latest audited accounts of the merging entities should be submitted. The Authority will inform applicants within 14 days if the transaction is excluded. If a response is not received within this period, merging parties must formally apply for approval.

The development and application of merger thresholds is encouraging. We are also buoyed by recent steps taken by the Authority to confirm that merger control does not apply to bare asset sales or internal group restructurings which do not result in any change to ultimate beneficial control (single entity doctrine). This will no doubt go some way to alleviating the not-insignificant costs of regulating benign mergers and shifting the focus on to transactions which are likely to have potentially significant anti-competitive consequences in the local market.

The implications of the Competition Act and any new regulations which are published under the Act and their inter-relation with The COMESA Competition Regulations, 2004 remains a problem. We understand that the regulatory authorities are in discussions to try and harmonise the various areas of overlap / conflict ■

“merger control does not apply to bare asset sales or internal group restructurings which do not result in any change to ultimate beneficial control (single entity doctrine)”



Watching Brief: Of what value is it to you?

Watching brief is a practice of representing persons who are not strictly parties to proceedings. It was developed in the 19th Century in England as a means of asserting and protecting the rights of persons who had an interest in criminal proceedings and their outcome. These parties would be the victims of an offence, and are ordinarily referred to presently as “the complainant”, which may be a corporate entity or an individual.

Lawyers who are instructed to “watch brief” will in general assist the prosecutor in conducting his or her case, with the objective of ensuring a successful outcome in prosecuting accused persons. In the past, lawyers generally did not have a right to address the court. Further, only those persons with financial means instructed advocates to watch brief in their matters, as it was generally considered superfluous legal representation, due to the right of audience being restricted.

With the advent of the Constitution, 2010, the nature of watching brief has changed. Article 48 of the Constitution now provides that the state shall ensure access to justice for all persons, while Article 50 (7) of the Constitution provides that in the interests of justice a court may allow an intermediary to assist a complainant to communicate with the court. In the circumstances, the rights of complainants and victims to participate in criminal proceedings has been significantly broadened, and is now a constitutional right.

The power to institute and terminate criminal proceedings against any person who has been accused of a criminal offence under the Constitution vests in the Director of Public Prosecutions (DPP), with a proviso that parliament may enact other legislation conferring powers of prosecution on other authorities. In the past majority of the prosecutions in the magistrate’s court were conducted by the Kenya Police, while murder and treason matters which are triable only by the High Court, were prosecuted by trained lawyers known as state counsels, from the DPPs office. However with the creation of the DPP as a constitutional office, more funds have been allocated to the office of the DPP for hiring trained lawyers to take over the prosecution of all criminal cases in all courts.

While hiring trained lawyers as prosecutors is a welcome step towards ensuring better standards in the conduct of prosecutions, the prosecution of criminal cases still faces some challenges. Due to overwhelming case loads vis-à-vis a paucity of prosecutors, cases that would have succeeded have failed. Most prosecutors come into contact with the files that they are dealing with the very same morning that the matter is in court. Further, they meet witnesses for the very first time in

court, when the witnesses are taking the stand to give their testimony. They do not meet with witnesses in advance to determine whether their evidence is beneficial for the prosecution of the case neither do they have the opportunity to conduct pre-trial meetings to prepare witnesses for trial. In addition prosecutors rarely have the time to carry out research on the law or to prepare written submissions, which counsel for the accused would most certainly do.

It is because of these inadequacies that watching brief is so important. Lawyers watching brief, perform all or any of the following functions:

- Evaluating the evidence collected by the police and liaising with the complainant and the police for any additional evidence that may be crucial to the outcome of the case.
- Assessing the charges brought against the accused, and notifying the prosecutor and the investigating officer of any defects in the charge sheet.
- Drafting applications and affidavits on behalf of the prosecutor.
- Informing the prosecutor about matters that would affect applications for bail or bond terms.
- Holding pre-trial meetings.
- Preparing written submissions, on the facts and legal issues in the case

In a matter where the complainants were victims of a violent robbery, the prosecution benefited from the advocate watching brief who assisted the prosecutor in preparing for trial by holding pre-trial meetings with key witnesses and by preparing written submissions. In another matter where the accused persons fraudulently obtained a colossal sum of money in a fraudulent land transaction, the accused persons’ bank accounts’ were frozen by the magistrate’s court. However, the accused persons applied to the High Court for access to the funds in their accounts. The advocate watching brief was able to oppose the application for the funds to be released by demonstrating the complainant’s entitlement to those funds. Employers also retain lawyers to watch brief in criminal proceedings instituted against their employees, who have engaged in fraud, theft and other related offences while at work.

Most prosecutors may not like assistance in the prosecution of their cases. However, when the prosecutor and the advocate watching brief work in tandem, the outcome is in most cases a conviction. Watching brief has enabled our clients to ensure that all the relevant evidence that they have was presented to court, that witnesses were ready for the hearing and that all legal issues were addressed. Not only does it offer you as the client, the peace of mind that the matter is being pursued, but it also allows you the opportunity to proactively ensure that justice is indeed done ■



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Recognition of foreign law and/or judgments in Kenya



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As a general rule, Kenyan courts recognise and give effect to a foreign governing law clause. The clause is not conclusive if the result of recognising the foreign law would be fundamentally at variance with domestic public policy or if the intention of the parties is to evade mandatory provisions of Kenya law. The choice of foreign law has to have a real or substantial connection with the contract as a whole.

Where parties to a contract submit to the jurisdiction of a foreign court, the courts will generally enforce this agreement and will in their discretion, stay any proceedings instituted in breach of that agreement unless satisfied that it just and proper to proceed.

A foreign judgment by a court of competent jurisdiction is conclusive and may be sued upon in the Kenyan High Court except in

circumstances where it is inter alia not given on the merits of the case, is obtained by fraud, if founded on an incorrect view of international law or a refusal to recognize the law of Kenya if applicable, where proceedings are opposed to natural justice, or where it sustains a claim founded on a breach of the law.

If the country in which the judgement or order was given has signed a reciprocal judgment enforcement agreement with Kenya, and the judgment inter alia relates to civil proceedings where a sum of money is payable or where movable property is to be delivered to any person, the judgment is enforceable as if it were issued by the High Court in Kenya. The decision is enforceable without retrial or examination of the merits subject to any objections by the counterparty relating to, inter alia, service, notice, public policy, penalties or fraud ■

Statute Tracker

National Legislation

Division of Revenue Act	Commenced 11.06.2013
Science, Technology and Innovation Act	Commenced 24.06.2013
Tech. and Vocational Edu. and Tr. Act	Commenced 24.06.2013
Appropriation Act (No 33 of 2013)	Commenced 01.07.2013
Supplementary Appropriation Act	Commenced 15.07.2013
Sports Act	Commenced 01.08.2013
County Allocation of Revenue Act	Commenced 26.08.2013
Value Added Tax Act	Commenced 01.09.2013
Public Health Officers (Reg & Lic) Act	Commenced 18.09.2013
Crops Act	By notice
Public Benefit Organizations Act	By notice
The Finance Act	Assented to on 24.10.2013

County Legislation

Bungoma County Appropriation Act	Commenced 01.07.2013
Isiolo County Appropriation Act	Commenced 01.07.2013
Kakamega County Appropriation Act	Commenced 01.07.2013
Kitui County Appropriation Act	Commenced 01.07.2013
Kirinyaga County Appropriation Act	Commenced 01.07.2013
Laikipia County Appropriation Act	Commenced 01.07.2013
Nyandarua County Appropriation Act	Commenced 01.07.2013
Nyeri County Appropriation Act	Commenced 01.07.2013
Samburu County Appropriation Act	Commenced 01.07.2013
Vihiga County Supplementary App. Act	Commenced 01.07.2013
West Pokot County Appropriation Act	Commenced 01.07.2013
Petitions to Parliament Act	Commenced 30.03.2013
Public Super Annuation Scheme Act	Commenced 30.03.2013

Bills pending before the Senate

- The National Flag Emblems & Names Amendment Bill, 2013
- The County Governments Amendment Bill, 2013
- The County Governments Amendment Bill,(No.2) 2013

Bills pending before the National Assembly

- The Agriculture Fisheries and Food (Amendment) Bill, 2013
- The Microfinance (Amendment) Bill
- The National Police Service Commission (Amendment) Bill
- The Kenya Deposit Insurance (Amendment) Bill
- The Kenya Information and Communications Amendment Bill
- The Insurance (Amendment) Bill
- The Media Council Bill
- The Insurance (Motor Vehicle Third Party Risks)(Amendment) Bill
- The Wildlife Conservation and Management Bill
- The Tax Appeals Tribunal Bill
- The Truth Justice and Reconciliation Amendment Bill
- The Matrimonial Property Bill
- The National Flag Emblems and Names Amendment Bill
- The Marriage Bill
- The National Social Security Fund Bill
- The Election Campaign Financing Bill
- The Constitution of Kenya (Amendment) Bill
- Constitution of Kenya (Amendment)(No 2) Bill, 2013
- The Law Society of Kenya Bill, 2013

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Kaplan & Stratton is a leading law firm in Kenya. We provide legal services and commercial advice. With more than 48 qualified lawyers, including partners, associates and paralegals, the firm is the largest full service firm in East and Central Africa.

Kaplan & Stratton has an outstanding reputation for advising clients in the field of investment, banking, corporate and commercial law and complex litigation and dispute resolution. We have been involved in many of the important developments in the field of business in Kenya the region's principal economy.

We work for private sector businesses, governmental and international donor agencies, parastatals, NGOs and multinational corporations. We have advised on legislative reforms and have sat on legal reform committees.

The firm is also a founder of the **LEXAfrica Network** - Africa's first true network of leading law firms. Today the LexAfrica law community is an established legal network in Africa and is comprised of leading law practices in 28 African countries. Through the network, we are able to service our clients throughout the continent ■

Featured Lawyer Profile



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Ken is a partner in the Commercial Department. His experience spans across corporate restructuring, privatisation transactions and due diligence. His work involves advising on and preparing documentation for joint ventures, mergers and acquisitions, loan financing arrangements, capital markets, regulatory compliance in the telecommunications, agriculture and mining sectors and establishment of business entities.

His recent transactions include:

- Advising on the joint venture between TPS Kenya Limited and OI Pejeta Ranching Limited for the establishment of a tourist camp and lodge
- Acquisition of the Simbanet Group by the Wananchi Group in Kenya and Tanzania
- Joint venture between Kenya Airways and Stamina Group for the establishment of an ultra modern cold storage facility at the Jomo Kenyatta International Airport

Ken has recently been cited as a "*Rising Star*" by IFLR 1000 in Kenya for M&A and Capital Markets

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