

Kaplan &amp; Stratton

# Legal Bulletin



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## Special points of interest:

- Vetting of judges—a step in the right direction
- Increase in number of judges and magistrates
- Parties favour ADR due to confidentiality issues
- Isn't ADR expensive?

## Inside this issue:

Recent developments in Mining Law	2
Wills and post-life planning	3
Statute Tracker	4
Recent deals and matters	4

## A place for Alternative Dispute Resolution in a Transforming Judiciary

The Judiciary in Kenya is metamorphosing. The rapid response to the implementation of the Constitution has brought about structural and policy changes in the administration of justice.

The Honourable the Chief Justice in his report on the state of the Judiciary in 2011-2012 made no pretence of the dire situation the judiciary was in prior to August 2010.

The vetting of Judges and Magistrates has, despite the mixed reviews in its determinations, added to the generally accepted notion that the Judiciary is heading in the right direction.

Confidence is at an all time high. The numbers of Judges and Magistrates have increased to a total of twenty seven in the Court of Appeal, eighty six in the High Court, fifteen in the Land and Environmental Court, twelve in the Industrial Court and four hundred and thirty nine Magistrates.

The Court of Appeal and High Court have been decentralised in accordance with the devolved system under the Constitution. The High Court has further created divisions dealing with Criminal, Civil, Commercial and Admiralty, Environmental and Land, Family, Judicial Review and Constitutional cases.

There is ofcourse the Supreme Court presided by five Judges.

In the CJ's report referred to above, the number of cases lodged in the High Court in 2011/12 were 37,954. The cases finalised were 51,604 and cases pending 299,472.

At the Court of Appeal there were 833 cases lodged, 822 finalised and 6,707 pending over

the same period.

It is expected that the pending cases will be reduced significantly with the recent increment in the judicial officers.

Changes made to the court rules coupled with judicial policy to stem the delays arising from deciding cases on technicalities, has further given credence to the Judiciary coming of age in the delivery of substantive justice expediently.

With all these "good things", happening, why would anyone still wish to Arbitrate or take time in an alternative dispute resolution process?

It is submitted there are significant and fundamental advantages in opting for ADR/ Arbitration determination.

Article 159 (2) (c) of the Constitution recognises the need for these alternative dispute resolution forums.

Some advantages of ADR/Arbitration worthy of consideration are:

Courts are public institutions. The court files are in most cases accessible to the public. Court sessions are also open to the public (unless held "in camera" pursuant to an order of the court). Arbitration and ADR proceedings on the other hand are conducted in private and only open if the parties so agree. This protects confidential commercial and family information and data.

The parties' further have a choice of the arbitral tribunal to hear the dispute. This instils confidence in the disputants especially where it involves complex agreements.

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Parties from different nationalities/jurisdictions are more comfortable in having a neutral forum for determination of the dispute than litigating in court.

In disputes that are highly technical, Arbitration and ADR gives the parties a choice of having a member of the tribunal who is an expert in that field.

Arbitration and ADR hearings are held in any place of the parties’ choice and can follow rules of procedure agreed by the parties. This consensual process gives the parties and the tribunal

considerable latitude.

Arbitral awards are normally enforceable in any country as opposed to a judgment from a Kenyan Court which is limited to the reciprocal enforcement provisions under the Foreign Judgments (Reciprocal Enforcement) Act Cap 43 of the Laws of Kenya.

There are of course disadvantages in Arbitration and ADR - the costs being a major factor. Jurisdictional issues also do at times arise but given the considerations above, these are dispute resolution processes that commend themselves even in a transformed judiciary ■

## Recent Developments in Mining Law



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On 12 October 2012, the Minister for Environment and Mineral Resources promulgated The Mining (Local Equity Participation) Regulations, 2012 under the Mining Act which essentially sought to introduce mandatory equity participation of Kenyan citizens in the mining sector.

The operative provision of the Regulations states that *"It shall be a condition of every mining licence that the mineral right in respect of which the licence is issued shall have a component of local equity participation amounting to at least thirty five per cent (35%) of the mineral right."* The Regulations define *"local equity"* as the share of interest in a mining right which should be held by a citizen of Kenya.

The Regulations are poorly drafted. For instance, it is not clear what the terms *"mineral right"* or *"mining right"* refer to as these have no specific meaning under Kenyan law. It is also not clear what is referred to in the Regulations as a *"mining licence"* as the Mining Act only provides for grant of prospecting rights, exclusive prospecting licences, registered locations and mining leases.

However, if these are to be construed as the *"mining licences"* referred to in the Regulations, there are inconsistencies with the provisions of the Mining Act that would impede the implementation of the Regulations from a legal

perspective.

First, with regard to prospecting rights and exclusive prospecting licences - according to the Act - any minerals obtained pursuant to prospecting rights or exclusive prospecting licences would be the property of the Government and accordingly there would be no *"mineral right"* or *"mining right"* to which the Regulations could apply.

Secondly, with regard to registered locations or mining leases, the Act provides that holders of mining leases or registered locations will have exclusive rights to prospect/mine and therefore to the extent that the Regulations have the effect of depriving existing holders of registered locations or mining leases of such exclusivity, the Regulations would be inconsistent with its enabling legislation (the Mining Act) and in our view, void.

There has also been uncertainty on the possible retroactive effect of the Regulations with respect to *"mining licences"* issued before the Regulations came into force. Under Kenyan law, unless specifically stated, legislation in general is presumed not to have retroactive effect.

The Regulations do not include any language making them retroactive and we therefore do not think that they would apply to *"mining licences"* in existence before the Regulations were made.

We understand that the Attorney General has recently confirmed this position in advice provided to Base Titanium Limited, one of the affected investors who have been seeking clarification on the application of the regulation to its existing Special Mining Licence.

We would add that there are Constitutional restraints on retroactive legislation, particularly where the retroactive application seeks to deprive a person of property rights and insofar as the Regulations have the effect of depriving existing holders of "mining licences" of their exclusive rights, we would consider the Regulations to be contrary to the Constitution and therefore void.

We are not aware of any steps taken to seek judicial guidance on the application of the Regulations. However, as the drafting of the Regulations is so poor, it is difficult to say with any certainty how a Kenyan court would apply them in any particular circumstance.

We also consider that the Regulations may be open to challenge

for other reasons. Section 92(1)(ix) of the Mining Act which grants the Minister power to prescribe regulations only empowers the Minister to prescribe the applicable "working and any other conditions" of licences, locations and mining leases. Applying the usual rules of interpretation, we consider the power of the Minister in this regard to extend to only prescribing working conditions and other conditions of the same nature. We do not consider that equity participation is of the same nature as working conditions. Accordingly, it can be argued that the Regulations are also void on the grounds that they are beyond the powers of the Minister (ultra vires) under the Act.

At the same time, there have been consultations among stakeholders and the Government on a new Bill for the mining sector which is intended to replace the current Mining Act. However, the draft Bill was not presented for debate before expiry of the term of Parliament and it is expected that the Bill will be introduced in Parliament after the General Elections in March 2013 ■

## Wills and Post-life planning



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It is a fact of life that death is inevitable so we might as well actively plan for it by writing a Will. You will have peace of mind knowing that upon your demise your loved ones will be provided for as you intended.

Apart from having a Will it is important to discuss your burial wishes with your loved ones. You may have indicated in your Will that you wish to be buried or cremated but this is not enough. You have to make your wishes known to your loved ones and close relatives. This is because your family may go ahead and make funeral arrangements prior to the reading of your Will. In addition, your choice of burial wishes may not sit well with your family members. For example, cremation is considered a taboo in the African culture, yet the truth of the matter is that more people are opting for cremation as a choice of interment.

In the High Court case of *John Omondi Oleng and Charles Opondo Apuka v Svetlana Radol civil case No. 382 of 2012* relatives of the deceased moved to court immediately after the widow of the deceased placed an advertisement in the local dailies stating that the remains of the deceased would be cremated.

The relatives argued that cremation was against their custom. They also argued that their custom gave the clan more rights than the widow in deciding where the deceased would be buried.

On the other hand, the widow argued that on countless occasions the deceased had expressed the desire to be cremated. In his ruling, Justice Korir held that the widow was at liberty to follow the deceased's wishes. He stated that Article 44(3) of the Constitution provides that, "a person shall not compel another person to perform, observe or undergo any cultural practice or rite."

Therefore, as much as the deceased belonged to the relatives' community which practiced certain rites the spouse was at liberty to ignore those rites and honour his burial wishes. In the case in point, though the courts ruled in favour of the deceased's widow, it would be prudent that, after discussing your wishes, to write them down in a simple letter addressed to your loved ones as well as the executors of your estate. You should make the letter known and put it in a place where it will be accessible after your death. In this letter you may state where you would like to be buried or cremated, the location and type of ceremony.

For instance, the American actress Elizabeth Taylor was fashionably late for her burial - as this was her wish. You may not wish to ponder about your death but settle your affairs now and save your family from having to second guess your burial wishes. In addition, spare your family from having to battle each other in court at a time of loss ■

## Statute Tracker

### Acts

National Transport & Safety Act	Commenced 01.12.2012
Treaty Making & Ratification Act	Commenced 14.12.2012
Truth Justice & Recon. (Amd.) Act	Commenced 14.12.2012
Breast Milk Substitutes Act	Commenced 17.12.2012
Micro and Small Enterprises Act	Commenced 04.01.2013
Office of the AG Act	Commenced 04.01.2013
Political Parties Amendment Act	Commenced 04.01.2013
Seeds & Plant Varieties (Amd.) Act	Commenced 04.01.2013
Kenya Plant Health Insp. Act	Assented; not yet commenced
Kenya School of Law Act	Assented; not yet commenced

### The following Bills were assented to by the President on 13 January 2013 . Commencement dates are yet to be published

The Kenya Institute of Curriculum Development Bill 2012  
 The Basic Education Bill 2012  
 The Kenya Commission for UNESCO Bill 2013  
 The Science Technology and Innovation Bill 2012  
 The Technical and Vocational Education and Training Bill 2012  
 The Transition County Allocation of Revenue Bill 2012  
 The Transition County Appropriation Bill 2013  
 The County Gov. Public Finance Management Transition Bill 2013

The Constituencies Development Bill 2012  
 The National Government Co-ordination Bill 2012  
 The Agri., Livestock, Fisheries and Food Authority Bill 2012  
 The Kenya Agricultural and Livestock Research Bill 2012  
 The Pyrethrum Bill 2012  
 The Crop Bill 2012  
 The Presidential Retirement Benefits Amendment Bill 2013  
 The Public Private Partnership Bill 2012  
 The Social Assistance Bill 2012  
 The National Honours Bill 2013  
 The Supplementary Appropriation Bill 2013  
 The Office of the Director of Public Prosecutions Bill 2013  
 The Civil Aviation Bill 2013  
 The International Interests in Aircraft Equipment Bill 2013  
 The Kenya Medical Supplies Authority Bill 2013  
 The Kenya Law Reform Commission Bill 2012  
 The Nairobi Centre for International Arbitration Bill 2012  
 The Public Benefit Organization Bill 2012  
 The Sports Bill 2012  
 The Public Health Officers (Training, Reg. and Lic.) Bill 2012  
 The Customs and Excise (Amendment) Bill 2012  
 The Statutory Instruments Bill 2012

## Recent Deals and Matters

### Independent Power Producer

Advised Citibank N.A. on a USD 45 million credit enhancement of an independent power producer in Kenya with support from the International Development Association (part of the World Bank)

*Lawyers: Oliver Fowler, Binti Shah, Sarah Kiarie* ■

### Serena Acquisition

Advised NSE listed Tourism Promotion Services on a USD 22 million acquisition of the Serena Kampala Hotel by way of a share swap transaction and the listing of newly issued shares to the sellers on the Nairobi Securities Exchange. The cross border transaction

covered complex competition aspects, capital markets applications on exemptions from take-over regulations amongst others

*Lawyers: Mahesh Acharya and S Kiarie* ■

### Disposal of Chai Bora Group

Advised NSE listed Transcentury Limited on a multi-million dollar disposal of its interests in one of Tanzania's largest tea packaging companies. The transaction closed in December 2012 and involved complex pre-transaction structuring and full compliance and investment documentation

*Lawyers: Amar Grewal-Thethy, Gachini Macharia. External counsel: Clyde & Co (Tz)* ■

### Barclays Bank Kenya

K&S was instructed by Barclays to institute judicial review proceedings to challenge a KRA tax claim. The Commissioner of Domestic Taxes claimed that the payments made by Barclays to credit card companies to access their network constituted agency fees and that withholding tax was payable. The claim was successfully quashed and the Court held that the Commissioner is under a duty to identify and state with clarity the specific types of payments that attract tax. The Court emphasized that the Commissioner is obligated to demonstrate how the credit card transactions fall within the terms of the statute.

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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 ■

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### Featured Lawyer Profile



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Binti is a partner in the Corporate Commercial department and has considerable experience in advising clients on corporate (capital markets, project finance, M&A) matters. She is qualified as a Kenyan Advocate and an English Solicitor. Her clients consist primarily of international and local banks and developmental financial institutions. Prior to joining Kaplan & Stratton, Binti Shah had previously worked at Denton Wilde Sapte (then Wild Sapte 1995-1998).

Some of her deals include:

Acting for Export-Import Bank as mandated lead arranger and lender in relation to a USD2 billion aircraft for Kenya Airways. Counsel to AFD in a USD 39 million financing of credit for onward lending to renewable and energy efficiency projects. Counsel to IFC in a project financing of Braeburn Schools Limited.

Binti has been consistently ranked as a leading lawyer by Chambers Global, IFLR 1000 and Legal 500 ■

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