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Litigation

Second Edition

Kenya: Trends & Developments
TripleOKLaw Advocates

chambers.com

2019

Trends and Developments

Contributed by TripleOKLaw Advocates

TripleOKLaw LLP Advocates is a Kenyan Law firm, established in 2002 and has grown to a workforce of over 80 advocates and associated professionals. The firm's main office is located in Nairobi's commercial district with affiliated networks providing the firm with access to international markets. TripleOKLaw LLP is widely known for its dispute resolution practice specifically in the litigation and arbitration space having acted in several major cases over the years that have had an impact on jurisprudence. Recent notable cases include a tax dispute between a major local Bottler against the Kenya Revenue Authority in Civil Appeal No 164 of 2013 on the inclusion of the cost of returnable containers in computing excise duty. The firm also successfully defended the Central Bank of Kenya (CBK) and the Kenyan Bankers Association on the statutory rights of the CBK in prescribing conditions on deposits and withdrawals by customers in banks and financial institutions.

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Benard Ogutu is an associate and a promising advocate with a focus on commercial dispute resolution and litigation, investment treaty and commercial arbitration, international trade and investments law, cross-border compliance, regulatory advisory among other alternative dispute resolution proceedings. He serves as an Arbitrator and Memorial Judge for the Annual Willem C Vis International Commercial Arbitration Moot and the Skadden Foreign Direct Investment Arbitration Moot. He is a Certified PublicSecretary of Kenya and a member of the Chartered Institute of Arbitrators.

Isaac Kiche is a senior associate and has a record of effectively handling multifaceted litigation disputes and related practice areas including litigation, arbitration and mediation. His impressive portfolio of successful representation includes a leading telecommunication company, a major Kenyan Airline and, recently, several bottling companies in a landmark tax case. Isaac has significant experience in arbitration and is a member of the Chartered Institute of Arbitration. He was recently provisionally accredited as mediator by the Mediation Accreditation Committee and serves on the tax committee of the Law Society of Kenya. He is widely published in both Kenyan and international legal publications.

Kenya 2019: Trends and Developments in Litigation
Litigation in Kenya has maintained a steady pace of development in recent times. This has been attributed to changes in the constitutional regime, statute law and most commonly, soft law, which are created to streamline legal practice. Soft law has come in the form of frameworks adopted by practitioners, practice directions issued by the courts, as well as rules and regulations which are from time to time set jointly by practitioners and the judiciary and are meant to shift the culture and attitudes towards litigation.

Kenya has experienced a paradigm shift following the promulgation of the Constitution of Kenya, 2010. In particular, Article 159 of the 2010 Constitution is now seen as the platform from which a seismic shift in the procedural approach to the decision-making process has flowed. In particular, this provision states that "judicial authority is derived from the people and vests in, and shall be exercised by, the courts…". Sub-Article 159(2) further provides that, in exercising judicial authority, the courts and tribunals shall be guided by the following principles:

- justice shall be done to all, irrespective of status;
- justice shall not be delayed;
- alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); and
- justice shall be administered without undue regard to procedural technicalities;

This was followed by the enactment of pieces of legislation and rules which gave effect to the new constitutional regime. Kenya by virtue of Article 2 (5) of the Constitution also adopted general rules of international law as part of her laws. This has contributed immensely in the realm of constitutional law litigation particularly in the agitation of economic and social rights under Article 43 of the Constitution.

Kenyan Courts have now robustly adopted the exhaustion principle, which enjoins litigants to pursue legal remedies through the dispute resolution mechanisms set out in the Statutes for instance through tribunals before referring the dispute to Court. This precept gained traction with the promulgation of the Constitution, which at Article 162 created specialised courts to determine disputes relating to employment and labour relations as well as environment, the use and occupation of, and title to land.

As a matter of judicial practice, suits which are instituted in the wrong fora have been transferred to their right forum when applications of that nature are made, or sometimes, the courts on their own motion have taken upon themselves to transfer the suits, rather than taking the traditional step of dismissing the suit. Litigation practice in Kenya can now be said to have completely shifted from the traditional administration of justice in the strict sense where both procedural and substantive technicalities are considered to an approach of casting a blind eye to procedural technicalities which do not have an effect on the substance of the dispute. This is a result of compliance with the new constitutional dispensation.

Through these changes, litigation, as a mechanism for dispute resolution, has been streamlined to achieve its best result.

Notable recent trends in litigation in Kenya range from judicial review proceedings, tax practice, strategic interest litigation, complex commercial litigation, land and environment litigation as well as employment and labour relations proceedings among others.

Judicial Review Proceedings
These are proceedings that seek the court to pronounce itself on the arbitrariness or otherwise of decisions of a government body. Whenever litigants are dissatisfied with decisions of government bodies charged with performing a set of defined activities, they would ordinarily commence judicial review proceedings in the High Court to challenge the process leading to the decision and not the merits of the decision. This has been the recognised mode of instituting the judicial review proceedings in Kenya.

However, with the promulgation of the Constitution, judicial review is now recognized as a constitutional remedy under Articles 23 (3) and 47 of the Constitution and therefore litigants are now permitted to either commence the judicial review proceedings through the traditional common law mode or as a constitutional petition.

In commencing judicial review proceedings as a constitutional petition, litigants are required to demonstrate clear breach of constitutional rights by decision of the government bodies incapable of being remedied through the existing legal mechanisms.

These proceedings have, for quite some time, defined practice in the regulatory sector. However, this can be said to have shifted and litigants have now become desirous of following through the processes and procedures preceding the decision making. The aim of this practice is that instead of challenging the regulatory decision, litigants participate in enabling the regulator to arrive at the best decision. Following the enactment of the Fair Administrative Action Act, 2015, both litigants and administrative authorities have become more vigilant in observing the common law requirements for fair hearing, which have now been enacted into statute law.

As a matter of general principle, whenever a governmental body is faced with a situation where a decision it is about

to make is likely to affect the rights and interests of others, it is required by law to afford a reasonable opportunity to make representation to all the parties likely to be affected. However, regulatory authorities have in the past ignored this requirement as it was not mandatory. With the enactment of the Fair Administrative Action Act, 2015 and other pieces of legislation to this effect, regulators have engaged the services of both in- house and litigation counsel to advise them on the potential risks of taking certain steps.

In this regard, litigation has taken a dispute-prevention and advisory approach rather than the conventional adversarial approach. Litigation counsel in the authorities' panel of lawyers often engage in consultations with the technical staff to determine how best to formulate decisions so that litigation can be avoided. Further, litigants who are involved as parties to the regulatory proceedings, as a benefit of the practice of fair hearing, are often allowed legal representation. During these times, litigation counsel are often involved and they take an active role in ensuring that the decisions arrived at is favourable to their clients.

This practice notwithstanding, there has been a developing trend where parties have nonetheless approached court to render a decision on the sanctity or otherwise of the regulatory decision. With the upsurge in regulatory bodies and independent offices, there has been a remarkable increase in development of regulatory proceedings' litigation both internally or even at the courts.

The judicial attitude has, however, been that courts would be reluctant to micro-manage the operations of regulatory authorities and other administrative proceedings but would nonetheless not hesitate to do so if the rules and principles of natural justice are impeded. The approach has been that, "…courts are very loath to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run Universities or indeed any other bodies...However, courts will interfere and quash decisions of any bodies when the courts are moved to do so where it is manifest those decisions have been made without fairly and justly hearing the person concerned or the other side..." Onjira John Anyul v University of Nairobi [2019] eKLR.

Tax Practice

Litigation in tax practice has been on the rise in Kenya following the Kenya Revenue Authority's aggressive approach to meet its revenue collection target. As the tax authority becomes more resilient in ensuring that it achieves its required targets of revenue collection, the taxpayers have become increasingly vigilant of their rights under law. Tax practice has become a trend in litigation, evidently motivated by the mandatory constitutional dictate of "no taxation without legislation", which has seen parties seeking judicial intervention both at the Tax Appeals Tribunal and the Tax Division of the High Court of Kenya in interpreting tax Statutes.

In Kenya, tax is one of the areas most legislated upon. This is due to the fact that every annual budget, enacted through the Finance Bills, affects the tax regime.

Recently, the Court of Appeal in Mount Kenya Bottlers Ltd & 3 Others v Attorney General & 3 Others [2019] eKLR upheld the need for clear and concise statutory provision before a tax burden can be imposed, thereby upholding the English test in Cape Brandy Syndicate vs Inland Revenue Commissions (1921) 1 KB 64, Russell vs Scott (1948) 2 All ER 5 and Ramsay Ltd vs Inland Revenue Commissioner [1992] AC 300 that the language imposing the tax must receive a strict construction and there is no room for assumption and presumptions.

Tax litigation has, therefore, taken a developing turn, with businesses and individual taxpayers taking up the challenge to ensure that the revenue authority does not act beyond its powers. The Kenya Revenue Authority on the other hand, has also employed a robust approach in pursuing, through litigation, individuals who they believe have breached the tax laws. In so doing, it has established a legal unit which is divided into both prosecution and civil divisions to handle their matters. The Tax Appeals Tribunal, established by the Tax Appeals Tribunal Act, 2013, plays a critical role in hearing and determination of appeals from the decisions of the tax master. The Tribunal, whose members were appointed on 15 April 2019 following a year-long stalemate, handles decisions presented before it that have not been taken to the Revenue Authority's alternative disputes resolution mechanisms.

The practice in this Tribunal is slowly becoming more desirable owing to its exemption from the application of the Civil Procedure Act and rules. The Tribunal's Practice and Procedure Rules enacted in the year 2015 are steadily being appreciated by litigants and litigation practitioners. The Kenyan courts and tribunals have this year experienced more tax litigation than the past years, and tax-specialised institutions have become more relevant of these reasons.

The Kenya Revenue Authority in the spirit of promoting alternative dispute resolution underscored in Article 159 (2) of the Constitution has developed a robust alternative dispute resolution mechanism which has seen a significant number of disputes resolved without the same being preferred to the Tribunal or Courts. These alternative dispute resolution mechanisms have been largely accepted by the taxpayers as it cushions them from immediate enforcement and allows for proper tax planning and payment plan.

Strategic Interest Litigation

This is litigation that would have a lasting impact on people in the national, regional and international levels. The Ken-

yan legal system is accommodative of this area of practice whose focus has now shifted from public interest to strategic interest litigation. Here, litigants have sought judicial intervention on matters that may not have an impact on the human rights while not couching them in public interest terms. The pursuit of this legal practice has not only had an impact on the development of legislation but also governance practice. The justification here has been that, whereas public interest litigation focuses on the rights and interests of the general public or a class of people, strategic interest litigation focuses on matters which would affect, or is likely to affect the interests and needs of people, or government for a significant length of time.

Such litigation includes environment-related litigation, where, instead of waiting until an approval is given for activities which would have an impact on the environment and only suing when the impact is felt, in terms of public interest litigation, litigants have chosen to approach the courts at the earlier stages of the approval, and before commencement of the projects, and the courts are thereby invited to analyse the strategic rights of the complainants with respect to the future effects of a certain action. To this end, litigation has taken a proactive approach rather than the conventional reactive approach.

Practitioners have been actively and increasingly engaging professionals in other sectors to assist in understanding the technical aspects of the impending dispute and how best it can be pursued. This level of litigation is increasingly gaining prominence in Kenya and specialised courts and tribunals.

Complex Commercial Litigation

Complex commercial dealings often attract controversial, even more complex litigation. In most events, disputes of this nature are often referred to arbitration. However, with the thought that the judicial processes may just be as effective, commercial disputes of a complex nature that do not have arbitration clauses are now being referred to court. This practice is gaining prominence as legislation is becoming accommodative to expeditious resolution of disputes and the quest for accountability.

However, courts are not reluctant to refer suits to arbitration or mediation on their own motion or if applied by one of the disputants. The courts, when confronted with complex commercial disputes, have engaged the services of independent professional experts to aid it in administration of justice.

The Court Annexed Mediation was first piloted in the Commercial and Family Division of the High Court in April 2016. This has seen cases screened for mediation being resolved within two months as opposed to the two or more years taken in the normal litigation process.

Employment and Labour Relations

The development of a robust trade and labour relations' litigation practice in Kenya has taken a remarkable amount of time. Following the enactment of labour statutes in the year 2007, the enactment of the Employment and Labour Relations court and other legislation that affect the sector, Kenyan litigation practitioners have enthusiastically practiced labour relations and employment, both at dispute resolution levels and even at dispute prevention. The practice of employment and labour relations litigation has also had a positive impact on the streamlining of the labour system, and employers have taken a more cautious approach in handling labour or employment disputes owing to the vigilance by employees which is now on the rise.

The Chief Justice, in pursuance of the powers vested upon them by statute, has from time to time established various employment and labour court registries that facilitate the administration of justice in the sector.

The Employment and Labour Relations Court is also being increasingly approached through judicial review, which by dint of the Fair Administrative Action Act, requires that decisions should be made within 90 days of filing, a recent case being Bryan Mandila Khaemba v Chief Justice and President of the Supreme Court of Kenya & another [2019] eKLR where a suspended magistrate applied to court on 17 June 2019 and a final judgment was rendered by 30 August 2019. Both statute and case law has upheld this practice within both the Employment and Labour Relations Court and the Environment and Land Court. In these Judicial review proceedings, evidence is admitted through Affidavits, instead of oral evidence as has been common.

Arbitration Related Litigation

Key concern for arbitration as an alternative dispute resolution mechanism has been the role of courts in the process of arbitration, particularly post the publication of an arbitral award.

The Kenyan Arbitration Act, 1995 is based on UNCITRAL Model Law which emphasizes limited intervention of courts in arbitral process.

There have been numerous litigations on the right of appeal to the Court of Appeal against decision of the High Court on setting aside of arbitral award under Section 35 of the Arbitration Act. The said section doesn't provide for a right of appeal and therefore litigants dissatisfied by decision under Section 35 of the Act, have some sort relied on the Constitution to argue that right to appeal is a constitutional right incapable of limitation.

This issue appeared to have been put to rest a five Judge bench of the Court of Appeal in the case of Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR, where the

Court unanimously held that there was no right of appeal. However, this decision has been appealed against and the Supreme of Kenya is yet to make a final determination on it.

In entrenching integrity in the arbitral process, the Court in the case of Kenya Airports Authority v World Duty Free Company Limited t/a Kenya Duty Free Complex [2018] eKLR, declined to recognise and enforce an award after it found that the agreement subject to the arbitration was procured by bribery and corruption, contrary to the public policy of Kenya.

Digitising Litigation

The Kenya judicial system has taken a comprehensive approach in addressing the concerns of delays in administration of justice after years of lamentations by various stakeholders. To this end, the judiciary, through its administrative organs and rules committee, has established a framework for case management through a digital platform. A number of cases in Nairobi City are now digitised, The court has also established an e-filing and online case management tool that allows subscribing law firms and legal practitioners to file cases and receive service, or track court records from the comfort of their offices and homes.

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Specialised Magistrates/Adjudicators

Legal practice in Kenya has further been streamlined through the appointment of special magistrates who are conferred with powers to handle given areas of law, in order to streamline and bring administration of justice closer to the people. These have been done through gazette notices by the Chief Justice for instance those appointing special magistrates to handle employment matters where the employee's salary does not exceed KES80,000, environment and land court matters where the value of the property does not exceed KES20 Million and even anti-corruption cases which have previously been handled by judges of the High Court.

In totality, the Kenyan legal landscape has significantly transformed with the promulgation of the Constitution which has seen elimination of strict procedural technicalities in the administration of justice and promotion of alternative disputes resolution mechanisms as well as other administrative frameworks.

Several pieces of legislation have been enacted purposely to give effect to the Constitution particularly on access to justice and to revamp effective litigation in Kenya with a focus on elevating Kenya as a commercial hub.