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CM NEWSLETTER

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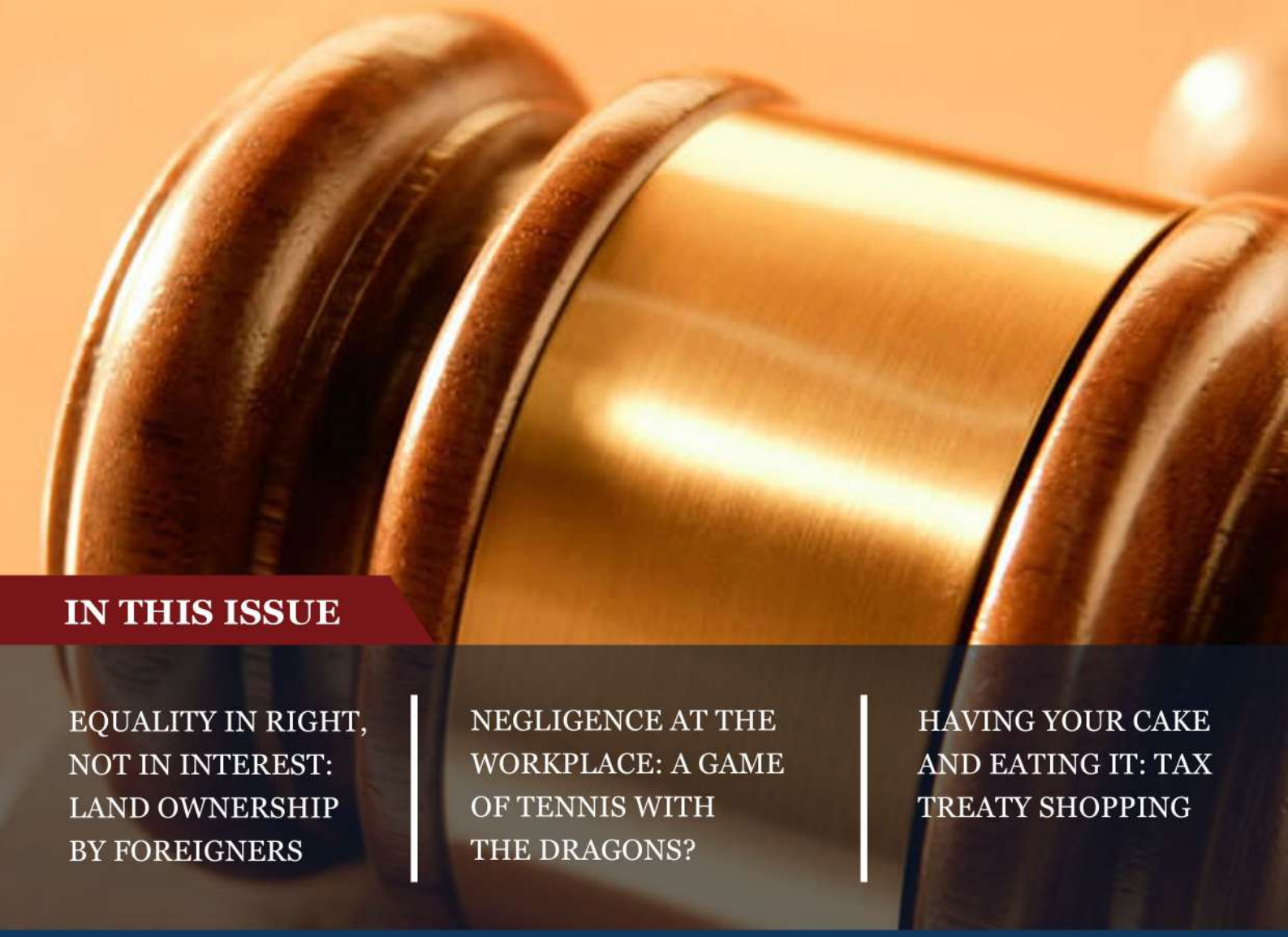
ISSUE 4 | QUARTER 4 | 2019



IN THIS ISSUE

FOREIGNERS AND PROPERTY OWNERSHIP IN KENYA

Irene WANJIRU

Irene is a Senior Associate at the firm and working with the Real Estate, Banking and Finance Business Unit.

A. Introduction

Over the years, there has been an increase in the number of foreigners seeking to own land in Kenya either for investment or residence. In addition, there are foreigners who have held land in Kenya for many years without necessarily acquiring Kenyan citizenship. There were various laws and practices relating to ownership of land by foreigners. While foreigners may have certain rights over land owned by them, there are also restrictions imposed on a foreigner who owns or seeks to own land in Kenya.

B. Can A Foreigner Own land in Kenya?

Article 40 of the Constitution of Kenya 2010 grants the right of ownership of land to any person in any part of Kenya. This means that a Kenyan citizen or a non-citizen can own land in Kenya. The said Article is however subject to and should be read with Article 65 (1) of the Constitution which sets out restrictions on the limitations as to the land tenure which a non-citizen can hold.

The considerations for land acquisition in Kenya by non-citizens lie in the tenure for which the property can be held as well as whether the nature of the land in question is agricultural. This shows that ownership of land in Kenya by foreigners is subject to the limitation on land tenure to a Leasehold of not more than Ninety-nine (99) years as well as the requirement that the land in question must not be agricultural.

C. What are the laws Governing Land Ownership in Kenya by Foreigners?

In line with the envisages of the Constitution of Kenya 2010, Parliament has passed several laws governing ownership of land in Kenya including the Land Registration Act No. 3 of 2012, the Land Act No. 6 of 2012 and the National Land Commission Act 2012.

The provisions governing the acquisition and ownership of land by foreigners in Kenya are encapsulated in the following laws:-

(i) The Constitution of Kenya, 2010

Article 65 of the Constitution of Kenya (the "**Constitution**") limits the tenure for which foreigners can hold land in Kenya to a leasehold of less than 99 years. It is imperative to note that this Article does not expressly prohibit foreigners from acquiring or owning freehold land. This position was upheld by the High Court in the case of ***Kunde Road Residents' Welfare Association Versus Deshun Properties Company Limited & Four Others*** *(ELC PETITION NO. 1433 of 2013)* where Justice Gacheru observed that:

"...The Constitution at Article 40 guarantees ownership of land in Kenya by any person. Granted, this provision is not absolute as it is subject to Article 65 thereof which restricts land to be held by non-citizens only as leasehold of a term of 99 years and no more. Article 65(2) of the Constitution, in my view, envisages a situation where non-citizens can enter into transactions for acquisition of interest in land that is freehold. Indeed there is no law that prohibits non-citizens from acquiring and owning freehold land, the Constitution however restricts that ownership to leasehold of a period of 99 years. It is therefore my finding that the transfer of the property in question, though the interest therein being freehold to the 1st Respondent being a non-citizen is not illegal as alleged. The bottom line is that the 1st Respondent has acquired 99 year leasehold interest..."

In the event that a Kenyan citizen sells the freehold interest to a foreigner and the freehold tenure is converted to Leasehold the property cannot be converted again to freehold tenure after the expiry of the leasehold term.

The Constitution also restricts a non-citizen from owning freehold property under a trust and provides that any property held in trust shall be regarded as being held by a citizen only if all the beneficial interest of the trust is held by people who are citizens.

After the expiry of the leasehold term the foreigner can apply for a renewal of the lease term or an extension of lease. Unlike citizens, foreigners do not enjoy an automatic right of renewal or extension of a lease on expiry. Section 12(7) of the Act provides that upon expiry, termination or extinction of a lease granted to a foreigner, the land shall vest in the government.

(ii) The Land Act 2012

Section 12 (5) of the Land Act allows the National Land Commission to allocate land to foreign governments on a reciprocal basis in accordance with the Vienna Convention on Diplomatic Relations. This is however subject to the Constitution and any other relevant law as well as consultation with the national and county governments.

The Act was amended in 2016 to introduce a new section – 12A – which requires foreigners to obtain consent to purchase 1st and 2nd row properties. This was however challenged in court leading to the suspension of the application of these sections until the matter is determined.

(iii) Land Registration Act 2012

The Act in section 107 (3) reiterates the provisions of Article 65 of the Constitution that the maximum leasehold period that may be granted to a foreigner is 99 years.

(iv) Land Control Act 1989

This Act restricts the ownership by non-citizens of agricultural land or land within defined land control areas. Section 9 of the Act, read together with section 6, provides that any dealing in agricultural land or controlled land the purported effect of which is to sell, transfer, lease, charge, partition or exchange land with a non-citizen is void for all intents and purposes.

The Act provides two options by which a foreigner can own agricultural land:

a. Through an application for exemption to acquire agricultural land by the President granted under section 24 of the Act; and
b. Through owning shares in a public company that owns agricultural land.

D. Has the Constitution had any effects on Land ownership by Foreigners in Kenya?

As noted above, a foreigner may only hold land in form of a leasehold of up to 99 years which begs the question of what happens to land held by foreigners for a leasehold longer than 99 years.

Following the promulgation of the Constitution in August 2010, a freehold interest in land held by a foreigner is automatically deemed to be leasehold by operation of law. Subsequently the Government of Kenya issued a directive to foreigners holding free hold land to surrender such titles to the Lands Office for conversion from a freehold to a leasehold tenure. However the process of conversion of the land tenure is yet to be put in place by the National Land Commission and the Ministry of Lands and Physical Planning.

Section 8 of the 6th schedule of the Constitution also provides that all leases exceeding 99 years held by foreigners shall revert to the State on the date when the Constitution came into force (27th August, 2010) and the State shall grant the person a 99-year lease. Additionally, all freehold land that was held by foreigners was to be converted into leaseholds of not more than 99 years with effect from the said date.

It is however not clear whether a freehold title or an un-expired leasehold title of more than 99 years that is jointly owned by a foreigner and a Kenyan citizen would be converted to a leasehold of 99 years or whether the tenure would remain intact.

E. Can Foreigners own beach plots in Kenya?

In 1970, the then President of Kenya, Jomo Kenyatta, issued a presidential decree prohibiting the sale and purchase of 1st and 2nd rows beach plots on the Indian Ocean and land within a zone of 25 kilometres from the inland national boundaries of Kenya without consent from the President.

This decree would remain in force for over 42 years until it was declared illegal by the High Court in ***Mohamed Balala and 11 others Vs. The Attorney General and 7 others [2014] eKLR.*** In this case, the High Court, at first instance, held that the presidential consent was an illegal and discriminative practice and issued prohibitory orders against officers who set the requirement for presidential consent as a pre-condition before transferring land located on the 1st and 2nd row beach plot to foreigners. On appeal, the Court of Appeal upheld the decision in the 2012 ruling of the High Court, stating that:

"Neither the Registered Land Act, Registration of Titles Act nor the Land Titles Act, now all repealed, nor even the current land law regime has such provisions. Nor is there any statute or legal basis for requiring such consent."

In 2016, and in an apparent attempt to re-introduce the requirement for Presidential consent for the sale of beach plots to foreigners, Parliament enacted the Land Laws (Amendment) Act, 2016 (No. 28 of 2016) which sought to introduce various amendments to the existing Kenyan land laws. These amendments were assented to by the President on 31st August, 2016 and came into effect on 21st September, 2016.

One of the key changes introduced by the amendments was introduction of section 12A to the Land Act 2012 which introduced the concept of "controlled land" and "ineligible persons". The term "controlled land" was defined to mean land which is either (i) within a zone of twenty-five kilometres from the inland national boundary of Kenya; (ii) within the first and second row from high water mark of the Indian Ocean, or (iii) any other land as may be declared controlled land under any law or statute. An "ineligible person" was defined as (i) an individual who is not a Kenyan citizen; (ii) the government of a country other than Kenya or a political subdivision of a country other than Kenya, or any agency of such government or political subdivision, or (iii) a body corporate which has non-citizens as shareholders shall be deemed to be a noncitizen.

The section prohibited transactions in controlled land to an ineligible person without the prior written approval of the Cabinet Secretary for Lands.

Later in the year, the Malindi Law Society, in ***Petition No. 19 of 2016, Malindi Law Society vs Attorney General of Kenya and Another*** moved to the High Court challenging the constitutionality of section 12A of the Land Act.

The Court granted the Petitioner interim conservatory orders staying the application of section 12A of the Act pending the full hearing and determination of the petition. We await the determination of the Petition to see the direction this will take but in the meantime the consent of the Cabinet Secretary for Lands is not required.

F. Does the Constitution adequately protect the rights of foreigners on land ownership in Kenya?

The implementation of the Constitution had the objective of addressing the historical land injustices that have ailed Kenya as it is the basis on which the existing land laws provide the necessary protection and security for the rights of land owners in Kenya. The clarity afforded by the Constitution and the land laws on the issue of the rights to ownership of land by foreigners in Kenya and attendant security afforded to such interests has brought about productivity in the utilization of the land by foreigners for development purposes, which has led to economic growth in the country.

The Constitution and the land laws thereby seek to bring about a sense of equitable ownership of Land which has given a guarantee of the foreigner's right being protected and secured.

While noting the positive effects achieved by the implementation of the Constitution and the land laws on land ownership in Kenya, it should not be overlooked that the same legal restrictions and limitations therein have also created room for corruption and fraud as, in cases where consent is needed such as for the acquisition of agricultural land, land officials will often make promises to foreign investors with the intention of defrauding them by giving them possession of land which the law prohibits them from having access to.

As much as the conversion of freeholds and leaseholds of more than 99 years to 99-year leaseholds was automated by the use of the operative word "shall", there is a need for the implementation of a robust legislative or policy procedure by the National Land Commission and the Ministry of Land and Physical Planning to provide guidelines on the renewal and extension of a leasehold period by foreigners and eliminate uncertainties in the process so as to ensure the sustainability of the investments made on their land.

Under the Land Control Act, a foreigner needs to seek an exemption from the President to own agricultural land. This requirement was passed during the post-colonial era when the President had powers and control over land but following the promulgation of the Constitution and the enactment of the new land laws this function should be transferred to the National Land Commission.

It is also important to note that there is a loophole under the Land Control Act whereby a foreigner can own agricultural land by being a majority shareholder in a public company. Foreigners have taken advantage of this loophole and incorporated public companies in which they are majority shareholders and are thereby able to own agricultural land through these companies. The Act should therefore be reviewed to include that a public company that has foreign shareholding cannot own agricultural land.

There is also a need for a test against which a non-citizen corporation seeking land for investment in Kenya should be measured in order to determine the scope and breadth of its leasehold interests up to the upper limit of 99 years.

G. Conclusion

While a foreigner has a right to acquire own land in Kenya, he/she can only hold such land under a leasehold of up to 99 years, and where there is any document conferring interest in land greater than 99 years the document shall be regarded as to confer a 99-year leasehold interest and no more. Even where a foreigner holds a freehold title or acquires title to a freehold title, the interest acquired is deemed to be a 99-year leasehold as the conversion is automatic and requires no further formalities to be operational. Furthermore, an individual foreigner or private corporate body with majority foreign ownership may not own agricultural land except with the President's consent.

HAVING YOUR CAKE AND EATING IT: TAX TREATY SHOPPING

Ken MUIGAI

Double taxation refers to an instance of taxation whereby the same income is subjected to tax in more than one tax jurisdiction. Closer home in Kenya, Section 5 of the Income Tax Act (ITA) provides that employment income earned by a non-resident individual employed in Kenya is taxable in Kenya and further provides that, employment income earned by a resident individual both in Kenya and outside Kenya is taxable in Kenya. This means that Kenya is both a source and income/residence tax jurisdiction and thus there is a possibility of having the taxable income of both Kenyan residents and non-residents being subjected to double taxation.

Bilateral Double Taxation Agreements (DTAs) can therefore entered into as a remedy to this possibility and with a view to shielding residents of the contracting states from having their income subjected to tax twice in the jurisdiction of another contracting state. Countries often enter into DTAs to enable their citizens to enjoy preferential rates of tax on transactions, avoid double taxation and remove obstacles to cross-border trade in goods and services, and movements of capital, technology and persons in their business transactions.

However, a country's treaty network can be exploited by residents of third countries (non-treaty countries) in order to benefit from the preferential treatment accorded under the DTAs which would otherwise be unavailable to them. It is common practice for entities engaged in cross border activities to adopt corporate and operational structures that help reduce chargeable taxes. This arrangement is referred to as 'treaty shopping' and involves the use of a conduit company in a contracting state under the DTA to reroute profits out of the contracting state to a third country. It is through such structured transactions that conduit companies aim to enjoy the benefits of a tax agreement between two jurisdictions without being a resident of either of those jurisdictions. This is deemed to be a form of treaty abuse which results to the loss of tax revenues and contributes to global wealth inequality. In addition, treaty shopping strategies undermine the tax sovereignty of the exploited jurisdictions as conduit companies can claim treaty benefits that were intended to be granted to them.

Some of the major beneficiaries of treaty shopping are technology companies including the FAANG group i.e. Facebook, Apple, Amazon, Netflix and Google, who generate significant revenues worldwide and who are widely criticised that some of these companies are not paying their fair share of taxes. The recent tax leaks (Panama papers, Paradise leaks, Mauritius leaks) have exposed elaborate and complex tax structures (including the more popular Double Irish arrangements) which are employed by companies such as Amazon, Google and Starbucks to avoid taxes.

While the inherent issue of treaty shopping has been around for years, the matter has only started gaining traction in the recent past. Action 6 of the Organisation for Economic Cooperation and Development's (OECD) Base Erosion and Profit Shifting (BEPS) Action Plans dubbed 'Preventing the Granting of Treaty Benefits in Inappropriate Circumstances' specifically addresses treaty abuse and treaty shopping.

The OECD asserts that the inefficiencies in tax treaties have triggered double non-taxation in a number of situations.

The OECD plans to develop model treaty provisions and recommendations for domestic law measures such as the introduction of 'beneficial ownership' clauses in the tax treaties. In tandem with this, there have been concerted efforts by different governments to fight tax arbitrage by multinational companies.

Some of the so-called conduit jurisdictions include Mauritius and the Netherlands. These countries are used by corporates to channel investments using the existing DTAs. The recent Mauritius leaks by the International Consortium of Investigative Journalists (ICIJ) have exposed Mauritius as a conduit jurisdiction with its treaties with less developed countries being exploited by corporations to avoid taxes and shift profits to other jurisdictions.

According to the United Nations, almost half of all foreign investment in India by 2013 could be traced to companies in Mauritius. Most of the DTAs Mauritius has entered into restrict the taxing rights of capital gains on the sale of shares to the residence of the seller of the shares. As most sellers are based in Mauritius, the ultimate beneficiaries of this provision are Mauritius-based companies and individuals. However, as Mauritius does not tax capital gains, this leads to the double non-taxation of the income of those companies. Moreover, the research by ICIJ also reveals that the DTAs signed with the Netherlands have cost poorer countries collectively at least $1 billion a year in lost tax revenues.

In response to treaty abuse and treaty shopping, South Africa and India have both amended their DTAs with Mauritius, and Namibia, Senegal and Uganda are also reviewing their DTAs with Mauritius, with Senegalese officials declaring in June that the country would seek to cancel the DTA claiming that it cost Senegal $257 million over 17 years.

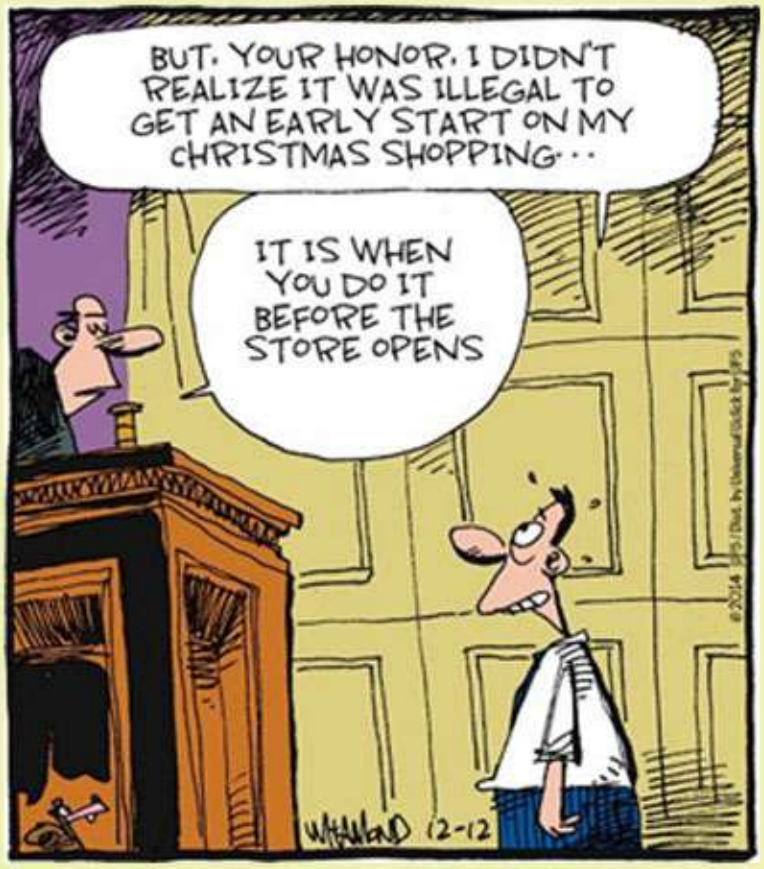
Kenya has also not been left behind; in March 2019, Kenya's High Court nullified the Kenya-Mauritius DTA in a case filed by Tax Justice Network Africa which argued that the DTA would allow companies to shift profits out of Kenya. Furthermore, according to the ICIJ, tax officials in Egypt, Lesotho, Zimbabwe, Thailand, Tunisia and Zambia have expressed their discontent with the Mauritius DTAs.

In response to prevalent treaty abuse, East African countries - Kenya, Uganda and Tanzania - have introduced a limitation of benefits (LOB) clause in their respective Income Tax Acts (ITA). Kenya has introduced this clause under Section 41(5) of the ITA, which came into force on 1 January 2015. While the clause is meant to deter the establishment of conduit companies, the rule does not apply to companies listed in a securities exchange operating in the other contracting state.

It is important to note that treaty abuse is not restricted to African countries. Developed countries are also amending existing DTAs or entering into new DTAs with anti-treaty abuse provisions. Both the Switzerland-Brazil DTA and Japan-Iceland DTA include a Limitation of Benefits clause.

The OECD has championed measures to prevent treaty abuse and profit shifting. According to an OECD report released in February 2019, 116 countries will add provisions to their tax treaties to deter tax treaty shopping. The OECD report further states that 82 of the 116 jurisdictions have agreements that are already compliant or that are expected to be compliant. Further, the OECD has urged all signatories to sign the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI) to incorporate the BEPS plan agreements into the respective tax treaties with ease.

Therefore, it is prudent for governments, especially the Kenyan Government, to critically assess who is ultimately benefitting from the DTAs at the country's expense and endeavour to eliminate tax treaty shopping that is detrimental to Kenya's economic growth prospects.



NEGLIGENCE AT THE WORKPLACE: A GAME OF TENNIS WITH THE DRAGONS?

Rita AUMA

Rita is a legal clerk with a vast experience in legal support capacities and administration.She is responsible for administrative duties at legal settings and performing tasks such as handling mail, preparing legal documentation and trials, conducting research and offering customer service in support of the Administrative Assistant.

When presented with the issue of negligence at the workplace, very few employers look closely at how they can be protected from certain liabilities. The legal knowledge often discussed in our society is in regards to how the employee should be protected. This may have a lot to do with the power dynamic that is at play in the commercial industry for instance, most employment contracts are drafted to the detriment of the workers and excessive gain for the business or company owner.

A question however arises as to what happens in the scenarios where the employer has been playing a game of tennis with dragons, given that they can try to follow all the right things ranging from protective work gear provided to workers to employing the right workers. They may thus hit all the right strikes but the opponent will always be expected to retaliate with fire. That's just how dragons play. Given this scenario, is it even possible for employers to be victims in a society where immense responsibility has been placed on them?

Is there a world where both parties can equally coexist and benefit from the legal system?

Negligence typically occurs where there is a duty of care to do or refrain from doing something and the breach of that duty causes harm to someone else. If a person breaches that duty of care, they are seen as negligent. The resultant harm/injury is usually a foreseeable consequence of the breach of the duty of care. Where this is not the case, it may be argued that the injury/harm was too "remote" and not reasonably foreseeable. An injury may arise as a result of a breach because the reasonable steps were not taken to eliminate or minimize its occurrence.

What are the Elements for Proving Negligence in Employment?

In assessing the conduct of a person which resulted in the harm or injury, the standard used is usually median, or in legal speak, a standard of reasonableness. All that is required of the employer is to act reasonably in averting the occurrence of harm or injury. The extent of reasonableness is not defined and is usually measured subjectively.

The elements for proving negligence in employment are therefore simply that a duty of care exists, that duty of care was breached, and injury or harm resulted from the breach of the duty of care

What duties does an employer owe to the employee or vice versa?

With regard to negligence, the employer has a duty to protect all his workers e.g. provide a healthy working environment with the necessary gear. It remains debatable as to whether an employee owes any duty of care to the employer in this regard. This is because for a duty of care to exist, it has to be imposed by law. Even if such a duty existed by law, the principle of vicarious liability would exculpate the employee. For this reason, it may be argued that the negligence by an employee at the work place is non-consequential to the employee, save for cases where the negligence led to self-harm or injury to the employee in question.

Indeed, the employer has a duty to protect all workers even from themselves, for example by ensuring that the protective wear provided is used correctly.

It goes without saying that in an age of bold outspokenness against atrocities in the work spaces, employers should be evermore vigilant, mindful always of the fact that the scale are tipped against them. This ranges from unwanted sexual advances to physical assaults. An employer can safeguard from this by establishing a proper working system. Admittedly, this can be a challenge for small businesses because the business owner may be the manager, human resource and literally everything. None-the-less, every business can set up structures tailored to its size and need which will ultimately guarantee safety of employees and third parties.

Lawsuits cost time, energy, money and other resources and should be avoided in any way possible. An employer can avoid this whole process by investing in safe and healthy procedures from the very beginning.

An employer needs to do due diligence when hiring a person. Due diligence extends beyond the authenticity of the documents of that person. This would also guard against negligent hiring in the work space.

Employers should also create systems where employees are adequately supervised by those that have been in the field longer, provision of training opportunities, as well as a system of checks and balances. This will ensure that your company or business is not stagnant and that the employees are more experienced.

Today the reality check is that the boundaries have been broken and it's a global affair. So you have to learn how to apply yourself with the future world that is coming, so keep learning and applying. It creates an even bigger impact if learning is not just at the top i.e. with the supervisors and company heads but is an organization's culture.

In conclusion, whereas negligence in the workplace is a concern for the employer more than it is for the employee, there are several solutions an employer can employ to avoid liability in the first place.

AN EMPLOYER'S CHOICE: THE DISCIPLINARY PROCESS AND CRIMINAL OFFENCES.

Betty KAGENI

Betty is the team leader in charge of the firm's Nyali- Mombasa Branch.

Time and again employers find themselves facing the difficulty of how to proceed with an employment disciplinary process where an employee commits a criminal offense in the course of his employment and the criminal case against the employee is still pending in court. An employee can commit such a criminal offence either at or outside the work place and, in both instances, an employer can lawfully and justifiably terminate the employment of the employee.

Criminal offences at the work place.

Under the Employment Act, 2007 (the "Act"), a criminal offence committed at the work place involves a situation where an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property. It is not enough that an employee merely commits a criminal offence; the offense has to be against the employer or employer's property.

Where, in the opinion of the employer, the employee's misconduct amounts to a criminal offence, the employer may initially initiate and conclude an administrative disciplinary case. In this instance, matter rests with the employer's decision without involving the relevant justice agency and/ or engaging the criminal justice system. However, by electing to charge the employee with a criminal offence, the employer is not precluded from internally concluding the employee's disciplinary case.

There is no requirement that an employer must wait for the conclusion of the criminal case before taking disciplinary action. It is now trite law that criminal process is a parallel process to the internal disciplinary mechanism and the burden of proof in the latter is much lower than in the former. This view was taken by the court in Mbagga Wetangula –v- Co-operative Bank of Kenya [2017] eKLR where Onyango J held that:

> ***"The court is however cognisant that an acquittal on a criminal charge is not an automatic release from civil liability as the test for criminal convictions is much higher, beyond any reasonable doubt, while that in civil cases is on a balance of probabilities which present a much lower threshold."***

Thus, an acquittal in a criminal case does not mean that an employer, provided that an employee was put on his defense, cannot proceed to terminate the employee.

In determining whether to utilize the administrative disciplinary process, the criminal justice system or both, some employers consider the negative public perception that may affect their reputation if they elect to institute criminal proceedings. Others are reluctant to use the criminal justice system due to the fact that the process can be long and employers may be unwilling to participate in attending court and/or obtaining witnesses.

However, in many cases employers have preferred using the criminal process so as to deter other employees from committing the same offence against the employer. It is noteworthy that caution should be taken when employers are instituting criminal proceedings against employees since the said proceedings can be used by the latter as a basis for a claim of damages against employers for the tort of malicious prosecution.

Criminal offences outside the work place

Under section 44(4)(f) of the Act, an employer can summarily dismiss an employee where the employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty. The burden of proving that the employee remained in the police custody for over fourteen days is on the employer.

The employer can then choose to start the disciplinary process immediately after the employee has been in custody for over 14 days or after the conclusion of the criminal proceedings. In most cases, the former is ideal due to the fact that criminal proceedings can be prolonged for an indeterminate period, which will cause the employer to suffer the loss of paying an employee who is absent for the period that it will take to conclude the proceedings.

Similarly, the provisions on summary dismissal set out in section 44(4) (g) of the Act can also be applied if an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

This ground of termination has its roots in the fact that an employee is mandated to uphold the ethical standards of his/her employer and, should any criminal act by the employee affect the employer's business, then that will amount to gross misconduct and the employer has a right to summarily dismiss the employee under this ground.

In this instance, the employer is required to demonstrate the factual link between the offences committed and the employer or its property, which demonstration is dependent on the following factors:

- the criminal act and the type of employment;
- the nature of the accusations;
- the existence of reasonable grounds to believe that maintaining, even temporarily, the employment relationship would be prejudicial to the employer or to his reputation;
- the existence of immediate, important inconveniences that cannot be practically countered by alternate measures (for example: assigning the employee to another post); and,
- whether the employee is unable to discharge his or her employment obligations.

In other words, there have to be reasonable and sufficient grounds that link an employee to acts of criminal nature that amount to gross misconduct to justify a dismissal. It is not enough to rely solely on mere suspicions which employers can unjustifiably use to harass and intimidate their employees without justifiable cause.

Suspension of an employee

An employer can also opt to suspend an employee from his/her employment if such employee is charged with any offence, including one that does not affect the employer in any way, and minor offences such as traffic offences.

Suspension of an employee is intended to enable an employer to carry out investigations in instances where the presence of the employee may jeopardize the investigations, or where an employee has been convicted and is awaiting sentence, or where the employee has or is suspected of having committed a criminal offence to the substantial detriment of the employer as provided in Section 44(4)(g) of the Act.

In **Donald C. Avude v Kenya Forest Service [2015] eKLR**, the court held that a suspension should be for a specific period where such suspension is without pay. The employee is considered to continue being in the employer's employment whilst the suspension is subsisting, a position held by the Industrial Court in the case of **Paul Ngeno v Pyrethrum Board of Kenya Ltd [2013] eKLR.**

In instances where an employer has decided to suspend an employee pending the determination of police investigations or criminal proceedings, the findings of the said investigations or proceedings would be binding upon the employer, as was held by the Industrial Court in the case of **Patrick Njuguna Kariuki v Del Monte (K) Limited [2012] eKLR.** This process is referred to as 'forfeiture' as the employer is seen to forfeit the right to proceed with disciplinary action.

The forfeiture process is disadvantageous to the employer as the employer has little or no control as to how the matter will culminate and is bound by the determination of the police investigations or the courts. Moreover, in the event of an acquittal, the employer would be barred from commencing or continuing administrative disciplinary action against the claimant on grounds substantially similar to the matters in the criminal case and for which the employee has been acquitted.

Procedure for termination of employment where a criminal offence has been committed by an employee.

Most employers believe that when an employee has committed a criminal offence at or outside the work place that directly and negatively affects the employer, especially in cases of fraud, theft and corruption, immediate dismissal is warranted once the crime has been discovered. Summary dismissal is not an on-the-spot dismissal of the employee in his/her absence or without a hearing.

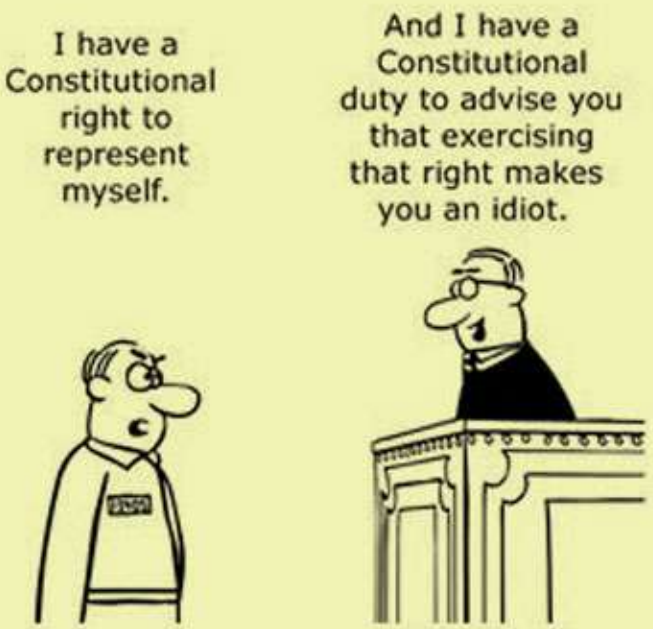
Whatever reason arises to cause an employer to terminate an employee, that employee must be taken through the dismissal process outlined under section 41 of the Employment Act. This procedure is applicable in a case for termination as well as in a case that warrants summary dismissal and, in both cases, the right to be heard is never to be discarded.

Section 41 of the Employment Act states as follows:
(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

This provision is couched in mandatory terms which are applicable even when the employee is detained.

Where an employer fails to follow these mandatory provisions, the outcome of the termination process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. However, the conduct of disciplinary proceedings may be a bit complicated when an employee is detained since a hearing has to be carried out. The courts are silent on how to conduct a disciplinary hearing in this instance but in the case of **Samuel Nyasimi v Merica Hotel [2019] eKLR**, the court held that the termination was lawful when the employee was issued with a show cause letter and failed to respond.

Even where an employer has a just cause as to apply the provisions of section 44(4) (f)and (g), the termination process must also comply with the provisions of section 43 of the Act, which places an obligation on the employer to prove that the reasons for terminating the employment of an employee amounted to gross misconduct. If the employer fails to discharge that obligation, then the court will make a finding that the termination was unfair.



viii. Agreements; and

ix. Powers of Attorney and Revocations of Powers of Attorneys

The opinion of the Collector of Stamp Duty (the "Collector") may be sought (within the stamping timelines and subject to the payment of Kshs. 100/-) as to whether or not an instrument is chargeable with stamp duty. If the Collector confirms that such an instrument should be stamped, the Collector proceeds to assess the stamp duty payable and the instrument should be stamped within Twenty-on (21) days from the date of assessment as opposed to the usual Thirty (30) day period. The process of seeking the Collector's opinion is referred to as adjudication.

Who pays stamp duty?

The Schedule to the Act outlines the parties who are obliged to pay stamp duty. As a matter of practice, this obligation is placed on the party who is acquiring an interest from the transaction. For instance, in the event of a sale of land, the purchaser is responsible for paying the stamp duty.

In other cases, such as in grant of letters of administration in succession matters, the administrator of the estate in question pays the nominal stamp duty chargeable on the instruments of transmission of the estate to the beneficiaries. However, a subsequent transfer or other dealing in the property after transmission would attract stamp duty in the normal course as provided under the Act.

There are certain consequences where one fails to pay stamp duty on a document specified as being chargeable with stamp duty under the Schedule to the Act. These are that the unstamped document cannot be:

i) admitted as evidence in any criminal or civil proceedings except by the Collector to recover stamp duty; and

ii) filed, enrolled, registered or acted upon by any person, until stamped in accordance with the Act.

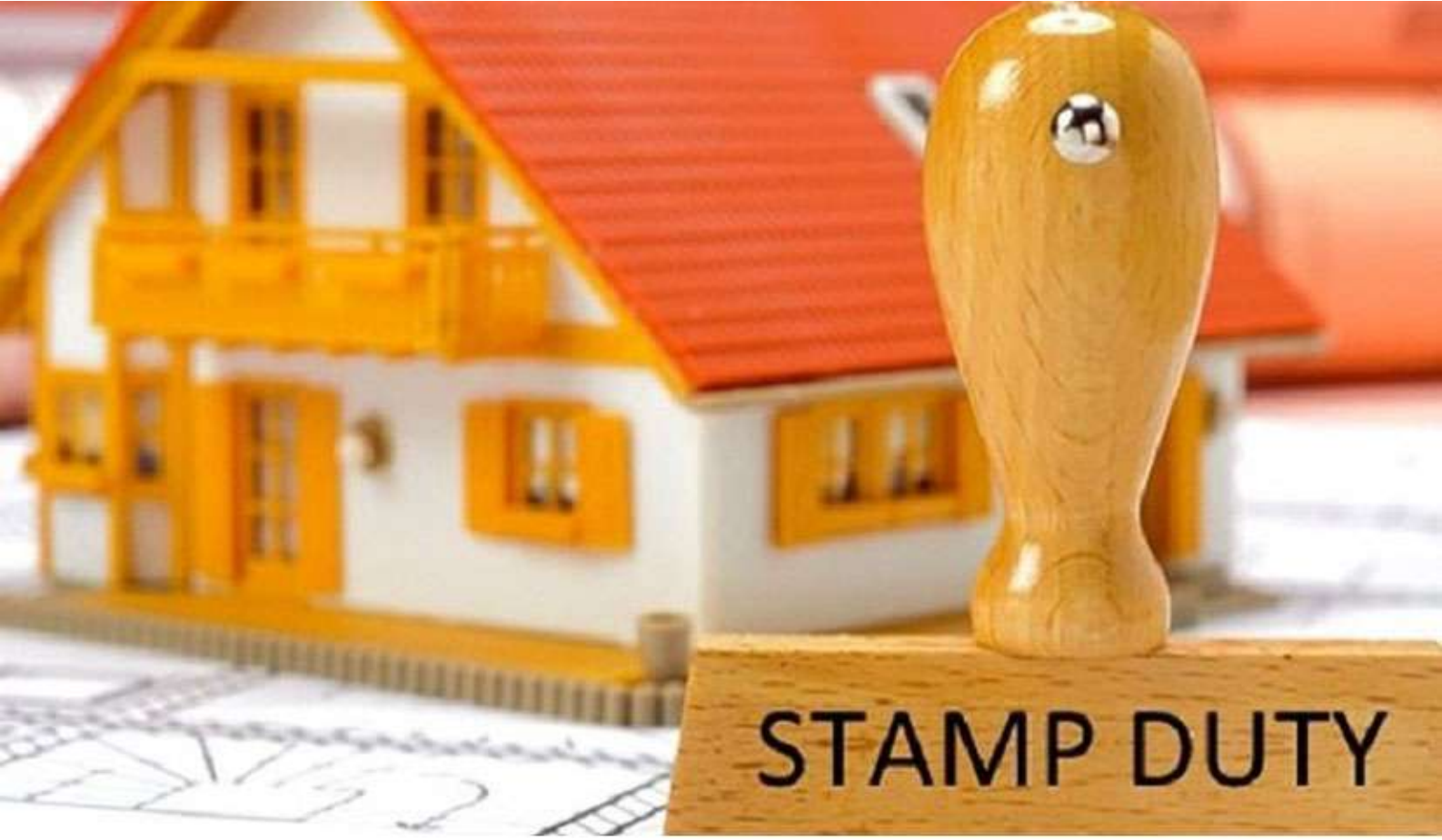
How much stamp duty is one required to pay?

The Act provides the stamp duty rates applicable for various transactions with respect to stamp duty although all such payments are subject to assessment undertaken by the Kenya Revenue Authority. For instance, stamp duty on instruments conveying an interest in property is usually pegged on the value of the property or the transaction as assessed by the Government Valuer and not necessarily the purchase price of the property. An example of this is:

- Stamp duty payable on transfer of property within a Municipality is four (4)% of the value as ascertained by the Government Valuer;
- Stamp duty payable of a Charge is 0.5% of the facility secured; and
- Stamp duty payable on a Discharge is 0.05% of the facility secured.

The document to be stamped with stamp duty should contain the value or price of the transaction that affects the liability and the amount of the duty to be paid. Where the value of the transaction cannot be ascertained, as is the case for commercial agreements or powers of attorney, a nominal amount is assessed and paid on the said agreements.

For instruments relating to the transfer of land, the Collector refers the matter for valuation by a Government Valuer who determines the open market value of the land as at the date of the instrument of transfer to ascertain whether any stamp duty is payable.



STAMP DUTY: WHAT YOU NEED TO KNOW

Anne WANJOHI

This Articles will highlight the frequently asked questions regarding the payment of stamp duty.

What is stamp duty?

Stamp duty is a tax levied on specified legal instruments or documents and include instruments conveying an interest in property. This tax is provided for under the Stamp Duty Act Cap 480 of the laws of Kenya (the "Act") and is collected by the Kenya Revenue Authority.

Which instruments are chargeable with stamp duty?

The instruments chargeable with stamp duty are outlined in the Schedule to the Act, some of which include the following:

i. Charges, Further Charges and Discharges;
ii. Guarantees;
iii. Indemnities;
iv. Leases/Licenses and Surrender of Leases;
v. Transfer of land/Conveyance;
vi. Transfer of shares;
vii. Insurance policies

When is one required to pay stamp duty?

Stamping of instruments with stamp duty should take place within thirty (30) days from the date of the instruments. If an instrument is executed outside Kenya, the 30 days' timeline starts to run from the date when the document was first received in Kenya.

If the document is one conveying interest in land, the Collector assesses the duty to be paid within 21 days of the Collector's notification of assessment as opposed to the usual 30 days period set out above. Previously, the Collector would allow transfers relating to land to be stamped pending valuation. If the value as assessed by the Valuer was higher than what had been indicated by the owner of the property, the Collector would require the transfer instrument to be up-stamped with the additional stamp duty assessed from the consideration in line with the market value as recommended by the Valuer. However, this practice has since changed and it has now become a condition precedent to carry out valuation before stamping of transfer instruments. Payment of stamp duty outside the prescribed timelines attracts a penalty on the stamp duty payable which is assessed by the Collector.

The applicable penalty rate is One Kenya Shilling (Kshs. 1/-) for every Twenty Kenya Shillings (Kshs. 20/-) and of any fractional part of the Twenty Kenya Shillings (Kshs. 20/-) of the duty chargeable per quarter, that is, for every period of three (3) months. This can be simply translated to a rate of Five (5)% per quarter on the total stamp duty payable. However, the maximum penalty on stamp duty should not exceed the principal stamp duty payable.

When can I be exempted from paying Stamp Duty?

There are various instruments and transactions which are exempt from stamp duty. It is important to note that any such exemption must be provided for in law for the same to apply.

Below are some instruments or transactions which are exempted from stamp duty:

	Instrument	Comments (if any)
1.	Discharge and replacement charge for purposes of surrender of a title with an existing registered charge for purposes of change of user, amalgamation, subdivision or other form of property development.	The requirements are that the parties (chargor and chargee) as well as the charge debt must be the same. Where the chargor and the chargee are companies, the Discharge of Charge and the replacement charge must also be registered at the Companies Registry. The basis of this exemption is that: • full duty was paid on the existing charge, a copy of which must be produced to the Collector when applying for exemption; and • the outstanding charge debt is yet to be redeemed hence the exemption of stamp duty on the Discharge of Charge.
2.	Instruments relating to creation of securities rights under the Movable Property Security Rights Act No. 13 of 2017	Such instruments include Debentures (whose securities do not include immovable property), facility and security Agreements and deeds of assignment of rights/proceeds from a movable asset.
3.	Transfer/conveyance between spouses	Proof of marriage must be provided.

4.	Transfers to family owned companies	Proof of relationship must be provided. The degree of consanguinity is limited to a nuclear family.
5.	Transfer/conveyance by an individual to a family owned company.	The law is silent on the transfer from a family owned company to an individual. Parties would have to apply to the Collector for adjudication subject to the payment of the adjudication fees being Kshs. 100/-.
6.	Transfer of beneficial interest in property among associated companies.	The threshold for the qualification is: • either of the transacting companies must be a beneficial owner of at least 90% or more of the issued share capital; or • a third company with limited liability must be a beneficial owner of 90% or more of the issued share capital of the transacting companies.
7.	Instruments relating to transactions in which the obligation to pay stamp duty would be imposed on a person with disability.	This exemption is subject to certain conditions set out under the Persons with Disabilities Act No 14 of 2003 such as registration as a person with disability by the Persons with Disabilities Board and vetting by the Kenya Revenue Authority.
8.	Instruments relating to transactions in which the obligation to pay stamp duty would be on bodies enjoying diplomatic immunity under the Privileges and Immunities Act.	Examples of such bodies include Embassies and Foreign Ministries.
9.	A will, codicil or other testamentary disposition.	For most instruments especially those that are registrable, a formal application for exemption has to be made to the Collector citing the enabling provision. However, from practice, no such application needs to be made for wills and codicils.
10.	Instruments with respect to licenses of business activities of an export processing zone enterprise.	The enterprise has to be licensed under the Export Processing Zones Act. Chapter 517
11.	Instruments relating to the business activities of special economic zone enterprises, developers and operators.	The enterprises, developers and the operators should be licensed under the Special Economic Zones Act of 2015
12.	Instruments relating to the transfer or issue of shares, preferred shares, stocks, warrants or similar capital market instruments which are	Currently, there is no other approved securities exchange under the CMA other than the Nairobi Stock Exchange.
	listed and transacted in the Nairobi Stock Exchange or other securities exchange approved under the Capital Markets Authority Act Chapter 485A (CMA).	
13.	Instruments relating to the Purchase of a house by a first time home owner under the affordable housing scheme.	For more details on the affordable housing scheme, please refer to the article in our 2019 Quarter 2 Newsletter on *'Does Everybody Get a House? The Housing Fund Levy'* by one of the Firm's partners, Mr. Francis Kakai.