CM NEWSLETTER

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Instructive, Insightful & Legally Sound

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CM ADVOCATES LLP

Editorial Team

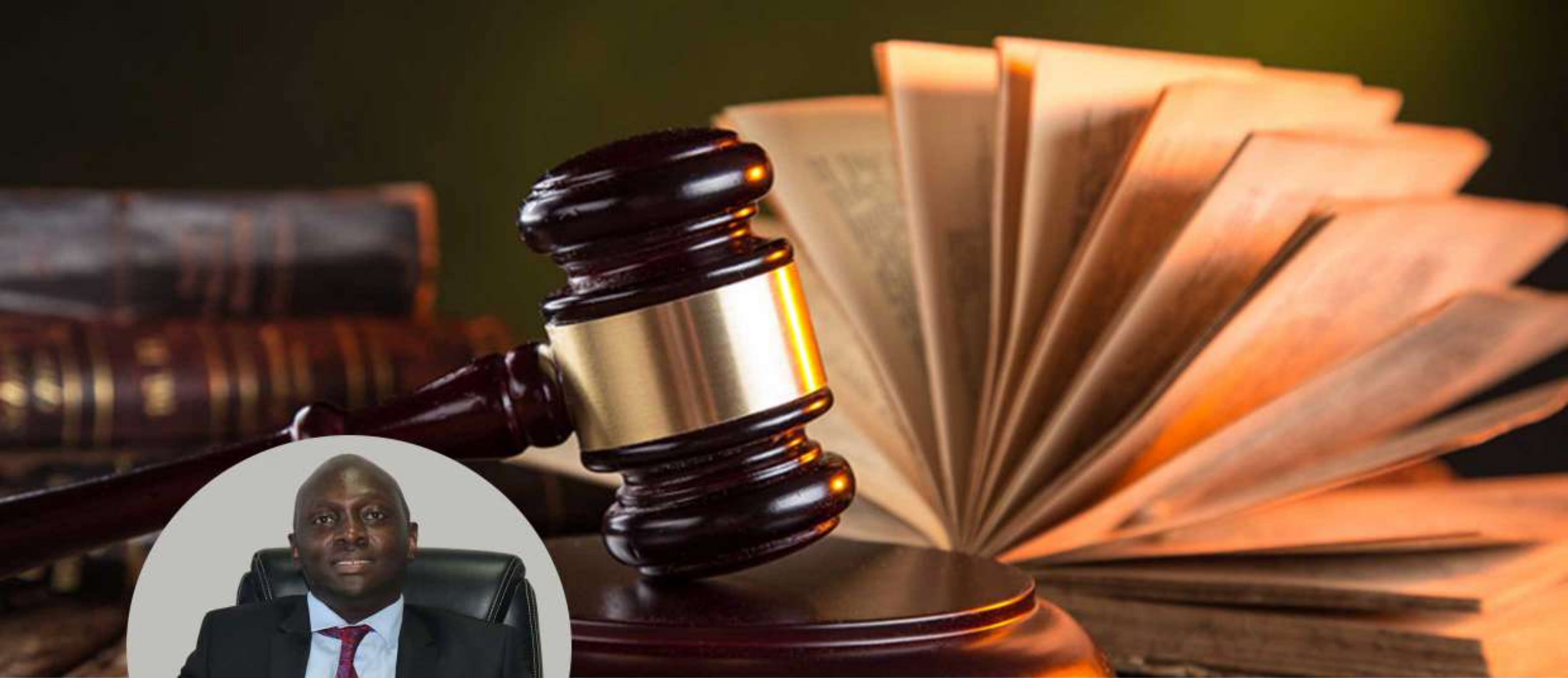
Suleiman Bashir

Njomo Kamau

Dianah M. Gichuru

Victorine Rotich

Edward Mandela



Cyrus MAINA, Managing Partner
cmaina@cmadvocates.com

Acknowledgement

On 10th June this year, we shall be celebrating our 5th year since inception. During these past years, our firm has grown from an initial team of two to a team of about forty, two thirds of whom are advocates. It is Theodore Roosevelt who opined, "Nothing in this world is worth having or worth doing unless it means effort, pain, difficulty". Undoubtedly, ours has been a challenging but satisfying journey.

During these five years, it has equally given us great pleasure to see many of you achieve greatness and tremendous successes in your business and other life affairs. Going forward, we look forward to stronger partnership with yourselves. We remain heavily indebted to all of you for your undiminishing support, and even constant advice on how we can serve you better.

Consequently, a part of our 5th year celebrations, we have decided to start a journey of sharing knowledge with you; our esteemed clients, and learning together with you. In fulfillment of this aspiration, the Firm has decided to launch a free quarterly Newsletter dubbed The CM Newsletter, through which our team of advocates and lawyers shall be sharing with you our collective knowledge and experiences in various areas of our practice.

As a firm, we continue to fix our eyes on the stars and our feet to the ground as we match towards our ultimate objective, which is: ***To be a distinguished legal solutions provider in Kenya and Eastern Africa Region that adds value to its customers through a professional and results- oriented team.*** In this journey of continuous improvement, we shall continue giving up what is good in us in order to achieve greatness.

We pride ourselves in understanding our Clients businesses and therefore offering relevant and practical- as solutions to your legal needs and challenges. Accordingly, our team will endeavour to concentrate on topics that would be of interest to, or that may affect, many of your businesses and personal affairs.

We hope that you shall enjoy our publications and even give us your suggestions on the topics that would be of interest to you.
Thank You!

Cyrus Maina

Suleiman BASHIR, Editor
sbashir@cmadvocates.com

Greetings.

The CM Newsletter is here - Instructive, Insightful and Legally Sound. Through the CM Newsletter, we hope to offer our clients and readers a first class experience on matters law in Kenya. It is designed to be at the forefront in keeping our readers informed on current legal developments in varied practice areas in a simple and easy to understand language.

In this issue, our team of lawyers have spurned through among other areas; Intellectual Property Law, Business Law and Competition Law. The Newsletter shall in its every edition introduce our clients and readers to one the Firm's Business Units – This edition features the Family Business Unit (FBU) comprised of experts on matters Family Law.

We have aptly captured best practices in corporate governance. Are you a board member? Aspiring board member? Or has your start up now grown into an SME and is steadily on its way to becoming a market leader? Well, it is time to ensure your corporate governance structures are in order. To this end, Miriam Mugo writes on effective board practices.

You are also presented with an opportunity to understand how fundamental principles of nemo dat and bona fide purchaser affect your everyday life and why in reality, "sometimes, both sides of an argument are right. Not just partly right, or right on odd numbered days, or right only under certain circumstances. They are both right for all time, and — ceteris paribus — under all circumstances."

At CM we keep abreast with changes in law. Read through to know more about proposed amendments to the Insolvency Act, the Copyright Act and the proposed digitization of processes within the Competition Authority of Kenya.

It is our hope that you will enjoy this Newsletter and we shall be delighted to have your feedback to the articles and even suggestions on areas of interest that you wish us to write on.

Enjoy!!!

Contributors

Njomo Kamau, Partner
Wilfred Lusi, Partner
Diana Gichuru, Senior Associate
Afia Kojo, Associate
Miriam Mugo, Associate
Suleiman Bashir, Associate

KISS OF DEATH: ENFORCEMENT OF QUALIFYING FLOATING CHARGES (QFCs) IN KENYA

Dianah GICHURU,
Senior Associate
dgichuru@cmadvocates.com

Afia KOJO,
Associate
akojo@cmadvocates.com

Debt is the slavery of the free. A bold saying attributed to a former Syrian slave, Publilius Syrus. A few millennia later, in what would seem as a meeting of minds on the subject, Ringera J, (as he then was) stated that "receiverships in Kenya tended to give a kiss of death to many a business". He went on to add that "courts may have to take judicial notice of this notorious fact!" (See Barclays Bank of Kenya Ltd –vs- Andrew Douglas Gregory and Abdul Zahir Sheikh (2003) 2ea 434.

Such bold comments were definitely part of the reason why the laws on insolvency in Kenya needed an overhaul. The reforms in the industry culminated in the promulgation of the Insolvency Act, 2015 (hereinafter the "IA"). The IA, was seen as a ray of sunshine. Enough was enough, out with the all too common shark mentality. The age of corporate rescue was here, they said!

Corporate Rescue Culture is not a Kenyan invention, with the global recession more and more companies were running into receivership dealing a heavy blow to many industries. On a supranational level, there was consensus that enforcement of insolvency laws generally ended in receiverships, which only made matters worse. Thus began the global shift from receiverships to business recovery. In Kenya, with the commencement of the IA, administration was introduced as a debtor friendly remedy for defaulting companies.

"receiverships in Kenya tend to give a kiss of death to many a business... courts may have to take judicial notice of this notorious fact!"

In this Issue, we shall consider the IA, and highlight the regulatory framework change in enforcement of a Qualifying Floating Charge (QFC) to determine if the intended objectives have been achieved. In the words of President Uhuru Kenyatta "[The task is not in legislating] but in turning the policy prescriptions into prosperity for Kenyans."

Blacks Law Dictionary defines a Floating Charge as a continuing charge on the assets of the company creating it, but permitting the company to deal freely with the property in the usual course of business until the security holder shall intervene to enforce his claim. A Qualifying Floating Charge (QFC) is one that allows the holder thereof to appoint an administrator or administrative receiver without an order of the court.

The Floating Charge (FC) is ambulatory and hovers over the assets until the Debenture holder exercises its rights (to appoint a receiver/ administrator) whereby the Floating Charge crystallizes into a Fixed Charge.

Before the commencement of the IA, enforcement of QFCs was governed under the Companies Act, 1985, CAP 486 (the "Repealed Act). Whenever a Company defaults in repayment of a loan facility, the Lender is entitled to realize the security by amongst other options appointing a Receiver. Part VIII of the Repealed Act provided for the appointment of a Receiver by a holder of a QFC. Such Receiver owed a primary duty to the Debenture holder as opposed to the company or other creditors. His role under the Debenture was simple; get in, realize sufficient of the company's assets and undertaking to satisfy the outstanding debt of his appointer, get out! Many a time, this narrowed scope by the Receiver led to a compromise of other stakeholders' interests inter alia unsecured creditors, employees, customers e.t.c. The resultant effect therefore was, as succinctly noted by Justice Ringera, "a kiss of death to many a business".

With the inception of the IA, holders of Floating Charges are specifically prohibited from appointing Administrative Receivers, therefore only left with the option of Administrators.

Administration has at its core mandate maintaining the (defaulting) company as a going concern and turning around the financial misfortunes of the (defaulting) company to the benefit of all or most creditors.

The new procedure of Administration is therefore destined slowly to replace the floating charge holder's remedy of Receivership with Administration. Thus the beginning of the corporate rescue culture.

Floating charges created after the commencement of the IA will therefore in a mandatory sense only have the option of administration. In order to appoint an Administrator, the QFC must be enforceable i.e. the debenture holder must be entitled to call in their security in line with Section 65, 66 and 67 of the Moveable Property Security Rights, 2017.

In the context of whether the floating charge entitles the holder of it to appoint an Administrator, drafters must be intentional in the wording of the Debenture in order for it create an enforceable QFC. Section 534 of the IA provides that the instrument creating the QFC must state that this proviso applies to it or purports to empower the holder of the floating charge to appoint an Administrator of the Company. The ambiguity of Section 534 (2) of the IA is in our view likely to become the subject of judicial interpretation.

It may therefore be safer that drafters specifically provide for the appointment of the Administrator in the Debenture therefore leaving no room for inference.

The appointment of the Administrator by a holder of a QFC will take effect when the above requirements are met. This appointment concomitantly creates a moratorium whereby unless leave of the Court is obtained, the Company may not be wound up, no security can be enforced and all legal proceedings against the Company are stayed. However, it is important to note that this appointment cannot be made if the Company had already entered administration or if an administrative receiver is in office. Illegitimate appointments may also result in liability on the appointor.

Where there is a prior holder of a QFC, the IA has imposed restrictions on a holder of a QFC to give at least 3 days' notice to the holder of the earlier registered Floating Charge in order to succeed in appointing an Administrator. A QFC has priority over another if it was either created first or it is to be treated as having priority in accordance with an agreement to which the holder of each floating charge was party. However, the office of the Official Receiver has in consultation with various stakeholders compiled proposed amendments to the IA one of which is to include a requirement that a former holder of a QFC gives its consent in writing for the making of the appointment.

Notably though, floating charges created before the commencement of the IA and appointments of administrative receivers made before the commencement are excluded from this prohibition (see S. 690 (2) of the IA). Accordingly, such floating charges remain governed by the provisions of Part VIII of the Repealed Act as the IA does not have any substantive provisos on Administrative Receivers. Interestingly, in a bid to make up for this, the office of the Official Receiver has submitted proposed amendments to the IA including a transposition of the Part VIII of the Repealed Act as the new Part VIIA of the IA.

Perhaps the most radical proviso of the IA is the requirement that an Administrator has to make available 20% of the Company's net assets for the satisfaction of unsecured debts. Although this is a preserve of companies whose net assets are above Kes. 500,000/-, it offered a much needed reprieve to unsecured creditors who ordinarily rank lowest in the order of distribution and rarely get any part of the pie. Interestingly though, proposed amendments to the IA include a proposal to amend S. 474 to give rights to any holder of a floating charge to make an application to the Court on the grounds that the deduction of the 20% share of the assets in favour of the unsecured creditors unfairly harms the interests of the floating charge holder.

So much for the corporate rescue culture- in through the front door, out through the back.

A BALANCING ACT: INTRICACIES OF NEMO DAT & BONA FIDE PURCHASER PRINCIPLES

Suleiman BASHIR
Associate
sbashir@cmadvocates.com

Imagine the following scenario:

Sandra is in the market for a quality used car and she goes scouting around looking for her favorite car, a Mazda Demio. She finally sees what she wants on the forecourt of Nzuri Motor Dealers, a car dealership that she trusts is well managed and decides to buy it. Two days later, Peter turns up on the front lawn of her house claiming the car is his. He is furious. Eventually, Sandra gets him to calm down enough to explain what happened. It turns out that the previous week, Peter had put up an advertisement in the newspaper offering his Mazda Demio for sale.

One John responded to the advertisement and came around to view the car. John was interested in the car and issued a cheque for the sum of Kshs. 550,000/= to Peter who cheerfully accepted it and released the car to John. John then proceeded to sell the car to Nzuri Motors and has since disappeared. Peter discloses that the cheque issued to him by John was fake and therefore bounced. However, it emerges that Sandra had bought the car, paying good money for it with no idea of the car's provenance. Peter demands for his car. Sandra and Peter decide to proceed to the court to have the matter settled.

Who has the right to the Mazda Demio? Peter or Sandra? Depending on different principles of law, it would seem that both Sandra and Peter have good claims to the car:

Peter has a good claim as when John sold the car to the dealership, he had nothing to sell: he did not have good title. This principle is known in the common law as the 'nemo dat' rule, which is short for nemo dat quod non habet. That is, you cannot give what you do not have. What you do not have a legal right to alienate, you cannot purport to transfer.

Sandra also has a good claim. She purchased the car in good faith. She paid good money for it. Maybe the question turns on the integrity of Nzuri Motors. Did it suspect the car's provenance? Is Nzuri Motors known for doing a bit of 'receiving' on the side? Or did it, like Sandra, purchase the car in good faith from John who seemed to have good title? Once again, the common law will come to Sandra's aid. Sandra is a 'bona fide purchaser for value without notice'.

The nemo dat principle rests on a vision of a chain of transactions. Current owners must be able to trace their ownership back in time through a series of legitimate transfers (ideally) to an act of legitimate original acquisition.

Assuming the car dealer also acquired the car in good faith, who gets the car? If the car dealer was engaging in a bit of 'receiving', how does that change the outcome? What if Peter had turned up on the car dealer's forecourt before Sandra bought the car?

The Principle of Nemo dat quod non habet

This is a legal rule, which states that the purchase of a possession from someone who has no ownership right to it also denies the purchaser any ownership title. The purchaser has only that which the previous owner had and nothing more. This is sometimes called the "derivation" principle: the transferee's rights derive from those of the transferor.

The nemo dat principle rests on a vision of a chain of transactions. Current owners must be able to trace their ownership back in time through a series of legitimate transfers (ideally) to an act of legitimate original acquisition.

For the same reason, Harper could not transfer title to the finance company. Bennett was therefore able to recover the car from the finance company.

Applying the nemo dat principle to our scenario- Peter has the right to the Mazda Demio since passing ownership of the motor vehicle to John was pegged on a purchase price of Kshs. 550,000 that was never met by John as the cheque had bounced, thus, John did not get good title. Nzuri Motors did not also get good title as John lacked ownership right in the first place. Sandra, by the chain of transactions did not have good title since the purported transfer of the motor vehicle by Nzuri Motors was void ab initio.

Mitigating the 'harsh' rule in Nemo Dat

Although the nemo dat rule in its essential form may be clear, it is not always fair, as it is an innocent buyer who will suffer. This principle is also a setback to keeping with the needs of modern commerce and trade as it places a buyer of goods in a very difficult position. The owner, in voluntarily parting with the possession of the goods, takes upon himself the risk that something might happen to the goods.

The owner is in a position to check for himself the creditworthiness of the person to whom he gives possession of the goods and there is an argument that if the owner's trust is in fact ill-founded then he ought not to put the consequences of his own mistaken judgment on to the shoulders of the innocent purchaser. It is largely difficult for a buyer to trace ownership of goods- if the goods are to move freely in the distribution chain in an ordinary business setting it is important that buyers are confident in their purchases. Furthermore, goods may be perishable and there is a need for them to be dealt with quickly and efficiently.

Because of the apparent harshness of the nemo dat rule, several exceptions to it were developed at common law and also have been enshrined in statute. All of the exceptions will apply only in favour of a person who acquires the goods in good faith and without notice of the rights of the original owner.

One of the key exceptions to the nemo dat principle is the rule in bona fide purchaser.

Innocent Purchaser for Value without Notice (Bona Fide Purchaser)

A bona fide purchaser must purchase for value, meaning that he or she must pay for the property rather than simply be the beneficiary of a gift.

Even when a party fraudulently conveys property to a bona fide purchaser (for example, by selling to the bona fide purchaser, property that has already been conveyed to someone else), that bona fide purchaser will, depending on the laws of the relevant jurisdiction, take good (valid) title to the property despite the competing claims of the other party.

For a purchaser to successfully rely on the bona fide doctrine, one must prove the following:

a. That he holds a certificate of Title.
b. That he purchased the Property in good faith;
c. That he had no knowledge of the fraud;
d. That the vendors had apparent valid title;
e. That he purchased the goods without notice of any fraud;
f. That he was not party to any fraud.

Under the principle of innocent purchaser for value without notice, Sandra can enjoy ownership of the Mazda Demio after proving that she is an innocent purchaser who had no knowledge of a claim by any other party to the Mazda Demio.

A bona fide purchaser of a property without notice has absolute unqualified and answerable defence against a claim of any prior equitable owner.

In Kenya, the "nemo dat" rule is also subject to the following other exceptions which are provided under the Sale of Goods Act, CAP 31:

(a) Estoppel.
Section 23 (1) of the Act provides that the "nemo dat" rule will not apply if "the owner of the goods is by his conduct precluded from denying the seller's authority to sell".

(b) Sale under a Voidable Title.
According to Section 24, where the seller of goods has a voidable title thereto but his title has not been avoided at the time of the sale, a buyer in good faith without notice of the defect in the seller's title acquires a good title.

(c) Resale by a Seller in Possession.
Section 26 (1) provides that if a person who has sold goods, but has remained in possession of them or of the documents of title to them, transfers the goods or documents of title to a third person, that person acquires a good title if he receives the goods in good faith and without notice of the previous sale.

(d) Sale by a buyer in Possession (section 26 (2).

(e) Sale under a common law power of sale, such as a sale by an agent of necessity.

(f) Sale under a court order.

(g) Sale in market.

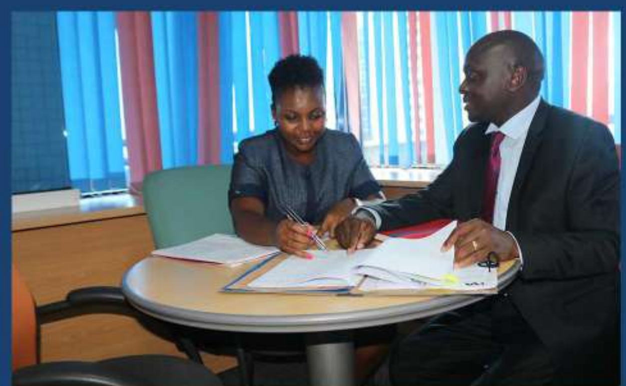
In conclusion, although the exceptions do go some way to limiting the harshness of the nemo dat rule, there is a need for further reform in the area to ensure that conflicts between owners and purchasers are resolved fairly.

FAMILY BUSINESS UNIT

At CM Advocates LLP, we have an experienced team of family business lawyers who can assist you in a number of matters related to estate planning as well as probate and administration.

Our services offerings include:

- Drafting of a Family Constitution;
- Drafting of a Shareholders' agreement in line with IFC Handbook on Family Owned Businesses;
- Aligning your company's Memorandum and Articles of Association to the shareholders' agreement;
- Transfer of family properties to a family holding company (for ease of administration and tax efficiency) and procuring the requisite tax exemptions on transfer of family properties such a vehicle;
- Creating of an effective group structures (where there are more than one companies);
- Company secretarial issues;
- Corporate governance advisory;
- Executive Managers/directors' contracts and their remuneration structure including HR Manual;
- Wills and family trusts;
- Set up of a Family foundation or Charity;
- Planning and executing a Succession Planning Strategy.



AUTOMATED CASE MANAGEMENT SYSTEM: DIGITIZATION OF THE MERGER FILING PROCESS IN KENYA

Njomo KAMAU
Partner
nkamau@cmadvocates.com

Competition agencies across the world have in the recent past commenced the automation of their services by initiating a change-over from a manual case management system to an automated case management system. Kenya is no exception to the trend with the Competition Authority of Kenya (the 'Authority') having initiated efforts since 2016 to put in place an automated case management system for filing of merger applications to replace the manual case management system currently in use.

The manual merger filing system

The key statute regulating mergers and acquisitions in Kenya is the Competition Act No. 12 of 2010 (the "Act"), which came into force on August 2011.

The Act provides that all mergers and acquisitions must be notified to the Authority for its approval or exclusion prior to completion. The parties to a proposed merger, that is, the undertaking directly or indirectly acquiring or establishing direct or indirect control over the whole or part of the business of another undertaking (the "Acquiring Undertaking"), and the undertaking being acquired (the "Target Undertaking"), are both required to notify the Authority of the proposed merger in "writing or in the prescribed manner". This notification is done through the completion of a Merger Notification Form which is delivered along with the following documents:

i. A complete list of shareholders and their respective shareholding for both the Acquiring and the Target Undertakings and of any undertaking that directly or indirectly controls the Acquiring Undertaking;
ii. The products or line of business that the parties deal in; and
iii. Strategic documents of the merging parties in relation to the affected markets including, but not limited to:

- Merger Agreement (for example a copy of the
- Sale Purchase Agreement or a Shareholders Agreement),
- Board minutes approving the transaction;
- Annual Financial Statements for the preceding three years;
- Business plans;
- Claim for Confidentiality (if applicable);
- Evidence/proof of remittance of the applicable merger fees (if applicable).

The duly completed merger application may be hand-delivered to the Authority's Registry or may be sent by electronic mail (though the Authority will still require the original application to open the merger record file) or by post. The Authority will acknowledge receipt of the merger application within 30 days and may also make a request for additional information or convene a hearing conference if it deems this necessary. Thereafter, the Authority reviews the application and communicates its determination within 60 days.

Challenges of the manual merger filing system

The Authority, as well as stakeholders, have noted that the manual case management system is cumbersome due to the reliance on the manual filing of documentation a challenge that has been compounded by the increasing number of merger and acquisition filings in Kenya. While the Authority has largely managed to adhere to the timelines set out in the Act, the need to physically deliver the Merger Notification Form to the Authority together with the supporting documents and any other information requested and thereafter make visits and phone calls to the Authority's offices to physically follow up on the progress of applications filed has made the process unjustifiably slow.

The move towards an automated merger filing system in Kenya

In line with the global trend towards automation of systems, the Authority has embarked on a journey to automate all its processes with an aim of increasing the speed of operations, reducing the cost of multiple interactions with stakeholders, fast-tracking the decision making process and expediting stakeholder feedback.

In this regard the Authority intends to introduce an automated case management filing system for merger filings in Kenya and has commenced a public consultation and participation exercise with various stakeholders that has included an interactive briefing on the proposed online automated system. Below are some salient features of the proposed system:

1. Both the Acquiring and Target Undertakings will be required to register a user account with their respective personal details and create a user name and password for the account to allow the respective undertakings to file their merger applications on the system.

2. To proceed with the filing of a merger transaction, both the Acquiring and Target Undertakings will be required to create a merger application record by uploading their respective details and the description of the merger as well as their email addresses on the automated system. The parties must also indicate which party is making the application, with the party lodging the application first in time being the First Party and the party lodging its application thereafter being the Subsequent Party.

3. Upon registration of the merger application, a unique reference code will be automatically generated and an acknowledgement of the initiation of the merger process issued to the respective undertakings by the Authority. It is noteworthy that the Subsequent Party will be required to obtain the merger reference code from the First Party to access the merger application record created.

4. Upon the creation of the merger record, each undertaking will proceed to fill the schedules of the online merger application form which schedules are similar to the Merger Notification Form currently in use. The undertakings will also be required to upload the requisite supporting documentation for the Schedules in the Portable Document Format (PDF) as files in other formats will not be accepted by the system.

5. Upon submission of the online form, each undertaking will be issued with an acknowledgement by the Authority. It is noteworthy that the Authority will follow the same process of evaluation of the online application as for a manual application before the issuance of a determination.

The Authority has also put in place a similar automation system on the automated case management portal for all its services.

Benefits of the automated merger filing system

The following benefits are likely to accrue from the implementation of the automated case management system:

- Faster applications by undertakings when lodging merger applications;
- Ease for undertakings in tracking, querying and receiving feedback on the status of their lodgments online through the use of unique application reference numbers thereby reducing physical follow-ups;
- Enhanced confidentiality in handling client information through ether electronic storage of applications as opposed the physical filing of manual applications;
- Increased efficiency and ease in obtaining user feedback on merger applications;
- Minimized human error and increased accuracy of merger application process; and
- Retention of institutional memory.

Potential data protection and privacy concerns

While the implementation of the automated merger filing system will be expected to greatly ease and speed up the merger application process in Kenya, vital concerns remain regarding the protection and privacy of data provided on the automated system as the Authority has not clearly stated in what manner the data will be stored and thereby protected from unlawful disclosure. Therefore there exists a potential risk to undertakings of having their data submitted on the system illegally accessed. It is noteworthy that the above concerns are evident in the digitization processes of other Government services.

While Article 31 of the Constitution of Kenya, 2010 provides a general right to privacy, which includes the right not to have information relating to one's family or private affairs unnecessarily revealed or the privacy of one's communications infringed, Kenya does not have a substantive law protecting personal information from unlawful disclosure or misuse. Furthermore, the recently enacted Computer and Cybercrimes Act 2018, while setting out various provisions dealing with cybercrimes, does not provide any protections against the disclosure of personal data.

However, the proposed Data Protection Bill 2018 includes various provisions on data protection and states that interference with personal data of a data subject or infringement on the right to privacy will attract a fine not exceeding Kshs. 500,000 or to imprisonment for a term not exceeding 2 years or to both. In addition, the Privacy and Data Protection Policy 2018 proposes principles for data protection and as well as consequences for non-compliance.

In the interim, it will be incumbent on the Authority to provide relevant undertakings to the parties confirming the security and protection of the data provided on the system prior to the use of the system by the parties.

Way forward on the implementation of the automated merger filing system

The Authority has indicated that the automated case management system is in the final stages of the developmental process and further that it has planned to carry out additional engagements with the various stakeholders for the review of the automated system prior to its anticipated rollout in the course of the year.

BEGINS AT THE TOP: BEST PRACTICES FOR EFFECTIVE BOARDS

Miriam MUGO,
Associate
mnmugo@cmadvocates.com

A Board of Directors is the primary driver of corporate governance in a company. Corporate Governance refers to the manner in which the competing interests of a company's stakeholders, namely: shareholders, management, the Government, creditors, employees and suppliers among others, are directed and controlled with the goal of creating long-term value and sustainability for the company and its stakeholders.

The Board of Directors of a company is heralded as the steward tasked with setting the strategic direction of the company and overseeing the conduct of the business of the company. It is mandated to balance the competing interests of stakeholders as well as attaining long term value and sustainability of the company.

The Institute of Certified Secretaries (ICS) has set out the best practices for adoption by private organizations in the appointment, composition, roles and functions of corporate boards in the Code of Governance for Private Organizations in Kenya (the "Code"). In light of the recent scandals and woes which have plagued many companies in Kenya, we note that the recommendations made by the Code would go a long way, if properly implemented, to ensure that companies are effectively run to ensure growth, longevity and sustained profitability. Below is a discussion of some of the pointers noted in the Code that can be embraced and implemented by corporate boards across the public and private sector regardless of the size of the companies' balance sheets.

I. Constitution of a Board

The constitution of a board determines how the company will operate as corporate culture is inculcated at the top and it is the leadership that sets the trend for the rest of the company. The composition of such a board should therefore be carefully considered.

Appointments to the board must be done in a transparent manner which should incorporate a competitive process to ensure that a company attracts the best talent available and that no bias is introduced and loyalties are not owed to any other party save for duties owed in exercise of one's fiduciary duties.

The Code provides that a company should adopt a formal process for appointment of members of its board and that this process should take into account the diversity and skills required to execute the mandate of the board and ultimately achieve the objects of the company. The Code proposes the use of a nomination committee to identify suitable candidates for appointment. This committee should be guided by the terms of reference reflecting the needs of the company and should conduct the selection in a transparent and unbiased manner. Where such a model is followed, the directors appointed will not be held ransom by the interests of persons or forces who influenced their appointments and will be able to exercise their mandate bearing in mind that it is to the company that they owe their allegiance and not to an unseen puppeteer pulling their strings. It is important that just like in other engagements within a corporation, the terms of a director's engagement should be clearly set out in a written contract or a letter of engagement. The contract or letter should detail the role of the director and the applicable remuneration and must be consented to by the incoming director.

A Board's Composition should be one which is reflective of its shareholders. A well constituted board must have a balanced mix in terms of age, expertise, skills, gender, geographical diversity and experience amongst other factors. This mix is necessary in ensuring the company's versatility and allows it to benefit from different ideas and different points of view. Having the persons of the same gender, or from the same tribe, or from the same profession results in a narrow-minded view of issues as there is no alternative perspective. All views are held from the same angle with no contrary view being expressed yet such a view could be held by the employees or the customers. Because these stakeholders do not have a way of voicing their concerns and lack representation at the top, their concerns are often overlooked to the detriment of the company. The Chief Operating Officer of Facebook, Sheryl Sandberg shared in her book, "Lean In", about her experience while working at Google and the challenges facing pregnant women, attributing the oversight by the institution to the fact that there was no one at the management level who had experienced such challenges and there was therefore no one to voice the issues.

In addition to the foregoing, the constitution of the board should have an aspect of **Independence and Accountability.** This is recommended by the Code in the form of having non - executive directors (NEDs) on the Board in addition to executive directors. The executive directors are the directors who are involved in the day to day routine management of the company and include, among others, the Managing Director. The NEDs on the other hand are not involved in the operations of the company and can therefore hold the executive directors to account. In addition to this aspect of accountability, they are involved in strategy formulation and policy making and this gives the company a chance to benefit from a certain caliber of leadership which may not be available to the company on a full-time basis. Their presence on the board therefore introduces an aspect of independence and facilitates the management of conflicts that may arise between the roles of the executive directors as managers of the routine business of the company and their oversight role as members of the board. The Code notes the vital role played by the NEDs and goes on to propose that the chairperson to the Board should be a non-executive director. In as much as NEDs are not part of the executive team, corporate governance requires that they should keep abreast with the developments in the company so as to engage meaningfully and give clear direction to the Company.

Size also matters when constituting a Board. The Code proposes that the number of members should not be less than five with NEDs making up two thirds of the Board. Such provisions are replicated across various regulated industries such as the banking sector and public listed entities regulated by the Capital Markets Authority. Although the Companies Act, 2015 allows a company to have one director and one shareholder, it should be noted that best practices in corporate governance hold a contrary view when it comes to the constitution of the board.

II. BOARD EVALUATION

The Code provides that the Board should organize an annual evaluation exercise where the performance of the board as a whole, its committees, and members (including the chairperson, the CEO and the Corporation Secretary) are assessed. This should be facilitated by an independent governance expert and should result in a governance report complete with recommendations for implementation. Good Corporate Governance practices require that, upon their appointment, directors should be taken through an induction programme to familiarize them with their role, obligations, liabilities as well as the processes of the company. It is on this basis that the director's performance can be fairly evaluated. For the Board members to adapt and keep abreast with changes in the relevant industry, and to equip them with skills and competencies essential for dispensing with their mandate, the Code recommends that the directors should be exposed to a continuous knowledge development program which should take place annually and in which members are briefed on relevant matters and changes in relevant laws affecting the company and its operations. In addition to the regular board evaluations undertaken, the Code also recommends that an annual Governance Audit should be undertaken by an accredited member of ICS.

III. BOARD COMMITTEES

To ensure effective and thorough execution of the Board's mandate, a board should be organized into committees with a framework of delegated responsibility to enable them consider specified matters in great detail and with due regard to professional detail.

The Code recommends that there should be four critical committees in any board, namely the Audit and Risk, Remuneration, Nomination and Governance and Compliance committees. Each of these committees should comprise of members with the necessary skills and competencies to execute their responsibilities.

IV. SUCCESSION PLANNING

The Code recommends term limits for NEDs by providing that they should not cumulatively serve for more than six years. To ensure continuity and to maintain institutional memory of the Board and the company by retaining and appointing new directors with the right set of skills and competencies, the Board should ensure that the terms of the NEDs are staggered to ensure a phased transition. Directors should be encouraged to mentor other leaders within the organization so as to build capacity and ensure that no gap is left when a director exits from the board of a company. A board should reflect the perpetuity of the company and the performance of the board should not rely on the personalities at the helm.

V. BOARD CHARTER AND PRACTICE MANUALS

Boards should ensure that they have Charters and Practice Manuals which set out the rules, roles, responsibilities, structures, and processes of the board. These provide guidance to the members as to their mandate and the framework (legal or otherwise) within which they operate. Board Charters and Practice Manuals should prompt the practice of the tenets of good corporate governance by the board. In addition, for boards to be effective, they should develop annual Board Work Plans which, at the minimum should focus on risk assessment and management, strategic planning, governance and compliance, board evaluations and a review of the management's implementation of strategies, policies and plans.

In conclusion, Kenya has a long way to go in engendering corporate governance but the codification of the rules for governance of private organization is a step in the right direction. Although the application of the Code currently not mandatory as the same is not prescribed in law, companies need to now invest in training and inculcating these rules as part of their values and driving creed.

TAKE IT DOWN!
LIABILITY OF INTERNET SERVICE PROVIDERS IN COPYRIGHT INFRINGEMENT

Wilfred LUSI,
Partner
wlusi@cmadvocates.com

The internet has been defined as one big copying machine due to its mode of operation. According to Public Relations Consultants Association V Newspaper Licensing Agency Ltd [2013] UKSC 18: the ordinary use of the internet will involve the creation of temporary copies at several stages. Copies will be created in the course of transmission in internet routers and proxy servers. Where a web-page is viewed by an end-user on his computer, without being downloaded, the technical processes involved will require temporary copies to be made on screen and also in the internet "cache" on the hard disk.

Bentley and Sherman note that, "the digital communication-and digital tools generally (such as softwares and computer programs)-function through the generation of temporary copies." The question then begs, to what extent can an internet Service Provider (ISP) be held liable for copyright infringement?

Black's Law Dictionary defines Copyright as "[t]he right of literary property as recognized and sanctioned by positive law. An intangible, incorporeal right granted by statute to the author or originator of certain literary or artistic productions." Under Kenya's Copyright Act, 2001 it refers to literary works, musical works, artistic works, audio-visual works, sound-recordings, and broadcasts. Kenya's Copyright Act defines direct or primary infringement as the unauthorized doing of any of the acts exclusively reserved to a copyright holder, "namely the reproduction in any material form of the original work or its translation or adaptation, the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement, and the communication to the public and the broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original."

Conversely, secondary infringement is facilitating, causing to be done or enabling the commission of acts that amount to direct infringement. English law considers that secondary infringement would largely be undertaken in a commercial context or course of business neither for private nor domestic use. It further requires establishing knowledge or presence of reason to believe (i.e., actual or constructive knowledge) that the acts are wrongful.

ISPs have been simply defined as an entity that provides its customers access to the internet and other web services. In addition to maintaining a direct line to the internet, the ISP usually maintains web servers. The Copyright Amendment Bill, 2017 of Kenya convolutedly defines ISPs as "any person providing information services, systems, or access software provider [sic] that provides or enables computer access by multiple users to a computer server including connections for, the transmission or routing of data.".

According to Communications Authority of Kenya (CA), the huge mobile data subscriptions market in Kenya is dominated by 3 ISPs: Safaricom with 68.4%, Airtel with 23.1%, and Telkom with 7.6%. ISPs enable users to access the internet through fixed telephony (plain-old telephone service), mobile-cellular telephony, or fixed fiber-optic or broadband service. These communication channels, however, are also exploited by those who seek to pirate copyright-protected content, including music, television shows, movies, video games, eBooks, computer software, and other digital content.

SECONDARY INFRINGEMENT OF COPYRIGHT

1. KENYA

Secondary infringement is codified in Section 35(1) of the Copyright Act which proscribes the causing to be done, of acts, reserved for the copyright owner. Further Section 35(3) (b) & (d) proscribe specific types of accessorial infringement: such that by creating access and/or an enabling environment for infringement such person is secondarily liable for infringement.

Despite the growth in internet access, no reported case law has adjudicated these sections. Nonetheless recognizing the need to protect ISPs but contemporaneously curb secondary infringement by ISPs, the Copyright (Amendment) Bill, 2017 was introduced and is currently pending before the Kenyan Parliament. The proposed new Section 35A, titled 'protection of internet service providers,' largely adopts the four American 'safe harbor' provisions. Subject to additional conditions, the 4 exemptions from liability that would be enjoyed by ISPs under the proposed amendments are:

(i) Exemption when serving as mere conduit: ISPs shall not be liable for infringement "for providing access to or transmitting content, routing or storage of content in [the] ordinary course of business."

(ii) Exemption for cache copies: ISPs shall not be liable for infringement "for the automatic, intermediate and temporary storage of that content, where the purpose of the storing such content is to make onward transmission of the data more efficient to other recipients of the service upon their request."

(iii) Exemption for material storage: ISPs shall not be liable for damages arising from material stored at the request of the recipient of the services.

(iv) Exemption for provision of information location tools: ISPs shall not be liable for damages incurred by a person if the service provider refers or links users to a webpage containing infringing material or facilitates infringing activity by using information location tools including a directory, index, reference, pointer or hyperlink.

These exemptions are available to ISPs, on a condition that the ISPs satisfy the prerequisites set out under each of these exemptions under the proposed law. In interpreting these four exemptions, they must be read purposefully, to give effect to curbing secondary infringement erstwhile protecting ISPs from otherwise certain culpability.

Kenya equally proposes to enact section 35B, in the Copyright Act which would make provision for take down notices. The proposal makes elaborate processes under which a party issuing a notice ought to satisfy including issuing a notice to the Kenya Copyright Board, Communication Authority of Kenya, the umbrella organisation for ISPs, and the ISP. The provision also requires an ISP to take down allegedly infringing material with the exception of where a counter-notice has been served on the ISP. Significantly the Bill proposes protection for ISPs where they take down works in error pursuant to a valid notice.

2. UNITED KINGDOM

The UK applies the E-Commerce Directive, which in its preamble recognizes that the purpose of the directive centers on facilitating growth of the information society. Materially, Articles 12, 13 and 14 creates 3 instances under which intermediaries [ISPs] may be exempted from liability for secondary infringement. These three instances are where an ISP in providing an information society service, served as a mere conduit, used copyrighted works for caching purposes and hosting services.

The UK has enacted the Electronic Commerce (EC Directive) Regulations 2002, which under, Regulations 17, 18 and 19 set out the 3 exemptions together with the qualifiers thereto. ISPs are immune from liability for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission arising from mere conduit, caching and hosting services.

These 3 exemptions additionally have conditionalities preceding their application. In the instance of a mere conduit the ISP must not initiate the transmission; did not select the receiver of the transmission; and, did not select or modify the information contained in the transmission. This exemption extends to automatic, intermediate and transient storage of the information transmitted where: (a) this takes place for the sole purpose of carrying out the transmission in the communication network, and (b) the information is not stored for any period longer than is reasonably necessary for the transmission.

On the second exemption of caching it applies where the information is the subject of automatic, intermediate and temporary storage where that storage is for the sole purpose of making more efficient onward transmission of the information to other recipients of the service upon their request, and the service provider—

(i) does not modify the information;

(ii) complies with conditions on access to the information;

(iii) complies with any rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(iv) does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information; and,

(v) acts expeditiously to remove or to disable access to the information he has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

Third, the ISPs are exempt under the hosting categorization, where the ISP (a) (i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or, (ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information; and, (b) the recipient of the service was not acting under the authority or the control of the service provider. The UK and the EU have a robust legal regime that protect ISPs.

3. UNITED STATES OF AMERICA

Under 17 U.S. Code § 512 titled 'Limitations on liability relating to material online' the US has enacted what has been dubbed as the 'safe habor' for ISPs. The US law establishes 4 exemptions available to ISPs viz: Transitory Digital Network Communications, System Caching, Information Residing on Systems or Networks at Direction of Users, and, Information Location Tools to include hyperlinking functions with emphasis on knowledge of the infringing character of the subject information.

The US exemptions are mirrored by the EU and UK regimes with the exception of the 4th exemption on information location tools. The proposed Kenyan regime however adopts all 4 safe habor provisions under which an ISP is exempt from pecuniary, injunctive/equitable and criminal sanctions (for Kenya and the EU/UK, the US law does not make express exemption from criminal sanctions as the other two regimes do). Such that if secondary infringement were held to be criminally punishable, the safe habor provisions wouldn't apply.

The US similarly has notice and take down provisions, 17 US Code 512(f), which significantly has a provision penalizing falsification of take down notices. This was adjudicated upon in Online Policy Group v. Diebold 337 F. Supp. 2d 1195 (N.D. Cal. 2004) which suit involved the manufacturer of voting machines issuing a notice demanding the take down on a misrepresentation of copyright infringement. The Court held Diebold liable for the take downs, even without considering the failure of counter-notice and the effect (if any) on liability.

CONCLUSION AND RECOMMENDATIONS

The proposed legislation in Kenya, protects the ISPs who are otherwise significantly exposed to liability for secondary infringement under the Copyright Act, 2001. Under Section 38, Copyright Act the infringer commits an offence and is exposed to monetary fines, possible custodial sentence and also damages in a civil action for copyright infringement. This is because currently under the Act, no special protection is availed to ISPs the peculiar nature of this business notwithstanding. This paper therefore recommends

First, the limitations of liability for ISPs are in compliance with Article 9(2) of the Berne Convention, authorizing members to legislate for limited exceptions to the author's exclusive right to authorise the reproduction of his work, "provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." Thus the copies that reproduce the right holder's works are accommodated under Berne. Nonetheless there is need to qualify the exemptions under Section 35A, Copyright Amendment Bill, 2017 to the standard evinced in Article 5.5, InfoSoc to ensure that the limitations do not do not unreasonably prejudice the legitimate interests of the rightholder.

Second, Section 35B, Copyright (Amendment) Bill, 2017 provides complex and apparently conflicting provisions on the notice and takedown process, where on the one hand an ISP is entitled to not disable access to material upon receipt of a counter-notice, and on the other an ISP that fails to take down or disable access when it receives a takedown notice shall be fully liable for any loss or damages resulting from non-compliance to a takedown notice. This is compounded by almost placing adjudicative responsibilities on ISP to weigh and counterweigh notices and counter-notices before acting. There is need to reform to simplify this process. However, Section 35C, proposed law provides no general obligation on an ISP to either (a) monitor the material transmitted, stored or linked; or, (b) actively seek facts or circumstances indicative of infringing activity within its services. This mitigates the undue burden that would be placed on ISPs, noting the volume of data they handle.

The Copyright (Amendment) Bill makes significant strides in recognizing the centrality of information economy in aiding the country's development and the need to strike a balance between the interest of consumers of information society services & the providers (benefits of a new technology). It introduces determinate protection, that accrue as of right, over & above the traditional fair dealing exemptions currently available in law.

THE FIRM

At CM Advocates LLP, we pride ourselves on being able to provide our clients with consistently timely, high quality, innovative and commercially relevant legal advice. Since technical know-how is not adequate, we constantly seek to build excellent working relationships with our clients and clearly understand their businesses and the realities and imperatives they face. Our strategy is to build teams that are specific to our clients' needs and also combine specialist legal skills, industry experience and practical know-how.

Our achievements for clients are made possible by our professional team of technically and commercially brilliant lawyers led by our Managing Partner at the fore front of every transaction, who are singularly focused on their clients' success. In other words, our pride is to make you succeed in your business or project.

We have a culture of professionalism, team work and respect, where talented professionals with different views, experiences and backgrounds can thrive. To remain on the cutting edge, we put extra emphasis on continuous learning, knowledge sharing and peer reviews. This has enabled the Firm to curve a niche for itself in the existing as well as new and emerging branches of law.

The Firm's local and international clientele cuts across various sectors of our economy like financial services, real estate development, manufacturing, telecommunication, agri-business, tourism and hospitality, energy and mining.

OUR CORE VALUES

Our values: - At CM Advocates LLP, our values and guiding principles include: -

Respect: We treat each other and our clients as we would want to be treated: with respect. We value our staff since they are the most important asset for the Firm. We also value our clients and treat their work as if it was our own. In other words, we promote a culture of respect for every individual. We strive to promote a working environment where individuals can flourish and all of our interactions with each other are guided by mutual respect, courtesy, recognition and appreciation.

Teamwork: While we value individual contributions, our best results are achieved when we work together. We endeavor to build a collaborative work environment through delegation of responsibilities, sharing of information and experiences, relying on each other's expertise, implementing our goals and objects, keeping commitments and trusting each other.

Commitment: We will demonstrate unflinching courage while pursuing our clients' instructions and endeavor to meet our goals and objectives and live up to our values. We will strive to ensure clients' goals are met with satisfaction

Client Service Excellence: At CM Advocates, we are deeply committed to the success of our clients and we believe that their interests come first. We also anticipate our clients' needs, and get to understand their priorities in order to meet and exceed their expectations.

Professional excellence: We shall be at the forefront of our profession in terms of skills, expertise and judgment. We shall consistently seek opportunities to learn and grow in order to remain relevant to our clients as their trusted legal and business advisors. We shall always embrace change and use technology to better serve our clients. We shall strive to coach and train our people in order to enhance their competencies and productivity.

Integrity: We believe that character counts. Behaving ethically and working to the highest professional standards is vitally important to us. We have a commitment to fairness, reliability, honour and truth. We are unfailingly honest with our clients, as well as with each other.

Speed: We shall always strive to implement our clients' instructions in a timely manner, within their and our internal turnaround times and service level agreements standards. We shall shun procrastination and seek to understand our client's priorities and time expectations before embarking on the implementation of their instructions.

BUSINESS UNITS

REAL ESTATE, BANKING AND FINANCE

We handle conveyancing and all types of property-related transactions and deals for both local and international clients.

DISPUTE RESOLUTION

The firm has the legal expertise, capability and commitment to find quick creative and cost effective solutions for our clients in Tribunals, Commissions and any quasi-judicial bodies and arbitration venues.

CORPORATE LAW, TRUSTS & CHARITIES

The firm has vast experience in handling various asset, business and share deal transactions for our clients involving hive-down of specific business units, either for restructuring or sale purposes, assets and business purchase agreements, legal due diligences and management buy-out transactions.

COMMERCIAL/ BUSINESS LAW

In the area of commercial law, the firm has vast experience in the drafting and review of various commercial agreements as well as offering legal services and advisories related to financing through debt financing, asset-based finance, equity investments and private public partnerships.

ENERGY, MINING AND INFRASTRUCTURE (EMI)

The firm has acquired relevant skills and developed wide networks in the local energy sector that enable it to advise local and international clients on diverse issues related to the oil and gas sectors specifically on the Model Kenya Production Sharing Agreement, electricity production and sale in Kenya and related legal issues.

The firm also has experience in offering legal services and providing advisories relating to infrastructure projects in the sectors of power generation, industrial plants and oil, gas and other natural resource projects.

The firm has also acted for various local and international clients in the preparation of Private Public Partnership (PPP) agreements for various infrastructure projects, including for the development of roads and aviation installations.

FAMILY LAW, ESTATE PLANNING AND PROBATE ADMINISTRATION

Our Firm offers expert services in family law matters namely probate and administration, trusts, estate planning and will drafting.

DEBT RECOVERY, RESTRUCTURING & INSOLVENCY (DRRI)

One of the firm's most vibrant practice areas is Debt Recovery, Restructuring and Insolvency that the firm offers its corporate clients especially banks, microfinance institutions and companies.

AVIATION, SHIPPING, LOGISTICS AND ADMIRALTY

We cater to our clients in the aviation industry who include domestic and international airlines, non-scheduled operators and air cargo services. We also act for the Kenya Airport Authority which is mandated to build, run and operate all airports and aerodromes in Kenya. We also have a vibrant admiralty and transportation law practice focusing on transactional matters, dispute resolution, legal and regulatory compliance, nautical issues and private maritime disputes and general maritime and trucking transactions.

TAX LAW ADVISORY

We have a team of highly effective, solution-oriented tax lawyers that offer competent service in form of advisory and dispute resolution in the areas of Tax Law.

IMMIGRATION, LABOUR AND EMPLOYMENT (ILE)

Immigration Laws Advisory - General advisory on all immigration law matters and processing of applications for citizenship, asylum, permanent residency, work permits, passes etc in a an efficient and competitive manner.

Labour and Employment Advisory - To advise on all labour and employment laws including related employment taxation (under NHIF, NSSF and Income Tax Acts) and also handle related disputes in liaison with DRBU.

CM ADVOCATES LLP

Contact Information

Head Office:

I&M Bank House, 7th Floor,

2nd Ngong Avenue.

P.O. Box 22588 - 00505, Nairobi, Kenya

Phone: +254 20 2210978

Cell: +254 716 209673

Email: law@cmadvocates.com

www.cmadvocates.com

Mombasa Office

Links Plaza, 4th Floor ,Links Road.

Phone: +254 41 4470758

Cell: +254 791 649913

Email: mombasaoffice@cmadvocates.com