

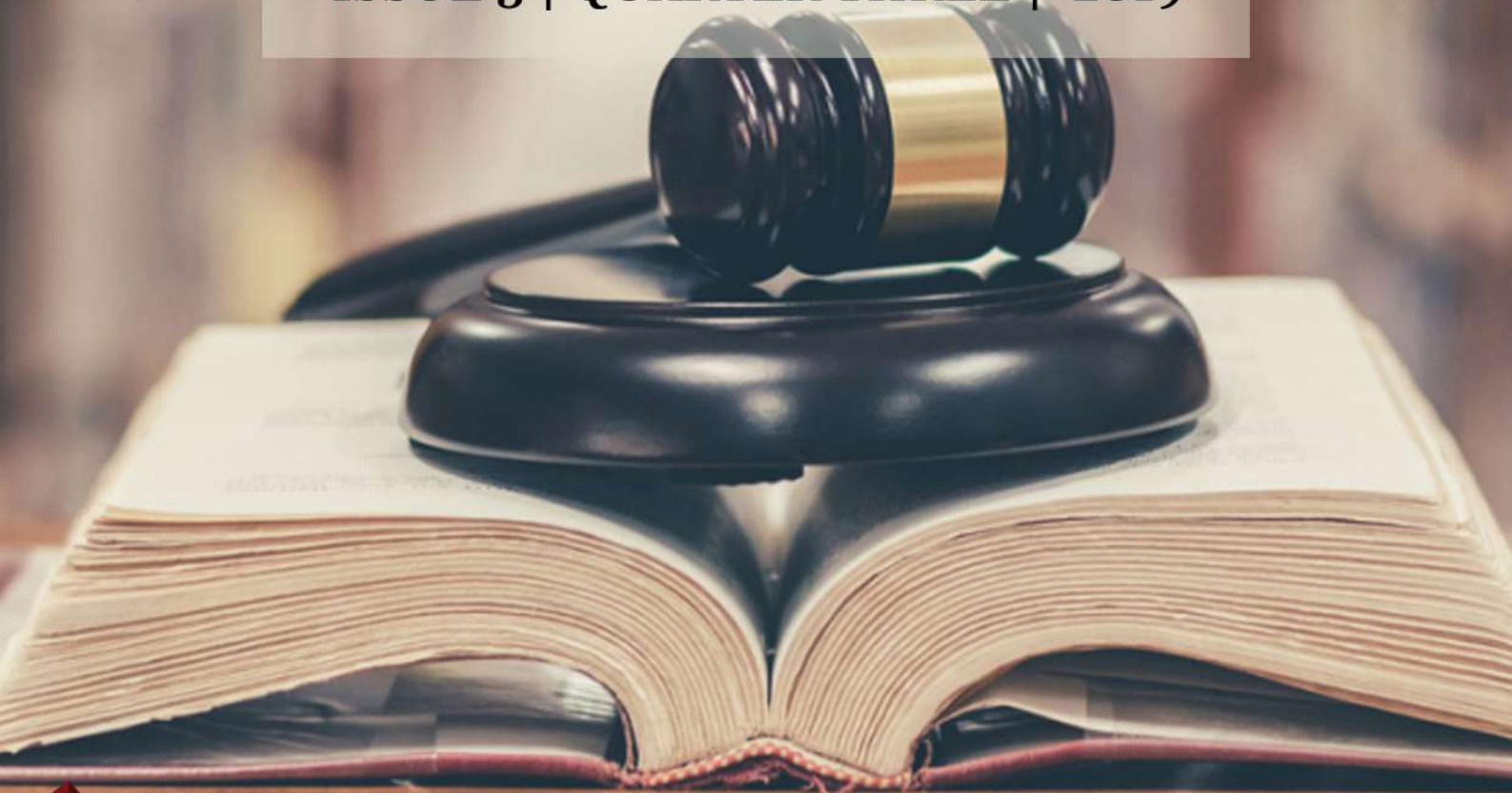


CM ADVOCATES LLP

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At CM Advocates LLP, we pride ourselves on being able to provide our clients with consistent, high quality, innovative and commercially relevant legal advice. To achieve this objective, we constantly seek to build excellent working relationships with our clients and clearly understand their businesses and the realities they face.

In line with our goal to be the leading legal solutions provider in the East Africa region, Cymbell Group, of which CM Advocates LLP is a part of, is pleased to announce that it has opened new offices in Kampala, Uganda and Dar-es-Salaam, Tanzania operating under the names Cymbell Advocates and Cymbell Attorneys respectively. These branches offer a wide range of services similar to those offered by CM Advocates LLP and will be of great service to clients engaged in cross-border trade or who are in the process of expanding into the East African region.

We have noted that our clients are looking for more than just legal advice and therefore Cymbell Group aspires to be a one stop-shop for your legal and business needs. In this regard, we are glad to announce the launch of our new company secretarial and corporate governance arm, Bellmac Consulting LLP. We have included in this edition of the Newsletter a profile of Bellmac as well as its catalogue of services for your kind attention. This firm will have qualified company secretaries and corporate governance experts among its staff.

In a bid to secure the best possible outcome for every engagement you have entrusted with us, we continuously improve and build our individual capacity as well as the synergy of our reliable team of advocates and support staff. As was communicated to you earlier in the quarter, the Firm closed its doors for a day to undergo training undertaken by Totally Sorted Limited consultants with an aim of enhancing our productivity and managing our performance structures.

We thank you for your continued trust and we look forward to your continued support as we commit to refining our value-add to you and your business in the future.

Cyrus Maina
Managing Partner



Njomo KAMAU
(for the Editor)

EDITORIAL NOTE

Greetings!

The 3rd edition of the CM Newsletter is here.

In this issue, our lawyers have delved into the legal nuances of various sectors of the law that we think would be of interest to you including the Law of Contract, the digitization of the business registration process at the Companies' Registry, Image Rights and Children's Law.

Catherine Karanja explores the complex legal issues behind the protection of image rights in Kenya and scrutinizes the level of protection provided for such rights by the existing legal regimes as well as the evolving jurisprudence around the same. Ever wondered what rights and responsibilities parents have when children are born out of wedlock? Nancy Mireri takes you through the arising issues as well as the considerations made by courts in safeguarding the rights of children born to unmarried parents. Still on the topic of children's law, Betty Kageni looks at the issue of jurisdiction and contrasts the operation of the Kadhis' Court and the Children's Court in determining custody and maintenance disputes involving children. She delves into an in-depth analysis of relevant case law and clarifies the current legal position on these issues.

In addition Mumbi Mukuru takes you through the newly digitized business registration services and examines the ease brought on by digital technology in registration of businesses and further highlights the benefits gained in the conduct of business from the transition to the use of an online system. In the world of contracts, Emmanuel Gisemba analyses the commonly used phrase '*subject to*' in agreements and discusses how the courts have ruled on the extent of its implication in transactions.

On behalf of the Editorial Team and the entire CM Advocates LLP staff, we again thank you for your continued support through your consumption of this Newsletter and valuable feedback. We look forward to continuing to provide you with the top-class legal services you desire.

Enjoy!!!



PROTECTION OF IMAGE RIGHTS IN KENYA



Catherine KARANJA

Catherine is a Senior Associate in the Corporate, Commercial and Real Estate Business Units. She has a wealth of knowledge and experience in commercial and corporate law, real estate and regulatory compliance. She has a Masters Degree in Intellectual Property from the University of Cape Town.

Businesses in Kenya have increasingly adopted the art of image-based advertising by using images of well-known celebrities and other personalities to sell their products and services. This is driven by the growing realization of the commercial gain accruing to brands development as consumers are more inclined to buy into a particular product or service on account of the person endorsing it. Unfortunately, there are many instances where the personalities have had their images used without their knowledge, consent or authorization.

Therefore, drawing from the growing popularity of the use of personalities in selling of products and services and contemporaneously in an age where the image of a person can be used and circulated in a matter of seconds, it becomes increasingly necessary to ensure that a person's image rights are not abused.

Image rights or personality rights were defined in the case of **Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others [2017] eKLR** as a “person's right to commercialize aspects of his personality such as physical appearance, pictures or caricatures, signature, personal logos and slogans, and also the right to prevent other people from commercially making use of them”.

Simply put, image rights or personality rights refer to an individual's proprietary right in their personality and the right to prevent unauthorized use of their name, image, likeness, mannerisms, voice or other attributes associated with them.

There is no uniform global approach to the protection of image rights, or personality in general and Kenya does not have a specific legislation that regulates the use of a person's image rights per se. Consequently, persons who fall victim of commercial appropriation of their image rights have no clear cut legal remedy at their disposal. Due to the legal lacuna, courts rely on a cocktail of legislative provisions and often times invoke the provisions of the Constitution of Kenya, 2010 (the "Constitution"). The relevant laws that are applied include laws on intellectual property, common law and consumer protection to seek legal redress. Generally, a person's image rights are recognized and protected under the constitutional rights to dignity (Article 28), privacy (Article 31) and property (Article 40). This Article will highlight the approaches taken by Kenyan courts in adjudicating over matters relating to image rights.

Image Rights within the scope of Right to Privacy

Article 31 of the Constitution provides that every person has the right to privacy, which includes the right not to have information relating to their family or private affairs unnecessarily required or revealed. The nature and importance of this right was articulated in the case of *JW1 & Another v Standard Group Limited & Another [2015] eKLR* where the court opined that, "*the right to privacy consists essentially in the right to live one's life with minimum interference. It concerns private family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorized publication of private photographs, protection from disclosure of information given or received by the individual confidentially.*"

The right to privacy safeguards an individual's dignity, and proceeds on the premise that this right is intrinsically intertwined with the right to inherent dignity. This inherent right is guaranteed by Article 28 of the Constitution which provides that every person has the inherent dignity and the right to have that dignity respected and protected.

Image Rights as a Property Right

The second aspect in the discussion of Image Rights is discussing these rights in the context of property. The right to property is guaranteed under Article 40 of the Constitution as well as under intellectual property laws including the Copyright Act, No. 12 of 2001 (the "Copyright Act") and the Industrial Property Act, Number 3 of 2001. Intellectual property rights (IPR), as a property right, allows creators or owners of copyrighted works, trademarks, patents, utility models and industrial designs inter alia to benefit from their own work or investment in a creation or invention and innovation.

The Copyright Act in addressing the issue of ownership of images provides that in order for a person to invoke the protection available under this legislation, the image must meet the requirements set out under Section 22 of the Copyright Act. That is:

- it must be a "works eligible for copyright" e.g. literary, musical, artistic, sound recording, audio-visual or broadcast;
- the work must satisfy the idea-expression dichotomy by being (i) original and (ii) reduced into material form.

In as much as it is possible to protect one's copyright in a work that comprises the image of another person, it is important to distinguish the application of IPR protection in the context of unauthorized commercial exploitation of one's creation or invention and innovation.

This will be highlighted in the cases that will be discussed in this Article. In addition to this, some critical questions with respect to protection available under the Copyright Act when it comes to Image Rights include: to whom does copyright accrue especially when the work to be protected is the image of a person other than the applicant? Does the Copyright Act effectively provide for commercial appropriation of a person's image in instances where the proprietary right belongs to the artist who captures and reduces the work in a material form? Does it distinguish cases where the work was as a result of a commissioned assignment?

In discussing the practical application of protection of Image Rights, we will seek to answer the aforementioned questions and highlight the nexus between copyright in an image and image rights.

Practical Application of Image Rights

Due to the development in the marketing strategies of companies, use of alternative media and modes of advertising as well as the lacuna in the law, courts in Kenya, through judicial-craft have established jurisprudence to answer the questions above and to provide for the ever changing landscape that touches on issues relating to image rights.

In *Rukia Idris Barri v Mada Hotels Limited [2013] eKLR*, the learned Judge referred to the South African case of *Angella Wells v Atoll Media (PTY) Limited & Another, Western Cape High Court Case Number 11961/2006* where it was held that “*the appropriation of a person's image or likeness for the commercial benefit or advantage of another may well call for legal intervention in order to protect the individual concerned. That may not apply to the kinds of photographs or television images of crowd scenes which contain images of individuals therein.*”

However, when the photograph is employed, as incase, for the benefit of a magazine sold to make profit, it constitutes an unjustifiable invasion of the person's rights of the individual, including the person's dignity and privacy, in this dispute, no care was exercised in respecting these core rights.”

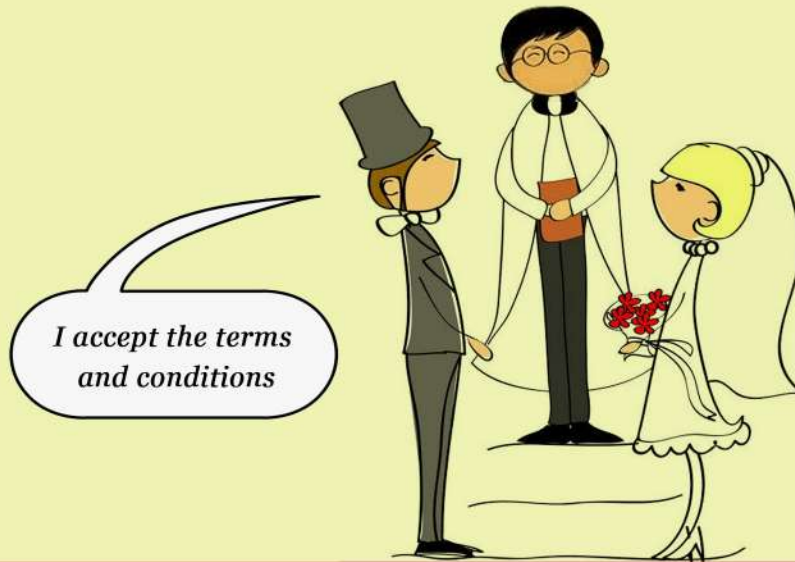
Furthermore, courts have in recent judgments including *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 Others [2017] eKLR* coined three key elements that must be established for a person to succeed in a claim for unlawful use of name or image:

- a. Use of a **protected attribute**: the plaintiff must show that the defendant used an aspect of his identity that is protected by the law. This ordinarily means a plaintiff's name or likeness, but the law protects certain other personal attributes as well;
- b. For an **exploitative purpose**: the plaintiff must show that the defendant used his name, likeness or other personal attributes for commercial or other exploitative purposes. Use of someone's name or likeness for news reporting and other expressive purposes is not exploitative, so long as there is a reasonable relationship between the use of the plaintiff's identity and a matter of legitimate public interest.; and
- c. **Without consent**: the plaintiff must establish that he or she did not give permission for the offending use.

In a recent case, of *Ann Njoki Kumena v KTDA Agency Limited [2019] eKLR*, the court was called upon to determine whether the use of the plaintiff photograph by the defendant in its marketing brochure without the plaintiff's knowledge and consent amounted to a breach of Articles 28, 31 and 40 of the Constitution of Kenya, 2010. The Court used the three step test and held that the defendant was in violation of the plaintiff's constitutional rights and therefore entitled to damages.

In conclusion, the efforts made by the judiciary to address the protection of images rights against commercial appropriation must be commended. The Constitution of Kenya plays a critical role in light of the fact that image rights does not fit neatly within the existing statutes related to intellectual property law. In addition to this the Legislature should also formulate adequate laws to cater for this area and borrow best practices from around the world. An example of this would be establishing a registration system for Image Rights which allow one to register a property right in his own image. For example, Guernsey introduced a registration system for image rights. The Image Rights (Bailiwick of Guernsey) Ordinance (IRO) 2012 provides for the registration of personality and any image rights (including rights in characteristics, mannerisms or traits) unique to that personality.

Nonetheless, it is prudent for commercial entities and persons engaging in image-based advertising to enter contracts that address ownership of images and the exploitation thereof to prevent legal tussle upon use of the same. A business keen on using the images of celebrities and other personalities in their marketing campaign should enter into image release agreements, authorizing the use of his or her image. This has worked well for a number of TV productions a case in point being *Alfred K'Om-budo V Baileys Weddings with Noni (2014)*. In this case the plaintiff alleged that he had not authorized the use of his image in a TV show but this was disproved by the executed image-release agreement which authorized the defendant to use the plaintiff's image for its TV Show.



When an advocate gets married, they don't say "I do" - they say, "I accept the terms and conditions."



THE RIGHT TO EQUAL PARENTAL RESPONSIBILITY FOR CHILDREN BORN OUT OF WEDLOCK



Nancy MIRERI

Nancy is an associate at the Firm in the Dispute Resolution, Debt-Recovery, Restructuring and Insolvency Unit as well as the Family Business Unit. She is an experienced practitioner in the area of issues of custody and children's rights.

Before the promulgation of the Constitution of Kenya, 2010 (the “Constitution”), a child born out of wedlock had arguably no automatic right of parental responsibility from its father where there was no legal relationship between the mother and the father. A child’s mother was deemed to have parental responsibility over the child at first instance while the father had the option of taking responsibility or not.

Prior to the promulgation of the Constitution, the rights of children were not enshrined in the Constitution and thus the (the “Children Act”) constitutional enactment was viewed as a major and decisive step towards the protection of the rights of children. Prior to this, the only laws governing this area were the Children Act, Number 8 of 2001 and international laws including the United Nations Convention on the Rights of the Child 1989.

This Article shall therefore highlight the various provisions of the law relating to parental responsibility over children born out of wedlock and outline the position of the courts on the protection of their rights.

a) The Constitution of Kenya, 2010

The rights of children are expressly anchored in Article 53 (1) and (2) of the Constitution, with Article 53 (1) stating that every child has, inter alia, the right to *parental care and protection, which includes equal responsibility of the mother and father to provide for the child*, and Article 53(2) further providing that a child’s best interests are of paramount importance in every matter concerning the child.

Article 53 is therefore the reference point as far as the rights of children are concerned and remains the yardstick by which laws relating to children in Kenya are to be measured. The plain meaning of this provision is that fathers and mothers have equal responsibility to take care of and offer parental care and guidance to a child they bear and this responsibility cannot be left to the sole volition of either its father or mother. The bottom line is that both of them must therefore take responsibility for providing for the child. Furthermore Article 27(4) guarantees equality and freedom from discrimination and further places an obligation on the State not to discriminate, directly or indirectly, against any person on any ground including birth.

b) The Children Act No. 8 of 2001

Section 2(b) of this Act defines a relative, in relation to a child, to mean ‘any person related to the child, whether of the full blood, half blood or by affinity’, and, ‘where the child is born outside marriage and the father has acknowledged paternity and is contributing towards the maintenance of the child, the father of the child within the meaning of this definition if the child was the child of his mother and father born inside marriage’. This definition gives a father the discretion of choosing whether a child is to be his relative or not. Where a father does not acknowledge paternity of a child or has not been contributing to the maintenance of the child, that child cannot be considered to be a relative of the father.

Section 24(1) and (2) places equal parental responsibility for a child on a father and mother who are married either before or after a child’s birth.

However, section 24 (3) further provides that where the child’s father and mother were not married to each other at the time of the child’s birth and have not subsequently married each other, the mother shall have parental responsibility at the first instance and the father shall only acquire parental responsibility of the child in accordance with the provisions of section 25. This section provides that the father only acquires parental responsibility for the child if:

- (i) he applies to the court for it,
- (ii) through a parental responsibility agreement with the mother,
- (iii) has accepted paternity; or
- (iv) has maintained the child or lived with the child for 12 months.

Section 27(1) provides for transmission of parental responsibility to a father and mother who are married or have subsequently married after the birth of the child. The section provides for the doctrine of survivorship in case of death of either parent where responsibility of the child is transferred to the surviving parent. Section 27(2) provides that the father can only take up responsibility after the death of the mother ‘**if he has acquired parental responsibility under the Act**’. This means that, if the father had not taken parental responsibility of the child during the lifetime of the mother, it is not automatic that he shall have parental responsibility upon death of the mother. This is against the principle of equal responsibility of parents under Article 53(1)(e) of the Constitution, which right cannot be qualified on the basis that the father either has, or has not, acquired parental responsibility.

Section 94(1) provides a guide on the factors that a court has to consider before making an order for financial provisions to a child by a step-parent or father of a child born out of wedlock.

One of the factors to be considered is “whether the respondent has assumed responsibility for the maintenance of the child and, if so, the extent to which and the basis on which he has assumed that responsibility and the length of the period during which he has met that responsibility.” The section implies that parents of children born out of wedlock have to assume parental responsibility before they can be ordered to pay maintenance towards their children.

These provisions seemingly contradict the provisions in sections 5 and 6 of this Act which provide that no child is to be subjected to discrimination on any ground and that children have a right to live with and be cared for by their parents.

c) The Births and Deaths Registration Act Cap 149

As highlighted in the article: ‘*Your First Certificate: What You Need To Know About The Birth Certificate*’ published in our second issue of the CM Newsletter, Section 12 of this Act provides that no person shall be entered into the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognized custom, are married. This provision means that a child’s mother cannot enter the name of the father of the child in the birth certificate without the father’s consent unless it is shown that they are married at the time of the birth of the child. This provision effectively aided fathers who did not wish to recognize children born out of wedlock. This also meant that the father of the child born out of wedlock could evade parental responsibility by simply refusing to have their name on the birth certificate of the child.

The legal positions codified under the Children Act and the Births and Deaths Registration Act also seem to contravene the United Nations Convention on the Rights of the Child which Kenya had ratified. Article 18(3) of the Charter declares that “*No child shall be deprived of maintenance by reference to the parents’ marital status.*” It is however noteworthy that the court in *RM & Another V Attorney General [2006] eKLR* found that “...Section 23(4) and by extension Section 25 (of the Children Act) do not offend the principle of equality and nondiscrimination either by themselves or in their effect.”

LEGAL POSITION AFTER THE PROMULGATION OF THE CONSTITUTION

The position of joint responsibility of both parents, whether married to each other or not, is guided by Article 53 (e) of the Constitution which places an obligation of parental care and protection on both parents whether they are married or not.

In the case of *Zak & Another vs. The Attorney General & Another (2013) KLR*, Justice Mumbi Ngugi declared unconstitutional the provisions of the Children Act placing the responsibility for children born outside marriage only on the mother, specifically Section 24(3) together with sections 90(a) and (e) of the Act. The Judge held that, in line with the provisions of Section 7 of Schedule 6 of the Constitution, the Children Act must be read as imposing parental responsibility on both of their biological parents, whether they were married to each other or not at the time of the child’s birth.

In the case of *L.N.W v Attorney General & 3 others [2016] eKLR*, Justice Ngugi, in declaring section 12 of the Births and Deaths Registration Act unconstitutional, held that:

“The law must demand that fathers of children born outside marriage step up to the plate and take parental responsibility for their children. This must begin with the provisions in respect of registration of the birth of such children. A situation in which such children and their mothers are discriminated against on the basis of the law cannot be allowed to continue under our transformative constitution.”

Further, in the case of **NSA & another v Cabinet Secretary for, Ministry of Interior and Co-ordination of National Government & another [2019] eKLR**, the court agreed with the sentiments of Justice Ngugi in the above referenced cases and reiterated *“...the automation of parental responsibility upon birth of a child, and the said responsibility is not left to the discretion of either the father or mother...”*

Article 2(1) of the Constitution provides that the Constitution is the supreme law of the Republic and shall bind all persons and state organs.

Further, Article 2(4) states that any law, including customary law, that is inconsistent with the Constitution is void to the extent of inconsistency and any such provisions hindering the achievement of the best interest principle for any child should be struck out.

It is noteworthy that various attempts have also been made to repeal the Children Act, with the most recent being the publication of the Children Bill 2017 which seeks to align the laws affecting children in Kenya with the provisions of the Constitution by eliminating the provisions in the current Children Act that allow discriminate against children born out of wedlock. The passage of the Bill into law has however been pending since 2017.

In conclusion, the inclusion of the rights of the child in the Constitution has served to eliminate the uncertainties and the perceived discrimination of the offending sections of both the Births and Deaths Registration Act and the Children Act as the provisions of these statutes must now be interpreted in line with the provisions of the Constitution.



“The prosecutor says you have to roll over.”



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A CLICK AWAY: EASE OF DOING BUSINESS AND DIGITIZATION OF BUSINESS REGISTRATION SERVICES



Fidelis MUMBI

Fidelis is an Administrator in the Commercial Business Unit. She is a Company Secretary and a member of the Institute of Certified Secretaries of Kenya. She is currently undertaking her studies towards qualification as a Certified Public Accountant of Kenya.

The World Bank lists, among other parameters, the following indicators against which the ease of doing business in a country is measured:

- **Starting a business** - Procedures, time, cost and paid-in minimum capital to start a limited liability company;
- **Registering property** - Procedures, time and cost to transfer a property and the quality of the land administration system;
- **Getting credit** - Movable collateral laws and credit information systems; and
- **Resolving insolvency** - Time, cost, outcome and recovery rate for a commercial insolvency and the strength of the legal framework for insolvency.

The World Bank's Ease of Doing Business report for the year 2018 indicated that Kenya had made major strides in this area and we note that a large part of this progress was attributable to the digitization of various processes through an initiative undertaken by the Government of Kenya.

The Government had, through the development of the National ICT Master Plan 2013/14 – 2017/18, sought to guide the creation of an enabling policy, legal and regulatory environment to facilitate the provision of e-government services that are simple to use and convenient for citizens and businesses; increase the productivity, efficiency and effectiveness of critical economic sectors; stimulate the setup and growth of ICT-related businesses to enhance employment creation;

Enable and scale up ICT innovation; and develop a dynamic and robust ICT sector that will enhance socio-economic growth.

This policy was implemented through the establishment of *Huduma Centres* which is a programme aimed at ensuring provision of services by the Government in an efficient and accessible manner through various integrated service delivery platforms. Among the delivery platforms is the online business registration platform that is run on the Government's e-Citizen online portal (www.ecitizen.go.ke) which is noted as a gateway to access Government services. It allows citizens to access various government services including registration of businesses and application for registration and extension of passports, identity cards, driver's licenses among other services.

BUSINESS REGISTRATION SERVICE

In the year 2015, the National Assembly enacted the Business Registration Services Act (Number 15 of 2015) under which the Business Registration Service (BRS) was established as a body corporate charged with the responsibility of *“implementation of policies, laws and other matters relating to the registration of Companies, partnerships and firms, individuals and corporations carrying on business under a business name, bankruptcy, hire-purchase, and security rights”*.

The BRS is intended to facilitate the incorporation and maintenance of business, and the registration of encumbrances as well as other services aimed at enhancing the ease of doing business in Kenya. The BRS also aims to ensure the effective administration of the laws relating to the incorporation, registration, operation and management of companies, partnerships and firms, specifically overseeing the digital operations of the Companies Registry, Movable Property Security Rights Registry (Collateral Registry), Insolvency (Official Receivers) Registry and the Hire Purchase Registry. Movable Property Security Rights Registry (Collateral Registry), Insolvency (Official

Receivers) Registry and the Hire Purchase Registry.

The following are some of the services offered under BRS portal: name search and reservation; registration of: business names, partnerships, limited liability partnership, limited companies, public companies, companies limited by guarantee, foreign companies and non-governmental organizations; official searches; winding up of a company; name change of a company; filing of Annual Returns and changing the directorship and shareholding structure of a company among other services.

Coupled with this, the enactment of the Companies Act No. 17 of 2015 has introduced wide-reaching provisions on current and emerging trends in the management of companies' operations in Kenya and led to a number of benefits for shareholders and directors. This Act has transformed and streamlined the company registration and maintenance processes by allowing the adoption of electronic platforms that have seen a shift from a manual registration system to an online registration system on the e-citizen platform.

BENEFITS ACCRUING FROM DIGITIZATION AND THE USE OF THE BUSINESS REGISTRATION SERVICE

1. Prevention of Double Registration of Companies

Online registration of businesses has made it possible to resolve the issue of double registration of companies, business names and partnerships. Unlike in the previous system where no online database was maintained containing all the names of businesses and companies which had been reserved, registered or incorporated, under the online platform there is ease in searching for names as well as certainty provided where two different entities have similar names.

The use of the online platform has even prompted the Registrar of Companies to require companies or businesses which were incorporated or registered under names which were similar to those of businesses existing prior to their registration to change their names. This directive, although done in compliance with the applicable law, has had a cost on the affected businesses as many had used the name for years amassing goodwill in the market. The changes must also be filed in accordance with the provisions of the Companies Act, No. 17 of 2015, meaning the companies would have to bear the costs of registering the changes.

2. Ease of Doing Business.

Business people are no longer obligated to travel to the Companies Registry at Nairobi to make changes in company details thanks to the migration to the online registration process, which has significantly reduced the number of people attending to the Company Registry offices to file company documents.

In addition, the turnaround time for processing of applications such as registration of entities or changes to a company's structure has significantly reduced. For example, registration of a company takes 3-5 days upon uploading the requisite documents on the portal.

3. Improved Revenue Collection

The Government is now better positioned to collect monies paid for online services through the use of electronic payment systems including credit cards and pay bill numbers. Although this comes at an additional cost due to the convenience fee charged by the system, this system allows users to pay for the service at their convenience without having to present themselves before the Registrar as was previously the case under the manual system.

4. Elimination of Corruption

The BRS system has eliminated the involvement of brokers and middlemen who used to take advantage of the delays and confusion which characterized the manual system and now affords users a direct link to the online registration platform.

CHALLENGES OF THE ONLINE BUSINESS REGISTRATION PROCESS

Despite its positive features as highlighted above, the BRS has experienced some teething problems in its development and implementation which include:

1. Lack of company data and details to facilitate the linking of existing businesses on the BRS online portal. The physical files of some businesses cannot be traced for linking as they may either be hidden, misplaced or missing relevant documents evidencing changes in the structure. In such cases, unless the members, partners, shareholders or directors have copies of the documents previously filed, the status of the entities remains unverifiable. Due to the hue and cry occasioned by this, the BRS officials now require the entity's officials to indemnify the BRS, the Companies Registry and any other relevant authority against any action that may be brought against them for confirming and effecting the structure as per information communicated by entity's officials. It is unclear what the effect of such a deed would be should the same be challenged in court and if such an indemnity works to shield the BRS and the Registrar from liability.
2. Limited access by users to internet connection and know-how to access the BRS online portal. Not every entrepreneur has internet access and an e-citizen account, particularly in the rural areas. Many Kenyans are also either computer illiterate or not trained on how to access and operate the BRS portal.
3. The digitization of the process has not completely eliminated human interaction as the changes must be reviewed by an official from the relevant registry. The system does not also allow the user to communicate directly through the platform to highlight the issues encountered forcing the users to still make trips to the Registry to have their issues resolved.

This re-introduces the element of corruption as some unscrupulous officials may take advantage of the user's frustration, confusion and desperation to solicit bribes so as to review and process the changes, thereby compromising the integrity of the data captured in the BRS portal.

4. The BRS system experiences frequent system downtimes that affect the operations of the BRS portal leading to delays in the filing and processing of applications. Furthermore, there are system delays due to the inability of the server to handle a lot of data which has been attributed to the lack of adequate personnel to review applications. Unfortunately, this state of affairs has taken away from the gains made at the initial stages where applications would be processed in a speedy manner.
5. There is a lot of bureaucracy when it comes to the revision of the system to address challenges encountered. This has been the case especially where there is an interface between the systems of different departments, such as the interface between BRS and Kenya Revenue Authority systems which, as presently structured, does not allow the appointment of old companies as directors or shareholders contrary to the provisions of the Companies Act. Currently no alteration can be made on the BRS system to rectify this anomaly unless the same is approved through the bureaucratic channels causing a lot of delays and frustration to users.
6. It is currently not possible for a user to register encumbrances such as debentures and charges on the BRS portal.

In addition to this searches to verify encumbrances registered by an entity do not always provide a comprehensive picture. Furthermore, only officials can undertake the search and in others only the registering user has sight of the registered document.

In conclusion, the reforms have enhanced and promoted business in Kenya by easing registration processes and related services thereby attracting a large number of foreign investors investing in Kenya. The challenges highlighted above are not fatal as the following steps, some of which are currently being implemented by the BRS, can be undertaken to cure some of the drawbacks:

- Offering short term employment to individuals to help in linking of businesses or scanning of documents to hasten the migration and population of the online Register.
- Involving company secretaries and stakeholders to create awareness on the existence of the BRS system and its benefits.
- Signing of codes of conduct by the registry staff to enhance accountability, transparency and diligence in their work.
- implementing a robust data protection policy to safeguard the integrity and privacy on the data held by BRS.

It is therefore imperative that all business entities and other stakeholders work together to ensure the success of the implementation of the online business registration process.



About Us

We are a leading fully-fledged professional service firm that delivers a wide range of specialist corporate advisory services to various clients in the SME as well as corporate sector.

We offer tailor-made professional services delivered by our team of highly qualified, competent and experienced professionals. It's not just about the services we provide, but how we put them together to solve your problems. We focus on offering solutions so that you can focus on your business.

Our Services

- Company Incorporation and Business Registration Services
- Company Secretarial Services
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‘SUBJECT TO’: ARE CONTRACTS TO CONTRACT BINDING?



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The phrase ‘*subject to contract*’ is a common phrase in various transactional documents relating to commercial agreements especially at the initial stages of negotiation. Essentially, the use of this phrase means that a proposal or an offer has been made by one party to another to enter into a contract to, for example, buy or sell an item. The parties will at the preliminary negotiation stages set out the terms on which they would wish to enter a contract or to carry out the transaction.

The use of the phrase has led to the emergence of disputes on the legal implications of its use in agreements and for which aggrieved parties have sought legal recourse from the courts. This Article seeks to interrogate the position of various courts on the legal implication of the phrase ‘*subject to contract*’ in agreements.

The restriction imposed by the use of the phrase ‘subject to contract’ is a legally sound one and the basis of the same can be traced back to the case of *Chinnock v The Marchioness of Ely 4 DE G J&S 638* where Lord Westbury, LC at 646, observed that under Common Law:

“As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials, which this Court requires, to make a legally binding contract. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation.”

Similarly, in the case of *Rose and Frank Co. v J.R Crompton and Brothers Ltd (1923) 2 KB 261*, the Court held that there was nothing wrong in having clauses in an agreement to the effect that parties agree not to be bound in law but subject to a contract being drawn up.

This position has been upheld by the local courts such as *East African Fine Spinners Limited (in receivership) & 3 others v Bedi Investments Limited [1994] Eklr*. In this case the Judge observed that where a person accepts an offer ‘*subject to contract*’, it means that the matter remains in negotiation until a formal contract is entered and executed. Until that contract is executed there is no contract between the parties which could be enforced by an order for specific performance or mandatory injunction.

From the foregoing it is clear that the use of the term ‘*subject to contract*’ is a strong indication that where the parties did not intend that an enforceable obligation arise before the execution of a formal document, the parties are not bound to perform the contract. Therefore, where one has a proposal or agreement drawn up in writing and expressed to be subject to a formal contract being prepared, it means that such proposal or agreement is subject to and is dependent upon a formal contract being entered into.

However, it is important to note that, contrary to the traditional position stated in the aforementioned cases, recent jurisprudence has indicated that the rule of ‘subject to contract’ does not apply in a blanket manner. The High Court of Kenya, in the case of *Eldo City Limited v Corn Products Kenya Ltd & another [2013] eKLR* delivered a landmark ruling, highlighting the exception to the general rule of ‘subject to contract’. Justice Mabeya observed that:

“It is trite law that in deciding disputes, it is the court’s duty to give effect to the intention of the parties. The parties’ intention is discernible from the documents and conduct of the parties.”

The Court relied on the English case of *Smith vs Cook (1891) AC 297* at 303 where it was held that:

“The duty of the court is to give the natural meaning to the language of the deed unless it involves some manifest absurdity or would be inconsistent with some other provision of the deed and would therefore be contrary to the intention of the parties as appearing upon the face of the deed.”

The Court further relied on the case of *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG [2010] UKSC 14* where the Supreme Court of the United Kingdom considered whether using the phrase ‘*subject to contract*’ during contract negotiations prevented an enforceable contract from being formed. In that case, the Court held that whether or not there was a binding contract in place could be established by considering the communication, by words and by conduct, between the parties and assessing whether it led to the objective conclusion that the parties intended to create legal relations and whether the parties had agreed on all terms essential to form a contract. The Honourable Judge in this case quoted the case of *Investec Bank (UK) Ltd v Zulman and another [2010] EWCA Civ 536* where the Court cautioned against putting too much weight behind the phrase ‘*subject to contract*’ and held that it is the parties’ intention that matters. Therefore, the use of the phrase ‘subject to contract’ will not of itself determine whether or not a contract exists as it is the intention of the parties that matters and which intention is inferred through their conduct.

In light of the above, the question then begs, how do Courts determine the intention of the parties? In the case of *Storer v Manchester City Council [1974] 1 W.L.R. 1403*, Lord Denning M.R. observed that:

“In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: “I did not intend to contract” if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough.”

The Court concluded its holding by observing that to uphold the position that a party can pull out of a transaction when there is already mutual assent among the parties will not be prudent in the world of commerce. The Court added that such freedom to pull out of a transaction should be limited up to a point the parties are still negotiating and, once all terms have been agreed and settled, that freedom should then be taken away.

If such a principle is not upheld then, for example in agreements for sale, mischievous parties with no intention of selling their property may engage serious purchasers in a wild goose chase knowing very well that they can pull out at any stage, which action should not be encouraged or tolerated.

In conclusion, in as much as the use of the phrase ‘*subject to contract*’ is intended to mean that the terms of agreement remain in negotiation until a formal contract is entered into, this rule does not apply in a blanket manner. Courts have intervened to prevent mischief by parties in the use of the phrase ‘*subject to contract*’ and in cases of dispute the Courts look at the intention of the parties.





Justice Cup

It was a pleasure to take part in this year's LSK Justice Cup.

The theme of the tournament was "Kicking out Sexual Gender Based Violence". It was held at Parklands Sports Club.





WHICH COURT FOR THE CHILD? THE TUSSELE BETWEEN THE KADHIS' COURT AND THE CHILDREN'S COURT



Betty KAGENI

Betty is the team leader in charge of the firm's Mombasa Branch. She has acquired vast expertise in Civil and Commercial litigation practice in the Kenyan Courts.

The question as to whether it is the Kadhis' Court or the Children's Court that has jurisdiction over children's matters is one that has elicited mixed opinions in Kenya as each court has given differing determinations on the subject. This situation has seemingly pitted the Children's Court against the Kadhis' Court in a 'battle' for jurisdiction on the question on custody and maintenance of children.

This Article analyses the constitutional interpretation of Article 170(5) of the Constitution of Kenya (the "Constitution") regarding the jurisdiction of the Kadhis' Court on questions relating to the custody and maintenance of children following the divorce or separation of parents who both profess the Islamic faith.

It also gives a brief overview of the Islamic law concerning the issues of custody and maintenance of children in comparison to the enforcement of the law on similar issues by the Children's Court.

The Jurisdiction of the Kadhis' Court

Article 170(5) of the Constitution provides that "*the jurisdiction of a Kadhis' Court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhis' Courts*".

The major argument surrounding the question of jurisdiction over children's matters has been the interpretation as to whether or not personal matters, as cited by Article 170(5) of the Constitution, includes issues of custody and maintenance of children.

Proponents in favour of the jurisdiction of the Kadhis' Court submit that the personal matters over which the Kadhis' Court has jurisdiction are not only confined to issues of marriage, divorce and inheritance but also include children's matters. The question of efficacy in dealing with family disputes has also arisen in discussions on the extent of the jurisdiction of the Kadhis' Court. It has been submitted that it would be costly and time consuming for parties to a Muslim marriage to submit to the Kadhis' Court for divorce proceedings while disregarding the issues of custody and maintenance of the children and thereafter proceed to a different court to decide on the issues of custody and maintenance.

The Kadhis' Court has indeed decided on matters maintenance and custody as in the case of **HGG V GGG (2018) eKLR** where the Court in granting the mother custody stated as follows:

“Under Islamic law, the same principle of priority of custody of children of tender age to mothers applies. It is based on traditions of the Prophet Muhammad (may peace and blessings be upon him), the second source of Islamic law, interpretation of Muslim jurists of the highest eminence and panel of contemporary Muslim scholars who authored the Islamic charter on Family under the International Islamic Committee for Women and Child [IICWC].”

The Jurisdiction of the Children's Court

Section 73 of the Children Act provides that the Children's Court shall among other things have jurisdiction to decide on matters involving custody and maintenance of children. In discussing the conflict between the jurisdiction of the Children's Court and the Kadhis' Court, the court in **Republic v Kadhi's Court Nairobi & 2 others Ex-parte T L [2018] eKLR** observed that the Kadhis' Court's jurisdiction flows from either the Constitution or the legislation or both. In the court's view, neither the Constitution nor legislation has given the Kadhis' Court jurisdiction to preside over children's matters.

This position was maintained in the case of **Al-larakhia v Aga Khan [1969] EA, 613**, where the court stated that parties cannot, even by mutual consent, confer jurisdiction upon a court which has no such jurisdiction. The court further noted that Section 83 of the Children Act was clear as to the factors that the court shall take into account in granting the custody order, which among others includes the religious persuasion of the child, and was of the considered view that the Children's Court has the power and jurisdiction to deal with matters regarding the custody of children irrespective of the child's religion

Various superior courts of record have equally held that Kadhis' Courts do not have jurisdiction to hear and determine children's cases. However, there has been no decision on the question of the Kadhis' Courts' jurisdiction from the Supreme Court or the Court of Appeal to bind the High Courts and, as was noted by Justice Odero in the case of **HMM v KJD [2014] eKLR**, the decisions of the High Court were only persuasive but not binding upon it.

Below is a brief comparison of the law as interpreted by the Kadhis' Court *vis-a-vis* the Children's Court.

ISLAMIC LAW ON CUSTODY AND MAINTENANCE OF THE CHILDREN

The following are the considerations made by the Kadhis' Court on matters custody and maintenance:

1. The mother is given priority in custody

Sharia law, as applies to the questions of custody and maintenance, gives the mother of the child, particularly a child of tender age, priority over custody of the child. In making this observation, the Kadhis' Court in the case of *HGG v GGG [2018] eKLR* noted Article 106 [1] of the Islamic Charter on the family which provides that the mother has the greatest right to custody of the child according to Islamic Sharia law.

Similarly, in; the case of *DAJ v HMA [2019] eKLR*, the Kadhis' Court at Bungoma observed that "*the mother has more right to custody of her children regardless of sex until the age of understanding recognized at seven or so provided she has not remarried or otherwise*".

Although the mother's re-marriage may affect the maternal priority in cases of custody of the child, the court cautioned on the need for objectivity in interpreting the Islamic text and stated that a mother's re-marriage should not automatically bar her from enjoying the custodial rights unless evidence that she is unfit is presented to the court. In addition, other than re-marriage, either of the parents' rights to custody may also be lost if the parent is immoral, corrupt, careless, heedless or travels frequently, if this will harm the child's interest or be detrimental to their upbringing.

In proving the above, the parent who wishes the court to be awarded custody must adduce evidence against the other parent to meet the required standard of proof.

2. The wishes of the child

Islamic Law gives the child who has attained the age of reason an opportunity to choose between either of the parents in custody cases. The Kadhis' Court in the case of *SSA v MNA [2019] eKLR* noted that the child's choice must be weighed and caution exercised to ensure that it is in conformity with the sole cause of the custody. The court observed the possibility that any child would prefer the less harsh parent and therefore emphasized the need to bear in mind the best interests of the child in awarding custody.

3. It is the father's duty to provide maintenance

The Kadhis' Court's determination on the question of child maintenance, as informed by the Quran, is that the father is charged with the greater responsibility towards the maintenance of the child. In the case of *DAJ v HMA [2019] eKLR* the court directed, after awarding custody of the minor children aged 7 months and 2 years to the mother of the children, that the father provides maintenance for the children. The duty is however subject to the father's ability.

CUSTODY AND MAINTENANCE OF CHILDREN IN THE CHILDREN'S COURT

Article 53 (2) of the Constitution provides that that a child's best interests are of paramount importance in every matter concerning the child. In addition, section 4 of the Children Act provides that the Children's Court should at all times be guided by the best interests of the child in awarding custody and maintenance.

Both parents of a child have equal rights to custody of the child and section 82 of the Children Act provides that either of the parents has the right to move the court to award custody. In awarding custody, the Children's Court should be guided by the principles set out in section 83 of the Children's Act which include:

- a) the conduct and wishes of the parent or guardian of the child;
- b) the ascertainable wishes of the relatives of the child;
- c) the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;
- d) the ascertainable wishes of the child;
- e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;
- f) the customs of the community to which the child belongs;
- g) the religious persuasion of the child;
- h) whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;
- i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;
- j) the best interest of the child.

Legal custody is usually vested upon both parents of a child, however it has been the courts' practice to place the actual custody of the child with the mother while granting the father of the child access orders. However, in a recent decision of the High Court in *JKN VS HWN (2019)*, the court was of the view that section 83 of the Children Act does not dictate that custody – whether actual or legal – must be given to only one parent or person, instead the court stated that what that section envisages was that custody can be shared or joint. The court proceeded to reverse the decision of the Children's Court which had awarded the mother both actual and legal custody and needed to award both parents actual and legal custody of their two children since the court considered both to be fit to take on their parental rights and responsibilities.

Unlike Islamic law, the Children Act does not favour any of the parents in determining which parent has the first right to custody of the children, even when the children are of tender age. However, judicial precedent has reached a consensus similar to that elucidated by Islamic law that a mother should be awarded custody of children of tender age, especially when the children are female, unless there are exceptional circumstances not to do so. Exceptional circumstances have been explained by the courts, such as by the Court of Appeal in the case of *J.O. v S.A.O (2016) eKLR*, to be “ones which affect the welfare and best interests of the child and may include, but not limited to: the mother's mental instability or insanity; disgraceful conduct such as immoral behavior, drunken habits, abandonment of and cruelty to the children, the company kept by the mother and in instances where the mother has taken a new husband.

In matters concerning the child's maintenance, it is the law that the welfare of a child is the responsibility of both parents and not exclusive to either the father or the mother. Where both parents are working, courts take an approach on the interest of the child by ensuring each of them contribute financially to the child's welfare. This determination is founded on Article 53 of the Constitution which provides for the rights of a child.

In conclusion, it is clear that there are various similarities and differences under the Kadhis' Court and Children's Court when it comes to the determination of a child's custody and maintenance following divorce and separation proceedings. Both systems of the law are in agreement that the overriding principle of a child's best interest should inform any decision made in regard to the child's custody and maintenance.

However, as indicated in the discussion above, there is seemingly a disconnect between the two courts and the Supreme Court ought to pronounce itself on this matter to avoid the current state of uncertainty. Children are a vulnerable group who should be protected and their rights upheld and safeguarded. In as much as the Constitution is the basis upon which these two courts operate, the rulings of the court in *Republic v Kadhi's Court Nairobi & 2 others Ex-parte T L [2018] EKL*R and in several other High Court Cases should give any person seeking to have a matter on custody and maintenance of children adjudicated by the Kadhis' Court pause.



Family Business Unit conducting a training for one of our clients.



CYMBELL ADVOCATES

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The Firm's Geoffrey Paul is highly qualified and, having had many years of experience in corporate affairs, heads the firm as managing partner. He has vast experience in Conveyance, Company Law, Merger & Acquisitions, Insurance, Commercial Law, Family law, Labour Law, Commercial Arbitration, Intellectual Property and General Litigation matters.



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