



This newsheet is designed to inform our clients of recent developments in the law in Kenya, Uganda and Tanzania. If you would like us to e-mail it direct to any specific persons in your organisation please contact: Pamela Nabwire
pwn@africalegalnetwork.com

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The East African Community Customs Union

It has been the case for over a decade now that the world is fragmenting into regional trade blocs – for instance, the European Union, the Association of Southeast Asian Nations, the Economic Community of West African States, Southern African Development Community (“SADC”) and Common Market for East and Southern Africa (“COMESA”) to name a few. Closer to home, and apart from COMESA, the acronym EAC (the East African Community) immediately comes into mind in this regard.

The EAC is the regional inter-governmental organization of the Republics of Kenya, Uganda and Tanzania established by a Treaty signed by the Heads of State of each of these Republics on 30th November, 1999. As is the case with regional trading blocs, the objective of the EAC broadly stated is to enhance co-operation among its member states for their mutual benefit. Pursuant to this objective the EAC member states have in the Treaty undertaken to establish among themselves a Customs Union, thereafter a Common Market, a Monetary Union and, ultimately, a political federation.

If the signing of the Treaty by the Heads of State of the EAC member states was the first milestone in the journey towards their economic integration, then the establishment of the Customs Union will be the second. Theoretically, the case for the establishment of the Customs Union is clear: together with a common external tariff (and the elimination of non-tariff barriers among the member states, for instance, delays related to border control) the Customs Union will provide for free trade of goods within the EAC member states – so there will be a wider market for raw materials and finished products (the total population of the member states is estimated at 90 million), increased competitiveness of industries, increased investment opportunities and, therefore, employment opportunities and wealth – all going a long way to achieving what will be the EAC’s third milestone – the establishment of the EAC Common Market.

On 2nd March, 2004 the Heads of State of the EAC member states signed the Customs Union Protocol. The Protocol requires that upon its coming into effect in each of the EAC member states, EAC member states

will be required to facilitate the free flow of goods among them and to apply a three band common external tariff (maximum of 25% for finished goods; 10% for intermediate goods and 0% for raw materials) in respect of all products imported into the EAC. In addition, EAC member states will be obliged to eliminate all internal tariff and charges of equivalent effect on trade amongst themselves. In the latter regard however, whereas Ugandan goods going into Tanzania (and vice versa) and Ugandan and Tanzanian goods going into Kenya shall be eligible for immediate tariff free treatment upon enactment of the appropriate Protocol legislation, certain goods from Kenya going to either Uganda or Tanzania shall not enjoy similar eligibility but shall be subject to a gradual tariff reduction to 0% over a period of five years. Conventional wisdom has it that this outcome is tied to the collapse of the former East African Community in 1977 under which Kenya is thought to have benefited disproportionately as well as the perception that at present the economy of Kenya is advanced relative to the economies of Uganda and Tanzania.

The Protocol will only come into force in each of the EAC member states through the enactment of appropriate national legislation. If the joint communiqué issued on 28th August, 2004 by the Heads of State of the EAC member states is adhered to, then legislation giving effect to the Protocol will be in force in each of the EAC member states by 30th November, 2004. No doubt there will be much to applaud upon the coming into effect of the Protocol. What will be interesting to observe, however, will be how the EAC member states *actually* implement the Protocol generally (it is accepted that the effectiveness of the Protocol and, indeed, the Treaty, is dependant on the goodwill of the member states) and what effect it will have on their membership in other regional trade blocs and attendant commitments – Kenya and Uganda are also members of COMESA but not SADC and Tanzania is a member of SADC but not COMESA.

Anjarwalla & Khanna (Kenya)

Banks Sharing Confidential Information Under The Banking Act

As early as 1999, the Central Bank of Kenya was convinced of the merit of the formation of a credit reference agency where banks could exchange information on their customers and particularly defaulting borrowers. At the time, the increasing level of non-performing loans in the country was an issue of major supervisory concern – between 1997 and 1999, the level of non-performing loans increased from K.Shs.56 billion to 97 billion. The Central Bank acknowledged that there was no legislation that permitted banks to exchange information in this regard. The Government therefore moved to remedy the situation and, in 2001, enacted legislation that empowered the Minister for Finance (the “Minister”) to prescribe regulations pursuant to which the Central Bank and institutions licensed under the Banking Act (Cap. 488, Laws of Kenya) (the “Act”) could exchange information that came into their possession in accordance with the performance of their duties: (Section 31(3)(b) of the Act). In 2003, further legislation was enacted specifically providing that the regulations that the Minister could prescribe under section 31(3) (b) included:

“...regulations...for the establishment and operation of credit reference bureaus, for the purpose of collecting prescribed credit information on clients of institutions licensed under [the] Act, and disseminating it amongst such institutions for use in the ordinary course of business, subject to conditions or limitations as may be prescribed.”(Section 31(4) of the Banking Act)

In exercise of these powers, the Minister, by way of a legal notice number 80 dated 30th June, 2004, made the Banking (Exchange of Information) Regulations, 2004 (the “Regulations”). The Regulations were published in the Kenya Gazette Supplement Number 45 on 9th July, 2004.

In a nutshell, the Regulations permit banks, by agreement, to exchange and share prescribed information relating to their customers, through the use of credit reference bureaus and other mechanisms, approved by the Minister in consultation with the Central Bank, without the necessity of first seeking and obtaining their customers’ consent. In essence, sections 31(3) and (4) of the Banking Act and the Regulations constitute a statutory exception to the general duty of bank confidentiality.

Regulation 3 states as follows:

“The Minister may, in consultation with the Central Bank, approve mechanisms, such as credit reference bureaus, set up from time to time by institutions licensed under the Banking Act, through which the institutions may exchange information.”

Whilst it is clear that this regulation sets out the power of the Minister to vet the mechanisms (including credit reference

bureaus) proposed to be set up by banks through which banks will exchange information, there is ambiguity as to whether the Minister can approve credit reference bureaus set up by persons not licensed under the Banking Act. There is every likelihood that this is a case of inaccurate drafting as we have had direct involvement with the Central Bank and the Kenya Bankers Association in matters concerning the Regulations and in particular, discussions relating to the approval of a particular credit reference bureau that is not owned by a licensed institution. In light of that we do not believe it to be the intention of the Minister that independent credit reference bureaus should not be appointed to operate a sharing of information mechanism, provided that the mechanism which they use is approved by the Minister.

The nature and type of information that can be exchanged under the Regulations shall be that prescribed by the Central Bank from time to time. The Central Bank has yet to prescribe such information, although it is our understanding that they are seeking views from banks in this regard.

When a credit reference bureau or other sharing information mechanism is set up and approved and the information to be exchanged by the banks is prescribed in accordance with the Regulations, customers of banks utilising the bureau will be glad to know that they will be able to demand to know what information the bureau has on them. Where the customer disputes such information he will be in a position to complain to his bank who will be under an obligation to investigate such records and up date the same if necessary.

Further, within the shared information mechanism envisaged under the Regulations, the confidential character of the information so shared remains sacrosanct so that where it is shown to the Central Bank that any bank is in breach of confidentiality safeguards within the mechanism, the Central Bank may by notice terminate the right of the bank to participate in the mechanism.

Finally, although the Regulations are new to Kenya, it is noted that comparative studies conducted by bodies such as the World Bank and the European Banking Federation reveal that the existence of credit registries is common in jurisdictions in Europe and in North America. There has been research undertaken with the results indicating that credit information sharing is of economic benefit to countries which have established regulations and mechanisms for the same as they appear to encourage and facilitate bank financing. It is hoped that these advantages will be achieved Kenya in due course.

Anjarwalla & Khanna (Kenya)

The Tobacco Control Bill, 2004

The long title of the Bill describes it as an Act of Parliament to regulate the manufacture, sale, labelling, advertising and promotion of tobacco products, to regulate smoking in specified areas and for connected purposes.

The Bill provides for an 11 member Tobacco Products Regulatory Board (“the Board”) to, *inter alia* advise the Minister of Public Health (“the Minister”) on the exercise of his powers and the performance of his functions under the Act. The Board, however, has no binding powers. The functions of the Board include:

- Advising the Minister on the national policy to be adopted with regard to the manufacture, sale and promotion of tobacco products;
- Assisting the Minister in determining the test methods and in testing tobacco products and their emissions in order to access conformity with the requirements under the Act;
- Recommending to the Minister and participating in the formulation of the regulations under the Act;
- Performance of such other functions as may from time to time be assigned by the Minister. It appears that the Minister is not bound by the advice of the Board.

The Minister is given wide powers under the Bill. For instance, he is required to prescribe permissible levels of tar and nicotine; prohibit the use of harmful constituents in the manufacture of tobacco products and control the labelling, packaging, sale, distribution and promotion of tobacco products.

The Bill prohibits the sale of cigarettes to young persons and requires vendors to post signs to this effect at their premises. Kiosks and street vendors appear to be included. Use of automatic vending machines to sell tobacco products is prohibited save in prescribed places. Similarly, mail order deliveries and self-service displays for tobacco products are prohibited. Selling of cigarettes in a package containing less than 20 cigarettes is prohibited.

The Bill also prohibits the sale of tobacco products by means of a display that permits a person to handle the product before paying for it. This would mean that stocking

of cigarettes on shelves such as in a supermarket would be prohibited and such retail outlets would have to sell cigarettes behind a controlled counter

The Bill prescribes the information that must be contained on the packaging. For example, there must be two warning labels in English and Kiswahili comprising not less than 30% of the surface area of the package and bearing the word “**WARNING.**” Other warnings which are required to be displayed randomly in each twelve month period on a rotational basis and to as equal a number of times as possible on every fifth package of each brand include such messages as “*tobacco use causes cancer*” and “*tobacco harms your unborn baby*” and “*tobacco is an addiction.*” The package is also required to state the amount of tar, nicotine and other constituent yield as prescribed. Retailers are also required to provide and supply leaflets stating the health hazards and health effects connected to the use of tobacco products.

Promotion of tobacco products will also be restricted. In addition, advertising on mediums of electronic communication will be prohibited. The Bill also seeks to ban all advertising of tobacco products save in direct mailings or publications with not less than 85% adult readership or a sign in places where the law does not permit young persons.

The Bill provides for a general punishment for derogating from the provisions of the Act being a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding three years or both.

The Bill appears to signal Kenya’s start to implementation of the Framework Convention on Tobacco Control (FCTC), which she has signed and ratified. The FCTC is a WHO treaty whose objective is to protect the present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the parties in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.

Anjarwalla & Khanna (Kenya)

Undeveloped Leasehold Land Held on Grant from the Government of Kenya

Banks holding securities over leasehold land held on grant from the Government that was undeveloped in breach of development conditions of the Grant were in March this year stunned by the announcement of the Government, through the press, that following the revocation of a certain Legal Notice it was no longer legally possible to transfer undeveloped leasehold land.

If there was any doubt as to the land affected by the announcement (the conventional wisdom at the time was that the announcement was to only affect land that was designated as public utility land so that to the extent that such land was in private hands it had been “grabbed”) the Ministry of Lands reportedly put this to rest by way of a circular issued by its Permanent Secretary and directed to all land officers in the Ministry to the effect that the announcement affected all undeveloped leasehold land held on Grant from the Government.

In the circumstances the impact of the announcement to the value of the securities portfolio of banks was potentially huge: the Kenya Bankers Association feared that since the amount of money lent on the strength of securities over land in general was over 90% of the total debt portfolio, a number of banks could be facing huge losses.

It was not all doom and gloom. Apart from the issue of consent to transfer undeveloped leasehold land, there was the equally significant issue regarding the potential repossession by the Government of such land in exercise of its right to forfeit that land under the Government Lands Act. Obviously, bank's security interests in such land would be potentially prejudiced, notwithstanding that they may be able to claim relief against forfeiture in accordance with the said Act. In this regard, and at the same time as the announcement that it was no longer possible to transfer undeveloped leasehold land, the Government also announced that owners of leasehold land held under Grant from the Government who were in breach of the development conditions had been granted a further 24 months from the date of the announcement to develop their land. On the face of it, therefore, banks would be able to reduce their exposure in respect of such land by requiring a borrower (being the original lessee of the land) who has created security over such land to submit development plans to the relevant authorities and develop the land in accordance with such plans so that the development is complete by the end of the 24 month moratorium. Banks should be aware though that the moratorium announcement was made through the press, as opposed to the Kenya Gazette, so that as a matter of law it has no legal effect and the Government could – however unlikely this may seem – potentially exercise its right to forfeit in ignorance of its own announcement.

Returning to the announcement relating to the issue of consent to transfer undeveloped land and bearing in mind its alleged extent (as set out in the circular issued by the Permanent

Secretary mentioned above) and the conventional wisdom prevailing at the time, a number of interested parties took up the matter with the Government with a view to obtaining some clarification as to the correct position. The Government obliged and in September issued an appropriate clarification. The Government stated that the Commissioner of Lands will grant consent to transfer undeveloped leasehold land that does not contain development conditions in the Grant; that applications for consent to transfer subdivisions emanating from a leasehold title in respect of which the initial development conditions was complied with will be considered positively and that a parcel of land that has been converted to a leasehold tenure from a freehold tenure upon change of user or subdivision may be transferred without any restriction despite its development status. The Government added that it would not entertain applications for consent to transfer any land that was previously designated as a public utility plot.

Anjarwalla & Khanna (Kenya)

A REVIEW OF THE COPYRIGHT AND NEIGHBOURING RIGHTS BILL

The Copyright and Neighbouring Rights Bill seeks to reform our copyright law to make it adaptable to, and accommodative of the changes and developments that have taken place in the realm of works eligible for copyright protection.

The Bill highlights protectable works as those created by a citizen of Uganda or first published in Uganda by a resident (regardless of nationality) or work which originates from a person who is a national of a state which is a member of an organization to which Uganda is a signatory. For example WIPO, ARIPO, UNESCO and WTO.

The Bill expands the scope of protectable works to include, inter alia, computer programming and electronic data banks. Protectable works however exclude works of public interest such as Laws, Court Decisions, Reports of Commissions of Inquiry and news from the media.

The Bill gives a formula for determining an individual interest in a work created by more than one person. Every participant in this creation shares in the copyright proportionately.

Lastly in what appears to be the most profound innovation, the Bill creates a new species of rights (named “neighbouring rights”) for actors and actresses, producers of plays, directors of theatrical performances, broadcasters and recorders.

Adriko & Karugaba(Uganda)

Recent Amendments to the Land Act in Tanzania

The Land (Amendment) Act No. 2 of 2004 (the “Act”) recently enacted by the Government amended the provisions relating to mortgages contained in the Land Act 1999 and has gone a long way in settling the issue as to the extent of a foreign investor’s ability to acquire a right of occupancy or a derivative right over land. A number of amendments in the foregoing regard will be of interest to banks and borrowers. These are highlighted in this article.

Mortgages

Part X of the Land Act 1999 contained all the provisions dealing with mortgages. The Act has made fresh provisions governing mortgages and repealed Part X of the Land Act 1999. The most significant of these provisions relate to:

- The granting of mortgages over matrimonial homes;
- The granting of mortgages over customary rights of occupancy;
- The conditions to be implied in any mortgage;
- Matters concerning the variation of mortgages as well as their interest provisions; and
- The powers of a mortgagee when a mortgagor is in default.

With respect to mortgages over matrimonial homes, the Act provides that in order for a mortgage created by a husband (or wife, as the case may be) to be valid, the wife (or the husband, as the case may be) living in the home has to indicate his or her assent by signature or other evidence and sign the instrument used to grant the mortgage. In connection with these formalities it is, as a matter of law, incumbent on a potential mortgagee to take reasonable steps to ascertain whether the mortgagor has a husband or wife (as the case may be). A matrimonial home has been defined as meaning the building where a husband and wife ordinarily reside together.

The Act makes provisions for a form of mortgage referred to as a “customary mortgage” (mortgages over customary rights of occupancy). The difficulty here is that in case of default a mortgagee is expected to seek “customary remedies” - an expression that is not defined in the Act. Presumably, the expression means the remedies prescribed by the customary law of the community that claims the mortgaged property as forming part of its ancestral land. In any event, the tribunal having jurisdiction to adjudicate disputes and to enforce customary remedies under a customary mortgage is the village land council. The mortgagor may first attempt to mediate on the matter with the mortgagee by using the mediation services of the council. If that fails then the mortgagor may apply to have the mortgage “re-opened” on grounds that the terms of the mortgage were unfair, or are an unreasonable departure from the normal terms of a customary mortgage, or are disadvantageous to the interests of the dependants of the mortgagor. These grounds are couched in fairly wide terms and it remains to be seen what terms the councils will be prepared to consider as “unfair” or “unreasonable” or “disadvantageous” and therefore meriting the re-opening of a mortgage. In the event that the council is of the opinion that there is a lacuna in the customary law or no other system of customary law makes provision or adequately addresses the issue in dispute the provisions of the Land Act shall guide it.

The Act has reduced the time period for various notices to be provided in the event of enforcement of a mortgage and now permits the mortgagee to realize the mortgage upon the issue by the mortgagee of a 30-day notice to the mortgagor notifying the mortgagor of the mortgagee’s intention to exercise any of its remedies (for instance, appointing a receiver of the income of the mortgaged land) if the mortgagor does not remedy his default under the mortgage. It is mandatory that the 30-day notice be served on the mortgagor prior to exercise of any of the remedies available to the mortgagor.

The Act contains several conditions which will be implied in the mortgage and bind the mortgagor. These include matters relating to: payment of interest, rates, rent, charges, taxes and other outgoings; repairs, insurance, use of agricultural land in a sustainable manner and in accordance with good husbandry principles; not without consent to lease or sublease, transfer or assign the property and the mortgagee’s powers to appoint a receiver (as agent of the mortgagor) of the income of the mortgaged land.

Any variation of a mortgage without notice to the mortgagor is now invalid. In addition, any variation of interest payable under a mortgage is possible only upon notice being issued to the mortgagor by the mortgagee and the mortgagor duly signifies consent to the variation by signature.

It should be noted that the Act provides that a mortgagee shall not otherwise than through execution of a court order enter into possession by taking physical possession of, *inter alia*, a dwelling house in which any person is in residence, land used for agricultural or pastoral purposes or of any land where the taking of physical possession peaceably is not possible. In addition, section 132(2) of the Act stipulates that a mortgagee shall not exercise the power of sale over any of the above mentioned properties without first obtaining an order of the court for possession or having taken possession. This clearly constitutes a fetter on the ability of mortgagees to exercise their statutory rights and should be considered when taking security over such properties.

Other provisions of the Act worthy of note are:

- That mortgages created will take effect as security only and shall not act as a transfer of ownership;
- that priority in the case of multiple mortgages will be governed by the date of registration;
- the right of tacking is included in the Act; and
- the common law right of a mortgagee to foreclose has been abolished.

Land Transfers to Non-Citizens

It has always been clear that under the Land Act 1999 corporate bodies that had a majority of shareholders who were non-citizens are precluded from owning a right of occupancy or a derivative right unless it was for the purpose of “investment” as prescribed by the Tanzania Investments Act 1997. Less clear was the position in respect of “non-prescribed” investments or in cases where the investor did not wish to take advantage of the provisions of the Investment Act. The law was silent on this and it was not clear as to whether investors were completely precluded from ownership of a right of occupancy or a derivative right in these circumstances. Act 1997.

Where a non-citizen has acquired a right of occupancy or a derivative right prior to the clarification contained in the Act, then for purposes of compensation that right shall be deemed to have no value except for the value of the unexhausted improvements (that is to say, the developments and structures) made on that land. Finally, sale of land that has no unexhausted improvements shall not be made to a non-citizen. A non-citizen can however acquire an interest in such land if it is acquired under a joint venture with a citizen in order to comply with development conditions which the citizen has agreed to but does not have the means to comply

*Who to contact:***KENYA -  Anjarwalla & Khanna**

6th Floor
Transnational Plaza
City Hall Way
P.O. Box 61278-00200
NAIROBI

S.K.A. House
Dedan Kimathi Avenue
P.O. Box 83156
MOMBASA

Tel: (254 2) 312332, 248464, 229350
Fax: (254 2) 215446
E-mail: nbi@africalegalnetwork.com

Tel: (254 41) 312848/9, 311741, 314211, 225090
Fax: (254 41) 224996/312013
E-mail: mba@africalegalnetwork.com

Karim Anjarwalla – ksa@africalegalnetwork.com
Sonal Sejpal – ss@africalegalnetwork.com

Atiq Anjarwalla – asa@africalegalnetwork.com
Akash Devani – ard@africalegalnetwork.com

UGANDA -  Adriko & Karugaba

Jubilee Insurance Centre
8th Floor
14 Parliament Avenue
P.O Box 9243 Kampala
Uganda
Tel: (256 41) 254374, 031 260330
Fax: (256 41) 254324
Email: kla@africalegalnetwork.com

Moses Adriko - mja@africalegalnetwork.com
Phillip Karugaba - pk@africalegalnetwork.com

TANZANIA -  Ringo & Associates

1st Floor
Peugeot House
Upanga Road
Dar es Salaam

Tel: (255 22) 2120954/6
Fax: (255 22) 2121625
Email: ringo@africalegalnetwork.com

Fredrick Ringo - fsr@africalegalnetwork.com
Mustafa Tharoo - mt@africalegalnetwork.com

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