HUMAN RIGHTS & LEGAL AID Magazine

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LEGAL RESOURCES FOUNDATION
Haki Itawale


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LEGAL RESOURCES FOUNDATION
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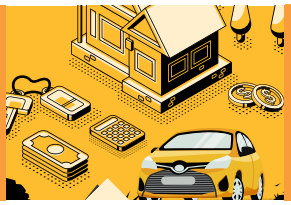

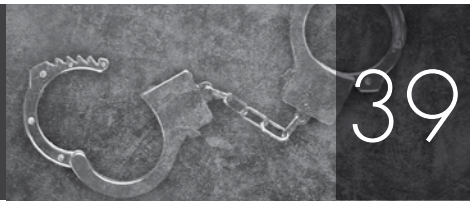

FIRST THOUGHTS

Every new day there are a myriad of legal questions that arise. Whether you are talking about family relations, Children law, custody and maintenance, sexual offences, labour, property and torts. these questions sometimes arise in diverse contexts requiring situation specific responses. In this issue Legal Resources Foundation seeks to respond to legal concerns by Kenyans of different walks of life.

The first chapter, the longest covers family law and children matters. Family is defined as a basic unit of the society and without a doubt family well-being has significant consequences on what happens in other spheres of societal life. It focuses on divorce, separation and maintenance, registration of births and concerns around registration of persons in Kenya.

Second chapter endeavors to respond to the concern of many parents when sexual relations occur between teenagers. This relationship practice is now christened "Romeo and Juliet relations' from the famous Romeo and Juliet masterpiece by Shakespeare. We note that legal response to such occurrences have been changing and we hope the law will eventually be amended to remedy the existing gap.

Chapter three focuses on labour relations. Labour law questions arise at all stages of the employment cycle. Perhaps due to high unemployment levels in the developing world, sound consideration of the legal provisions of the labour law take a back seat at engagement. However, many legal challenges arise when employment has ceased, especially if deemed unfair by the employee. while some individuals seek redress immediately others take time, sometimes due to lack of resources to pursue their rights. The chapter responds to questions when pursuing compensation or pension.

Chapter four responds to questions on property including tenancy agreements, transfer of property and ownership. One of many a citizen concern is whether a lawyer can be sued for negligence. While this has emerged in the recent past it an important subject for Kenyans seeking legal services.

In appreciating that the world is a global village chapter five responds to care of children born in a foreign jurisdiction. The procedural steps are explained in a layman's language.

The last chapter addresses the law of tort by responding to steps to legal action for tortuous act at a construction site.

LRF endeavors to breakdown legal concepts in a simplified way to enable the poor, vulnerable and marginalized understand and use the law to protect and advance their rights. It is our sincere hope that this magazine will be useful to many readers who may find themselves in situations similar to those in this issue.

Editorial Team

Prof. Kimani Njogu
Chairperson Board of Trustees
Legal Resources Foundation Trust (LRF)

FOREWORD

This publication speaks to our actions and interventions which consistently promote and protect social, legal, environmental and economic rights for all people in particular the indigent through diverse strategies. Our interventions are motivated by the desire to realize a just and equitable world, which are captured in our strategic plan 2019-2023 and integrated in our value system and practiced over the past twenty-seven years. As Legal Resources Foundation Trust, we are fully present as nonprofit Civil Society Organization discharging our mandate to enhance access to justice, improve partnerships between state and nonstate actors in the administration of justice sector, besides generating knowledge that sustainably entrenches community organization and movement for a society leaning on the rule of law as its bedrock.

While LRF's main thrust is Para legalism as an approach towards effective and efficient administration of justice, sharing of thematic information and knowledge creation continue to be a preferred approach towards a legally literate community. This in particular focuses on the very common sectors in which human interaction is prevalent and by default interfaces with the justice system. Some of these include issues on family and children; gender -based and sexually-driven violence; the emotive question of property rights and land ownership - be it through succession, tenancy, leasehold or freehold-; cultural norms and their place in the new constitutional order; corruption and governance; among others. All the afore described themes play a critical role in development of programmes in an attempt to accelerate provision of legal aid.

In seeking to reach the wider public beyond the targeted beneficiaries, LRF has adopted information sharing and generation of knowledge d as a tool for community empowerment in order to harness interest that supports access to justice while collecting voices that challenge poor governance. In this regard, LRF has taken lead in commissioning thematic studies; development of administration of justice leaning guidelines; development of human rights oriented policies; unpacking of statutes into user-friendly versions; development of Information, Education and Communication (IEC) materials; development of targeted demographic magazines; running newsletters; and leveraging on the digital, print and electronic media space to consistently update and educate the community.

The content of this newsletter demonstrates the team spirit that manifests at LRF and the mentorship relationship which define the role Board of Trustees in strengthening the capacity of the secretariat to develop Information, Education and Communication materials alongside other institutional structuring processes. We specifically acknowledge ten-month contributions made by Eric Mukoya, Job Mwaura, Timothy Mwichigi, Mildred Arum, Mary Airo, Jeff Kitonyi, Florence Gachichio, Lydia Muriuki, Joseph Kimutai, Brenda Cheptoo, Dickson Mulwa, Paul Kauku, Tina Kendi, Fred Otieno, Lucy Barongo, Milka Gichamba, James Karoki, Salome Njuguna, and Jackline Kyalo. Importantly, the Board of Trustees provided critical contextualization, review and insights in the development of the materials. This collaboration between the Trustees and the Secretariat ensures that the vision of the institution is buttressed.

We recognize the financial and technical support and the invaluable partnership of the European Union without whom this newsletter would be non-existent. Finally, we give profound gratitude to our affiliate partners for their technical support and virtual visibility, particularly at this moment when the world is facing COVID-19 pandemic.

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CHAPTER 1
FAMILY AND CHILDREN

I want to divorce my abusive wife

Key Highlights of the case:

- Given your marriage history, we would advise you premise your marriage dissolution petition on cruelty, though separation (desertion) could also be a supporting ground if it applies (you didn't indicate the length of time you have been living away from each other).
- A family lawyer, who is a practising advocate of the High Court of Kenya, should be able to take you through the journey to your desired end.

Question

I need advice on filing a divorce case. We have been married since 1991 and did a church wedding in 1998. All our children are over 18 years old. The marriage has been abusive. We don't together anymore. Lastly, my clothes were thrown out and I was threatened. There are many more things I have endured in this marriage.

Answer

To be thrown out after 28 years of marriage is a painful experience. Divorce, just like marriage, will come with lows and highs. Nonetheless, you are brave to face the reality of the situation you and your wife are in. There are many of us out here with similar predicament who can't muster the courage to speak up. In order to dissolve a Christian marriage and any other, the law has made certain provisions that are chronological.

First, the Marriage Act 2014, section 64, enables couples to exploit necessary reconciliation avenues before proceeding to court to seek dissolution. This would be preferable in the jurisdiction where the marriage was officiated, like the church where your wedding was celebrated. Should this approach fail, then a petition of divorce for dissolution of marriage can be sought on the grounds that, the marriage has irretrievably broken down and efforts at reconciliation have been futile.

In seeking the dissolution, the petitioner in this case, you, will be guided by section 65 of the Marriage Act, to move the court on the following grounds that contextualize the irretrievability of the marriage: (i) One or more acts of adultery committed by the respondent (ii) cruelty, whether mental or physical; (iii) desertion by either party for at least three years; (iv) and, exceptional depravity.

Given your marriage history, we would advise you premise your marriage dissolution petition on cruelty, though separation (desertion) could also be a supporting ground if it applies (you didn't indicate the length of time you have been living away from each other).

A family lawyer, who is a practicing advocate of the High Court of Kenya, should be able to take you through the journey to your desired end.

Must I provide for my wife if we're separated?

Key Highlights of the case

- Last year, we separated and she took away the children.
- She has now taken this matter to the children's department so that I can be tasked to pay her upkeep money.

Question

I am a man aged 40. Ten years ago, I married a lady who already had a son aged five. I loved and provided for him as my own. We now have two more children aged 12 and nine years. All the three children attend school. Now, the problem is that I have tried to adopt this boy through the legal process by changing his birth certificate details but my wife has been sabotaging the process. Last year, we separated and she took away the children.

She has now taken this matter to the children's department so that I can be tasked to pay her upkeep money. We never had a violent relationship nor have I ever abused her and I have been paying for the children's education in a private school. Are there any legal implications if I stop and disassociate myself from providing for her son? Can the court also give orders for the mother to provide for the children as she is in a formal job?

Please advise.

Answer

This question demonstrates courage and desire on your part to find a solution to a problem that has occurred in the privacy of your family. This is the dilemma of many married partners today. Your questions bring out two legal issues 1) acquisition of parental responsibility by a father and 2) financial provision to a child by a step-parent on separation. According to Kenyan law, one acquires parentage and parental responsibility through legal or biological means.

In your case, you acquired parental responsibility by agreeing to take in and provide for the boy which you have done for over 12 years. Your attempts to amend the boy's birth certificate to include your name demonstrates commitment to the child.

It is also very important to note that the Constitution bestows equal parental responsibility to both parents regardless of their (both parents) respective financial ability to take care of the child. In the event of a dispute over parental responsibility or any matter relating to children, the same can be addressed through the Department of Children Services, or filed in court should the parties fail to reach an agreement. Now that your estranged wife has referred the matter to the Children Department, you are at liberty to pursue an agreement that is in the best interest of your children.

However, if you feel that you are not ready to continue providing for the child in question, having separated with the mother, only a court of law can decisively and conclusively determine the issue. Before arriving at any decision, the court is guided primarily by 'the best interest of the child' principle. Other factors may include earning capacity of the parents, financial needs of a child, any medical condition of a child, education and social interests of a child, and whether the either parent has assumed parental responsibility knowing the child was not his or her right from the start, among others.

I want my wife's child to bear my name

Key highlights of the case:

- The process is a statutory obligation
- It is strongly recommended you include the child in the discussions
- The wife's opinion in this matter should also be considered

Question

I am David Kariuki and I happened to marry a wife with one child. The child's birth certificate bears the name of her biological dad. Can I change the dad's name to mine now that I have taken full responsibility of bringing up the child? Does the law of Kenya allow that?

Answer

David you raise two fundamental concepts that inform each other in dispute resolution: dialogue and law. However, let us first congratulate you. Your commitment as a parent to protect the interest of the child is commendable. You demonstrate the importance of effective parenting as well as good parent-child relationship. Your intention therefore to change name is likely motivated by the many challenges you anticipate the kid may face in future, that may be legal, social, cultural or economic.

Nonetheless, your action may be resisted by both the biological father and the child. This means you require consent. Your wife's opinion in this matter should be considered. Therefore, right from start you require to hold dialogue including all the parties especially the mother, child, biological father and yourself. Should you lack consensus on this issue, please brace yourself for a likely court battle. Nevertheless, the law allows for name change in the following terms

Option 1: The law allows you as a parent or legal guardian to make an application to the registrar of births and deaths to change the child's name, provided two years have not elapsed from the date of the initial registration.

Option 2: If at all two years have lapsed, Registration of Documents or Change of Names Regulations allows you to make an application known as "deed poll" for minors. This legal

document enables name change, though contents vary depending on the person making the application. For instance, where the minor involved is below the age of sixteen, Form 4 A is completed. We are inclined to believe you fall under this category.

Together with your wife, you will be required to complete the deed poll, indicate the old name that is being replaced and the new one. You shall then proceed to sign off the document as parents and your signatures attested thereto by one witness. The process is a statutory obligation, and as such, calls for the change of name to be published in the Kenya Gazette to facilitate official use of the new name. Afterward, an application for another birth certificate bearing the new name will be made to the registrar of births and deaths.

We strongly recommend you include the child in the discussions, the age notwithstanding

My second born son is from my wife's affair. Must I provide for him?

Key Highlights of case:

- The law provides that biological parents acquire automatic parental responsibility.
- They do not have to be married for this to be enforced.
- A man who is not the biological father of a child may apply formally to acquire parental responsibility.

Question

I am a 40-year-old father of three children aged 11, 7 and 5 years. I recently discovered that my wife has been cheating on me and has kept regular contact with a certain man for over seven years. This was her boss in a company she previously worked for. I went ahead and did private investigation only to discover that he is the father of my second born son. I am now depressed and do not want to be associated with a child that is not mine.

I do not wish to continue providing for this child. I understand that this will affect the relationship with my wife and the other children and this dispute might end up in court and consequently a divorce. I want to delete my name from all documents relating to the child. Does this have any legal basis?

Answer

This question presents both social and legal technicalities. The social aspect relates to provision and maintenance for two of the children and leaving out one yet they have lived and known you as their father all their lives. You have, however, mentioned that you are fully aware of the implications of this action.

The legal question is on whether you can cease providing for one of the children and also have your name deleted from their records or legal documents. The law provides that biological parents acquire automatic parental responsibility. They do not have to be married for this to be enforced. A man who is not the biological father of a child may apply formally to acquire parental responsibility. In this case you allege that you are not the biological parent and was not aware of this fact till recently. Since you became aware of this fact, you have mentioned that you do not wish to take up that responsibility. It is, therefore, within your legal right to seek to cut the link. This should be presented to a civil court for determination.

You will be required to prove that you are not the child's biological parent through DNA test, and that at no time, knowing that you are not the child's biological parent, did you agree to take up this responsibility.

I am not sure who the father of my Children is, help!

Key Highlights of the case:

- It demonstrates your honesty and desire to find an amicable solution to the situation.
- I would like you to know that there are many women out there facing similar challenges

Question

I had unprotected sex with two men on the same day and became pregnant. Neither wants to take responsibility before official proof of paternity. How do I go about getting the court to order for DNA testing and subsequent child support?

Answer

Thank you for taking the courage to ask this question. It demonstrates your honesty and desire to find an amicable solution to the situation. I would like you to know that there are many women out there facing similar challenges. Your question presents two issues: i) Paternity; and ii) Child maintenance.

We will address the first question profoundly since its outcome determines the second. It will be prudent to wait until the baby is born upon which you can request the two to take a DNA test to determine paternity.

Assuming they fail to cooperate, then you may proceed to sue the person you reasonably suspect to be the father. The court may order for paternity test, determine who should bear the cost of the test and finally make relevant orders based on the results.

I don't want anything to do with my wife or sons

Key highlight of the case:

- In Kenya, marriage is considered legal upon registration.
- In your case, you have not formalized the marriage and hence cannot institute divorce proceedings.
- In layman's language, what you would be doing is to end the relationship where you cohabited.

Question

I'm married with two sons. I doubt whether I'm their father because I caught my wife in bed with another man. She also openly confessed to having been with that man for long time. I never took parental responsibility for the children because I don't trust her. I now want a divorce even though we are not legally married. What is the legal implication?

Answer

Thank you for seeking legal guide on this matter.

Your question is not only a reflection of the challenges faced by a number of couples today, it is also a reminder of the changing composition of families in the contemporary world.

There are two legal issues to consider. First, we will explore whether the marriage exists and secondly whether the relationship with your children remains if you were to terminate the relationship with your wife. In Kenya, marriage is considered legal upon registration. In your case, you have not formalized the marriage and hence cannot institute divorce proceedings.

In layman's language, what you would be doing is to end the relationship where you cohabited.

On the second matter, the law provides for different scenarios where one is said to have acquired parental responsibility. These include:

Having cohabited with the woman for a period of over 12 months;
Having acknowledged paternity of the children; and,
Having maintained the children.

In your case the assumption is that you have lived with your wife for at least two years (since you have two children) and during that period you have maintained them.

This means the children are still your responsibility and that you should continue providing for them until you go to court to prove you are not the father.

Therefore, to clear the doubt on paternity, a DNA test will be required as proof in court for necessary orders to be made

Can we get full parental rights to children from previous relationships?

Key highlights of the case:

- My fiancée and I have daughters from our previous relationships and the children live with us.
- Their other biological parents' names appear in their birth certificates.

Question

I am a 44-year-old man living with my fiancée and hoping to get married soon. We both have daughters from our previous relationships who live with us, and we would like to have full parent rights to the children. Please advise us on how we should go about this matter as the names of their other biological parents appear in their birth certificates. The second issue is: Will it be possible to change the children's names to suit our current arrangement?

Answer

Your scenario deserves compliments. You two demonstrate a desire to ensure good care of the children. However, it is difficult to give a conclusive answer since you have not stated the relationship between the other parents and the children. Nevertheless, based on the information provided, your question raises three issues.

First, the act of marrying your fiancée will bestow parental responsibility. Second, full parental responsibility can be obtained through a court process called adoption proceedings. The court will consider the role of the other parents in the children's lives and the best interest of the child.

Lastly, Births and Deaths Registration Act does not provide for the changing of names after formal registration has been done. However, after acquiring parental responsibility, you are at liberty to add a name/s without deleting any of the original ones.

Can I remove the biological father from the birth certificate?

Key highlights of the case:

- You can assume parental responsibility without changing names by virtue of marriage or through an adoption process for legal custody.
- Unfortunately, the Births and Deaths Registration Act does not give clear direction on deleting the name of a parent on a birth certificate.

Question

If I marry a single mother of one child and want to assume full responsibility for the child, is it possible to delete the name of the biological father from the birth certificate? This is because adding the child to one's list of dependents e.g. for medical cover, is impossible if a different name appears as father on the birth certificate

Answer

Thank you for your question. You can assume parental responsibility without changing names by virtue of marriage or through an adoption process for legal custody. Unfortunately, the Births and Deaths Registration Act does not give clear direction on deleting the name of a parent on a birth certificate. Lastly, upon acquiring parental responsibility through marriage, you can add the child's name to the list of dependents for medical cover. In the alternative, you are allowed to swear an affidavit as proof of parental responsibility.

My nephew's dad refuses to provide for him

Key Highlights of the case:

- I took custody of the boy until when my sister finished college. She was got casual jobs and this enabled her to take care of the son independently.
- She has been making several attempts to make the father of her child (a renowned doctor in Turkana County) provide for the boy in vain.
- Last year, her contract came to an end and I was forced as a sister to relocate them to my house for upkeep as she looks for a job

Question

I'm writing on behalf of my sister. In 2009, while in college, she got pregnant by a medical student. Later in the year, she gave birth to a baby boy. The father of the child and my sister never got to stay together since they were both students. I took custody of the boy until when my sister finished college. She got casual jobs and this enabled her to take care of the son independently. She has been making several attempts to make the father of her child (a renowned doctor in Turkana County) provide for the boy in vain. Last year, her contract came to an end and I was forced as a sister to relocate them to my house for upkeep as she looks for a job. We have tried to convince the father to provide for the boy, but he is very adamant. I have a family to provide for too and I have no ability to pay fees and provide for the boy. Should we go to the Children's Department? We are seeking for a solution to this problem.

Answer

In law both parents, whether married or not, have equal responsibility to provide for the child. The Children's Department would be a good start. Should you fail to get the desired results you may proceed to court to seek maintenance. In this case, the court may first establish paternity then proceed to make maintenance orders

Can I use a father's name to get birth certificate?

Key Highlights of the case:

- It is the duty for both parents to give notice of birth to the relevant Registrar of Births. The notice is required to be given in a prescribed form.
- This means entering both the name of the father and the mother regardless of their marital status.
- Section 12 of Registration of Births and Deaths Act provides for prior consent of the father before his name is entered in the register.

Question

Thank you for the legal advice you give people. My question is this: If you have a baby with a person, can you use their name to acquire a birth certificate without using their ID in the event that they have not given it?

Answer

Let us start by first appreciating you for following us by reading our column. Secondly, We appreciate you for bringing to the fore the question of birth registration which in the recent past, has been a subject of litigation. We will answer your question on the assumption that, it centers on an unmarried couple and a child born out of wedlock. The question brings out both substantive and procedural or administrative legal issues.

For starters, Article 53 of the Constitution of Kenya bestows equal parental responsibility. This responsibility is not exercised on the whims of the man or the woman. The bottom line is that parental responsibility is automatic and self-activating on both parents whether they are married or not; and includes the right of a child to a name. Registration of a child infers recognition of parental responsibility. In terms of actual registration, the position today is that all births must be registered. It is the duty for both parents to give notice of birth to the relevant Registrar of Births. The notice is required to be given in a prescribed form.

This means entering both the name of the father and the mother regardless of their marital status. Section 12 of Registration of Births and Deaths Act provides for prior consent of the father before his name is entered in the register. The Act predates the Constitution and the provisions of section 12 have been declared unconstitutional on two separate occasions by the High Court. The cases obligated the Attorney General to bring appropriate amendments to the Act with a view to bringing it to conformity with the Constitution.

However, until that happens, both parents to step up the plate and take parental responsibility for their children, which must begin with registration of birth with the appropriate name. In the event of refusal by either of the parent to have their name entered in the child's birth certificate, civil proceedings can be brought against the adamant parent. Therefore, to answer your question, the answer is a big YES.

My ex-lover is married, but wants child support

Key highlight of the case:

- To settle the issue, you will need to take a paternity test, assuming that the woman is willing to cooperate.
- However, you will need to be cognizant of the legal implications of going this route.
- If the test turns out positive, you might be required to take up parental responsibility depending on the woman's course of action

Question

I got intimate with a lady 10 years ago who claimed to have conceived but after a month, she got married to a different man. She gave birth to the child she had claimed was mine and they got one more so now they have two children. My problem now is that as much as I try to advise this lady to respect and stay with her husband whom she accuses of being abusive, she keeps on texting me threatening to sue for child support, although there is no proof that the first child is mine. How can I stop her legally from these threats?

Answer

You have a dilemma which has both legal and social implications. The two are different and our response will consider the legal aspects that can help you deal with the social concerns. To begin with, there is a probability that you are the biological father of the child considering you were intimate even though she got married to another man a month later.

To settle the issue, you will need to take a paternity test, assuming that the woman is willing to cooperate. However, you will need to be cognizant of the legal implications of going this route. If the test turns out positive, you might be required to take up parental responsibility depending on the woman's course of action. On the issue of threats, with or without the question of child paternity, various avenues exist for you to explore. The first is your initiative to caution the lady from threatening you. Second, should this persist and you feel uncomfortable, then you can make an official complaint with the police.

Please advise me on of adding a fathers' name to the birth certificate

Key Highlights of the case:

- Article 53 of the Constitution of Kenya bestows equal parental responsibility on both parents whether they are married or not.
- The same is automatic and self-activating and is not exercised on the whim of either of the parents.
- Registration of a child's birth is the first right of a child after birth; the first legal acknowledgement of the child's existence and the first of requirement towards fulfilment of other rights.

Question

Thank you for the legal advice you give people. My question is: If you have a baby with a person, can one use their name to acquire a birth certificate without using their ID in the event that they have not given it?

Answer

Thank you for following us and being appreciative of our work. Your question raises two issues, namely: i) parental responsibility; and ii) registration of a child's birth.

Article 53 of the Constitution of Kenya bestows equal parental responsibility on both parents whether they are married or not. The same is automatic and self-activating and is not exercised on the whim of either of the parents. Registration of a child's birth is the first right of a child after birth; the first legal acknowledgement of the child's existence and the first of requirement towards fulfilment of other rights. Such registration therefore ought to bear both parent's names.

In the previous dispensation, i.e. section 12 of the Birth and Death Registration Act 1928 Cap. 149 (rev. ed. 2014), children born out of wedlock hardly had the names of their father on their birth certificate, since the law required prior father's consent. This provision was, however, declared unconstitutional on two separate occasions by the High Court.

Therefore, until such a time that the Attorney General brings appropriate amendment to the Birth and Registration Act, with a view to bringing it to conformity with the Constitution it is the cardinal duty of parents to step up and take parental responsibility, which must begin with registration of a child's birth.

You may need to bring civil proceedings against an unwilling parent in order to ensure his or her name is entered in the child's birth certificate.

I want to marry her, but I am not the father of her children

Key Highlights of the case:

- First things first: It is legal and mandatory by the Births and Deaths Registration Act to capture the name of the biological father of a child in the birth certificate.
- This allows ease in establishing paternity, provides insights into medical history and other related matters such as a share of an estate whenever such circumstances arise.
- The courts in Kenya have cemented this position in various cases

Question

I am in a stable relationship with my girlfriend and want to marry her very soon but I have a problem. She has two children and the name of the biological father is in their birth certificates. My question is: Will this cause trouble in future?

Answer

These are the assumptions to contextualize the distress likely to arise:

First, the place of the birth certificate is sacrosanct to a person's journey of growth and development. Second, that the biological father of the two kids will make claim over his children at some point during your marriage yet he hasn't been supporting them in anyway. Third, that the children are below the age of 18. Fourth, your legal marriage to the mother of the two kids will create a father-child relation recognized in law: Fifth, both of you (mother and yourself) will agree on the maintenance of the children, in spite of their biological father's name in the birth certificate.

First things first: It is legal and mandatory by the Births and Deaths Registration Act to capture the name of the biological father of a child in the birth certificate. This allows ease in establishing paternity, provides insights into medical history and other related matters such as a share of an estate whenever such circumstances arise. The courts in Kenya have cemented this position in various cases.

Secondly, we have assumed that the children are below the age of majority and require parental care, guidance and love. Therefore, your worries in this context demand we review scenario three where the biological father makes claim in the subsistence of your marriage and the matter goes to court for adjudication. In this case the court will be guided by following the principle of the best interest of the child that is found in the Constitution of Kenya and the Children's Act of 2001.

The claim will be measured against historical patterns of responsibility between the biological parents. Should there be history of maintenance from the biological father then, the court may grant him continued privilege of parenting, and the opposite of this is true as well, based on Article 53 of the Constitution where parental care and protection is a responsibility borne by both parents, irrespective of their marital status.

However, if a claim for custody arises, the court becomes the immediate protector of the child and may seek to confirm with whom are the children best suited to be. On the other hand, if the children are above 18, then they are at liberty to make personal decisions based on individual preferences. If your marriage is recognized in law and both of you opt for parental responsibility of the two kids, the following is likely. First you must demonstrate that you have voluntarily assumed parental responsibility towards the kids, but remember this does not confer legal parentage. Simply put, you must not be coerced into assuming fatherhood to the two kids. Similarly, as parents you would have consented to take care of the children jointly.

Second, in a scenario where your spouse's children seek allocation or inheritance of all or part of your estate, then an adoption order recognizing the two kids as your own must be in place. For one to arrive at such an ideal situation the biological father must have waived all his parental responsibilities and rights to you within a child adoption process. Should the matter be before an administrator such documents must be produced as proof.

My ex wants to move Our child to usa

Key Highlights of the case:

- The situation demands that an agreement is arrived at between the two of you, where the child should reside.
- While the law is clear about young female children being in the custody of their mother, unless proved inappropriate, your voice and consent on the residency of the girl especially moving out of Kenya is mandatory.

Question

I am writing to you with regards to my ex-girlfriend who wants to take our five-year-old daughter to USA where she currently resides. I have been paying maintenance since her birth until sometime in July 2018 when she insisted that I send money to her mum (who will take care of the child) and not her because she was relocating to Nakuru from Nairobi without the child. I refused and emphasized that I will send it to her and she can send it to her mum.

Note that she didn't want to give me any contacts of her mum. Since my refusal, she has blocked me and contacted me a month ago from USA mentioning she's planning on taking the child abroad. She has also refused to share with me any of the child's documents. I don't know where they live because I have been working out of the country. Please help me.

Answer

The tone of your mail depicts you as a man in constant search of truce about your daughter's comfort. Besides, you indicate amiable communication between you and the mother, though your daughter's whereabouts remain unknown to you since July 2018. Thank you for sharing this unfortunate scenario where your ex-girlfriend seems determined to relocate the child to USA. You must appreciate as we do that many couples face similar dilemmas only with different dynamics. Therefore, this discussion acknowledges your concerns as valid, yet an opportunity to speak for parents.

A number of scenarios emerge from your question. First, both of you seem to reside away from the child, leaving the girl in the care of the grandmother. Two, the kind of parenting demonstrated gives rise to the concept of parental duties and rights. Three, the rights of a child especially a five-year-old manifesting as welfare and custody, in particular migration to foreign country.

For starters, both of you should be aware of joint and equal right as well as responsibility to parent the girl. As parents, you have a legal duty to provide adequate diet, shelter, clothing, medical care, education and guidance besides the onus to protect the child from neglect, discrimination and abuse; duties which you and your ex-girlfriend have been sharing despite the nature of your relationship. This is provided for in the Constitution of Kenya. None of you has superior rights nor inferior responsibility towards the wellbeing of the girl. She remains a daughter to both of you.

Having said that, I wish that both of you know that decisions regarding the welfare and rights of children are always motivated by the principle of "best interests of the child." Without disregarding the impact of your differences, the question to ask is what is the best interest of your daughter, with you, with her or with the grandmother? The situation demands that an agreement is arrived at between the two of you, where the child should reside. While the law is clear about young female children being in the custody of their mother, unless proved inappropriate, your voice and consent on the residency of the girl especially moving out of Kenya is mandatory. However, the court could waive off this right, if in the past you have demonstrated disinterest in the care of the girl.

Your situation has the following options. First, negotiate as parents bound by interests, needs and rights of your daughter to find a middle ground that takes care of the concerns of both parties. The agreement arrived at, for the purposes of execution and legal recognition, should be registered at the High Court. Should this approach fail, both of you are at liberty to invoke Article 159 2-C of the Constitution which provides for alternative dispute resolution. This opens you guys to arbitration, mediation, reconciliation and or traditional dispute resolution mechanisms to find consensus. In the event that this doesn't settle the matter, you will be free to move the court for adjudication. But remember the courts are extremely reluctant to canvass matters that can be resolved by other means. Nevertheless, in court you may seek the following: an injunction to prevent your ex-girlfriend from relocating with your daughter.

Second, file an application for custody if you so feel this serves the best interest of your daughter. Lastly, file an application to have the child brought to court and be given interim custody, care and control of her pending the full hearing and determination of your application for custody. Do note, however, that in the case of young female children, custody is often granted to their mother unless special circumstances exist. Courts always consider the welfare of the child before deciding. Therefore, if the court is convinced that you are better suited to hold custody of the child then their decision will be reflective of this.

I would like full custody as my mum's son is an unfit parent

Key highlights of the case:

- You intend not to physically resist nor argue with her when she resurfaces from the "unknown place of transfer" to pick your son at the end of term three of school and invite legal redress approaches, for which you seek clarity.
- While it is not in the purview of this platform to determine whose parental skills are superior among you, you raise four fundamental legal issues regarding children and parents.

Question

I am the father of a four-year-old son. His mother got a job transfer recently to a place she did not share with me and she was to take the child with her but I had already paid his third term school fees so he stayed behind with me. She told me that I would stay with him only for this third term then she would come back for him once the schools close for the year. She knows that I am a better parent than her but she says that she is the one with the right to live with the child. I won't argue with her about that. I will let her take him.

My question is, can I claim the child back if she won't be staying personally with him, because for the period i have known her, she will most probably hand him over to her sister or her mother for schooling because she loves money?

Answer

In your estimation, the mother of your four-year-old son demonstrates inadequate parenting skills, yet you are willing to let her take him. You intend not to physically resist nor argue with her when she resurfaces from the "unknown place of transfer" to pick your son at the end of term three of school and invite legal redress approaches, for which you seek clarity.

While it is not in the purview of this platform to determine whose parental skills are superior among you, you raise four fundamental legal issues regarding children and parents.

One is the capacity for parenting between father and mother. Two, the principle and concept known as the best interest of the child. Number three touches on the custody of a child caught between feuding parents, while four alludes to processes followed whenever such issues emerge.

For starters, Article 53 of the Constitution bestows equal parental responsibility to both parents whether they are married to each other or not. Therefore, a presumption of capacity to parent exists in law, not unless the court advises otherwise upon contestation. As such, no parent can claim superior parental responsibility over the other. Nonetheless, matters of children, irrespective of the adjudicative forum are guided by the principle of "the best interest of the child." In this case you raise the issue of custody. You ask, who between the two of you is legitimately entitled to physically remain with the child? Either of you has an equal chance although the courts tend to grant children of very tender ages to their mothers, if their conduct, demeanor and character is not discreditable. Any parent, guardian or person can get custody of a child if they lodge an application to that effect. They must demonstrate that they have been living with the child for at least three months prior to the application.

If not parents, the other person must have had permission from the parent or guardian to do so. However, any other party interested in child custody separate from the afore-described must show how the best interests of the child may suffer or be injured should they not be given such prayers. To arrive at the ideal situation both of you have several avenues to follow. Note, though, that courts are reluctant to adjudicate matters where other forums with equal capacity can suffice.

If you directly move to court, the judge or magistrate may decide to afford you a court-annexed mediator.

Alternatively, you may seek services directly from such a person, or proceed to the children's office in your jurisdiction for consensus regarding the custody of the child. Upon failure to agree, you then decide to file suit of custody in court. Whichever forum you decide to exploit, the following aspects, inter alia, guide the process and decision arrived at: i) wishes of the child; ii) wishes of the parents, guardian, or any other person to have had custody of the child; iii) culture and religious background of the child; iv) parent-child relationship bond; v) parenting abilities of each parent; vi) physical and emotional health and vii) available support systems of each parent.

Should the mother convince the court or mediator that she is best suited to have custody, be aware that she may also be granted some maintenance from you till the child reaches the age of eighteen. We may not appreciate the gravity of your differences, but we can advise that before proceeding to court, it is in the best interest of all parties concerned, including the child, to pursue other dispute-resolution mechanisms, including traditional ones, as they are also provided for in law.

My wife changed our son's name

Key highlight of the case:

- As I often say, none of you has superior rights nor inferior duties.
- You and your wife have ensured that he is identifiable by name, goes to school and enjoys shelter, clothing and protection from abuse and neglect.
- You mention that you realized your son was given a different name from the one you favored after the birth certificate was issued.

Question

I enjoy reading the legal advice you give in your articles. I have a son I named in absentia through the phone but it turned out that my wife's family convinced her to change the first name to match that of her father. Unfortunately, I was still in college and did not follow up on the names in the notification card. By the time I realized this, the birth certificate already bore that name. I don't like somebody else naming my child for their selfish reasons and so my son has enrolled in school with the name I chose while the official documents read otherwise.

Sorry for the long email. My question now is, is it possible to strike out a name from the birth certificate and replace it with another? If possible, how does one go about it?

Answer

We are encouraged when you read the articles which are responses to questions such as yours. You should know that you are also appreciated in equal measure. The framing of your question suggests an existing marriage despite the issue regarding the preferred name to your son. You also point out that your son is using your preferred name in school, which is different from the registered one on the birth certificate. Your situation raises four important issues: They are: The right of the child to have a name; the right of both parents to take parental responsibility towards the child, including naming; the voice of the child in the event their name is being changed, and the processes or procedure to undertake such an assignment.

The Children's Act, pursuant to the Constitution in Article 53 (1-A), gives any child a right to have a name and nationality at birth. Therefore, your son's current names are valid in law. Further, both of you have equal responsibility to parent this boy. As we often say, none of you has superior rights nor inferior duties.

You and your wife have ensured that he is identifiable by name, goes to school and enjoys shelter, clothing and protection from abuse and neglect.

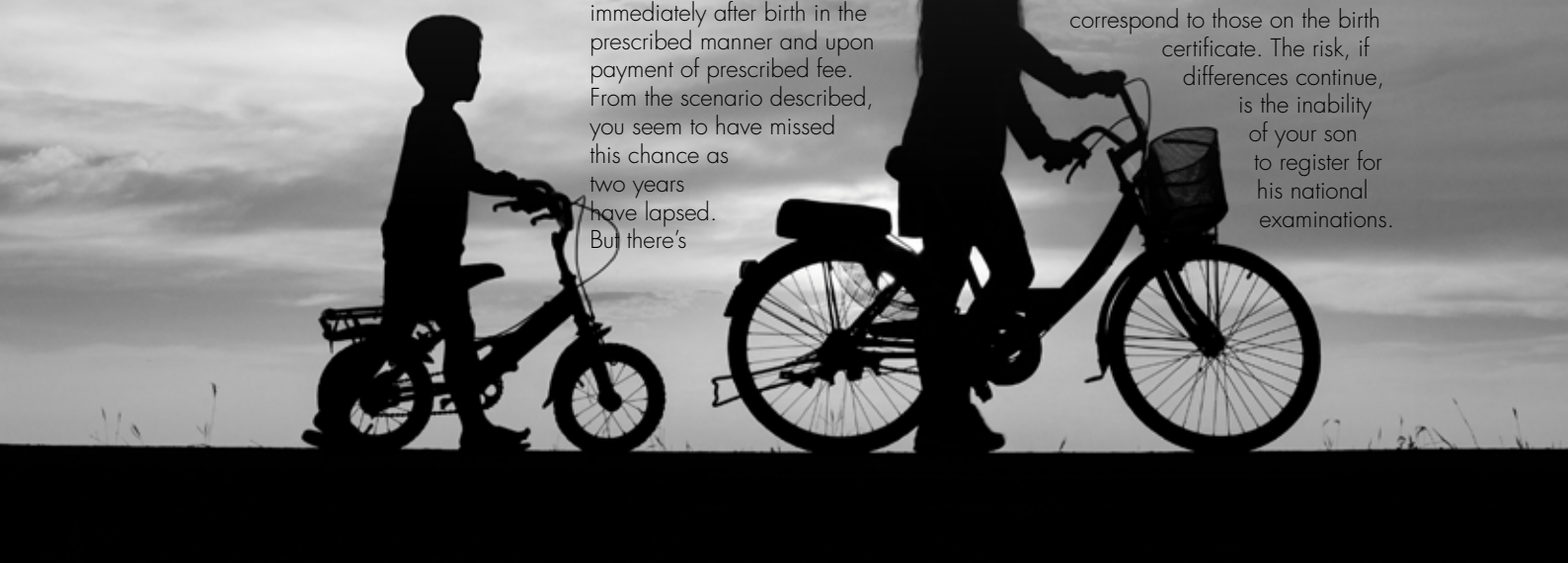
You mention that you realized your son was given a different name from the one you favored after the birth certificate was issued. In such cases, the law allows the parent or legal guardian to make an application to the registrar of births and deaths for change of a child's name within two years as a second registration, from the date of the initial registration given immediately after birth in the prescribed manner and upon payment of prescribed fee. From the scenario described, you seem to have missed this chance as two years have lapsed. But there's another option. At this stage, one can resort to the Registration of Documents or Change of Names Regulations.

This demands that a parent or guardian makes an application known as "deed poll" for minors. Deed polls are standard forms officially provided by the government to enable change of name, though their contents vary depending on the person making the application. Where a minor below the age of sixteen is involved, the form completed for the transaction is Form 4 A. This is your opportunity. You and your wife will complete the deed poll, and as the law demands, indicate old names that are being replaced and the new ones. After this both of you shall sign off the document as parents and your signatures attested by one witness.

However, if the minor whose name is being changed is aged sixteen and above but below eighteen, their consent must be sought and endorsed on the document before an advocate of the High Court of Kenya.

This, for your information, is a statutory obligation. Once the deed poll has been completed, and all the requirements met, the change will be published in the Kenya Gazette to enable your son commence the use of the new name officially. Subsequently, an application for another birth certificate bearing the new name will be made to the registrar of births and deaths, and for the old name to be vacated.

From your concern I wish to raise a few lessons for any parent out there. Children, depending on their age, have a right to understand the process and even the choice of their name. Besides, the government has gone digital to register learners through the National Education Management Information System (NEMIS). This requires that details used and shared in school records correspond to those on the birth certificate. The risk, if differences continue, is the inability of your son to register for his national examinations.



Must I Include fathers' name in the birth certificate?

Key highlights of the case:

- One may ask the importance of a father's name in the birth certificate.
- First, such inclusion gives a child a name and identity considering Kenya is a patriarchal society.
- Secondly, the burden imposed on women is lessened and it is possible for men to take up their responsibilities with respect to children sired outside marriage.

Question

I'm 25 years old and a single parent. Must I include my child's father's name on his birth certificate? What are the legal repercussions of not doing so?

Answer

You speak for the many single parents out there who have similar struggles. Thank You. Your question brings to the fore a number of legal issues including: i) Rights of children; ii) Registration of their birth; iii) Circumstances under which the name of the biological father may be inserted; and, iv) implications of such registration or lack thereof.

From the onset, the Constitution and the Children Act have set out various rights of children including but not limited to: right to name and nationality from birth, right to parental protection which includes equal responsibility of the mother and the father whether they are married to each other or not.

Registration of birth has in the recent past being the subject of two landmark cases owing to provision of section 12 of Registration of Births and Deaths Act, which provides for consent of the father before inclusion of his name into the certificate. While the Act predates the 2010 Constitution by eighty decades and section 12 has been declared unconstitutional, appropriate amendments to bring the Act to conformity with the Constitution are yet to be effected.

However, and as matter of principle, all births must be registered. Accordingly, parental responsibility begins with both parents serving notice of birth to the registrar in the prescribed manner. This means entering the names of both the father and the mother their marital status notwithstanding. One may ask the importance of a father's name in the birth certificate. First, such inclusion gives a child a name and identity considering Kenya is a patriarchal society. Secondly, the burden imposed on women is lessened and it is possible for men to take up their responsibilities with respect to children sired outside marriage.

Third and most importantly, litigation burden placed on children during succession to prove father/ child relationship is lessened.

On the flipside, entry of the name of the father may not necessarily mean that the child will get care and attention that it ought to get from the father. However, and at the very least, it will give the child an identity, the knowledge that though the father does not support or care for it, it does have a father and not a series of **xxxx** in its birth certificate.

Therefore, to answer your question, take the shortest route to the registrar of birth and death and have the name your child's father entered into the birth certificate.

I want my wife's child to bear my name

Key highlights of the case:

- The process is a statutory obligation
- It is strongly recommended you include the child in the discussions
- The wife's opinion in this matter should also be considered

Question

I am David Kariuki and I happened to marry a wife with one child. The child's birth certificate bears the name of her biological dad. Can I change the dad's name to mine now that I have taken full responsibility of bringing up the child? Does the law of Kenya allow that?

Answer

David you raise two fundamental concepts that inform each other in dispute resolution: dialogue and law. However, let us first congratulate you. Your commitment as a parent to protect the interest of the child is commendable. You demonstrate the importance of effective parenting as well as good parent-child relationship.

Your intention therefore to change name is likely motivated by the many challenges you anticipate the kid may face in future, that may be legal, social, cultural or economic.

Nonetheless, your action may be resisted by both the biological father and the child. This means you require consent. Your wife's opinion in this matter should be considered. Therefore, right from start you require to hold dialogue including all the parties especially the mother, child, biological father and yourself. Should you lack consensus on this issue, please brace yourself for a likely court battle. Nevertheless, the law allows for name change in the following terms

Option 1: The law allows you as a parent or legal guardian to make an application to the registrar of births and deaths to change the child's name, provided two years have not elapsed from the date of the initial registration.

Option 2: If at all two years have lapsed, Registration of Documents or Change of Names Regulations allows you to make an application known as "deed poll" for minors. This legal document enables name change, though contents vary depending on the person making the application. For instance, where the minor involved is below the age of sixteen, Form 4 A is completed. We are inclined to believe you fall under this category.

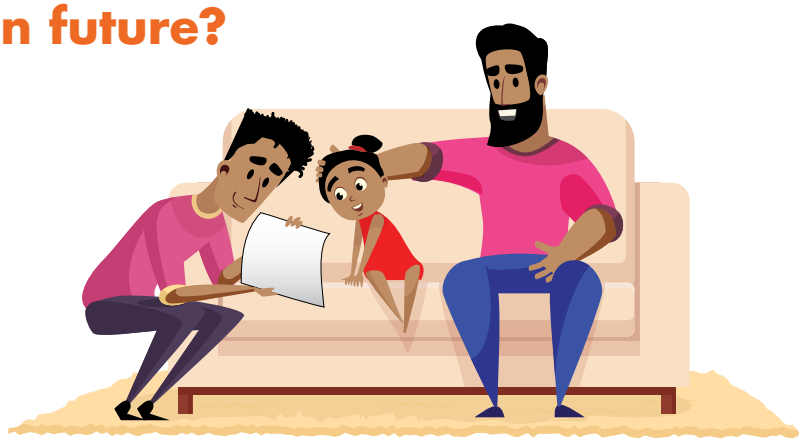
Together with your wife, you will be required to complete the deed poll, indicate the old name that is being replaced and the new one. You shall then proceed to sign off the document as parents and your signatures attested thereto by one witness. The process is a statutory obligation, and as such, calls for the change of name to be published in the Kenya Gazette to facilitate official use of the new name. Afterward, an application for another birth certificate bearing the new name will be made to the registrar of births and deaths.

We strongly recommend you include the child in the discussions, the age notwithstanding

Will a new birth certificate affect my child in future?

Key highlights of the case:

- The act of registering your daughter's birth afresh and subsequent issuance of a new birth certificate rendered the initial registration null and void
- The net effect of deleting the name of your daughter's father is more psychosocial than legal
- The act allows a child to grow up with the knowledge that, he or she has a father and not a series of xxx in the birth certificate



Question

I was dating this Luhya man. We got a baby girl. Within one year of the birth of my baby, we parted ways because of the persistent problems we could not solve. He left with my daughter's birth certificate. He has never contributed anything towards our daughter's upkeep. During enrollment to school, it was a requirement that we produce a birth certificate. I had to process the same afresh, this time as a single mother. What may be the effect on my daughter in future?

Answer

Jael, you are honest and open. You dated and married a Luhya man for at least one year, a period that brought forth a daughter. You clearly indicate that your problems were irreconcilable, leading to separation, in turn a loss of your daughter's first birth certificate. Nonetheless, you have continued to raise your daughter as a single parent, which to say the least is commendable. Several things need to be put into perspective:

a. the situation of having two birth certificates for one person, in this case your daughter

b. the likely effect on your daughter with regard to the presence of the two birth certificates, and

c. the legal impression of Luhya man or any other in a scenario of a replaced birth certificate without their name.

The act of registering your daughter's birth afresh and subsequent issuance of a new birth certificate rendered the initial registration null and void. In the eyes of the law, the old birth certificate no longer exists. Registration of birth of a child and subsequent inclusion of both parents' names affirms parental responsibility, child's full identity, and most importantly, reduces rigors associated with litigation in the event of succession.

Although inclusion of both parents' names in the birth certificate may not compel an absent parent to take up parental responsibility, at the very least, the act allows a child to grow up with the knowledge that, he or she has a father and not a series of xxx in the birth certificate.

Lastly, the legal implication for this kind of action where a birth certificate has been replaced without the name of the father is similar, whether the man is Luhya or of any other tribe. So, the net effect of deleting the name of your daughter's father is more psychosocial than legal. As with legal the court may order a paternity test in the event that this becomes necessary on matters parental responsibility on maintenance and or custody.

Can I change my son's name as it appears in the birth notification?

Key highlight of the case:

- At birth every child enjoys recognition that is both social and legal
- The advice shared is directed by the assumption that this will be the first but late registration

Question

I want to apply for a birth certificate for my two-year-old son but I need to change the middle and surname on the birth notification. The names are my son's biological fathers name. How can I do this please?

Regards, Lily.

Answer

Lily, welcome to 2020

At birth every child enjoys recognition that is both social and legal. Legal acknowledgement of any child is foundational to all other antecedent and auxiliary rights and responsibilities. In particular it's the basis upon which state recognition, documentation and obligation is derived. Similarly, social recognition serves to meet the expectations and commitments of families and the community at large to the wellbeing of a child.

In the aforementioned context, I wish to state that registration of birth of a child is their first fundamental right as it breathes legal life into their presence or existence. Registration guarantees the child's right to a name and nationality. Lily, you wish to apply for a birth certificate for your two-year-old son. In this process, you intend to change part of the name as enumerated in the birth notification, by replacing the middle and surname.

The advice shared is directed by the assumption that this will be the first but late registration. Under the Births and Deaths Registration Act, any registration of birth taken after six months is considered late, which is synonymous with your purposed action. Such registration requires submission of the following documents aided in Form GP 138 A:

a. County notification of birth (from a recognized health centre where the birth of child occurred)
b. Certificate of doctor or midwife who attended the birth
c. Child immunization clinic card
d. Baptismal card for those of the Christian faith and an equivalent for other religions
e. Identify card or passport of the parent
f. Any other document that the registrar in her or his sole discretion may require

Currently there is no law governing change of name from birth notification to a birth certificate. It is however important to note that, birth notification does not denote registration of birth. In addition, its possession does not necessarily guarantee issuance of birth certificate. Nonetheless, it is an administrative document that assists the government to identify location and date of birth of the child, besides confirming the name of the mother. This put together tend to ease process of registration of birth.

Therefore, change of name from birth notification to birth certificates is solely dependent on the counsel of the registrar of birth.

Can I change my name and signature?

Key highlights of the case:

- For the benefit of other readers who may have missed our previous piece on change of name, allow us to delve into the topic and thereafter offer response to your two questions on change of name and signature.
- The process of change of name is anchored on the Birth and Death Registration Act, and the Registration of Documents (Change of name) Regulations.

Question

Upon reading your article on change of name, I found reason to believe you could help me with an issue that has bothered me a lot. It has always been my wish to drop two aspects of my identity, namely my English name, i.e. Patrick, and lastly my signature, which is so ridiculously simple that it can't be seen as a signature. It is only my initials, separated by full stops. Is it possible to apply to change a signature, at least? Thank you.

Looking forward to your reply.

Answer

Your words mean a lot to us. That our responses motivate you to seek answers to some nagging questions is more than a compliment. You have encouraged us to keep the conversations on legal matters up and running. Secondly, you may wonder why we have addressed you as Sir. It's both a sign of respect and a reiteration of your desire to drop the name Patrick.

For the benefit of other readers who may have missed our previous piece on change of name, allow us to delve into the topic and thereafter offer response to your two questions on change of name and signature.

The process of change of name is anchored on the Birth and Death Registration Act, and the Registration of Documents (Change of name) Regulations. The former speaks to the substantive component with the latter speaking more on the process. The process commences at registration of name immediately after birth, whereupon, birth notification is presented to the Registrar of Births for official conferment of a name. Parents or legal guardians are allowed a two-year window by the law to change the name of their child, after which, an entirely new process kicks in.

The new process is hinged on Registration of Documents (Change of name) Regulations. The process is actualized through completing a legal document referred to as Deed Poll in which the person wishing to change his/her name, be it an adult or a minor, renounces and abandons use of his/her former name and assumes a new name. Once completed, the document is presented to the registrar for gazettement.

The registrar may refuse to accept change of name if:

i. The change of name is impossible to pronounce;
ii. Includes numbers, symbols or punctuation marks;
iii. Chosen name is vulgar, offensive or blasphemous;
iv. Name chosen promotes criminal activities;
v. Name chosen may result in the belief that one has been conferred or inherited an honour, among others.

As a country, we don't have a law that regulates change of signature. But just as you are at liberty to change your name following the procedure provided for in this text, it is presumed that your capacity to alter signature can follow the same route. Nonetheless, each of these steps has due diligence required to ensure the same is in tandem with the value and legal philosophies of the country. For the change name please refer to issues that could motivate the registrar to reject your initiative. Furthermore, for the signature, you owe your service providers such as banks, insurance companies among other entities where you need to provide the specimen of the new signature. As you purpose to change the signature, it is important to ensure the new signature doesn't resemble that of any other person to avoid running the risk of being labelled a fraudster.

I pay child support but she won't let me see my son

Key highlights of the case:

- Just as the expectation to offer financial support stands prominent so is the right to spend quality time with your son.
- It is expected as parents of this boy to jointly develop a visit or meeting programme that allows you to spend time with him.

Question

I have a six-year-old son but don't get along with his mother. I was unable to support him when I lost my job some time back, but I have since got a stable income and occasionally pay his bills. His mother only allows him to talk to me on phone but won't let me see him. Yet she expects me to continue sending money for the care of the boy. I'm willing and able to pay for any needs my son has but is there a way through in which I can get my rights to spend time with my kid as we stay in the same neighbourhood?

Answer

Bringing up children is ideal where both parents are present and on good terms. This is not often the case because many couples face challenges, including differences that hurt effective parenting. Parenting should always be a compromise of principles shared between parents, alongside society for the best interest of the child. Feuding parents, should never reduce a child's ability to enjoy their childhood, as is the case of your son. Before inviting the importance of law and policies and besides attending to the four fundamental legal matters you have raised, it is imperative to mention that children's vulnerability and reliance on adults for their welfare and rights is the primary motivation for the formation of any law addressing their issues.

Therefore, flouting this principle is in itself an injustice. First is the onus to parent a child. The Constitution at Article 53 (1-e) commands and commits parents to joint child-rearing responsibility with or without a marriage. The second issue which is a component of the first, involves the right to spend quality time with one's child. The Constitution is clear that no parent is superior, irrespective of the financial, political or social muscles at play between father and mother. Just as the expectation to offer financial support stands prominent so is the right to spend quality time with your son. It is expected as parents of this boy to jointly develop a visit or meeting programme that allows you to spend time with him.

Third, is child support in broken relationships. The spirit in Article 53 (1-e) extends its force to you supporting your son. While in application child support is court-ordered payment that goes towards the upkeep of a child, it must not always emanate from litigation. Your concern is that despite providing such support voluntarily, you have been barred to see and spend time with him. This is a valid concern. The remedy has two approaches. The most preferred is negotiation between you and the mother or your representatives through the help of a children officer in your area to find consensus on the how. The second, upon failure of the first approach, is to file a suit in the children's court seeking judicial intervention that allows you time with your son.

The fourth issue regards custody of the child, which in a layman's language means actual place of abode and the parent who physically resides with the child among the two. It doesn't read as though you have a problem with this matter. However, were it that it is an issue where direct negotiation between you and the mother of your son have failed, then court would have become the arbiter. For your information, if court is moved to determine custody, then minors of tender age especially girls are often kept under the care of their mothers, not unless there is evidence discrediting this position in particular likelihood of child exposure to harm. Further, the court among other reflections, may consider what Section 83 (1) of the Children's Act provides, which is; wishes of the child, wishes of the parents, guardians, foster parents or any other person who have custody of the child; cultural and religious background of the child, best interest of the child, parent-child relationship bond, parenting abilities of each individual, each parent mental, physical and emotional health and available support systems of each parent.

In conclusion, let it be known that law is available to those unable to agree on the parenting mechanisms of their own children. Similarly, the law is forceful and was intended so for those who disregard child rearing responsibilities.

My ex has sued me for child support

Key Highlights of the case

- The suit by your ex-wife is about child support. This means we highlight basic tenets of child support in the context of law
- Provide banking slips and likely receipts as proof: inform the court that you have provided medical support for both mother and child
- The court will examine the historical relationship between you and the child to ascertain your presence in their growth and development, on the hindsight that custody is with the mother

Question

My ex-wife has sued me for child support, yet I have been sending her money via M-Pesa. I also pay for the child's school fees and pay for both their medical bills. Since June 2019, I have been sending her monthly support at the sum of Sh10,000. I think her intention is to get the money through my employer, which is embarrassing to me. I am also working towards a promotion, so that they can at least receive a higher amount. The case is coming soon, can the court agree for me to continue sending the money to her directly instead of going through my employer? Please advise.

Answer

You have demonstrated good manners and fatherhood to fathers and men out there. You consistently pay school fees for your child, besides putting both the mother and child on a medical scheme. In addition, since June 2019, you have been sending direct financial support of Sh10,000 to your estranged wife, this is commendable. While parenting is a responsibility, it is love for those who are passionate about it.

The suit by your ex-wife is about child support. This means we highlight basic tenets of child support in the context of law. Second, it raises the concept of equal but differentiated parenting between father and mother. Consequently, a small conversation about the role of both parents in bringing up a child. Third, the intention of the suit by your ex-wife, especially the timing to move the court for child support, yet there is evidence you have been providing the same.

In principle the court will be guided by Article 53 of the Constitution which provides that every child has a right to parental care and protection, which includes equal responsibility of the mother and father to take care of the child, whether married to each other or not.

On specifics, the court will interrogate income or earning capacity, property and other financial resources of both father and mother, against the needs of the child contextualised as food, education, shelter, health and clothing, as well as the current child's living conditions. Furthermore, the court will also review other obligations of both parents requiring finances to ensure that likely orders do not jeopardize their stability and ability to take care of the child. Moreover, the court will examine the historical relationship between you and the child to ascertain your presence in their growth and development, on the hindsight that custody is with the mother.

On both counts of your response, you will have to do the following: Convince the court that you have been giving child support. In this regard share with the court M-Pesa records indicating the amounts and dates for which support is given as evidence: persuade the court, you have been paying school fees consistently. In this case, provide banking slips and likely receipts as proof: inform the court that you have provided medical support for both mother and child. As proof, share with the court medical scheme records and cards showing the purported provisions.

Having shared this, you are then at liberty to tell the court that your ex-wife's suit is veiled with malice.

This is because, the issue upon which her suit is based is already being executed by you voluntarily. Therefore, you find no legal basis to support her prayers. You can request the court to strike out the suit making claim that intentions in it cannot be contextualized as child support.

Nevertheless, we cannot with certainty guarantee you that the court will order continuation of voluntary support without passing through your employer, but you have a strong case, if presented well.

I want my father's name on my records

Key Highlights of the case:

- Father and child relationship can be both physical and legal
- The Registration of Documents Regulations is clear on how to change name of a child above the age of two through completing and filling of a Deed Poll

Question

My name is Stephen and I am 26 years old. I want to change my father's name on my birth certificate, as the one there belongs to my step-father. I want it replaced with my biological father's name. Kindly advise.

Answer

Dear Stephen,

Father and child relationship can be both physical and legal. Birth certificates therefore are some of the instruments that define legal relations between parents and children. Your question speaks to the recognition of your biological father on the birth certificate, which now reads the name of your step-father. Your desire is valid and at 26 years, no one can doubt your intentions. You are brave to seek this kind of change 26 years later in life. Your position gives legal scholars and practitioners an opportunity to interrogate the law with regard to registration of births and deaths. The Registration of Births and Deaths Act is specific to how to change the name of child, which can happen before age two.

The Registration of Documents Regulations is also clear on how to change name of a child above the age of two through completing and filling of a Deed Poll. Nonetheless, the law is not generous on removal, deletion or alteration of a parent's name from the birth certificate. Therefore, the response to your question will be guided by case law (decisions made previously on matters with similar connotations) rather than direct intervention by the law.

Scenario one: the mother seeks to remove step-father's name from birth certificate of her child.

This matter, brought before High Court Judge in Civil Case No. 3 of 2014, Justice Ougo noted the following:

a) the applicant was the biological mother of the child whose father's name was to be removed had a right to ask the court for such order. b) the second applicant, who is not the biological father of the minor did not object to the mother's prayer to court, and the judge found no justification in law to retain his name for the fact that he remained silent. c) the applicant admitted before the Honourable judge, that on hindsight, she considered her action to register the child's step-father's name as a mistake. In his judgement Justice Ougo okayed the deletion of the step-father's name from the birth certificate, an order which was directed to the Attorney General to act.

Scenario two: the mother seeks the erasure of a name of a person erroneously entered into the birth certificate of her child.

A matter of this nature: Miscellaneous case No. 33 of 2019 was before Honorable Justice Asenath Ongeri and the Judge observed the following: a) the person entered onto the birth certificate was the actual father of the applicant (mother of child): b) the name of the grandfather of the child, who is the father of the applicant was erroneously entered onto the birth certificate as the father of the child. Based on this an order was given to the Registrar General to strike out the name of the deceased (grandfather) from the Birth certificate of the child. The second term that the child be issued with another birth certificate which does not bear the names of the deceased (Grandfather) as the father of the child: and that the father of the child be indicated as unknown

Your position is unique, because it is you who seeks to expunge your step-father's name from the birth certificate and substitute with that of your biological father. Since the likely possible intervention could be administrative by a deed poll, an understanding with regard to successful deletion is necessary.

You must appreciate that the law, including the use a deed poll did not anticipate children contesting father's name on birth certificates. It is no surprise that many cases are about adults wanting to change names of children. Our advice to you, notwithstanding the factors motivating your action is as follows: Move the High Court citing the grounds; a) The inadequacy of Registration of Births and Deaths Act to delete a parent's name from a birth certificate; b) Insufficiency within the Registration of Documents Regulations that provide for a deed poll, that only contemplates parents seeking to undo, change and review children's names, and, c) To seek clarity from the court as regards the ceiling time frame upon which a claim of changing either mother's or father name can be made.

As such your issue can best be canvassed as a Public Interest Litigation (PIL) opportunity to harmonize various identity laws with the Constitution. This will therefore guide the prayers you may seek: one, review of the Registration of Births and Deaths Act: two review of the Registration of Documents Regulations (RDR) to expand the use of the deed poll: and three ask the court under the law of equity to define the necessary time line while a party raises such a matter.

CHAPTER 2
SEXUAL OFFENCES

My Son has been accused of defiling his girlfriend

Key Highlight of the case:

- Even though your son is a minor, he can be held to account (criminally liable) for offences that he commits and hence can be accused and be convicted of any offence.
- This being the case, we will interrogate the circumstances leading to this allegation

Question

I am a mother of a 17-year-old boy who is in secondary school. My son is accused of defiling a 15-year-old girl in his school and she is now expectant. The matter was reported to the local police station, he was arrested but I bailed him out pending investigations. The police were able to collect evidence of the alleged offence, and will probably conduct a DNA test after the child is born. My son is going to be charged in court very soon. Both the boy and the girl admit to have had a sexual relationship for two years until the girl's parents discovered and preferred charges against my son. They have resisted any attempt to settle the matter between the two families claiming that my son's actions have compromised the daughter's education and future. Being older, they argue that he took advantage of their daughter's innocence. The girl insists that she loves my son and was not forced into having the affair. She has threatened to commit suicide should he be jailed. Is my son going being treated fairly?

Answer

Thanks for this question. This is a legal gap that has existed for a long time and also represents a dilemma for parents of sexually active teenagers. The law provides a minimum sentence of 20 years should one be found guilty of defilement of a child aged between 12-15 years.

For this reason, it is important to thoroughly examine the circumstances of the alleged offence before sentencing. One element to note is that this is a case involving minors. Even though your son is a minor, he can be held to account (criminally liable) for offences that he commits and hence can be accused and be convicted of any offence. This being the case, we will interrogate the circumstances leading to this allegation.

The second element is on consensual sex by a child. The law states that minors cannot consent to sex. This, therefore, means that the two minors in this case cannot be said to have consented to sex with any person and hence this cannot be a defence. The third element is that there was no allegation of force. Both children agreed to commit the act and hence played an equal role. Having established this, it means that the law cannot be applied discriminatorily against the boy. A ruling delivered by the High Court of Kenya (Constitutional Petition 1 of 2017) stated that in the circumstances the minors should be treated as those in need of care and protection.

This means that the children need to be counselled and be protected against sexual activities. If this matter is presented in court you will need to inform the court that your son is under age and the court will provide appropriate directions e.g. supervision by a Children's' Officer.

CHAPTER 3
LABOUR RELATIONS

Can I sue for pension benefits when I leave the company?

Key highlights of the case:

- Your question relates to occupational pension scheme. In most cases, this benefit is provided for in the employment contract.
- If you feel your omission from the list of beneficiaries is on the basis of discrimination, you may take up the issue with your employer.

Question

Thank you for your legal advice. It is much appreciated.

I work for a company where some people are in a pension scheme while most of us are not in the pension scheme except NSSF. Recently, I stumbled upon this statement on the Retirement Benefits Authority website: "If you are eligible, you have a right to the membership of your employer's pension scheme."

Does this apply for my case? Secondly, as an employee on a permanent contract, do I have the right to sue for pension benefits when I leave the organization? I have been in the company for over five years now. Thank you

Answer

Thank you for the feedback. We appreciate that you are one among the many readers who are keen to understand the law in Kenya. Your concern is important and revealing on the fears that most people have on matters of a secured retirement. Understanding the pension scheme environment in Kenya is important.

In Kenya, there are three types of Pension schemes: i) Pubic Pension Fund; ii) Occupational Pension Scheme; and iii) Individual Pension Plan. The law regulates public pension scheme and both the employer and employee make mandatory statutory contributions. Occupational Pension Scheme is sponsored by an employer and is only open to employees if eligible. Individual Pension Plan, on the other hand, is offered by registered service providers and is open to everyone.

Your question relates to occupational pension scheme. Ordinarily, employers provide occupational pension to employees as a benefit. In most cases, this benefit is provided for in the employment contract.

Therefore, you may need to have a second look at your contract. If it doesn't have it and you feel your omission from the list of beneficiaries is on the basis of discrimination, you may take up the issue first with your employer, and if need be, with the Retirement Benefit Authority. Legal action in court should come as matter of last resort.

She was unfairly fired nine years ago. Can she sue?

Key highlights of the case

- Your situation calls for empathy. It is unfortunate for anyone to be a victim of such circumstances.
- The case finds ground in Article 47 of the Constitution, which addresses the right to fair administrative action that is expeditious, efficient, reasonable and procedurally fair.

Question

My name is Kelvin. Thank you for the good work you are doing in educating some of us.

I am writing to inquire on a case of a relative who lost her job as a school accountant after she threatened to expose corruption in the institution's finances. The school Board of Governors suspended her in 2010 on grounds of insubordination of the school principal. The charges against her were fabricated after she refused to allow irregular payments for the school supplies to a company owned by the principal. She had worked in the school for more than 20 years before this happened and losing the job in that manner meant she could not get retirement benefits. Due to financial difficulty, she was not able to file a suit at the labour courts back then and she was wondering whether it can be done now. The school principal was later transferred following uproar from the students and the parents on the poor administration of the school.

Is it still possible to seek legal help or is it now a lost cause? Thank you in advance for any advice.

Answer

Your situation calls for empathy. It is unfortunate for anyone to be a victim of such circumstances.

The case finds ground in Article 47 of the Constitution, which addresses the right to fair administrative action that is expeditious, efficient, reasonable and procedurally fair. The second ground is under Article 20 (2) which provides that every person has the right to enjoy all the rights under the Bill of Rights, unless limited by law as espoused at Article 24. The third ground, is found in the Employment Act. While this situation raises important issues for consideration, given the information shared, the claim is time-barred.

In accordance with the law on employment, it is stipulated that an action to a contract of employment can only be brought before court within three years from the date of dismissal.

Unfortunately, your claim comes nine years later, and therefore fails the legal threshold of raising it in court. With the circumstances explained, this is a lost cause.

My employer won't release my pension contribution

Key highlights of the case:

- How termination of employment comes about is immaterial
- It is expected that your employer will communicate to the pension service provider to execute the obligations as set in law

Question

My employer refused to authorize my pension contribution release after I had resigned. They claim that I was to attend disciplinary hearing before I resigned. To that effect, they have insisted that I attend the hearing before authorizing my dues.

Please advise

Answer

Retirement from regular employment into gainful use of time in old age is a fundamental right and quite a comforting thought. Therefore, your concern mirrors the fears that most employed harbour. However, your situation provides a platform for learning about retirement schemes in the market and the laws that govern them. There are three types of pension schemes which include:

a. statutory public pension fund, which is managed by the state. This is a mandatory requirement for every employer.
b. occupational pension scheme that is primarily sponsored by an employer and only open to employees, if eligible
c. individual pension scheme that is offered by registered pension service providers and open to everyone who may afford, irrespective of their income generation pathways.

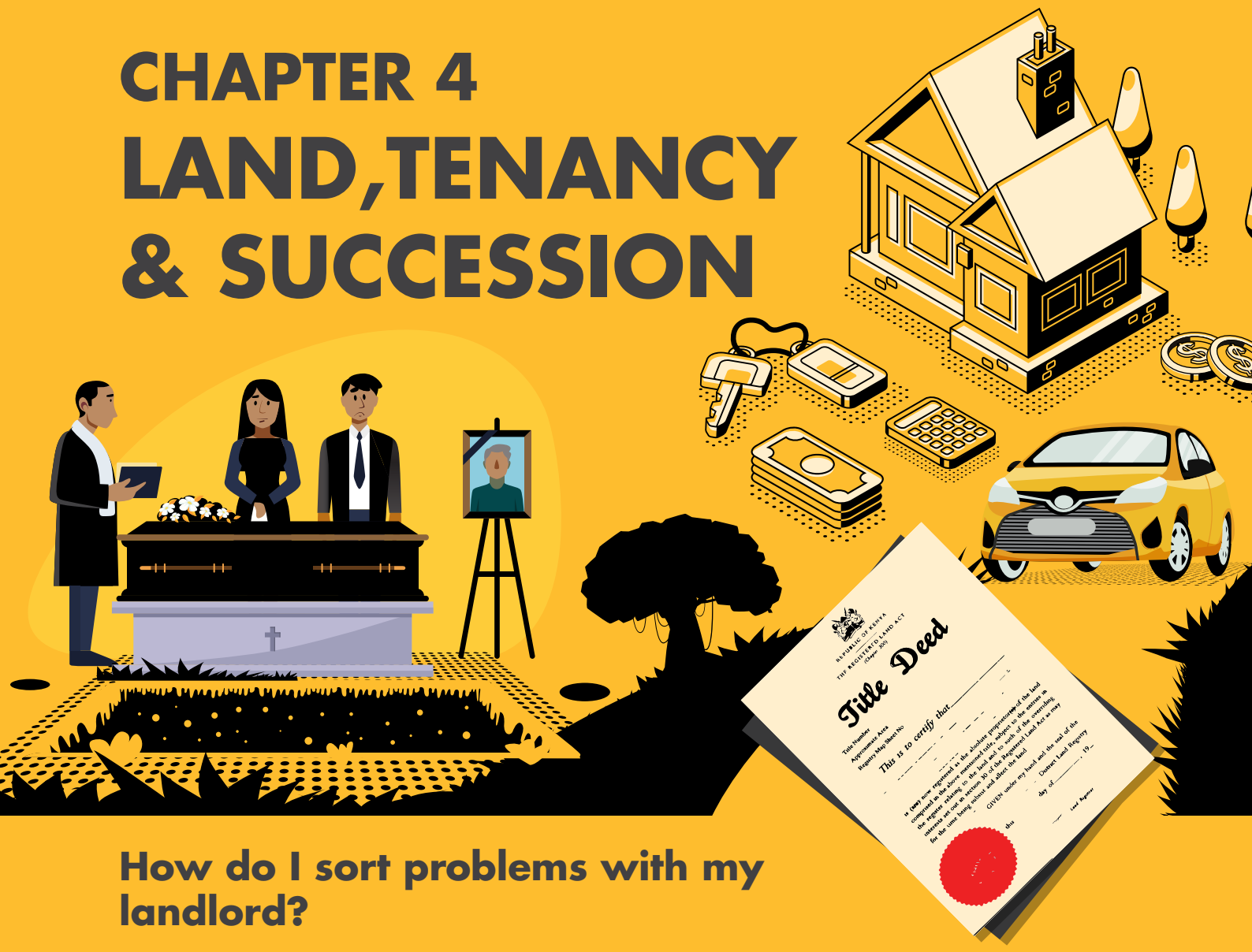
The Retirement Benefits Act provides for the different pension schemes, but each has its own regulatory framework.

In your case, we wish to refer to the occupational pension scheme that is governed by the Retirement Benefits (Occupational Retirement Benefits Scheme) Regulation of 2000. Under Occupational scheme, employees are entitled to 100% of their contribution and 50% of employers' contribution upon termination of employment. How termination of employment comes about is immaterial. In this regard, it is expected that your employer will communicate to the pension service provider to execute the obligations as set in law for you to access your pension in the manner afore-described in this text.

However, should it be that you are part of the Public Pension scheme then your benefits will only be accessed upon the following scenarios: i) attainment of at least 50 years and is no longer in regular employment; or, ii) attainment of 55 years or upon retirement; or, iii) if the benefits are payable to a survivor.

In view of the above, your former employer doesn't have any legal right to hold your benefits pending disciplinary proceedings unless your resignation is yet to be accepted. If the current stalemate persists, you may wish to engage the service of Retirement Benefit Authority.

CHAPTER 4
LAND,TENANCY & SUCCESSION



How do I sort problems with my landlord?

Key highlight of the case

- Your question relates to landlord-tenant relationship, and I purpose to answer the same on the assumption that you are currently in Kenya.
- It is evident from your question that none of the avenues pursued to address your issues have borne fruit.

Question

I have been having issues with my landlords for several years. I have gone for legal assistance in various places including the community alliance of tenants and the State Bar Association to no avail. To make things worse, I have been going to HUD for more than three years without any success. It took them years to speak to me and even then, they caused unbelievable damage resulting in my whole case being botched.

I have gone to the bureau of labour and industry, but they can only help with the past year and not the half a decade my son and I have been suffering. I am unsure how to take HUD to court for the damage they have caused and the case they have lost. It is not my fault that I lost the cases.

Answer

Thank you for your question.

Your question relates to landlord-tenant relationship, and I purpose to answer the same on the assumption that you are currently in Kenya. It is evident from your question that none of the avenues pursued to address your issues have borne fruit. Your situation calls for empathy.

Since you have not indicated the specific issues, allow us to answer generally by highlighting the avenues to explore in landlord tenant disputes. In Kenya, such disputes are governed by the Rent Restriction Act and the Landlord and Tenant (Shops, Hotel and Catering Establishment) Act. The former offers arbitration services and prevents landlords from exploiting tenants, while the latter relates specifically to controlled tenancies – shops, hotels or catering establishments. Where tribunals (business rent tribunal and or rent restriction tribunal) have not borne the desired results, you may approach the court High Court and file an appeal against the decision of the tribunal.

Most important, a contract between a landlord and tenant ensures both parties are protected within the law.

How can I reverse a sale agreement?

Key highlights of the case

- The issue is that the buyer claimed the plot was too small and even though I added another 18 feet by 70 feet, she was still not satisfied and even went ahead to incite my brother to go against me.
- The two of them added another 18 feet by 70 feet without me or my mother's consent. They used a different lawyer.

Question

Thank you for the great legal support you give Kenyans. Here's my problem: My rural home is a prime place located very near Nairobi. Our family land is registered in our mother's name. In 2013, I sold 18 feet by 70 feet parcel for Sh 170,000. This was part of my inheritance. We had a sale agreement that bears both my mum's signature and mine. The advocate agreement presumes a 1000 per cent fine over the sale amount in case of default.

The issue is that the buyer claimed the plot was too small and even though I added another 18 feet by 70 feet, she was still not satisfied and even went ahead to incite my brother to go against me. The two of them added another 18 feet by 70 feet without me or my mother's consent. They used a different lawyer.

Now, how can I reverse the sale agreement and refund the buyer? Is it legally binding for me to be charged the 1000 per cent fine as per the agreement? I'm tired of this situation and my mother got very angry for she wasn't made aware of the added part of my brother's plot deal. I pray to settle the matter in peace.

Answer

We salute you in admiration. Your compliments encourage service to those in need of legal knowledge and willing to resolve impending conflicts in their day to day experiences. Your situation is saddening and the least regrettable. Nonetheless, it offers a platform to discuss two issues that are separate but related.

First is what constitutes acquisition of private land in Kenya. Second is what legal instruments are necessary for such process. You mention having sold an 18feet by 70 feet land in 2013 for which the buyer claims inability to acquire title due to its small size. You further concede your brother adding another 36feet by 70feet piece to appease the buyer's desire to acquire a title. Let it be clear that Land Control Board decides what is the smallest parcel that can have title. There is no law to determine minimum or maximum land ownership by an individual, but Cabinet secretary in charge of land has powers through a scientific study to determine economic viability of minimum or maximum acreage that a person can possess. In this setting, the claims of the buyer are contestable.

Second, and which is facilitative to land acquisition is the necessary legal instrument herein referred to as contract. This points to four important questions. What is an implementable contract? Who can review or rescind a contract? Is 1000 per cent penalty term in lieu of breach unfair? and what are the implications of non-performance of a contract?

To contextualize this, cognizance is made of your mother being registered owner of the land, and until a transfer is effected bequeathing the same to you or your brother, none of you (two brothers) has legal capacity to dispose off the land. In short, the contract in discussion is invalid, as the parties involved do not qualify to undertake the purported transaction. This position remains despite you having received Sh170,000. Similarly, where land is on sale, contract law demands the following: sale agreement be in writing: agreement be signed by buyer and seller: and their signatures be attested by witnesses. This enables the aggrieved party to seek legal redress should breach occur. Consequently, it is

difficult to rescind or review a contract that is non-existent from its structure in strict legal terms.

Therefore, the 36feet by 70feet addition of land to the buyer is in itself an illegality. Without legal capacity to create a contract, similarly no power exists to dismantle, not unless there existed power of attorney from the start. None is alluded to in your case. Moreover, the 1000 per cent penalty if based on the principle of contract by conduct, invalidity notwithstanding, creates an obligation on your part, since you have received the initial sum of 170,000. Still, you find this unpalatable. You can canvass this as a term that is unfair within the sale agreement likely impacting adversely on you and entire family, either in a court of law or other forums preferred as alternative dispute resolution mechanisms including council of elders.

In conclusion and for an amicable result three scenarios portend: a competent court declaring this contract invalid and unenforceable. An adjudicating body under principles of equity ordering you to refund the 170,000 plus interest accrued, and specific performance for the 1000 per cent in lieu of breach: both (you and the buyer) referred to mediation through court annexed mediation process.

How can I help my spouse complete our family home?

Key highlights of the case:

- The situation is unfortunate and disheartening
- Legally, sale of land agreement gives rise to equitable interest conferring trust in the property to the purchaser pending completion of the transaction
- Essentially, the purchaser acquires equitable ownership even though (full) legal title to the land will not pass until completion and (registration)

Question

Thank you for great support to all readers on legal matters.

We have land that my husband bought just before we got married. Two months after marriage, he was retrenched. He had only paid the loan for three months, that means even a quarter of the amount had not been paid. He and his colleagues sued their employer and the case is still ongoing. He had promised to use the cash they will get as compensation to pay the bank. At the same time, he started building on the land. The house was never completed.

Now, he wants me to finish the construction, which I have no problem with, but I find myself lost on the following issues:

1. He never cleared the bank loan which has accrued to millions now, can the bank auction the land?
2. He only has a land sale agreement with the seller as efforts to get him process the title have gone futile. His reasoning is that the bank can auction the land if the title is in his name.
3. With no title, what support document can I obtain to make sure I am a legal beneficiary of the property if am to put my money in?

Answer

No one would wish to be in your position and many of us are vulnerable for as long as we are employed.

The situation is unfortunate and disheartening. You deserve empathy. As a couple you intended to acquire land and construct a house. The unexpected happened when he lost his employment. Nonetheless, if we assume that the loan by your husband was supported by his salary, then the impending scenario which could happen to anyone, requires us to consider the following:

a. the principle of privity of contract
b. legal weight of a sale of land agreement, and
c. ultimate ownership of any parcel of land or property.

Issue one: Privity of contract has a dictate that only parties to a contract can perform the obligations within it. Therefore, the contract between the bank and your husband was pegged on consideration that, a certain amount of money from your husband's salary would on monthly basis go towards repayment of the loan. As such, auction is an independent process and a 'stranger' to the transaction contained in and which formed the contract. To elaborate, you may need to know that unsecured loans are primarily pegged on salaries whereas secured loans are pegged on specific property. Our assumption is that your situation falls under the former.

Issue two is whether the sale of land agreement is sufficient to transfer full ownership of interest in land.

Legally, sale of land agreement gives rise to equitable interest conferring trust in the property to the purchaser pending completion of the transaction. Essentially, the purchaser acquires equitable ownership even though (full) legal title to the land will not pass until completion and (registration).

On the third issue, legal ownership of any parcel of land or property takes effect when the transfer of title has been given and documentation in the name of title deed corresponds with those at the ministry of land or relevant lands office. However, for you to fully realize any benefits, limited or otherwise from the land as described, including development, you will need to ensure the seller of the land performs obligations of the contract which includes transfer and registration of the same. For your security, you may need to have a side discussion with your husband to have the land jointly registered in his and your name.

Be that as it may, this advisory is not conclusive. It is advisable to seek alternative legal opinion where the content and context that formed the two contracts which your husband entered into are taken into consideration.

Can I invoke "adverse possession" in a land row?

Key Highlights of the case:

- For adverse possession to succeed, it must be continuous, open, hostile, and an interrupted for a period in excess of twelve (12) years.
- Development whilst in occupation ordinarily demonstrates intentions to possess (animus possidendi).

Question

I write on behalf of a friend and neighbour.

There is this situation between stepbrothers whereby one of them by the name (W.K) registered himself by deceit, as the proprietor of a parcel of land on which the other (G.K) lives (i.e. born and raised). W.K has never lived on nor developed the said parcel. It's way over 12 years since the purported registration & issuance of title to W.K. Whereas G.K has carried out extensive development of the same. Now, the question is, Can G.K succeed if he moved the court by invoking the doctrine of Adverse Possession. Looking forward to your assistance. Thank you In advance.

Answer

Land is such an emotive issue in Kenya, being the single most important source of production and livelihood. There are many people who have employed deceit to gain possession of land, but others who through legally recognized means, obtain similar outcome, and this informs this response.

The situation between WK and GK invites us to speak about a specific form of land acquisition and possession process known as adverse possession. Adverse possession refers to a situation where a person occupies land, asserts rights over it and the person having legal rights in and over the land omits or neglects to act against such possession. For adverse possession to succeed, it must be continuous, open, hostile, and an interrupted for a period in excess of twelve (12) years. Development whilst in occupation ordinarily demonstrates intentions to possess (animus possidendi). The rationale behind the concept is to dissuade ownership of land for speculative purposes.

Article 40 of the Constitution of Kenya may hold a different view, but recent cases in the High Court (See ELC No. 323 of 2017) advances a counter argument in favour of adverse possession. On the foregoing, your friend and neighbour (GK): having taken possession of the said land for a period of more than twelve (12) years; having developed it openly; the purported owner (WK) having not taken steps to interrupt such possession; can indeed move the court and invoke the doctrine of adverse of possession.

Can such a matter be deliberated by the court? Yes, if at all GK goes ahead and moves the court by filing a suit. The court never moves from its own motion when seeking to deliberate any matter. Can GK succeed in getting a favourable outcome once he has moved the court? This, again depends on how the facts will be presented before the court especially witnesses and evidence of his presence on the land for the twelve or more years.

We must remember that Kenya is an adversarial system and sometimes poor legal presentation of facts can ruin a good case. Therefore, this can only be left for the specific court (now Environment and Land court to decide)

Can I sue my Lawyer for Negligence?

Key highlights of the case:

- Lawyers are expected to have a higher calling to observe a strict code of professional conduct while dealing with clients
- A breach of this code of conduct, to which most swear an oath to keep when being admitted to the bar, amounts to professional misconduct

Question

I am writing to ask if I can seek any action in court against a lawyer who was meant to file our succession case in court. My Dad passed away last year and we gave her the relevant documents and she had prepared them last year around November. When we try to get her, she says the date has been moved. I did some reading and it says she should have had an announcement in the Kenyan Gazette which she still has not done. Additionally, last year my Dad has Mumias Sugar shares and now they are under receivership which means we will not be able to sell those shares because of her negligence. Is there anything I can do to seek for damages from the lawyer (she represents my mum)?

Answer

Your state of distress raises two important issues: one, is the need to share information which describes the process of land succession: and two, the professional threshold of a practicing advocate. In both situations, you and others with similar challenges have a right to knowledge.

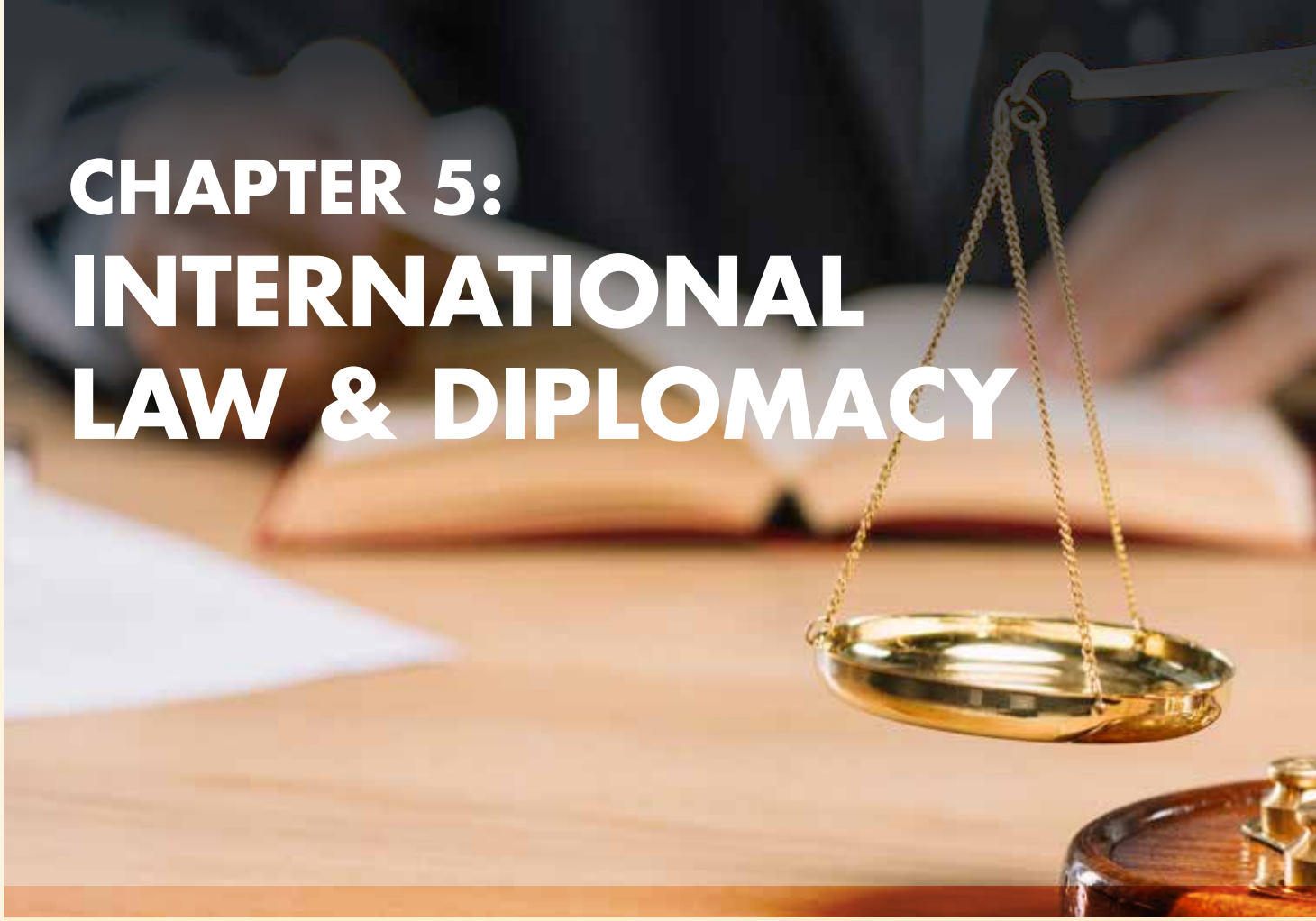
The law of succession is invited when a person dies and has property which require sharing or transfer. This law envisages two scenarios: testate succession, which is the transfer of deceased property as directed by her or his WILL OR TESTAMENT. Ordinarily, the testator (being a person who has written a will) appoints another, known as an executor to manage and eventually distribute the property upon death. Although the executor derives authority from the will, the court must affirm authenticity of the said will.

Intestate succession, which is the most common scenario is caused when a person dies WITHOUT A WILL. At such moments the rules of intestacy take effect through a court process. The rules consider that immediate family, comprising of spouse and children be granted the property as first preference. In the event that immediate family is dead or non-existent for one reason or another, then relatives such as parents, brothers, sisters, cousins, nephews and nieces are considered to accede the property. Should, the situation arise that none of the aforementioned persons are not traceable, then the property is devolved to the state. Intestate succession process commences with completing appropriate Probate and Administration ***(P&A 80,5,11, 12, 38 & 57)*** forms and attaching thereto certified copy of the deceased's death certificate; applicant's identity card; a letter from the area chief listing all the beneficiaries; identity cards of all sureties; proof of ownership of the property of the deceased e.g. Title deeds, logbooks etc.

The documents are then filed in court and appropriate fees paid including gazettement fees. Afterwards, the succession notice is published in the Kenya Gazette and if no objection arise within 30 days, grant of letters of administration is issued six months after gazettement.

Without being prejudicial to the advocate, the import for professional conduct is not debatable. As a professional society, lawyers are expected to have a higher calling to observe a strict code of professional conduct while dealing with clients. Besides, like other citizens, lawyers are also bound by the laws of the land and can be taken to task to account for their misdeeds. Therefore, a breach of this code of conduct, to which most swear an oath to keep when being admitted to the bar, amounts to professional misconduct. In this context an aggrieved person is entitled to redress.

The redress is tripartite: first would be to lodge a complaint with the Law Society of Kenya, in particular the Advocates Complaints Commission or the Disciplinary Tribunal: second, where one thinks that the Law Society of Kenya would not guarantee fairness, a direct filing of a suit in a court of law laying down the alleged transgression: and third, is where both the lawyer and the aggrieved person seek intervention by another party within the alternative dispute resolution approaches.



CHAPTER 5: INTERNATIONAL LAW & DIPLOMACY

How can I bring my twins back from the United Kingdom?

Key highlights of the case:

- Under international law, refugee status may be lost if it is proved that, such status was obtained fraudulently with regard to the core aspects relating to eligibility
- You cannot subject a sovereign state to Kenya's judicial system, unless the country waives that right
- The remedy is diplomacy

Question

I have been reading your article on the Nation about the man whose daughter is supposed to relocate to the United States and the father has not given consent. My case is similar. I am sure you may have come across it in 2015 when there was some media attention on it. Back in 2015, my twin boys Hussein and Farid were five years old and already relocated to the United Kingdom, their identities changed, and according to my Kenyan wife and the children's mother, they were all now claiming to be from Somalia so as to gain asylum and live off benefits and free housing in the UK as refugees.

I was not on board with this because first of all, it was illegal to fraudulently acquire asylum in UK using false documents and fake stories. Most importantly, I did not give consent. We were legally married in 2007 and the marriage was never dissolved, even though now I am told she has remarried. Advise on the legality of this. Four years on, the British have refused to respond to my communication as well as my lawyer's. I had requested to have my children registered as Kenyans through the foreign office and the British High Commission.

The Kenyan authorities have also gone quiet and apparently my case file was taken to ODPP in February 2016 but their office said they have no such case or anything like that. The former British High commissioner, Dr Christian Turner, wrote me a letter on July 15, 2015 and promised to look into it and come up with a speedy resolution. That was four years ago. The next High Commissioner Nic Hailey told me when I met him that my wife had been questioned and admitted to be Kenyan. From then on, I kept asking about the progress of my children's registration. On Twitter, he went ahead and blocked me and cut all communication with my lawyer and I. They also withdrew my visa application when they had no reason to cancel it, refunded my money and started to pretend I do not exist.

I have also written to the new High Commissioner, Jane Marriotte. Now I need advice of on how I can go about suing the ODPP and British Government for what they have allowed to happen. My children are now 10 years old and growing up isolated from their entire family in Kenya.

Please advise on what rights fathers have in this country and if what I am asking for is unreasonable.

Thanks,

Answer

We are honoured our legal advice over the course of the year has precipitated the instant discourse. Be that as it may, your courage, consistency and determination to reunite with your family despite the seemingly insurmountable odds placed on your way cannot be gainsaid. In fact, many in similar positions would have given up by now. Your steadiness emboldens.

The challenge you face is unique since it transcends Kenya's territorial borders, necessitating invocation of international law. Closer home, your situation invites discussion of the following substantive issues:

i. refugee status determination and cancellation;
ii. what amounts to a valid marriage;
iii. parental rights and responsibilities;
iv. enforcement of fundamental freedoms and rights; and
v. an individual's capacity to institute legal proceedings against a Sovereign State.

You mention that your wife and children relocated to the UK back in 2015 and fraudulently obtained refugee status to secure comfortable lives. Therein lies the key to solving all your problems. Under international law, refugee status may be lost if it is proved that, such status was obtained fraudulently with regard to the core aspects relating to eligibility. Cancellation in itself is not automatic, since the burden of proof lies on the person making the allegation. In this case, you.

In addition, refugee legislations vary from one country to the other. The underlying principle, however, is that caution and discretion ought to be exercised before cancellation of refugee status. Assuming cancellation of refugee status is effected, a number of variables arise depending on the legal provisions of the host country.

i. The affected party or parties can immediately be removed from the host country;
ii. affected party or parties can be afforded stay of execution, if at all they hold permits authorizing their continued stay, which normally remains in effect unless the same is cancelled through a separate process; and
iii. where children are involved, international law obligates host Countries to act in their (children) best interest.

You've questioned the legality of your wife's second marriage. Indeed, Matrimonial Causes Act of 1973, which governs marriage in England and Wales provides that, a marriage is void or does not exist ***abinitio*** if at the time of marriage either party was lawfully married. For the marriage to be declared a nullity, you will be required to file a physical petition in UK which is a tough call considering your visa has been revoked.

As a parent, parental responsibility begins with registration of birth of a child. You mention that, your attempts to register your children as Kenyans have fallen on deaf ears. The registration process depends on your ability to demonstrate paternity and marriage to your former wife which again has been handicapped by new status of your wife and children.

The Constitution of Kenya 2010 guarantees every Kenyan rights and fundamental freedoms as espoused in Chapter four. In the event of breach, denial, infringement, or violation, you can file a petition at the Constitution and Human Rights division of the High Court seeking redress. So, as to whether you can sue the Office of the Director of Public Prosecution, the answer is yes, provided the suit therein is sound and good in law. Otherwise you risk being slapped with cost of the suit, which might dent your financial position significantly.

However, you cannot subject a Sovereign State, in this case, the British High Commission to Kenya's judicial system, unless UK waives that right. On the flipside, you can sue individuals working at the British High Commission, in their own country, provided, their acts or omissions fell outside the purview of privileges and diplomatic immunity.

Your remedy is diplomacy. Through your legal team, you can write to Kenya's Ministry of Foreign affairs and request intervention on your behalf.

CHAPTER 6
TORT

Can I sue for being injured at a construction site?

Key highlights of the case

- All I could recall was something hitting my head and shoulder. Thereafter, everything went dark.
- When I regained consciousness, it was around 11am and I was lying in a hospital bed.

Question

I'm a married man with two children and a lot of financial obligations. This is why I made the decision to be walking to work every day to save on costs but I recently paid dearly for it. I often pass through a busy street to access my place of work. Two months ago, I noticed that a new building was coming up just two meters from the street because the construction company had not erected a fence around the area.

Two weeks ago, at around 7am on my way to work, someone shouted at me to duck from a falling object.

All I could recall was something hitting my head and shoulder. Thereafter, everything went dark. When I regained consciousness, it was around 11am and I was lying in a hospital bed. My wife was sitting next to the bed. She explained to me I was hit by a falling bucket full of concrete. The doctor told me the bucket caused a mild concussion and sprained my left shoulder.

Two days later, I was discharged and instructed to take two weeks' bedrest. I was slapped with a hospital bill of Sh70,000. Luckily, my brother came to my aid, though I am expected to repay. Can I take legal action against the construction company?

Answer

The answer is a big yes. You say that the construction site is just two meters away from the busy street. The construction company should have taken measures to ensure falling objects do not reach street users, including vehicles. The company should have gone a step further to erect a sign informing members of the public of the ongoing construction work. By failing to take measures to caution members of the public from falling objects, the company breached duty of care owed to users of that street.

Once you regain your health, file a civil suit through an advocate of the High Court. Carry with you proof of hospital expense i.e. every hospital bill, prescription, including taxi cost to and from hospital for yourself and your wife. Ensure the legal action is taken before three years lapse. The advocate will be in a position to quantify damages suffered including cost of suit and make necessary prayers to the court.

CHAPTER 7
JUSTICE REFORMS AND VIOLENT EXTREMISM

CRIMINAL JUSTICE SYSTEM MISCONSTRUED TO FUEL VIOLENT EXTREMISM

To understand why violent extremism tends to thrive despite a vibrant criminal justice system, one needs to appreciate it beyond police and courts. Besides, a deeper analysis as to why imprisonment or none of it, is incentive to agents of violent extremism. Therefore, the imperative to identify the role of the Director of Public Prosecutions (ODPP), Director of Criminal Investigations (DCI) within the ambit of National Police Service (NPS), Department of Children Services, Probation and After Care Services, Civil Society and Community at large in matters violent extremism is non-negotiable. There is popular assumption that suspects affiliated to terror groups who have gone through Kenya's criminal justice system hold it in contempt and owe no faith if any. This situation is explainable by ideological, operational and motivational concepts on the role of the criminal justice system in combating violent extremism. Consequently, the hypothesis that a flawed criminal justice system is catalytic to radicalisation and fundamentalist ideologies.

Experiences and allegations obtained from suspects of violent extremism including their families and friends paint a terrible picture of human rights violations by state organs. Their narratives indicate blatant abuse of the Bill of Rights at chapter four of the Constitution, yet Article 20(1) binds all state organs and persons to promote and protect human rights for everyone. At Article 20(2), it offers each and every individual rights and fundamental freedoms to the greatest extent consistent with the nature of any particular right within the confines of the Constitution. Specifically, they allege less adherence to human dignity, exposure to torture and cruel inhuman or degrading treatment or punishment, a complete departure from the 24-hour constitutional time period to be before a competent court upon arrest and all efforts to deny the right to access bail and bond. Shamefully from the talk of investigators the difficulty to be assumed innocent till proved guilty and the unconstitutional effect of unofficial enjoinment of relatives and family into suspected criminal activities of the accused. In essence, once in the criminal justice system, suspects tend to suffer either way and therefore being imprisoned does not necessarily discourage radicalisation. In fact, allegations, though unverified,

that agents of violent extremist would be happy to get into prison even under lesser criminal activities to enable recruitment of more followers or sympathisers.

The fragility of dealing with violent extremism suspects in the strictest sense of human rights is tall order. Nevertheless, there is a basic legal regime that includes the Prevention of Terrorism Act and the Persons Deprived of Liberty Act consistent with the Constitution, allegations of violations by state agencies abound. Anecdotal reports suggest that, security agencies contribute to the most reported human rights violations. While there is a myriad of factors that influence people to join violent extremist groups, a study conducted by the Institute for Security Studies shows that the final "push" for many people is the injustices suffered at the hands of security forces, particularly "collective punishment". Generally, person who profess Islam faith in the country and globally at large are treated with suspicion as in relation to terrorism. Many have cited instances of discrimination and arbitrary arrest by police in response to attacks.

Many are times, these arrests result in detention of persons for extended periods, well in knowledge of the fact, places of detention especially Police Lock – up facilities fall way below the required standards. In addition, evidence points to extrajudicial killings and enforced disappearances all perpetrated against suspects by Security agencies. Owing to these deeply entrenched grievances a significant number of people have fallen to the trap that is radicalization to violence. If left unchecked, security agencies' approach to nip violent extremism is on the contrary converting many young people into fundamentalists, apparently rebelling against a system insensitive or blind to their realities.

The judiciary has had fair share of accusations on matters of violent extremism and continues to suffer low public opinion. Courts have grappled to steady the rule of law, similarly afford and sustain rights for accused persons, even with undue political pressure to consider the unlikely. Though different officers have made varying pronouncements with rights such bail and bond, there is evidence that freedoms and rights have been granted to an extend as demonstrated in the matter of *Aboud Gogo Mohamed & Another v Republic* {2010, eKLR}, where applicants were charged with the offense of engaging in an organized criminal activity contrary to the Prevention of Organised Crimes Act. While the trial court rejected their application for bail pending trial on the grounds that they could be linked to Al-Shabaab and therefore could pose a threat to the public if released on bail. The appeal court quashed this decision granting bail on presumption of innocence acknowledging inability of the prosecution to demonstrate compelling reasons for a contrary decision. Despite such judicial precedencies, courts have been blamed for few convictions if any. Many of the suspects get acquitted for lack of evidence, often a consequence of poor investigations and inter agency cooperation.

Article 20 (2)

Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

Experiential learning indicates laisse faire scenario not to discourage the many from joining extremist organizations since acquittal seems likely notwithstanding hawkeyed security vigilance. Even where conviction is arrived at Prison is nonetheless a welcome idea for continued radicalisation. It is appreciated that many of the Kenyan prisons host poor, hopeless youth most without motivation for a fulfilling livelihood, and easily fall prey to promises of good life habitually offered by agents of radicalisation. In addition, allegations of human rights abuses and brutality meted upon some of the imprisoned represents systemic disenchantment which herds them towards rebellious pathways including violent extremism. This reality notwithstanding, there are various measures to redraw the current anti-radicalisation map as here below proposed:

Security agencies and prison officers need to employ a human rights approach in the way they deal with suspects. This should be the case even when dealing with the community and family and friends of persons suspected of being part of violent extremist organizations.

The Anti-Terror Police Unit, National Police Service, National Intelligence Service and Directorate of Criminal Investigations should develop strategies that will enhance cooperation among them to enhance information sharing and improve investigations.

Anti-corruption measures should feature in Kenya's counter-terrorism campaigns in order to guarantee people's security and ensure that security authorities are not taking advantage of them while purporting to be acting within their mandate.

Partnership with probation and aftercare services to develop strategies for rehabilitation, reintegration and resettlement of offenders leaving correctional institutions to the community. This will reduce the likelihood of recidivism.

Lastly, the community must be sensitized in order for them to offer support and smooth transition for persons who are released from prison after serving a sentence for terror related activities. These should not be castigated, but instead they should be reintegrated and embraced as valuable members of the community from which they came

GOOD LAWS ARE NOT THE PANACEA FOR ALL OUR PROBLEMS

Past conversations on reforming our governance and service delivery have dwelt on the making of good laws and strengthening of our institutions. And while this has indeed been necessary, it is becoming increasingly clear that it's not enough to have good institutions and great laws.

Truth be told; it is the occupant of a public office that carries the dream and makes things happen.

The proclamation of Kibaki Tosha by Honourable Raila Odinga in 2002 and former's subsequent presidency elevated Kenyans as the most optimistic community in the world. During that time the country experienced voluntary actions of common good organised and executed by the citizens. This died a sudden death when office holders in the public service failed to steer the optimism of the public with policy and practice.

George Bush, at a similar time, was President in the United States of America and had rallied the world's most powerful nation to war in the gulf. 2008 saw Baraka Obama take over and stop the war which saved US from sinking into serious economic ruin. Enter Donald Trump and and it is helter-skelter in government departments. Racism, mass gun killings, doubts about climate change and unpredictable global power dynamics.

A positive outlook to life and the world around, which comprises a view where nothing is insurmountable and unachievable, irrespective of time drive societies to progress. But does public service in Kenya give us hope. The speck of cynicism in most Kenyans is partially informed by the non-responsive leadership which essentially kills people's trust in systems and structures.

Kenyans seem to be in a rush all the time as though no plan exists. A few examples suffice: We promised laptops for schools, and the outcome is not a secret. The commencement of the competence-based curriculum was suspended, then overnight the Cabinet Secretary walked back on her words creating unnecessary crisis. The National Education Management Information System (Nemis) was introduced with so much raucous that it caused greater heartache to parents, guardians and education administrators that further instruction had to be issued when the whole admission process was nearly grinding to a halt. Crisis seems to be our work ethic.

Another example: Can anyone coming to this country from Mars, or elsewhere, believe that the Director of Public Prosecutions Noordin Haji is using the same laws which his predecessor Keriako Tobiko used for years?

Also when the history of the ministries in Kenya is chronicled it will be very difficult to account for the comparative difference because personalities tend to be worlds apart. One wonders if they were serving under the same appointing authority and mandate.

Many public offices are at best apathetic to work and at worst clueless. How, for instance, does a ministry charged with ensuring food security and the wellbeing of our food security sector allow harvests to rot and then later listen to voices of agony months later appealing for food rations?

How counties and public offices continue getting support even when billions cannot be accounted for, year in year out, beats me.

Taking an oath for a public office is pledging to carry out practices that uphold values, stand by sound policies, enhance regulations and promote laws for the common good. Commitment to serve and do right is tethered on attitudes and capacities to respect people's rights founded on the desire to protect the weak from pointless suffering. Unescapably, it is not about institutions, laws and policies but personal conviction to bear and drive a dream that appeals to indiscriminate brotherliness and development.

Effective public service delivery should be understood as key in a functioning democracy. It must be seen as antipathy to poor planning, impunity, apathy and discrimination. It is about safeguarding transparency, accountability and integrity.

It's not just laws, but only true leaders will save the country from sliding into permanent state of pessimism.

HOSTILE ATTITUDES BETWEEN LOCAL COMMUNITIES AND LAW ENFORCEMENT AGENCIES BOOSTS VIOLENT EXTREMISM.

Violent extremism is now a global problem and largely pose more danger despite highly sophisticated mitigation efforts. In the wake of attacks, countries experience high fatalities, indiscriminate loss of people and infrastructure which eventually dishevels economies, social stability and political sanity if at all. In many countries, violent extremism is synonymous with terrorism hence a question of national insecurity. While it is in the interest of communities and governments to prevent and counter violent extremism, besides working to reduce the spread of radicalization, there seem to exist a disconnect between state agencies and civil society organization(s) in particular local communities which feign victimization from the former. The suspicions, tensions and unclear working relationship between law enforcement agencies and local communities are evidence of a slowed war against violent extremism and terrorism by extension.

Violent extremism and radicalization are known to be a twin problem in the former Northern frontier districts (Isiolo, Marsabit, Garissa, Wajir, Mandera, Tana River and Lamu) and the coastal region (Mombasa, Kwale, Kilifi and Taita Taveta). Nairobi, the capital has not been spared either. There is evidence to indicate that government has for a long time preferred militarised response. However, intelligence in the recent past has proofed that softer social skills that are less military in nature tend to have more positive results and therefore considered a game changer. These concerns are quickly being adopted by the lead agency, National Counter Terrorism Center (NCTC), which is an entity whose mandate including coordination of national counter terrorism efforts to detect, deter and disrupt terrorism acts, is founded on Security Laws Amendment Act 2014. NCTC comprises personnel from various security agencies and its composition may further be determined by the National Security Council.

Antagonism and tension between local communities and security agencies are primarily fuelled by fear, systemic generalities about illicit militancy, deep rooted mistrust between members of the public and the government originating from years of social economic marginalization, political exploitation, social profiling especially of the Somali and Islamic leaning communities, ethnic discrimination and religious stereotyping among others. Though communities have vivid memories of troubled relationships between them and law enforcement agencies also its agents, a lot is attributed to the general architecture of policing in the country. First, policing is influenced by colonial heritage that highly relied on force to keep law and order. Use of force and excessive in the case of suspected incidents of violent extremism is characteristic of law enforcement, despite reforms which has included change of name from national police force to service. Second, there has lacked consistent and reliable feedback mechanism between local communities and law enforcement agencies. Information on prevention and countering of violent extremism is considered high value national security therefore only a purview of the state. Third, absence of guaranteed protection of whistle blowers (Informants) specifically the returnees. Fourth, is the isolationist tendencies and discriminative approaches preferred by the state in handling suspects of violent extremism, as was the case of Somalis in 2014 when most were rounded up and detained at Kasarani stadium following a government crackdown to identify and deport undocumented members. Fifth, inadequate or lack of security agencies to incentify and prioritize community participation in public policing as a service delivery. Sixth, an apparent misdiagnosis of terrorism causing definitional or philosophical inconsistencies between duty bearers and right holders. These processes have raised concerns of human rights violations, manifesting as victimization, maltreatment of detainees and detained incommunicado purportedly by the police and Kenya Defence Forces.

Nonetheless, security agencies do have a narrative that supports their suspicion of local communities especially those in the north. While it is not loudly recognised security agencies assume that local groups privy to specific planned incidents of terror attacks deny them vital information making response reactive and late in the day. There are allegations that select clerics and sections of Islamic faith practitioners empathize with ideologies of militant groups such as Al-Qaeda and Al-Shabaab and as process hoard suspects and promote radicalization among youths in Garissa, Wajir, Mandera and Isiolo. More so, the trend where non-indigenous ethnic groups are targeted during terror attacks creates an impression of informed action planning. Additionally, the ease by which violent extremist groups muster sophisticated, complex and vicious assignments in environments they often reside for periods of time leaves bad taste among law enforcement agencies. In earnest, the use of social media to mobilise, organise, radicalise and camouflage attest the storyline of security agencies.

This scenario is recipe for human rights violations. This is because security agencies are extremely vigilant and reasonably motivated by inhuman historical attacks has led to interventions especially arrests and extra judicial killings based on unreasonable and sometimes unsubstantiated suspicion

No doubt dealing with violent extremism poses difficult yet fragile situations. Even though, the infrastructure to uphold human rights and inclusivity in anti-violent extremism is given. In context, the long-term approach within the National Strategy to Counter Violent Extremism (CVE) emphasises the role of citizens, civil society and private sector in defeating violent extremism. It is particular that community engagement leads to ownership of CVE actions by local communities to compliment other state driven efforts military or otherwise. Moreover, Article 244 (c) and (e) of the Constitution commands the National Police Service (NPS) to comply with the Bill of Rights as it promotes relationships with the broader society. This aspiration finds relevance in the National Police Service Act through community policing concept, whose objectives purpose to (i) establish and maintain partnership between the community and the NPS through Community Policing Committees; (ii) promote communication and cooperation with the community; (iii) promote joint problem identification and solving on collaborative terms of engagement. This hasn't reduced mistrust between communities and law enforcement agencies and countering violent extremism stands in-between.

There is no discount to disapprove the frosty relationships between local communities and law enforcement agencies who counter violent extremism. Opportunities are provided within legal infrastructure for the two groups to wear rights attitudes and enhance fight against violent extremism. To operationalise the legal expectations here are proposals: a) public education program on the benefits of cooperation, in particular mechanisms for quality interaction: b) development of tools of engagement to build trust with a view of accessing relevant intelligence by way of anonymous platforms amongst others: c) decentralization of NCTC to work within the County Action Plans to prevent and counter violent extremism thus bridging the gap between grassroots and national efforts, in addition to good use of technical and financial resources: d) De-militarising of anti-violent extremism and emphasising soft, human rights leaning approaches with a clear feedback loop to affected communities: and e) national police service and Kenya Defence Forces living the reforms acknowledged in public domain hence building confidence of a reorganized security regime. Without doubt, if this followed, even progressively there would be reduced polarization between local communities and law enforcement agencies.

Disconnect between state and communities

This article examines causes of antagonism between security agencies and local communities, similarly makes recommendations to improve collaboration and cooperation in the fight against violent extremism in Kenya.

IS THE LAW AFRAID OF CORRUPTION? DIRECTOR OF PUBLIC PROSECUTION FLIP FLOPPING AGAIN

Certainly, efforts to fight corruption are galore. However, news about huge financial loses continue to make headlines, at least for the past two decades and each scandal seems to grow in size. Goldernberg, Forensic Laboratory, Anglo Leasing, Mumias Sugar, purported Maize imports, and Euro Bond among many others. This is so, despite "good laws, polices and regulations", properly constituted response institutions and constant government reiteration to eradicate corruption. With this background, let me contextualize anti-corruption efforts this far.

One can argue that Kenya has good intentions and willingness to defeat corruption. It does not begin with ratification of the United Nations Convention Against Corruption in 2003, but back to 1956 when Prevention of Corruption Act was enacted. Other laws and policies have been formulated, including promulgation of the constitution in 2010, yet the result is an increase in sophisticated, bold and innovative corruption. Something is definitely amiss!

Through the law: we have formed and disbanded institutions, like Kenya Anti-Corruption Authority and Kenya Anti-Corruption Commission (KACC): we have appointed and hounded out anti-corruption leaderships. Mention Harun Mwau, Retired Justice Aaron Ringera, Mumo Matemu and Counsel Patrick Lumumba. At the center of these debacle has been the hand of Parliament with a zeal of purpose: many a times the same law establishing offices and directing appointments has been found to be inconsistent and unconstitutional, ostensibly from the law-making organ. This is a tragedy, when the legislature represents a contradiction!

Auditor Generals' revelations that counties are unable to account for 81 billion in 2018, is an annual ritual only with different sums. The disclosures do not deter future loses nor discourage practices that entrench reckless and untraceable spending in public service. Commentators have questioned the import of Auditor General's and other accountability reports, as most lead not to prosecutions. What a contradiction? Does the afore-described scenario indicate fundamental gaps in fighting corruption? As a pessimist I concur and ask: Could it be that we have defined corruption wrongly? Is it time to decenter the corruption debate to the masses and deconstruct the narrative that is seemingly elitist, yet it fetches successful prosecutions on the lowly? Is it not time to re-work strategy and interrogate the deficits prominent in the current mitigation regime?

Philosophically corruption is a response to failed systems, structures and process, which constantly deny people access to basic rights, threatens their survival and predisposes them to unnecessary competition over "hidden opportunities". As a formation, it aligns to the value system ingrained in generations, especially the survivalist syndrome to outwit a society that glorifies theft, greed and discrimination. Though we confine our actions on the dichotomy that refers, either to lose of genuine public resources or presence of illicit and unexplained riches. No one has been convicted successfully using this line.

Nevertheless, abuse of office charges have at least taken some people to prison. So what accounts for the difference? Could it be that standard of proof distinguishing the two crimes is different? Both refer to loss of resources in ways that are abhorrent to the society. Instead of having same results on alleged lethargy of the Directorate of Criminal Investigations and political correctness of the Office of the Director of Public Prosecutions, we may wish to review our definition of corruption and depict it as failed humanity.

Unfortunately, corruption is restrained in the courts even asking judiciary to "uphold the law" and circumvent evidentiary threshold to achieve some prison sentences. Besides impeaching Ethics and Anti-Corruption Commission in public gallery claiming ineptitude, irrespective of assets recovered and suspects arraigned. This needs to change.

The narrative doesn't speak to the social formation which accuses our culture, attitudes, education, psychosocial support systems and ethics. The conversation does not help ordinary Kenyans appreciate how health care, housing and other basic services are deplorable due to corruption. Moreover, we seem unaware of processes and systems groomed in our psyches which lucratively propel corruption and are only shocked when loss of billions is mentioned.

Time is now to re-think strategy. Proposals such as forgiving perpetrators of corruption and denying them entry or reentry into public service by religious leaders sometime in 2017 are empty outside a comprehensive framework. We must regroup our efforts with an understanding that lifestyle audits and stricter refrain into public service presents corruption as a public service issue while it is broader. This presents the difficulty of inviting integrity into this discussion.

As Director of Public Prosecutions withdraws the NYS case, we need to profile corruption as an empire whose legion thrives on patronage, favoritism, power and cultist culture whose political economy often silences righteousness. We may concede corruption to be bigger than the law seeking to impede it, yet our primary contribution is to cultivate and improve rule of law.

PRESIDENT, DPP AND DCI
MUST KEEP THE TEMPO OF GRAFT FIGHT

To lose public interest and confidence in the court is tragic. This statement is a dichotomy that divides and unites Kenyans in equal measure. Judiciary and police should never be the homes of corruption. Otherwise, the country's collective cynicism on the fight against the minster will be justified. Despite this, there is need to speak to the justice triangle to contextualise the interaction and contradiction between police, prosecution and courts.

Arrest and prosecution are only an aspect of the justice system; it is not the whole picture. For the past few months, we seem to have excelled in arresting high-profile figures. Historically, this tends to happen at the brink of pressure and diluted public allegiance in political institutions. Much of this has not appeased ordinary citizens. Not now not tomorrow. Police and prosecutorial actions only aid the courts to do their work. There is an assumption in the public eyes for the court to be home of justice. This supposition is now contestable in view of 2019.

As a country, we seem to have perfected the art of blame. Very few take responsibility for their omission or commission. We appear blinded by heroism and the worship of individuals we owe allegiance to for whatever reason at the expense of the greater good.

Be that as it may, we need to give the barbs and bouquets of 2019 to the officials who did their jobs and those who shirked responsibility. The Director of Public Prosecutions, Noordin Haji, out-performed his predecessors. The gentleman worked as though his office had new powers beyond those accorded it by the 2010 constitution. The Director of Criminal Investigations, George Kinoti, worked with a zeal never before seen in that department, going about the job as if his office acquired new forensic technology besides the bravery to confront the powerful. The Director of Ethics and Anti-Corruption Commission, too, deserves a bouquet because most headlines emanated from his work, bringing to book some of the powerful officials like governors suspected to be pickpocketing the counties they have been entrusted to steward.

The words of Agesilaus, the second indict us: "Courage is of no value unless accompanied by justice; yet if all men became just, there would be no need for courage". This is well articulated by the arrest of high-level government officers, which have headlined our news for quite some time.

One wonders: What is the sum total of these arrests? Does "Wanjiku" even care when Cabinet Secretary of Treasury, governors of Nairobi, Migori, Kiambu and Samburu counties spend several nights in police cells? When such are left to walk scot free, even on bond and bail terms, the presumption is that their power affords them favour before the courts. Things are not always what they seem, though. We should examine things further before passing the harsh judgement on our courts.

In the public court, government officers who weather allegations of corruption, abuse of office, blatant breach of law and other crimes are a manifestation of impunity.

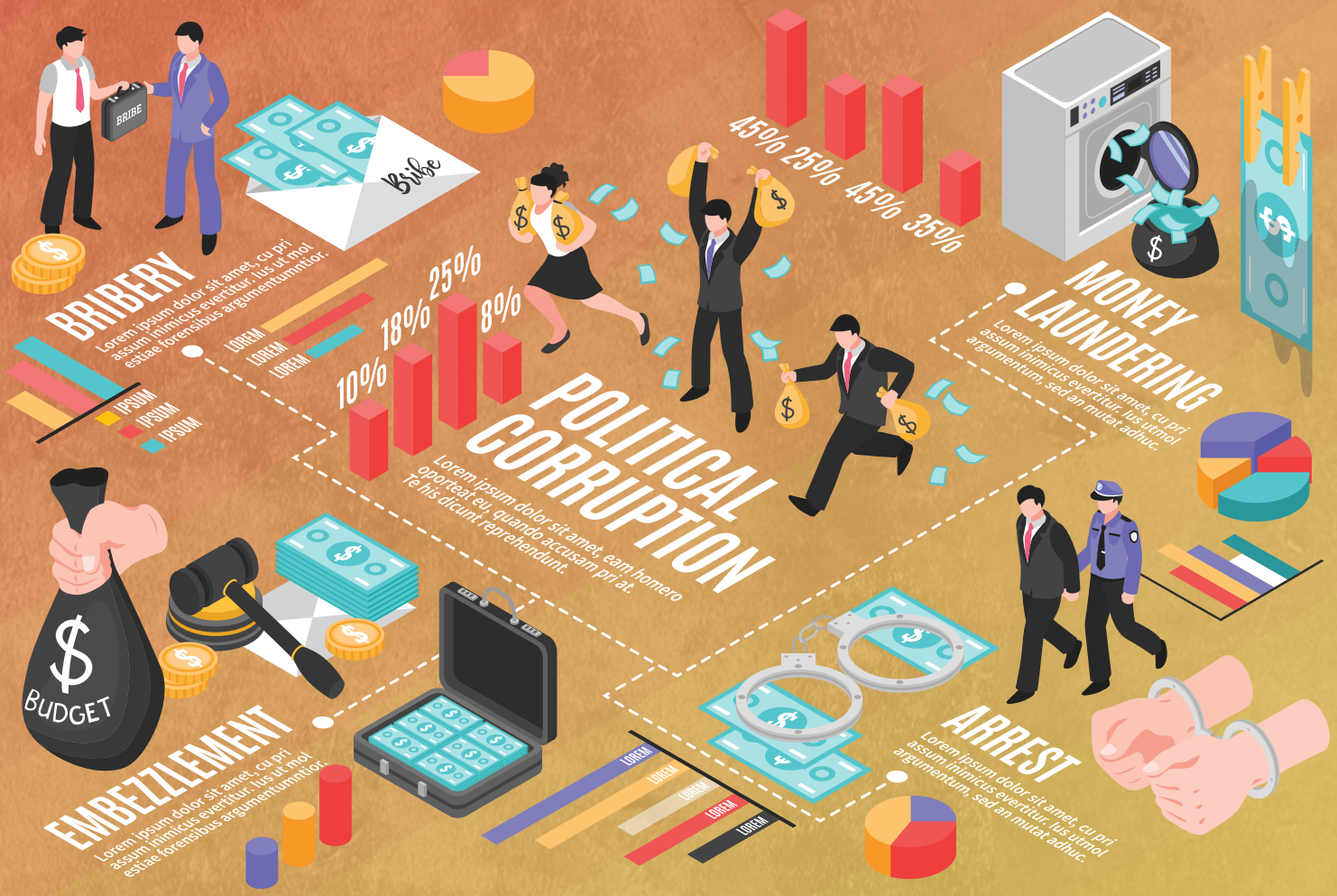
To them it evokes the memory of the 80s and 90s when the refrain "do you know who I am" was the order of the day. The consistency by the President nonetheless, to denounce those who offend the law, is a clear message in seeking to find truth. The President is depicted as though he finally understands the reality of keeping friends too close for political reasons, when professional expectation demands results. For this, President Kenyatta deserves a bouquet. As a reminder, the presidency enjoys the double jurisdiction of handling professional and political matters. What doesn't change is the intention to remain just and right.

The courts listen and adjudicate matters through two important proof principles: that of "proof beyond reasonable doubt" on criminal matters and balance of probability regarding civil matters. It is the onus of prosecution or competing parties to make evidence supported submissions alongside believable witnesses and corroborate observations to the court. Similarly, it is responsibility of police to investigate and present credible cases to the prosecution. And then the courts will make the call as to who is guilty and who is not.

The President should be thanked for making us believe again on December 12 that all is not lost. He has, for a while, demonstrated that his office can be an embodiment of effective leadership. Yet the past haunts us. Are we the same people who cannot respect traffic lights, follow the traffic jam and use foot-bridges? Are we the government officials that ply the wrong side of the road to avoid traffic constantly?

Therefore, high drama on arrest with no eventual conviction is a sure way to erode confidence in such an important office in our society as the courts and to disappoint Kenyans.

But we must never lose hope. All of us, even political favourtites, are accountable to the law. The President must keep his foot on the ground so that we may again believe in the institutions of justice. And to the rest of us, including legislators: Let's not be the ones to take the barbs protecting those perceived to be corrupt either because of political allegiance or financial reward.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PRIVATE SECTOR
KEY IN WINNING WAR ON GRAFT

A country whose private sector is unhappy is likely victimised by an overbearing monopolistic public service probably bedevilled with corruption, obsolete technology, lethargy, poor quality products and services.

Different countries' experiences show private sector's significance in development. Private sector allows co-sharing of benefits by society: Services, products and employment to the people; diversified innovations solving persistent socio-economic challenges and taxes to the government.

The place for the private in economic development can't really be gainsaid. The more reason many global processes such as Sustainable Development Goals have room for private sector involvement especially private public partnerships to improve living standards. Evidence shows poverty reduction in countries with a vibrant private sector. Similarly, development experts agree that a bubbly private sector is synonymous with a reliable and rewarding economy.

However, a broader four dimensional understanding is necessary to disabuse us of the notion that all is well whenever private sector is active.

The private sector is a voter. The private sector not only casts ballots but funds candidates and political parties with manifestos which prioritise and protect their interests. This illustrates its close relationship with political houses that guarantee investment opportunities and profits. Given its important place the private should act as a model of acceptable business ethos.

Yet Transparency International, through the business integrity index, often cites the private sector as the supply side of corruption, particularly establishing shady systems to gain business advantages. Allegations cited against companies like CMC di Ravenna, Jupiter Real Limited and Reliance hotels as well as Tile and Carpet Centre limited to defraud Kenyans of monies meant for Kimwarer dam attest to this.

In this context, can the private sector be an agent of justice? It follows that private sector's main role is to produce goods and services fit for human consumption, making it live to consumer rights besides being truthful to advance less exploitative practices. Should the private sector negotiate for good governance? The private sector has vast economic powers which are often enticing to politicians. The sector can leverage its influence on law and policy reforms to entrench human rights' sensitive corporate governance.

This background marks the instrumentality of the private sector. Nonetheless, a trend has emerged in which some private sector players seem to defraud citizens despite poor quality service and products. Some members of the private sector are roguish. Tenderprenuers in the counties are sources of grief and blatant stealing, while national infrastructure projects stand as homes of inflated costs, unnecessarily imported labour and channels of foreign and local debts.

Truth be said, it is unacceptable and immoral for private sector players, irrespective of their business arrangement, local, bilateral or multilateral, to act with total or partial disregard of due process and the rule of law including obliteration of people's rights.

To recover public trust in the private sector is difficult if dirty deals continuously implicate its members. Worse when both the private and public sectors deviate from professionalism, efficiency, effectiveness and optimum utilisation of resources and embark on partnerships of sleaze, money laundering, thievery, fraud, blatant circumvention of due diligence and abuse of procurement procedures. There is an urgent need to enhance corporate governance for both private and public sectors, lest the country becomes a jungle. Recall the corporate invasion of Iraq, Syria, Democratic Republic of Congo, Libya and Germany's of Adolf Hitler. It is indicative of the private sector's capacity for violence, abrasiveness and the willingness to engage in human atrocities because of profits.

The private sector sits on the right side of history if it commits to defeat corruption, impunity and injustice. Its leadership must embrace responsible business culture and resist the deceit of some multinationals which go as far as cajoling governments to create war for businesses. They should go further and adopt mechanisms to tame a few wicked private sector members who unashamedly plunder the country's resources for selfish gains.

Punishment must be equivalent to the destroyed lives and should be stiffer than the opportunities denied the youth.

This can only be done if governance institutions with clear standards of ethics, business ethos and integrity exist to regulate their members. The law must be amended to ensure that no business entity in Kenya operates alone, but in an umbrella association to enable credibility assessments, reliability vetting and recommendation of legitimacy.

This must begin by stopping tender mongers and brokers in the counties. The country must design effective enforcement measures, particularly having mandatory sentences rather than judicial discretion. Otherwise we risk not seeing revolutionary creations such as Facebook and mobile money transfers again in our lifetime.

The private sector should be architects of business integrity and merchants of good governance. It is imperative for the private sector to be sickened by violations of the environment, abuse of law and unfairness to the people. The sector must help Kenyans inculcate honesty, fairness and trust in their dealings going forward.

WHAT REALLY DRIVES VIOLENT EXTREMISM?

Ask a person if they would take the life of another person and they would most probably say no. Ask the same person if they would a take a life of someone directly involved in the death of loved one, and chances of their answer changing to the affirmative lights up. It is the general assumption that violent extremists are religious fanatics, people of a particular ethnic group, hateful and ignorant people; that persons susceptible to radicalization are poverty stricken, and extremism is the only path to poverty free life. While these assumptions bear a resemblance of some truth, there is a raft of other reasons that drive people to engage in violent extremism.

Poverty, for one, is viewed by many as a logical reason for joining a violent extremist organization. Well, lack of shelter and other basic human necessities might precipitate radicalization to violence without much thoughts going into the decision. However, food is rarely a fundamental incentive when one decides to become a killer. After the Sri Lanka Easter bombings of 21st April 2019, the Sri Lankan junior defense minister, Ruwan Wijewardene, said that most of the bombers were well-educated and came from well to do families. They were described as persons who grew up with silver spoons in their mouths. Another example of an affluent radical is Osama Bin Laden who was one of the most notorious violent extremists of our time. Osama was the son of Mohammed bin Awad bin Laden, a multi-millionaire Saudi businessman who was also the wealthiest non-royal Saudi. Even with all this wealth at his disposal, Osama still chose a path of blood and death. Therefore, while poverty may be a useful indicator of potential recruits, it is not characteristic of a violent mind.

In a research conducted by CTC Sentinel, (The Combating Terrorism Center) an independent educational and research institution based in the Department of Social Sciences at the United States Military Academy), one of the respondents in Somalia said, "*My father bought me a gun and brought it home. He said that if he were me, young and healthy, he would be at the front line of the battle and not at home.*" The father wanted his son to join the Al- Shabaab. He believed the Al-Shabab's fight to be his own, likewise the family. Despite the social economic problems Somalia is currently facing, yet with many years of war, Al-Shabab has managed to sell an ideological narrative coupled with social economic programs as incentives to stir loyalty in the hearts of their rank and file, including earning respect among community members.

Another crucial selling point violent extremist leverage on to get recruits and/or sympathizers is a sense of camaraderie. A lady called Erin Marie Saltman joined a far-right youth camp in Hungary under an alias for the purposes of her study. She was doing a Ph.D. on youth political socialisation and expected to be met by a very grim scene at the radical camp. Once she got there and had the chance to associate with the group members, Erin found the interaction to be fun and accommodating. The people at the camp were taken through various training sessions that built camaraderie and combat skills and engaged social events. Violent Extremist groups offer their recruits a platform to vent and promise them a life of adventure and freedom. Furthermore, these organisations appear to offer a supportive social network. They promise a sense of belonging where members look out for each other and have their best interests at heart. They promise a family that defends its own and assure them that they will be a part of a greater purpose.

A common misconception is that radical groups are generally religion-based; that a person is more likely to join a violent extremist group simply because they identify with a certain religion. To the contrary, recruiters contort religious messages to justify violence in the name of a supreme being. More respondents from the study by CTC Sentinel said that they were made to believe that joining Al-Shabab was a divine duty and that it was what Islam required of someone in their position. Schools of Islam, both Shi`a, and Sunni accept that paradise is a reward for those who die as martyrs. The disagreement that arises is what exactly constitutes valid Jihad. Terrorist organizations such as the Al-Shabab tend to convince young youth who are not sure about their religious doctrine that joining them is indeed valid Jihad. These young minds get pulled into violent acts because they believe that it is a divine purpose.

In a book by Robert Pape titled *Dying to Win*, he analyses suicide terrorist acts from a social and psychological viewpoint. The book is based on a database of every suicide bombing and attack around the globe from 1980 to 2003, which Robert compiled himself. He concluded from this study that; most suicide terror attacks had a strategic goal in mind when they were being planned. In most cases, this goal was to withdraw military forces from a territory the terrorists considered to be their homeland. One of the major causes of violent extremist action is denial, or the perception thereof, of what the public considers to be their rights and civil liberties. With the internet and other media platforms in place, the general public is much more aware of what should be rightfully theirs and what their leaders' responsibilities are. Those same channels of information, are also used to disseminate propaganda and reinforce violent ideologies. A radical group such as the Kahane Chai, for example, founded by Rabbi Meir Kahane in 1971 and based in Israel, fights for multiple agendas that the members of its group and society consider to be their rights. Some of these issues range from economy and employment to education; from demanding that minimum wages be raised, to a total re-organization of the Jewish education in Israel be undertaken, including schools, the army, and state news media.

According to United Nations Development Program (UNDP),

"Most suicide terror attacks had a strategic goal in mind when they were being planned".

violent extremism is the product of historical, political, economic and social circumstances, including the impact of regional and global power politics. Growing horizontal inequalities is a major driver of violent extremism. The world saw a major rise in the number of violent acts committed by extremists in the wake of the 21st century. The number of deaths from violent extremism and terrorism increased from 3,329 in 2000 to 32,685 in 2014. This rise can only be seen as a reaction to the growth of corruption and injustices, and the rise in the different ways in which people could spread information. Extremists fight against human rights violations, social-political exclusion, widespread corruption and sustained mistreatment of certain groups.

Efforts to curb violent extremism have only gone so far as to kill violent extremist individuals rather than ending the ideology promoted by the terror groups. This can be attributed to our obscure understanding of the real reasons for violent extremism. We believe poverty, ignorance, tribal and religious affiliations to be the root causes. This could be attributed to architecture of information delivered to public by the mainstream media, or maybe because we cannot imagine ourselves giving up our lives for a set of beliefs without any foreseeable material benefits. But clearly, members of such terror groups live in a different reality. They believe their fight to be justified and, in some cases, blessed or demanded by a Supreme being.

To truly combat extremism, we as the public, anti-terrorism organisations and governments would need to imagine what beliefs and values may be used to push individuals toward violence, and which groups are likely to seek empowerment due to long periods of oppression. Either way, violent extremists glorify the idea that one particular group is superior to all others. Whether these ideas are based on religion, race, citizenship, class or simply conviction, they oppose the idea of a more open and inclusive society and are hence detrimental to the smooth functioning of human society.

SOCIAL MEDIA, TECHNOLOGY, AND RADICALISATION

There has been a shift of broadcast monologues to highly sophisticated real time web-based community dialogue platforms in which social media thrives largely uncensored. Though, use of social media has many positive effects and continues to reduce distances between and across people globally, it has also turned out to be the driver one of the most feared security threats in Kenya. Terrorism and related heinous acts have grown exponentially due to ease of communication that has expanded radicalisation and recruitment into extremist groups online. Similarly, spread and access of the internet has outmatched any other schooling platform and consistently offers extremist ideologies unlimited to religious, social, political and economic marginalization. In a nutshell, the internet has transformed the limited models of information consumption into a seamless network in which anyone and everyone is able to produce and upload content for unparalleled readership. Courtesy of the internet, we have a 21st Century global village where dealing with violent extremism is quite a humongous challenge.

The breadth of Kenyans and other nationals who have borne the brunt of terrorism is as expansive and saddening. Travelers, university students, police officers, soldiers, hoteliers and mall goers and people of many different walks of life including children, with little or no understanding of the grievances of violent extremist. Many of the terrorist acts have been successful credit to technological advancement of the internet in particular social media, a global trend in which Kenya is a heritage. This, according to UK's counter terrorism Internet Referral Unit, which seeks to remove material that glorifies terrorism from internet (Facebook, BlogSpot, Bloggers and Twitter) can be seen from actions and consistent communication of groups such as Ku Klux Klan, Neo-Nazis and other terror outfits whose business primarily is to spread vile, hate and hurtfulness.

Al-Shabaab just as her mother terror group Al-Qaeda has shifted clandestine movements from physical to virtual and is consistent in the use of WhatsApp groups to further its agenda, propaganda and organise financiers even in when cyber security seems to be growing in vigilance. Similarly, the group uses internet to glorify its evil acts of inhumanity as it did after the Dusit D2 attack of January 2019 in Nairobi claiming this action to be retaliation for the prosecution of innocent Muslims in Kenya. Separately it causes deliberate pandemonium, fear and panic to dislodge the social fabric of those it seeks to and attacks. The group has escalated its campaign on You Tube and Facebook especially posting gruesome pictures of their victories of decapitated Kenyans amongst other nationals as well as pictures of destroyed infrastructure to increase sympathisers and supporters to their ill-conceived jihadi. The machismo of some of these gruesome pictorials and messaging originating from the Westgate Shopping mall attack of 2013 in Nairobi and on Garissa University in 2014 has appealed to considerable number of youths who since have willingly joined this unfortunate course. The presence of the internet has redefined the mainstream perceptions of terrorism and violent extremism. For instance, the Garissa University massacre was led by a young Kenyan lawyer who had been radicalised during his campus years.

The innovations on the internet have remained dynamic and includes online magazines such as the Inspire which is Al-Qaeda's English version to spread their messages in the Arabian Peninsula. These creations have been used to motivate demoralized fighters in moments of defeat and defections. Evidence of this can be read from encouragement that came from leadership of Al-Qaeda upon military assault from the African Union Mission in Somali (AMISOM). Other similar online publications such as that run by Al-Shabaab is tool for propaganda. A case in point is the chiding of Kenya Defense Forces for its operation in Somalia under the "Operation Linda Nchi" (secure the country) and labeling it as its (Al-Shabaab) mission to "protect Islam," thus painting the mission as invasion of the Islamic faith to turn public opinion into hostility away from empathy.

While terror and violent extremist groups have mastered the use of internet to achieve their monstrous acts of crime, there exists an opportunity to counter this strategy through dissimilar social media platforms airing contradicting opinion(s) and truths. As opposed to the brick and mortar militaristic approaches, production of emotional counter violent extremism narratives may work well to demystify terrorist propaganda. This is how: a) offer narrative that decolonize violent extremism from the slender confinements of religious lies into light of crimes against humanity: b) enhance inter-religious dialogue which has worked to reduce animosities between different faiths on to platforms that distance from hate and outright faith racism: c) employ creative communication such as cartooning to slowly induce positive values into the minds of children and youths: d) in light of the many diverse platforms used by propagandists, provide inclusive interventions of economic wellbeing especially to youth including the development of income earning applicative online platforms that dissuade young people from joining violent extremist groups: e) returnees and re-converted former recruits be positively employed to use digital platforms to reach those they interacted with for a structured rehabilitation program: and f) encourage peer to peer communication, where messages, pictures and videos of peace, sanctity of life and religious deity are shared among friends and common acquittances. It should be remembered always that online counter-content is anchored on three main pillars namely: the message, media and the messenger.

No doubt countering violent extremism on the Internet is an arduous task for governments, many of which are torn between interventions through censorships and counter-narratives or allowing the freedom of expression and democracy to thrive through the free flow of information. Kenya is an example of how such interventions, if approached wrongly, threaten the right to privacy, freedom from discrimination, and the right of association and expression. First, terrorism-related content on the Internet should be clearly defined by the Kenyan government. This can be done through laws and bills across all parliaments in affected regions in order to ensure that there is uniformity across the region when it comes to defining terrorist content that will be illegal regardless of the jurisprudence.

For instance, the East African region can borrow a leaf from the EU's Council of Europe Convention on the Prevention of Terrorism that has provisions against the use of social media

to publicly demonstrate purpose and intent to carry out a terrorist activity. This council also provides that it is criminally culpable to disseminate material related to terrorist training. It goes without saying that uniformity in the law across the East African region is key to unraveling the terror menace. It would be difficult to get rid of extremist content online if it is illegal in one country but not anchored by any law in another.

The discussion on the threat posed by social media and radicalisation and the possible solutions show that there is no single magic bullet to end the propaganda and narratives bedeviling the region. An integrated approach that involves the use of the same social media as a tool for counter-narratives and anchoring the illegality of using social media to aid terror in uniform law across East Africa region would be a fruitful approach to take. The government alone cannot win this fight. It is vital to take an integrated stakeholder approach that involves technology experts, the civil society, religious, and political leaders. Blending local with international coordination within the Eastern African region will ensure that there aren't any avenues for spewing lies, glorifying terrorist deeds, and soliciting for followership and financing via online platforms for terrorists such as al-Shabaab.

THE COURT IS INNOCENT
TILL PROVED GUILTY!

Recent utterances and headlines on how the courts must deal with graft cases are disconcerting, primarily disparaging professional excellence while reeking of human vitriol that almost reduces operational space of an otherwise independent institution as espoused under Article 159 of the Constitution. The story on Saturday Nation dated 5th January 2019- "DPP misery: why graft fight is stuck in the ruts- an article by Paul Mwangi: On the same day, a story by Everlyne Kwamboka- "Eyes on the judiciary as corruption cases spark fierce debate" and the editorial entitled "It's now time for the judiciary to expedite pending graft cases", both appearing in the Saturday Standard.

My diatribe first picks out select lines in the referenced articles: *"This year the Judiciary should make conscious efforts to reinvent itself and while observing all tenets of justice, deal with graft cases before it" … "but for judiciary this might be a defining moment for its anti-corruption division to change public perception on how the cases of are handled compared to previous years."* These comments highlight three important issues: first is whether as a country we have clear understanding on the role of courts, the procedures and processes involved in expensing matters before them: second, is whether, our constitution proffers the independence of "four" arms of government-Judiciary, Legislature, Executive and the Public: and third, is whether the newspapers and media houses have the moral responsibility to provide factual information besides sharing commentators' opinions, on certain matters with high significance value.

The Judiciary is an independent institution and has two fundamental functions: Protecting and promoting the law, which includes interpreting and developing through precedence in cases before them. The other function is to adjudicate matters brought before it, guided by legal instruments and principle that emphasize access to justice for all, such as bail, bond administering plea, and evidence procedures. However, these functions are not necessarily a making of the court, because in law it must be moved by an "aggrieved party" on a particular matter. The court must listen with high levels of neutrality regarding the evidence presented to it in support of the position taken by the parties involved. The court must then dispense off the matters in accordance with the law, having reviewed the quality of evidence brought before it. At this point the court is innocent, not unless the procedures are highly obtuse and matters before them have undergone thorough investigations, and clarity of offense is undoubtful and meets the set standard of proof. This scenario demands that the Directorate of Criminal Investigations and the Office of the Director of Public Prosecutions work out their role to ensure that Judiciary gets water tight cases to dispense.

The attacks on the judiciary as currently experienced may have been the grounds upon which the United Nations under the Commission on Human Rights, in 1994 made an appointment for a special Rapporteur through resolution 1994/41 to monitor and work towards scaling down attacks on judges, lawyers and court officials. This resolution was an acknowledgement of the vulnerability of judicial staff and the absence of outright protection of judicial systems. Previous attacks on Deputy Chief Justice Philomena Mwilu and Justice Mwita attest.

One can understand why Kenyans are angry as regards graft. We must remember that corruption is an organized crime, and often the perpetrators invest in destruction of evidence including demobilizing witnesses. Second, perpetrators have upped sophistication and likely operate within legally recognized channels, which creates difficulty to detect the crime. Therefore, is it right for instance to claim that Justice Chacha Mwita' orders jeopardized the fight against corruption. What does it amount to, regarding his order for stopping investigations on a person of interests by Police? At this point I wish to quote Cynthia Gray in her research titled, "The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability

"Judges must be able to rule in accordance with the law which they believe applies to the case before them, free from extraneous considerations of punishment or reward. This is the central value of judicial independence. That value is threatened when a judge confronted with a choice of how to rule-and judges are confronted with scores of such choices every day-must ask not "which is the best choice under the law as I understand it"

The Incoherence between the three official arms of government, especially the blame game from those who make and execute the law predisposes Judiciary to the anger, dislike and disdain of the fourth arm-public. The media, therefore has responsibility to provide facts to ensure that the court is not crucified for standing on the side of law. If at all, there is a problem with the law, then legislators must take up the matter. In the eyes of the public, the court is Guilty for non-performance!

RIGHTS MUST SCALE
THE WALLS OF INCARCERATION

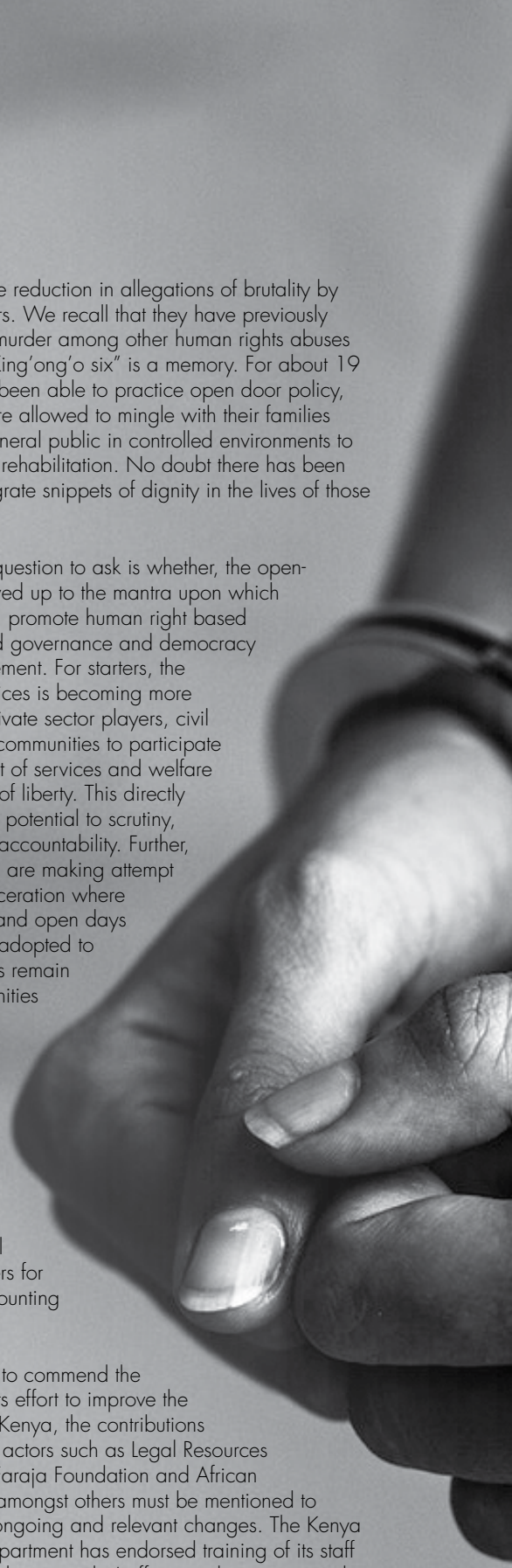
Every 10th day of December evokes 70 years of challenges and opportunities, where different members of United Nations have struggled to entrench a culture of human rights, rule of law and respect for human dignity in institutions, laws and among their people. Human Rights are inalienable irrespective of a person's station of life. The ideal has necessitated many socio-economic and political models including treaties, declarations and laws. Currently the Sustainable Development Goals and the International Bill of Human Rights are among fundamental vehicles converging development and human rights for people, including concerns for planet and prosperity. Kenya as a UN member, has committed to eradicate poverty, reduce environmental degradation and deplete acts of inhumanity among and across societies by 2030. In this context we reflect upon the rights of 55,000 incarcerated persons in several correctional facilities in Kenya.

Ordinarily Kenyan prison facilities should house 27,000 inmates comfortably. However, the actual population is double and likely to rise. Technically, this points to congestion, strained accommodation, less budgetary allocations for food and other basic services, similarly uncertainty of legal assistance, if any. On the International Prisoner's Justice day, which is 10 August, prisoners at the Thika Main prison spoke on behalf of many of their colleagues in analogous conditions, indicating the sluggishness of justice wheels. The prisoners forwarded a memo to the justice actors especially the state and judiciary with the following plea.

First, pre-trial detainees, popularly known as remandees expressed concern that court cases took long even to arrive at the stage of mention. Second, appeals were identified as grindingly slow, yet these were process driven and bound by time. Third, innovative instruments purposed to hasten matters before courts such as plea bargain, were not consistently and effectively complied with, hence not populated even when offenders were willing. Fourth, concerns of recidivism among offenders because the law remained inflexible, extending and maintaining the tag of criminality on individuals who have served their sentences in the criminal justice system. Fifth, in prison-training largely pillared on self-driven businesses, and less focus on possible employment upon serving correctional sentences; and lastly the community from which most prisoners originate were not open to welcome and take them back, even with evidence they had reformed. Yet, emerging crimes such as violent extremism and terrorism are likely to test our human rights lenses.

Though the petition from the prisoners generally indicts the criminal justice system as insensitive and archaic depicting local communities to be holding stereotypic understanding of criminality, it also represents the strides made over time. To begin with, freedom of expression and the right to canvass issues that seem to compromise the path towards justice points to desirable practice. Second, there is evidence to show that freedom of worship is not only guaranteed, but largely practiced in many of the prison facilities. Third, introduction and adoption of the United Nations Standard Minimum Rules (UNSMR) also known as Mandela Rules, has contributed to the considerable reduction in allegations of brutality by correctional officers. We recall that they have previously been accused of murder among other human rights abuses and the famous "King'ong'o six" is a memory. For about 19 years, Kenya has been able to practice open door policy, where prisoners are allowed to mingle with their families and sometimes general public in controlled environments to advance inclusive rehabilitation. No doubt there has been an attempt to integrate snippets of dignity in the lives of those behind bars.

Nonetheless, the question to ask is whether, the open-door policy has lived up to the mantra upon which it was established: promote human right based approaches; good governance and democracy in prisons management. For starters, the Kenya Prison Services is becoming more open, allowing private sector players, civil society and local communities to participate in the improvement of services and welfare of those deprived of liberty. This directly gravitates towards potential to scrutiny, transparency and accountability. Further, the prison facilities are making attempt to humanize incarceration where remote parenting and open days are quickly being adopted to ensure that families remain intact and communities thrive even when one of their own is imprisoned. Besides, the government has willed and supported the idea of some prisoners taking professional courses and careers for example law, accounting and teaching.



Though it is timely to commend the government over its effort to improve the state of prisons in Kenya, the contributions made by nonstate actors such as Legal Resources Foundation Trust, Faraja Foundation and African Paralegal project amongst others must be mentioned to contextualize the ongoing and relevant changes. The Kenya Prison Services department has endorsed training of its staff as paralegals and human rights' officers, who consequently act as internal mechanisms to ensure compliance to rule of law and human rights. Legal aid and training inmates unable to afford advocates in self representation is fast being accepted operational practice to reduce mistrial caused by inadequate understanding of court processes and law. Legal clinics and enjoining of prison officers into Court Users Committees spearheaded by Legal Resources Foundation since 2004 has improved coordination and chances to

unhinge bottlenecks in the criminal justice system. Significant, is the integration of innovative means to deal with offenses where practices such Victim Offender Mediation, diversion and Traditional dispute resolution approaches is noticeable. Furthermore, interventions to bolster the supply chain where state funds are constrained manifesting as psycho social support, improved information and technological infrastructure as well as food and stationery.

We recognize such improvement as anchored on consistent private public partnerships and a government willing to work with its citizens. If the open-door policy is strengthened then status of prisoners' rights will depart the findings of a criminal justice system's audit carried in 2017 by Legal Resources Foundation Trust in collaboration with the National Council on Administration of Justice and RODI-Kenya, which demonstrated the following: 70% of those serving jail terms and choking the case management profiles are of petty crimes, which can be diverted and assigned non-custodial sentences: the state contributes 68% of the congestion in prisons, as most in remand are victims of state regulated offenses which are statutory in nature, and may essentially require administrative and not litigious criminal approaches.

Nevertheless, prisoners' human rights can be improved. Key is the review of Kenya Prisons Act (Cap 90), partly to entrench the ongoing interventions in law, but important, establish strategies to reenergize the correctional system.

Particular clauses to: remove the criminality record on those who successfully serve jail terms, subsequently enhance re-integration of prisoners back to society: here we recall Pope Francis' caution "prisoners who are re-entering civic society ought not be punished anew by neglect, indifference or, worse, contempt": set a structure for revenue sharing on proceeds from prison enterprises between national treasury and Kenya Prison Services to boost thin budgetary allocations from consolidated fund kitty: reduce children's age from 4 to 2 accompanying their mothers into prisons: and re-introduce remission, amongst other proposals.

Kenya must respect the constitution especially Article 2 (5) that entrenches commitment to implement international treaties, legal instruments and declarations for which they are a signatory. Universal Declaration of Human Rights is one of those. Further, actualize the ideals of Article 10 on national values and edicts under the Bill of Rights. As a religious community we must insist punishment be coupled with human treatment, compassion and charity towards those imprisoned and resist situations where some of our brothers and sisters languish in abuses and violence that is both systemic and informal. 10 December should not just celebrate the many unbound, but recognize those who have consistently reminded us of the need to procure, proffer and promote humanity, notwithstanding the political or economic state of the general.

"We reflect upon the rights of 55,000 incarcerated persons in several correctional facilities in Kenya".


Notes


HUMAN
LEGAL
RIGHTS
AID
REHABILITATION
JUSTICE
COURT
LAW
JUDGE
DISABILITY
LIFE
OPINION
PEACE
FAMILY
GUILTY
ETHNICITY
WARNING
POLITIC
CHARACTER
DISCRIMINATION
BULLYING
FREEDOM
CIVIL RULE
RADICALIZATION
PROSPERITY
HOPE
SEX
VIOLENT
PREVENTING
SYSTEM
SEX TOLERANCE
COUNTERING
EXTREMISM
SOCIAL
FAITH
VIOLENT
AGREEMENT
GUILTY
CHARACTER
PEACE
EQUALITY
ETHNICITY
DISCRIMINATION

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