



# NATIONAL PRACTITIONERS' & PROFESSIONAL FIRMS GROWTH FORUM – Nairobi

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# Brief Background



- Unclaimed (or abandoned) property is property "held or owing" in the ordinary course of business that has not been claimed by the owner.
- The roots of unclaimed property laws date back to the Roman Empire and common law. At common law, the concept of escheatment was applied whereby land held in tenure (i.e. occupied by someone other than the owner) was reversed back to the Lord when the immediate tenant died without heirs.

## Brief Background..Cont'd...



- The modern rationale for state custodial statutes is that the state is best placed to preserve and protect the interest of the rightful owner.
- Not only does the state owe its citizens an obligation to regulate all financial activities, but also a duty to protect consumers.
- It therefore plays both a supervisory and a protective role; both which are recognized as international best practices.

## Brief Background..Cont'd...



- Escheatment law is therefore custodial in nature.
- What transfers to the state is possession and not ownership (title).
- Prior to the enactment of the Unclaimed Financial Assets Act in 2011, Kenya did not have specific laws that had been formulated to regulate unclaimed property.

# Unclaimed Property Laws



- The Constitution of Kenya, 2010 - Any provision that violates any fundamental human rights and in general contravenes the constitution shall be invalidated.
- Unclaimed property laws therefore have to be consistent with provisions on human rights, economic rights, provisions on consumer protection, property rights and all provisions that may have an effect in the implementation of the unclaimed property laws.

# Unclaimed Property Laws..Cont'd...



- Article 40 provides that every person has the right to own and acquire property of any description in Kenya ; either individually or in association with others.

# Unclaimed Financial Assets Act, 2011



- The Unclaimed Financial Assets Act, 2011 which came into force on 16th December 2011.
- This Act provides a legislative framework for dealing with unclaimed assets in Kenya. It is the first legislation of its kind in Africa.

# UFAA Role & Mandate



- The Unclaimed Financial Assets Authority (UFAA) is a statutory organization established under the National Treasury pursuant to the Unclaimed Financial Assets (UFAA) Act No. 40 of 2011.
- The primary mandate of the Authority is to receive unclaimed financial assets from holders of such assets, safeguard and reunite the assets with their rightful owners.

# Objects and Functions of the Authority



- Receiving of payments in respect of unclaimed assets.
- Maintenance of a Trust Fund and Investment of the funds of the Authority.
- Making payments out of the Trust Fund to identified owners of the declared assets.
- Undertake examination of the records of the holder(s) upon reasonable notice to determine the extent of compliance.
- Advising the Cabinet Secretary on pertinent issues regarding unclaimed financial assets.

# Objects and Functions of the Authority



- 27th July 2007: Finance Minister appointed a Taskforce on Unclaimed Financial Assets on the recommendation of National Economic and Social Council (NESC)
- Taskforce recommended a framework to govern unclaimed financial assets in Kenya, including a mandatory statutory framework (legal, regulatory, institutional)
- In May 2011, the MP for Laisamis, Hon Joseph Lekuton, introduced the Unclaimed Financial Assets Bill, 2011 into the National Assembly as a private member's Bill

# Background



- 2nd December 2011: Unclaimed Financial Assets Bill, 2011 was assented to and the Act commenced on 16th December 2011
- UFAA Board was gazetted on 16th November 2012
- UFAA commenced operations on 20th March 2013 as a statutory body established under the National Treasury pursuant to the Act
- The primary mandate of the Authority is to obtain unclaimed financial assets from holders of such assets, on behalf of the Government, safeguard and return the assets to their rightful owners

# Overview of the Act



- PART I - PRELIMINARY
- PART II - DETERMINATION OF UNCLAIMED (FINANCIAL) ASSETS
- PART III - DEALING WITH UNCLAIMED ASSETS, DUTIES OF HOLDERS AND POWERS OF THE AUTHORITY
- PART IV - THE UNCLAIMED FINANCIAL ASSETS AUTHORITY
- PART V - THE UNCLAIMED FINANCIAL ASSETS TRUST FUND
- PART VI - MISCELLANEOUS

# Determining UFA (s2)



“unclaimed financial assets” means financial assets that:

- have been presumed abandoned and have become unclaimed (financial) assets under the provisions of this Act; and
- have been transferred to the Authority as unclaimed financial assets; or
- have been deemed under any other law to be unclaimed assets and payable to the Authority, and includes all income, dividend or interest thereon but excludes any lawful charges thereon;

# Determining UFA (s2)..Cont'd..



“holder” means:

any entity who, in respect [of financial] assets to which this Act applies, holds such assets on behalf of an owner, is in possession of assets belonging to another, is indebted to another on an obligation, or is a trustee;

“apparent owner” means:

the person whose name appears on the records of the holder as the person entitled to assets held, issued, or owing by the holder

# How Financial Assets become 'Unclaimed'



One or more of these requirements must be satisfied for an asset to become an unclaimed financial asset:

the records of the holder do not reflect the identity of the person entitled to the assets;

the holder has not previously paid or delivered the assets to the apparent owner or other person entitled to the assets

# How Financial Assets become 'Unclaimed'..Cont'd..



- the last known address, as shown on the records of the holder, of the apparent owner is in a country that does not provide by law for the escheat or custodial taking of the assets or its escheat or unclaimed assets law is not applicable to the assets and the holder is domiciled in Kenya.
- Death; Poor record keeping
- Relocation; Ignorance/ Negligence
- Abandonment

# Presumption of Abandonment (ss 4 to 18)



Asset Classes	Period
Ownership interest (Shares and Dividends)	3 Years
Travellers' cheques / money orders	2 Years
Cheques, drafts or similar instruments	2 Years
Demand, Savings or matured time deposit	5 Years
Life or endowment Insurance Policy or Annuity contract	2 Years
Deposit for utility services	2 Years
Determination or Order by Court of refund by holder	2 Years
Assets from dissolved business entity	2 Years
Assets held in fiduciary capacity	2 Years
Gift certificates or credit memos	5 Years
Unpaid wages	1 Year
Assets held in safe deposit box	2 Years
Assets held by Court or Government department	1 Year

# Summary of Roles & Responsibilities



Holders	UFAA	Claimants
<ol style="list-style-type: none"> <li>1. Identify UFA as stipulated in the Act</li> <li>2. Make reasonable efforts to trace owners</li> </ol>	<ol style="list-style-type: none"> <li>1. Provide a structured framework for compliance</li> </ol>	<ol style="list-style-type: none"> <li>1. Make claims</li> <li>2. Submit supporting documentation</li> </ol>
<ol style="list-style-type: none"> <li>1. File reports on UFA</li> <li>2. Pay or deliver the assets to the Authority in good faith</li> <li>3. Maintain reports for a period of 10 years</li> </ol>	<ol style="list-style-type: none"> <li>1. Assume custody and responsibility for the safekeeping of assets</li> <li>2. Maintain searchable database of reported UFA</li> <li>3. Appoint relevant agents</li> </ol>	<ol style="list-style-type: none"> <li>1. Continuously search for UFA</li> </ol>
<ol style="list-style-type: none"> <li>1. Institute strong internal controls</li> </ol>	<ol style="list-style-type: none"> <li>1. General Administration of UFA in line with the Act</li> <li>2. Make authorised deductions</li> </ol>	<ol style="list-style-type: none"> <li>1. Perpetual right to reunification</li> </ol>
<ol style="list-style-type: none"> <li>1. Reunification</li> </ol>	<ol style="list-style-type: none"> <li>1. Reunification</li> </ol>	<ol style="list-style-type: none"> <li>1. Reunification</li> </ol>

# Unclaimed Financial Assets Regulations, 2016



The Authority drafted the UFA Regulations 2016 to operationalise the UFA Act, 2011.

The Regulations mainly cover:

- a) the Holders' reporting process and
- b) the Claimants'/ beneficiaries' claims process

# Reporting Timelines



- Holders of any UFA shall file the reports to UFAA and remit equivalent value of funds on or before 1st November of each year for the twelve-month period ending on the immediate preceding 30th day of June.
- The Authority may extend the filing date up to sixty days after the deadline, IF an estimated payment is paid on or before the deadline of 1st November.
- The holders are expected to provide a soft and a hard copy of the report. The hard copy report should be forwarded with a letter duly signed by the CEO/ MD. Soft copies of reports are filed online in the prescribed format

# The Authority



- Establishment of the Authority
- Composition of the Board
- Objects and Function of the Board
- Appointment of the CEO
- Exemption from Stamp Duty (instruments executed on behalf of or in favour of the Fund)

# The Trust Fund



- Establishment of the Trust Fund
- Payment of Claims
- Accounts and Audit
- Penalties Payable to the Fund
- Investment of Funds

# Consequences of Non Compliance



The Authority may exercise powers prescribed under Section 31 in the event that a holder does not comply with the Act

Penalties that may be imposed are set out in s33 of the Act (failures to pay or deliver assets)

# Powers



- Authority to appoint Agents
- Power to institute proceedings in Court
- Power to enter premises
- Offences and Penalties
- Make Regulations

# Challenges



- Education & Awareness
- Compliance
- Incomplete records
- Legislative/Reporting inconsistencies
- No recognition of UFA in IFRS & IAS

# Call to Action



- Risk Assessment - Identify compliance issues and areas of potential exposure relating to UFA law
- Quantification of Actual Liability - By Asset class and Retrospectively
- Voluntary Disclosures – Comply and Endeavour to resolve any outstanding compliance issues with UFAA
- Jurisprudence - Contribute to the review of UFA Act, 2011 and Regulations, 2016

# UFA Regulations, 2016



- The Authority developed UFA Regulations, 2016 to operationalize the UFA Act, 2011.
- The Regulations cover mainly the holders reporting process and the claims process by use of various Forms.
- The claimants are expected to fill various forms e.g. 4A or, 4B or, 4C or, 4D, and Form 5 in addition to the prescribed support documentation.
- These support documentation include identity details, holders' written remittance confirmation among others to enable the Authority to process the claims.

# Other Statutes



- Consumer Protection Act No. 46 of 2012
- The Law Of Succession Act, Cap 160
- Competition Act No. 12 of 2010
- Trustee Act Cap 167 Laws of Kenya
- Companies Act No. 17 of 2015
- Insurance Act Cap 487
- Banking Act Cap 488
- Cooperative Societies Act Cap 490
- Leadership and Integrity Act

# Benefits of Compliance



- The Authority assumes custody and responsibility for the safekeeping of assets.
- Anyone who remits Unclaimed Assets to the UFAA in good faith shall be relieved of all liability to the extent of the value of assets paid or delivered to the Authority.
- Where the holder pays or delivers assets to the Authority in good faith, then the Authority shall defend the holder against the claim and indemnify the holder against any liability on the claim.

# Benefits of Compliance



- Enhances shareholder/customer relations;
- Minimizes corporates “deadwood”
- Reunites and reactivates missing owners with their assets and clients with their deposits;
- Reduces operating expenses/overheads;
- Eliminates regulatory/non-compliance risks
- Reduces risk of operational fraud, in addition to class action suits given the assertive, and increasingly litigious nature of the Kenyan consumer;
- Obviates embarrassing and awkward questions

# Consequences of Non-Compliance



- The Authority may exercise powers prescribed under Section 31 in the event that a holder is not complying with regards to due filing procedures.
- Penalties that can be instituted are:
- The holder shall pay to the Authority interest at the current monthly rate of 1% above the adjusted prime rate per annum per month on the assets or value of the assets from the date the assets should have been paid or delivered.
- The adjusted prime rate shall be based on the Central bank of Kenya average rate during the twelve-month period ending thirtieth day of September.

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# THANK YOU!



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