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**OVERVIEW OF LEGAL COMPLIANCE OBLIGATIONS AND
ENFORCEMENT OF VARIOUS CONTRACT CLAUSES DURING AND POST
THE PANDEMIC**

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OVERVIEW OF LEGAL COMPLIANCE OBLIGATIONS AND ENFORCEMENT OF VARIOUS CONTRACT CLAUSES DURING AND POST THE PANDEMIC

Introduction

Covid-19 has had a negative impact on commerce over and above public health in Kenya. Key amongst areas of socio-economic relationships affected are contractual obligations. These obligations have suffered substantially as a result of measures taken by the Government of Kenya in compliance with World Health Organisation guidelines to contain the spread of Covid-19. I propose to review the general legal framework of key contractual obligations that underlie the day to day activities of an ordinary Kenyan, trace the legal interventions taken upon the discovery of Covid-19 and discuss how these legal interventions have impacted compliance obligations and enforcement of various contract clauses during and post the pandemic. I make recommendations necessary to ameliorate the current plight and enable return to normalcy post the pandemic and conclude.

Legal framework of key contractual obligations

There are several laws which govern the manner of entry into and performance of contractual obligations. The **Law of Contract Act Cap 23 of the Laws of Kenya** provides for general principles of contract. The emphasis in the **Act** is the necessity for contracts to be evidenced in writing and witnessed. Without providing for every matter in the making and meeting contractual obligations, the **Act** incorporates the application of the common law of England relating to contract. Specific detailed contractual

obligations will be found in individual contracts negotiated between parties or implied by common law and **Acts** of Parliament. A few examples germane to this discourse will suffice.

The starting point is the **Employment Act, Cap 226 of the Laws of Kenya**. It is the primary obligation of the employee to work in the manner contracted and the duty of the employer to pay and protect the wages due to the employee.¹ The rights and duties in employment are enumerated to include: basic minimum conditions of employment; hours of work; annual leave; maternity leave; sick leave; housing; water; food; and medication.² Where termination of employment is necessitated by factors other than disciplinary for instance redundancy³ or insolvency of the employer⁴ several considerations come into play.

The sale and alienation of movable and immovable property is governed by various **Acts** of Parliament, which in addition to specific conditions of contract determine the time within and the manner in which contracts are to be performed.⁵ Without finishing the categories of such transactions, the purchase of motor vehicles and land is pegged upon the obligation of the purchaser to pay the purchase price on completion date.⁶

¹ See Sections 17 to 25 of the Employment Act.

² Sections 26 to 34 of the Employment Act explain in detail how these rights are exercised and duties performed.

³ Under Section 40 of the Employment Act the employer is required to notify the trade union of which an employee is a member and the labour office of the reasons for and the extend of the intended redundancy or the employee in cases/he is not a member of a trade union a month before date of termination. Several consideration are to be taken into account in terminating for redundancy including but not limited to the age of the employee.

⁴ Sections 66 to 73 of the Employment Act provide for ways in which employment will be terminated with less dues to an employee following the insolvency of an employer.

⁵ The Movable Property Security Rights Act No 13 of 2017 is the regime for purchase and finance of movable property whilst the Land Registration Act No 3 of 2012 regulates the sale and alienation of land.

⁶ Time varies depending on the agreement between contracting parties in the purchase of motor vehicles whilst ninety days is considered to be widely accepted time for concluding the purchase of land transaction.

These are the purchase price and completion clauses. Failure to complete in time or at all has penal consequences including payment of interest and forfeiture of the deposit paid under the contract as well termination of the contract. These are the delay and termination clauses. In certain cases, these contracts may provide for termination due to events beyond the control of the parties. This is commonly known as the *force majeure* clause.⁷

There is then the Banker-Customer relationship upon which business people and incorporated entities borrow to finance commercial enterprises. The time of payment of loans advanced, the rate of interest and penalties for default are issues generally provided for by the **Central Bank Act Cap 491 of the Laws of Kenya, Banking Act Cap 488 of the Laws of Kenya** and the **Bill of Exchange Act Cap 27 of the Laws of Kenya**. However, specific lending agreements and securities given by the borrower contain more elaborate but often standard form terms which the borrower has no or little negotiation power over. The failure or delay in performance of these contractual obligations invites legal consequences including realisation of securities provided by the borrower, repossession of chattels, actions for recovery of the sums advanced and listing with the Credit Reference Bureau. Interest and penalty clauses are every borrower's nightmare as they cripple one should the venture financed fail to repay the loan.

⁷ A force majeure clause provides temporary reprieve to a party from performing its obligations under a contract upon occurrence of a force majeure event.

Legal interventions taken upon the outbreak of Covid-19

The Government of Kenya is the biggest enabler of commerce. No wonder therefore, when Covid-19 struck in February, 2020, the Law Society of Kenya moved to Court for assurance on:

...[A] contingency plan on prevention, surveillance, control and response to corona virus (COVID19 outbreak in Kenya.⁸

This litigation was intended to secure the health safety of Kenyans. The failure of action or response by the Government of Kenya to the directive by the Court would manifest in many other acts and omissions together decisions taken by it on the socio-economic implications of Covid-19. Attendant to these would be legal consequences on contractual performance.

The President of the Republic of Kenya would issue directives aimed at containing the spread of Covid-19 and lessening the economic plight of Kenyans.⁹ Some of these directives resulted in policy decisions or legislation impacting compliance obligations and enforcement of various contract clauses. The 15th March, 2020, directive resulted in the suspension of public activities including the closure of learning institutions and places of work. This decision did not take into account contractual obligations that would be affected by it. Contracts could not be performed or fully performed for no fault

⁸ On 28th February, 2020, the High Court issued an order in Law Society of Kenya v Cabinet Secretary for Health & others, Petition No 78 of 2020 (UR) directed at the Cabinet Secretary for Health to provide the contingency plan. No plan has been provided to date.

⁹ Fourteen directives have been issued between March and November, 2020.

of the contracting parties. Land Registries were closed affecting the registration of charges, mortgages and discharges necessary to facilitate borrowings and secure advances. Courts were scaled down leaving contracting parties exposed without a place to run to for temporary reprieve to ensure the performance of others' contractual obligations or prevent adverse action being taken against them for inability to perform their contractual duties as a result of the pandemic.

On 25th March, 2020, the President of the Republic of Kenya directed Parliament to implement several tax reliefs, encouraged government employees to take salary cuts and directed government employees with pre-existing medical conditions or above fifty eight years of age to take leave or work from home. It would follow that private employers had to consider extending the **“leave or work from home”** directive to their employees. This intervention reduced labour output from employees yet the employers' duty to pay wages subsisted.

The Curfew Order which has been enforced since 27th March, 2020¹⁰ and the restriction of movements on movement enforced from 6th April, 2020 impacted negatively on contracts of employment, sale transactions, commercial contracts amongst many other contractual obligations. Employees locked out affected Counties could not access places of work. Several employers terminated contracts of employment, send staff on unpaid leave or declared redundancy. Some petitioned for insolvency. Businesses shut

¹⁰ On 16th April, 2020 the High Court ruled in *Law Society of Kenya v Inspector General of National Police* that the Curfew Order was necessary to combat the spread of Covid-19 notwithstanding the uncertainty of the duration and impact on commerce. Members of the Law Society of Kenya were designated as essential service providers and therefore, exempt from its application.

or scaled down exposing owners to recall of loans and reduced production. For instance, Fairmont Hotel Nanyuki threatened closure and termination of all staff, a process that was halted at the intervention of the Solicitor General. On the other hand, Kenya Airways declared several pilots redundant as it could not sustain their wages on account of reduced air ticket sales following the suspension of local and international air travel.¹¹ In some cases, Courts have been reluctant to intervene and offer reprieve where contractual obligations cannot be met on account of the effects of Covid-19 and in others have intervened. Uncertainty continues to loom when one is faced with a challenge in performing contractual obligation despite impairment by Covid-19.

Parliament passed **The Tax Laws (Amendment) Act, 2020** and the same was assented to by the President of the Republic of Kenya on 25th April, 2020. It cannot be ascertained with exactitude, what the legal impact this **Act** has had in so far compliance obligations and enforcement of various contract clauses is concerned. Suffice it to say, cases abound in Court, where people have sought to stop actions taken against them as a result of their failure to meet their contractual obligations due to the effects of Covid-19. There are also many cases where businesses have collapsed on the weight tax liabilities which hinder performance of contractual obligations necessary to sustain those businesses.

The Pandemic Response and Management Bill, 2020 contained a raft of amendment proposals intended to ease the plight of contracting parties. First, it sought to suspend

¹¹ There is pending before the High Court and the Court of Appeal a claim by the pilots challenging the redundancy. On 25th August, 2020 the High Court halted the redundancy on a technical challenge, in a decision made in Kenya Airlines Pilots Association v Kenya Airways & others (2020) but gave Kenya Airways the go ahead to commence the process afresh.

the realisation of securities on loans.¹² Second, a moratorium on penalties was to be given for late payments.¹³ Third, there would be prohibition of levy of distress, repossessions and termination of leases.¹⁴ Fourth, landlords would not be able to terminate leases for defaulting tenants.¹⁵ There are many other incentives offered under the Bill. The Bill is yet to be passed and it is doubtful that it will ever see the light of day noting the far reaching implications it has on the right of parties to contract and enforce those contracts. May be Parliamentarians, many of whom are capital owners targeted in the Bill, do not want to hold the shorter end of the stick by having such laws in place.

In the meantime, the Government continues enforcing **The Public Health (Covid-19 Restrictions of Movement of Persons and Related Measures) Rules, 2020**. These Rules limit optimum use of business spaces and passenger vehicle spaces in so far they direct the number of users of these spaces. How is an investor who has purchased a matatu or bus for maximum transport capacity meet her/his targets to repay loans with reduced passenger capacity? Contractual obligations get caught up in the course of enforcement of the Rules. These Rules though well intentioned, have not been enacted by Parliament and are constantly being reviewed in subsequent directives by the President of the Republic of Kenya without any empirical data or legal justification to support the reviews. It would be neat if these measures were considered objectively and implemented in a proper legal framework of effectively combating Covid-19 without

¹² Section 26.

¹³ Section 27.

¹⁴ Section 28.

¹⁵ Section 29.

unnecessary interruptions to compliance obligations and enforcement of various contract clauses affected thereby.

Recommendations

Covid-19 is likely to prevail for a period longer than we can humanly predict. If the Spanish flue is an example to go by, Covid-19 may be here for another one year. The negative effect on contracts will enormous. There is therefore, urgent need for a legal framework to secure the manner of performance of contractual obligations in the intervening period without imperilling commerce. Some of these measures require urgent legislative intervention whilst others demand prudent individual contracting decisions. The United Kingdom from whom we have historically borrowed legislation enacted the **Coronavirus Act 2020** as early as 25th March, 2020. It is therefore, expected that Parliament, should it survive the current illegitimacy challenge, pass **The Pandemic Response and Management Bill, 2020** and any other necessary law to cater for the immediate and long term effects of Covid-19. Over and above legislation which may be aspirational, contracting parties would require legal innovation to incorporate in their contracts clauses that enable them an easy way out should they fail or delay to perform their respective obligations. Short-term employment contracts will be necessary. Staggered instalment payments for purchases of chattels and land with less punitive exit options will be required. Well thought of long repayment periods for loans with room to negotiate in the event of delayed payment will be necessary. Prudence in contracting, not limited to legal expertise but including other experts will be necessary for sustainability.

Conclusion

Covid-19 has impacted negatively on compliance obligations and enforcement of various contract clauses and its effects will be felt post the pandemic for several reasons. First, conditions and terms of contracts have to be performed fully or the contracts terminated with drastic legal consequences notwithstanding the handicaps portended by Covid-19. Secondly, measures directed by the President of the Republic of Kenya towards policy and legislation have not suspended the performance of obligations and enforcement of various contract clauses in particular, time bound and money payment obligations. Third, Parliament appears unconcerned or impervious to the predicament of contracting parties resulting from the effects of Covid-19. Fourth, where monies have been directed to be channelled towards alleviating economic effects of Covid-19 the same have been misappropriated or plundered and there appears to be no accountability mechanism of remedying the transgression. Parties must therefore, ensure continued compliance with their obligations and enforcement of various contract clauses. Caution must be taken when getting into any contracts with long term obligations. It is now more than ever before, that the keen eye of legal and other experts are required before putting your signature on any binding contract.