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Kenyan banking law – introducing the *in duplum* rule

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The Banking (Amendment) Act 2006 was published in the *Kenya Gazette Supplement No 93* dated January 2 2007 and proposed significant amendments to the Banking Act (Chapter 488 of the Laws of Kenya) with respect to the regulation of banks and financial institutions in Kenya. Pursuant to Legal Notice No 52 of 2007, the Amendment Act came into operation on May 1 2007. This article highlights the impact of two critical changes to the banking laws, namely (i) the limits on amounts recoverable on non-performing loans, and (ii) the prohibition of levying fees in respect of certain accounts.

Amounts recoverable on non-performing loans

The Banking (Amendment) Act 2006 brings into effect the *in duplum* rule with the introduction of a new section 44A to the Banking Act which limits the amount recoverable from a debtor with respect to non-performing loans by providing that the maximum amount recoverable is the sum of: (a) the principal owing when the loan becomes non-performing; (b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and (c) expenses incurred in the recovery of any amounts owed by the debtor. Simply put, banks will only be entitled to recover a maximum of twice the principal amount owing at the time the loan becomes non-performing plus the costs of recovery.

The Amendment Act provides that the term "debtor" includes a guarantor. Accordingly, it is suggested that the maximum amount recoverable will be subject to the above limits notwithstanding the security held by a lender.

Subsection 44A(3) provides that if a loan becomes non-performing and the debtor resumes payments on the loan and then the loan becomes non-performing again, the above limitations "shall be determined with respect to the time the loan last became non-performing". This seems to suggest that a non-performing loan can become a performing loan if the debtor resumes payments, but the Central Bank of Kenya's prudential guidelines do not envisage a such a situation. This potential inconsistency will have to be addressed, possibly by amending the definition of a non-performing loan in the prudential guidelines to harmonize it with the provisions of the Amendment Act.

Section 44A does not limit any interest accruing pursuant to a court order. Of more concern to banks and financial institutions, this section will apply retrospectively to loans made before the section comes into operation, including loans that are already non-performing. For such non-performing loans, the maximum amount recoverable will be the aggregate of: (i) the principal and interest owing on the date of commencement (May 1 2007); (ii) interest accruing after this date but not exceeding (i); and (iii) the costs of recovery.

Imposition of charges and payment of interest

The Banking (Amendment) Act 2006 also includes restrictions on the fees imposed on certain accounts and mandatory provisions for the payment of interest on deposits. The introduction of a new section 16A to the Banking Act provides that:

(a) no institution shall impose any form of charges on a savings, seven-day call or fixed deposit account;

(b) an institution shall pay interest accruing to a savings account as long as the minimum balance is maintained; and

(c) in respect of a seven-day call or fixed deposit account, an institution shall pay interest accruing to the account on agreed contractual terms provided that such interest may be forfeited if the deposit is uplifted before the maturity date.

It is interesting to note that the various accounts referred to have not been defined. Nonetheless, banks will not be entitled to levy any administrative or other fees on such accounts, as used to be the practice.

The new provisions mentioned above seek to re-introduce, to a limited extent, those contained in the Central Bank of Kenya (Amendment) Act 2000, which had attempted to cap interest rates that financial institutions could charge on loans and advances to the principal sum loaned and further provided that a contravention of its provisions would constitute an offence. However, the 2000 act provided for a commencement date of January 1 2001 (several months before it was in fact published), and the High Court of Kenya held that this was inconsistent with the Constitution of Kenya and was therefore "void to the extent that it is penal and retroactive".

Financial and corporate

Recommended firms
Tier 1
Kaplan & Stratton
Tier 2
Anjarwalla & Khanna
Daly & Figgis
Hamilton Harrison & Mathews
Walker Kontos
Tier 3
Iseme Kamau & Maema
Tier 4
Oraro & Company

Kenya has been slow to develop, with widespread corruption stunting the country's financial growth; a prospect that seemed assured during the optimism of the sixties. Instead, the Kenyan economy has been in a state of sluggish decline over the past few decades.

But there are signs of change. The Kenyan government is more supportive of the free-market economy and the private sector than it used to be, leading to a healthier flow of foreign direct investment. "This year has been quite rosy," said one lawyer. "The work is getting bigger and bigger and firms are in the search of specialists - that is how I see the market moving."

And with general elections due in December 2007, there may be an even better chance a brighter future. To win over Kenyan voters, the contending parties are promising a tough stance on corruption and pragmatic fiscal policies, such as an extensive privatization programme. What form these policies take - as long as they turn out to be more than cynical hot air - will eventually shape Kenya's economic destiny.

Kaplan & Stratton

Kaplan & Stratton is the biggest and most successful law firm in Kenya. "You can't doubt the quality of the individuals, especially Richard Harney and Oliver Fowler," said one its rivals.

The firm has traditionally held the top spot in the Kenyan market, and while it still has a strong foothold in the market, it is increasingly facing competition from the tiers below. "It stands out in the market, but its days of hegemony are more or less over," said one market commentator.

At the time of writing, it was acting for CFC Bank in its acquisition and merger by the Standard Bank of South Africa. Actis Africa, a private-equity fund investor, also used the firm's services in relation to an equity investment.

In a standout deal, the 80-year old firm acted for Shell Petroleum in its acquisition of BP Africa's down-stream businesses in Kenya. The same client used Kaplan & Stratton's services to purchase BP's shares in the Kenyan joint venture. TPS Eastern Africa used its services on cross-border restructuring and the listing on the Nairobi Stock Exchange. Oliver Fowler, who heads the commercial department, advised International Finance Corporation in a $7.5 million cross-border financing by way of a loan to Intraspeed Group.

In another deal, the firm acted for Overseas Private Investment Corporation in the $7.1 million financing of Jopa Villas. Rabai Power came to Fowler and his team for assistance in the establishment of a thermal power project, including licensing and leasing.

Clients and rivals mentioned Philip Coulson as a highly talented individual and he has worked on a number of significant private-equity deals in the last year, such as the proposed acquisition of an UK company with subsidiaries in Kenya and other African countries. Lastly, the firm advised Sanlam, a financial services group from South Africa, on the acquisition of controlling interest in Pan Africa Insurance Holdings, listed on the Nairobi Stock Exchange.

Leading lawyers
Philip Coulson
Oliver Fowler
Richard Harney

Anjarwalla & Khanna Advocates

"In terms of quality, Anjarwalla & Khanna is the second-best firm in Kenya after Kaplan & Stratton," said one peer when asked about the eight-partner firm. On the deals front, the practice advised Société Générale on an $80 million loan and letter of credit facilities to an oil company in east and central Africa. The oil sector provides a substantial part of the firm's business, and in another recent deal it advised Rand Merchant Bank on a $45 million facility to an oil company.

The firm is part of the Africa Legal Network, cooperating with Masembe Makubuya Adriko Karugaba & Ssekatawa Advocates from Uganda and Ringo & Associates from Tanzania. In one if its key deals, it advised International Financial Corporation on a $9 million facility to Advanced Bio-Extracts and its subsidiaries in Kenya, Uganda and Tanzania.

In February 2007, Anjarwalla & Khanna represented Wesbank in the aircraft leasing and mortgage financing of aircrafts in Kenya and Uganda. It also acted for Rai Holdings on the acquisition of 51% of the Ugandan government's shares in Kinyara Sugar Works. The $20 million deal was closed in October 2006 and was the biggest privatization deal in Uganda.

Sonal Sejpal was given identified by clients as one of the firm's leading names. "She is good at managing client expectations and very interactive and articulate. She is extremely helpful and knowledgeable about local Kenyan laws," said one client.

On the M&A side, it was involved in the acquisition of ExxonMobil's local operations on behalf of its client Tamoil. Finally, it was also advising DEG & Proparco on an equity investment in Investment & Mortgages Bank.

Among the firm's project finance work this year has involved advising Herakles Telecom on a proposed east and southern African undersea fibre optic cable.

Leading lawyers
Atiq Anjarwalla
Karan Anjarwalla
Sonal Sejpal

Daly & Figgis

According to a client: "Daly & Figgis is a top-quality firm, and with Hamish Keith it has one of the best lawyers in the country". The firm had another successful year, despite losing its partner Zul Alibhai, who joined a Dubai firm.

Daly & Figgis has been heavily involved in the recent wave of foreign investment, acting for Virgin Atlantic Airlines in legal aspects of setting up operations in Kenya. It also acted for Renaissance Group when it established its investment banking operations in Kenya, by incorporating two of its subsidiaries. Finally, Scangroup was assisted by the firm on its listing on the Nairobi Stock Exchange along with some restructuring work.

Leading lawyers
Ashwini Bhandari
Hamish Keith

Hamilton Harrison & Mathews

Peers believe that Hamilton Harris & Mathews is "at its peak" right now, and is renowned for its strong government connections. The firm has been working for the International Finance Corporation and the Kenyan government in the restructuring and privatisation of Telkom Kenya. It also participated in the negotiations with Vodafone with regard to the sale of 9% of Telkom's shares in Safaricom, and the deal is expected to close by the end of the year.

One of the firm's partners, Paras Shah, won several accolades for his assistance to Rift Valley Railways Consortium when it was awarded a 25-year concession by Kenya and Uganda Railways. This was one of the first successful rail privatizations in the region and was valued at $125 million.

Andrew Mugambi, described by one rival as "a superb capital markets lawyer", worked along with Paras Shah on the listing, issue and offer of shares of AccessKenya Group. The $12 million transaction also included working on the employee stock ownership plan. The firm advised Standard Chartered in the financing of a $125 million for Tiomin Kenya. Some of its key clients include PricewaterhouseCoopers, KPMG, Commercial

Bank of Africa, General Electric, Guardian Bank, Coca-Cola East Africa and the World Bank.

Hamilton Harrison & Mathews is particularly renowned for its capital markets work and assisted the Government of Kenya in the partial privatization of the Kenya Reinsurance Corporation by way of an initial public offering (IPO) on the Nairobi Stock Exchange. It is also advising the Kenya Electricity Generating Company in a secondary public offering of shares after working with the company on its IPO in 2006. Trafigura Europe used the firm in its takeover of an oil storage business in Kenya and Tanzania. Finally, it advised Aureos East Africa Fund on a $3 million private-equity investment in Ovidian Advertising and Design.

Leading lawyers

Andrew Mugambi
Richard Omvela
Paras Shah

Walker Kontos Advocates

Walker Kontos Advocates moves into the second tier after its rivals had only good things to say about the firm. “It is definitely not a tier three firm, it must move up,” said one lawyer.

One client praised the firm’s lawyers, especially for work in the banking sector, and the practice was involved in the largest bank merger in Kenya between Stanbic Bank Kenya and CFC Bank. In another project Walker Kontos acted for the mandated lead arrangers in providing an $85 million syndicated loan to Telkom Kenya for restructuring purposes. Another deal that displays the firm’s banking expertise was when it acted for the Bank of Africa Kenya on the acquisition of a majority share in Eurafrican Bank.

When the firm opened in 1988, it was heavily involved in property financing, but over the last decade it has grown into one of the leading corporate and commercial firms in the country.

Michael Kontos was singled out for his work and one competitor praised his “attitude and technical know-how”. He worked on the Rift Valley Railways project which deals with the concession of the Kenya Railways. The firm is also part of the Africa Legal Alliance, giving it good access to other local firms in the surrounding regions.

Leading lawyers

Alexandra Kontos
Michael Kontos
Peter Mwangi

Iseme Kamau & Maema Advocates

Iseme Kamau & Maema Advocates is one of the younger firms in Kenya and has been making strides in the market in the last couple of years.

On the deals side, it advised Coca-Cola East & Central Africa in the acquisition of real estate for the construction of an office complex. The $12.6 million transaction was pending at the time of writing and was handled by partners James Kamau and William Maema, along with two associates. In another property financing project it acted for Pillar Amusement Parks in the development of about 700 maisonettes. The firm is included on the panel of nine commercial banks in Kenya in connection with security documentation. Partner William Maema advised the African Lakes Corporation in its acquisition by Telkom South Africa, and provided legal support to its local subsidiaries.

Leading lawyers

James Kamau
William Maema

Oraro & Company

Oraro & Company maintains its position this year after good feedback from its clients and peers. “Despite being more of a litigation-oriented firm, it has improved over the last few years,” said one of its competitors. The firm is more active in banking than in M&A and capital markets. According to one of its clients, who has worked with the firm on banking matters, its lawyers have a professional attitude, with the client further commenting on the “invaluable experience and leadership of managing partner George Oraro”. Another client said: “It has immense experience in matters related to banking, companies and commercial securities law.”

Leading lawyers

George Oraro