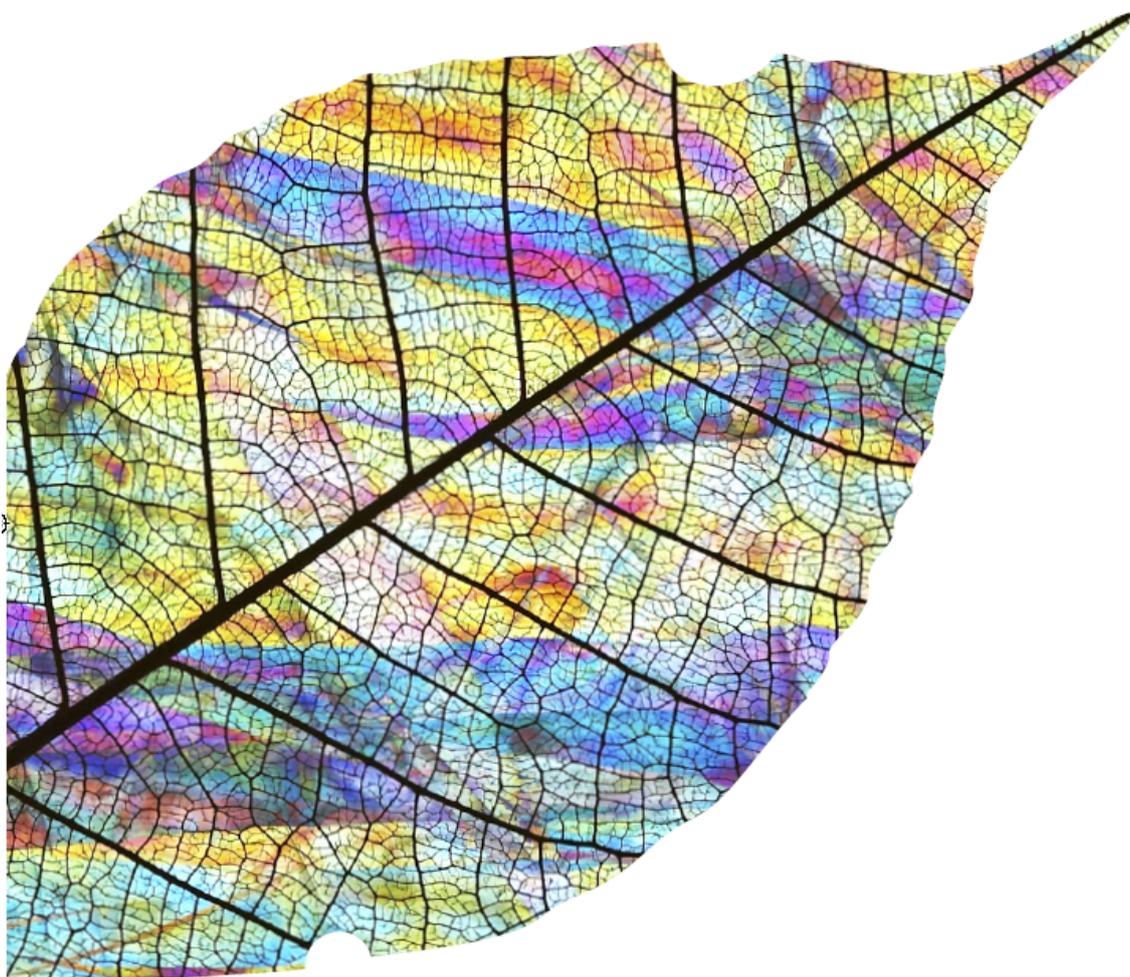


World Universities Comparative Law Project

Legal rating of Kenya

carried out by students at the University of Nairobi School of
Law

A production of the Allen & Overy Global Law Intelligence Unit



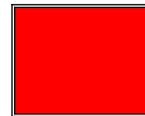
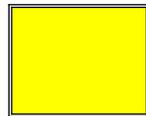
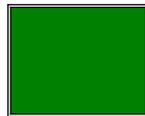
December 2014

World Universities Comparative Law Project

Legal rating of Kenya

**carried out by students at the
University of Nairobi School of Law**

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Produced by the Allen & Overy Global Law Intelligence Unit

World Universities Comparative Law Project

The World Universities Comparative Law Project is a set of legal ratings of selected jurisdictions in the world carried out by students at leading universities in the relevant jurisdictions. This legal rating of Kenya was carried out by students at the University of Nairobi School of Law.

The members of the Practitioner Expert Panel with whom the students could discuss the questions in the survey were:

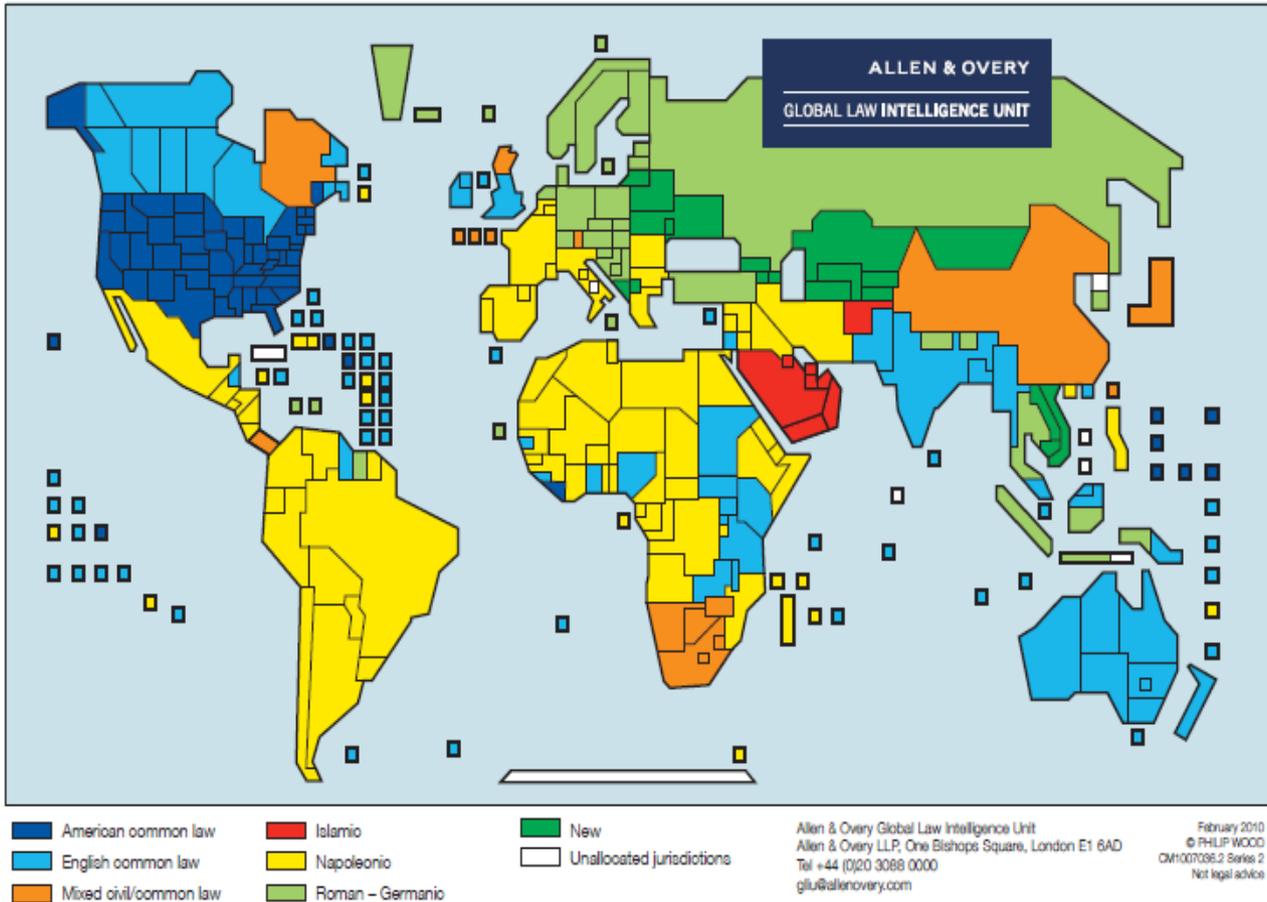
Ms Rosa Nduati-Mutero

Ms Maureen Mujera

The Allen & Overy Global Law Intelligence Unit produced this survey and is most grateful to the above for the work they did in bringing the survey to fruition.

All of those involved congratulate the students who carried out the work.

Families of law



Foreword

The University of Nairobi (UoN) School of Law is proud to present this report prepared in conjunction with Anjarwalla & Khanna Advocates. I laud the team of nine students from the School who dedicated their time to undertake research for this study. The students, all exemplary performers, were chosen on merit from the 2014 graduating class of UoN. They took time and painstaking care to ensure that the research was as conclusive as possible despite attending to their class work.

The project involved, undertaking a survey on the corporate and financial laws in Kenya, with the aim of coming up with a well-researched risk rating. This rating is meant to be used to benchmark the Kenyan corporate environment against other countries drawn from a wide array of jurisdictions around the Globe. The risk-profiling was undertaken using a colour-coded standard technique developed by Allen & Overy. The final report gives succinct but meaningful perspectives and insights into Kenya's business environment.

The University of Nairobi acknowledges the numerous jurists and practitioners who guided the students throughout the research process. They have indeed invested in brushing true diamonds in the rough to get their shine out. Special thanks to Anjarwalla and Khanna Advocates whose corporate team chaperoned the process.

We are immensely grateful to Allen and Overy for having considered our school and students as their partner of choice in this endeavour. Our students and school have benefitted from the collaboration and together with you, we hope to contribute to the knowledge base for investors in Kenya - a leading economy in East and Central Africa considered to be strategic to investors. I hope that the information gathered will provide useful insights for potential investors in the East-African region.

Prof. Patricia Kameri-Mbote SC

Professor of Law & Dean,

University of Nairobi School of Law

Description of the legal rating method

Introduction

This paper assesses aspects of the law in Kenya with a view to rating the law in the relevant areas. The survey is concerned primarily with wholesale financial and corporate law and transactions, not with retail law.

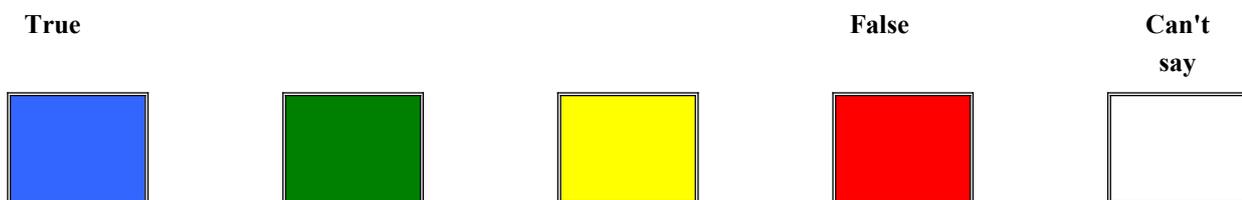
Legal risk has increased globally because of the enormous growth of law; because of its intensity; because many businesses are global but the law is national; because nearly all countries are now part of the world economy; and because the law is considered to play a very significant role in the fortunes of our societies. Liabilities can be very large and reputational losses severe.

The survey was carried out by students at the University of Nairobi School of Law. The survey was designed by the Allen & Overy Global Law Intelligence Unit.

The students were requested to express their views freely and in their own way. The views expressed are their views, not necessarily those of, the University of Nairobi School of Law, the members of the Practitioner Expert Panel or the Global Law Intelligence Unit, the members of Allen & Overy.

Methodology

The survey uses colour-coding as follows:



Blue generally means that the law does not intervene and the parties are free, ie the law is liberal and open.

Red generally means that there is intense legal intervention, usually in the form of a prohibition.

Green and **yellow** are in-between.

The purpose of this colour-coding is to synthesise and distil information in a dramatic way, rather than a legal treatise. The colours correspond to a rating of 1, 2, 3 or 4, or A, B, C or D.

The cross in the relevant box signifies the view of the students carrying out this assessment of the position of Kenya. This is followed by a brief comment, e.g. pointing out qualifications or expanding the point. These comments were written by the students.

The colour-coding does not usually express a view about what is good or bad. Whether the law should intervene in a particular arena is a matter of opinion. The scale is from low legal intervention to intense legal intervention or control. This is not a policy or value judgment as to whether or not the law should or should not intervene. Jurisdictions often disagree on whether the law should intervene and how much. So one of the main purposes of this survey is to endeavour to identify some of the points of difference so as to promote fruitful debate.

Black letter law and how it is applied

This survey measures two aspects of law. The first is black letter law, ie what the law says or the written law or law in the books.

The second measure is how the law is applied in practice, regardless of what it says. Thus, the law of Congo Kinshasa and Belgium has similar roots but its application is different.

Although there is a continuum, these two measures have to be kept separate. Otherwise we may end up with just a blur or noise or some bland platitude, eg that the law depends upon GDP per capita.

In fact, only the last two questions deal with legal infrastructure and how the law is applied. All of the others deal with the written law, without regard to enforcement or application.

Key indicators

The survey uses key indicators to carry out the assessment. It is not feasible to measure all the laws or even a tiny fraction of them. The law of most jurisdictions is vast and fills whole libraries.

The key indicators are intended to be symptomatic or symbolic of the general approach of the jurisdiction. To qualify as useful, the indicator must usually be (1) important in economic terms, (2) representative or symbolic and (3) measurable. In addition, the indicators seek to measure topics where jurisdictions are in conflict. There is less need for measuring topics where everybody agrees.

An important question is whether this method is useful or not, and, if it is, whether the indicators are relevant.

Legal families of the world

Most of the 320 jurisdictions in the world, spread just under 200 sovereign states, can be grouped into legal families. The three most important of these are: (1) the common law group, originally championed by England; (2) the Napoleonic group, originally championed by France; and (3) the Roman-Germanic group, originally championed by Germany, with major contributions from other countries.

The balance of jurisdictions is made up of mixed, Islamic, new and unallocated jurisdictions.

Many aspects of private law are determined primarily by the family group, but this is not true of regulatory or economic law.

Excluded topics

This survey does not cover:

- transactions involving individuals
- personal law, such as family law or succession
- competition or antitrust law
- intellectual property
- auditing
- general taxation
- macroeconomic conditions, such as inflation, government debt, credit rating or savings rates
- human development, such as education, public health or life expectancy
- infrastructure, such as roads, ports, water supply, electricity supply
- personal security, such as crime rates, civil disorder or terrorism.

Banking and finance

Introduction

Banks and bondholders (typically also banks, but also insurance companies, pension funds and mutual funds) provide credit or capital. Their main risk is the insolvency of the debtor and therefore the key indicators intended to measure whether the law supports those habitual creditors or debtors, such as large corporations as borrowers, when it matters, ie on bankruptcy. This is when commercial law is at its most ruthless in deciding who survives and who drowns.

This debtor or creditor decision is implemented mainly through the bankruptcy ladder of priorities. A feature of common law systems is the presence of super-priority creditors who are paid before anyone else - creditors with a set-off or a security interest and beneficiaries under a trust. For example, if a bank has universal security over all the assets of a company, the bank is paid before all other creditors, including employees and trade creditors. This regime therefore protects significant creditors who such as banks.

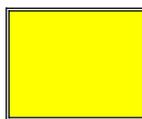
Jurisdictions based on the English common law model give super-priority to all three claimants. Traditional Napoleonic jurisdictions typically do not allow insolvency set-off, have narrower security interests and do not recognise the trust. Their bankruptcy ladder favours greater equality of creditors. Most traditional Roman-Germanic jurisdictions are in-between. They allow insolvency set-off and have quite wide security but most do not recognise the trust. There are wide exceptions to these generalisations.

Insolvency set-off

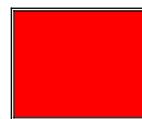
Generally If set-off of mutual debts is allowed on insolvency, the creditor is paid. If it is not allowed, then effectively the creditor is not paid. Very large amounts are involved in markets for foreign exchange, securities, derivatives, commodities and the like, so that the question of whether exposures should be gross or net is a matter of policy as to who the law should protect.

Q1 In Kenya, creditors can set off mutual debts on the insolvency of a debtor if they are incurred before notice of the insolvency.

True



False



Can't
say



Comment:

With respect to individuals, set off is allowed where there have been mutual credits.¹ In the winding up of an insolvent company, the bankruptcy rules under the law of bankruptcy with respect to the estates of individual persons adjudged bankrupt do apply.² However, the provisions on set-off are not absolute and set off is limited to insolvent companies. Consequently, it will not apply to a solvent company winding up, nor will it apply to a company insolvent at the commencement of the winding up but which subsequently turns out to be solvent. Set off will also not be implemented where an official receiver has been appointed. It should be noted that the Bankruptcy and

¹ Bankruptcy Act, (Chapter 53, Laws of Kenya) S. 36

² Companies Act, Chapter 486, Laws of Kenya) S. 310

Companies Act of Kenya is old and might be replaced by the Insolvency Bill and Companies Bill of Kenya.

Security interests

Generally Security interests give priority to the creditor with security - typically banks - who are the main providers of credit in most countries.

In traditional common law jurisdictions, a company can create universal security over all its present and future assets to secure all present and future debt owed to a bank. Once registered, the security is valid against all creditors, except that the floating collateral ranks after preferred creditors - typically wages and taxes. The security can be granted to a trustee for creditors. On a default there are no mandatory grace periods and the creditor can enforce out-of-court by appointing a receiver (a type of possessory manager) or by private sale. But in some common law jurisdictions there are freezes on enforcement in the event of a judicial rescue of the debtor. Also, in some of these jurisdictions there are stamp duties.

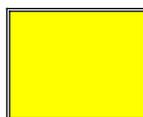
On the other hand, in many traditional Napoleonic jurisdictions, universal security is not possible, neither is security for all future debt. There is no trustee to hold the security. On enforcement, there are grace periods and no receiver. Sale is through the court and a public auction. Preferential creditors rank ahead. Some countries have a freeze on enforcement under a judicial rescue statute.

The main policy issue is therefore whether security should be encouraged or whether the law should intervene to impose greater equality.

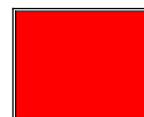
The main tests are (1) scope of eligible assets, (2) debt secured, (3) trustee, (4) priority over preferred creditors, (5) private enforcement and receiver, (6) no rescue freezes and (7) low costs.

Q2 In Kenya, the law offers a security interest which is highly protective of the secured creditor.

True



False



**Can't
say**



Comment:

Companies in Kenya may secure their debts through various means including means of either fixed or floating charges. A floating charge can cover all the assets of the company. However, where the asset is land, the creditor must register the charge at the land registry so as to be able to effectively realize the land security. There are no restrictions on the debt secured and creditors are allowed to appoint trustees. Fixed charge holders have priority in receiving debts due to them. This is however subject to preferential payments that are given priority to other debts. These include: certain taxes, government rents, wages or salaries retirement benefits contributions and vested benefits of any clerk or servant of the company who must be paid at least Kenyan Shillings twenty thousand (KES 20,000) before other secured creditors can be considered.

Furthermore, in many instances creditors have had their claims struck out by courts on technicalities. In addition, the realization of land securities has also become quite a challenge due to the elaborate and

protectionist approach to land that has been set out by the Land Act and the Land Registration Act of Kenya, or in the alternative, the discovery that the chargor had no proper title to the property.

Universal trusts

Under a trust, one person, called the trustee, holds title to the assets of another person, called the beneficiary, on terms that, if the trustee becomes insolvent, the assets go to the beneficiary and are not used to pay the trustee's private creditors. The assets are immune and therefore taken away from the debtor-trustee's bankrupt estate.

The main examples of trusts are custodianship of securities, pension funds, securities settlement systems and trustees of security for bondholders and syndicate banks. The amounts involved are enormous.

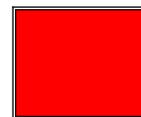
All jurisdictions have an effective trust of goods (called bailment or deposit). The common law group has a universal trust for all other assets (land and intangible property). Most members of the civil code group do not have a universal trust, subject to wide exceptions, especially for custodianship of securities. A few countries in this group have a universal trust by statute, e.g. France and China.

Q3 Kenya has a universal trust for all assets.

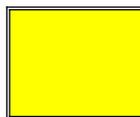
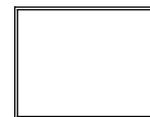
True



False



Can't say



Comment:

In Kenya, any form of property may be held in trust. The Trustee Act (Chapter 167, Laws of Kenya) defines property as including immovable and movable property, and any estate, share and interest in any property, immovable or movable, and any debt, and anything in action, and any other right or interest, whether in possession or not. This broad description suggests that Kenya has a universal trust for assets.

Other indicators

Other bankruptcy indicators not measured here include freezes on the termination of contracts, fraudulent preferences, the priority of rescue new money, the presence and intensity of corporate rescue proceedings and recognition of foreign insolvencies. Director liability for deepening the insolvency is dealt with below.

Other financial law topics not covered in this survey include the regulatory regime, especially capital, liquidity, authorisation of financial business, conduct of business, control of prospectuses, control of market abuse and frauds, such as insider dealing, and the insolvency regime for banks. Financial regulation is a very large field.

Corporations

Introduction

Financial law involves competition between debtors and creditors so that jurisdictions can be positioned on a straight line. Corporate law however involves three main competitors: (1) shareholders, (2) creditors and (3) managers - a triangle. If the key indicators show that a jurisdiction strongly favours one or other of the parties at the points of the triangle, whether creditors, shareholders or management, then one can begin to build up a picture of the choices which the jurisdiction habitually makes in resolving the conflicting interests of the parties.

For example, a very tough prohibition on financial assistance (which is protective of creditors against shareholders) tends also to support an attitude to other principles of the maintenance of capital or to support the proposition that mergers by fusion are difficult (because they can prejudice creditors). This would be true of the English regime in 1948. Similarly, a view which easily imposes personal liability on directors for deepening an insolvency might also show a legal approach which is not supportive of the veil of incorporation in other areas, eg shareholder liability and substantive consolidation on insolvency.

The two extreme corporate law models are the Delaware model and the traditional English model, exemplified by the English Companies Act 1948 (now superseded). Napoleonic and Roman-Germanic models are in-between to varying degrees.

The Delaware regime is highly protective of management in the key areas. The traditional English regime favours creditors on most of the key contests and, where creditor interests are not involved, it tends to favour shareholders as opposed to managers.

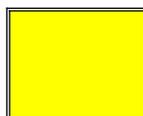
Director liability for deepening an insolvency

Generally If the law imposes personal liability on directors for deepening an insolvency, eg carrying on business and incurring debts where there is no reasonable prospect of paying them, then the regime is hostile to the interests of management. The legal risks of management are increased.

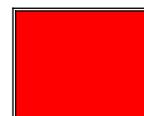
There are basically four regimes internationally: (1) directors are hardly ever liable for deepening the insolvency, eg Delaware and most US jurisdictions, plus some traditional English jurisdictions which only punish fraudulent trading; (2) directors are liable for serious negligence (England, Singapore, Australia, Ireland); (3) directors are liable for mere business misjudgements deepening the insolvency (France); and (4) directors are liable if they fail to file for an insolvency proceeding after the company becomes insolvent (France, Germany and others).

Q4 In Kenya the law rarely imposes personal liability on directors for deepening the insolvency and there is no rule that the directors must file for insolvency when the company is insolvent.

True



False



Can't
say



Comment:

S. 318(1) (m), (n) and (o) and S. 320 of Companies Act (Chapter 486, Laws of Kenya) provide for offences relating to the conduct of insolvency proceedings and improper or fraudulent conduct in the period leading to an insolvent winding up of a company for which directors may be held personally liable. In particular, directors must take care to ensure that the company does not trade in insolvency thereby defrauding creditors (S. 320). Directors can incur both civil and criminal liability in these circumstances (S. 324). Prosecutions for trading in insolvency are, however, rare. S. 402 provides an avenue for directors to escape liability arising from negligence emanating from their ignorance or inexperience if it can be proven to court that they acted honestly and reasonably. This is borrowed from the English position in *Equitable Fire Insurance Company, Re [1925] Ch. 407* and upheld in Kenya in *Flagship Carriers Ltd v Imperial Bank (Civil case No. 1543 of 1999, unreported, High Court)*.

Financial assistance to buy own shares

Generally Many jurisdictions prohibit a company from giving financial assistance to buy its own shares. The typical example would be where a bidder finances the acquisition of a target company by a loan and after the takeover arranges for the target to guarantee the loan and charge its assets to secure the guarantee. The commercial effect is similar to the repayment of the share capital of the target before its creditors are paid. Shareholders should be subordinated to creditors.

The prohibition therefore favours creditors against shareholders of the target.

The Delaware regime does not prohibit financial assistance. The traditional English regime has a wide prohibition (not England any more). Most Roman-Germanic regimes are against it, with Napoleonic regimes hesitant. The EU has a prohibition against financial assistance by public companies. Some countries allow financial assistance by private companies if solvency is established.

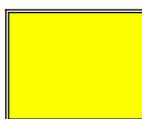
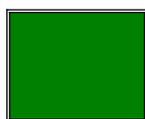
A contravening transaction is usually a criminal offence and void.

Q5 Kenya permits a company to grant financial assistance for the purchase of its own shares.

True



False



Can't say

**Comment:**

The common law rule in *Trevor v Whitworth [1887]12 A.C 449* which applies in Kenya provides that a company is not permitted to purchase its own shares even if there is an express power to do so in its Memorandum of Association as this would amount to a reduction of its capital. This is also forbidden under S.56 of the Companies Act (Chapter 486, Laws of Kenya) except in very limited circumstances. The exceptions to this prohibition include: lending by companies whose business is lending money if the lending is in the ordinary course of business; and employee share schemes. However, there are proposals in the Companies Bill that will allow companies to offer financial assistance in the purchase of their shares.

Public takeover regime

Generally A public takeover regime which is free and open tends to favour managers who can guard against takeovers by poison pills and the like and who have relative freedom to acquire other companies. An example is the Delaware regime. A restrictive regime on the lines of the British system tends to favour shareholders.

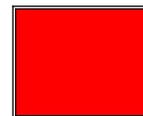
The chief features of a restrictive regime are: (1) the bidder must make a mandatory bid in cash when a threshold of shares in the target is reached, eg 30%; (2) the bidder must pay the same price to all shareholders (sharing the control premium); (3) no partial bids (getting control on the cheap); (4) proof of certain funds to implement the offer; (5) compulsory acquisition of dissenting minorities (squeeze-out); (6) fixed timetable; (7) no ability of the managers to frustrate a bid by poison pills without shareholder approval; and (8) control of the content of circulars, especially forecasts.

Q6 Apart from exchange controls and restrictions on foreign direct investments, the public takeover regime in Kenya is open and has few restrictions.

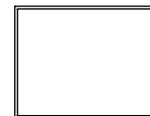
True



False



Can't
say



Comment:

The public take over regime in Kenya is open and has few restrictions for non-listed companies. One would have to obtain approvals from, the Competition Authority of Kenya, and the COMESA Competition Commission (if the transaction will have an effect in two or more COMESA countries). However for listed companies there are many rigorous restrictions, regulations, thresholds and timelines that must be adhered to. In addition to the consents needed by non-listed companies, listed companies must also obtain consent from the Capital Markets Authority and the Nairobi Stock Exchange.

Other indicators

Other important indicators are corporate governance (difficult to measure), free ability to merge companies by fusion, the one-share-one-vote rule, and, to a lesser extent, minority protections. Other indicators relate to quick and cheap incorporation, the *ultra vires* rule, maintenance of capital, no par value shares, shareholder liability, substantive consolidation on insolvency and disclosure. These are not measured here.

Commercial contracts

Introduction

Contract is at the heart of commercial life, and is everywhere. In fact, the main tenets of contract law across the main families of jurisdictions are consistent - it is in the fields of insolvency and property law where the main differences emerge. It is true that there are contract differences, for example, between writing requirements, open offers, the time of acceptance and specific performance, but often these differences are of lesser significance in practice in the business field.

The key indicators the survey chooses all tend to symbolise whether the approach of the jurisdiction to contract is hard or soft. If the approach is hard, then the jurisdiction tends to support predictability in

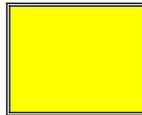
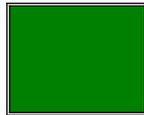
business contracts so that certainty and freedom of contract are valued more than mitigating the risk of occasionally abusive behaviour and unfair results, especially for weaker parties. A soft jurisdiction tends to give greater primacy to notions of good faith and the like.

Exclusion of contract formation

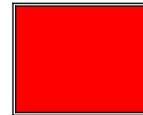
Generally Commercial parties often wish to be able to negotiate heads of terms commercially without being bound by a contract. In some jurisdictions, the courts are ready to infer that the parties are bound if the terms are sufficiently clear, even if they have said expressly that they do not intend to be bound.

Q7 In Kenya, parties are not bound to heads of terms if they expressly state that the terms are "subject to contract" or some such clear phrase.

True



False



Can't say



Comment:

Generally, agreements such as letter of intent or heads of agreement which are stated to be subject to the contract are not legally enforceable and merely serve as a written record of what the parties are negotiating about.

Termination clauses

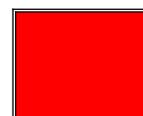
Generally Many contracts, especially loan contracts, leases of goods and long-term sales contracts, contain events of default on the occurrence of which one party can terminate the contract. Jurisdictions which uphold freedom of contract and the literal interpretation of contract give effect to these clauses and do not rewrite the contract according to the court's notions of what is fair. Other jurisdictions prefer good faith. We ignore consumer contracts - where there may be consumer protections.

Q8 In Kenya, a termination clause in a loan or sale of goods contract between sophisticated companies (not individuals) providing for the termination of the contract immediately on certain events is usually upheld, even if the event concerned is relatively trivial.

True



False



Can't say



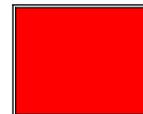
Comment:

Kenyan courts have consistently upheld contractual freedom. Consequently, a termination clause providing for termination upon certain events will be upheld.

Exclusion clauses

Generally Contracting parties often seek to exclude their liability for defective performance of the contract. So the issue is whether these exclusion clauses are generally upheld if they are clear and whether freedom of contract is allowed in this area.

Q9 In Kenya, exclusions of liability in most commercial contracts between sophisticated companies, such as a sale of goods contract, are generally upheld if they are clear.

True**False****Can't
say****Comment:**

Once a party in Kenya signs a written contract in the absence of fraud or coercion, the party is bound by the terms of that contract. In *Dr. John Chamia and 6 others v The Board of Trustee National Social Security Fund and another* [2013]eKLR, the Court was emphatic that parties are bound by the contracts they sign inclusive of the exemption clauses. Similarly in *Securicor Courier (K) Ltd v Benson David Onyango & another* [2008] eKLR, the Court of Appeal ruled that the parties to a contract were to be bound by exemption clauses limiting liability in those contracts as long as they were clear and unambiguous. If the clause is clearly framed then the parties are bound by **section 55** of the Kenyan Sales of Goods Act which states that where any right, duty or liability would arise under a contract of sale by implication of law, it may be negated or varied by among others, an express agreement between the parties.

Other indicators

Other contract indicators not assessed here include writing formalities, open offers, mistake, frustration, damages, penalties, specific performance and whether notice of assignment of the contract to the debtor is mandatory if the assignment is to be valid on the insolvency of the assignor.

Litigation**Introduction**

The first three key indicators of governing law, jurisdiction and arbitration tend to show whether the jurisdiction does or does not place a high value on international comity and freedom of contract as opposed to national primacy.

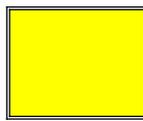
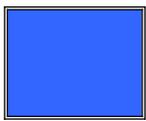
The indicator on class actions tends to show whether or not the jurisdiction's litigation system is orientated towards plaintiffs, especially mass plaintiffs in product liability cases. This indicator may also show the attitude of the jurisdiction to the protection of individual parties as against business parties, both in terms of the incidence of costs and enforcement.

Governing law clauses

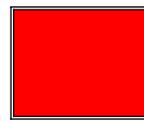
Generally Most countries apply a foreign governing law of a contract even if there is no connection between the contract and the jurisdiction. If the courts do not uphold the governing law, the effect is that the contract obligations may be different.

Q10 The Kenya courts will apply an express choice of a foreign law in a loan or sale of goods contract between sophisticated companies, even though the contract has no connection with the foreign jurisdiction, but subject to Kenyan public policy and mandatory statutes.

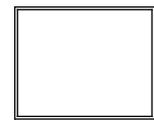
True



False



Can't say



Comment:

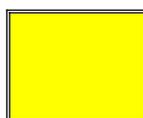
Courts may apply an express choice of law even though the contract has no connection to the foreign jurisdiction. However, courts have pointed out that a choice of law clause is not decisive and if persuaded otherwise, courts will apply the law to which the contract is most closely related to a choice of law clause should be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case and the law of Kenya should be excluded totally.

Foreign jurisdiction clauses

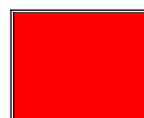
Generally Many contracts confer jurisdiction, sometimes exclusive, on the courts of a foreign jurisdiction, usually accompanied by a choice of foreign governing law.

Q11 The Kenya courts will generally uphold a clear submission in a loan or sale of goods contract between sophisticated companies to the exclusive jurisdiction of the courts of a foreign country, even if there is no connection between that country and the contract.

True



False



Can't say



Comment:

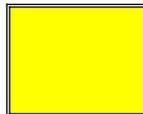
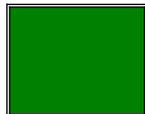
In Kenya, the general rule as was expounded in *Raytheon Aircraft Credit Corporation & Another vs Air Al-Faraj Limited* (Civil Appeal 326 of 1998) and the rule is that where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation unless the party suing in the non-contractual forum discharges the burden case on him showing strong reasons for suing in that forum. However, parties to contracts must be aware that the courts can chose to ignore the clause where Kenya is the forum conveniens.

Arbitration recognition

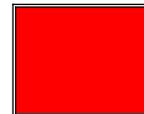
Generally Contracting parties, especially in trading and construction contracts, but less so in loan contracts, wish to submit disputes to arbitration, sometimes in a foreign country. The resulting award is often enforceable locally under the New York Arbitration Convention of 1958, to which most countries have adhered.

Q12 In Kenya, the courts allow sophisticated contracting parties to submit contract disputes to a foreign arbitral tribunal to the exclusion of the Kenyan courts.

True



False



Can't say

**Comment:**

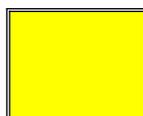
Kenyan courts respect and uphold agreements to submit disputes to arbitration. Further the civil procedure rules empower parties in a suit to submit disputes to agreement before judgement.

Class actions

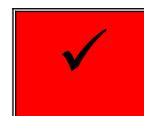
Generally In some countries, such as the United States, a plaintiff can be authorised by the court to sue on behalf of all claimants who are similarly situated. Claimants have to opt out or they are bound.

Q13 In Kenya, class actions where the class is bound if they do not opt out are generally not allowed.

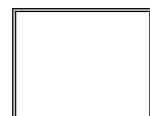
True



False



Can't say



Comment:

In Kenya, a plaintiff is allowed by law to sue on behalf of other claimants who are interested in deriving a remedy on their claim. The law of Kenya requires that before a representative suit or class action is filed, the plaintiff should seek leave of the court to file the suit and authority of the class to represent it. Order 4 as read together with Order 1 Rule 8 of the Civil Procedure Rules, 2010 (the Rules) obligates the plaintiff to obtain authority from the people he is representing. This authority should be filed in court. Failure to obtain the approval or file the necessary documents may lead to the suit being struck out.

Other indicators

Other indicators not covered by this survey include contingent costs, loser pays the costs of the winner, prejudgment freezes or arrests, appeals, scope of disclosure (discovery of documents), efficacy of waivers of sovereign immunity and the enforceability of foreign judgments.

Real property

Ownership of land

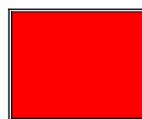
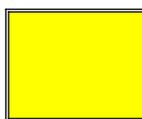
Generally In most countries, nationals can own land absolutely and are not restricted simply to leases for a limited term or simple rights of occupancy. However, in some jurisdictions, absolute ownership of land is not available to nationals or local corporations. If this is so, then the jurisdiction would be coloured green if citizens can lease land for a very long term without material restrictions, such as 999 years, and can also mortgage or sell the land or give it away or bequeath it under their wills without official consent because the ownership is a close proximate of absolute ownership. If on the other hand citizens are entitled only to a lease of, say, 70 years or less, or to similar rights of occupancy, and if there are limitations on dealing with the land without official consent, such as mortgaging, selling or bequeathing it, then the jurisdiction would be red.

Q14 In Kenya nationals and local corporations are entitled to own land absolutely.

True

False

Can't say



Comment:

National and local corporations can own land absolutely in Kenya provided the corporation is wholly owned by one or more Kenyan citizens. Otherwise it will be regarded as a non-citizen and can only own land by a leasehold tenure not exceeding ninety nine years.

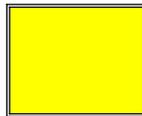
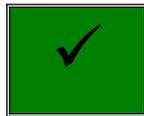
Security of land title and land registers

Generally Many jurisdictions improve the security of title to land by a registration system which, although not necessarily state-guaranteed, has high reliability. An example is the Torrens system developed in Australia and used in many other countries, eg Canada and England.

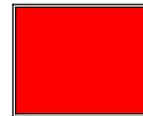
Most countries in the civil code groups do not have a title register but instead require documents concerning land to be notarised and filed at the registry so that they can be searched. The United States does not generally have title registers for land although there may be mortgage registers. They rely on title registration companies which provide title insurance.

Q15 Most land in Kenya is registered in a land register which records most major interests in land, eg ownership, mortgages and longer-term leases.

True



False



Can't say



Comment:

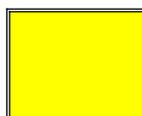
Land and the interests accruing from it should be registered and are registered in Kenya in a system similar to the Australian Torrens registration system. In 1963 Kenya passed the Registered Land Act (Chapter 300, Laws of Kenya) now repealed to bring all land under registration. However, there is still unregistered land in Kenya and land that is registered under the registration of deeds model which is different from the Australian Torrens registration system. It is notable that in the coastal region courts have taken judicial notice of ownership of land which is unregistered where one individual can own a piece of land whereas another owns the house erected on that piece of land.

Land development restrictions

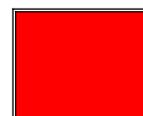
Generally Many countries restrict development and the change of use of land and require permits to be obtained for any development or change of use.

Q16 In Kenya, apart from environmental controls (dealt with later), the control of commercial development and the change of use of land is very light and, where required, permits are quick and cheap to obtain.

True



False



Can't say



Comment:

Permits for change of use of land and control of commercial development in Kenya is regulated by the Land Control Act (Chapter 302, Laws of Kenya) and Physical Planning Act (Chapter 286, Laws of Kenya). The former deals with agricultural land while the latter with municipal land. The permits are not quick and cheap to obtain due to bureaucracy. The process may take around four months before one gets a permit and it is always advisable to get legal counsel. If the land in question is land classified as agricultural land, one has to obtain consent from the land control board. The consent is only issued to Kenyan citizens and without such consent any dealing in the land is void.

Other indicators

Other indicators not surveyed include transfer costs, stamp duties and lessee protections.

Employment law

Generally The indicator here is whether it is easy or hard to hire and fire employees. The measures include high minimum wages, maximum hours, minimum holidays, maternity rights, equal pay for equal work (non-discrimination) and severance costs.

Q17 In Kenya, there are few controls on hiring and firing employees or on the terms of employment.

True



False



Can't say



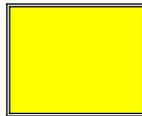
Comment:

The main legislation governing labour relations is the Employment Act, 2007 which declares and defines the fundamental rights of employees, provides basic conditions of employment among others. The Act is protectionist in nature and leans more to the employee protection, in most cases to the detriment of the employer. It also dwells more with the formal employment sector despite the fact that the informal sector forms the bulk of the working class in Kenya. The Act makes it hard to fire workers or retrench at will. Further Kenyan courts have taken a very protectionist approach to employment disputes and have sided heavily with employees.

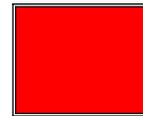
Environmental restrictions

Q18 In Kenya the rules governing the environment and liability for clean-up are very light and relaxed.

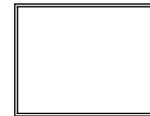
True



False



Can't
say



Comment:

The 2010 Constitution of Kenya provides extensively for the protection, conservation and sustainable use of the environment. However, the provisions are not strict enough. Other Kenyan instruments which deal with the environment are outdated and do not deal with the current issues affecting the environment. One of the major problems in Kenya is also enforcement of the few rules and regulations governing the environment and also failing to abide by these rules does not lead to a heavy penalty. Pollution of the environment is therefore extensive to the point that it is now difficult for the Kenyan Government presently to monitor and reduce pollution.

On the brighter side however, there have been major steps to repeal the environmental rules and regulations due to the irreversible effects of pollution to the environment. The governor of Nairobi for example just recently suggested a by-law to ensure a thorough clean-up of Nairobi County.

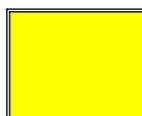
Openness to foreign business

Generally These indicators measure the degree to which the country is open to foreign businesses. The indicators are quite generic and therefore subjective.

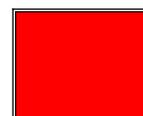
Foreign direct investment

Q19 In Kenya foreigners may freely own and control local companies outside protected industries, such as media, banks and defence.

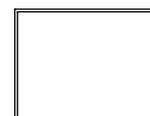
True



False



Can't
say



Comment:

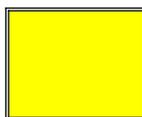
Foreign ownership of equity in the following protected industries is restricted to the following percentages: 66.7% insurance; 70% telecommunication; 75% companies listed in Nairobi stock exchange; 49%-

companies fishing industry. The Private Security Regulation Bill also contains provision that may include private security companies in the ambit of protected industries. Investors manufacturing and dealing in firearms and explosives require special licenses which are subject to security vetting. However, there are no restrictions on the percentage of equity that foreign nationals may hold in a locally incorporated company, although the government encourages foreign firms to form joint ventures with Kenyan companies or entrepreneurs.

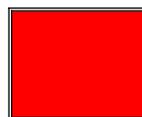
Exchange controls

Q20 In Kenya, there are no exchange controls. Businesses may therefore have foreign bank deposit accounts in foreign currency, borrow in foreign currency and repatriate profits to foreign shareholders in foreign currency.

True



False



Can't say



Comment:

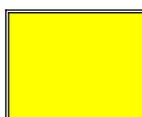
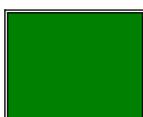
There are foreign exchange controls in Kenya. The Anti-Money Laundering Act of Kenya makes it an offence to fail to report, inter alia, suspicious transactions and conveyances of monetary instruments in excess of US\$.10,000.00 or its equivalent to or from Kenya.

In addition, pursuant to the Central Bank Circular No. 12 of 1996 – “Revised Foreign Currency Transaction Guidelines to Authorised Banks” and the “Guidelines on Foreign Exchange” issued by the CBK on 1st September, 2002 (the 2002 Guidelines), commercial banks have been assigned a monitoring role by the CBK in relation to foreign currency transactions. Each commercial bank is required to submit returns to the CBK on a regular basis in relation to inter alia foreign currency transactions.

Alien ownership of land

Q21 In Kenya, foreign-controlled companies have the same rights as nationals or residents to own or lease land without a permit.

True



False



Can't say



Comment:

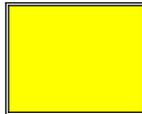
Art 65(1) of the Kenyan constitution 2010 provides that non-citizens (which include natural and artificial persons) may only hold land on a leasehold basis for a period not exceeding 99 years. This therefore means that they do not have the same rights as nationals to own land as their ownership of such leasehold may only be for a 99 year period. Such foreigners are not allowed to own freehold land. However, no permit is required by a foreigner to own land in Kenya.

Application of the law

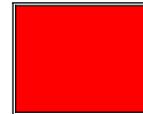
Generally These indicators deal with the application of the law, as opposed to what the law actually says. They are bound to be generic and subjective, a matter of impression.

Q22 In Kenya, the higher courts usually treat big businesses as fairly as they treat individuals and do not favour local interests over foreigners.

True



False

Can't
say**Comment:**

Higher courts strive for fairness and justice and as such in some instances big business are not treated similarly to individuals. Local interest is sought to be protected by the higher courts but no favouritism is shown to locals over foreigners.

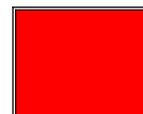
Costs and delays of commercial litigation

Q23 The costs and delays of commercial litigation in the higher courts in Kenya are not considered materially greater than in other comparable countries.

True



False

Can't
say**Comment:**

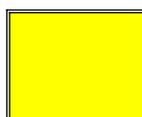
Specialisation of Kenyan higher courts into distinct divisions tackling different matters coupled with the hiring of judges and the periodic vetting of judges has led to a reduction in the costs and delays of commercial litigation. Although costs and delays in Kenya are comparatively higher compared to developed countries, Kenya is further ahead than its developing counterparts.

Overall ranking

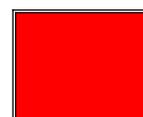
This overall ranking is achieved by a survey of all the rankings as shown this table:

	Question	Rating
1.	Insolvency set-off	
2.	Security interest	
3.	Universal trusts	
4.	Director liability for deepening insolvency	
5.	Financial assistance to buy own shares	
6.	Public takeover regime	
7.	Exclusion of contract formation	
8.	Termination clauses	
9.	Exclusion clauses	
10.	Governing law clauses	
11.	Foreign jurisdiction clauses	
12.	Arbitration recognition	
13.	Class action	
14.	Ownership of land	
15.	Security of land title and land registers	
16.	Land development restrictions	
17.	Employment law	
18.	Environmental restrictions	
19.	Foreign direct investment	
20.	Exchange controls	
21.	Alien ownership of land	
22.	Court treatment of foreign big business	
23.	Costs and delays of commercial litigation	

True



False



**Can't
say**



Commentary and suggestions for change

Some aspects of the law we researched on were largely based on common law doctrines as opposed to Kenyan statutes. This is because there is a lacuna in the Kenyan legislative framework and many corporate and contractual matters are not adequately governed by existing statutes. We therefore recommend statutory enactments and amendments in order to ensure that the law is clear on emerging corporate and contractual issues. The suggested laws should be drafted in a manner that gives due regard to international best-practice.

Additionally, Kenya should strive to make it easier for potential foreign investors to access information on the legal regime and procedures relating to business in Kenya. This could be done through the establishment of legal depositories with information on specific foreign-investor transactions. At the moment, there is ambiguity and difficulty in accessing information on the procedural requirements. Such reform would potentially facilitate foreign investment and trade. Kenya should facilitate and strengthen existing frameworks in which one-stop shops of information are available.

With regard to employment laws, the Kenyan employment Act is protectionist in nature and leans more towards the protection of employees. In most cases, such measures operate not only to the detriment of employers, but also in complete disregard of a transformed and dynamic business environment where the employers frequently need protection as well. Moreover, our employment laws dwell predominantly on regulation of the formal employment sector, despite the fact that the informal sector forms the bulk of the working class in Kenya. Due to the rigidity of the laws such as minimum wage, employers do not employ as many individuals. This leads to high levels of unemployment, with the unemployed seeking livelihoods that yield much less than the minimum wage- hence beating the purpose of the law that was created to assure their financial stability.

Moreover, the Kenyan employment laws are not tailored in a way that gives regard to the changing employment structures which are evolving courtesy of the effects of information technology in the digital era for example the Business Process Outsourcing. The foregoing issues ought to be addressed by statutory amendments.

It is also noteworthy that Kenya would benefit greatly from a review of its conflict of laws regime as well as the codification of various internationally recognized principles. Kenya ought to borrow from the European Union where such developments have taken place.

Ultimately, the greatest bottleneck in Kenya lies in implementation of its laws. There have been great injustices in the Kenyan business environment due to corruption and lack of enforcement. Although the last five years have been characterized by a shake-up of the judiciary to eliminate corrupt judges, many cases continue to be thrown out on 'technicalities' hence delaying or preventing the implementation of the law. There are also cases where inadequately informed judges or magistrates misinterpret well-crafted statute. Measures should be taken to minimize such occurrences. This is because such incidences reduce the credibility of the Kenyan judiciary to interpret the law- and properly drafted law is of no useful purpose if it is not well interpreted and implemented.

Student Profiles

1. Ndunge Wambua



Ndunge Wambua was the Team Leader of the group of students who worked on the Allen and Overy Research project to establish Kenya's rating.

She graduated in the top two percent of her University of Nairobi, School of Law 2014 graduating class. She is also a certified accountant (ACCA) and is pursuing a degree in applied accounting in which she is set to graduate with first class honours. Ndunge was actively involved in a wide array of student activities at the University of Nairobi. These included Model United Nations which she chaired in her campus and additionally served in the intervarsity National Secretariat as the Vice President of the General Assembly; as well as the Moot Court Club. She featured as a semi-finalist in the World Human Rights Moot Court 2012. She was also part of a team of four which won the 2014 Eastern African Rounds of the Price Moot Court Competition and proceeded to international rounds at Oxford University where their memorial was awarded second place overall. Ndunge is currently a tax analyst at Taxwise Consulting Limited. Her fields of interest include tax law, banking, international economic law, and various aspects of corporate law.

Ndunge can be reached at ndunged@gmail.com/nwambua@taxwise-consulting.com

2. Omoke Morara



Morara is currently undertaking the LL.M programme (Banking and Financial Services Law) at the University of Nairobi under a scholarship from the same university. He recently graduated from the University of Nairobi, School of Law, with a First Class Honours in Bachelor of Laws in the class of 2014 where he finished top of his class and as overall best undergraduate student in the School of Law. He is currently a legal assistant at Mboya, Wangong'u and Waiyaki where he has been involved in various transactions on capital markets, banking, real estate, estate planning, incorporation of companies and registration of trade marks. He has also trained as a Certified Public Secretary. His interests are litigation, academia and legal research.

Morara can be reached at omokemorara@gmail.com

3. Samson Munene



Munene is currently a Graduate Management Trainee at Centum Investments Company Limited a leading investments firm in East and Central Africa. At Centum, he is involved in various transactions involving compliance with regulatory bodies mainly Capital Markets Authority (CMA), Retirement Benefits Authority and Kenya Revenue Authority. He is also involved in conveyancing, drafting and reviewing contracts, filling annual returns, legal research, incorporation of companies, tax compliance and structuring and managing shareholders' relations within the company.

He graduated in 2014 from the University of Nairobi with a Bachelors of Law (Second Class Honors Upper Division). He is undergoing Company Secretarial Training and researching on Real Estate Investments Scheme, Derivatives and Asset Backed Securities, new products being launched in Kenyan by CMA.

Munene can be reached at samunene2@gmail.com

4. Mary Ngoiri

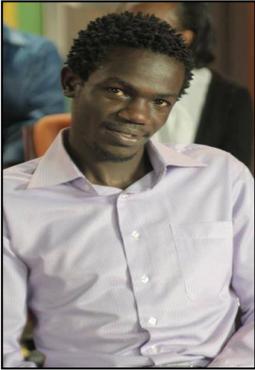


Mary just finished her undergraduate degree from the University of Nairobi having graduated with a Second class honors upper division. Her main fields of interest are corporate, M&A, banking and finance, commercial law, civil law, capital market (including investment law, central bank law, etc.), and private and public international law.

Mary is currently a legal assistant at B M Musau & Co. Advocates, where she has been involved in various transactions on banking, taxation, litigation, incorporation of companies and conveyancing. She has also trained as a Certified Public Secretary as well as a Certified Public Accountant.

Mary can be reached at shyrohmary@gmail.com

5. Kenneth Likoko



Kenneth has recently graduated with a Bachelor of Laws, LL.B (Second Upper Honour) from the University of Nairobi. He is currently working at Sichangi Partners Advocates as a Legal assistant in the IP & ICT Practice Group Department. He has keen interest in Intellectual property Law, Commercial Law and Corporate and Capital Markets Law for both contentious and non-contentious matters.

Kenneth holds a Diploma in Forensic Accounting from the Kenya Institute of Studies in Criminal Justice and is pursuing a course to become a Certified Public Secretary.

Kenneth can be reached at ken.likoko@gmail.com or klikoko@sichangi.com

6. Brenda Vilita



Brenda recently graduated from the University of Nairobi, school of law with a Bachelor of Laws degree. She has previously worked with Manyonge Wanyama & Associates Advocates where she was exposed to legislative drafting and writing, as well as civil and criminal litigation.

Brenda can be reached at brendavilita@gmail.com

7. Monicah Mwanaszumba



Monica recently graduated from the University of Nairobi, School of Law with a Bachelor of Laws Degree, second class honours, upper division. Her main fields of interest are corporate law, alternative dispute resolution, criminal law, private law, and public international law.

Monica can be reached at mwanaszumbahmonic@yahoo.com

8. Rosemary Wakaba

Wakaba has just graduated from University of Nairobi, School of Law Kenya.

Wakaba can be reached at wakabarosemary@gmail.com

9. Lynda Mokaya

Lynda has graduated from the University of Nairobi, School of Law Kenya with a Second Class Upper Honours. Her main fields of interest are Conveyancing, Corporate law, Commercial law, Banking and Finance, Civil law and Private law.

She has undertaken internships at Coulson Harney Advocates and United States International University - Africa. She is currently working as a Legal Assistant at Kiruti & Company Advocates.

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University of Nairobi School of Law: Profile

The University of Nairobi School of Law was founded in the late 1960s and is one of the leading faculties of law in the region. The school, which offers courses leading to the degrees of Bachelor of Laws (LL.B), Master of Laws (LL.M) and PhD in Laws, has distinguished itself as a hub of legal scholarship with a strong foundation for training on basic legal concepts, legal advocacy and legal research. It is a centre of excellence in research, scholarship and offers studies in five thematic areas of law: financial and commercial law; democracy, governance and law; human rights law; environmental law and international law. It has expanded over time and now includes two satellite campuses, one in Kisumu and another in Mombasa.

Although legal studies at the university level are by tradition, of theoretical character, pedagogical efforts have been made to encourage active participation in class and to introduce mock trials and moot court competitions locally and internationally. This is supported by a state of the art moot court room. The faculty also runs a clinical programme under which students are attached to courts in order for them to appreciate the workings of the law and gain practical experience. These efforts have facilitated the outstanding performance of the school's students in local, regional and international moot court competitions. Numerous students have received accolades on account of their outstanding performance in moot court competitions across the globe. More recently, the school was honoured with the opportunity of hosting the 23rd African Human Rights Moot Court Competition in Nairobi.

Cognizant that it exists within the context of a larger society, the school frequently engages in activities aimed at serving the larger community. The administration of the school facilitates students' engagement in frequent legal aid activities which are geared at enhancing access to justice. The school also facilitates community service activities through the clubs that operate under the Kenya Law Students' Society.

The University of Nairobi School of Law boasts of alumni who comprise luminaries in diverse areas of law serving as senior members of government, judges of superior courts, magistrates, and senior legal officers in Kenya's State Law Office, public corporations, local authorities and private entities. Others are law instructors in many institutions. Indeed the school of law has played the role of mentoring nascent law schools by providing skills and personnel. The school also hosts students from other countries through exchange programmes, the most prominent of which is the ABA-approved Widener summer programme which takes place at the University of Nairobi and involves both Kenyan and American students.

The University of Nairobi School of Law continues to spread its wings as it strives to maintain its position as a regional leader in the instruction of law.

Members of the Practitioner Expert Panel

MAUREEN MUJERA

PARTNER

Maureen Mujera is a partner at Anjarwalla & Khanna, a leading law firm in Kenya. Her practice focuses mainly on project finance, banking, energy and real property law. Maureen has extensive experience in handling infrastructure projects, large scale real estate acquisitions and disposals, real estate developments and real estate finance.

She has conducted a number of seminars on Kenya's land laws, Real Estate Investment Trusts, money laundering legislation, bank securities and finance documents.

She has been ranked in Kenya by various Legal Guides including Chambers Global and Legal 500. Maureen is a graduate of the University of Nairobi with a Bachelor of Laws degree.

ROSA NDUATI-MUTERO

PARTNER

Rosa Nduati-Mutero is a partner at Anjarwalla & Khanna, a leading law firm in Kenya. Rosa is based in the Nairobi office. Her practice focuses mainly on mergers and acquisitions, capital markets, public private partnerships and employment.

She is a recognized speaker and has conducted a number of seminars and training on a variety of different topics.

Rosa is a graduate of the University of Nairobi with a Bachelor of Laws degree. She is an advocate of the High Court of Kenya, a certified public secretary, a certified public accountant and member of the Law Society of Kenya and the Institute of Certified Public Secretaries.

She is recommended as a leading lawyer and has been ranked in Kenya by various Legal Guides including Chambers Global and Legal 500. In 2011 Rosa was rated as one of the regions 'top women under 40' by Kenya's leading business newspaper - Business Daily.

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