KEPSA
KENYA PRIVATE SECTOR ALLIANCE
The Voice of the Private Sector in Kenya

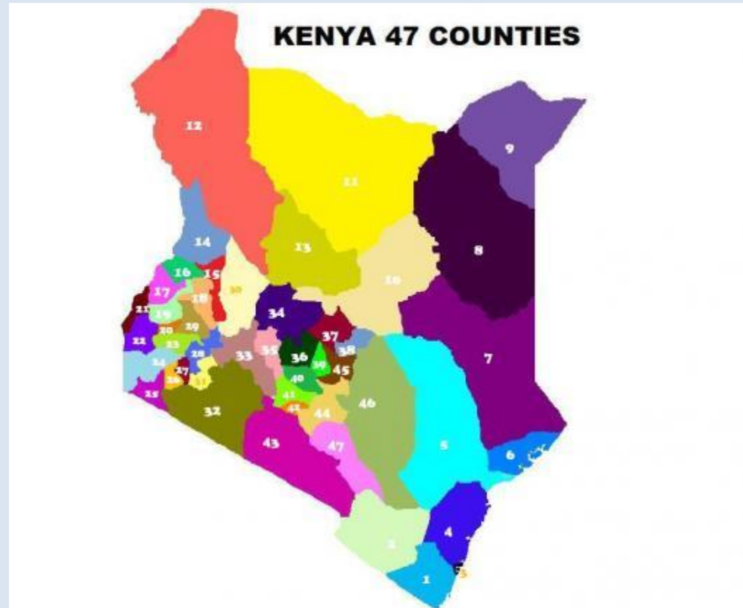
KEPSA WEEKLY LEGISLATIVE BULLETIN

Issue No. 5

Understanding limitations on County Governments over taxation

Over the past few months, Kenya has witnessed a raging debate over powers and limits of County governments to impose taxes. The constitution has a number of provisions that address this moot question.

Broadly, the basic principle that must inform public finance, including taxation by Country governments, is set out under Article 201 which demands "openness and accountability, including public participation in financial matters". The constitution seeks measures through which the burden of taxation is shared fairly and one which promotes an equitable society.



Taxation measures must, therefore, meet the principles of equity, fairness and avoid arbitrariness. Indeed, the new constitution sets out the principle of equitable sharing of national resources between the national and county governments under Article 174(g). Currently, the constitution demands an allocation of at least 15 per cent of the revenue collected by the national government to be assigned to the County governments. The constitution also allows the Counties to generate additional revenue through property rates, entertainment taxes and any other tax authorized by an Act of parliament.

One limitation imposed on the County governments under Article 209 (2) relates to certain category of taxes which can only be imposed by the national government. These include, income tax, value-added tax, customs duties and other duties on import and export goods and excise tax.
Therefore, county governments have constitutional power to impose certain categories of taxes and the issue that needs clarity and elaboration is how that power should be exercised.

Article 209 (5) imposes an important caveat on the constitutional authority to impose taxes by County governments by expressly providing that "the taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour".

It must be noted that in imposing taxes or levies, County governments are required to comply with the law as per Article 210 (1) which provides that “no tax or licensing fee may be imposed, waived or varied except as provided by legislation”. In plain reading this means that the County governments must be in compliance with Article 209 (authorization by Parliament) and also adhere to the constitutional guidelines set out under Article 201 which requires openness, accountability and public participation in financial matters.

The ongoing debate on taxation by county governments has established the need for clear guidelines and parameters to ensure compliance with Article 209 (5) which demands that in imposing any taxes, the Counties must not undermine national economic policies and activities. Article 209 (5) provides that “the taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour”.

Call to tighten regulation of professionals to curb land fraud risk

Last week, we reviewed the adequacy of regulations governing Surveyors in addressing the potential risk of land fraud. In our last and final instalment this week, we review the adequacy of existing regulations and mechanisms amongst valuers and estate agents in mitigating against the risk of land fraud

In Kenya, valuers are primarily engaged in carrying out valuations on property value for a variety of reasons. The most common reason is usually being to establish the value of property to act as collateral security against an advance of funds by a lender. Because the value attached to such property determines the amount that can be advanced to a borrower with minimal risk, it is usually in the interest of both parties that the valuation process is above board and reflects the true market value of a property. The lender especially must have confidence that on the basis of the valuation, his loan can be fully redeemed in the event of default on payment.

Fraud could arise in cases where such collateral is over-valued since in the event of default, the lender would be unable to realize his debt in full because the debt was not fully secured having been premised on a fraudulent misrepresentation of the property value.

In Kenya, Valuers are regulated under the Valuers Act which addresses the issue of professional misconduct. Under the Act, the board is empowered to take disciplinary measures against a registered valuer found guilty of professional misconduct either through an act of omission or commission in the course of his professional duties.

Additional regulations that now form part of the Act have further addressed professional misconduct under regulation

3 (1) through which, a valuer who "conducts himself in a manner which the board may deem incompetent, dishonorable or grossly negligent in connection with the work performed by him", can be censured.

However, the sanctions and penalties that the board is empowered mete out are generally lenient and cannot provide adequate deterrence. These sanctions include: issuing a caution or censuring a valuer; suspension from practice or removal from the register of valuers; and, imposition of a fine not exceeding Kshs 10,000

There is a clear need to review these penalties and sanctions to provide sufficient deterrence against serious professional transgressions such as involvement in land fraud. The Act also needs to elaborate on the process through which, third parties aggrieved by the actions of errant valuers, are to approach the board for relief. Currently, the Act is primarily focused on actions commenced at the instance and on the initiative of the board which may limit the ease of registering and filing complaints on professional misconduct by third parties. There is also a need to outline specific procedures geared towards making the complaints mechanism more practical and accessible.

Estate Agents

Estate agents are among the other cadre of professionals who deal with land matters on a regular basis. They are regulated under the Estate Agents Act (Cap 533) which among other things provides clear guidelines on the registration of estate agents and also establishes a framework for addressing professional misconduct.

Indeed, the Act makes good professional standing one of the conditions that must be satisfied to secure registration as an estate agent. In addressing professional misconduct, the Act establishes a professional code of conduct and empowers the board, to "publish a statement specifying acts or omissions which, if done or made by a practicing estate agent in his capacity as such would, in the opinion of the Board, be contrary to the public interest or amount to professional misconduct by the person so practicing".

Further, the board may institute inquiries into any allegations of professional misconduct acting on its own motion or after receiving a complaint from an aggrieved party.

The board is empowered under section 24 of the Act to mete out various sanctions for professional misconduct which include: suspension of registration; issuance of a caution; imposition of a fine not exceeding Kshs 5,000; or, removal of a member from the register.

However, these sanctions are inadequate to serve as a sufficient deterrent and require review to better respond to the challenge of professional misconduct involving land fraud and other improprieties. Clear timelines are necessary within which disciplinary proceedings should be conducted and finalized and sufficient safeguards on due process must be provided such as the right to legal representation in disciplinary proceedings instituted against an estate agent before the Board.

News on KEPSA legislative engagements

KEPSA roots for legal review to implement Common Market Protocol

KEPSA last week met with a visiting delegation of parliamentarians from the East African Legislative Assembly (EALA) to share perspectives on its work on regional integration. The EALA parliamentarians were on a weeklong tour of various projects in Kenya bearing on regional integration.

At a dialogue session with the parliamentarians, KEPSA noted that the ratification of the Common Market Protocol had placed a key demand on the EAC Partner States to align national legislation to the provisions of the Protocol. The Partner States were also required to implement various obligations arising from the Protocol.

KEPSA explained areas in which it has engaged with various organs of the EAC on regional integration and highlighted recent recommendations for amendment of various laws in Kenya to align to the Common Market Protocol.

On the **Investment Promotion Act,** KEPSA has proposed a review of the definition assigned to “foreign investor” and “local investor” with a view to recognizing investors from other EAC Partner States as “local investors”.

This amendment will break down the current distinction between “foreign” and “local” investors to allow greater flexibility and facilitation to investors within the EAC without distinction. KEPSA believes that the proposed amendment would facilitate cross-border investment by treating both local and “foreign” investors in the same manner. Investors from the EAC Partner States would enjoy a range of investment incentives with clear certainty since there would be no further distinction made between “local” and “foreign” investors.

KEPSA has also proposed amendments to the Foreign Investment Promotion Act to broaden the definition of “Partner States” to include the Republic of Rwanda and Burundi. This would accord them the same rights and obligations under the EAC Treaty as enjoyed by the original 3 Partner States of Kenya, Uganda and United Republic of Tanzania.

This proposed amendment would grant citizens of the Partner States similar rights meaning that they would not require special protection for their investments since the Protocol provides for the free movement of capital and the right of establishment in any of the EAC Partner States.

A similar of Rwanda and Burundi in the construction of EAC Partner States has been proposed under amendments to the **Bills of Exchange Act** so that bills of exchange drawn in any of the EAC Partner States can be treated as Inland Bills in Kenya.

To encourage and attract investment into export processing zones, KEPSA has recommended amendments to the **Export Processing Zones Act** to dispense with the current requirement where a Company registered in any of the EAC Partner States must also seek parallel registration in Kenya under the Companies Act.

This proposed amendment will facilitate the operations of companies registered in any of the Partner States to operate without the burden of additional registration in Kenya which should enhance the attractiveness of investment in the Export Processing Zones in the region.