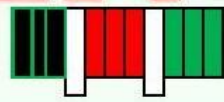




KENYAN LEGAL



real Kenya, real Issues



PROTECTING THE EYES AND THE EARS OF JUSTICE

Also Inside:

- ✚ How Kenyan Lawyers Charge Legal Fees.
- ✚ Court Injunctions and a Rogue Parliament; Thoughts on the Conflict.
- ✚ Corporate Governance in Kenya; a Need for Review.



Without Inspiration...

To the Kenyan Legal Team; that includes you the audience, the contributors and the editorial; I never shall have second thoughts on your commitment to see that we move forward, in Legal knowledge and information, for Knowledge is power and an informed nation is strong even on its knees, I wish to thank you for your continued support; Much appreciated. They say you never know what you got till its all gone; but we know we got you, and we appreciate your audience. Welcoming you to the fifth issue of The Kenyan Legal Magazine, hoping this finds you well. I mean it has been a great year so far, that's if you look on the positive side, so it's only logical that at every chance we thank the almighty this far.

Kenya is a much trying Nation, that much we must agree. Its what should constitute our pride, our diversity, our heritage; and even as we may want to dwell on the wrongs around, I subscribe to Murphy's Law that "Whatever was supposed

to go wrong, definitely shall go wrong", and that wouldn't change much as to who holds the reigns of the government. Let's accept pride ourselves in our successes, as well as our flaws, join hands and build this nation; not lying in wait to 'paint' it once 'others' are done.

In this issue we get the privilege of one on one with the Witness Protection Agency-Kenya, who so far has been on a steady rise with a mission "To promote the rule of Law by providing an effective and efficient Witness Protection Programme in Kenya" and a greater mission "To be the leading Protection agency in the world". So what exactly does the Witness Protection Agency-Kenya do to achieve its mandate, its structure and achievements so far? Do find out in this issue in the main feature.

Also introducing in this issue the "Scholar Section". Find out what it's all about.

I finish up by quoting one Johann G. Von Herder who stated:

'Without inspiration, the best Powers of the mind remain dormant; they are a fuel in us that needs to be ignited with sparks.'

Its Real Kenya, Real Issues. Welcome.

REGARDS,

Michael

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In this issue

SCHOLAR SECTION	6
The 2010 Constitution As A New Dawn And A Golden Future For Kenya’s Legal Profession	7
Main Feature	9
How Kenyan Lawyers Charge Legal Fees	14
The Law Affecting Corporate Governance In Kenya: A Need For Review	16
Martin Wambora Impeachment.....	24
Case Of The Month.....	24
Courtesy: <i>Www.Kenyanlaw.Org</i>	24
REVIEW AND DEBATE SECTION	26
The Fear Of Miscarriage	27
The Irony Of Marital Rape	29
The Kenyan Constitution; Born On The Ideology Of Spirit And Letter.....	30
Court Injunctions, And A Rogue Parliament;.....	31
Thoughts On The Conflict.....	31
The Anatomy Of Double-Sex: Kenyan Law And Transgenders	33
Why Uhururuto’s Government May Fail.....	35
Can Kenyan Courts End Tribalism And Civil Strife?	37
LIFESTYLE SECTION	39
Don’t Sell Your Birthright For A Bowl Of Soup	40
Carla’s Diaries	42
The Publication Team.....	43

CAN KENYAN COURTS END TRIBALISM AND CIVIL STRIFE?



By Michael Opondo O.,
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In Kenya, there's a huge difference between Minor (Maina) and A minor (Amina) than just size; it's their tribes. The social foundation of Kenyan Society is conceived at conflict coercion which considers society as consisting of individuals and groups characterized by conflicts and decent, but altogether held as one by coercion; that perfectly describes the Kenyan society whose individual's recognition basic criterion lies on one's tribe. The social order is thus temporal because every group is trying to maximize its interests within an environment of limited resources thus creating conflict; most evident in the political scene; its PNU vs. ODM, CORD vs. Jubilee, Us vs. Them and the cycle never ends. Ascent to power is thus a weapon in the hands of the dominating class to protect their interests and perpetuate inequality by formalizing their interests into Law at the expense of others; the main fuel behind tribalism and civil strife in Kenya and Africa as a whole. One Stoics contended that the mind is a blank slate upon which impressions are inscribed; no one is ever born hating the other on account of tribe, its something learnt.

So at the length of all this we turn to Law as its the logical system where it is expected correct legal decisions can be deduced/reached at by logical means from a pre-determined set of rules. But even as this is an expectation, its truth rarely sees the light of the day and consequently citizens' confidence in the judicial system is gone; ghosts of yore. There's money, power, and position that can buy you justice, or at least hire it.

The closest grace we can therefore have to deliver justice, in my view, is Alternative Dispute Resolution, henceforth abbreviated as ADR. ADR is a system of resolution of conflicts and disputes alternative to litigation which is a full scale assistance of administration of Justice by the Courts. Constitutionally, ADR is supported as an alternative means to conflict resolution by virtue of article 159 constitution of Kenya which states that alternative forms of dispute resolution including conciliation, reconciliation, arbitration and traditional dispute resolution mechanisms shall be promoted as long as they do not contravene the Bill of Rights and not repugnant to justice, and not inconsistent with the constitution and any other written Law. This scope of ADR's application in Kenya has also been widened by article 189(4) constitution of Kenya stating that national Laws shall provide for procedures to be followed in settling intergovernmental disputes by ADR mechanisms.

The ADR approaches are much more appealing than litigation due to their characteristics as:

- 1) They are largely informal as compared to litigation which is restricted to courts.
- 2) Application of principles of Equity compared to litigation's rule of Law. The uniformity of legal stand is not strictly followed as 'Justice

shall be administered without undue regard to procedural technicalities'.

3) Direct communication of the disputants as ADR mechanisms are based on dialogue and reconciliation between the parties.

However, it should be observed that like litigation, ADR will often involve a third party but his function is fundamentally different from that of a judge and is best described as a neutral facilitator; doesn't impose a decision on the parties but facilitates the parties to reach a resolve.

The suitability of ADR mechanisms in Kenya lies in the fact that Kenya has a heavy case backlog which impairs effectiveness of courts and the complex procedures applied. The Kenyan Judiciary can use ADR:

- 1) To test procedures that may later be extended and integrated into court system.
- 2) Can be created as an option within the judicial system.
- 3) They can streamline procedures that provide/accelerate case dispositions.
- 4) Can be used as a bypass in order to bypass ineffective or already discredited courts.

The ADR mechanisms should rather be viewed as an outgrowth of the courts and not as substitute of the court.

By and by, ADR, as stated by Dr. Avtar Singh, is more established in its utility and the reason it should be supported is that it is the only real alternative to judicial adjudication, to reduce civil strife in Kenya.

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To comment on this and other articles please visit www.kenyanlegal.com

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