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KENYA NATIONAL ASSEMBLY

ELEVENTH PARLIAMENT – SECOND SESSION

REPORT OF THE COMMITTEE
ON
REGIONAL INTEGRATION ON THE CONSIDERATION OF
THE EAST AFRICAN COMMUNITY CROSS BORDER LEGAL PRACTICE BILL, 2014; THE
EAST AFRICAN COMMUNITY INTEGRATION (EDUCATION) BILL, 2014; AND THE EAST
AFRICAN COMMUNITY COOPERATIVE SOCIETIES BILL, 2014

PARLIAMENT BUILDINGS
NAIROBI

MARCH, 2014

PREFACE

Mr. Speaker, Sir

The Committee on Regional Integration one of the select committees of the National Assembly established under Standing Order 212 and mandated to, inter alia; 'examine the Bills introduced in East African Legislative Assembly and Acts of the East African Community'.

Mr. Speaker, Sir

The Committee on Regional Integration was constituted by the House on Thursday 16th May, 2013 comprising of the following members:

The Hon. Florence Kajuju, MP (**Chairperson**)
The Hon. Christopher Nakuleu, MP (**Vice Chairperson**)
The Hon. David Ouma Ochieng, MP
The Hon. Dan Kazungu, MP
The Hon. Bady Twalib Bady, MP
The Hon. Robert Mbui, MP

The Hon. Anyanga Andrew Toboso, MP
The Hon. Florence Mwikali Mutua, MP
The Hon. Ogendo Rose Nyamunga, MP
The Hon. Charles Mutisya Nyamai, MP
The Hon. Alois Lentoimaga, MP
The Hon. Anthony Kimaru, MP
The Hon. David Kariithi, MP
The Hon. Wanjiku Muhia, MP
The Hon. Murungi Kathuri, MP
The Hon. Ali Wario, MP
The Hon. Eric Keter, MP
The Hon. Mary Seneta, MP
The Hon. Gideon Konchella, MP
The Hon. Dido Ali Rasso, MP
The Hon. Ann Nyokabi, MP
The Hon. Emmanuel Wangwe, MP
The Hon. Peter Shehe, MP
The Hon. Alex Mwiru, MP
The Hon. Mark Lomunokol, MP
The Hon. Sarah Korere, MP
The Hon. Cyprian Kubai Iringo, MP
The Hon. Timothy Bosire, MP
The Hon. Joseph Kahangara, MP

Mr. Speaker, Sir,

On 11th February, 2014, the following Bills from East African Legislative Assembly were tabled in the House by the Majority Leader:

1. East African Community Cross Border Legal Practice Bill, 2014 sponsored by the The Hon. Dora C. Kanabahita Byamukama, Member of East African Legislative Assembly
2. The East African Community Integration (Education) Bill, 2014 by the The Hon. Abubakar Zein Abubakar, Member of East African Legislative Assembly
3. The East African Community Cooperative Societies Bill, 2014 by the The Hon. Mike Kennedy Sebalu, Member of East African Legislative Assembly

Mr. Speaker, Sir,

Standing Order 251 provides that whenever the Clerk of the National Assembly receives copies of the records of relevant debates of the meetings of the East African Legislative Assembly, or copies of Bills introduced into the East African Legislative Assembly and Acts of the East African Community, the Clerk shall forward the records of debates, Bills or Acts of the Community to the relevant Committee. The Committee shall consider this report and submit its report to the House within twenty one days (21) for Consideration. Upon consideration of the Committee's report, the Clerk of the National Assembly shall forward the House's resolutions to the Clerk of the East African Legislative Assembly within seven days.

In accordance with Article 65(b) of the Treaty, the Clerk of the East African Legislative Assembly requested the Kenya National Assembly (in his forwarding letter) to consider the Bills and submit its views by 25th March, 2014.

In processing the Bills, the Committee called for memoranda from the stakeholders pursuant to Standing Order 127(3) and Article 118(b) of the Constitution. The following institutions sent their memoranda on the Bills:

1. The Ministry of East African Affairs, Commerce & Tourism
2. The Kenya Law Society
3. Kenya Private Sector Alliance
4. Attorney General
5. Kenya Law Reform Commission
6. Ministry of Education
7. Council for University Education
8. Sacco Regulatory Authority (SASRA)
9. Kenya Union of Savings & Credit Co-operatives Ltd (KUSCCO)
10. Council for Legal Education

Consideration of the Bills

Mr. Speaker, Sir,

In examining the Bills, the Committee noted the following:

1. Cross East African Community Cross Border Legal Practice, 2013

The object of the Bill is to provide for conduct and regulation of cross border legal practice in the East African Community. The Bill operationalises Article 126 of the Treaty by harmonizing the legal training and certification with the partner states. It will also operationalise Articles 10, 76 and 11 of the Treaty on the free movement of labour.

In considering the Bill, the Committee observed that the proposed East African Community Council will be not having a representative from the Institutions offering legal training among the Partner states if the Bill was to pass in its current form. To effectively harmonize legal training, there is need for inclusion of a representative of academia from each partner state.

2. East African Community Cooperative Societies Bill, 2014

The Bill makes minimal reference to the East African Community Treaty and the relevant statutes governing Saccos in individual partner States. It merely creates a regional Cooperative Society without providing how these Saccos will be interlinked and regulated both within their countries and regionally. Mode of formation of the cooperative is not clear as the integration component has not been addressed by the Bill. The Constitution of Kenya recognizes that Saccos is a devolved function and therefore there it is apparent that there will be divergent rules and regulations governing them from one county to the other.

If passed in its current form, the Bill will override all national legislations governing Saccos as provided in clause 54. It should take cognizance of the fact that the licensing, supervision and regulation of SACCOs as deposit taking institution is not covered in the bill, and thus domestic laws such as Sacco Societies Act, 2008 ought to take precedence when it comes to prudential regulations of SACCOs.

3. The East African Community Integration (Education) Bill, 2014

The Bill proposes the creation of an Integration Education Unit within the Secretariat with a mandate to coordinate integration education activities in the partner states, develop relevant materials and set standards and quality control measures amongst other functions.

In examining the Bill, the Committee observed that there is a clear mismatch of the title from the contents of the Bill. Whereareas the Bill sets its object as that of providing civic education to the

people of the community in line with the people centeredness initiative of integration, the content of the Bill goes beyond civic education by regulating standards of education in partner states.

Appreciation

Mr. Speaker, Sir,

The Committee is thankful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee wishes to thank all the stakeholders for their participation in scrutinizing the Bills. Finally, I wish to express my appreciation to the Honourable Members of the Committee who sacrificed their time to participate in the activities of the Committee and preparation of this report.

Mr. Speaker, Sir,

It is therefore my pleasant duty and privilege, on behalf of the Committee on Regional Integration, to table its report in the House on the consideration of the East African Community Cross Border Legal Practice Bill, 2014; East African Community Cooperative Societies Bill, 2014; and East African Community Integration (Education) Bill, 2014.

Signed 

THE HON. FLORENCE KAJUJU, MP
CHAIRPERSON,
COMMITTEE ON REGIONAL INTEGRATION

Date: 25/3/2014

CONSIDERATION OF THE BILLS

1. EAST AFRICAN COMMUNITY CROSS BORDER LEGAL PRACTICE BILL, 2014

The Committee considered the Bill clause by clause and deduced the following:-

The definitions/ interpretations under clause 2 should be made in such a manner that they recognize that an advocate would be licenced by the National Bar Associations having met the stipulated qualifications in that partner state. Having been registered by the National Bar Association, an advocate will automatically be enrolled in the EAC advocates register and therefore eligible to practice in other Partner States. This will avoid double registration.

The proposal in Clause 4(2) to have the a representative of the East African Law Society as the Secretary to the Council will defeats the law of fair play. It is important for the Council to competitively recruit its secretary from among the partner states.

The proposed composition of the Council under clause 4 excludes the important role played by the academia in legal training. To achieve the objective of harmonization of legal training and certification as contained in clause 3(b), there is need for inclusion of a representative of the universities offering legal education from each partner state. It would also be important for the partner states to ensure gender representation when making nominations to the council.

The envisaged council in the Bill will be a unit of the EAC and therefore it should be funding from the EAC budget as opposed to fees charged on issuance of a practicing certificate. It will be important if the council was allowed to raise funds though any other means to support the performance of its functions. Regional practicing certificates should be issued by the National Bar associations; who will retain the fees charged for that service.

2. EAST AFRICAN COMMUNITY COOPERATIVE SOCIETIES BILL, 2014

The Committee considered the Bill clause by clause and deduced the following:

The Constitution of Kenya 2010

The principal legislation/statute governing the registration of Co-operative Societies is the Cooperative Societies Act (CSA) Cap 490 under the administration of the Commissioner of Cooperative Development. However, the 4th schedule to the Constitution classifies Cooperative societies as a devolved function of the County Governments meaning that registration of Cooperative Societies shall be devolved to the County Governments giving power to County governments to enact their own county legislations to govern registration and regulation of the Cooperative Societies with the counties jurisdictions.

The bill ought to recognize the fact that there may be more than one "appropriate authority" in Kenya as defined in Clause 7 and read with Clause 2 thereof.

With the exception of internationally best practices in cooperatives, there is a possibility that the various Cooperative Societies legislations which may crop up from the County governments to govern registration may markedly differ. This may only be addressed through a national policy and legislation prescribing the minimum contents of such county legislation.

The Co-operative Societies and Sacco Societies

Cooperative Societies Act governs the registration and other administration of all types of Cooperative Societies. The enactment of SACCO Societies Act, 2008 as principal legislation providing for the licensing, supervision and regulation of deposit-taking (FOSA) SACCOs provided that the Act supersede the Cooperative Societies Act in cases of conflict, while the Cooperative Societies Act continued to apply to SACCOs in case in which the Sacco Societies Act, 2008 is silent.

The Bill should clearly recognize this special type of cooperative societies, namely SACCOs especially those engaged in the quasi-banking businesses (FOSA) and the need to have them prudentially regulated by an independent body within the partner states.

Clause 54 of the bill makes the bill superior to the partner states' legislations, which is well within the spirit of the EAC Treaty. However, the bill should take cognizance of the fact that the licensing, supervision and regulation of SACCOs as deposit taking institution is not covered in the bill, and thus domestic laws such as Sacco Societies Act, 2008 ought to take precedence when it comes to prudential regulations of SACCOs.

Membership to Cooperative Societies

In Kenya, Membership to cooperative societies including SACCOs is normally defined from the perspective of the Saccos' By-Laws and not statute as proposed by Clause 5(2). This definition in the By-Laws was done through the common bond principle, but which has since been abandoned by many SACCOs with the adoption of the open bond policies.

Clause 5(2) of the Bill is limiting, and does not agree with the current trend in Kenya where membership of SACCOs is open to a wide range of people and not just those who live or work within a given area.

Sale of Shares to Third Parties

Kenya's current legal framework governing cooperative societies does not envisage a situation in which cooperative society would sell its shares to other third parties as proposed in Clause 5(5) of the Bill. The law currently prohibits SACCOs from dealing with non-members and thus the issue of selling shares to other persons would not arise.

A person seeking to purchase the shares of a cooperative society must therefore join the membership thereof, which may be through the normal member recruitment or as a transfer from an existing member. Such sale of shares will also violate domestic Capital Markets Act.

Clause 5(5) should be redefined along the prevailing domestic laws in Kenya to limit sale or purchase of shares of a cooperative society to members only.

Recognition of Cooperative Societies registered in other Partner States

Whereas Clause 7 of the Bill provides that a cooperative society shall be registered by the appropriate authorities in the partner states, there is no provision to guide the reciprocal recognition of such a society in other partner states, other than where it has been registered. This will thus hamper the cross border operations of such a cooperative society in the state other than where it has been registered. This is very necessary for deposit taking SACCOs, where domestic legislation ought to guide with certainty their prudential regulation.

The Bill should provide for the procedure for the recognition of cooperative societies registered in one partner state, but seeking to operate within the jurisdiction of another partner state or whether such cooperative society will have to seek dual registration to operate in other partner state.

The Bill should also provide mechanisms for cross-border operations of cooperative societies, particularly when it comes to deposit taking SACCOs mobilizing deposits.

Settlement of Disputes

The Bill proposes that all disputes arising between cooperative societies, their members and employees in accordance with Clause 47 thereof ought to be settled through the Alternative Dispute Resolution mechanisms of conciliation, and in default arbitration, with appeals lying to the High Court. This provision is in direct conflict with the Cooperative Societies Act which provides that such disputes are to be handled by a cooperative tribunal and the appeals from the tribunal lies to High Court. Indeed even the Sacco Societies Act provides that disputes between the Authority and SACCOs are to be referred to the tribunal as the Court of first instance.

The cooperative tribunal as established is deemed to be a specialized court for purposes of cooperative disputes, as the court of first instance and thus should be retained – with appropriate reforms thereto. Since clause 54 of the Bill makes the bill superior to the domestic laws, it is likely

that the bill is likely to oust the powers of the tribunal as a court of first instance in respect of cooperative matter.

The Bill should equally provide for resolution of disputes arising out of cross border operations of cooperative societies, and the inter-relationship with the domestic tribunals in order to make the dispute resolution forum clear. There is therefore need for creation of an EAC tribunal to handle what the tribunals in the partner states cannot handle.

Share Capital of Cooperative Society

Clause 27 of the Bill provides inter alia that the shares of a member may be used to off-set a debt due to the society from such a member. This is erroneous and is likely to lead to de-capitalization of the society in case of defaults by members.

The current legislations in Kenya are clear that members shares are equities for the society and cannot be expended, unless on liquidation. The shares cannot therefore be collateral against credit advance to members, nor can such equity be used to off-set debts owed. They can only be transferred to other members.

The Bill needs to clearly distinguish between shares which are equity capital to the society and other deposits which may be used as collateral for credit advances, and also to off-set debts due. This is particularly important for deposit taking SACCOs which rely heavily on the members' shareholding as their main source of capital, in the absence of which the SACCOs existence would be threatened.

Audit and Inspection

The Bill proposes in Part VII that the auditing and inspection of cooperatives societies shall be undertaken by the appropriated national authorities. However, the Bill does not take into consideration the extent to which such inspection and /or audit may go with regard to operations of the society, outside the jurisdiction of the Registration State.

The Bill ought to recognize the fact that the cross-border operations of a society may have material negative impact on the performance and stability of the society, especially a deposit-taking SACCO. In this respect, the role of the Partner State and its equivalent appropriate authority need to be defined in the Bill.

Terminologies

The Bill introduces terminologies which are not necessarily aligned to the prevailing legal system in Kenya. These include General Assembly, Control Committees among others. These terms may bring confusion with regard to the operations of the cooperative societies in their current module, unless the proposals are aligned.

There is need to have general terminologies and not specific terminologies suit to a country where each country will interpret the general terminologies to suit their own local scenario.

3. EAST AFRICAN COMMUNITY INTEGRATION (EDUCATION) BILL, 2014

The Committee considered the Bill clause by clause and deduced the following:

That, the Bill is anchored on Article 7 of the Treaty which provides for people centered and market driven economy and that the object of the Bill is to provide a legal framework within which people of East Africa get necessary knowledge and information about the affairs and activities of the Community.

The title of the Bill is not consistent with contents therein. For instance, the title makes reference to education whilst the contents of the Bill show that it is meant for dissemination of community information among the partner states.

THE COMMITTEE'S PROPOSED AMENDMENTS

(a) EAST AFRICAN COMMUNITY CROSS BORDER LEGAL PRACTICE BILL, 2014

The Committee proposes the following amendments to the bill when it comes for the Committee Stage in the East African Legislative Assembly:

CLAUSE 2

THAT, the Bill be amended in the definition of "indiscipline" under (d) by inserting the words "on account of disciplinary proceedings" after the word "practice".

Justification

This definition fails to contemplate that it is possible for a lawyer to be restricted or limited to practice on account of reasons other than "disciplinary proceedings" e.g. a lawyer in good standing but who has not taken out a practicing certificate.

THAT, Clause 2 of the Bill be amended in the definition of the "disciplinary record" by inserting the following immediately after (e)

(f) any other orders to pay fine and or costs, compensation or reimbursement

Justification

To cover all orders possible for issuance upon conviction of professional misconduct.

THAT, Clause 2 of the Bill be amended in the definition of the "practicing certificate" by deleting the words "issued by Registrar to an advocate authorizing him or her to practice in any of the partner state" and substituting thereof with the words "by issued accordance with the Rules of the Partner State"

Justification

Each partner state shall be issuing practicing certificates according to its laws rather than an East African Practicing certificate.

THAT, Clause 2 of the Bill should be amended in the definition of "Register" by deleting all the words therein and substituting thereof with the following words-

"register means" a register of advocates admitted to the roll of advocates of each partner states;

Justification

At a regional level we only need a register of the admitted advocates. Each Partner State should keep a register of eligible advocates and reserve the right to authorize who to practice within their jurisdiction that will be guided by regulations to be provided for by the Law Council.

CLAUSE 4

THAT, Clause 4(2)(a) of the Bill be amended by inserting the words "or its equivalent national bar associations" immediately after the word "council".

Justification

It is important to recognize that some state partners the regulatory body is the Bar Association

THAT, Clause 4(2)(a) of the Bill be amended by inserting the words “after consultations among themselves to ensure gender parity” after the word “States”

Justification

To ensure gender equality in the membership of the Council

THAT, Clause 4(2)(b) of the Bill be amended by deleting the words “”who shall be the Secretary.

Justification

The Secretary to the Council should be recruited competitively.

THAT, Clause 4(2(c) of the Bill be amended by deleting the words “Court of Justice who shall preside over the law council’ and substituting it with the words “Community Secretariat”

Justification

It is not proper for a member of EACJ to be a member of the EA Law Council considering that they may at one point preside over matters arising out of cross border legal practice. The Bar and the Bench should enjoy its independence. The Secretariat representative will be ideal in these circumstances.

Clause 4(2) should be amended by inserting the following new sub clause 4(2)(d)-

“a representative of Universities offering legal education from each Partner State”

Justification

Inclusion of the academia in the council is important in so far as regulation of legal training is concerned.

THAT, Clause 4(3) of the Bill be amended by inserting the following words after the word “once”-
“Upon assuming office, the Council shall elect the chairperson and competitively recruit the Secretary to the Council who shall serve on full term basis”

Justification

Provides for the mode of recruitment, appointment and term of office of the Secretary and the chair

THAT, Clause 4(2) be amended by including a proviso to specifically state that the appointing authority of the members of the council

Clause 7

THAT, Clause 7(2) of the Bill be amended by deleting all the words after the word “a” and replacing them with the words “as prescribed under Section 4(3)”

Justification

There secretary general should be competitively recruited as amended in 4(3) above

THAT, Clause 7(3) of the Bill be amended by deleting the words “fees payable by advocates upon issuance of East African Practising Certificate” with the words “East African Community Budget”

Justification

The practicing certificate will be issued by the national bar associations as amended in clause. Since this is a function of the community, it is only logical that funds to run it should be drawn from the Community budget as contributed by the partner states.

Clause 7 of the Bill be amended by inserting a new clause 7(4):

“The Law Council may also raise funds through any other means to support the performance of its functions under this Act”

Justification

The Law Council should have the power and flexibility to raise funds to meet its expenses over and above the provisions of section 7(3).

(b) EAST AFRICAN COMMUNITY COOPERATIVE SOCIETIES BILL, 2014

The Committee proposes the following amendments to the bill when it comes for the Committee Stage in the East African Legislative Assembly:-

CLAUSE 5

THAT, the Bill be amended in clause 5 (5) by inserting the replacing the word “persons” with the words “members of a society”

Justification

The Kenyan law currently prohibits SACCOs from dealing with non-members and thus the issue of selling shares to other persons would not arise.

CLAUSE 7

THAT, the Bill should make a provision for the procedure for the recognition of cooperative societies registered in one Partner State, but seeking to operate within the jurisdiction of another Partner State or whether such cooperative society will have to seek dual registration to operate in other partner state.

The Bill should also provide mechanisms for cross-border operations of cooperative societies, particularly when it comes to deposit taking SACCOs mobilizing deposits

THAT, the Bill be amended in clause 7 (6) by inserting the words “except where such an additional trade licence is considered necessary to secure the interest of specific members investing through the society under a special purpose investment vehicle” after the word “licence”

Justification

This is an important provision which will facilitate the ease of operations and reduce the cost of doing business by removing the need for additional licenses. However, this provision should take into account that certain licenses may be required where a society seeks to diversify services such as creating special purpose investment vehicles (e.g. housing schemes) which would require separate registration

THAT, the Bill should be amended in clause 7 (7) by inserting the words “but within the validity of the temporary certificate” after the word “time”

THAT, the Bill be amended in clause 7 (7) by inserting new clause 7(7a)

7 (7a): The appropriate Authority shall specify in writing the requirements that have not been met and seek compliance within a period of 1 year provided that this period may be extended where the appropriate authority deems that there is sufficient cause and reason to grant further extension

Justification

It would be necessary to indicate and specify the conditions that have not been met and which the society must comply with pending grant of full registration. It is also important to have flexibility over the 1 year limitation since compliance may require additional time beyond the 1 year prescribed period.

THAT, the Bill be amended in clause 7 (8) by inserting the words “provided that before exercising its power to suspend the society from operating, the authority shall notify the society on the areas of breach and shall provide a specific time period within which to remedy the breach and be in compliance or face suspension in default” after the word “Act”

Justification

It is important to ensure the rules of natural justice are observed before taking any measures to suspend a society. The right to a fair hearing is of the essence.

CLAUSE 8

THAT, Clause 8 be amended by deleting the words “shall have limited liability” and replace them with the words “its liability shall be limited in its constitutive instruments”

Justification

In view of the fact that a society holds funds and assets in trust for its members, its liability must be limited to its constitutive instruments rather than being determined through a statutory provision prescribing the nature of its liability.

CLAUSE 12

THAT, Clause 12 (1)(c) of the Bill be amended by inserting the words “if eligible” after the word “elected”. Clause 12(1)(d) be amended by inserting the words “owing to such member” after the word “benefits”.

Justification

In line with the standards expected of leadership, a society is entitled to prescribe conditions for eligibility to seek office. Election cannot be a matter of right but must be pegged to satisfying specific criteria. Ordinarily, payment of benefits owing to a member must be pegged to one’s entitlement and this must be made explicit.

THAT, Clause 12(2)(e) of the Bill be deleted.

Justification

This provision appears misplaced and inconsistent with the generic duties expected of a member of a society.