Insights/Articles

Did *Stephen Nyamweya & another v. Riley Barasa Services Limited* [2013]eKLR change Kenya's Employment law on Enforceability of Arbitration Clauses in Employment Contracts?

Arbitration clauses in employment contracts are enforceable under Kenya's Employment & Labour relations laws. *Nyamweya & another v. Riley Barasa Services Limited* [2013]eKLR did not change this legal position. What *Nyamweya* did was to clarify the legal position that arbitration clauses in employment contracts will not be enforceable if they are "incapable of implementation owing to certain absurdities".

Equally important, the absurdities test in *Nyamweya* is not a new innovation. Section 6 of the Arbitration Act, 1995 already states that arbitration clauses in agreements (including employment contracts because arbitration laws apply to employment contracts in Kenya- see, e.g., *James Heather-Hayes v. African Medical and Research Foundation (AMREF)* [2014]eKLR) will not be enforceable if the arbitration clause is null and void, inoperative or "incapable of being performed".

Accordingly, the absurdities test in *Nyamweya* is rightly within the purview of Kenya's arbitration laws.

There is need, therefore, for employers (drafters of employment contracts) to ensure that the arbitration clause in an employment contact, if any, is capable of being performed/implemented. The arbitration clause must be self-executing otherwise disputes arising out of the contract may not be subjected to arbitration.

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Mismatch between Law and Economics Hurting Kenyan Agriculture

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In *The Wealth of Nations*, Adam Smith warns that “laws frequently continue in force long after the circumstances which first gave occasion to them, and which could alone render them reasonable, are no more”. This is perfect description of the regulatory framework of our nation’s agriculture. There is a lot of mismatch between law and economics that has hindered, and continues to hinder, realization of the full potential of Kenya’s agriculture. This mismatch poses greater threat to agriculture than drought. No wonder Kenya is among the list of countries in Africa with over 10million people living in hunger.

Agriculture is a great contributor to Kenya’s GDP. However, bureaucracy has made it impossible to realize agriculture’s full potential. Regulation of Kenya’s agriculture is a good case study on how law can become a trade barrier.

Kenya’s Constitution protects the right of every person “to be free from hunger, and to have adequate food…” This right is to be progressively realized, with the Constitution mandating the State to “take legislative, policy and other measures including the setting of standards”. However, it will be impossible to have a hunger free nation if the nation does not pay serious attention to the trade-distorting and competition-destroying power of law. Let this be the year when sound law and economic reasoning triumphs over “tyranny of numbers”. Let this be the year when we commit anew to creating a competitive world-class agricultural market. Let this be the year when the nation’s agriculture was market driven, a year when government’s visible hand gave way to the invisible hand of the market.

It is only in those sectors where market forces are more in operation where we see most progress. A good example is the diary sector. The revival of the diary sector by the NARC government in 2003 was largely successful because there was political will to match law and economics.

In other sectors where government's hand is more visible, it has been very difficult to create competitive agricultural markets. Sugar sector is a good example. The 2012/13 *Sugar Sector Study* by the Competition Authority found that the creation of a competitive sugar industry has been hampered by, *inter alia*, the "sugar licensing regime in the country". In other words, the mismatch between law and economics hurt, and continues to hurt, the nation's sugar industry. It is time we thoughtfully created competitive industry structures, industry structures driven by sound law and economics.

The Crops Act, 2013, is a step in the right direction, for it seeks to reduce state bureaucracy over Kenya's agriculture. It seeks to create a synergy between national and county governments in agriculture as decreed under the Fourth Schedule of the Constitution. Counties have the Fourth Schedule power over agriculture as well as "trade development and regulation" of markets. The Crops Act seeks to ensure that County legislation does not hinder national agricultural policy and inter-county agricultural commerce. While the Fourth Schedule envisions a non-uniform development of County agricultural markets (which is a good thing because it allows market innovation and inter-County competition), the Competition Authority should pay attention to the competitive nature of County agricultural legislation to ensure that County agricultural markets are competitive.

In exercising the board-establishment power under the Crops Act, the Cabinet Secretary for Agriculture ought to ensure that the agricultural boards do not exercise too much power over the agricultural markets. Uniform standards like marketing and pricing often destroy the emergence of competitive markets. Standardization should be used sparingly to encourage market efficiency and innovation. Countries like South Africa did away with too many agricultural boards and price controls as a prerequisite for creating market-driven agricultural markets.

It is impossible to develop competitive agricultural markets without first nurturing a strong competitive culture.

Market players in agricultural markets must not be allowed to engage in anti-competitive conduct including farming cooperatives. Farming cooperatives have become very powerful with several having very sophisticated production and supply chains. The Competition Authority should invest more resources in studying production and supply chains of farming cooperatives.

Equally important, farming cooperatives should no longer be exempt from competition laws. It is a mismatch between law and economics for farming cooperatives to be allowed to fix production quotas.

Under section 31 of the Cooperatives Act, production contracts between cooperative society and farmers cannot be challenged as being a restraint of trade. This is an old unreasonable law, which should not be allowed to hinder the operation of market. Comparatively speaking, under America's federal antitrust law farmer cooperatives are not allowed to fix pre-planting production quotas (see, e.g., *In re Fresh and Process Potatoes Antitrust Litigation*., No. 4:10-MD-2186 *(D. Idaho).* The economic wisdom in prohibiting cooperatives fixing pre-production quotas obtains from the first fundamental principle in economics (i.e., the inverse relation between price charged and the quantity demanded). If for example potato farming cooperatives limit the quantity of potatoes produced, the Law of Demand will raise the price of potatoes.

Kenyan farmers face a great competitive disadvantage from farmers in countries with competitive agricultural markets. Non-competitive agricultural markets dampen risk appetite in agricultural commodity markets. *Grow Africa*'s 2013-2014 report notes that Kenya's agriculture has failed to attract finance because of under-developed risk finance market. However, and this confirms the power of competition to drive agricultural markets, investors are beginning to invest in Kenya's agriculture as agricultural markets become more competitive.

And although it is encouraging that the Capital Markets Authority has put in place regulations to guide the formation of a futures exchanges market, it will be impossible to translate futures markets into significant movers of Kenya's agriculture without having in place competitive agricultural markets. Let this be the year when agricultural law matches with sound economics.

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