

## EDITORIAL

In the year 2019, Kabarak University Law School launched the inaugural edition of the *African Journal of Commercial Law* as a platform for intellectual discourses on commercial legal themes of relevance or significance to the African continent. I am excited to present to our readers the second volume of the AJCL. In this volume, we have a rich collection of articles on varying topics.

In the first article, Harrison Otieno Mbori, discusses trade remedies in relation to African states. In this regard, he makes two broad arguments. Firstly, that trade remedies would only be more meaningful for African states only if implemented at the level of regional economic communities. Secondly, he argues for the elimination of trade remedies at the multilateral level. These two arguments are based on the fact that trade remedies have traditionally been abused to serve protectionist goals and that there exists an asymmetry in the capabilities of countries in the global North and South to effectively employ trade remedies in global trade relations.

Augustus Mutemi Mbila and Edmond Shikoli review the jurisdiction of the East African Court of Justice (EACJ) to hear and determine trade and investment disputes within the East African Community (EAC). In so doing, they highlight the manner in which the jurisdiction of the EACJ has been constrained through the creation of parallel dispute settlement mechanisms. These actions, in their opinion, have significantly minimised the role of the EACJ as the principal judicial organ of the EAC.

Julius Edobor brings the Economic Community of West African States (ECOWAS) voice to this volume. He looks at the legal limitations placed on the rights of individual persons to enforce the right to establishment in the

ECOWAS through the ECOWAS Court of Justice (ECCJ). He urges the ECCJ to strengthen the role played by private persons in the integration process by seeking inspiration from the courageous approaches of the East African Court of Justice (EACJ) and the Southern African Development Community Tribunal that have innovatively interpreted their regional legal frameworks so as to positively develop the law by allowing Community citizens an enhanced access.

Priscah Wamucii Nyotah looks at the manner in which Covid-19 containment measures have affected enjoyment of the right of establishment within the EAC. She argues that due to lack of an elaborate regional policy on the employment of protection of public health as a limitation to the right of establishment, EAC Partner States have, in an uncoordinated and non-transparent fashion, introduced restrictions that have adversely affected the right of establishment.

Moses Antony Odhiambo and Tomasz Milej deal with the hackneyed topic of how to decolonise the economies of African states. Specifically, they discuss the manner in which the Agreement Establishing the African Continental Free Trade Area (AfCFTA) could be used in the context of trade and investments to create Regional Value Chains that will transform the commodity structure of exports from Africa by minimising overreliance on primary goods and overprotection of foreign investors.

Hanningtone Amol shines the spotlight on EAC's legal and institutional framework on non-tariff barriers (NTBs). He decries the tendency of continued prevalence and emergence of new NTBs in the EAC and points at various weak points in the legal and institutional framework. He argues that NTBs in the EAC have significantly contributed to the decline of intra-EAC trade.

In my article, in a summary manner, I have looked at the ongoing Kenya-USA negotiations on a Free Trade Area (FTA) Agreement. Once completed, the USA hopes to use the Kenya-USA FTA Agreement as a model for negotiations with other African states. In this article, I have argued for the adoption of a gender-responsive approach as a way of ensuring that the resultant FTA Agreement contributes to the promotion of meaningful participation of women in the economy.

Three more authors have contributed short case commentaries on significant cases that have impacted various aspects of commercial law in the period under review. Abdullahi Ali reviews the Commissioner of Domestic Taxes (Large Taxpayers Office) and Barclays Bank of Kenya (now trading as ABSA Bank) judgements before the High Court and Court of Appeal of Kenya. He engages with the central issue in these cases, the literal interpretation rule in tax adjudication, and wonders whether there is cause for abandonment of the literal interpretation rule, and more so, its effects on tax obligations into the future.

Cedric Kadima reviews the *Kampala International University v Housing Finance Company Limited* case in relation to its central controversy, privity of contract and assignment of arbitration. Kadima explores the problems that arise when a third party to a contract is assigned rights in the contract and then go ahead to enforce an arbitral award in its favour. He argues that such an approach can reward contractual misconduct and proposes three standards to be met before courts accept validity of assigned rights to arbitration.

Finally, John Nyanje reviews the incredulous case of *Process & Industrial Developments Limited v Federal Republic of Nigeria*, a matter that went to arbitration in London and is currently under challenge before the English courts. In this case which produced the single largest arbitral award in the sum of \$6.597 billion with interest at the rate of 7% starting from 20 March 2013. It later emerged that the arbitration was a case of ‘match fixing’ with counsel for Nigeria having been bribed to poorly defend the case and thus lead to the incredulous outcome. Nyanje explores the obvious concerns for advocate misconduct, corruption and the legal hurdles the challenge before English courts must overcome. He concludes by raising concern that such unabashed collusion is sadly not the exception in Africa and that African states must take greater caution with commercial agreements that can lead to huge losses in international arbitration.

Compared to the first volume, in terms of outlook, this volume has stronger continental and regional features. We hope that we can develop this trend further with subsequent editions so that commercial law issues affecting all parts of Africa can be discussed. Scholarship has a very important role in

championing and galvanising the African agenda and we pledge to play our part in supporting scholarly work in this regard.

I wish to express my gratitude to all persons who contributed to the success of this edition in various capacities such as authors, editors and peer-reviewers.

Omolo J.A.  
Editor-in-Chief  
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