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THE LEGAL AND REGULATORY FRAMEWORK APPLICABLE TO ELECTRONIC AND NEW TECHNOLOGY BANKING IN KENYA.

AUTHORED BY - STEPHEN ANDITI

KEY WORDS: Banking, regulation, technology, electronic, security, internet-banking.

ABSTRACT

The uptake of new technology in the banking sector in Kenya has been unprecedented. Of vital significance, is the rapid absorption of mobile based banking services. This trend of continued reliance on mobile devices to execute monetary transactions, has totally gained momentum in Kenya. This paper sought to bring out the critical legal and regulatory framework issues arising from the emergent mobile technological innovations. The paper is structured to offer strategic insights into the current legal position and state of mobile banking in Kenya.

In its definition of banking business, the Banking Act only refers to the cash and cheque payment systems. The Act provides no definition and makes no reference to electronic banking. Electronic Commerce (and electronic banking) preceded the Internet. Before the advent of communication through Internet, business communication was conveyed using telex, facsimile machine, telephones, telegrams and other electronic media.

1.0INTRODUCTION

Money and payment play a central role in commercial and financial transactions. Every working day, millions of transactions are concluded involving the sale and purchase of land, goods and services, the lending and borrowing of money, and the issue and transfer of financial instruments. Every working day, funds are transferred and payments made in discharge of money obligations. Save for small value transactions, payment, and banking go hand in hand.[1] It is necessary to identify how electronic banking actively interferes with the lives of thousands of consumers who use banking products to manage their economies. Banking is not simply

[1]K. Kilonzo; An analysis of legal challenges posed by electronic banking; article published in the Kenya Law Review 2007.

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about cheap delivery – one of the benefits of electronic banking – running a bank is not like selling books or mobile telephone handsets. There is a whole range of other types of risks – credit liquidity, interest rate risk, and market risk that need to be taken into account. Brand name in banking is one of a bank's (and most enterprises') most important assets. Customers will feel more comfortable with a name that they know, and perhaps one whose name they see every day in the street, on signs above physical bricks and mortars (building) and not so much the provision of electronic; or other user-friendly banking facilities.

The Simplicity of the emphasis on banking at the click of a mouse, 24 hour banking, banking at your finger tips, mobile banking, shows the intricacies, dexterity and network of relationships involved in the banking relations between banks themselves, banks with corporate as well as natural personalities, banks and national governments and banks in the international environment[2].

The Banking Act of Kenya Cap 488 Laws of Kenya provides that the Act is enacted to regulate banking in Kenya and for connected purposes[3]. From the term" connected purposes" it would seem that mobile banking and transfers should be under this ambit of the Banking Act because they are connected to banking business.

The Banking Act does not define mobile banking or transfer. According to section 2(1) of the Act, banking business is the accepting from members of the public money on deposit repayable on demand or after notice[4].

2. SCOPE OF ELECTRONIC AND NEW TECHNOLOGY BANKING.

Due to the need to cope and embrace new technological developments, the banking industry has adopted new systems in the fields of e-commerce, e-banking, and payment systems. These are termed as mobile financial services, encompassing both mobile money and mobile banking.

Mobile money is money that is exchanged electronically through mobile phones.[5] Mobile

[2]Supra
[3] Banking Act of Kenya Cap 488 Laws of Kenya
[4] Ibid
[5]J Firpo, 'E-Money – Mobile Money – Mobile Banking' what's the Difference? <http://blogs.worldbank.org/psd/e-money-mobile-money-mobile-banking-what-s-the-difference>.

Money refers to the service to mobile phone subscribers that enables them to deposit cash and receive electronic-value into a virtual account (mobile money account), and to perform financial transactions.

Internet banking is a system allowing individuals to perform banking activities, via the internet. This form of banking enables customers to perform routine transactions such as account transfer, balance inquiries, bill payments, and maintain standing orders, download online account statements among others.

There are various institutions in Kenya that provide internet banking and mobile money services and they include: commercial banks, non-banking financial institutions, and mobile network operators.

The study will focus on the use of mobile money and internet banking as new forms of banking and payment systems in Kenya, the impact they have had on business competitiveness and the economy as a whole. The focus on mobile money and internet banking stems from the fact that they are new forms of electronic banking and continue to develop at a very high speed; new forms of transactions are developed now and then. The study intends to establish how effective these forms have been, on business transactions both local and international, the challenges posed by these two forms of banking will be analyzed with the aim of finding solutions.

2.0 MOBILE MONEY TRANSACTIONS

Prior to 1998 Kenya's payment system was dominated by cheques and cash payments. Over the years, technological advancement and globalization has seen the emergence of the internet which is used globally today to aid effective commercial transactions. This has brought about changes in money transfers. Mobile money services are a very important part of the said changes in Kenya today.

Mobile money services are rapidly growing in Kenya.[6] They are currently offered by mobile network operators as well as independent mobile money service providers who operate mobile money services using the mobile network operators in partnership with licensed financial

[6]Central Bank of Kenya Banking Guidelines, June2013.

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institutions to offer the mobile money service.

In developing countries, mobile payment solutions have been deployed as a means of extending financial services to the community known as the "unbanked" or "under banked," which is estimated to be as much as 50% of the world's adult population.[7]

In Kenya the informal sector heavily relies on mobile money services for business transactions. On the other hand, the elite and educated have embraced internet banking to transact on their bank accounts. A study conducted on mobile money in Africa[8] established that mobile money services are used by most people in the informal sector. Likewise, in East Africa it was established that people in businesses rely more on mobile money than on bank transfers while transacting with their suppliers.

The study highlighted that a mobile phone has the potential to enhance informal businesses and some of the advantages listed were that mobile money helps the business to:-

(i) Save transport costs
(ii) Better manage the cash flow
(iii) Pay suppliers more easily
(iv) Recover money from customers easily
(v) Increase sales
(vi) Allow the businesses to reach more customers

There is no doubt that mobile money offers consumers tremendous advantages in terms of speed, accessibility, convenience, safety and often affordability. However, consumers need adequate legal protection in place to give them confidence when using mobile money services. In particular, there is need for fair rules for the allocation of liability for unauthorized transactions, privacy and confidentiality, and complaints handling procedures are in place.[9]

Mobile money and internet banking transactions are very important engines for economic growth and development. However, both mobile money and internet banking transactions are still mired with several problems such as the lack of regulatory as well as specific laws for

[7]R.Bollen,'Recent developments in mobile banking and payments' (Journal of International Banking Law and Regulation 2009).
[8]Dr.Christoph:Mobile money in Africa: Bridging the financial gap and unlocking entrepreneurial potential.
[9]Discussion Paper on Expanded EFT code of Conduct in AustraliaJuly1999

their effective management and control. Kenya does not have a specific law that regulates mobile money and internet banking transactions. As a result there have been problems relating to operational, safety, and reliability.

Generally, any form of regulation relating to mobile money or internet banking should be guided and informed by the following principles:-

- **i.** A quality consumer protection regime for payment facilities;
- **ii.** Promoting consumer confidence in electronic money transactions;
- **iii.** Effective disclosure of information, to enable consumers to make informed decisions about facilities offered;
- **iv.** The need for clear and fair rules of allocating liability for unauthorized transactions;
- **v.** Effective procedures for resolving conflict and complaints; and
- **vi.** The need for a regulatory regime that is flexible and accommodates all new innovations

2.1 INTERNET BANKING TRANSACTIONS

According to Yee,[10] internet banking is the banking service provided via secure website operated by the bank provider whereby it involves the use of the internet as a remote delivery channel.

Namirembe[11] asserts that banks offer internet banking in two main ways. It can be an existing bank with physical offices that establish a website and offer internet banking to its customers as an addition to its traditional delivery channels. Another alternative is to establish a "virtual," "branchless," or "Internet-only" bank. The computer server that lies at the heart of a virtual bank may be housed in an office that serves as the legal address of such a bank, or at some other location.

Many commercial banks in Kenya have valued the importance of internet banking in improving the profitability and the overall efficiency of their business.[12]They have similarly allocated substantial resources for internet banking adoption and begun to build infrastructures

[10]A Yee-Loong Chong, KBoonOoi, Binshan Lin& B-In Tan, "Online banking adoption: an empirical analysis", International Journal of Bank Marketing Vol.28No.4 (2010)267-287
[11]E Namirembe, "Influence of ICT on the Banking Industry: the case of Kampala", Masters Dissertation, Makerere University (2007).
[12]F.A baasa, 'Banking in Kenya Gone High Tech', Nairobi Kenya ; Kenya Literature Bureau(2007) pg 201..

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to support a more reliable and quicker transfer of information to reach their customers. The evolution of internet banking has altered the nature of personal-customer banking relationships and has enabled electronic channels to perform many banking functions that would traditionally be carried out over the counter.

Although the proficiency of using internet banking is relatively low and in its infancy stages, the service has the advantages of being convenient, safe; efficient and economical, Kenyan domestic banks seem to be confident that internet banking benefits might outweigh traditional banking services in the future.[13]

According to Ndiwalana,[14] the rate of adoption of internet banking has not risen as strongly as expected. Some researchers identify attitudes towards internet banking to be the consumer's positive or negative feelings related to accomplishing the banking behavior on the internet. It can therefore be inferred that customer attitudes can affect the adoption of internet banking.

Attitude has affected trust and perceived risk towards internet banking adoption. An obstacle to internet banking adoption has been lack of security and privacy over the internet. This has led many to view internet banking as a risky undertaking. Trust and perceived risk reduction are very critical factors in electronic banking since they reduce the social complexity for the internet banking and drive to the achievement of electronic goals and without them, there is a failure of such goals and relations.[15]

However trust and perceived risk in Kenya have been affected by the problem of internet bank fraud for example The Central Bank of Kenya has warned the public against fraud in the Automated Teller Machines.[16]

As a result, there has been slow adoption rate to internet banking. The slow rate of adoption of internet banking in Uganda could be attributed to lack of trust, perceived risk, poor

[13]M Rogers, 'Consumers' attitudes, perceived risk, trust and internet banking adoption in Uganda ',A dissertation submitted to school of postgraduate studies in partial fulfilment the award of the degree of master of business administration of Makerere University (November,2010).
[14](Supra)
[15] (Ibid)
[16]East African Business Week,29,2010, also see M Rogers, 'Consumers' attitudes, perceived risk, Trust and internet banking adoption in Uganda', A dissertation submitted to school of postgraduate studies in partial fulfillment for the award of the degree of master of business administration of Makerere University (November, 2010).

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perceptions on usefulness and ease of use of the system by the customers.

2.2 SECURITY FOR ELECTRONIC MONEY TRANSACTIONS

Executing electronic money payments naturally involves the transmission of highly sensitive and personal information, raising reasonable concerns regarding how this information is sheltered from interception. Consumers must believe that they will have the protection of their money and other information both domestically and internationally.[17] Trends towards greater use of mobile or internet technology has naturally given rise to new issues regarding the security of sensitive personal financial information.[18]

The most common security concerns stemming from use of mobile financial services in Kenya are concentrated in two main areas.

First, is the fraud concern as a consequence of a mobile phone being lost or stolen. It is not clear from the scattered legislations that are related to mobile money or internet banking whether the initial personal information relating mobile money operators are well protected from fraud. If personal information and transactions are not protected by a personal identification number or other mechanisms, unauthorized transactions may be processed before the unit could be remotely deactivated, this is likely to discourage mobile money and internet banking users from their use.

Secondly, it is submitted that mobile network providers normally require a person who intends to do mobile money business to register with them, giving to the network information such as place of residence, source of money intending to be put in the business and other information relating to bill payments. There is likely to be fear in relation to personal and information privacy. If mobile phones are perceived as a high risk for breach of privacy, consumers will be reluctant to use them.

The adequacy of electronic money security is important, not only because the customers are entitled to protection of their accounts and to the confidentiality of the information they provide, but also because an unacceptable number of security failures is likely to undermine

[17]Angelovska-Wilson A & Feltault J, 'M-payments: the next payment frontier- current developmentsandchallengesininternationalimplementationofm-payments' (Journal of International Business, 2005

[18]ibid.

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public confidence in these transactions, this might have the effect of slowing the economic growth contributed by the use of mobile money and/or internet banking.[19]

2.3 CONSUMER PRIVACY AND CONFIDENTIALITY

Over the last decade, mobile telephony has enjoyed phenomenal adoption rates across most of Africa.[20] Since 2005, there has been a major increase in the number of African mobile phone subscriptions resulting in mobile phone subscriptions' increase amongst inhabitants.[21] As the primary means of communication for most Kenyans, mobile phones have become a source of significant economic growth and a platform for innovation. One of the most dynamic of these innovations has been mobile money, the use of mobile phones to purchase goods or services through funds connected to the user's account. On a continent with too few banking options necessary for a dynamic and modern economy, mobile money has the potential to address long-existing gaps in African economies.

Unfortunately, the rapid growth of mobile telephony in Africa has not been accompanied by appropriate consideration for privacy and security concerns, opening the door for abuse and erosion of the application's utility.

Inadequate privacy protection can lead to abuse by governments and data brokers as well as leave personal information susceptible to theft or leakage, ultimately damaging user trust and limiting adoption and use.

Against the above background, it can be fairly submitted that there are few established legal protection in African nations. Most nations do not formally recognize a right to personal privacy, and most do not have laws or regulators in place to monitor abuse.[22] Compounding the lack of legal protection is the relative absence of public interest groups to monitor government behavior, propose public policy, and promote awareness. These all lead to situations where serious abuses can occur with little impediment.

[19]L. Wilkinson; Electronic Fund Transfers: A Critical study of Indian Context with special reference to Security and Privacy Issues

[20]H. Andrew, G. Seymour, and P. Traynor, 'Privacy and security concerns associated with mobile money applications in Africa' Washington Journal of Law, Technology & Arts (Vol8, issue3 mobile money symposium 2013).

[21]Key Global Telecom Indicators for the World Telecommunication Service Sector 2018

[22]V.Sinis; Digital Signature legislation in Europe; September 2009 Paper presented to the International Bar Association.

It is important to note however that although there is no specific law on privacy in Kenya, the Constitution of the Republic of Kenya, Article27 provides for the right to privacy. However, rules or principles of privacy and guidelines concerning interception on the basis of law enforcement or intelligence gathering have not been developed which may culminate into abuse.

Some control mechanisms involving public and private sub-sector interventions have developed over years to ensure privacy as a whole. Employers of telecommunications operators are subject to confidentiality clauses and a duty not to disclose. System controls are very important as it controls whoever has access and the editorial and user powers to ensure network security. The question remains as to whether these arrangements can meet the extra demands brought about by mobile money and internet banking transactions.

2.4 SAFETY OF TRANSACTIONS

Mobile finance gives rise to a number of vulnerabilities that affect end-users. Users are faced with issues pertaining to account safety and authentication, the need for documentation and platform integrity issues.[23]

The safety of mobile money relative to cash is often cited as one of the key benefits of mobile money for customers. Safeguarding customer funds held as electronically stored value and reducing opportunities for agent fraud and other harmful actions have both been viewed with concern. It is opined that customers can be given even more protection through greater transparency, customer recourse processes, insurance protection, and privacy and data security measures.[24]Mobile money and internet banking must strike a balance between creating innovative forms of financial access and offering an acceptable level of consumer protection.

It is argued that when subscribers try to send money on their network Mobile Money, it might happen that they press a wrong digit or a wrong amount. In such cases, the system recognizes the transaction but does not complete it. Hence, while money is sent, it is usually not received. Such money is then kept in a suspense account, a system also used by commercial banks for money whose ownership is not yet clear.

[23]M. Harpgood (Editor) Pagets Law of Banking 15th Edition pg 264
[24]ibid

Many subscribers struggle to recover such money because, in Kenya, the process is long and tedious. A good number of them, especially if small amounts are involved, simply give up. Mobile networks are supposed to monitor this money to avoid scammers eventually making fictitious claims as to whom it belongs. However, it is submitted that the lack of specific law, rules and guidelines have hampered the service providers such as mobile networks from providing proper protection to the users. These same concerns apply to internet banking transactions in Kenya.

3. REGULATION OF ELECTRONIC MONEY SERVICES IN KENYA

Electronic money transactions have presented regulatory challenges that could potentially hinder maximum development benefits. This is because firstly, mobile money blurs the traditionally distinct and independent sectors of regulation (mostly, the telecommunications and financial banking sectors. It often involves an overlap between multiple ministries and Government agencies, thus adding to the complexity of oversight needed.

Secondly, due to the rapid growth in technological advancement other stakeholders are exploring emerging business opportunities like mobile banking. This in effect is changing the traditional business models and the financial landscape.

Thirdly, there is limited legislative and regulatory experience in other countries and regions to draw lessons from when drafting relevant legislation and regulations. As is the case in most other developing regions, national regulations have not kept pace with developments in the field. It is therefore imperative that regulators identify and address the gaps and potential overlaps between their existing legislative and regulatory frameworks.

The pertinent legislations that influence the operations of electronic banking within Kenya include the following.

3.0 KENYA COMMUNICATIONS (AMENDMENT) ACT 2009.

The Kenya Communications Amendment Act 1999 did not provide for the regulation of electronic transaction and neither did it provide for Mobile Money Transfer. This Act was amended to provide for electronic transactions in 2009 vide the Kenya Communications (Amendment) Act 2009.The Act does not define Mobile Money Transfer Services and Mobile Payment services. It defines a computer but does not define a mobile phone most of its

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definitions are limited to computers.

Section 83 of the Act lists the functions of the Communication Commission in relation to electronic transactions as to facilitate electronic transactions by ensuring the use of reliable electronic records; to facilitate electronic commerce and eliminate barriers such as those arising from uncertainties over writing and signature requirements; promoting public confidence in the integrity and reliability of electronic records and electronic transactions[25].

The above functions are general on commerce. Banking requires more specific legislation. Perhaps the reason is because banking is conducted as a business hence the drafter avoided the use of the term banking in exchange for commerce.

Section 83G provides for the legal recognition of electronic records[26]. Even if the Act does not recognize electronic money services and mobile payment services, if the transaction involving electronic services is recorded electronically then the Act will recognize and govern those records.

Section 83J provides for the formation and validity of electronic Contracts. Electronic money services and mobile payment services are contracts that are performed electronically; the limitation here is that the Section specifically refers to computers hence electronic contracts on mobile phone are not governed by this section. The contracts entered into electronically are definitely under the ambit of this section but it is arguable whether the contracts that are written on paper though performed electronically are fully under the ambit of this section.

3.1 KENYA COMMUNICATIONS REGULATIONS, 2001

In exercise of the powers conferred by sections 27, 38, 39, 40 and 66 of the Kenya Communications Act, the Minister for Information, Transport and Communications in consultation with the Commission promulgated the Kenya Communications Regulations; 2001.The regulations recognizes electronic mail, electronic document inter-change and electronic voice mail but does not have provisions regulating the use of the above.

[25] Kenya Communications (Amendment) Act 2009
[26] Ibid

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3.2 THE BANKING ACT CAP 488 LAWS OF KENYA.

The Banking Act is an Act of Parliament enacted to regulate banking business in Kenya and for other connected purposes. From the term "connected purposes" it would seem that mobile money transfer services and Mobile payment systems should be under the ambit of the Banking Act because they are connected with banking business especially where a consumer can directly transfer his money from his bank account to his mobile money account.

The banking Act does not define mobile money transfer services or even mobile money, according to section 2(1) of the Act banking business is the accepting from members of the public of money on deposit repayable on demand or after notice[27].

Mobile transfer services involve the accepting of deposits from the consumers. The consumers have to be subscribers of the particular service provider in Kenya e.g Safaricom or Airtel Kenya. Once the consumer has deposited the money with the agents of the service provider, he can withdraw the money anytime he wants and this would amount to conforming to the provision requiring'' payment on demand". The consumer can also decide to transfer the money to another person and the person can withdraw the money whenever he wants. This transfer of money takes place in the same manner as it does in the banks.

When a consumer transfers money from his phone and sends it to another person, the telecommunications service provider credits the transferor's mobile account and debits the transferee's account. This exemplifies a banking transaction in that, when one wants to transfer money to the account of another person he just orders the bank to credit his account and debit the account of the transferee.

From the above it would seem that mobile money transfer service providers conduct banking business and this would imply that they are contravening section 3 and 4 of the Banking Act. Section 3(1) states that no person in Kenya, should transact any banking business unless it is an institution or a duly approved agency conducting banking business on behalf of an institution which holds a valid license. Section 4(1) states that every institution intending to transact banking business in Kenya shall, before commencing such business, apply in writing to the Central Bank of Kenya for a license. The telecommunications companies offering money

[27] 3.3 The Banking Act Cap 488 Laws of Kenya

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transfer services are conducting business without licenses from the Central Bank, hence according to section 3(2) they commit an offence.

It is worth noting that Section 16(1) of the Act also prohibits the acceptance of deposit in the course of carrying on a deposit taking business without a valid license. Section 16(2) of the Act goes ahead to explain the meaning of deposit. It states that "deposit" means a sum of money paid on terms under which it will be repaid with or without interest or a premium, and either on demand or at a time or in the circumstances, agreed by or on behalf of the person making the payment and the person receiving it, and which are not referable to the provision of property services or the giving of security[28]. From this definition it would seem that the Mobile Money Transfer services do take deposits hence contradicting section 16(1) of the Banking Act.

4. CONCLUSION

There can be no doubt about the enormous potential for mobile money and internet banking in Kenya. For a country overwhelmed by limited banking options, mobile money has in just a short time brought millions to the ranks of financial inclusion. The increased data collection associated with this transparency renders mobile money users in Kenya and Africa at large vulnerable to governmental or corporate abuse of the data generated by mobile transactions.

There is also the issue of the agents used by the mobile transfer services not having been regulated by any law; they are regulated by the telecommunication service providers. There should be laws to register and regulate these agents. It is thus not clear who bears the burden of liability in case of a mistake. Electronic banking can be performed anytime and anywhere for instance Kenya's Safaricom is in partnership with United Kingdoms' Vodafone where subscribers in the United Kingdom can wire money through their mobile devices to subscribers in Kenya, there is hence a possibility of conflict of laws. There are no laws in Kenya providing for such situation this ought to be addressed.

Equally, troubling are cyber security concerns, leaving Kenyan mobile money users in a precarious position. Should mobile money platforms come to be drowned with privacy breaches and ***malware***,[29]users will lose trust in the application, eliminating potential gains. It

[28] Ibid
[29] short for malicious software, is any software used to disrupt computer operation, gather sensitive information, or gain access to private computer systems

is therefore imperative that a special law or regulations be adopted to enable the protection of mobile money and internet banking users, to manage and control their related activities, devise mechanisms for dispute resolution or the logging of complaint with the view to addressing the already existing deficiencies and ensure that the benefits of mobile money and internet banking will be enjoyed across Kenya and its borders.

To ensure effective regulation that does not undermine innovations, it is the regulator's responsibility to ensure that any intervention aimed at breaking a monopoly or abusive dominant (like in the case of Safaricom) position does not harm the industry, create an unequal playing field for current market players, or negatively impact customers.

In this regard, the regulator should employ long term measures that are aimed at mitigating the various risks. The long term measures include the development of detailed legal frameworks with clear action plans to guide their implementation.

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