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**GPR 699: RESEARCH PAPER**

**TOPIC: FREE MOVEMENT OF LABOUR WITHIN THE EAST AFRICAN  
COMMUNITY: KENYA'S COMPLIANCE WITH EAST AFRICAN COMMON  
MARKET PROTOCOL**

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## **ABBREVIATIONS AND ACRONYMS**

COMESA	-	Common Market for Eastern and Southern Africa
EAC	-	East African Community
ECA	-	Economic Commission for Africa
ECOWAS	-	Economic Community of West African States
EU	-	European Union
IOM	-	International Organisation for Migration
KCFNMSA	-	Kenya Citizens and Foreign Nationals Management Service Act
MEACA	-	Ministry of East African Community Affairs, Uganda
PRSP	-	Poverty Reduction Strategy Paper
RQAN	-	Return of Qualified African Nationals
SADC	-	Southern African Development Community

## **LIST OF TREATIES AND PROTOCOLS**

East African Community Common Market Protocol

East African Co-operation Treaty, 1967

ECOWAS Protocol on Free Movement of Persons and the Right of Residence and  
Establishment, May 1979

ECOWAS Supplementary Protocol on Free Movement of Persons

ECOWAS Supplementary Protocol on Right of Residence

Treaty for the Establishment of the East African Community, 1999

## **LIST OF STATUTES**

EAC Mediation Agreement Act, 1984

Investment Promotion Act, 2004

Investment Promotion Centre Act (repealed)

Kenya Citizens and Foreign Nationals Management Service Act, 2011

Kenya Citizenship and Immigration Act, 2011

Kenya Citizenship and Immigration Regulations, 2012

Treaty for the Establishment of the East African Community Act, 2000



## CHAPTER ONE: INTRODUCTION

### 1.1 BACKGROUND

Countries cannot fully survive on their own without dependence on each other. This has led to establishment of various international organizations to formalize and regulate this inter-dependence. International organizations have, thus, become permanent and important phenomena of international life. These institutions represent a form of international relations between states. Upon their establishment, they assume some functions that affect the relationship between states.

The East African region has not been left behind, but has established the East African Community (EAC). The EAC has four major objectives.<sup>1</sup> The first is to establish a Customs Union by eliminating all tariff and non-tariff barriers between the members in addition to adopting of a common external tariff. The second is to establish a Common Market, aiming at free movement of goods and all factors of production such as labour and capital. The third is to establish Monetary Union, aiming at creation of a single currency area and reducing cross-border transaction costs. Ultimately it aims to be a Political Federation culminating in the formation of a unitary government with East African president.

The key to achieving a common market is the free movement of factors of production, labour being one.

Labour migration across nations has been in existence for a long time. It is a process that occurs due to a number of factors including, voluntary and involuntary and forced migration due to wars and political instability. In the past, this process took place virtually unnoticed, only becoming an issue of concern for the international community in the last three decades. This is attributed to increased immigration as a result of several

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<sup>1</sup> For detailed exposition on objectives of the EAC, see EAC (2012), *What are the Aims and Objectives of The East African Community?* available at: <http://www.eac.int/component/content/article/38-faqs/63-aims.html> (last accessed 19<sup>th</sup> April 2013).

factors, including wars, social instability, economic hardships, increased unemployment and education. Of recent, the surge in labour migration has been as a result of globalization, easy communication due to revolution in information technology and regional integration processes.<sup>2</sup>

### **1.1.1 Brief History of the EAC**

Integration efforts in the EAC region were started by the colonial power, that is, Britain. When the colonialists initially came into East Africa, they were concerned with abolition of slave trade, mainly in the coastal areas. This objective changed when they realized the economic potential within the East African region. They, until the time of independence, spearheaded various efforts aimed at achieving integration of the East African region in an attempt to tap into its enormous economic potential.<sup>3</sup>

By early 1960s, the Africans had, by various means, including peaceful and violent ones, managed to gain increased participation in governance of the three East African countries.<sup>4</sup>

The first Africans-led integration effort can, thus, be seen as the East African Common Services Organization, which operated between 1961 and 1967. In 1966, a commission led by Professor Philip, from Denmark, was formed to look into the issue of integration and grievances of the Partner States and make appropriate recommendations for the purpose of furthering integration. The recommendation of the Philip Commission led to

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<sup>2</sup> Jose Antonio Alonso: *International Migration and Development – A review in light of the crisis*: available at [http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.un.org%2Fen%2Fdevelopment%2Fdesa%2Fpolicy%2Fcdp%2Fcdp\\_background\\_papers%2Fbp2011\\_11e.pdf&ei=1\\_p8UsmTJ43Qsga4lYF4&usg=AFQjCNFr4THKAvKowlavUqs2YVWcIelnCw&bvm=bv.56146854,d.Yms](http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCwQFjAA&url=http%3A%2F%2Fwww.un.org%2Fen%2Fdevelopment%2Fdesa%2Fpolicy%2Fcdp%2Fcdp_background_papers%2Fbp2011_11e.pdf&ei=1_p8UsmTJ43Qsga4lYF4&usg=AFQjCNFr4THKAvKowlavUqs2YVWcIelnCw&bvm=bv.56146854,d.Yms) (last accessed on 08 November 2013)

<sup>3</sup>These include but are not limited to; the British East African Association in 1887, the Imperial British East African Company (IBEAC) in 1888, the Customs Union between Kenya and Uganda in 1917 (Tanzania; then Tanganyika; joining in 1927) and the East African High Commission 1948-1961.

<sup>4</sup> The countries were initially three but now include Rwanda and Burundi and the application by Southern Sudan to join is pending for review.

the establishment of the East African Community under the East African Co-operation Treaty of 1967.<sup>5</sup>

The East African Co-operation Treaty did not provide for the free movement of factors of production, such as labour, between Partner States, leaving intact immigration laws and requirements relating to migrating to Partner States. Thus, despite the Treaty's attempt to establish a common market, it left out a very basic element of definition of a common market

The East African Community collapsed in 1977 due to several factors, among them lack of central planning at the community level, balance of payments and foreign exchange problems experienced by the member state around this time, and the Idi Amin factor.<sup>6</sup> The different ideologies pursued by the Partner States also contributed to the collapse of the Community; for example Tanzania was a socialist state, Kenya was capitalistic while Uganda was more dictatorial. Other new developments within the Partner States diluted the common services of the community.<sup>7</sup>

After the collapse of the EAC in 1977, the partner states in 1984 signed the East African Countries Mediation Agreement to provide for the modalities of winding up the community.<sup>8</sup> Part of the agreement required Partner States to explore and identify further areas of future cooperation between them and work out concrete arrangements for such cooperation. Pursuant to this provision, the heads of state of the three countries, in

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<sup>5</sup> This treaty was signed by Kenya, Tanzania and Uganda. It comprises 98 articles and 15 annexes.

<sup>6</sup> Otiso Kefa (2009), *Kenya in the Crosshairs of Global Terrorism: Fighting Terrorism at the Periphery*, available at: [http://kessa.org/yahoo\\_site\\_admin/assets/docs/5\\_K\\_OTISO.140160306.pdf](http://kessa.org/yahoo_site_admin/assets/docs/5_K_OTISO.140160306.pdf) (last accessed on 14<sup>th</sup> April 2013). On June 27, 1976, four terrorists forced an Air France Airbus to land in Uganda, in the heart of Africa. They quickly demanded that Israel release 53 convicted terrorists. The hijackers freed the French crew and non-Jewish passengers, while retaining 105 Jewish and Israeli hostages. The Israeli military launched a successful rescue mission at Entebbe Airport and saved the hostages. Ugandan president Idi Amin was angry that Israeli military had used Kenya as a base to refuel after the Entebbe rescue mission, declaring Kenya an enemy and that he would reclaim the boundary of Uganda up to Naivasha, souring relations between the neighbours.

<sup>7</sup> For a fuller discussion of the reasons, see Ethan B. Kapstein (2010) *The East African Community: Why This Time Is Different*, INSEAD and Center for Global Development, p. 10, available at: [http://www.sabmiller.com/files/reports/2010\\_sabmiller\\_east\\_african\\_community.pdf](http://www.sabmiller.com/files/reports/2010_sabmiller_east_african_community.pdf) (last accessed 13<sup>th</sup> April, 2013).

<sup>8</sup> This agreement was domesticated in Kenya through the EAC Mediation Agreement Act (Chapter 4 of the Laws of Kenya).

November 1993, signed an agreement establishing a permanent tripartite commission known as the East African Co-operation Commission. The commission was in existence between 1993 and 2000.

The Commission developed and launched the East Africa Development Strategy for a five-year period (1995 – 2000). This Strategy included an undertaking to re-establish the East African Community. Pursuant to this objective the Commission launched a draft treaty for establishment of EAC in 1998. This treaty was eventually signed by the partner states on the 30<sup>th</sup> of November, 1999 and came into force on 7<sup>th</sup> July 2000.<sup>9</sup>

The 1999 Treaty establishes the East African Community as a body corporate with perpetual succession, the power to sue and be sued in its own name and power to acquire, manage and dispose of property in any of the partner states, to perform any of the functions conferred upon it by the Treaty and do all things necessary for the performance of those functions. Article 3 of the Treaty identifies the members as the contracting parties and any other country that is granted membership in accordance with it. This article allows for expansion of membership. This has facilitated the addition of Burundi and Rwanda as members.

### **1.1.2 The EAC Common Market**

One of the objectives of the EAC is creation of a common market by member countries. This is provided for in Article 5(2) of the Treaty establishing the East African Community and, more specifically, Article 76(1) which states that:

‘There shall be established a Common Market among the Partner States. Within the Common Market, and subject to the Protocol provided for in paragraph 4 of this Article, there shall be free movement of labour, goods, services, capital, and the right of establishment.’<sup>10</sup>

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<sup>9</sup> EAC (2012), *Milestones in the EAC Integration Process*, p. 2, available at [www.eac.int/about-eac/eac-history.html](http://www.eac.int/about-eac/eac-history.html) (last accessed 13<sup>th</sup> April 2013).

<sup>10</sup> Article 104 (2) of the Treaty Establishing the East African Common Market also provides for the Common Market.

Article 76(4) of the Treaty states that ‘for purposes of this Article, the Partner States shall conclude a Protocol on a Common Market.’ Negotiations on the East African Community (EAC) Common Market Protocol commenced in February 2008 and were successfully concluded in September 2009 when the EAC Multi-Sectoral Council of Ministers adopted the Draft EAC Common Market Protocol and its annexes. The Draft was further considered for its legal content by the Attorneys General under the EAC Sectoral Council on Legal and Judicial Affairs and approved in October 2009.

The Protocol was signed by the EAC Heads of State on 20th November 2009 in Arusha, Tanzania. It entered into force on 1st July 2010, having undergone a ratification process in all the five Partner States, that is, Kenya, Uganda, Tanzania, Burundi and Rwanda.<sup>11</sup>

It is expected that the common market will accelerate economic growth and development in EAC through realization of free movement of East Africans. It is expected to lead to considerable benefits in terms of increased trade, economies of scale, efficiency and cost reductions. However, these prospective benefits can only be actualized when there are effective and people-centered policies and legislation on labour, employment, investment and trade.

One of the objectives of the EAC is ‘the strengthening and consolidation of co-operation in the agreed fields that lead to equitable economic development within the partner states and which would in turn, raise the standard of living and improve the quality of life of their populations.’<sup>12</sup> To achieve this, an enabling environment is necessary so that East Africans can begin reaping the benefits of having a single market by engaging in productive activities that empower them.

### **1.1.3 Free Movement of Labour**

A basic element in definition of a common market is free movement of the factors of production, including labour. As stated earlier, the previous East African Community did

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<sup>11</sup> *East African Community Common Market Protocol*, available at: [www.eac.int/component/content/351.html](http://www.eac.int/component/content/351.html) (last accessed 13<sup>th</sup> April, 2013).

<sup>12</sup> Article 5(3)(b) of the Treaty Establishing the East African Community

not provide for free movement of labour. This was a great weakness in the earlier attempt to establish a common market.

The Treaty establishing the East African Community has remedied this by expressly providing for the same in Article 5(2) and, more specifically, Article 76(1). Article 76(1) mentions free movement of labour as a key component of the common market. Pursuant to this, the Partner States have negotiated the East African Common Market Protocol (the Protocol) which is already in force.

The Protocol has three important articles which actuate the objective of free movement of labour in East Africa. These are Article 7 which provides for the free movement of persons, Article 10 which provides for the free movement of worker and Article 13 which provides for the right of establishment.

Free movement of persons and workers is covered in Part D of the Protocol. Part D requires Partner States to take steps to achieve these two in accordance with regulations on free movement of persons in Annex I and regulations on free movement of workers in Annex II.

Each partner state is required by Article 7 and Annex I not to discriminate between the citizens of other partner states and its own nationals in respect to movements in and out of the country, subject to standard travel documents. This demands steps to remove visa requirements within the partner states for a member country's citizens.

Further, Article 10 and Annex II require Partner States to treat workers from other countries in the region as equal to nationals in relation to employment, remuneration and other conditions of work and employment. This demands that workers from Partner States should be able to apply and accept offers of employment in any member state, move and stay in that member state, join any association or participate in collective bargaining for better working conditions and enjoy the rights of social security given to the nationals of the host state.

The right of establishment is covered in part E of the Protocol and Annex III and IV. This right allows citizens of a partner state to take up and pursue economic activities as self-employed persons, set up and manage economic undertakings and join social security schemes in any member state.

Among the annexes still under consideration, two will go a long way in establishing and fully enforcing the right to free movement of labour. These are, ‘Annex on Mutual Recognition of Academic and Professional Qualifications’ and ‘Annex on Social Security Benefits in the Community.’

## **1.2 STATEMENT OF THE PROBLEM**

The EAC Common Market Protocol provides for free movement of labour, defining it broadly to include workers and establishments.<sup>13</sup> It requires Partner States to remove visa requirements that restrict free movement of persons.<sup>14</sup> It also requires Partner States to treat workers from other Partner States as equal to nationals in relation to employment, remuneration and other conditions of work and employment.<sup>15</sup> Finally, it grants a right to citizens of partner states to take up and pursue economic activities as self-employed persons, set up and manage economic undertakings and join social security schemes in any member state.<sup>16</sup> Full implementation of these provisions would realize free movement of labour for citizens of the EAC Partner States.

Despite the Common Market Protocol coming into force on 1<sup>st</sup> July 2010, there has been little movement in terms of facilitating enjoyment of the rights to free movement of labour. Tanzania has clearly indicated that it shall delay implementation of the provisions

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<sup>13</sup> Articles 10 and 13 of the Protocol.

<sup>14</sup> Article 7 of the Protocol and Annex I.

<sup>15</sup> Article 10 of the Protocol, and Annex II.

<sup>16</sup> Article 13 of the Protocol, and Annexes II and IV.

of the free movement of labour.<sup>17</sup> In addition, there are many challenges that stand in the way of achieving full implementation of this right as provided for in the Protocol.

The above factors notwithstanding, Articles 7 which provides for the free movement of persons, 10 which provides for the free movement of worker and 13 which provides for the right of establishment, demand reforms from each member state on their existing policy, legal and institutional framework on free movement of labour. These reforms are those necessary to eliminate all barriers to free movement of labour within Partner States. In addition, the free movement of labour itself poses numerous challenges to each member state, leading to reluctance to fully implement it.

There was, thus, need to investigate what reforms are demanded by the EAC Common Market Protocol on each member state, including Kenya. In addition the steps Kenya has taken to implement this key right as provided for by Protocol were in need of scrutiny to establish whether they were effective to meet the requirements of the Protocol. Further, there was need for an investigation of the challenges that would face full implementation of free movement of labour together with ways Kenya as a member state was addressing the challenges.

Due to the vastness of the EAC region, and the cost constraints in collecting data from each member state, this study only reviewed the legal, policy and institutional framework established in Kenya towards full compliance with the Protocol requirements on free movement of labour. The study further established the steps that the Kenyan government had taken to enforce free movement of labour for citizens of the EAC partner states and their effectiveness. The study also analyzed the challenges that would affect implementation of the right to free movement of labour in Kenya and how the government can effectively address such challenges to ensure successful enjoyment of this right in the country by citizens of EAC partner states.

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<sup>17</sup> The Citizen Daily, *Tanzania Likely to Delay Free Labour Movement — EAC*, available at: [www.allafrica.com/stories/201007120678.html](http://www.allafrica.com/stories/201007120678.html) (last accessed 14<sup>th</sup> April, 2013).



### 1.3 JUSTIFICATION OF THE STUDY

There is a renewed enthusiasm towards regional integration all over the world. Spurred on by the successes of the European Union, many countries are becoming more keen on active participation in regional trading blocs.<sup>18</sup> Among the key indicators of integration in any regional trading block is free movement of factors of production among Partner States. All the regional trading blocks have since developed provisions providing for attainment of this right by citizens of Partner States.<sup>19</sup>

The EAC has not been left behind. It has enacted the EAC Common Market Protocol, providing for several rights and freedoms for the citizens of the Partner States. Free movement of labour is one of the fundamental freedoms guaranteed by the Protocol. Nationals of Partner States have a right to take up and engage in gainful employment on the territory of another Member State and to treatment equal to that of national workers as regards working and employment conditions, social security and tax benefits. His or her family members are also entitled to establish themselves, together with the worker, whatever their nationality.

Research was, thus, necessary to indicate the extent to which EAC Partner States have granted this right to its citizens. Such research should have among others established what the Protocol requires for each member state so as to attain the right to free movement of labour. Policy, legal and institutional frameworks of the Partner States needed to be examined so as to reveal the extent to which they comply with the requirements of the Protocol. Potential challenges in attempts to attain the right needed to be analyzed and ways of addressing these challenges explored.

It was noted that the studies already done had not adequately dealt with these issues: they were generalized studies on the right to free movement of persons in selected regional trading blocks. Most research had just highlighted challenges faced in attempts to achieve

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<sup>18</sup> Economic Commission for Latin America and the Caribbean (ECLAC) (2009), *Opportunities for Regional Cooperation and Integration*, p. 4, available at: [www.adb.org/themes/regional-cooperation/main](http://www.adb.org/themes/regional-cooperation/main) (last accessed 27th July, 2013).

<sup>19</sup> *supra*, note 17.

this right but had not made concrete proposals on how to address the challenges. Specifically on EAC, research done was majorly descriptive of the legal frameworks and labour migration trends.

This study has introduced such new perspectives, enriching the existing research on the topic. The study analyzed the requirements for each EAC member state in implementing the right to free movement of labour as granted by the EAC Common Market Protocol. Requirements such as removing all obstacles to intra-regional movement of skills, labour and travel, harmonizing social services, providing for the transfer of social security benefits and establishing common standards and measures for accreditation and equivalency have been explored.

This study investigated the possibility of achieving the foregoing in Kenya within the context of the Protocol. Due to the vastness of the EAC region, with 5 Partner States, and the limited time, this study limited itself to the extent to which the right has been achieved in the Kenyan jurisdiction. The study further analyzed the challenges posed by such a move and how they can be addressed. The study further made recommendations on the best way of implementing the Protocol's provisions on free movement of labour in Kenya.

#### **1.4 OBJECTIVE OF THE STUDY**

The objective of the study was to establish the extent to which the policy, legal and institutional frameworks on free movement of labour in Kenya reflect the Protocol establishing the East African Common Market, and the extent to which these frameworks have been implemented.

#### **1.5 RESEARCH QUESTION**

The study answered the following questions:

1. To what extent does the existing policy, legal and institutional framework on free movement of labour in Kenya reflect the Protocol establishing the East African Common Market?

2. To what extent has this framework been implemented?

## **1.6 HYPOTHESIS**

The study set out to test the following hypothesis: Kenya's policy, legal and institutional framework and practice on free movement of labour do not reflect the standards required by the Protocol establishing the East African Common Market.

## **1.7 THEORETICAL FRAMEWORK**

This study was informed by several theories. The first theory is the theory of integration. This theory seeks to explain the conditions necessary for effective integration of states.<sup>20</sup> Success of every integration scheme will depend on positive achievement in three main functional areas. The first area is the strength and nature of nationalist sentiments in the Partner States. The theory proposes that there is need to match stronger nationalist feelings among citizens of Partner States with regional objectives. The second area is ensuring divergence in social, economic and political structures as opposed to structural homogeneity. This implies that Partner States should have diversity so as to create a multinational, multicultural, and multilingual federation of states, with variety in levels of economic growth and political structures. The final area is the need for an established culture of bureaucracy in decision making within the Partner States. The theory proposes that Partner States should have an established culture of civil service that would bring about the necessary bureaucracy in decision making at regional level that is important for implementation of the regional policies and programmes.

The study also relied on organizational theory. This theory states that organizations emerge as better means of satisfying the individuals' interests than each of them would satisfy on their own. They are sustained because of their ability to create value and acceptable outcomes for various groups of stakeholders, where stakeholders are actors who have an interest, claim or stake in the organization, in what it does, and in how well

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<sup>20</sup> For more discussion on this theory, see Finn Laursen (2008), *Theory and Practice of Regional Integration*, available at <http://aei.pitt.edu/8219/1/LaursenLongSympos08RegIntegedi.pdf> (last accessed 14th April 2013).

it performs. Further, stakeholder groups are engaged in a process of continuous and simultaneous competition and collaboration, which is actually the essence of the organization.<sup>21</sup>

The theory posits that all stakeholders are interested in the survival of the organization, as an elementary condition for pursuing their goals. Consequently, they collaborate. For EAC as an organisation, each member state is a stakeholder in joining for its own interests and fighting inside it for its interests which includes but not limited to the wellbeing of her citizens, professional bodies and the business community that would be beneficiaries. The theory argues that the goal of an organization is to minimize its dependence on other organizations for the supply of scarce resources in its environment and to find ways to influence them in order to make resources available. This is the basis of the move towards free movement of labour.

On the basis of this theory, EAC is regarded as an organization where Partner States are its stakeholders. The initial moment of integration is explained by resource interdependence and interests of the founding states. Spillover and stagnation stages are explained as processes of organizational change and resistance to change. An example of the spill over and stagnation stage in EAC would be Tanzania showing reluctance to move towards full mobility of labour.

Thirdly, the study was based on the theory of common markets. This theory states that common markets are achieved by an addition of free movement of all factors of production to a customs union.<sup>22</sup> This theory argues that there are additional benefits that can be achieved by going beyond a customs union. A common market widens the freedom of choice for investors and leads to more efficient allocation of savings. Based on this theory, the study analyzes challenges facing mobility of labour as a factor of production, proposing how to deal with the challenges.

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<sup>21</sup> For additional information on this theory, see Jones (2004), *Organizational Theory, Design, and Change* (4th ed.) (Upper Saddle River, NJ: Prentice Hall).

<sup>22</sup> For more information on this theory, see *Lecture outline on Common Market theory*, available at [www.economicsnetwork.ac.uk/sites/default/files/.../com%20mkt.ppt](http://www.economicsnetwork.ac.uk/sites/default/files/.../com%20mkt.ppt) (last accessed 11<sup>th</sup> March, 2013).

However, scholars have also developed theories to counter the above three theories. The first is the theory of transactionalism.<sup>23</sup> This theory suggests that as countries gain economic independence and greater levels of economic growth through the benefits of common market and customs union, there is less trans-national activity which means less interdependence thereby leading to disintegration. The need for supranational rules among the Partner States diminishes leading to collapse of federations.

This theory, applied to EAC, would indicate that as a benefit of the EAC integration, other Partner States will experience rapid growth in their economies and catch up with Kenya, which currently is the more developed economy. Such a situation will then create fewer transactions between states leading to collapse of the EAC. Fears are rife that Kenya discovering oil,<sup>24</sup> Uganda nearing commercial production of its oil<sup>25</sup> and Tanzania discovering large deposits of natural gas<sup>26</sup> may precipitate such a state of events. There is also the danger of a Partner State being overstretched by supporting the activities of the Community by virtue of her economic positioning in relation to other Partner States which may cause jitters with her citizenry as taxpayers.

However, this study noted that the EAC is still at nascent stages and has Rwanda, Burundi and Uganda being landlocked, leading to continued dependence on neighbours for imports. Also, benefits from commercial exploitation of minerals take time to be realized fully by the host country. The above factors mean that the state of affairs foreseen by transactionalism theory would take several years to occur. Further, regional integration has worked well in other areas with almost equal levels of development, for

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<sup>23</sup> Hans Vollaard (2008), *A Theory of European Disintegration*, Fourth Pan-European Conference on EU Politics, 25th – 27th September 2008, University of Latvia, Riga, p. 10, available at: <http://www.jhubc.it/ecpr-riga/virtualpaperroom/017.pdf> (last accessed 11<sup>th</sup> April 2013).

<sup>24</sup> BBC News (March 2012), *Kenya Oil Discovery After Tullow Oil drilling*, available at: <http://www.bbc.co.uk/news/world-africa-17513488> (last accessed 11<sup>th</sup> April 2013).

<sup>25</sup> Uganda Pcs (February, 2012), *Oil Production in Uganda to Begin in 2015*, available at: <http://www.ugandapicks.com/2012/02/oil-production-in-uganda-to-begin-in-2015.html> (last accessed 12<sup>th</sup> April 2013).

<sup>26</sup> The Citizen (January 2012) *Huge Gas Deposits Found in Tanzania*, available at: <http://thecitizen.co.tz/magazines/31-business-week/19243-huge-gas-deposits-found-in-tanzania.html> (last accessed 11<sup>th</sup> April 2013).

instance, the European Union in Europe. For these reasons, the theory was, thus, not relied on in this study.

The second theory that counters regional integration is the Theory of positive disintegration.<sup>27</sup> This theory notes that after a period of primary or primitive integration characterized by uncritical endorsement and adherence to social convention, there is breakdown to an individualized developmental pathway. This breakdown is characterized by breakaway from an automatic, rote, socialized view of life into and through a series of personal disintegrations. The theory argues that these disintegrations are a key element in the overall developmental process.

Applied to the EAC, this theory would presuppose a stage in which Partner States after embracing primary integration for some time based on the wave of regional integration elsewhere, will realize the need for an individualized developmental pathway. The above situation would then lead to pulling away from EAC, thus disintegrating the common market.

However, this study noted that the EAC Partner States have similar liberalized economies and face almost similar socio economic challenges to development. Their development models are, thus, similar, focused on industrialization. There is little indication as to the need for individualized developmental pathways, due to the interdependence explained above. Thus, this study did not rely on the positive disintegration theory.

Finally, the study also relied on John Locke's labour theory of property, explaining the relationship between labour and production. This theory emphasizes that labour is the primary source of use value.<sup>28</sup> It argues that labour as compared to other factors of

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<sup>27</sup> Dabrowski Kazimierz (1972), *The Theory of Positive Disintegration*, available at: <http://positivedisintegration.com/> (last accessed 11<sup>th</sup> March 2013).

<sup>28</sup> For more discussion on this theory, see Vaughn Karen I (1978), *John Locke and the Labor Theory of Value*, *Journal of Liberation Studies*, Vol. 2. No. 4, pp. 311-326, available at: [mises.org/journals/jls/2\\_4/2\\_4\\_3.pdf](http://mises.org/journals/jls/2_4/2_4_3.pdf) (last accessed 12<sup>th</sup> March 2013).

production is primarily responsible for creating products which are more useful, thus creating ‘most of the value’ of things we enjoy in this world. Locke insists on an overwhelming importance of labor compared to land in the production of valuable goods. Locke acknowledges input from other factors of production only that he argues that the value they create is minimal when compared to labor. This study did not downplay the role played by other factors of production, that is, land, capital and entrepreneurship in creating value. It, however, emphasized that labour is very important and central to value creation.

John Locke’s theory emphasizes the importance of labour as a factor of production. This would then mean labour policies should be at the centre of economic planning so as to increase productivity and economic prosperity of nations in general. The EAC common market Protocol defines labour as both workers and establishments and also dedicates two of the four annexes to free movement of labour and establishment. This then buttresses the position by the labour theories that labour is a major factor of production. It finally underscores the importance of the countries’ labour regulation and policies, part of which this study reviews.

## **1.8 LITERATURE REVIEW**

There are few academic writings in the area of free movement of labour in Kenya. These are examined in depth in this section. To complement the few writings on this area in Kenya and EAC, the study also reviewed some literature on the topic from the European Union (EU). The EU was chosen because the right to free movement of labour has existed since the foundation of its predecessor body, the European Community, in 1957. There are, therefore, well informed empirical studies on the same.

In addition, the study also reviewed literature on the topic from Economic Community of West African States (ECOWAS), Southern African Development Community (SADC) and Common Market for Eastern and Southern Africa (COMESA) regions. This is because the above regional bodies are in Africa and, thus, may share challenges and concerns over free movement of labour in their contexts. Their Partner States are also

developing economies which have similar conditions like Kenya. Literature from those regions, thus, mirrored the realities facing Kenya. It is also notable that some EAC Partner States are members of SADC and COMESA.

Flora Mundeme Musonda has written on migration legislation in East Africa.<sup>29</sup> In her paper, she notes that though there is much legislation that deals with immigration issues in the EAC member countries, none deals with emmigration.<sup>30</sup> Moreover, immigration laws that exist restrict rather than encourage mobility of labour except for the purposes of promoting foreign investments. She notes that even with the slight exception, movement of labour is conditional on the host countries not having the requisite skills domestically. There are, further, unpredictable administrative hurdles, and many departments dealing with immigration are uncoordinated. Further, she notes that immigrants are not protected and lack social security

Ms Musonda is of the view that despite the EAC member countries being signatories to various international conventions allowing free movement of labour, they have failed to include the principles espoused in these conventions in their national legislations. Insecurity and increased unemployment levels, she notes, have led local citizens to view immigrant workers as competitors in the workplace.

She further enumerates some migration challenges facing East Africa, including poor linkages between migration and development processes, inadequate administrative and institutional capacity for effective migration policies and migration management and lack of protection of migrant workers.<sup>31</sup> She also enumerates barriers to free movement of labour, noting that the region has, on the external front, continued to suffer from loss of human capital through emigration of high skilled-workers.

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<sup>29</sup> (2006), *Migration Legislation in East Africa*, International Migration Paper 82, available at: [www.ilo.org/public/english/protection/migrant/.../imp/imp82.pdf](http://www.ilo.org/public/english/protection/migrant/.../imp/imp82.pdf) (last accessed 16<sup>th</sup> April 2013).

<sup>30</sup> *ibid*, p. ix

<sup>31</sup> *supra*, note 28, p. 37.



To have effective migration regulation in East Africa, she recommends that legislation be harmonized and improved and new ones enacted. In addition to legislation, she proposes cultivation of a sense of belonging to East Africa with demand for labour movement coming from the stakeholders such as businesses, large and small. The demand should also come from the youth who will expand their spectrum and geographical limitations for employment opportunities. Finally, she proposes shared responsibility among national governments, regional economic communities and the private sector in improving the efficacy of education systems and contributing to human capital development.<sup>32</sup> This would enhance efforts of the EAC to develop human resources.

Ms Musonda's paper is important in explaining general weaknesses on legislative frameworks for EAC members on migration. It, however, focuses on the EAC member countries generally, with the result that it does not examine legislation of each country in detail to point out specific weaknesses. It also generally recommends improvement or enactment of new legislation without going into specifics.

Lastly, Ms Musonda's study was published in 2006. Since then, the Kenyan laws on immigration and free movement of labour have changed to a great extent addressing some of the challenges pointed out in her paper. This study took into account the changes that have already taken place in making its recommendations

Richard Black, Lyndsay Mclean Hilker and Claire Pooley have written on migration generally and its effect on the poor in East Africa.<sup>33</sup> On the aspect of labour migration, akin to free movement of labour concept, they point out that it may benefit poor communities through remittances from abroad. They, however, note that there has been minimal data on such.

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<sup>32</sup> *ibid*, p. 39.

<sup>33</sup> (2004), *Migration and Pro-Poor policy in East Africa*, Sussex Centre for Migration Research, available at: [www.migrationdrc.org/publications/working\\_papers/WP-C7.pdf](http://www.migrationdrc.org/publications/working_papers/WP-C7.pdf), (last accessed 16<sup>th</sup> April 2013).

The authors also note that free labour movement has led to ‘brain drain’. They describe this concept as the aspect where many people whose cost of education has been met by the Kenyan state end up emigrating and working in other countries, thus, not paying back the investment that the government has put in their education.<sup>34</sup>

Richard Black, Lyndsay Mclean Hilker and Claire Pooley suggest that though brain drain is not good, the efforts launched by the Kenyan government to reduce it have bore no fruit. They, thus, propose that it is more important to encourage the diaspora to contribute to nation and economy building activities from outside the country, giving examples such as Africa Online, that was founded by a Kenyan in the US, rather than encouraging the highly skilled to return home in a situation where there are high levels of un- and underemployment.

Black, Hilker and Pooley’s study gives an overview on brain drain generally and its effects of Kenyan economy without specifically addressing the concept of free movement of labour.

Professor Aderanti Adepaju writes on the extent to which the Economic Community of West African States (ECOWAS) Treaty and the Protocols on free movement of persons, residence and establishments among the Partner States have been implemented.<sup>35</sup> He notes that the ECOWAS treaty signed in Lagos on 28 May 1975 outlined the key objective of removing obstacles to the free movement of goods, capital and people in the sub-region.<sup>36</sup> This objective informed the negotiation and coming into force of the Protocol on Free Movement of Persons and the Right of Residence and Establishment of May 1979. The rights of entry, residence and establishment were scheduled to be

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<sup>34</sup> *ibid*, p. 20.

<sup>35</sup> (2011), *Operationalising the ECOWAS Protocol on Free Movement of Persons: Prospects for Sub-Regional Trade and Development*, available at: <http://www.gfmd.org/documents/switzerland/m4md/AdepajuS8.pdf> (last accessed 11<sup>th</sup> April 2013).

<sup>36</sup> *ibid*, p. 2.

progressively established within fifteen years from the date of entry into force of the Protocol.<sup>37</sup>

This Protocol was to be implemented in three phases, vide supplementary Protocols that would be negotiated for each phase. The first phase, which is the Supplementary Protocol on Free Movement of Persons, which guaranteed free entry of Community citizens without visa for 90 days, was ratified by Partner States in 1980 and put into effect forthwith. The implementation of this phase was to take the first five years. It abolished the requirements for visas and entry permits within the ECOWAS region. It allowed community citizens in possession of valid travel documents and an international health certificate to enter Partner States without a visa, for up to 90 days. However, the Partner States were allowed to refuse admission into their territory for immigrants characterised under their laws as ‘inadmissible’. For expulsions, to be done at the expense of the immigrants themselves, the states were required to guarantee the security of the citizen concerned, and that of his/her family and his/her property.<sup>38</sup>

This first phase, Adepoju notes, has been largely implemented with some level of success. He cites the abolition of visas and entry permits; the introduction of the ECOWAS Travel Certificate; the introduction of harmonised immigration and emigration forms; the establishment of national committees to monitor ECOWAS programmes on the free movement of persons and vehicles; the introduction of the Brown Card motor vehicle insurance scheme; the free movement of goods; the introduction of harmonised customs documents; and the harmonisation of economic and financial policies as some of the major successes in this phase.<sup>39</sup>

The second phase was the Supplementary Protocol on Right of Residence. After much delay in its promulgation, it came into force in July 1986, when all Partner States ratified it. However, despite coming into force, it had not yet been implemented by the time of

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<sup>37</sup> *ibid*, p. 3.

<sup>38</sup> *supra*, note 34, p. 5.

<sup>39</sup> *ibid*, p 6.

Adepoju's writing.<sup>40</sup> This Protocol granted ECOWAS citizens the right of establishment including: the right to apply for jobs effectively offered, to travel freely in the territory of Partner States for this purpose, to reside in one of the Partner States in order to take up employment and to live in the territory of a Member State after having held employment there.<sup>41</sup> This is what, if implemented, would grant the right to free movement of labour in ECOWAS.

The lack of implementation of this second phase has created a vacuum. Persons had taken advantage of the first phase of free movement of persons generally to migrate and work in other ECOWAS Partner States. The oil-led employment opportunities in Nigeria were a magnet especially to unskilled workers, who came in their droves from Ghana, Togo, Chad, Mali and Cameroon to work in the construction and services sectors. The lack of implementation of this second phase has left such workers unprotected and prone to expulsions.<sup>42</sup>

Prof. Adepoju notes that there, indeed, have been mass expulsions of citizens from ECOWAS Partner States due to harsh economic conditions. He cites early 1983 and in mid-1985 when the Nigerian Government reneged on, respectively, Articles 4 and 27 of the Protocol, and expelled between 0.9 and 1.3 million illegal aliens, mostly Ghanaians. Another instance is July 1986 when implementation of the structural adjustment programme in Nigeria led to expulsion of about 200,000 illegal aliens among them citizens of Member States. These developments have created a crisis of confidence that rocked the Community to its very foundations and put to doubt the achievement of free movement of labour as an objective in the community.<sup>43</sup>

In addition, Adepoju notes, most countries of the sub-region have enacted, or retained a series of laws which in effect restrict 'foreigners', including nationals of community

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<sup>40</sup> *ibid*, p. 2

<sup>41</sup> Article 3, *Supplementary Protocol A/SP/1/7/86 On The Second Phase (Right Of Residence) Of The Protocol On Free Movement Of Persons, The Right Of Residence And Establishment*, available at: <http://www.comm.ecowas.int/sec/index.php?id=asp010786&lang=en>, (last accessed 11<sup>th</sup> May 2012).

<sup>42</sup> *supra*, note 34, p. 3

<sup>43</sup> *ibid*.

states, from participating in certain kinds of economic activities, and the expulsion of aliens from some Partner States is negating the whole rationale of the establishment of ECOWAS.<sup>44</sup>

John Agyei & Ezekiel Clottey also analyze the extent to which free movement of people has been implemented in the ECOWAS region but with a focus on Ghana.<sup>45</sup> Though not equal to free movement of labour, it goes a long way to facilitating free movement of labour. The authors note that over 90 million of today's migrants migrate for economic reasons.<sup>46</sup>

On migratory trends, Agyei and Clottey note that population movements take place depending on political stability and prevailing economic circumstances in the source and destination countries. They give examples of the 1960s, where some Nigerians migrated to Ghana and also when Ghana experienced economic difficulties in the 1970s and 80s, many Ghanaians moved to Cote d'Ivoire and Nigeria in search of jobs to improve their well-being. Statistics show that there were about 2.5 million immigrants from West Africa residing in Nigeria in 1982 and Ghanaians constituted over 80%.<sup>47</sup>

On movement of labour, the authors note that intra-West African migration involves both skilled and unskilled workers. They highlight migration of the skilled labour like nurses, teachers, lecturers, doctors and engineers to Nigeria on large scale in the 1980s. At the same time, migration of unskilled persons within the same period to Nigeria was unprecedented in the history of the region, attributed to the many job opportunities and relatively high remuneration which followed the oil boom. In addition, for a long time, the Ivorian economy grew steadily and, therefore, attracted a lot of migrants from Ghana

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<sup>44</sup> *ibid.*

<sup>45</sup> Agyei & Clottey (2007), *Operationalizing ECOWAS Protocol on Free Movement of People among the Partner States: Issues of Convergence, Divergence and Prospects for Sub-Regional Integration*, available at: <http://www.imi.ox.ac.uk/pdfs/research-projects-pdfs/african-migrations-workshops-pdfs/ghana-workshop-2007/CLOTTEY%20and%20AGYEI.pdf> (last accessed 11<sup>th</sup> April 2013).

<sup>46</sup> *ibid.*, p 14.

<sup>47</sup> *ibid.*, p 10.

and Burkina Faso. The Ghanaian migrants to Cote d'Ivoire as compared to Nigeria possessed lower skills.<sup>48</sup>

Agyei and Clottley write that Article 27 of the ECOWAS treaty affirms the need for economic integration, including free flow of persons, goods and services, by calling on the Partner States to ensure gradual removal of all obstacles to free movement of persons, services and capital. They, however, lament that the second phase of the Protocol on Free Movement of Persons, Residence and Establishments, which grants the right of residence, is yet to be implemented by Partner States.<sup>49</sup>

This, they note, has created leeway for blanket expulsions of citizens of ECOWAS by fellow Partner States. They quote instances of Partner States who have expelled immigrants of West African origin since the operationalisation of the Protocol to include the Cote d'Ivoire in 1999; Senegal in 1990; Liberia in 1983 and Benin in 1998.<sup>50</sup> Agyei and Clottley lament that the inability to ensure full implementation of the Protocol, ascribed to multiple membership and overlapping interests of Partner States in other groups, has robbed the ECOWAS citizens of the right to free movement of labour.<sup>51</sup>

Again, Agyei and Clottley's article is focused on the ECOWAS region. It also does not engage in a detailed analysis of the extent to which Ghanaian laws implement the Protocol on Free Movement of Persons, Residence and Establishment. The Article also largely focuses on free movement of persons generally.

The Economic Commission for Africa (ECA) has written an article on the progress and prospects in the implementation of Protocols in Southern Africa region.<sup>52</sup> The article notes that as part of efforts to build an integrated community, the Southern African Development Community (SADC) produced a Draft Protocol on Facilitation of

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<sup>48</sup> *supra*, note 44, p. 10.

<sup>49</sup> *ibid*, p. 11.

<sup>50</sup> *ibid*, p. 13.

<sup>51</sup> *ibid*.

<sup>52</sup> (2008), *Progress and Prospects in the Implementation of Protocols in Southern Africa*, available at: [http://www.uneca.org/sa/documents/SRO-SA\\_Progress\\_and\\_Prospects.pdf](http://www.uneca.org/sa/documents/SRO-SA_Progress_and_Prospects.pdf) (last accessed 11<sup>th</sup> April 2013).

Movement of Persons. The stated objective of this Protocol is “...to develop policies aimed at the progressive elimination of obstacles to the movement of persons of the Region generally into and within the territories of State Parties.”<sup>53</sup>

However, it notes that though enacted some time ago, there is no evidence of an Implementation Framework being developed. The major fear towards implementing free movement of labour is cited as the differing levels of development among SADC Partner States, which would make it likely that job seekers from the less developed ones would swamp the more developed countries, thereby creating tension and conflict in receiving countries. Moreover, the less developed Partner States would suffer brain drain.<sup>54</sup>

On the Common Market for Eastern and Southern Africa (COMESA), the article notes that Article 6 (e) of the COMESA Treaty calls on Partner States to ‘remove obstacles to the free movement of persons, labour and services, right of establishment for investors and right of residence within the Common Market.’<sup>55</sup> It highlights that COMESA has developed the *Protocol on Free Movement of Persons, Labour, Services, the Right of Establishment and Residence* This Protocol was designed to make it easier for all citizens of Partner States to easily move between countries, as well as movement of labour, capital and in future. However, it is noted that the degree of overall compliance with the Protocols on movement of persons is low in Southern Africa, with only Zimbabwe and Mauritius 75% compliant whilst the rest are between 30% and 45%.<sup>56</sup>

The Partner States are noted to complain that the Protocol is too encompassing and has, thus, been a problem for them. However, such a complaint is not justified since full regional integration demands that Partner States embrace each other’s citizens for all legal travel to enhance the conduct of business and other opportunities. The failure of

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<sup>53</sup> *ibid*, p. 26.

<sup>54</sup> *ibid*, p. 28.

<sup>55</sup> *supra*, note 51.

<sup>56</sup> *ibid*, p. 29

commitment towards enacting free movement of labour is, thus, said to raise doubts as to the degree of commitment of Partner States to the regional integration process.<sup>57</sup>

The above article highlights the lack of goodwill to implement free movement of labour in the Southern Africa region. The article does not highlight the requirement by each state so as to fully implement the regional Protocols.

The Economic Commission for Africa (ECA) and Southern African Development Community (SADC) held a joint workshop on the role of population and migration in enhancing regional integration in the SADC and COMESA regions.<sup>58</sup> The workshop report notes that there are negative impacts of international labour migration on the development sectors. For instance, skilled labour emigration impacts the health and education sectors adversely, with unskilled labour emigration impacting agriculture and mining sectors. The report concludes that labour emigration leads to loss of institutional and development capacity in countries of origin.<sup>59</sup>

However, the report notes that if managed and supported by the right policies, it can be a positive force of development in countries of origin and destination through its multiplier effects. The report notes that there is a clear nexus between migration and development as can be seen from the outcomes of various international meetings such as the High Level Dialogue on Migration and Development (2006), the Global Forum on Migration and Development (2007, 2008) and the Joint European Union (EU)-Africa Strategy on Migration and Development (2007).<sup>60</sup> It posits that the benefits of free movement of labour are asymmetrical between the receiving countries and the sending countries. The receiving countries benefit from availability of abundant labour supply and skills, innovation and enriched capital, while the sending countries benefit from decreased

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<sup>57</sup> *ibid*, p. 30.

<sup>58</sup> (2008), *The Role of Population and Migration in Enhancing Regional Integration in the SADC and COMESA regions*, ECA-SA and SADC Joint Regional Workshop Report, 1 – 2 December 2008, Johannesburg, South Africa, available at: <http://www.uneca.org/sa/documents/Population-report.pdf> (last accessed 11<sup>th</sup> April 2013).

<sup>59</sup> *supra*, note 57, p. 6.

<sup>60</sup> *ibid*, p. 14.



unemployment, inflow of remittances, development of new skills, technology and investment and finally entrepreneurship.

Contextually, the report notes that the SADC region's labour market is characterised by labour migration. This initially started as a response to the labour needs of mining operations in South Africa. The migrant labour system was later extended to the agriculture and fishing sectors and had a strong influence on the structure of the labour market in the region. Presently, labour migration occurs in two major forms, that is, migration to jobs in neighbouring countries and migration of highly skilled workers to countries with higher levels of income. It notes that this trend of labour migration, a common feature in the SADC region, poses challenges for the countries and communities. Although there is a SADC Protocol on free movement of persons, it is noted that the Partner States are yet to harmonise their laws, policies and procedures. Generally, there has been slow progress to implement the Protocol on free movement of persons because of general concerns around national sovereignty, increase in cross-border crimes and influx of large number of workers. For instance, sending countries may be concerned about loss of workers to their neighbours while receiving countries may be concerned about massive influx of unskilled migrants.<sup>61</sup>

It makes several proposals to realize free movement of labour. It calls for a clear policy aimed at retention of skills within the region so as to reduce brain drain or alternatively promote brain circulation. Such policy would encompass appropriate incentives for return of migrant labour.<sup>62</sup> In addition, labour market studies across interested Partner States should be done so as to identify sector needs and filling skills and labour gaps.<sup>63</sup> In addition, setting up of Labour Market Information Systems at SADC Secretariat would assist in management of human resource gaps and tracking the movement of migrant

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<sup>61</sup> *supra*, note 56.

<sup>62</sup> *ibid*, p. 17.

<sup>63</sup> *ibid*, p. 19.

labour in the region.<sup>64</sup> Finally, the report recommends adoption of a judicious approach towards opening up of domestic labour markets for migrant labour.<sup>65</sup>

The report focuses on the SADC and COMESA region, making useful proposals towards achievement of free movement of labour in the region. In addition, it does not examine the policy, laws and institutions of any Member State.

Luigi Daniele has written on non-discriminatory restrictions to the free movement of persons in the European Union (EU).<sup>66</sup> According to him, Articles 48, 52 and 59 European Community Treaty (EC Treaty) lay down the principle of free movement for persons, which is one of the essential components of the Single Market pursuant to Article 7A of the EC Treaty. Article 48 grants the right to free movement to employed workers. Articles 52 and 59 do the same with reference to self-employed workers (including companies), who benefit from both the right of establishment (Article 52) and that of free provision of services (Article 59).<sup>67</sup>

He also notes that Articles 48, 52 and 60 of the EC Treaty also grant the employed or self-employed worker moving to a different Member State the right to ‘national treatment,’ that is, the free-mover is entitled to be treated like the nationals of the host Member State and is, therefore, protected against discrimination based on nationality.

Luigi then focuses on European Court of Justice (ECJ) rulings on non-discriminatory restrictions and rules placed by member countries. He notes that the Court has considered that such rules always involve a restriction on free movement, which can only be permitted if the rules satisfy the conditions laid down in an identically framed ‘rule of reason.’

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<sup>64</sup> *ibid.*

<sup>65</sup> *ibid.*, p. 21.

<sup>66</sup> (1997) *Non-Discriminatory Restrictions to the Free Movement of Persons* (Sweet & Maxwell: London), European Law Review 1997, available at <http://law.anu.edu.au/UnitUploads/LAWS8239-2702-Chapter 18 Daniele.pdf> (last accessed 16<sup>th</sup> April 2013).

<sup>67</sup> *ibid.*, p. 2.

This rule of reason, he argues, was expounded in Gebhard case.<sup>68</sup> This was a case concerning a German Rechtsanwalt who wished to practise law as a consultant in German law in Milan without joining the local Bar Council. In Italy, only lawyers admitted to one of the Bar Councils are entitled to practise law and to make use of the professional title of ‘avvocato’.

The Court held that as a general rule, when the access and the exercise of a certain profession in a Member State is subject to provisions justified on grounds of general interest, the national of a different Member State wishing to engage in this profession ought to observe such provisions. The Court, however, pointed out that such provisions must satisfy four requirements, namely: be non-discriminatory, be justified by imperative requirements in the general interest, be suitable for the attainment of their objective and be necessary in order to attain this objective.

According to Luigi, the Court appears to think that the mere fact that a Member State makes the access or the exercise of a certain professional activity dependent on the observance of rules may be regarded as a restriction to free movement of labour in as far as free movers are required to comply with such rules.

Luigi’s paper gives good information on the standards to be used to gauge whether non-discriminatory professional barriers are restrictions to free movement of labour, but limiting examination of the barriers to Europe.

A number of factors are notable with respect to the above literature. First, the literature does not specifically address Kenya’s attempts to enforce free movement of labour; it deals with other contexts. Second there lacks a detailed analysis of how any member state of the various regional trade blocs has enforced the right to free movement of labour. Most of the literature engages in a general analysis of the right in the regional bloc without addressing attempts to attain it by specific Partner States. Third, most of this

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<sup>68</sup> *supra*, note 65, p. 9, Case C-55/94 *Gebhard v. Milan Bar Council* [1995] E.C.R. I-4186.

literature was written before 2010. There have been numerous developments in Kenya since then, which have affected Kenya's efforts to attain free movement of Labour. Finally, the literature does not capture action points expected of each member state in a regional trading block so as to attain the right to free movement of labour.

This study enriches the above literature in several ways. First, it focusses on Kenya, reviewing Kenyan legislation and proposing areas that need change. It points out statutes that need amendments and proposes the nature and possible focus areas of any new legislation. Second, the study exhaustively addresses challenges to free movement of labour within East Africa. It makes proposals on how Kenya can address these challenges. Third, this study examines whether non-discriminatory professional barriers within Kenya satisfy the 'rule of reason' test. Failure to meet this test would make them mere restrictions, which goes against the spirit and the letter of the Protocol on Free Movement of Labour in East Africa. Finally, this study considers the possibility of brain drain happening as a result of free movement of labour within EAC and how such a problem can be addressed.

## **1.9 RESEARCH METHODOLOGY**

To sufficiently answer the research questions, this study required data on the EAC Common Market Protocol and its requirements on each member state towards implementing the right to free movement of labour. Data on the current policy, legal and institutional framework affecting free movement of labour was also needed.

The study relied on primary sources of data including the Treaty establishing the EAC, the EAC Common Market Protocol, the relevant annexes to the Protocol, Kenya's Immigration laws and government policy documents. A review of the Kenyan immigration laws established the current legal and institutional framework for free movement of labour in Kenya. The EAC Treaty and the Common Market Protocol assisted in establishing the requirements placed on each member state by the Protocol on Free Movement of Labour in East Africa. These formed the basis for the recommendations on the steps that Kenya as an EAC member state needs to take so as to

implement the Protocol. Finally, Kenya's Vision 2030, the Economic Recovery Strategy for Wealth and Employment Creation 2003–2007, the Poverty Reduction Strategy Paper (PRSP) and the Draft Diaspora Policy of Kenya were also reviewed. These revealed the current government policy on free movement of labour.

The researcher conducted interviews to collect information. Five advocates knowledgeable on immigration matters were interviewed. These contributed towards understanding the current legal framework on free movement of labour. They enriched the understanding of the requirements on Partner States so as to enforce free movement of labour as required by the EAC Common Market Protocol. They also enriched the analysis on Kenyan laws on immigration and the extent to which they enforce the Protocol requirements. They finally assisted in pointing out legal reforms needed for the achievement for the right.

Five immigration practitioners were also interviewed. These broadened the understanding on the policy and institutional framework for free movement of labour in Kenya. Having practiced in the field for some time, they helped identify potential challenges that face attainment of free movement of labour and gave proposals on how such challenges can be addressed. They also helped identify the various negative effects of free movement of labour and how these can be mitigated. Finally they assisted in identifying areas for reform towards full attainment of this right. The above interviews were conducted using self-administered questionnaires.<sup>69</sup>

The advocates and immigration practitioners were selected through the judgment sampling method, which helped identify the most experienced people with adequate information. Experience was determined largely by the number of years spent handling immigration matters. A larger sample size would pose the problems of costs, reliability and scheduling. Moreover, smaller and focused samples are needed for qualitative studies.

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<sup>69</sup> See Annex 1 and 2 at the end of this document for the questionnaires.

Finally, secondary sources such as books, journals, working papers and newspaper articles were reviewed. Desk review was undertaken to collect data from such sources. This showed various opinions from different writers on challenges facing free movement of labour and the reform measures that can address such challenges. It also revealed people's perspectives and views on how free movement of labour in Kenya can be effectively implemented.

The study employed qualitative approach in the collection of the data necessary for the research. This method was used since the study purely examined people's perspectives and it has the potential of providing adequate information for the study.<sup>70</sup>

## **1.10 SUMMARY**

The study report is divided into three chapters apart from this introduction.

Chapter two examine the Kenyan policy, legal and institutional framework relating to free movement of labour, *vis a vis* the Protocol requirements on each EAC Partner State. The chapter elaborates the policies and legal provisions on immigration related to workers in detail, comparing them with Protocol requirements.

The chapter first identifies the Protocol requirements on Partner States. Each Partner State is required: not to discriminate nationals of other Partner States on grounds of nationality; to guarantee the free movement of persons and workers who are citizens of the other Partner States; to guarantee the right of establishment of nationals of the Partner States within their territories; to recognize the academic and professional qualifications, experience and licences or certifications granted in other Partner States; to protect cross-border investments of other Partner States and the fruits of those investments; to remove restrictions on capital movement for EAC residents based on nationality, residence and

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<sup>70</sup> Johann Mouton (2001), *How to succeed in your Masters and Doctoral Studies: A South African Guide and Resource Book*, 11<sup>th</sup> edition (Van Schaik Publishers: Pretoria), p 194.

place of investment of capital and discrimination and to approximate laws and harmonize policies and systems with other partner states.

The chapter then examines the policy framework. Kenya does not have a consolidated labour policy, leaving the same to be derived from scattered policy documents among them the immigration policy on employment of foreigners. The immigration policy on employment of foreigners mainly seeks to limit access of employment to foreigners while promoting employment of nationals. Vision 2030, first Medium Term Plan for implementation of vision 2030 and the Draft Diaspora Policy propose measures to address brain drain, aimed at discouraging labour emigration. They also propose measures to lock out foreigners from jobs that can be done by Kenyans.

Moreover, the Kenyan legal and institutional framework is analyzed. The Constitution guarantees other rights and freedoms contingent to the right of labour, that are by extension, beneficial to immigrants. The Kenya Citizenship and Immigration Act, the Kenya Citizens and Foreign Nationals Management Service Act, the Employment Act, the National Social Security Fund Act, the National Hospital Insurance Fund Act and the Investment Promotion Act are also analyzed. The above have a few positive enactments that implement Protocol provisions in Kenya.

The chapter concludes that Kenya has an extensive policy, legal, and institutional framework, albeit with limited capacity to facilitate free movement of labour.

Chapter Three examines the factors in the legal framework that impede free movement of labour. The chapter first identifies problems within the Protocol itself that undermine attainment of this right. These include insistence on work permits, lack of clear parameters on limitations to be imposed on grounds of public policy, public security or public health, multiple residence documents and disharmony in Schedule on Timelines. The chapter then examined Kenya's policy framework regarding free movement of labour. The Kenyan policy framework, as inferred from numerous scattered policy documents, is generally restrictive to free movement of labour.

In addition, the chapter examines the gaps in the existing legal framework: lack of recognition of identity cards as travel documents; lack of clear timelines in processing of work permits and dependant passes; less than 24 hour operation in some border posts; insistence on student passes even for short courses; non-harmonized application forms, fees and procedures; contradiction in provision on appeals from Director's decisions in different Acts; deposits of restrictive amounts as cash bonds during employment by foreigners; high threshold of investment funds for one to qualify for investment certificates and non-portability of social security benefits. The implementing laws were generally seen not to fully implement the Protocol provisions.

The chapter then discusses other unaddressed issues: difficulty in free movement of family members, lack of safeguards for rights of migrant workers, restrictive approach to immigration issues, poor mechanisms for collection of migration statistics and data, and lack of provision for participation in trade union activities.

It concludes that the right to free movement of labour has not yet been achieved in Kenya due to the numerous challenges.

Chapter Four contains a summary of the findings of the study as well as recommendations to achieve full implementation of the provisions of the Protocol on free movement of labour in Kenya.

It highlights several conclusions. First, Kenyan frameworks are weak attempts to enforce the provisions of the Protocol on free movement of labour. Second, there are several pending challenges towards full implementation of the right to free movement of workers as provided for in the EAC Common Market Protocol. Third, the Protocol itself has internal weaknesses. Moreover, Kenya has not fully discharged its duties as a Partner State in implementing this right. In addition, the Kenyan policy framework is bent on discouraging workers from emigrating to other Partner States, while, at the same time, being non-facilitative of immigration of workers from Partner States. Finally, the Kenyan



legal and institutional framework is not fully supportive of attempts to implement the Protocol in Kenya.

The chapter then recommends measures to ensure full implementation of this right in Kenya. It recommends review of the immigration policy; enactment of new laws to facilitate free movement of labour; safeguarding rights of immigrant workers; protection of Kenya's emigrant workers; relaxation of requirements for work and investor permits; improvement of data collection mechanisms; amendments to the EAC Common Market Protocol; amendment to the Kenyan policy framework and specific amendments in the Kenyan legal framework.

## **CHAPTER TWO: THE POLICY, LEGAL AND INSTITUTIONAL FRAMEWORK FOR EFFECTING FREE MOVEMENT OF LABOUR**

### **2.1 INTRODUCTION**

Chapter Seventeen of the Treaty for the Establishment of East African Community deals with Free Movement of Persons, Labour, Services, Right of Establishment and Residence. Article 104 of the Treaty provides for Free movement of persons, Labour, Services, Right of Establishment and Residence. It goes further to articulate the means by which the Partner States are to achieve this objective by: easing border crossing by citizens of the Partner States; harmonizing and maintaining common employment/labor policies, programs and legislation. This provision was the basis of the Common Market Protocol that was negotiated and signed to ensure effective implementation of this principle. The Protocol came into force on 1st July 2010. The East African Community Common Market Protocol attempts to establish a legal framework for the free movement of goods, persons, labor, services, capital; and the rights of establishment and residence. Its key objective is to accelerate the economic growth and development of the Partner States through the attainment of these freedoms.

For these to be achieved, it is imperative that the partner states' immigration laws ensure that there is a free flow of labour in the region. It is however noteworthy that despite the continued efforts to ensure the free movement of people within the region, the situation is not yet as smooth as it is desired to be. As John Bosco Kanyangoga notes,

‘Migration issues in East Africa today are complex and challenging. They include large mobile population of refugees, internally displaced persons (for some parts of the community for a number of reasons), labor migrants and migrants in an irregular situation.’<sup>71</sup>

To improve labour mobility, all East African partner states should gradually relax visa and permits requirements, starting with categories of people but with the main goal of including all community citizens.

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<sup>71</sup> J.B. Kanyangoga (2010), *Integrating Migration with Development in EAC: Policy Challenges and Recommendations*, Regional Workshop, Nairobi, May 28th, p. 5, available at: [http://www.cuts-geneva.org/pdf/BIEAC-RP10-Integrating\\_Migration\\_with\\_Development\\_in\\_EAC.pdf](http://www.cuts-geneva.org/pdf/BIEAC-RP10-Integrating_Migration_with_Development_in_EAC.pdf) (last accessed 13<sup>th</sup> April, 2013).

This chapter, therefore, interrogates efforts made by Kenya in ensuring that her immigration policy, institutional and legal frameworks are crafted to facilitate labour flow in East Africa in the bid to foster cooperation in East Africa and realization of the Common Market Protocol. The Chapter is divided into the following sections:

- a) Obligations of Partner States under the East African Community Common Market Protocol
- b) Policy framework
- c) Legal and Institutional framework

## **2.2. OBLIGATIONS OF PARTNER STATES UNDER THE EAST AFRICAN COMMUNITY COMMON MARKET PROTOCOL**

The East African Common Market is governed by principles in the Treaty establishing The East African Community<sup>72</sup> and the Common Market Protocol. Specifically, Article 3 of the Protocol provides that each State should undertake to observe the principle of non-discrimination of nationals of other Partner States on grounds of nationality. It further elaborates that a state should accord equal treatment to nationals of other Partner States. These principles are meant to ensure non-discrimination of any national of a Partner State based on nationality.

The Protocol contains an express standstill obligation<sup>73</sup> with respect to the free movement of services, capital and the right of establishment.<sup>74</sup> The free movement of persons and labour, as well as the right of establishment and residence all allow for limitations on the basis of ‘public policy, public security and public health.’ Partner States can, therefore, impose limitations on the respective freedoms and if justified on the basis of public policy, security or health.

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<sup>72</sup> Articles 6 and 7 of the Treaty

<sup>73</sup> The standstill means that restrictions cannot be increased and new ones cannot be introduced.

<sup>74</sup> *East African Community Common Market: The Common Market Protocol Explained*. Ministry of East African Community Affairs (MEACA), Uganda.

Further, Articles 7 and 10 guarantee the free movement of persons and workers who are citizens of the other Partner States within the territories of each Partner State. Implementation of the commitments in Part D is in accordance with regulations on the free movement of persons (Annex I) and free movement of workers (Annex II). Partner States also committed to recognize the academic and professional qualifications, experience and licences or certifications granted in other Partner States. It is noteworthy, however, that the Annex which provides the framework for how this will happen is yet to be concluded.<sup>75</sup>

Article 13 guarantees the right of establishment of nationals of the Partner States within their territories. The right dictates that a national of a Partner State can take up and pursue economic activities as a self-employed person and set up and manage economic undertakings in the territory of another Partner State. The right of establishment also entitles a self-employed person to join the social security scheme of the host Partner State in accordance with the national laws of that Partner State. Article 14 of the Protocol guarantees the right of residence to citizens of other Partner States who have been admitted in their territories either as workers or visitors to establish a business as provided for under Article 13. Right of residence is also guaranteed for the spouse, child and dependent of a worker or self-employed person entitled to rights provided in Articles 10 and 13. It is, therefore, imperative that a Partner State provides for the same in its legal framework.

Article 24 calls on Partner States to remove restrictions on capital movement for EAC residents based on nationality, residence and place of investment of capital and discrimination. Partner States are also required to remove and not impose any new restrictions on payments related to capital movement or current payments and remove restrictions on capital incident to the movement of any of the freedoms. The Partner States may, however, restrict free movement of capital on several grounds provided the restriction is appropriate, reasonable and justified. The grounds include: where the free

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<sup>75</sup> The Annex on Mutual Recognition of Qualifications is being negotiated amongst Partner States as a matter of priority.

movement of capital creates ‘disturbances’ in the financial market, balance of payment difficulties, or if another Partner State intervenes in the forex market in such a way that distorts the conditions of competitions, then a Partner State can impose safeguards. These safeguards are subject to strict rules about their scope and manner of imposition.<sup>76</sup>

Article 29 provides that Partner States will protect cross-border investments of other Partner States and the fruits of those investments. This involves ensuring protection and security of cross-border investments, national treatment and Most Favoured Nation (MFN) treatment for these investments, and compensation on expropriation.

Finally, Article 47 commits Partner States to approximate laws and harmonize policies and systems. This is a vital element. By bringing the various systems closer together, it will reduce the cost of doing business, as it reduces transaction costs.

### **2.3 THE KENYAN POLICY FRAMEWORK**

Migration policies can be defined as those government interventions that regulate the arrival or departure of foreigners according to their nationality, purpose of their arrival and duration of their stay.<sup>77</sup> These policies include those governing emigration, migration, seasonal migration and refugees. Generally, in East Africa, migration policies translate into more or less restrictive regulatory frameworks comprising of immigration laws for the entry, residence and employment of foreigners. They mainly seek to limit access of employment to foreigners while promoting employment of nationals.<sup>78</sup>

Kenya’s Vision 2030 is the current economic blueprint for Kenya.<sup>79</sup> The first Medium Term Plan for the implementation of this vision outlines government approach to labour

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<sup>76</sup> *supra*, note 71.

<sup>77</sup> Francis E. (2000), *Making a Living: Changing Livelihoods in Rural Africa* (Routledge: London), p. 39.

<sup>78</sup> View expressed by IM1, Senior Immigration Officer, during an interview on 16<sup>th</sup> March, 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>79</sup> Government of Kenya (2008), *Kenya Vision 2030*, available at: <http://www.vision2030.go.ke/> (last accessed 12<sup>th</sup> March 2013). This is the development blueprint covering the period 2008 to 2030. Its objective is to help transform Kenya into a ‘middle-income country providing a high quality life to all its citizens by the year 2030.’

emigration.<sup>80</sup> In the human resource development, labour and employment theme, it identifies brain drain as one of the major challenges under this theme and notes that the government is committed to implementing measures that would ensure expansion of the absorptive capacity of the domestic labour market and retention of a critical mass of skilled personnel within the economy.<sup>81</sup> This is targeted at addressing the issue of brain drain. Under the health sector, it notes that brain drain resulting from migration of workers is a serious threat to achievement of the vision. It, thus, proposes development of a health manpower (*sic*) policy and improvement plan to address the development, absorption, management and retention of human resources in the sector.<sup>82</sup> It also calls for measures under the ‘Science and Technology’ theme to stem the tide of brain drain of scientific personnel.<sup>83</sup>

However, at the same time, the Medium Term Plan calls for development of mechanisms to offload excess labour to needy and friendly foreign markets. On this, it calls for taking stock of available skills in the country and the subsequent identification of skills for export.<sup>84</sup> In its policy action plans, it proposes the development of the diaspora and labour export policy.<sup>85</sup>

The above framework, thus, presents a proposed policy framework that would strike a balance between discouraging and encouraging labour emigration.<sup>86</sup> However, the implementation and drafting of policies has been moving at a snail speed with only one draft policy produced to date.<sup>87</sup>

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<sup>80</sup> Government of Kenya (2008), *First Medium Term Plan (2008-2012)*, available at: <http://www.scribd.com/doc/18345790/Vision-2030-Medium-Term-Plan-20082012> (last accessed 12<sup>th</sup> March 2013).

<sup>81</sup> *ibid*, p. 42.

<sup>82</sup> *ibid*, p. 101.

<sup>83</sup> *ibid*, p. 31.

<sup>84</sup> *ibid*.

<sup>85</sup> *ibid*, p. 44.

<sup>86</sup> Views expressed by IM2, Assistant Director, Immigration Department, during an interview on 16<sup>th</sup> March, 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>87</sup> Only the Draft Diaspora Policy has been produced to date.

Its predecessor, the Economic Recovery Strategy for Wealth and Employment Creation 2003 – 2007 had little to say about emigration policy.<sup>88</sup> Though it noted that the health sector suffered from mass emigration of health workers largely due to low remuneration,<sup>89</sup> it only called for measures to address this, without making any concrete proposal.

In addition, the Kenya Government participated in the Return of Qualified African Nationals (RQAN), a scheme run by International Organisation for Migration (IOM). It requested, for the return of 80 highly skilled professionals in 1995. 43 highly qualified (about 53% of the target) professionals had by December, 1998 returned to Kenya.<sup>90</sup> In the same breadth, Kenya also put in place a ‘Kenyanization programme’ in the early 1990s, whose main objective was to replace expatriates by competent Kenyans.<sup>91</sup> To ensure the smooth running of the programme, an Inter-Ministerial Entry Work Permits Steering Committee with a secretariat at the Immigration Department was established in 1991 to vet all applications for work permits.<sup>92</sup> This was meant to lock out foreigners from jobs that can be done by Kenyans.

The Draft Diaspora Policy is inclined towards discouraging labour emigration and encouraging persons in the diaspora to return home. It identifies one of its major

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<sup>88</sup> Government of Kenya (2003), *Economic Recovery Strategy for Wealth and Employment Creation*, available at: <http://siteresources.worldbank.org/KENYAEXTN/Resources/ERS.pdf> (last accessed 10<sup>th</sup> May 2012). This was an economic policy document for the new NARC government, meant to guide the economic planning process for the first five years of the administration. It drew ideas from the NARC Manifesto; its Post Election Action Programme (PEAP); the Poverty Reduction Strategy Paper (the PRSP) released in 2001 and other earlier policy documents. For detailed explanation, see: Prof Anyang Nyong’o (2005), *Planning for Policy Making and Implementation in Kenya: Problems and Prospects*, available at: [http://web.idrc.ca/en/ev-93016-201-1-DO\\_TOPIC.html](http://web.idrc.ca/en/ev-93016-201-1-DO_TOPIC.html) (last accessed 11<sup>th</sup> March 2013).

<sup>89</sup> *ibid.*, p. 32

<sup>90</sup> Achoch Elijah (2010), *Migration Policies and Plans: African, Caribbean and Pacific (ACP)*, Observatory On Migration, 25<sup>th</sup> – 27<sup>th</sup> October, Brussels, Belgium, p. 17, available at: [http://213.246.207.152/acp/sites/default/files/EN\\_Achoch\\_TLCM\\_Kenya\\_-\\_Migration\\_Policies\\_and\\_Plans.pdf](http://213.246.207.152/acp/sites/default/files/EN_Achoch_TLCM_Kenya_-_Migration_Policies_and_Plans.pdf) (last accessed 12<sup>th</sup> March 2013).

<sup>91</sup> Shitundu JM (2006), *A Study on Labour Migration Data and Statistics in East Africa*, IOM papers, 81, p. 8, available at: <http://www.ilo.org/public/english/protection/migrant/download/imp/imp81.pdf> (last accessed 12<sup>th</sup> March 2013).

<sup>92</sup> *ibid.*

objectives as tapping into diaspora talents to reverse brain drain.<sup>93</sup> The policy further notes that the professional Kenyan diaspora possesses immense intellectual resources. However, it notes that the Government is unable to attract her qualified and skilled human resource from the diaspora community, thus inhibiting reverse transfer of technology.<sup>94</sup> The policy proposes that the government will put in place structures, programmes and incentives to attract and utilize qualified and skilled human resources from the diaspora.<sup>95</sup>

## **2.4 THE LEGAL AND INSTITUTIONAL FRAMEWORK**

This section presents an analysis of the constitutional provisions and provisions in various Acts of Parliament addressing the matter. The Citizenship and Immigration Act of 2011,<sup>96</sup> Kenya Citizens and Foreign Nationals Management Service Act<sup>97</sup> and the Investment Promotion Act<sup>98</sup> are the main statutes that address the issue of labour mobility in and out of the country.

### **2.4.1 Constitutional Framework**

The Constitution of Kenya, 2010, identifies labour rights as basic human rights categorizing them under the Bill of Rights in Kenya. These rights are guaranteed by Article 41 of the Constitution. The Article guarantees a right to fair labour practices in relation to both workers and employers. Importantly, these rights are guaranteed to ‘every person.’ Article 260 that deals with interpretation does not exclude an immigrant from the scope of the word ‘person.’

With regard to immigration, movement in and out of Kenya is also provided for in the Constitution. Article 18 provides that Parliament shall enact legislation governing entry into and residence in Kenya. This Article specifically recognizes entry and residence into

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<sup>93</sup> Government of Kenya (2011), *Draft Diaspora Policy of Kenya*, p. ii, available at: <http://www.kenyaembassy.com/pdfs/DraftDiasporaPolicyofKenya.pdf> (last accessed 13<sup>th</sup> March 2013).

<sup>94</sup> *ibid*, p. 6.

<sup>95</sup> *ibid*, p. 12.

<sup>96</sup> Act No. 12 of 2011, assented to on 30th September, 2011 and Commenced 4th October, 2011.

<sup>97</sup> Act No. 31 of 2011, assented to on 30th September, 2011 and Commenced 4th October, 2011.

<sup>98</sup> Act No.6 of 2004.



Kenya without necessarily acquiring citizenship, meaning that it especially, addresses immigrants. Article 39(2)(3), over and above guaranteeing freedom of movement, provides that *every person* has the right to *leave* Kenya.

The Constitution also guarantees other rights and freedoms contingent upon the right of labour, that, by extension, are beneficial to immigrants. For instance, Article 27 addresses the right to equality and freedom from discrimination based on, among other considerations, ethnic or social origin, culture, language or birth. Article 30(4) also guarantees the right not to be subjected to slavery, servitude or forced labour.

#### **2.4.2 The Citizenship and Immigration Act**

Movement of labour is predicated upon movement of persons. This Act determines the conditions regulating this movement, by providing for various travel documents in and out of the country. Free movement of persons creates a conducive environment for free movement of labour.

The purpose of the Act is to provide for matters relating to citizenship; issuance of travel documents; immigration and connected purposes.<sup>99</sup> The Act entitles all Kenyan citizens to be issued with a passport or other travel documents to facilitate international travel upon application in the prescribed manner.<sup>100</sup>

The Act provides for various kinds of travel documents, some to be used specifically within the Partner States in East Africa. Of significance is the East African Passport, which is to be issued to a citizen of Kenya who intends to travel within the Partner States in the East African Community.<sup>101</sup> This passport is valid for use in all Partner States in the East African Community or for such other countries as may be prescribed by the

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<sup>99</sup> Preamble to the Act

<sup>100</sup> Section 24 (1)

<sup>101</sup> Section 25

Cabinet Secretary. Their validity period does not exceed ten years from the date of issue and, in the case of children, not exceeding five years.<sup>102</sup>

The Act further provides for the issuance of a Temporary Permit to a citizen of Kenya who intends to travel within the East African Community Partner States or to such States as may be prescribed by the Cabinet Secretary. This permit is valid for use for a period not exceeding one year. A Temporary Passport can also be issued for use in all countries of the world, except for any countries specified in the temporary passport in respect of which it is stated not to be valid. This passport is valid for a period not exceeding one year from the date of issue.<sup>103</sup>

Ordinary and Diplomatic passports issued under the Act<sup>104</sup> are valid for use in all countries in the world, except for any countries specified in the passport and for a period that does not exceed ten years and, in the case of children, not exceeding five years.

With regard to immigrants, the Act provides that a person who is not a citizen of Kenya or an asylum seeker shall not enter or remain in Kenya unless she or he has a valid permit or pass.<sup>105</sup> Further, the Act makes it an offence for any person not being a citizen of Kenya, to engage in any employment, occupation, trade, business or profession, whether or not for profit or reward, without being authorized to do so by a work permit. The only exception is if one is exempted from acquiring a work permit under the regulations. That then makes it mandatory for foreigners to acquire work permits. The issuance of the work permits is to be done pursuant to section 40 of the Act.

In addition, Section 59 empowers the Cabinet Secretary responsible for matters relating to citizenship and the management of foreign nationals to make Regulations for the better carrying into effect the provisions of the Act. The Minister of State for Immigration and

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<sup>102</sup> Section 26

<sup>103</sup> Section 29

<sup>104</sup> Section 28 at paragraphs (a) and (b)

<sup>105</sup> Section 34.

Registration of Persons published such regulations in 2012.<sup>106</sup> The Regulations state that an application for a residence or work permit shall be made to the Director.<sup>107</sup> In the application form for the work permit, it is clearly stated that the government policy is to ensure that the economy of Kenya is moved by trained and competent citizens.<sup>108</sup> Work permits are, thus, only issued to noncitizens with skills not available at present on the Kenyan labour market. In the application, the employer has to give details and give evidence of steps taken to confirm that the skills/qualifications sought are not available locally.<sup>109</sup> In addition, they are only issued on the understanding that effective training programmes shall be undertaken to produce trained citizens within a specified period.<sup>110</sup> The employer, in filling the application form, is required to indicate whether there is a Kenya citizen who is being trained for the post, attaching an employment contract.<sup>111</sup>

This Act finally defines the functions of the Permits Determination Committee. Though applications for permits are to be made to the Director, this Committee is charged with vetting the applications and making a binding recommendation to the director on issuance of permits.<sup>112</sup> The Committee is empowered to request additional information and, where necessary, summon the applicants and require production of supporting documents.<sup>113</sup> The Director has a time limit of fourteen days to act on the recommendations of the Committee.<sup>114</sup> The Director cannot overrule the Committee, but may only refer back matters to the Committee for further deliberation.<sup>115</sup> The Committee is, finally, empowered to regulate its own procedures.<sup>116</sup>

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<sup>106</sup> Kenya Citizenship and Immigration Regulations, 2012.

<sup>107</sup> Regulation 20.

<sup>108</sup> First Schedule, Form 25, Explanatory Notes, note 1, p. 50.

<sup>109</sup> Form 25, *ibid.*

<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.*

<sup>112</sup> Section 40 (3) and (4)

<sup>113</sup> Section 40 (5)

<sup>114</sup> Section 40(6)

<sup>115</sup> Section 7(a)

<sup>116</sup> Section 40(9)

This Committee vets and makes recommendations on issuance of work permits to foreign workers. Its decisions, thus, play a major role in regulating the immigration of foreign workers to Kenya.

### **2.4.3 Kenya Citizens and Foreign Nationals Management Service Act**

The Kenya Citizens and Foreign Nationals Management Service Act (KCFNMSA) Act establishes the institutional framework that ought to implement all the laws dealing with immigration and emigration. Specifically the Act creates the Kenya Citizens and Foreign Nationals Management Service<sup>117</sup> (hereinafter referred to as the Service). The Service is a body corporate with perpetual succession and common seal. The Service is under the general supervision of the Cabinet Secretary.<sup>118</sup> It is charged with the responsibility of implementing policies, laws and any other matter relating to, among others, citizenship and immigration, births and deaths, marriages, identification and registration of persons, issuance of identification and travel documents, foreign nationals management and the creation and maintenance of a comprehensive national population register.<sup>119</sup>

The Service has the additional roles of receiving, storing and updating information from primary registration agencies<sup>120</sup> and generating appropriate unique identifier for individuals and groups.<sup>121</sup> The Service is, therefore, the institution that regulates labour flow in and out of the country. Moreover, its implementation or otherwise of the said policies and laws directly affects the flow of labour. The Service also houses the Board charged with generally reviewing and formulating laws relating to immigration, thereby affecting labour flow in and out of the country.

The Act also establishes a Board to the Service (hereinafter referred to as the Board).<sup>122</sup> The Board, through the Cabinet Secretary, has the responsibility of formulating and

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<sup>117</sup> Section 3.

<sup>118</sup> This defined in Section 2 as, ‘the Cabinet Secretary responsible for citizens and foreign nationals management matters.’

<sup>119</sup> Section 4.

<sup>120</sup> Section 4(i)

<sup>121</sup> Section 4(ii)

<sup>122</sup> *ibid.*

reviewing the policies of the Service in accordance with constitutional values and principles.<sup>123</sup> It is the organ of the Service that has the responsibility of coming up with immigration policies that directly affect the flow of labour in and out of the country. Generally, the Board is to, among others, ‘provide for the creation and maintenance of a national population register and the administration of the laws relating to immigration and refugees and connected purposes.’<sup>124</sup> Related to this, it is also tasked with reviewing and recommending for review laws and regulations administered under the Act. The First Schedule to the Act lists these laws including the Citizenship and Immigration Act, 2011, that directly affects labour flow.

The Board is also charged with the role of establishing the Permits Determination Committee,<sup>125</sup> the organ that has a key role in issuance of permits to foreign workers. The Act provides that no resolution of a committee of the Board shall become a decision of the Board until it has been tabled before the Board and adopted by the Board,<sup>126</sup> which makes the Board a key institution in the regulation of free movement of labour.

Finally, the Act establishes the Kenya Citizenship and Immigration Service Appeals Tribunal (hereinafter referred to as the Tribunal).<sup>127</sup> The Tribunal has the same powers as a subordinate court of the first class. It is tasked with listening to appeals by any person aggrieved with the decision of the Board or its Directors. Though the members of the Tribunal are to be appointed by the Cabinet Secretary,<sup>128</sup> the rules prescribing procedures and appeals from the Tribunal are to be made by the Chief Justice.<sup>129</sup> This tribunal plays a role in labour immigration by hearing appeals from the decisions of the Director on issuance of work permits. It is empowered to invalidate the director’s decisions and even

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<sup>123</sup> Section 6.

<sup>124</sup> Preamble to the Act

<sup>125</sup> Section 7(1). Its functions are elaborated in the Kenya Citizenship and Immigration Act, as discussed above.

<sup>126</sup> Section 7(5)

<sup>127</sup> Section 23.

<sup>128</sup> Section 23(2)

<sup>129</sup> Section 23(5)

replace them with its own decision.<sup>130</sup> Persons aggrieved by a decision of the Tribunal have the option of further appeal to the High Court.<sup>131</sup>

#### **2.4.4 The Investment Promotion Act**

The Preamble to the Act states that the purpose of the Act is to promote and facilitate investment by assisting investors in obtaining the licenses necessary to invest and by providing other assistance and incentives and for related purposes. The scope of the Act includes foreign investors. The Act defines a ‘foreign investor’ as a natural person who is not a citizen of Kenya; a partnership in which the controlling interest is owned by a person or persons who are not citizens of Kenya; or a company or other body corporate incorporated under the laws of a country other than Kenya.<sup>132</sup>

Section 4 of the Act provides that both foreign and domestic investors may be entitled to investment certificate upon fulfillment of some conditions. One of the conditions is that the investment and the activity related to the investment are lawful and ‘beneficial to Kenya.’<sup>133</sup> ‘Beneficial to Kenya’ is defined as the investment which shall result into: creation of employment for Kenyans; acquisition of new skills or technology for Kenyans; contribution to tax revenues or other Government revenues; a transfer of technology to Kenya; an increase in foreign exchange, either through exports or import substitution; utilization of domestic raw materials, supplies and services; adoption of value addition in the processing of local, natural and agricultural resources; utilization, promotion, development and implementation of information and communication technology; and, any other factors that the Authority considers beneficial to Kenya.<sup>134</sup> Grant of the certificate to a foreign investor is further predicated upon the condition that the amount to be invested by the investor is at least one hundred thousand United States of America dollars or the equivalent in any currency.<sup>135</sup>

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<sup>130</sup> Section 23(3).

<sup>131</sup> Section 23 (5).

<sup>132</sup> Section 2 of the Act.

<sup>133</sup> Section 4 (1) (d).

<sup>134</sup> Section 4.

<sup>135</sup> Section 4 (1) (b).

Section 13 of the Act entitles the investors to entry permits for expatriates. The Section provides that the holder of an investment certificate is entitled to a number of entry permits under the Immigration rules: three Class A entry permits for management or technical staff (employee) and three Class H, I or J entry permits for owners, shareholders or partners (investors). If an entry permit in relation to Class A has already been issued to an employee of the holder of the investment certificate as of the time the investment certificate was issued, that permit is deemed to be one of the permits to which the holder of the certificate is entitled.<sup>136</sup> Moreover, if an entry permit in relation to Class H, I or J has already been issued to the holder of the investment certificate or an owner, shareholder or partner of the holder as of the time the investment certificate was issued, that permit is deemed to be one of the permits to which the holder of the certificate is entitled.<sup>137</sup>

The permits are issued for an initial period of two years, with entitlement to have the permits renewed or transferred to another employee or investor if necessary, without time limit.<sup>138</sup> Entitlement to a permit or pass under this section is conditional upon, *inter alia*, any security deposit or bond required under the Immigration Act being paid or provided.<sup>139</sup>

The fulfillment of the conditions by the potential investor directly affects the free movement of labour. The more relaxed such requirements are, the easier the labour flow. The converse is also true. This will result in more grants of such certificates to a potential investor. This will in turn result in an increase in the number of the permits issued freeing up labour flow into the country.

Section 14 of the Investments Promotions Act establishes the Kenya Investment Authority as a continuation of the Investment Promotion Centre established under the

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<sup>136</sup> Section 13 (10).

<sup>137</sup> *ibid.*, at Subsection (11).

<sup>138</sup> *ibid.*, at Subsections (2) (3).

<sup>139</sup> *ibid.*, at Subsection (7) (d).

Investment Promotion Centre Act.<sup>140</sup> Under the Act, the Authority has the mandate of promoting and facilitating investment in Kenya. In carrying out this function, the Authority in assisting both foreign and local investors specifically issues investment certificates, assists in obtaining any necessary licences and permits and incentives or exemptions under the Income Tax Act, the Customs and Excise Act, the Value Added Tax Act or other legislation and provides information, including information on investment opportunities or sources of capital.<sup>141</sup>

The Authority is also responsible for promoting, both locally and internationally, the opportunities for investment in Kenya. It also has the task of reviewing the investment environment and making recommendations to the Government and others, with respect to changes that would promote and facilitate investment, including changes to licensing requirements. It is further charged with facilitating and managing investment sites, estates or land together with associated facilities.<sup>142</sup>

## **2.5 CONCLUSION**

The focus of this chapter was to examine the Kenyan policy, legal and institutional framework for free movement of labour, *vis a vis* the Protocol requirements on each EAC Partner State. The chapter first identified the Protocol requirements on Partner States. Each Partner State is required not to discriminate nationals of other Partner States on grounds of nationality; to guarantee the free movement of persons and workers who are citizens of the other Partner States; to guarantee the right of establishment of nationals of the Partner States within their territories; to recognize the academic and professional qualifications, experience and licences or certifications granted in other Partner States; to protect cross-border investments of other Partner States and the fruits of those investments; to remove restrictions on capital movement for EAC residents based on nationality, residence and place of investment of capital and discrimination and to approximate laws and harmonize policies and systems with other partner states.

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<sup>140</sup> Chapter 485 of Kenya Laws (repealed).

<sup>141</sup> Section 15 (2) (a).

<sup>142</sup> *ibid*, at paragraphs (c) (d) (e).



As noted, Kenya does not have a consolidated labour policy, leaving the same to be derived from scattered policy documents. This policy mainly seeks to limit access of employment to foreigners while promoting employment of nationals. Vision 2030, first Medium Term Plan for implementation of Vision 2030 and the Draft Diaspora Policy propose measures to address brain drain and to discourage labour emigration. They also propose measures to lock out foreigners from jobs that can be done by Kenyans.

With respect to the Kenyan legal and institutional framework, the Constitution guarantees other rights and freedoms contingent upon the right of labour, that are by extension, beneficial to immigrants. The Citizenship and Immigration Act, the Kenya Citizens and Foreign Nationals Management Service Act and the Investment Promotion Act are also analyzed.

There are a number of challenges posed by these frameworks to the implementation of the Common Market Protocol provisions on free movement of labour in East Africa. These challenges are the focus of the next chapter.

## **CHAPTER THREE: CHALLENGES FACING REALIZATION OF FREE MOVEMENT OF LABOUR IN KENYA**

### **3.1 INTRODUCTION**

This chapter examines challenges facing realization of free movement of labour in Kenya. These are classified based on whether the challenges are posed by the Protocol itself, Kenya's policy framework, Kenya's legal framework or other factors.

### **3.2 CHALLENGES POSED BY THE PROTOCOL ITSELF**

The framework proposed by the Protocol, if well implemented, largely contributes to the attainment of free movement of labour. However, it has some clauses which introduce loopholes that can be used to undermine attainment of free movement of labour in Partner States. These are analyzed below.

#### **3.2.1 Work Permits**

Though the Protocol guarantees the right to free movement of workers, it makes it a mandatory requirement for citizens of other Partner States to obtain a work permit.<sup>143</sup> Only those securing employment for periods less than 90 days are exempted, but they must then apply for special passes.<sup>144</sup> Many states use work permits to restrict foreigners' access to their labour markets. This is achieved through elaborate application procedures, thorough vetting processes, high application and issuance costs and refusals to issue the permits if there are locally qualified persons.

The Protocol attempts to remedy the above negative effects by requiring permit issuance within a maximum period of 30 days<sup>145</sup> and requiring harmonization of the processing and issuance fees by the EAC Council of Ministers.<sup>146</sup> Strict modalities and timelines of implementing these safeguards are, however, lacking. The Protocol and the Annex are silent on deadlines for harmonization of the fees and the penalties for countries not

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<sup>143</sup> Annex II: Free Movement of Workers, Regulations 5 and 6.

<sup>144</sup> *ibid*, Regulation 6(4).

<sup>145</sup> *ibid*, Regulation 6(7).

<sup>146</sup> *ibid*, Regulation 6(9).

implementing these safeguards to the letter. This has made countries pull in different directions and make their own rules on matters relating to work permits.

Kenya has taken advantage of the work permit requirements, clearly using it as a stumbling block to free movement of workers in three ways. First, it has elaborate application and issuance procedures, taking up to three months to process a new work permit. Second, Kenya charges Ksh. 10,000 processing fees and Ksh. 200,000 per year as issuance fees.<sup>147</sup> This fee is general and does not cater for a special fee for citizens of EAC Partner States. The fee is on the higher scale and makes employment of citizens of other EAC Partner States an expensive affair. Third, it has introduced a condition in its application forms that employers must prove that no domestic workers could be found, and that appropriate steps have been taken to train domestic workers for the position.<sup>148</sup> This defeats the purpose of the Protocol in the first place, and locks out common workers from other Partner States from the local labour market. It is only in highly specialized areas that this requirement can be met easily. These provisions apply to all foreigners working in Kenya, citizens of East Africa not excluded.

The provision of work permits in the Protocol has also created conflict in policies among Partner States. Whereas Kenya has waived work permit requirements for Rwandese citizens working in Kenya,<sup>149</sup> citizens of other Partner States have to acquire the document, with only an exemption for them from paying the processing fees.<sup>150</sup> There is only a promise to totally waive requirements for the document for all EAC citizens

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<sup>147</sup> Kenya Citizenship And Immigration Regulations, 2012, Ninth Schedule on Fees.

<sup>148</sup> *ibid*, First Schedule Form 25: Application for Issuance or Renewal of Permit, explanatory note 1.

<sup>149</sup> State House Kenya (November 19, 2008), *Kenya Abolishes Work Permit Requirement For Rwandese Nationals*, available at: <http://www.statehousekenya.go.ke/news/nov08/2008191101.htm> (last accessed 27<sup>th</sup> March, 2013).

<sup>150</sup> The Standard (23<sup>rd</sup> June 2012), *Kenya Waives Work Permit Fees for East African Citizens*, available at: <http://www.standardmedia.co.ke/?incl=comments&id=%202000013010&cid=14&articleID=2000013010> (last accessed 27<sup>th</sup> March, 2013).

later.<sup>151</sup> Other Partner States continue to exhibit mixed signals on this issue, with Tanzania even proposing to raise the fees for work permits.<sup>152</sup>

To prevent such actions and conflicts among its Partner States, the EU abolished work permits among citizens of Partner States.<sup>153</sup> This has made it to be the trading block with the highest extent of implementation of the right to free movement of workers in the world. For the EAC Protocol to fully implement free movement of workers, such permits should, thus, be abolished as among citizens of EAC Partner States.

### **3.2.2 Public Policy, Public Security and Public Health Limitations**

The Protocol subjects the right to free movement of workers to limitations imposed by the host Partner State on grounds of public policy, public security or public health.<sup>154</sup> It requires Partner States placing such restrictions to notify the other Partner States accordingly.<sup>155</sup> The above grounds are extremely vague. Public policy has been described by the Kenyan judiciary as an ‘unruly horse’.<sup>156</sup> It is equally unclear what the category of persons who can be denied work permits on public security grounds are. The classes of diseases, suffered by work permit applicants, which would justify refusal to grant on public health grounds, has never been defined.

The limitations undermine free movement of workers in two ways. First, the Protocol only defines public security,<sup>157</sup> but does not define public policy and public health. This

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<sup>151</sup> The Citizen (1<sup>st</sup> April, 2010), Kenya to abolish work permits for EAC citizens, available at: <http://www.thecitizen.co.tz/news/2-international-news/1052-kenya-to-abolish-work-permits-for-eac-citizens.html> (last accessed 27<sup>th</sup> March, 2013).

<sup>152</sup> IWACU (23<sup>rd</sup> June, 2012), *Tanzania to Increase Cost of Work Permit*, available at: <http://www.iwacu-burundi.org/spip.php?article3480> (last accessed 27<sup>th</sup> March, 2013).

<sup>153</sup> Article 40 and 41, *European Council Regulation (EEC) No 1612/68 on Freedom of Movement for Workers Within the Community*, adopted on 15 October 1968, made pursuant to Article 46 of the Treaty on The Functioning of The European Union, available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1998:397:0010:0011:EN:PDF> (last accessed 27<sup>th</sup> March, 2013).

<sup>154</sup> CM Protocol, Article 10(11).

<sup>155</sup> CM Protocol, Article 10(12).

<sup>156</sup> Ringera J in *Christ for All Nations v. Appollo Insurance*, (2002) 2 East Africa Law Reports, p. 366.

<sup>157</sup> Article 1 of the Protocol defines ‘public security’ as “the function of governments which ensures the protection of citizens and other nationals, organizations and institutions against threats to their well-being and to the prosperity of their communities”

leaves discretion to Partner States to define their own limitations, relying on wide parameters. That amounts to granting them a blank cheque to unjustifiably deny and cancel work permits on flimsy grounds. Kenya has previously limited the right of entry and stay especially on grounds of public security, for instance, where a person is suspected to be linked to a terrorist group or appears on the watch list; and on grounds of public health, for instance, where there is an outbreak of an infectious disease like the H1N1 and Ebola virus.<sup>158</sup> However, it remains unclear what constitutes public policy, thus, creating room for abuse. Second, there is no clear reporting mechanism for the Partner States on the grounds of placing such limitations. It only requires them to notify other Partner States without giving the channel of communication.

Aware that such limitations are susceptible to abuse by Partner States, the EU has issued elaborate guidelines on exercise of such limitations.<sup>159</sup> The EU directive requires host states not to exercise the limitations for economic reasons, to apply the proportionality principle,<sup>160</sup> and to demonstrate exceptionality. It outlaws lifelong exclusion orders in whichever circumstance. The EAC, thus, needs to clarify these limitations, either through amendments to the Protocol, introduction of Annexes or issuing of a Directive by the Council of Ministers, so as to stem potential abuse.

### **3.2.3 Multiple Residence Documents**

The third major challenge in the Protocol is the use of multiple residence documents. The work permit is not deemed sufficient to guarantee residence status for citizens of other EAC Partner States. The Annex on the Right of Residence provides for residence permit in addition to alien card. The Annex first recognizes that residence may be based on any

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<sup>158</sup> Information given by IM3, Head Aliens Section, during an interview on 16<sup>th</sup> March, 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>159</sup> *EC Directive 2004/38/EC, on Freedom of Movement in the EU*, adopted 29th April, 2004 available at: <http://eumovement.wordpress.com/directive-200438ec/> (last accessed 27<sup>th</sup> March, 2013).

<sup>160</sup> States that 'A public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure.' The measure should thus, be:

- appropriate in order to achieve the objective which is intended
- necessary in order to achieve the objective which is intended, that is, there are no less severe means of achieving the objective
- reasonable, that is, the person concerned can reasonably be expected to accept the measure in question.

one of these documents.<sup>161</sup> However the use of the word ‘may’ makes this not a binding rule. To further undermine such an eventuality, it provides for separate residence permits<sup>162</sup> and alien cards,<sup>163</sup> in addition to work permits.

The need for two separate documents so as to enjoy the right of residence is a fetter to the right.<sup>164</sup> This is due to four reasons. First, the separate documents come with increased costs in terms of application, processing and renewal fees for the different permits. Second, they carry additional administrative hurdles that may be introduced by host states in an attempt to regulate immigration. Third, it introduces disharmony, with some Partner States using alien identification documents and other Partner States using the residence permit as the basis for granting the right of residence. Finally, the word ‘Alien’ in the Alien card is archaic and colonial. It should be replaced with a friendlier terminology.<sup>165</sup>

The Kenyan law has taken cue and gives power to the Cabinet Secretary to make an order requiring that foreign nationals, in addition to getting work permits, register.<sup>166</sup> The regulations provide for a foreign nationals register<sup>167</sup> and the procedure for such registration,<sup>168</sup> and application forms.<sup>169</sup> They are issued with residence certificates once they undergo the process. This introduces unnecessary additional bureaucracy.

### **3.2.4 Disharmony in Schedule on Timelines**

The schedule on professions that are eligible to enjoy this right together with timelines for the implementation of these rights is replete with disharmonies among the three Partner States. Each state is allowed to indicate its own timelines in the year in which it

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<sup>161</sup> Annex on the Right of Residence, Regulation 5(1).

<sup>162</sup> Regulation 5(2) and 6. It is to be issued based on the work permits, showing necessity of both documents for residence status of foreign citizens of EAC Partner States.

<sup>163</sup> Regulation 5(2).

<sup>164</sup> View expressed by IM4, Deputy Head Permits Section, during an interview on 16th March, 2012, at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>165</sup> View expressed by IM3, Head Aliens Section, during an interview on 16th March, 2012, at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>166</sup> Kenya Citizenship And Immigration Regulations, 2012, Section 56.

<sup>167</sup> *ibid*, Regulation 53.

<sup>168</sup> *ibid*, Rule 46.

<sup>169</sup> *ibid*, First Schedule Form 42.

shall allow free movement in certain professions. Some states allow certain professions free movement into their labour market earlier or later than others.<sup>170</sup> It has also created absurdity in some categories. For instance, a medical worker is defined separate from nurses and midwives.<sup>171</sup>

### **3.3 CHALLENGES POSED BY KENYA’S POLICY FRAMEWORK**

The Protocol calls on Partner States to guarantee the free movement of workers, who are citizens of the other Partner States, within their territories.<sup>172</sup> It outlaws discrimination of the workers of the other Partner States, based on their nationalities, in relation to employment, remuneration and other conditions of work and employment.<sup>173</sup> It also provides that Partner States should, within the framework of a joint programme, encourage the exchange of young workers amongst the Partner States.<sup>174</sup> It demands that the office responsible for employment in a Partner State facilitate a citizen of another Partner State who seeks employment in the territory of that Partner State to receive the same assistance as would be accorded to a citizen of that Partner State who seeks employment.<sup>175</sup> It provides that the national laws and administrative procedures of a Partner State shall not apply where the principal aim or effect is to deny citizens of other Partner States the employment that has been offered.<sup>176</sup> It finally calls for establish employment promotion centers and eventually adoption of a common employment policy.<sup>177</sup> The foregoing provisions call for detailed policy interventions so as to achieve the right to free movement of workers. However, the Kenyan policies on labour do not fully implement this right.

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<sup>170</sup> CM Protocol, Schedule for the Free Movement of Workers

<sup>171</sup> Pointed out by ADV1, an Advocate handling immigration matters at Pricewaterhouse Coopers, during an interview on 17<sup>th</sup> March 2012 at PwC Headquarters.

<sup>172</sup> CM Protocol Article 10(1).

<sup>173</sup> *ibid*, Article 10(2).

<sup>174</sup> *ibid*, Article 10(7).

<sup>175</sup> *ibid*, Article 10(8).

<sup>176</sup> *ibid*, Article 10(9).

<sup>177</sup> CM Protocol, Article 5(2)(c).

First, the Employment Act provides that it is not discrimination to employ a citizen in accordance with the National Employment Policy.<sup>178</sup> This policy is further mentioned in the Citizenship Rules. The rules expressly state that Government policy demands that the economy of Kenya be operated by trained and competent citizens and work permits shall be granted to non-citizens only for skills not available in the Kenyan labour market, only on the understanding that effective training programmes are undertaken to produce trained citizens within a specified period.<sup>179</sup> This is a policy specifically aimed at blocking employment of foreign workers, discouraging movement of labour into the country. It amounts to discrimination of workers from other Partner States, based on their nationality, contrary to the clear Protocol provisions. It can be challenged under Article 10(2) and (9) of the Protocol.<sup>180</sup>

Second, there is no specific policy targeted at achieving exchange of young workers across the EAC states, as provided for in the Protocol. Third, there lacks employment promotion centers to assist EAC citizens get employment. Notable is that such centers do not exist even for Kenya citizens. To this end, the proposed National Employment Bureau has not been fully operationalized, leaving the work to private employment agencies licenced by the Ministry of Labour.

Finally, there is no consolidated employment policy in Kenya. The proposed Employment Policy and Strategy has been at the draft stage for long, and the government is yet to roll it out.<sup>181</sup> Pending this, the government policy on employment has to be deduced from numerous policy documents. The provisions in these documents are also not clear and much of the conclusions are by inference.

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<sup>178</sup> Employment Act, Section 5(3)(c).

<sup>179</sup> Citizenship and Immigration Act, First Schedule, Form 25, Explanatory Notes, note 1, p. 43.

<sup>180</sup> View expressed by ADV2, an Advocate knowledgeable on immigration matters, during an interview on 17th March 2012 at ADV2 & Company Advocates.

<sup>181</sup> Ministry of Labour Quality Statement (March 2012), *Government set to roll out National Employment Policy*, available at: [http://www.labour.go.ke/index.php?option=com\\_docman&task=doc\\_download&gid=20](http://www.labour.go.ke/index.php?option=com_docman&task=doc_download&gid=20) (last accessed 7<sup>th</sup> April, 2013). It has remained in draft form since 2006.



Generally, in East Africa, migration policies can be translated into more or less restrictive regulatory frameworks comprising of immigration laws for the entry, residence and employment of foreigners.<sup>182</sup> The totality of the policy framework in Kenya is generally biased against immigration and specifically labour flow. The policy seeks to limit access of employment to foreigners while promoting employment of nationals.<sup>183</sup> This in turn makes it hard for citizens from other EAC Partner States to access the labour market within Kenya or even change jobs once the contract has expired since the re-employment of foreigners will be dependent on permits they are in possession of. The justification is the protection of the local labour market due to increased number of job seekers in the labour market. This presents an obstacle to free trade movement in East Africa as stringent measures are imposed by the immigration department in an effort to reduce potential job seekers from Partner states.

### **3.4 CHALLENGES POSED BY THE KENYAN LEGAL FRAMEWORK**

The Kenyan laws attempting to implement the provisions of the Protocol are weak, which undermine the efficiency of the Protocol itself. These are analyzed below.

#### **3.4.1 The Constitution**

The Constitution of Kenya, 2010 has positive provisions for the enablement of free movement of labour in and out of the country. These provisions include the recognition of dual citizenship,<sup>184</sup> right to free movement within the country and recognition of labour rights.<sup>185</sup> It however, has gaps which may undermine realization of this right.

The most glaring gap in the Constitution is in Article 27 that prohibits discrimination. Sub Article 4 does not specifically provide for country of origin as a ground for non-

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<sup>182</sup> African NGOs Refugee Protection Network (2002), *Workshop Report: The Need for a Progressive Legislative and Policy Framework*, p. 5, Workshop on Protecting Refugee Rights in East Africa, April 19-20, Mombasa, Kenya, available at: [http://www.humanrightsfirst.org/wpcontent/uploads/pdf/mombasa\\_04\\_02.pdf](http://www.humanrightsfirst.org/wpcontent/uploads/pdf/mombasa_04_02.pdf) (last accessed 12<sup>th</sup> April, 2013).

<sup>183</sup> View expressed by IM2, Deputy Director, Immigration Department, during an interview on 16th March 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>184</sup> Article 16.

<sup>185</sup> Article 41.

discrimination. Though it can be argued that social origin or place of birth can address this situation, this is debatable. This, in a way, hampers the realization of the provision of the Protocol that countries should not discriminate based on the nationality of the individual in question. Policies and laws which discriminate against citizens of other EAC Partner States based on their nationality, though contrary to the Protocol, still pass the constitutionality test. The government, thus, can pass and maintain such policies and laws without fear of unconstitutionality.<sup>186</sup>

In addition, Article 39 that provides for freedom of movement limits the scope of its provisions to the movement of citizens as far as immigration is concerned.<sup>187</sup> Emigration, on the other hand, is allowed for every person.<sup>188</sup> This does not confer this freedom to citizens of other countries and specifically East Africa. This, therefore, hampers the movement of persons and labour from other countries into Kenya.

It is, however, important to note that the Constitution as it is does not explicitly impede free movement of labour. Whether or not it does, especially, in consideration of the arguments pointed out above is dependent on interpretation of the same. It only provides for the framework that ought to regulate the free movement of labour.

### **3.4.2 The Kenya Citizenship and Immigration Act and Regulations**

The Kenya Citizenship and Immigration Act has several positive provisions that encourage free movement of labour. However, it falls short in several areas on implementing the provisions of the Protocol.

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<sup>186</sup> View expressed by ADV3, an Advocate knowledgeable on immigration matters, during an interview on 17th March 2012 at Maina and Company Advocates offices.

<sup>187</sup> Sub-Article 3 which provides that every citizen has the right to enter, remain in and reside anywhere in Kenya.

<sup>188</sup> Sub-Article 2 that provides that every person has the right to leave Kenya

### **3.4.2.1 Travel Documents**

Travel documents are an important aspect of implementing free movement of workers. The Protocol calls for use of valid common standard travel documents<sup>189</sup> or machine-readable and electronic national identity cards<sup>190</sup> as travel documents. Pursuant to this, Kenya indicated the intention to start producing machine readable new generation identity cards.<sup>191</sup> It even entered into an agreement with Rwanda to allow citizens of the two states to use the new generation IDs as travel documents.<sup>192</sup>

Despite the above moves, this Act does not recognize identity cards as travel documents. It only recognizes ordinary, diplomatic, East African and temporary passports, emergency travel documents, certificate of identity and nationality, temporary permits and refugee travel documents as the valid travel documents.<sup>193</sup> The foregoing are just the common standard travel documents. The Act, thus, falls short of implementing the Protocol in this regard.

### **3.4.2.2 Work Permits Issuance**

The work permits have been maintained as the documents to authorize movement of workers within the EAC. However, the Protocol defines the process of processing of work permits. At the entry point, the worker from the member state, on production of valid documents, should be issued with a pass, valid for six months and free of charge,

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<sup>189</sup> Article 9(1).

<sup>190</sup> Article 9(2) and Regulation 2, Annex I on free movement of persons.

<sup>191</sup> The Star (3<sup>rd</sup> August, 2012), *Sh4 Billion ID Tender Cancelled*, available at: <http://www.the-star.co.ke/national/national/87845-sh4bn-new-id-tender-cancelled> (last accessed 14<sup>th</sup> April, 2013). The process of tendering for the same was started but stalled after appeals were lodged by dissatisfied bidders at the Public Procurement Administrative Review Board (PPARB). The award was finally cancelled for lack of due process, with the ministry tabling doctored minutes. There are also fears that wrangles between the office of the President and Ministry of Immigration have slowed the process of issuing the cards. See The Star (6<sup>th</sup> January 2011), *Muthaura, Kajwang Row Halts ID Cards*, available at: <http://allafrica.com/stories/201101060934.html> (last accessed 14<sup>th</sup> April, 2013).

<sup>192</sup> Capital Fm (6<sup>th</sup> August, 2012), *Kenyans to use IDs to travel to Rwanda*, available at: <http://www.capitalfm.co.ke/business/2012/08/kenyans-to-use-ids-to-travel-to-rwanda>, ABC News (16<sup>th</sup> August, 2012), *Kenyans Travel to Rwanda Using Only One National Identity Cards*, available at: <http://abcnews.wordpress.com/2012/08/16/kenyans-travel-to-rwanda-using-only-one-national-identity-cards>, and Rwanda Eye, (10<sup>th</sup> August, 2012), *Rwanda, Kenya Move to Ease Travel*, available at: <http://rwandaeye.com/2012/08/rwanda-rwanda-kenya-move-ease-travel> (all last accessed 14<sup>th</sup> April, 2013)

<sup>193</sup> Section 25.

pending their application for work permits.<sup>194</sup> The worker who already has an employment contract should then apply for a work permit within 15 days of entry into another member state.<sup>195</sup> Those without employment contracts at the time of entry are required to apply within 15 days of concluding the contract.<sup>196</sup>

The host State is required to issue a work permit within 30 days of the application<sup>197</sup> and for an initial period of two years, which is renewable.<sup>198</sup> The period is, however, subject to the validity period of the travel documents.<sup>199</sup> The work permits should be processed using harmonized application procedures, forms and fees.<sup>200</sup> On cancellation of the work permits, the holder has thirty days to either regularize his or her status or leave the territory of the host Partner State.<sup>201</sup>

The Act, which should implement the provisions of the Protocol, digresses in several areas. First, the Act lacks clear timelines. The Director is required to refer the application to the Permit Determination Committee, which should deliberate and make recommendations.<sup>202</sup> There is no timeline given for this process. However, the Director should act on the Committee recommendations within 14 days.<sup>203</sup> He or she may refer back the matter to the committee for further consideration. This further consideration should be concluded within 14 days.<sup>204</sup> With the Protocol demanding issuance of the permit within 30 days of the Application, the Act poses challenges to this timeline. In fact, it takes up to three months (90 days) to process a new work permit,<sup>205</sup> way beyond the period stipulated in the Protocol.

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<sup>194</sup> Annex II on Free Movement of Workers, Regulation 5.

<sup>195</sup> *ibid*, Regulation 6(1).

<sup>196</sup> *ibid*, Regulation 6(3).

<sup>197</sup> *ibid*, Regulation 6 (7).

<sup>198</sup> *ibid*.

<sup>199</sup> *ibid*, Regulation 6(8).

<sup>200</sup> *ibid*, Regulation 6(9).

<sup>201</sup> Regulation 8(2)

<sup>202</sup> Section 40(4)

<sup>203</sup> Section 40(6)

<sup>204</sup> Section 40(7) and (8).

<sup>205</sup> Fact pointed out by IM4, Deputy Head, Permits Section, during an interview on 16th March 2012 at Ministry of State for Immigration and Registration of Persons Headquarters

Second, the Regulations enacted pursuant to this Act empower the Director to singlehandedly determine the period of validity of a permit.<sup>206</sup> The only limit to this discretion is a requirement that the validity period should not be more than five years.<sup>207</sup> This grants him or her discretion in determining the period. Further, the Regulations allow the Director to vary terms and conditions of the work permit.<sup>208</sup> This grants him or her discretion to unilaterally vary validity periods. This contradicts the Protocol which specifies two years as the initial validity period, with option for renewal.<sup>209</sup>

Third, the Regulations seem to comply with the Protocol by providing for a visitors pass of six months validity period,<sup>210</sup> issued free of charge.<sup>211</sup> However, they empower an immigration officer to vary the terms and conditions specified in a pass.<sup>212</sup> This grants him or her leeway to reduce validity periods, at will. Such variation would be contrary to the Protocol provision of six months validity.

Fourth, the Act provides that it is the duty of the employer to apply for and obtain a work permit or a pass conferring upon a foreign national the right to engage in employment before granting him or her employment.<sup>213</sup> This implies that the work permits should be processed even before offers of employment. However, the application forms in the Regulations require attachment of the employment contract setting out the terms of employment.<sup>214</sup> This, coupled with the long periods, almost three months, it takes to process the work permits, causes confusion as to the timelines within which the employers should apply for the same. It is not clear whether it is before signing of the contract, or within how many days after the signing of the contract.<sup>215</sup> The Act is, thus, silent on timelines within which

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<sup>206</sup> Kenya Citizenship Regulations, 2012, Section 24(1)

<sup>207</sup> *ibid*, Section 24(2)

<sup>208</sup> *ibid*, Section 20

<sup>209</sup> View expressed by ADV4, Advocate knowledgeable on immigration matters, during an interview on 17th March 2012 at Kamau and Company Advocates Offices.

<sup>210</sup> Kenya Citizenship Regulations, 2012, Section 31(3).

<sup>211</sup> *ibid*, Schedule Nine on Fees, Item 12 on Table (d): Permits/Passes/Permanent residence Fees.

<sup>212</sup> *ibid*, Section 26(3).

<sup>213</sup> Kenya Citizenship and Immigration Act, Section 45(2).

<sup>214</sup> *ibid*, First Schedule, Form 25, Part I.

<sup>215</sup> Pointed out by IM4, Deputy Head, Permits Section, during an interview on 16th March 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

the application for work permits should be done in such cases. This contradicts the Protocol, which specifies a period of either fifteen days after entry of the foreign worker or fifteen days after conclusion of the contract.

Finally, the Act is silent on what should happen after cancellation of a work permit. Though, in practice, a fresh application for another work permit is made, the Act should borrow from the clear provisions of the Protocol on this.<sup>216</sup>

### ***3.4.2.3 Dependant Pass***

Workers moving across states are bound to be accompanied by some dependants. The Protocol provides that the Partner States shall facilitate the admission of a dependant of a worker in accordance with the national laws of the Partner States.<sup>217</sup> The Annex on the Right of Residence gives a detailed procedure for application of the same. The application should be made within 30 days from date of entry. It should be supported by a travel document, work permit and document issued by the dependant's state showing relationship with the foreign worker. The pass should then be issued within 30 days, in accordance with EAC's harmonized classification, fees and procedures.<sup>218</sup> The host state is empowered to cancel the pass. On cancellation, the holder has thirty days to regularize his/her status or leave the host state.<sup>219</sup>

The Citizenship Regulations give the process of application for the same in Kenya.<sup>220</sup> The procedure, however, does not give the timeframe within which to make the application after entry. It also does not state the period within which to issue this document. It also does not state the supporting documents required.<sup>221</sup> Rather than granting a power to cancel the pass, the regulations define situations in which the pass is deemed to have

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<sup>216</sup> The East African Common Market (Free Movement of Workers) Regulations, Regulation 8 (2) 'where a work permit is cancelled, the work shall within thirty days of the cancellation; regularize his or her status; or leave the territory of the host Partner State.

<sup>217</sup> CM Protocol, Article 10(6).

<sup>218</sup> Annex on the Right of Residence, Regulation 8, for detailed process.

<sup>219</sup> *ibid.*

<sup>220</sup> Kenya Citizenship Regulations, 2012, Regulation 27

<sup>221</sup> Anomalies highlighted by IM1, Senior Immigration Officer, during an interview on 16th March 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

expired, thus, becoming invalid. Further, it is silent on what happens upon expiry of the pass. It is, thus, a weak attempt to implement the Protocol.

#### ***3.4.2.4 Operation of Border Posts***

The Protocol demands that the Partner States effect reciprocal opening of border posts and keep the posts opened and in operation for twenty four hours.<sup>222</sup> However, the Citizenship Regulations provide a schedule of operation of border posts with several only being open between 6:30 am and 6:30 or 8:30 pm.<sup>223</sup>

#### ***3.4.2.5 Workers Training***

The Protocol exempts a citizen who enters another Partner State for the purpose of undergoing training for a period not exceeding two months from applying for a student's pass.<sup>224</sup> This is meant to promote cross-border short courses for exchange of ideas among regional workforce, opening avenues for movement of labour. However, the Citizenship Regulations only exempt East Africans from having to pay any fees for the student pass.<sup>225</sup> There is no exemption from the student pass for courses less than two months.

#### ***3.4.2.6 Application Forms, Fees and Procedures***

The Protocol calls for harmonization of classification of permits, travel documents, application forms, fees and procedures through approval by the Council of Ministers.<sup>226</sup> However, the Kenyan Act provides for classification of permits and passes as prescribed under the Regulations.<sup>227</sup> The Citizenship Regulations' documents consist of application forms<sup>228</sup> and various classes of the permits and passes.<sup>229</sup> It also defines the fees payable.<sup>230</sup> At no point do they subject these to harmonization under the EAC Protocol.

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<sup>222</sup> CM Protocol, Article 7(7).

<sup>223</sup> Kenya Citizenship Regulations, 2012, Fourth Schedule.

<sup>224</sup> Annex on Free Movement of Persons, Article 6(5).

<sup>225</sup> Kenya Citizenship Regulations, 2012, Regulation 30(2).

<sup>226</sup> Regulation 6(9) of Annex on Free Movement of Workers, Regulation 8(f) of Annex on Free Movement of Persons and Regulation 6(10) of Annex on Right of Establishment.

<sup>227</sup> Section 36(1).

<sup>228</sup> First Schedule.

<sup>229</sup> Seventh Schedule.

<sup>230</sup> Ninth Schedule.

This creates room for non-uniform: charging of fees, classification and procedures by each state, with some state's fees being exorbitant. The Partner States may, thus, charge high fees as a bar to labour movement.

### **3.4.3 Apparent Contradictions between the Citizenship and Immigration Act and the Kenya Citizens and Foreign Nationals Management Service Act**

There is a challenge posed by the apparent conflict between the above Acts.<sup>231</sup> Whereas the Citizenship and Immigration Act provides that the Permits Determination Committee shall be answerable to the Director of the Kenya Citizens and Foreign Nationals Management Service,<sup>232</sup> the KCFNMSA provides that the same Committee shall be answerable to the Board.<sup>233</sup> This creates confusion as the office of the Director is not synonymous with the Board of the Service.

Further, the appeal structure in both Acts is also contradictory. Under the Citizenship and Immigration Act, appeals from the Director's decisions lie with the High Court<sup>234</sup> whereas in the KCFNMSA, the same lies with the Cabinet Secretary.<sup>235</sup> This is further complicated by Section 23(4) of the latter Act that provides that any appeal from the decisions of the Board or the Director is to be made to the Kenya Citizens and Foreign Nationals Management Service Appeals Tribunal.<sup>236</sup>

### **3.4.4 Employment Act**

This is the Act governing employment matters, including employment of foreigners, in Kenya. It has several provisions which place roadblocks on achieving the right to free movement of labour as envisaged in the EAC Protocol. The Protocol defines the right to free movement of workers to include the right to conclude contracts and take up

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<sup>231</sup> Contradictions pointed out by ADV4, Advocate knowledgeable on immigration matters, during an interview on 17th March 2012 at Kamau and Company Advocates Offices.

<sup>232</sup> Section 40.

<sup>233</sup> Section 7.

<sup>234</sup> Section 40 (10).

<sup>235</sup> Section 22 (1)

<sup>236</sup> Section 23.



employment in a Partner State without discrimination.<sup>237</sup> This Act fetters this right in several ways.

First, it requires employers who enter into foreign contract of service, but do not reside or carry on business in Kenya, to give security by bond in a prescribed form, with one or more sureties resident in Kenya, for the due performance of the contract in such sums as the labour officer considers reasonable.<sup>238</sup> Employers from other Partner States engaging Kenyans when they do not have set up in Kenya would be directly affected by this provision. This is restrictive and against the spirit of the Protocol.<sup>239</sup>

Second, it requires employers who are not incorporated or resident in Kenya to pay a bond assessed at the equivalent of one month's wages for all employees employed or to be employed by the employer, as per the directions of the Minister.<sup>240</sup> This bond is to be kept in a separate interest bearing account, and is to be used for paying wages and other entitlements to that employer's employees in the event of default by that employer.<sup>241</sup> This contravenes the Protocol by discriminating against employers not incorporated in Kenya but in the other Partner States.

Third, the Act requires foreign employers who engage Kenyan workers to work in their countries to furnish a security bond with the employment office in Kenya.<sup>242</sup> Failure to do so is an offence attracting a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.<sup>243</sup> The implication is that employers from EAC Partner States engaging Kenyans to work in their countries should

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<sup>237</sup> CM Protocol, Article 10 (3)(c)

<sup>238</sup> Employment Act, 2007 section 85.

<sup>239</sup> View expressed by ADV5, an advocate practicing in immigration matters at Pricewaterhouse Coopers, during an interview on 17th March 2012 at PwC Headquarters.

<sup>240</sup> Employment Act, 2007 section 23(1)(2)

<sup>241</sup> *ibid.*

<sup>242</sup> The Employment Act, Section 86.

<sup>243</sup> *ibid.*

deposit such bond or face the penalties. This is an additional cost, further complicating emigration of Kenyan workers to other EAC Partner States.<sup>244</sup>

The Act is generally restrictive in dealing with foreign employers, which is a bar to free movement of workers.

### **3.4.5 Investment Promotion Act**

The Protocol defines labour to include a worker and a self employed person.<sup>245</sup> Most self-employed persons would be small scale investors seeking to invest in small ventures in Kenya. Free movement of labour would, thus, include free movement of such investors. This Act is responsible for facilitation of such investments. It, however, has several provisions which may bar free movement of such investors.

The first challenge is the definition of foreign and local investor. This Act defines a foreign investor as:

- (a) a natural person who is not a citizen of Kenya
- (b) a partnership in which the controlling interest is owned by a person or persons who are not citizens of Kenya or
- (c) a company or other body corporate incorporated under the laws of a country other than Kenya.<sup>246</sup>

Under this definition citizens of other EAC Partner States are treated as foreigners. This is restrictive.

Similarly, it defines local investor as:

- (a) a natural person who is a citizen of Kenya
- (b) a partnership in which the partnership controlling interest is owned by a person who is a citizen of Kenya
- (c) a company incorporated under the laws of Kenya, in which the majority of shares are held by a person who is a citizen of Kenya

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<sup>244</sup> The issue of Bonds was repeatedly cited to be restrictive by most respondents. The strongest views against the bonds were expressed by IM5, Senior Assistant Director of Immigration, during an interview on 16th March 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>245</sup> CM Protocol, Article 1.

<sup>246</sup> Investment Promotion Act (Cap 485) Section 2.

(d) a trust or trust corporation established under the laws of Kenya, in which the majority of trustees and beneficiaries are citizens of Kenya.<sup>247</sup>

This definition is also restrictive as it limits local investors to Kenyans only. It also limits local companies to those incorporated under the Kenyan laws.

Second, under this Act, potential investors are granted Investment Certificates that allows them to carry on their ventures upon fulfillment of certain conditions. These conditions are set out in Section 4 of the Act. The Section provides that both foreign and domestic investors may be entitled to investment certificate upon the fulfillment of the condition that the investment and the activity related to the investment are lawful and ‘beneficial to Kenya.’ The Act explains what ‘beneficial to Kenya’ means. The investment or the activity connected thereto must fit into either of the following: creation of employment for Kenyans; acquisition of new skills or technology for Kenyans; contribution to tax revenues or other Government revenues; a transfer of technology to Kenya; an increase in foreign exchange, either through exports or import substitution; utilization of domestic raw materials, supplies and services; adoption of value addition in the processing of local, natural and agricultural resources; utilization, promotion, development and implementation of information and communication technology; and, any other factors that the Authority considers beneficial to Kenya. It is difficult for small scale investors from other EAC Partner States to qualify under the condition. The conditions, thus, impede free flow of self employed investors into the country and therefore, hampering the realization of the implementation of the Protocol.<sup>248</sup>

Third, the grant of the investment certificate to a foreign investor is further predicated by the condition that the amount to be invested by the investor is at least one hundred thousand United States of America dollars or the equivalent in any currency.<sup>249</sup> The effect of this is the denial of investment certificates to all foreign investment below the prescribed limit of US\$100,000. Most cross border investments from EAC Partner States

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<sup>247</sup> *ibid.*

<sup>248</sup> View expressed by ADV3, an Advocate knowledgeable on immigration matters, during an interview on 17th March 2012 at Maina and Company Advocates offices.

<sup>249</sup> Section 4.

may not meet this capital threshold.<sup>250</sup> The Act, thus, hampers the free movement of labour, defined to include investments, in the East African Community region.

### **3.4.6 National Social Security Fund Act**

An important element of free movement of labour is portability of social security benefits. The Protocol provides that workers from other Partner States have right to enjoy the rights and benefits of social security as accorded to the workers of the host Partner State.<sup>251</sup> It empowers the Council to issue directives and make regulations on social security benefits.<sup>252</sup> The EAC Council of Ministers has not issued such directives nor made such regulations. Further the Protocol demands equal treatment for EAC workers on contribution to a social security scheme.<sup>253</sup>

This Act deals with social security benefits in Kenya. The Act empowers the Minister for Labour to make regulations for the purpose of giving effect to any agreement providing for reciprocal arrangements with the government of any country in which a fund or scheme similar to the Fund has been established, for giving effect in Kenya to any such arrangements and for modifying or adapting this Act in its application to cases affected by such arrangements.<sup>254</sup> The effect of this section is to allow the Minister for Labour to make Regulations allowing portability of social benefits, but only on reciprocal agreements with countries with like funds. To date, no such regulations have been made in respect to any country.<sup>255</sup>

In the absence of the above regulations, the Act entitles foreign workers who are members of the Fund to a one-time emigration grant if they emigrate from Kenya to other countries without the intention of returning to reside in Kenya.<sup>256</sup> The purpose of social

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<sup>250</sup> View expressed by IM2, Assistant Director, Immigration Department, during an interview on 16th March 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>251</sup> CM Protocol, Article 10(3)(f).

<sup>252</sup> Article 10(4).

<sup>253</sup> Rule 13(1)(d), Annex on Free Movement of Workers.

<sup>254</sup> Section 43(1).

<sup>255</sup> Fact emphasized by IM5, Senior Assistant Director of Immigration, during an interview on 16th March 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>256</sup> Section 24.

security is to guarantee regular payments to retired workers so as to sustain their economic spending power in their twilight years. The one-time lump sum payment to foreign workers does not meet this objective. The lack of portability for the benefits is a hindrance to full attainment of the right to free movement of labour in EAC.

### **3.4.7 National Hospital Insurance Fund Act**

The right to free movement of workers cannot be attained without implementing proper healthcare insurance for the foreign workers. The Protocol entitles EAC workers to any other rights accruing to a worker under the provisions of the national laws of the Partner State.<sup>257</sup>

The NHIF Act in Kenya deals with medical insurance. The Act defines contributors as persons, ordinarily resident in Kenya, having attained the age of 18 years and earning, whether in form of salary or self-employment, not less than a prescribed amount.<sup>258</sup> The restriction of ordinary residence in Kenya disadvantages foreign workers who have found employment in Kenya.<sup>259</sup> It remains vague on whether foreign workers in Kenya are subject to the compulsory contribution. There is also doubt as to the portability of the medical cover.<sup>260</sup> The Act empowers the Board to modify the provisions of the Act in their application to persons who are or have been outside Kenya while contributors to the Fund.<sup>261</sup> Though this provision seems to support portability, the Board has yet to make clear regulations on contributors who are outside the country. Contributors who migrate to other EAC countries face a hurdle with their covers under NHIF being discontinued. This may be an impediment on attainment of the Right to free movement of labour in East Africa.

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<sup>257</sup> Rule 13(1)(h), Annex on Free Movement of Workers

<sup>258</sup> NHIF Act, Section 15.

<sup>259</sup> Pointed out by IM5, Senior Assistant Director of Immigration, during an interview on 16th March 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>260</sup> View expressed by ADV2, an Advocate knowledgeable on immigration matters, during an interview on 17th March 2012 at ADV2 & Company Advocates.

<sup>261</sup> NHIF Act, Section 28.

### **3.5 OTHER CHALLENGES**

This section discusses other un-addressed issues of the existing legal framework on labour flow in Kenya including; free movement of family members, rights of migrant workers, restrictive approach to immigration issues, participation in trade union activities and migration statistics and data.

#### **3.5.1 Free Movement of Family Members**

Kenya has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990. Under the Convention, migrant workers and members of their families ought to be free to leave any State, including their State of origin. This right is not to be subject to any restrictions except those that are provided by law, that which are necessary to protect national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention. Also, migrant workers and members of their families have the right, at any time, to enter and remain in their State of origin.<sup>262</sup> Further, the Convention states that the right to life of migrant workers and members of their families shall be protected by law. Full implementation of this Convention would facilitate labour circulation in the East African region. Legislation in Kenya, however, does not specifically reflect the consideration of the right to free movement of family members of migrant workers.<sup>263</sup>

#### **3.5.2 Rights of Migrant Workers**

There is no particular Act of Parliament in Kenya that addresses issues that concern foreign workers or lays out the rights due to a foreign worker. Both the Employment Act and the Citizenship and Immigration Act attempt this, though not sufficiently. This has led to certain diversified issues concerning migrant workers not being adequately addressed: knowledge of employment opportunities; entry and exit; terms and conditions of work; freedom of association including trade union rights; financial arrangements, including mobility and portability of earnings; movement of families; and data

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<sup>262</sup> Article 8.

<sup>263</sup> View expressed by ADV4, Advocate knowledgeable on immigration matters, during an interview on 17th March 2012 at Kamau and Company Advocates Offices.

collection.<sup>264</sup> Immigrants are not protected and lack social security. Further, there is no Act of Parliament that guarantees the protection of the rights of Kenya's emigrant workers abroad.<sup>265</sup> These concerns are not comprehensively addressed in the national laws.<sup>266</sup> Lack of laws that safeguard migrants implies that they can be expelled from the country for a very slight reason.

As already noted, Kenya's policy towards immigration is negative. The same trend is reflected in the relevant legislation. The existing legislation is quite restrictive and not attracting migration except for those related to foreign investment and employment that will result in benefit to Kenya.<sup>267</sup> In nearly all the cases, migrant labour is only permitted if there are no equivalent skills available in the local market and in many cases the jobs will be announced only at the domestic market; so others might not access the information.

### **3.5.3 Participation in Trade Union Activities**

Legislation in Kenya does not address the right of immigrant workers to be members and participate in trade union activities. Further, there is no provision for the formation of immigrant workers' trade union to champion their rights.<sup>268</sup> As such, the employers of such workers are more likely to disregard the rights of these workers without the workers having any means of recourse. This is more likely to cause potential immigrant workers not to consider job opportunities in the country.

### **3.5.4 Migration Statistics and Data**

In Kenya, data on migration flows is limited and not totally reliable. labour migration information remains incomplete and often inaccurate in the country.<sup>269</sup> Migration data is

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<sup>264</sup> African NGOs Refugee Protection Network, *supra*, note 181, p. 7.

<sup>265</sup> Concerns noted by IM1, Senior Immigration Officer, during an interview on 16th March 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>266</sup> Musonda, *supra*, note 27, p. 6.

<sup>267</sup> View expressed by IM4, Deputy Head Permits Section, during an interview on 16th March, 2012, at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>268</sup> Fact pointed out by ADV5, an advocate practicing in immigration matters at Pricewaterhouse Coopers, during an interview on 17th March 2012 at PwC Headquarters.

<sup>269</sup> Shitundu, *supra*, note 88, p. 12.

simply not accessible to the public at large. The government does not publish migration data or make them available to the public. Most of the data issued by the government from the Department of Immigration are in terms of figures.<sup>270</sup> However, some important information on profiles of migrants is lacking. As migration involves human beings, it is important to get much information than just numbers. Information on gender, skills, occupations, wages and sectors (employing migrant workers) are simply not available in Kenya. Further, the available data does not cover all migrant workers as migrants who find themselves in an irregular situation are not counted among migrants officially registered by the immigration department.<sup>271</sup> Shitundu points out that established government procedures for the review and attestations of foreign employment contracts, implied minimum overseas work standards, registration of private recruitment agencies and recruitment procedures are insufficient, a huge gap in the country's data collection mechanism.<sup>272</sup> The resulting danger is that discussion on international labour migration in Kenya is generally not knowledge-based. Without such profiles, it is difficult to assess the issues affecting immigrants and address the same.

### 3.6 CONCLUSION

The focus of this chapter was the factors in the policy, legal and institutional framework that impede free movement of labour. The chapter first identified problems within the Protocol itself that undermine attainment of this right. These include insistence on work permits, lack of clear parameters on limitations to be imposed on grounds of public policy, public security or public health, multiple residence documents and disharmony in Schedule on Timelines. The chapter then examined Kenya's policy framework regarding free movement of labour. The Kenyan policy framework is inferred from numerous scattered policy documents. It is generally restrictive to free movement of labour.

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<sup>270</sup> Economic and Social Research Foundation (2012), *Globalisation and East Africa*, Working Paper Series No. 13, available at: [http://www.eac.int/migration/index.php?option=com\\_docman&task=doc\\_download&gid=172&Itemid=131](http://www.eac.int/migration/index.php?option=com_docman&task=doc_download&gid=172&Itemid=131), (last accessed 7<sup>th</sup> August, 2012).

<sup>271</sup> Concern noted by IM3, Head Aliens Section, during an interview on 16<sup>th</sup> March, 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>272</sup> Shitundu, *supra*, note 88, p. 13.



In addition, the chapter examined the gaps in the existing legal framework. These include lack of recognition of identity cards as travel documents; lack of clear timeline in processing of work permits and dependant passes; less than twenty four hour operation in some border posts; insistence on student passes even for short courses; non-harmonized application forms, fees and procedures; contradiction in provision on appeals from Director's decisions in different Acts; deposits of restrictive amounts as cash bonds during employment by foreigners; high threshold of investment funds for one to qualify for investment certificates and non-portability of social security benefits. The implementing laws were generally seen not to fully implement the Protocol provisions.

The chapter then discussed other unaddressed issues including difficulty in free movement of family members, lack of safeguards for rights of migrant workers, presence restrictive approach to immigration issues, poor mechanisms for collection of migration statistics and data and lack of provision for participation in trade union activities.

The next chapter draws conclusions and makes detailed recommendations towards attainment of this right.

## **CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS**

### **4.1 INTRODUCTION**

The purpose of this study was to establish the extent to which the policies, legal and institutional frameworks on free movement of labour in Kenya have implemented the Protocol establishing the East African Common Market. Based on the analysis, the study was to propose policy, legal and institutional reforms that would assist in full implementation the Protocol establishing the East African Common Market. This chapter summarizes the major conclusions of the study and also makes the recommendations.

### **4.2 CONCLUSIONS**

#### **4.2.1 EAC Common Market Protocol**

The Protocol itself has a number of weaknesses. First, it insists on work permits, which have been used by Kenya to discourage free movement of workers. Second it allows derogation from rights based on public policy, public security and public health limitations. The parameters of these limitations are not well defined, opening doors for abuse. Third, it provides for multiple residence documents, which are administrative fetters on the enjoyment of the right to free movement of workers. Finally, it has a non-uniform schedule on timelines, which allows some Partner States to lock out free movement of workers in certain professions for a longer time.

#### **4.2.2 The Kenyan Policy Framework for Free Movement of Labour**

The policy framework in Kenya has remained hostile to free movement of workers to and from other EAC Partner States. The government employment policy demands that the economy of Kenya be operated by trained and competent citizens and work permits be granted to non-citizens only for skills not available in the Kenyan labour market, only on the understanding that effective training programmes are undertaken to produce trained citizens within a specified period. Since the law demands that foreign workers should not work in Kenya without valid work permits, they are, thus, denied permits for those skills easily available in the Kenyan job market. This bars labour immigration. Other policy documents, including Vision 2030, are geared towards curbing labour emigration, based

on the notion that Kenya suffers from brain drain. This shows a policy direction of discouraging workers from emigrating to other EAC Partner States.

#### **4.2.4 The Kenyan Legal and Institutional Framework for Free Movement of Labour**

The Constitution of Kenya, 2010, guarantees rights and freedoms contingent on the right of labour that, by extension, are very beneficial to immigrant workers. The Citizenship and Immigration Act and the Kenya Citizens and Foreign Nationals Management Service Act, have contradictions and still leave out many of the provisions of the Protocol, underlining Kenya's failure to fully implement the EAC Common Market Protocol. Further, the Investment Promotions Act pegs issuance of investment certificates to investors who are investing a minimum of one hundred thousand United States of America dollars or the equivalent in any currency. The implication of the Act is that citizens of EAC member countries investing a lesser amount are not entitled to an investor certificate. This constitutes a bar to free movement of capital and establishments.

The legislative framework has also set up an elaborate institutional framework on free movement of labour. The institutions include the Kenya Citizens and Foreign Nationals Management Service, the Kenya Citizens and Foreign Nationals Management Service Board, the Kenya Citizenship and Immigration Service Appeals Tribunal and the Kenya Investment Authority. These institutions, however, are bound by the policy and legal framework. They have no option but to implement the policies and laws of the government.

### **4.3 RECOMMENDATIONS**

Kenya has to address the foregoing challenges in order to play its part in full implementation of the East African Common Market Protocol as far as facilitating labour circulation in the region is concerned. This section proposes how the same can be achieved. The study recommends amendments to the EAC Common Market Protocol; review of the immigration policy; enactment of new laws to facilitate free movement of labour; safeguarding rights of immigrant workers; protection of Kenya's emigrant workers; relaxation of requirements for work and investor permits; improvement of data

collection mechanisms, , amendment to the Kenyan policy framework and specific amendments in the Kenyan legal framework.

#### **4.3.1 Amendments to the EAC Common Market Protocol**

The Protocol should be amended to abolish work permits.<sup>273</sup> This would eliminate the administrative barriers placed by Partner States on free movement of labour. Further, it would eliminate the duplicity of residence documents, leaving the residence permit as the only document required for residence and work in EAC Partner States.

The Protocol should also adopt a definition of ‘public policy’ and ‘public health.’ It should, further, incorporate elaborate guidelines on exercise of the limitations of public security, public policy and public health in denying work permits to citizens of EAC Partner States.<sup>274</sup>

Finally, the Protocol should adopt a harmonized timetable for liberalization of specific sectors and a clear definition of the categories of various sectors<sup>275</sup> rather than leaving the prerogative to individual states.

#### **4.3.2 Review of the Immigration Policy**

As already noted, Kenya’s policy towards immigration is negative. For Kenya to play its part in the implementation of the Protocol, it has to review its policy to ensure labor mobility in the East African region. From the outset, the policy should ensure full and effective implementation of the EAC Common Market Protocol

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<sup>273</sup> View expressed by IM4, *ibid.* he feels that this should be replaced with a residence permit, with the only requirement being keeping of a register of citizens of EAC members states living in Kenya. He however emphasizes that this should only be extended to citizens of EAC Partner States, with other foreigners being subjected to work permits.

<sup>274</sup> View expressed by IM3, Head Aliens Section, during an interview on 16<sup>th</sup> March, 2012 at Ministry of State for Immigration and Registration of Persons Headquarters. He feels that in its current form, the restriction may be used for discriminatory purposes, unjustifiably denying citizens of EAC Partner States the right to work in Kenya.

<sup>275</sup> View expressed by ADV1, an Advocate handling immigration matters at Pricewaterhouse Coopers, during an interview on 17<sup>th</sup> March 2012 at PwC Headquarters. Conflicting definitions and timelines give undue advantage to other states as opposed to Kenya which, as per the timelines, shall have fully allowed the right to free movement of workers by 2013.

The policy should lean towards establishing an informed and transparent labor migration system.<sup>276</sup> The policy should also address the issue of enforcement of labor standards in all sectors of activity. The policy should expressly prohibit discrimination and xenophobia.<sup>277</sup> In order to achieve this, the policy should embrace a culture of competition while at the same time promoting cross-border development projects. It should also encourage cultural and linguistic integration.

The policy should be mindful of the Kenyans working abroad, providing a framework through which the issues affecting them can be addressed.<sup>278</sup> In addition to this, the policy should enable the Kenyan Diaspora to contribute towards nation building. Generally, there is the need to map out an overall emigration plan for the country, make judicious use of limited government resources and facilitate institutional planning/co-ordination and programme implementation. There is also the need for the inclusion of a labour migration policy in the national agenda

The policy requiring the economy of Kenya to be operated by trained and competent citizens should be reviewed.<sup>279</sup> It does not pass the non-discrimination test applied by the Protocol. The study proposes that at least EAC citizens be exempted from this policy, if it should remain.

A policy targeting exchange of young workers across EAC Partner States should be adopted. This would entail regular exchange programs in all sectors between workers from the Partner States.

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<sup>276</sup> View expressed by ADV2, an Advocate knowledgeable on immigration matters, during an interview on 17th March 2012 at ADV2 & Company Advocates.

<sup>277</sup> Concern noted by IM3, Head Aliens Section, during an interview on 16<sup>th</sup> March, 2012 at Ministry of State for Immigration and Registration of Persons Headquarters. There is fear that high levels of unemployment in Kenya may lead to situation where locals view foreigners seeking employment in Kenya negatively, leading to xenophobic attacks.

<sup>278</sup> Three interviewees, ADV1, IM2 and IM1, expressed concern about treatment of Kenyan workers abroad, especially with reports of Kenyan workers being shunned in places like Rwanda and Tanzania. Further persistent reports of Kenyan workers dying mysteriously in South Sudan, a country which has applied to join the EAC, raise the need for such a policy approach.

<sup>279</sup> View expressed by ADV2, an Advocate knowledgeable on immigration matters, during an interview on 17th March 2012 at ADV2 & Company Advocates. His proposal is that EAC citizens be exempted from this provision. He however feels it should remain in reference to other foreign workers.

The proposed National Employment Bureau should be fully operationalized. It should, further, be granted the role of vetting foreign job vacancies and also facilitating advertisement and recruitment of persons to fill the same. It should also carry out the role of managing the exchange program proposed earlier.

Kenya should develop a consolidated employment policy which has clear policy directions on immigration and emigration of workers. Rather than discourage, the policy should endeavor to manage free movement of labour.

#### **4.3.3 Enactment of New Laws to Facilitate Free Movement of Labour**

At the moment, there is no specific legislation that provides for the implementation or domestication of the provisions of the East African Common Market Protocol.<sup>280</sup> It is, therefore, vital that the country passes a specific law that gives effect to the provisions in a bid to enhance its implementation. A legislation guaranteeing free movement of persons and workers who are citizens of the other Partner States within the territories of each Partner ought to be passed. Further, a legislation guaranteeing the right of establishment of nationals of the Partner States within their territories ought to be passed. In providing for this right, the legislation ought to entitle a national of a Partner State to take up and pursue economic activities as a self-employed person and set up and manage economic undertakings in the territory of another Partner State. This right should also entitle a self-employed person to join the social security scheme of the host Partner State in accordance with the national laws of that State. A further right of residence to citizens of other Partner States who have been admitted in the country either as workers or self-employed persons should be guaranteed.

#### **4.3.4 Safeguarding Rights of Immigrant Workers**

Migrant workers are more likely to be subjected to poor working conditions because there is no law that provides redress for them specifically. There is no law that grants

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<sup>280</sup> This gap was noted by IM5, Senior Assistant Director of Immigration, during an interview on 16<sup>th</sup> March, 2012 at Ministry of State for Immigration and Registration of Persons Headquarters. She proposes a single Act to implement the Protocol, suggesting that EAC Common Market Protocol Act would be a possible title to the Act.

migrant workers the right of association. In order to ensure that the rights of migrant workers from the Partner States are protected, they should be allowed to form Migrant Workers Association.<sup>281</sup> This will grant assurance to other potential migrants that their rights will be championed once they take up job opportunities in the country. This, in turn, will facilitate labour flow into the country.

#### **4.3.5 Better Protection of Kenya's Emigrant Workers**

The Employment Act has provisions relating to foreign contracts of service. Under the Act, the contract can only be approved if it is proven that it was procured with full consent of the employee. In other words there was no fraud or duress from the employer. The employee should also be medically fit for the performance of his duties under the contract. The Act, however, does not extend its protection of the employee to the actual time the employee will be working in the foreign state. It is, therefore, necessary that a framework be put in place to ensure that Kenyan emigrant worker's rights in the Partner States are protected.<sup>282</sup> This may be facilitated through inter-country bilateral agreements enforced at the countries' diplomatic offices in the Partner States. This, in turn, will facilitate movement of labour outside the country to other Partner States as the potential workers will be guaranteed protection by their own government.

#### **4.3.6 Relaxation of Requirements for Investor Permits**

The requirement of the potential employer 'passing the labour market test' requiring him or her to prove that steps have been taken to fill the position with a Kenyan citizen and why this has not been possible should be relaxed specifically for citizens of EAC Partner States. This would encourage cross-border movement of workers in EAC. Further, the definition of foreign investor needs to be amended to exclude citizens of EAC Partner

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<sup>281</sup> View expressed by ADV3, an Advocate knowledgeable on immigration matters, during an interview on 17th March 2012 at Maina and Company Advocates offices. She feels that a migrant trade union would be best placed to address the unique challenges faced by migrant workers.

<sup>282</sup> View expressed by IM3, Head Aliens Section, during an interview on 16<sup>th</sup> March, 2012 at Ministry of State for Immigration and Registration of Persons Headquarters. He pointed out reports of mistreatment of Kenyan workers in South Sudan, a country which has applied to join EAC. He also noted that there is increased hostility towards Kenyan workers in Tanzania and Rwanda, members of EAC.

States.<sup>283</sup> This shall exempt them from the one thousand dollars requirement for granting of investor certificates.

#### **4.3.7 Improvement of Data Collection Mechanisms**

There is need for credible sources of information with regard to international labour migration opportunities and the dissemination of the information to relevant bodies and individuals. There is also need to expose the Ministry of Labour and Human Resource Development officials to international migration market conditions and requirements.

This study recommends formation of a bureau to vet and handle all international jobs within the EAC.<sup>284</sup> This may be formed either by the country on its own or under the auspices of EAC. This agency would collect all data on labour market dynamics, vet available jobs and advertise these widely in all countries. This would help facilitate availability of data on jobs abroad and also data that may help countries in designing their labour policies based on emerging trends in the market.

#### **4.3.8 Specific Amendments in the Kenyan Legal Framework**

The Protocol demands that there be an appeals system for workers from other Partner States who are denied work permits. The apparent contradiction between the Citizenship and Immigration Act and the Kenya Citizens and Foreign Nationals Management Service Act, on the appeal procedure against decisions made by the Director and Board, should be resolved. These two Acts should be amended to achieve harmony. The study recommends that the appeals should be channeled to the Foreign Nationals Management Service Appeals Tribunal, and not the Minister or the High Court. Only further appeals from the Tribunal should find their way to the High Court. This is informed by the desire to have qualified immigration practitioners hear the appeals and also to reduce the backlog of such appeals to the High Court.

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<sup>283</sup> View expressed by IM2, Assistant Director, Immigration Department, during an interview on 16th March 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>284</sup> View expressed by IM4, Deputy Head Permits Section, during an interview on 16th March, 2012, at Ministry of State for Immigration and Registration of Persons Headquarters. She proposes that this bureau should be under the auspices of EAC, the Kenyan branch be based at Ministry in charge of EAC matters and should work hand in hand with Ministry in charge of Labour.



The Citizenship and Immigration Act does not recognize machine readable identity cards as travel documents. It should be amended to recognize such,<sup>285</sup> which shall be in tandem with the EAC Common Market Protocol.

The Citizenship and Immigration Act lacks clear timelines on issuance of work permits, with processing of a new work permit taking up to three months (90 days). This should be amended to stipulate a timeline of 30 days as per the provisions of the Protocol.<sup>286</sup> The same should be done in respect of processing of dependant passes.

Further amendments are required on the Citizenship and Immigration Act. The discretion of the Director to determine the period of validity of a permit should be removed and replaced with clear validity and renewal periods.<sup>287</sup> The discretion of an immigration officer to vary the terms and conditions specified in a pass is also unnecessary and should be removed.<sup>288</sup> The provisions of the Protocol on what happens upon expiry of a permit or a pass should be incorporated in the Act. The schedule of operation of border posts should have all posts open for twenty four hours, in line with the requirements of the Protocol. The Act should also be amended to exempt EAC citizens taking courses of less than two months from having to acquire a student pass.

The Employment Act should be amended to remove the requirements of bonds and securities with regard to employers from the EAC Partner States.<sup>289</sup>

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<sup>285</sup> View expressed by IM5, Senior Assistant Director of Immigration, during an interview on 16<sup>th</sup> March, 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>286</sup> View expressed by IM4, Deputy Head, Permits Section, during an interview on 16th March 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>287</sup> View expressed by IM4, Deputy Head, Permits Section, during an interview on 16th March 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>288</sup> *ibid.*

<sup>289</sup> View expressed by IM5, Senior Assistant Director of Immigration, during an interview on 16th March 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

The Investment Promotion Act should be amended to exclude EAC citizens from being part of the definition of foreign investors.<sup>290</sup> The requirement of an investment threshold of US\$100,000 should be relaxed in respect to citizens of EAC Partner States.<sup>291</sup>

The National Social Security Fund Act should be amended to recognize portability of social security benefits.<sup>292</sup> The Cabinet Secretary in charge of Labour should, as a matter of urgency, enact the regulations stipulated in the Act to allow this mobility, specifically with regard to EAC Partner States.

The NHIF Act should be amended to ensure foreign workers in Kenya are subject to the compulsory contribution, thus, granting them health insurance during their period of working in Kenya.<sup>293</sup> It should also extend the coverage to Kenyan citizens working in EAC Partner States where such a scheme does not exist.

#### **4.4 CONCLUSION**

Free movement of labour is an essential right in any regional integration initiative. The EAC Common Market Protocol has clear provisions entrenching this right among Citizens of EAC Partner States. This right however can only be fully achieved if specific Partner States enact laws and amend existing ones to bring them in tandem with the requirements set in the Protocol.

This study has engaged in an incisive analysis of provisions of both the Protocol and Kenyan policy, legal and institutional framework. The study concluded that the Kenyan frameworks are weak attempts to enforce the provisions of the Protocol on free movement of labour. There are several pending challenges towards full implementation

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<sup>290</sup> View expressed by IM2, Assistant Director, Immigration Department, during an interview on 16th March 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>291</sup> View expressed by ADV3, an Advocate knowledgeable on immigration matters, during an interview on 17th March 2012 at Maina and Company Advocates offices.

<sup>292</sup> View expressed by IM5, Senior Assistant Director of Immigration, during an interview on 16th March 2012 at Ministry of State for Immigration and Registration of Persons Headquarters.

<sup>293</sup> View expressed by ADV2, an Advocate knowledgeable on immigration matters, during an interview on 17th March 2012 at ADV2 & Company Advocates

of the right to free movement of workers as provided for in the EAC Common Market Protocol. The Protocol itself has internal weaknesses. Moreover, Kenya has not fully discharged its duties as a Partner States in implementing this right. In addition, the Kenyan policy framework is bent on discouraging workers from emigrating to other EAC Partner States, while, at the same time, being non-facilitative of immigration of workers from EAC Partner States. Finally, the Kenyan legal and institutional framework is not fully supportive of attempts to implement the Protocol in Kenya.

The study has then recommended measures to ensure full implementation of this right in Kenya. It has recommended: review of the immigration policy; enactment of new laws to facilitate free movement of labour; safeguarding rights of immigrant workers; protection of Kenya's emigrant workers; relaxation of requirements for work and investor permits; improvement of data collection mechanisms; amendments to the EAC Common Market Protocol; amendment to the Kenyan policy framework and specific amendments in the Kenyan legal framework. The specific recommendations made in this study, if fully implemented, would facilitate the right of free movement of workers in Kenya, with respect to citizens from other EAC Partner States.

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**Annex 1: Questionnaire for Advocates Knowledgeable on Immigration Matters**

**FREE MOVEMENT OF LABOUR WITHIN THE EAST AFRICAN  
COMMUNITY: KENYA'S COMPLIANCE WITH EAST AFRICAN COMMON  
MARKET PROTOCOL**

**RESEARCH QUESTIONNAIRE**

Greetings. My name is Davis Mawira Nyagah, a student of Master of Laws (LL.M) At the University of Nairobi. I am undertaking a research on Kenya's compliance with East African Common Market Protocol requirements on free movement of labour. Below is a list of questions facilitating the aforesaid research. The findings of this study will provide a feedback on the effectiveness of the current legal reforms in providing for free movement of labour as required by the Protocol. Kindly answer the questions truthfully, honestly and to the best of your knowledge. Your assistance is highly appreciated. The information you give will be treated with strict confidentiality.

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Name  
(optional).....

Professional ..... position

Gender            Male (    )            Female (    )



1. Detail your involvement and experience on labour laws and policy in Kenya
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2. Explain your understanding of the current Kenyan Legal, Policy and Institutional framework on the right to free movement of Labour as follows:

(i) Legal

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(ii) Policy

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(iii) Institutional

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3. Explain your understanding of the EAC Common Market Protocol provisions providing for the right to free movement of labour in East Africa, pointing out the various requirements on Partner States.

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4. Does the Kenyan Legal, Policy and Institutional framework explained in question 2 fully implement the EAC Common Market Protocol provisions on the right to free movement of labour    YES ( ) NO ( )

(i) If YES, explain

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(i) If NO, explain the shortcomings of the framework

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4. Describe the reforms necessary on the Kenyan Policy, Legal and Institutional framework so as to fully implement the EAC Common Market Protocol provisions on free movement of labour.

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**Thanks for your contribution**

**Annex 2: Questionnaire for Immigration Practitioners**

**FREE MOVEMENT OF LABOUR WITHIN THE EAST AFRICAN  
COMMUNITY: KENYA’S COMPLIANCE WITH EAST AFRICAN COMMON  
MARKET PROTOCOL**

**RESEARCH QUESTIONNAIRE**

Greetings. My name is Davis Mawira Nyagah, a student of Master of Laws (LL.M) At the University of Nairobi. I am undertaking a research on Kenya’s compliance with East African Common Market Protocol requirements on free movement of labour. Below is a list of questions facilitating the aforesaid research. The findings of this study will provide a feedback on the effectiveness of the current legal reforms in providing for free movement of labour as required by the Protocol. Kindly answer the questions truthfully, honestly and to the best of your knowledge. Your assistance is highly appreciated. The information you give will be treated with strict confidentiality.

Name  
(optional).....

Professional position .....

Gender            Male (    )            Female (    )

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1. Detail your work experience in immigration matters  
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2. Explain your understanding of the current Kenyan Legal, Policy and Institutional framework on the right to free movement of Labour as follows:

(i) Legal

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(ii) Policy

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(iii) Institutional

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3. Explain your understanding of the EAC Common Market Protocol provisions providing for the right to free movement of labour in East Africa, pointing out the various requirements on Partner States.

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4. From your experience on immigration matters, what challenges face the attainment/realization of the right to free movement of labour in Kenya?

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5. Describe how the challenges highlighted in question 4 above can be addressed.

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6. What are the negative effects of allowing free movement of labour in Kenya

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7. How can the negative effects explained in question 6 above be mitigated

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8. Describe the reforms necessary on the Kenyan Policy, Legal and Institutional framework so as to fully attain the right to free movement of labour as envisaged in the EAC Common Market Protocol.

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**Thanks for your contribution**