

# Prof. Albert Mumma & Company Advocates

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## STRATEGIC AMENDMENTS: UNVEILING THE CORE TENETS OF KENYA'S ANTI-MONEY LAUNDERING AND TERRORISM FINANCING LAWS (AMENDMENT) ACT, 2023

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*Disclaimer: This Article does not form part of a Legal Opinion and is purely informative.*

### INTRODUCTION

Kenya faces numerous internal and external money laundering and terrorism financing risks. Thanks to its strategic geographical location, which makes it a gateway to Eastern and Central Africa, Kenya is deemed a high-risk country with relation to money laundering. The strategic geographical positioning of Kenya introduces external risk factors that necessitate a nuanced understanding. Surrounded by politically unstable neighbors—Ethiopia to the North, Somalia to the East, and South Sudan to the North West—Kenya becomes a ripe target for terrorism financing activities. Corruption, which has been openly acknowledged by the Kenyan Government as one of its biggest detriments, is one of the leading internal risk factors for money laundering and terrorism financing in the country. Cognizant of the foregoing, the Kenyan Government in partnership with relevant international organizations has over the years developed various strategic, legal, and institutional anti-money laundering and counter-terrorist and proliferation financing (AML/CFT) capabilities. The regional instability, stemming from conflicts and geopolitical tensions, poses a direct threat to the integrity of Kenya's financial system. Consequently, the nation finds itself at the confluence of internal and external challenges, demanding a sophisticated approach to mitigate the associated risks.



## Evolution of Kenya's AML/CFT System

The post-2010 era marked a critical turning point for Kenya's Anti-Money Laundering and Counter-Terrorism Financing (AML/CFT) system, characterized by a stark recognition of its inadequacies. Prior to this period, Kenya's AML/CFT mechanisms were virtually non-existent, exposing the nation to significant vulnerabilities stemming from strategic, legal, and institutional shortcomings. The prevailing legal framework, the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), 2009, was widely criticized for its ineffectiveness. Beyond being incongruent with Kenya's internal and external AML/CFT risks, POCAMLA, 2009, failed to meet the standards set by the Financial Action Task Force (FATF), the premier inter-governmental body shaping global norms in AML/CFT since 1989. The realization of these deficiencies, coupled with the evolving landscape of financial crimes, prompted a paradigm shift and spurred Kenya's commitment to fortify its AML/CFT capabilities. This transformation was essential not only for aligning with international benchmarks but also for addressing the intricate challenges posed by money laundering and terrorism financing within the nation's borders. The subsequent legal reforms and institutional enhancements signify a proactive response, laying the groundwork for a more robust and globally compliant AML/CFT framework in Kenya.

## Impact of Kenya's 2010 Constitution

The enactment of the 2010 Constitution in Kenya marked a pivotal moment in shaping the nation's approach to Anti-Money Laundering and Counter-Terrorism Financing (AML/CFT) measures. This constitutional milestone, coupled with the damning Mutual Evaluation Report (MER) published by the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) in 2011, acted as a catalyst for the Kenyan Government to reassess and reinforce its AML/CFT capabilities. The MER served as a critical external assessment, shedding light on deficiencies within the existing framework and highlighting areas requiring urgent attention. The confluence of constitutional reforms and external evaluation compelled the government to undertake substantive steps to enhance its AML/CFT mechanisms. This dual influence underscored a proactive response, emphasizing the need for legal and institutional reforms to align with international standards and effectively combat money laundering and terrorism financing. Consequently, it paved the way for subsequent legislative changes and the establishment of crucial institutions, contributing to Kenya's ongoing efforts to strengthen its resilience against financial crimes.

## Legislative and Institutional Reforms Post-2011

In 2011, the Anti-Money Laundering Advisory Board (AMLAB) was launched thereby kickstarting a process that would result in the shoring up of Kenya's AML/CFT legal regime and institutional capabilities. Several statutes have since been enacted to buttress Kenya's AML/CFT legal regime, such as the *Prevention of Terrorism Act, 2012*; *POCAMLA (Amendment) 2012*; *POCAMLA Regulations, 2013*; *Capital Markets (Amendment) Act, 2012*, among others. To harmonize its AML/CFT system with internationally accepted standards, Kenya also ratified various international treaties and resolutions, to wit, the *International Convention on the Suppression of Financing of Terrorism, 1999* and the *UN Security Council Resolutions 1267 and 1373*. In addition to the foregoing, Kenya revamped its AML/CFT institutional capacity by operationalizing the Financial Reporting Centre (FRC) – an independent body whose main objective is to identify the proceeds of crime and combat money laundering. The Asset Recovery Agency (ARA) has also since been established as an independent institution with the principle objective of recovering proceeds of crime.



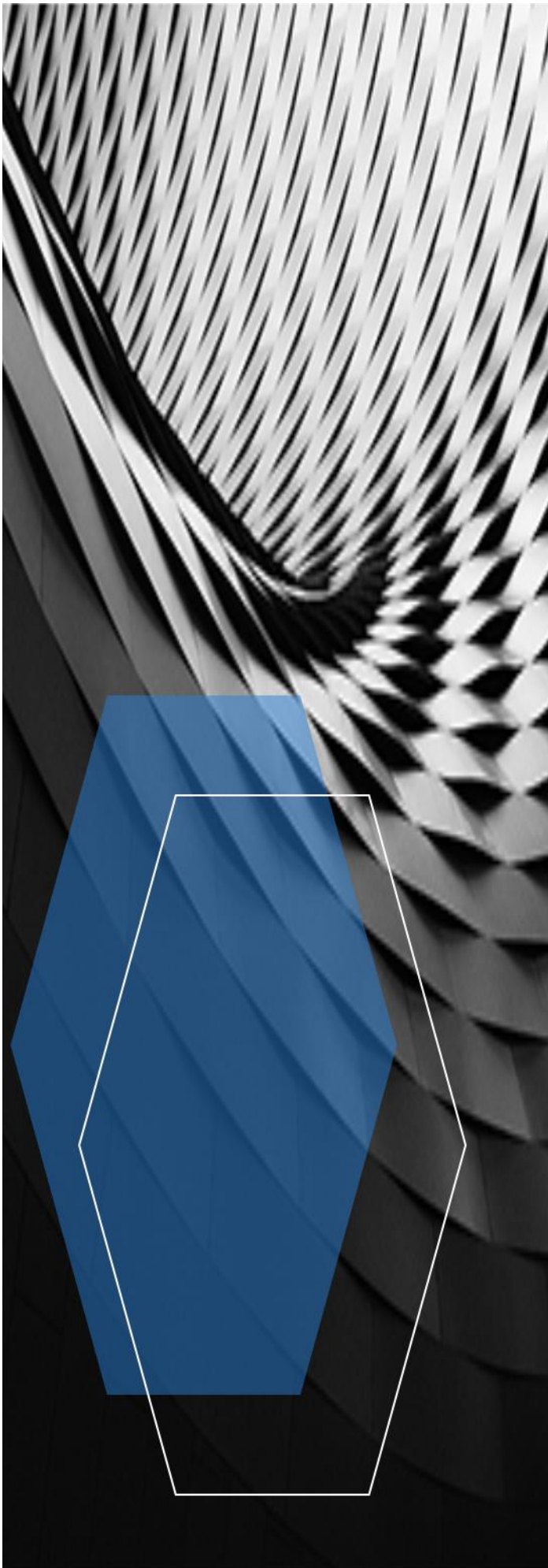


## Legislative Response: The Anti-Money Laundering and Combatting Terrorism Financing Laws (Amendment) Bill 2023

The AML/CFT Laws (Amendment Act), 2023 introduces a plethora of preventive measures aimed at bringing Kenya's AML/CFT regime at par with international standards. The Amendment Act has prioritized customer due diligence and record keeping with financial institutions obliged to report transactions above the designated threshold of USD.15,000. Under the auspices of the Amendment Act, the obligation of customer due diligence and record keeping supersedes that of financial institution secrecy. Relevant agencies, such as the ARA and CBK, are now statutorily empowered to access financial records of persons suspected of money laundering or terrorist financing activities. The statute also imposes an obligation on not only financial institutions but also juristic entities to keep records of all their financial transactions for at least 7 years. The Amendment Act has also prioritized the FATF standard of transparency and beneficial ownership of legal persons. All legal persons and entities are obliged to reveal all of their beneficial owners with the aim of preventing abuse of the legal doctrine of corporate veil.

At the pith and core of the AML/CFT (Amendment Act), 2023 is the doctrine of prevention aimed at preventing the myriad money laundering and terrorism financing risks facing the country from materializing. Through the multifaceted approach of regulation, supervision, and deterrence, the AML/CFT (Amendment Act), 2023 outlines a raft of preventive measures to be taken by supervisory bodies and agencies to not only anticipate but also prevent AML/CFT related activities. The Act has given various supervisory bodies, such as the Capital Market Authority, Central Bank of Kenya, Asset Recovery Agency, Financial Reporting Center, among others a wide-ranging scope of powers to not only supervise, investigate, but also punish financial institutions and other entities that flout the country's AML/CFT regime. The Amendment Act, 2023 has also bumped up money laundering and terrorism financing sanctions with the aim of deterring their perpetration.

Though the AML/CFT (Amendment Act), 2023 is a sterling manifestation of Kenya's desire to improve its AML/CFT regime, the amendments have not addressed key issues pertinent to Kenya's AML/CFT risks. The Amendment Act, 2023 does not address the money laundering and terrorism financing risk attributed to politically exposed persons. It is an indubitable fact that politically exposed persons pose the highest risk of money laundering and terrorism financing as they not only have the financial capacity but also political networks needed to perpetrate these acts. Moreover, Kenyan history is replete with cases of politically exposed individuals who have unscrupulously laundered proceeds of corruption out of the jurisdiction of Kenyan courts. The Amendment Act's silence on this issue means that Kenyans will have to find other ways of preventing corrupt politicians from laundering their illegally obtained wealth to foreign tax havens, such as the Cayman Islands.



Most significantly, the AML/CFT (Amendment Act), 2023 does not list Kenyan legal professionals as reporting persons for purposes of POCAMLA, 2009. The listing of advocates and other members of the legal profession as reporting persons was a key recommendation of ESAAMLG's 2022 Mutual Evaluation Report for Kenya.

Members of the legal profession are at a high risk of engaging in money laundering and terrorism financing activities as they not only design corporate vehicles, buy and sell assets but also engage in numerous financial transactions on behalf of their clients. Advocates are therefore better placed to detect money laundering and terrorism financing activities compared to even financial institutions. In 2007, 2018, 2019, and 2021 the Kenyan Government made significant attempts to include members of the legal profession in Kenya as reporting institutions. However, the attempts were thwarted by the concerted effort of the Law Society of Kenya. Kenya should borrow a leaf from contemporary jurisdictions, such as South Africa and the United Kingdom, where members of the legal profession are obliged to report suspicious financial transactions.

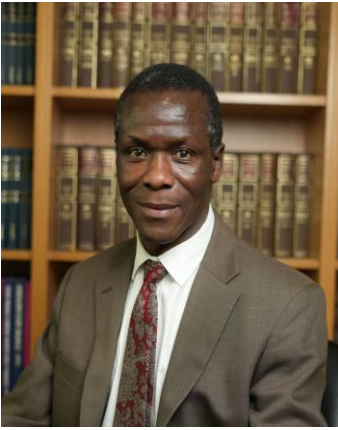
## CONCLUSION

Kenya's endeavours to fortify its anti-money laundering and counter-terrorism financing (AML/CFT) regime exhibit commendable commitment. While legislative amendments and institutional reinforcements mark significant progress, the Anti-Money Laundering and Combatting of Terrorism Financing Laws (Amendment) Act, 2023, introduces crucial preventive measures. However, its notable omissions—neglecting politically exposed persons (PEPs) and legal professionals as reporting entities—underscore potential vulnerabilities. Kenya must address these critical gaps to fortify its defences against evolving financial threats. The pursuit of a globally compliant AML/CFT framework demands continuous scrutiny, adaptation, and international benchmarking.

The full Act is available here:

<http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2023/TheAntiMoneyLaunderingandCombatingofTerrorismFinancingLawsAmendmentAct2023.pdf>

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