

ENHANCING REGULATORY CLARITY THROUGH INSIGHTS ON RETROACTIVE AND RETROSPECTIVE APPLICATIONS OF THE UNCLAIMED FINANCIAL ASSET ACT IN KENYA

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Abstract. This study delves into Kenya’s Unclaimed Financial Assets Act, examining its retrospective application in finance. While grounded in English Common Law, the Act faces hurdles in reporting and compliance due to its retroactive nature. Through analysis, it uncovers limitations and stresses stakeholder involvement, regulatory clarity, interpretation flexibility, and education for compliance. Its insights benefit policymakers and stakeholders grappling with unclaimed financial assets in Kenya’s regulatory evolution.

Keywords: Unclaimed Assets, retroactive, retrospective, financial, compliance.

JEL Classification: G18, G28, H83, K23, M48.

1. Introduction

The global landscape has witnessed the enactment of legislations across various countries, aiming to govern the management of unclaimed assets by financial institutions (Yusoff & Sulaiman, 2021). Notably, countries such as the United States, the United Kingdom, and Canada have played pivotal roles in delineating regulatory frameworks for unclaimed asset management. Rooted in English Common Law concepts of escheat and bona vacantia, modern unclaimed property laws evolved from a historical tradition where unclaimed assets reverted to the King in the absence of heirs (Yusoff & Sulaiman, 2021). This tradition has endured through the ages, adapted, and incorporated into contemporary Unclaimed Assets legislation worldwide.

The inevitability of introducing or amending laws is a constant in legal systems (Omoola & Ibrahim, 2023; Sadrieva & Oglezneva, 2021; Eriki et al., 2022). However, the implementation of newly enacted laws typically occurs prospectively, with retrospective or retroactive application generating significant debate (Kryvoi & Matos, 2021).

The purpose of this paper is to provide insights into the retroactive and retrospective application of the Unclaimed Financial Asset (UFA) Act in Kenya, with a focus on enhancing regulatory clarity. The study examines

how the Act, rooted in English Common Law concepts, is applied retrospectively within the finance sector, highlighting challenges in reporting and compliance. By analyzing the limitations of the Act and stressing the importance of stakeholder involvement, regulatory clarity, interpretation flexibility, and education for compliance, the paper aims to offer valuable insights for policymakers and stakeholders involved in Kenya’s regulatory evolution regarding unclaimed financial assets.

This paper therefore delves into the nuanced analysis of the retroactive and retrospective application of the Unclaimed Financial Assets (UFA) Act, specifically within the financial sector (The Unclaimed Financial Assets Act, 2011). As (Charoh, 2022) asserts, the fundamental purpose of law is to regulate future conduct rather than past events.

2. Literature review

2.1. Legal and regulatory framework for escheatment

Escheatment laws are deeply embedded within a complex legal and regulatory framework, serving as a pivotal mechanism to ensure accountability and transparency in the management of unclaimed assets (Arntsen, 2021). This framework comprises various dimensions, including

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constitutional mandates, legislative enactments, regulatory provisions, judicial interpretations, and managerial directives, all coalescing to delineate the rights and responsibilities of stakeholders involved in the escheatment process.

The inherent ambiguity surrounding the objectives of escheat laws perpetuates a discourse marked by contention and uncertainty (Sun, 2021). Scholars like (Gregory, 2011) have underscored the divergent goals of these laws, with debates revolving around whether they primarily serve as revenue-generating mechanisms for governments or as instruments for reuniting unclaimed assets with their rightful owners. This dichotomy underscores the nuanced balance that policymakers must strike between the fiscal interests of the state and the property rights of individuals.

Central to the discourse on unclaimed financial assets is the application of agency theory, which elucidates the fiduciary obligations incumbent upon holders and government entities (Wilson & Slagle, 2018; Payne & Petrenko, 2019). This theoretical framework underscores the custodial role of these stakeholders in safeguarding assets until such time as they are claimed by their rightful owners. Moreover, stakeholders in the realm of UFAs encompass a diverse array of actors, ranging from economic and non-economic regulators to state-owned enterprises and individual holders, each bearing distinct responsibilities in the management and disposition of unclaimed assets (Koop & Lodge, 2017; King, 2015).

As (Prewitt, 1980) advocates, there should be robust government intervention in the escheatment process, positing it as a means to alleviate the tax burden on citizens while concurrently fulfilling the state's custodial obligations. This assertion underscores the legitimate role of the government as a custodian of unclaimed financial assets, tasked with ensuring equitable treatment and efficient management of such assets in the public interest (Hartlage, 2010; King, 2012).

The proliferation of unclaimed property audits represents a noteworthy development within the realm of escheatment, offering states a potential avenue for revenue generation. However, as highlighted by (Hopkins, 2012), the efficacy of these audits in reuniting unclaimed assets with their rightful owners remains a subject of debate, with concerns regarding the equitable distribution of recovered funds and the potential for undue financial burden on holders.

The enactment of the Unclaimed Financial Assets Act heralded a paradigm shift in the regulatory landscape governing unclaimed assets, ushering in enhanced reporting and management procedures under the purview of the Unclaimed Financial Assets Authority (UFAA) and the Unclaimed Financial Assets Trust Fund (UFATF). With its retrospective and retroactive application, the UFA Act seeks to address historical lapses in asset management while fortifying regulatory oversight over future transactions (Hancher et al., 2021).

The retrospective and retroactive application of the UFA Act represents a double-edged sword, imbuing the

legislation with both corrective and prospective functions. While retrospective application serves to rectify past discrepancies in asset management practices, retroactive application introduces new legal consequences for historical transactions, a notion fraught with implications for vested rights and legal predictability (Troy, 1999; Bradfield, 2003). The perceived injustice of retroactive laws underscores the delicate balance that legislators must strike between rectifying past injustices and upholding the sanctity of legal norms.

A critical examination of the practical implications of the UFA Act's implementation reveals a myriad of challenges and complexities. The retroactive nature of the legislation engenders practical limitations, including difficulties in retroactively applying reporting and management requirements to past transactions (Kryvoi & Matos, 2021). Moreover, the potential for legal ambiguities and administrative burdens necessitates a nuanced approach to implementation, one that balances the imperatives of regulatory compliance with considerations of practical feasibility and equitable treatment (King, 2015).

The escheatment of unclaimed financial assets therefore occupies a pivotal nexus within the broader landscape of legal and regulatory frameworks. As evidenced by the scholarly discourse, the enforcement of escheat laws necessitates a delicate balance between fiscal imperatives and individual property rights (Bakar et al., 2020). Moreover, the application of agency theory underscores the multifaceted responsibilities borne by stakeholders in the management of unclaimed assets, highlighting the intricate interplay between legal mandates and fiduciary obligations (Styhre, 2018). Moving forward, policymakers must navigate the nuanced complexities of escheatment laws with prudence and foresight, striving to uphold principles of accountability, equity, and legal certainty in the administration of unclaimed financial assets (Mohammada & Suratman, 2017).

3. Methodology

This exploratory qualitative study investigates regulatory issues contributing to the low level of asset reunification of unclaimed financial assets in Kenya. The methodology centers on structured interviews designed to delve into the complexities and challenges within the regulatory framework governing these assets.

The research employs a qualitative sequential design to conduct an in-depth exploration of the multifaceted regulatory challenges. By examining different functional areas, hierarchical levels, and stakeholder perspectives sequentially, the study aims to provide a comprehensive understanding of the regulatory landscape affecting asset reunification efforts.

3.1. Data collection and analysis

Interview guides were carefully developed and piloted before being administered to key stakeholders, including

regulators, holders of assets, and claimants. A combination of convenience sampling and snowballing techniques was used to gather a diverse array of perspectives, enhancing the richness of the qualitative analysis. Respondents were selected from a stratified sample within the licensed financial services sector, encompassing 42 commercial banks, 46 insurance companies, 174 savings and credit societies, 60 retirement benefit schemes, and 5 financial regulators and industry associations.

The collected data was analyzed using NVivo software, allowing for systematic coding and thematic analysis. This methodological approach not only ensures the inclusion of varied perspectives but also aids in synthesizing complex information to uncover the underlying patterns and themes in the regulatory issues impacting the reunification of unclaimed financial assets.

4. Discussion

The main challenge that arises from the retrospective nature of the UFA Act is the documentation and retrieval of information that go several years or decades back into time, and way before the enactment of the UFA Act. Notably, most institutions lack the memory or the institutional ability to retrieve records spanning the duration of time that stretches all the way back to their point of inception, with some entities having been established a century ago. It is difficult for such holders to retrieve required records after such a lengthy time duration.

For instance, difficulties have been experienced with regards to implementation and compliance with the UFA Act all the way back to the point of inception or incorporation on the part of the holders of unclaimed assets. This is because prior to the enactment of the UFA Act, there were no specific requirements or timelines for the holders to keep information for periods longer than seven years. According to one respondent, *“... under the Access to Information Act, one is supposed to keep financial statements for a designated number of years, and beyond that time, you may find that there are those that are keeping such information, and a majority that may have genuinely discarded the information. Of course, in between also lies opportunists that may want to justify their inability to account for unclaimed assets on the basis of the passage of time.”*

It is inconsiderate to subject institutions to burdensome processes of reviewing detailed information and documentation that they previously never had to store or report on but are now reportable. It is not in doubt that such processes are not only time consuming but also resource intensive. As noted by one respondent, a respectable number of the holders have experienced difficulties in recreating records for purposes of retroactive reporting that is demanded of them as per the UFA Act. In the converse, a prospective application of the UFA Act would have been effective since it would give holders the opportunity to recalibrate their information systems to the demands of the law without disruption or adverse impact on the claimants.

The quality of information provided to UFAA by the holders remains low and at times not entirely useful. These records sometimes lack information that is necessary for purposes of supporting a successful reunification process, making it difficult for the UFAA to conduct reunification and get the rightful beneficiaries of the UFAs. It was noted that UFAA held a *“...holders conference...we talked about that, and hopefully that will improve.”*

The study highlights significant challenges in the reunification process of unclaimed assets in Kenya, primarily due to gaps in data quality provided by holders. These gaps stem from incomplete or missing information, making it difficult to identify and reunite assets with their rightful owners. Furthermore, the lack of specific disclosure requirements in regulatory reports to the Central Bank of Kenya exacerbates these challenges. The study criticizes the retroactive application of the Unclaimed Financial Assets (UFA) Act, noting that it places unreasonable demands on holders who were not legally required to retain certain information, leading to increased audits and non-compliance.

Respondents noted several other obstacles, including low reporting standards and the absence of support for recouping audit fees, which further complicate the reunification efforts. The processes for claiming unclaimed assets are described as cumbersome and costly, particularly discouraging for low value claims due to the high costs associated with documentation and legal fees.

Moreover, the study mentions that the UFA Authority's centralized operations limit accessibility, suggesting a potential solution through decentralization to service centers across the country. Legal conflicts between the UFA Act and other laws also create confusion about asset management, particularly concerning retirement benefits.

It emerges that the Authority has a ridiculously small staff complement in comparison to the mandate of the UFAA, and this has fundamentally impaired its ability to be more effective on many fronts including the reunification of many claimants. An interviewee suggested that the Authority needed additional capacity to carry out its mandate to *“... move the three pillars of the organization, which is the reunification pillar, the receive pillar, and the safeguard pillar. We do not have the internal capacity to execute those mandates. Though we have staff that, I will say they are like a skeleton, we are trying but we need capacity”*.

In addition, a respondent expressed the view that the Authority had poor ICT infrastructure hence most of its activities were undertaken manually. However, there are efforts to upgrade the system to help in the delivery of services. According to the manager, *“...we are trying our level best to upgrade our IT infrastructure to make sure the three pillars are up and running in our IT systems.”*

The findings indicate that UFAA had witnessed growth and in the period under investigation had been able to receive a respectable amount of unclaimed financial assets from holders. Although they have not been

as successful as expected, they were able to reunify a respectable number of UFAs. An interviewee explained that *“...when the Authority started from scratch, the structures had to be put in place, the policies and everything before the actual reunification could start. And now the process has started.”* Additionally, the Authority retained a good reputation in the market. In return, there was increased demand for services due to excellent customer services. For instance, sending reminders to holders on compliance, *“... has been largely successful in terms of sending the reminders for people to comply and there has been heightened levels of compliance.”*

The fact that the UFAA must go back in time makes the process of audit and reunification of claimants with assets ineffective due to capacity limitations. The demands on them, which partly stem from the retroactive application of the UFA Act, are too immense. The UFAA must contend with both issues that transpired before, as well as those that have transpired after, the enactment of the Act. Each of these scenarios is replete with its own dynamics, though the retroactive dealing with matters that transpired pre-enactment of the UFA Act makes audits and reunification processes more complex, costly, and quite involving, with a negative impact on the performance of the UFAA due to capacity constraints.

Some of the sanctions include civil suits against the non-compliant holders, conducting of audits and notices on unreported assets and criminal liability. There is also enforcement committee in place and penalties on non-compliance. However, as explained by an interviewee, *“The penalties seem to be so punitive as to probably discourage complete compliance in this way Most holders even after we’ve identified the unclaimed assets, are adamant against remitting the unclaimed assets for fear that remitting such assets would amount to them conceding that they are in breach of the Act and therefore liable for penalties. Another challenge would be that the Act does not give the Authority any leeway with regard to penalties waiver and so we find ourselves in a ‘Catch 22’ situation where we have a holder with identified assets but is unwilling to hand over the assets for fear of the penalties”.*

The incentives provided by the UFAA include capacity building of the holders; coming up with a rewards scheme for those who comply and publishing the list of holders that have reported. There was also encouragement of voluntary compliance and at times waiver on penalties. An interviewee explained that *“...we’re actually conducting sector-based conferences, so that each of the sectors now can raise their issues and then we are able to identify the gaps and what collaboration therefore we create around building their capacity on the part of reporting.”* Although waivers may to a good degree enhance compliance, a scrutiny of the UFA Act and the regulations thereunder do not seem to provide for the grant of waivers to holders. It is on record that UFAA has granted waivers before, yet the powers to provide such waivers are not provided for in law.

The sanctions and incentives systems under the UFA Act suffer problems associated with the retroactive application of the law. The sanctions that UFAA is able impose under the UFA Act extend to matters that transpired prior to its enactment. Also, the incentives system is limited since by law, UFAA is not empowered to give waivers, yet it is not in doubt that incentives like waivers may actually go a long way in encouraging holders to comply, including those that are holding assets that span the period before the UFA Act came into effect. Applying the law retroactively, whilst not giving room for incentives and compliance, is not a boon to the attainment of the mandate of UFAA.

The Unclaimed Financial Assets Authority (UFAA) in Kenya plays multiple roles, including as an administrator, regulator, and custodian of unclaimed assets. While some view its current structure positively, others see organizational confusion due to its broad mandate. The Kenyan context involves partial escheatment, where unclaimed assets remain accessible for claimants indefinitely, unlike true escheat where assets revert to the state after a specified period.

UFAA’s financial stability relies on investments, mainly in government securities, enabling it to fund government operations. However, claimants do not receive interest on their unclaimed assets, raising concerns about fairness and the authority’s commitment to reunification versus revenue generation.

The lack of clear guidelines exacerbates challenges, including inflation’s impact on asset value and the treatment of assets failing reunification. This ambiguity raises questions about whether UFAA prioritizes reuniting assets with owners or revenue generation.

Drawing from Agency Theory, it is suggested that UFAA’s interests may diverge from claimants’, especially as the authority benefits financially from the funds it manages. The complexity of legal aspects and information asymmetry further disadvantage claimants, who often receive negligible amounts, making reunification efforts economically unfavorable.

In summary, while UFAA serves various roles and faces challenges in fulfilling its mandate, questions persist about its prioritization between reunification and revenue generation, with implications for claimants’ interests and the broader financial ecosystem.

The provided text offers a comprehensive overview of the challenges associated with unclaimed assets, with a specific focus on the Unclaimed Financial Assets Act (UFA Act) (2011) and its retroactive and retrospective application. The study delves into the complexities faced by holders, regulators, and claimants in the Kenyan context.

The introduction highlights the global enactment of legislation to manage unclaimed assets, emphasizing the retrospective and retroactive nature of the UFA Act, which draws inspiration from English Common Law concepts. The primary objective of the paper is to analyze the implications of the UFA Act’s application in the financial sector.

The literature review covers essential aspects such as the legal and regulatory framework for escheatment, the confusion surrounding escheat laws, the application of agency theory to unclaimed financial assets, the role of the government in escheatment, and the potential use of unclaimed property audits as a revenue source. This sets the stage for understanding the broader context and challenges of managing unclaimed assets.

The study's importance lies in its concentration on practical challenges arising from the retroactive application of the UFA Act. It addresses a range of issues, including documentation and retrieval challenges, information quality, difficulties in reunification process, legal and policy challenges, awareness gaps, and structural/capacity issues. This comprehensive approach aims to contribute valuable insights for policy reviews and improvements in the regulatory framework surrounding unclaimed assets.

5. Conclusions

The study discusses the complexities of the Unclaimed Financial Assets (UFA) Act in Kenya, highlighting its retrospective challenges and effects on various stakeholders. It identifies limitations such as legal ambiguities and capacity constraints, advocating for a balanced approach to better manage unclaimed assets. The recommendations suggest enhancing stakeholder engagement, revising regulatory frameworks to reduce conflicts, allowing flexible interpretations of the UFA Act, and improving education and compliance processes. These measures aim to improve the management of unclaimed assets in Kenya, fostering a clearer, more cohesive regulatory environment. Additionally, the study notes limitations like its narrow focus and the impacts of the COVID-19 pandemic on data collection, suggesting future research could broaden the scope and include cross-country analyses to deepen understanding of unclaimed asset management globally. The overarching goal is to create a regulatory framework that is adaptable, transparent, and effective in managing and reunifying unclaimed financial assets, enhancing compliance, and contributing positively to socio-economic development.

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