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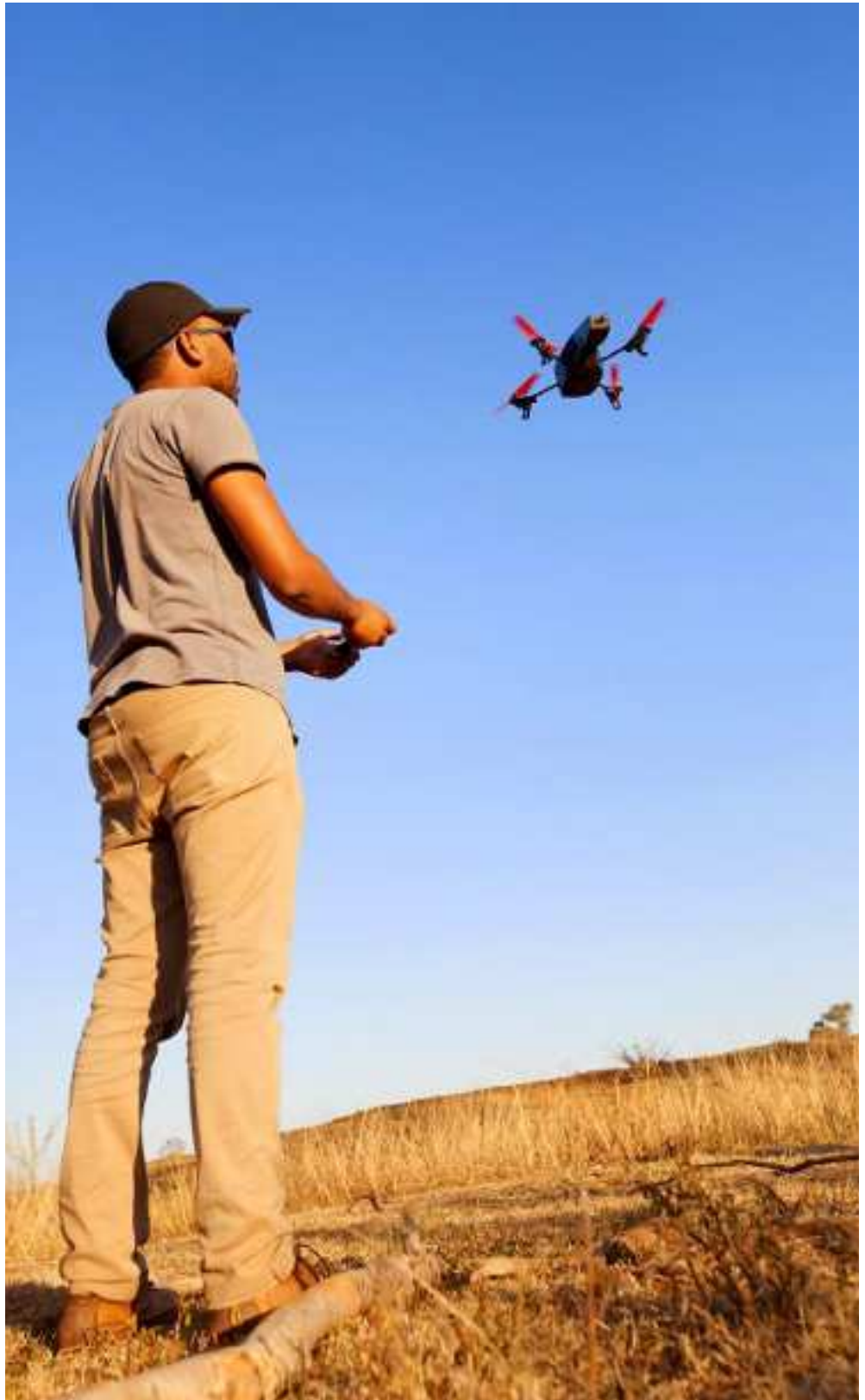
Drone Regulation: Can County Governments be involved?

It is difficult to tell exactly how many remotely piloted aircraft systems (drones) are presently flying in Kenya. However, it is generally agreed that there is a rapid proliferation of these devices in the Country and this means that there are now a significant number of civilian drone owners and operators. Majority of these people fly drones for recreation and have little or no understanding of the laws governing the national airspace or the safety requirements for operating aircraft in the national airspace.

With the promulgation of the Civil Aviation (Remote Piloted Aircraft Systems) Regulations (hereinafter 'RPAS Regulations'), vide Legal Notice No. 259 of October 6, 2017, Kenya has incorporated drones into its civil aviation regulatory framework.

The RPAS Regulations essentially require all operators of remote piloted aircraft systems (drones) to register them in a national database. Regulation 8 of the regulations requires an operator or owner of a drone to register it with the Kenya Civil Aviation Authority ("KCAA") established under Section 4 of the Civil Aviation Act, No. 21 of 2013. Regulation 12 prohibits any person from operating a drone in Kenya without KCAA authority.

The RPAS Regulations apply to all types of unmanned flying gadgets regardless of their size, except state aircraft, unmanned free balloons or airships and operation of toys. Why is KCAA, a National Government regulator, the sole regulator of these





low-flying devices? The simple answer is found in Article 186 of the Constitution of Kenya and Section 18(g) of the Fourth Schedule to the Constitution which give the National Government exclusive authority over civil aviation. KCAA is the national body mandated to regulate civil aviation within the navigable Kenya airspace.

Despite the National Government's general authority over the national airspace, there is a real likelihood of KCAA overreaching itself with the blanket regulation. Some of the drones used for recreation are virtually toys that can be bought online for a few thousand shillings, they pose little or no risk and have minimum capabilities. They are typically not built for lengthy flights at altitudes where manned aircraft fly. Some of

these drones are too small to appear on the radar and in fact have no GPS to broadcast their locations.

Regulation of drone activity is important because left to their own devices rogue drone operators can cause all manner of trouble; drones can snoop on people and sensitive sites; they can be used to smuggle contraband; they can cause injury and damage to humans and property; they can be a nuisance etc. However, is this enough justification for the Government to regulate all types of drones no matter the size and/or use?

With the promulgation of the RPAS Regulations drone owners and operators can now familiarize themselves with the general rules governing their operation. However, considering the

sheer number of drones (registered or otherwise) likely to land in private hands and the legal landscape, it might not be possible for KCAA to effectively regulate the use of these devices. In order to have a wider reach and apply common sense regulation, the National Government should consider giving County Governments some limited power to regulate small drones used purely for recreation pursuant to the provisions of Article 187 of the Constitution. This article asserts that a function or power of government at one level may be transferred to a government at the other level by agreement between the governments if the function or power would be more effectively performed or exercised by the receiving government.

Regulation of small drones for recreation might be more effectively performed by the County Government within whose local jurisdiction the drones are operated. First, breaches of the airspace are more likely to be reported because of the localized nature of their operation; a County Government can rely on citizens to report rogue operators. Secondly, it is relatively easy to enforce County regulations using the County's general law enforcement machinery. Thirdly, people are more likely to observe safety measures when they are conscious of the presence of a local enforcer; KCAA might not have capacity to police the entire country. Regulation by County may be done in the following ways:

a. County Governments in collaboration with KCAA could draft or amend the existing laws to incorporate the opera-

tion of drones. Laws may be enacted delimiting land owner's rights to exclude drones from flying over their land; laws may be enacted to protect the privacy of citizens against surveillance drones; laws relating to nuisance may be enacted to control noise pollution by buzzing drones etc. Further, County governments may be given power to prosecute drone owners or operators who violate laws of general applicability e.g. laws protecting right to property, privacy, nuisance laws, personal injury, property rights etc..

b. County Governments can be given power to use their zoning laws to regulate the locations from which drones may be launched, landed, or operated just as they are able to regulate many other activities that impact residents like setting up of abattoirs, funeral homes, dumping sites etc.



In conclusion, KCAA should avoid over-reaching itself by seeking to regulate all types of activities involving the operation of drones; some facets of drone regulation are certainly better suited for County Government regulation. KCAA should focus on those aspects of drone activity that make the airspace safe for all and that can most appropriately be implemented at the national government level. KCAA should seek to promote a more collaborative regulation mechanism between the National and County Government to ensure that there is more investment and uptake of safe drone activity. Too much regulation by KCAA will only serve to stifle the sector.