

**RADAR SCREEN** BY WILLIAM MAEMA

# Patenting is the sure way to harvest fruits of innovation

As the technology-driven economic advancement has gathered steam in recent years, Kenya has been ranked among the most innovative countries in the world.

More recently, the Global Innovation Index 2017 has ranked Kenya the third most innovative country in Africa, after South Africa and Mauritius.

This is the country that has given the world the life-changing digital money transfer service, M-Pesa - developed and commercialised on our soil. Kenyan companies keep winning accolades on the global stage for their innovative products and processes.

If the innovativeness of Kenyans, especially the youth, in the field of information, communications and technology could be matched by relevant fundamentals of economic development, including political stability, Kenya could easily join the ranks of middle-income economies well before 2030.

Innovation requires a substantial deployment of brainwork, time and money yet its benefits are enjoyed by society at large. Millions of people's lives have been transformed by M-Pesa, yet none of us contributed to the cost of its invention or development. The inventor is not even publicly known or acknowledged as a national hero.

Apart from the moral justification that one should enjoy the fruits of his labour, the economic rationale for the protection of the products of intellectual labour is to grant the inventor an exclusive right to commercialise his invention for a specified period without competition. This is the nature of rights granted by patent registration.

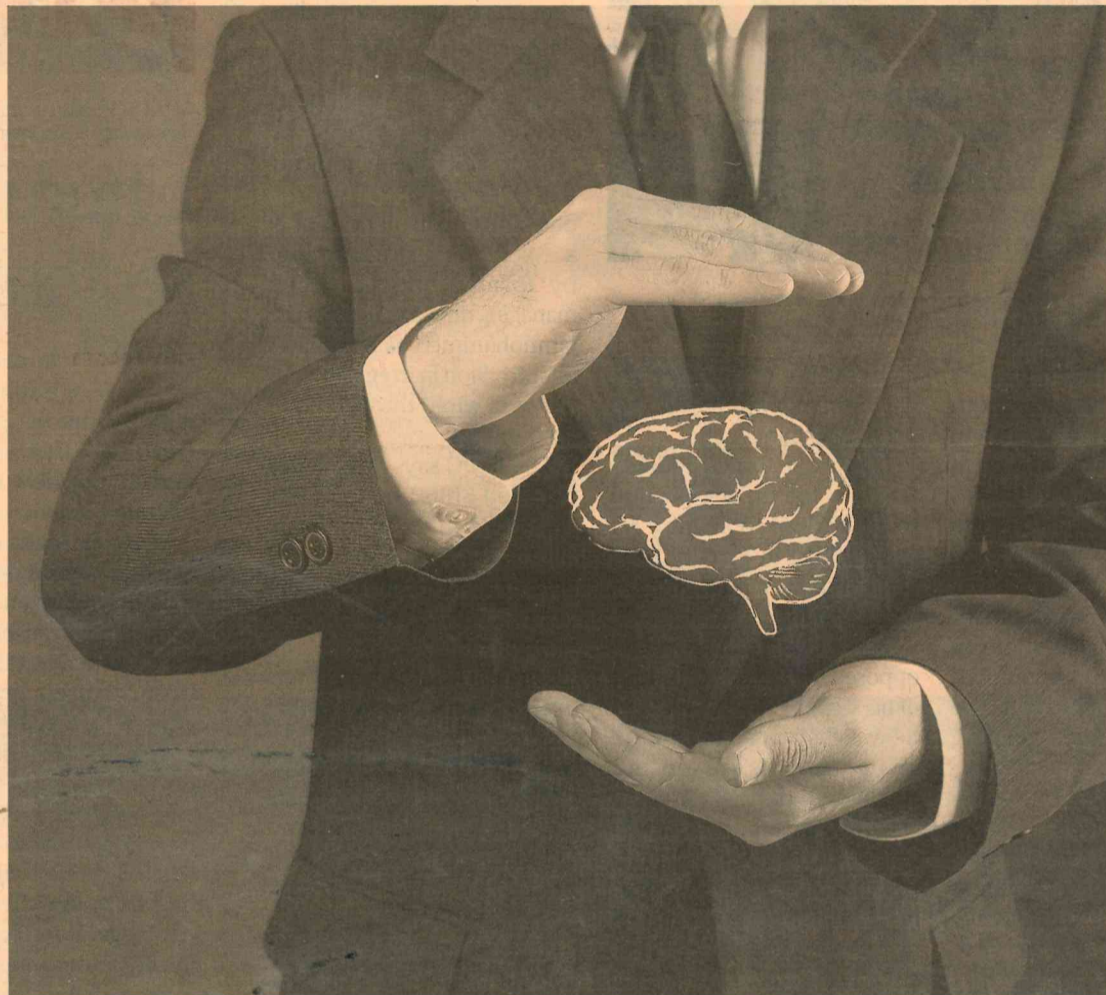
The grant of a patent is a bargain between the inventor and the State. In exchange for protection against competition for a limited period, the inventor undertakes to disclose his invention to the State and share its benefit with the society.

This assurance enables the inventor to commercialise his invention either by himself or licensing to a third party who has the financial muscle to do so, in exchange for a royalty or by an outright sale of the patent rights.

The Industrial Property Act, which governs the grant of patents and other industrial property rights like industrial designs, contains elaborate requirements and procedures on the acquisition of patent rights.

Basic qualification criteria are that

**PROPERTY RIGHTS** Assurance of protection enables the inventor to commercialise invention either by himself or licensing to a third party with the financial muscle to do so



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the invention must be novel (new), industrially applicable and involve an inventive step. This jargon simply means that the invention should not already be known anywhere in the world, must constitute a significant improvement on the existing technology and the inventor must describe the invention in a clear manner to enable any other person schooled in the relevant field to work the invention without reference to the inventor.

In other words, he must provide an operation manual for the invention.

The exclusivity granted by a patent is normally limited to a non-renewable period of 20 years after which the invention falls into the public domain. Upon the expiry of this period, the society begins to benefit from increased supply of goods and the corresponding reduction in prices due to competition.

The expiry of patents explains how generic drugs find their way into the market. These are legitimate drugs produced using inventions whose

patents have expired. That is why they are significantly cheaper than patented drugs, which are manufactured during the exclusivity period when the manufacturer, rather than market forces, dictates the price.

Generic drugs are not counterfeits as generally assumed, although they can, of course, be counterfeited in the same way as patented drugs.

The exclusive rights granted by a patent are, however, not without exceptions. For instance, in times of national emergencies or disasters like the HIV/Aids pandemic, the law suspends patent rights to enable the mass production of life-saving drugs using patented processes.

The threshold for patentability is deliberately set at a fairly high level to avoid clogging the wheels of commerce and industry with exclusive rights granted to undeserving contraptions or simple improvements on existing technology.

That is why most of what is generally considered useful and innovative knowhow does not qualify for patent

protection. To qualify for patent protection, an alleged invention must provide a solution to an existing technological problem. Further, it should not have been disclosed anywhere in the world.

The common trap for many scientists and researchers is that they rush to publish their inventions in seminars and revered journals to earn professional prestige but forget to apply for patent protection for an invention that could potentially contain life changing properties.

Unfortunately, by the time they realise the value of the invention and try to seek patent protection, it is often too late. The law, however, grants a grace period of 12 months from the disclosure of an alleged invention to the date of filing.

Like most other intellectual property rights, patent rights are territorial. However, there are legal mechanisms to obtain protection in multiple jurisdictions by filing one application within a member state of the Patent Cooperation Treaty or the African Regional Patent Office (ARIPO). This ensures that the patent takes effect in all the designated countries.

Know-how that does not qualify for patent protection but is commercially useful may still be protected by contract as a trade secret or confidential information. The benefit of this method is that unlike patents that expire after twenty years, it can last in perpetuity.

On the flip side, if the secret is breached, the invention becomes common fodder. Popular legend has it that Coca-Cola opted for this method for the protection of its secret formula instead of a patent which would have expired a couple of centuries ago.

The tragedy for inventors is that in most cases it is virtually impossible to predict the commercial viability or value of an invention upfront. Consequently, many do not bother to seek patent protection.

Others sell their invention for a song only to die in poverty and depression upon seeing the phenomenal success of their invention a few years later. Still others are duped into entering into exploitative licence contracts which only benefit the licensee. In matters of intellectual property it is always advisable to err on the side of caution.

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