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TWELFTH PARLIAMENT-SECOND SESSION

DEPARTMENTAL COMMITTEE ON TRADE, INDUSTRY AND
COOPERATIVES

REPORT ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2018
(NATIONAL ASSEMBLY BILL NO. 12)

Directorate of Committee Services

The National Assembly,

Parliament Buildings, Continental House, Room 402

NAIROBI

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CHAIRPERSON'S FOREWORD

On behalf of the Departmental Committee on Trade, Industry and Cooperatives in pursuant to provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of The Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12)

This report contains the Committee's proceedings of the consideration of The Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12) that was published on 10th April, 2018 and read a First Time on 18th April, 2018. In processing the Bill, the Committee invited comments from the public by placing an advert in the Daily Nation on Monday 7th May, 2018 pursuant to Article 118 of the Constitution. Stakeholders submitted written memoranda for consideration by the Committee. The Committee has since adopted the stakeholders' amendments for introduction into the Bill during the Committee Stage of the Bill.

In considering the Bill, the Committee noted that The Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12) proposes to amend various Acts of Parliament. However, the Committee on Trade, Industry and Cooperatives is in charge of processing amendments in relation to a total of 3 laws. They are: The Export Processing Zones Act, 1990, The Industrial Property Act 2001, The Anti-Counterfeit Act, 2008 and The Competition Act No. 12 of 2010

The Committee appreciates the assistance provided by the Office of the Speaker and of the Clerk of the National Assembly that enabled it to discharge its functions in considering The Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12 of 2018).

I take this opportunity to thank all Members of the Committee for their input and valuable contributions during the deliberations of the submissions by different stakeholders on the Bill.

Pursuant to provisions of Standing Order 199 (6), and on behalf of the Departmental Committee Trade, Industry and Cooperatives, it is my pleasant privilege and honor to present to this House the Report of the Committee on its consideration of The Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12 of 2018).

HON. KANINI KEGA, M.P (CHAIRPERSON)

EXECUTIVE SUMMARY

The Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12) propose to amend various Acts of Parliament. However, the Committee on Trade, Industry and Cooperatives is in charge of processing amendments in relation to a total of 4 laws. They are: The Export Processing Zones Act, 1990, The Industrial Property Act, 2001, The Anti-Counterfeit Act, 2008 and The Competition Act, 2010.

The Committee placed an advert in the dailies on Monday 7th May, 2018, calling for memoranda from the public on. The Committee received written memoranda from several stakeholders and oral submissions from The Anti-Counterfeit Agency and Export Processing Zones Ltd. The Committee deliberated on and considered the views of the stakeholders and some were adopted by the committee.

The Committee recommends for the passing of the proposed amendments to The Export Processing Zones Act, 1990, The Industrial Property Act, 2001, The Anti-Counterfeit Act, 2008 and The Competition Act, 2010 with committee amendments to The Export Processing Zones Act, 1990, The Industrial Property Act, 2001, The Anti-Counterfeit Act, 2008.

It is worth noting that even though The Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12) should ideally contain minor and consequential amendments, some of the proposed amendments in the Bill seem to contain many and substantive amendments which may negate the philosophical principle behind the introduction of the “omnibus” Bill.

1.0 INTRODUCTION

1.1 Establishment of the Committee

The Departmental Committee on Trade, Industry and Cooperatives is one of the fifteen Departmental Committees of the National Assembly established under *Standing Order 216* whose mandates pursuant to the *Standing Order 216 (5)* are as follows:

- a) To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- b) To study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;
- c) To study and review all legislation referred to it;
- d) To study, access and analyze the relative success of the ministries and departments measured by the results obtained as compared with their stated objective;
- e) To investigate and inquire into all matters relating to the assigned ministries and departments as they may be deemed necessary, and as may be referred to the House;
- f) To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order No.204 (Committee on appointments); and
- g) To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.

1.2 Mandate of the Committee

In accordance with Second Schedule of the Standing Orders, the Committee is mandated to oversee:-

Trade, securities exchange, consumer protection, pricing policies, commerce, industrialization including special economic zones, enterprise promotion and development including small and medium-size enterprises, intellectual property, industrial standards, anti-counterfeit policies and co-operatives development.

In executing its mandate, the Committee oversees the Ministry of Industry, Trade and Cooperatives.

The Committee on Trade, Industry and Cooperatives was constituted by the House on Thursday 14th December, 2017 and comprises of the following Members:-

Chairperson	Hon. Kanini Kega, MP
Vice Chairperson	Hon. Cornelly Serem, MP
Members	Hon. Alexander Kimutai Kigen Kosgey, MP
	Hon. Alois Musa Lentoimaga, MP
	Hon. Anab Mohamed Gure, MP
	Hon. Andrew Mwadime, MP
	Hon. Bunyasi John Sakwa, MP
	Hon. Daniel Maanzo, MP
	Hon. Wanyonyi Ferdinand, MP
	Hon. James Mukwe, MP
	Hon. Jones Mlolwa, MP
	Hon. Kipruto Moi, MP
	Hon. Murungi Kathuri, MP
	Hon. Gichimu Robert, MP
	Hon. Kimani Patrick Wainaina Jungle, MP
	Hon. Korir Generali Nixon Kiprotich, MP
	Hon. Nduati Joseph Ngugi, MP
	Hon. Wachira Rahab Mukami, MP
	Hon. (Dr.) Wilberforce Oundo, Phd, MP

Staff

Mr. Erick Nyambati	-	Clerk Assistant III	(Lead Clerk)
Ms. Nuri Kitel Nataan	-	Clerk Assistant III	
Mr. Peter Mwaura	-	Legal Counsel I	
Mr. Chelang`a Rotich Maiyo	-	Research Officer III	
Mr. Yaqub Ahmed	-	Media Relation Officer III	

2.0 BACKGROUND INFORMATION

The Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12) was published on 10th April 2018, and read a first time on 18th April, 2018, and thereafter committed to various Departmental Committees for consideration pursuant to Standing Order 127.

The Bill proposes several amendments to various Acts of Parliament. The Departmental Committee on Trade, Industry and Co-operatives considered the proposed amendments to The Export Processing Zones Act, 1990, (Cap. 517), The Industrial Property Act, 2001 (No. 3 of 2001), The Anti-Counterfeit Act, 2008 (No. 13 of 2008) and The Competition Act, 2010 (No. 12 of 2010).

The Bill seeks to; amend the Export Processing Zones Act to create a conducive environment for investors in the manufacturing sector and promoting value addition, amend the industrial property act to align the definitions in the act with the constitution, amend the Anti-Counterfeit Act, 2008 to make provisions relating to the Board and amend the Competition Act to provide for the mode of appointment of chairpersons of the Competition Authority

PUBLIC PARTICIPATION

Following the call for memoranda from the public on Monday 7th May, 2018, the Committee received written memoranda from several stakeholders and oral submissions from The Anti-Counterfeit Agency and Export Processing Zones Ltd. The Committee deliberated on and considered the views of the stakeholders as follows:-

The Chief Executive Officer for Export Processing Zones Authority (EPZA) appeared before the Committee and submitted as follows, that:-

EPZA welcomes the proposed amendments as it will create a conducive environment for investors in the manufacturing sector and promoting value addition.

The proposed amendments seeks to broaden the list of eligible activities under the EPZ Act (Cap 517) of the Laws of Kenya

The proposal seeks to reduce the cost of value addition on local agricultural products by integrating the agricultural activities with direct value addition under the Export Processing Zones (EPZ) program as opposed to the current situation where the separation approach leads to increased costs as the agricultural activities are taxed and administered under a separate regulatory regime then the value addition is regulated under the EPZs. This will expand EPZ benefits to the agricultural activity and therefore make Kenya's value added agricultural products more competitive globally.

Commercial activities have been allowed under the EPZ Act since inception of the EPZ program. EPZA works with KRA Customs Services which is present at all EPZs and is mandated to collect revenue to ensure compliance and collect taxes on EPZ local sales.

The proposed amendment targets attraction of investments in Global Sourcing/Buying Houses (IPR own-ers/brand owners); Regional Distribution/Logistics Hubs (e.g. intermediate goods and consumables) with full taxes paid for domestic sales.

The current restriction makes Kenya unattractive as a regional trade logistics hub and denies local manufacturers ready access to critical inputs to support manufacturing investments.

The ACA Management appeared before the Committee and submitted as follows. That:-

The Agency welcome the proposed amendments as it will keep away counterfeits from the market and ensure fair competition and ease of doing business for legitimate businesses.

ACA's experience has shown that unbranded goods are a major source of IP infringements.

Kenya is under obligation to provide protection for trademarks registered in other countries under TRIPS and in respect of goods that are traded in the country. Therefore, IP protection must not be made voluntary in order to protect the IP owners, government, consumers and the general public from harmful counterfeit goods.

3.2.2 Anjarwalla & Khanna Co. Advocates

Anjarwalla & Kahanna Co. advocates submitted that—

Section 32 The proposed provision is arbitrarily broad. It will compel importers to pay for searches with the Anti-Counterfeit Authority. Too much would be lost waiting for searches. The provision does not limit its application to good imported in the course of trade. If carried it would be an offence to import any kind of goods for personal use into Kenya.

Recommendation

Deletion of the provision

Section 34

S 34B (1) Registration of Trademarks is a matter for the Kenya Industrial Properties Institute (KIPI).

This will be tantamount to unnecessary duplication of tasks amongst government agencies. Thus burdening investors and impacting negatively on the ease of doing business in Kenya. The provision flies in the face of the principle of territoriality in trademarks and IP rights The provision as read together with the offence created under section 32(j) presumes that the trademark or intellectual property mark will as of right have been registered in Kenya. This is not practicable as it is possible to use IP rights without registering them.

S. 34B (2) The section accords the Authority power to approve or decline applications for recordation trademarks.

It however fails to provide a criterion for such approval and denial.

Recommendation

The criterion for such approval or denial should be set-out expressly.

The same should be limited to confirmation that the documentary proof of currency and validity of the registration mark at KIPI.

S, 34B (3) The proposed section requires that the citizenship and political jurisdictional details be availed at the point of seeking registration.

Recommendation

The requirement to provide citizenship details should be expunged.

S. 34B(6) The proposed section proposes to that the recordation of a trademark shall be in force for one year only.

This time frame is unreasonably short in the importation business.

This will reduce the ease of doing business in Kenya.

Recommendation

Validity of the recordation of the trademark should be annexed to the validity of the corresponding registration at KIPi which is 10 years.

S. 34B(10) This section is on renewal of recordation. It appears the word “renewal” was left out.

Recommendation

Insert the phrase “for renewal of the recordation trademark” immediately after the words “written application”.

It is also proposed that the expulsion of the mandatory renewal of the recordation trademark.

S. 34B(13) This section requires the issues of an anti-counterfeit device upon payment of a specified fee. This will impact negatively on the ease of doing business in Kenya.

Recommendation

The security device should be issued free of charge or upon payment of a nominal fee.

S. 34B(14) The section proposes destruction of goods imported to Kenya and which do not bear the anti-counterfeit security device. As a general rule destruction of goods can only be undertaken on the strength of a court order. The section does not specify the meaning of originally imported into Kenya. Thus, it could be applied in retrospect.

Recommendation

Destruction of goods ought to be contingent upon—

- (a) Application by a holder of a certificate issued under the Act.
- (b) Issuance of a court order.

4.0 CONSIDERATION OF THE BILL

The Committee deliberated on the Bill as follows—

Clause by Clause Analysis

The Committee during its fourteenth Sitting analyzed the proposed amendments clause by clause and made its recommendations as follows—

4.1 Report Processing Zone (Articles 17 & 177)

Section 2 Insert the following definition in proper alphabetical sequence-

"eligible activities" include activities to enable agricultural activities preceding processing and value addition, aquaculture, dairy and ranching and silviculture.

Recommendation

THAT, the proposed definition of the term "eligible activities" be deleted and substituted therefor with the following—

S. 2 "eligible activities" include activities to enable agricultural activities preceding processing and value addition directly related to value addition conducted in Kenya within a gazetted export processing zone in aquaculture, horticulture, tea, coffee, floriculture, dairy, ranching and silviculture.

Justification

The Committee was of the view that the proposed definition was likely to be abused by unscrupulous business individuals as there was no express requirement for the processing and value addition to be conducted in Kenya. Further, there was no requirement that the processing and value addition be conducted within the confines of a gazette export processing zone.

Section 15 (1)

Insert the following words "land or building or part thereof immediately after the word "area".

Recommendation

Agreed to

Section 21 (2) Delete the words "for a minimum period of thirty years within the export processing zone" and substitute therefor the words "or buildings or part thereof for a minimum period of ten years for land and six years for buildings or part thereof".

Recommendation

THAT, the amendment proposed to section 21 be deleted and substituted therefor with the following—

S. 21 Delete the words "for a minimum period of thirty years within the export processing zone" and substitute therefor the words "or building or part thereof for a minimum period of ten years for land and buildings or part thereof".

Justification

The Committee was of the view that the six years minimum lease period proposed for buildings or part thereof was short. The Committee therefore proposed to extend the lease period to ten years. The import of the Committee's amendment is to assign an equal minimum lease period for land, buildings or part thereof.

Section 26 (3B)

Delete

Recommendation

Agreed to

1.2 The Industrial Properties Act, (No. 3 of 1991)

Section 2

Delete the definition of the expressions "ARIPO protocol", "National Commission for Science, Technology and Innovation" and "Minister".

Insert the following new definitions in proper alphabetical sequence-

"Cabinet Secretary" means the Cabinet Secretary for the time being responsible for matters relating to the Institute;

"Harare Protocol" means the protocol on patents and industrial designs adopted at Harare on 10th December 1982;

"international-type search" means a search similar to an international search provided under Article 15 of the Patent Cooperation Treaty;

"National Commission for Science, Technology and Innovation" has the meaning assigned to it under the Science, Technology and Innovation Act, 2013.

Recommendation

Agreed to

Section 6

Delete the word "Minister" wherever it occurs and substitute therefor the word "Cabinet Secretary".

Recommendation

Agreed to

Section 9 Delete the word "Minister" and substitute therefor the word "Cabinet Secretary".

Recommendation

Agreed to

Section 12 (2)

Delete and substitute therefor the following new subsection—

(2) The Managing Director may delegate to a Deputy Managing Director or to a manager the functions conferred on him or her under this Act.

Recommendation

THAT, the amendment proposed to section 12(2) of the Act be deleted.

Justification

The Committee was of the view that delegation of duties is an administrative matter. Administrative matters do not as a matter of practice and principle warrant legislative intervention. The Board may issue directives on delegation of duties by the Managing Director to the Deputy Managing Director.

Section 16

Delete the word "Minister" and substitute therefor the words "Cabinet Secretary".

Recommendation

Agreed to

Section 18

Delete the word "Minister" wherever it occurs and substitute therefor the words "Cabinet Secretary".

Recommendation

Agreed to

Section 21 Delete the word “Minister” and substitute therefor the words “Cabinet Secretary”.

Recommendation

Agreed to

Section 27 Delete the word “Minister” wherever it occurs and substitute therefor the words “Cabinet Secretary”.

Recommendation

Agreed to

Section 29 (1) (a) Delete and substitute therefor the following new paragraph–

(a) a culture of the micro-organism has been deposited with a depository institution as prescribed by the regulations.

Recommendation

Agreed to

Section 29 (1) (b) Delete

Recommendation

Agreed to

Section 29 (1) (c) Delete

Recommendation

Agreed to

Section 34 (4) Delete and substitute therefor the following new subsection–

(4) The appointment of an agent shall be indicated by furnishing a power of attorney signed by the applicant

Recommendation

Agreed to

Section 34 (5) Delete and substitute therefor the following new subsection–

(5) The description shall disclose the invention and the best mode for carrying out the invention, in full, clear, concise and exact terms as to enable a person skilled in the art to make, use or evaluate the invention and that description shall include any drawing and relevant deposits as in the case of microorganisms and self-replicable material which are essential for the understanding of the invention.

Recommendation

Agreed to

Section 53 (2) (a) Delete and substitute therefor the following new paragraph–
“(a) to disclose the invention in accordance with this Act.”

Recommendation

Agreed to

Section 59 Delete and substitute therefor the following new section–

(1) For the purposes of this section–

“regional application” means an application for a patent, utility model or industrial design filed in accordance with the Harare Protocol and the regulations made thereunder;

“receiving office” has the meaning assigned to it by the Harare Protocol;

“designated office” has the meaning assigned to it by the Harare Protocol;

“designate” has the meaning assigned to it by the Harare Protocol;

(2) The Institute shall act as a receiving office where Kenya is designated in a regional application.

(3) The Institute shall act as a designated office where Kenya is designated in a regional application.

(4) The functions of the Institute under this section shall be performed in accordance with the provisions of this Act and the Harare Protocol;

Provided that in case of conflict, the provisions of this Act shall apply.

(5) A patent, utility model or industrial design granted or registered under the Harare Protocol and in which Kenya is designated shall be treated as if it were granted or registered under this Act.

(6) For purposes of subsection (5)–

(a) the owner of the patent, utility model or industrial design shall have the same rights and remedies and be subject to the same conditions as the owner of a patent, utility model or industrial design granted or registered under this Act; and

(b) the provisions of this Act relating to surrender, revocation, infringement and rectification of registers shall apply, with necessary modifications, to the patent, utility model or industrial design.

(7) The requirements and procedures under this section shall be prescribed in regulations.

Recommendation

Agreed to

Section 62

Delete the word “court” and substitute therefor the word “Tribunal”

Recommendation

Agreed to

Section 63 Delete and substitute therefor the following new section–

63. In the absence of any agreement to the contrary between the parties, joint owners of an application or a patent may, separately, transfer their rights in the application or patent, exploit the protected patent and preclude any person from exploiting the patent but may only jointly grant permission to any third person to do any of the acts referred to in section 54.

Recommendation

Agreed to

Section 77 Delete the word “Minister” and substitute therefor the words “Cabinet Secretary”.

Recommendation

Agreed to

Section 80 Delete the word “minister” wherever it occurs and substitute therefor the word “Cabinet Secretary”.

Recommendation

Agreed to

Section 84 (1) Delete and substitute therefor the following new subsection–

“(1) For the purposes of this Part –

“industrial design” means the overall appearance of a product resulting from one or more visual features of the shape, configuration, pattern or ornamentation of a product; and

“product” means anything that is made by hand, tool or machine.

Recommendation

Agreed to

Section 84 (2) Delete and substitute therefor the following new subsection—

(2) The protection under this Act shall not extend to anything in an industrial design which serves solely to obtain a technical result or to methods or principles of manufacture or construction.

Recommendation

Agreed to

Section 86 (2) Delete and substitute therefor the following new subsection—

(2) An industrial design is new unless it is identical or substantially similar in overall impression to an industrial design that has been disclosed to the public anywhere in the world by publication or use prior to the filing date or, where applicable, the priority date of the application for registration

(3) Delete and substitute therefor the following new subsection—

“(3) Section 23(4) shall apply, with necessary modifications, with respect to industrial designs.”

(4) Delete and substitute therefor the following new subsection—

“(4) The following shall not be registered as industrial designs –

(a) industrial designs that are contrary to public order and morality;

(b) works of sculpture, architecture, painting, photography and any other creations that are purely of artistic nature.”

Insert the following new subsection immediately after subsection (4) –

“(5) The details of the requirements and the procedure under this section shall be prescribed in regulations.”

Recommendation

Agreed to

Section 87 Delete the marginal note and substitute therefore with the following new marginal note—

“Application, examination, opposition and registration.”

(2) Delete.

(4) Delete and substitute therefor the following new subsection—

(4) Section 36 shall apply, with necessary modifications, in respect of amendment and division of applications for registration of industrial designs.

(6) Delete the expression “or a specimen thereof” in the proviso.

(8) Delete and substitute therefor the following new subsection—

(8) The managing director shall, if satisfied that an application meets the requirements of this section and of sections 84 and 86, accept the application and publish it in the prescribed manner.

(9) Delete and substitute therefor the following new subsection—

(9) Any interested person may, within the prescribed time and in the prescribed manner, give notice of opposition to the Managing Director.

Insert the following new subsections after subsection (9)—

(10) Where the managing Director establishes that a design application does not meet the requirements for registration, the Managing Director shall send the applicant a report setting out the objections to registration and if the applicant does not reply to the objections within the prescribed period, the application shall be deemed abandoned.

(11) Where an application for registration of an industrial design is accepted and published in error, the Managing Director may publish in the journal an indication to that effect and direct that the application be re-examined.

(12) The details of the requirements and procedure under this section shall be prescribed in regulations.

(13) The Managing Director shall, if satisfied that an application meets the requirements of this Act, register the industrial design and issue a certificate of registration to the applicant.

Recommendation

Agreed to

Section 90 Delete the expression “specimens, etc” in the marginal note.

Recommendation

Agreed to

Section 90 (1) Delete and substitute therefor the following new subsection—

(1) An application for registration of an industrial design together with any drawing, photograph, graphic representation or specimen shall be kept confidential until the application is published in accordance with section 87.

Recommendation

Agreed to

Section 90 (2) Delete the expression “and specimens” in paragraph (d).

Recommendation

Agreed to

Section 90 (3) Delete and substitute therefor the following new subsection—

(3) After publication, any person may obtain the official copy of the application.

Recommendation

Agreed to

Section 90 (4) Delete.

Recommendation

Agreed to

Section 91 Delete and substitute therefor the following new section—

91. The Managing Director shall, in relation to each industrial design registered under section 87, publish the details prescribed in the regulations.

New Insert the following new section after section 91—

91A. Section 46 shall apply, with necessary modifications, with respect to the maintaining of the register of industrial designs.

Recommendation

Agreed to

Section 92 (4) Delete and substitute therefor the following new subsection—

(4) Section 59 shall apply, with necessary modifications, with respect to industrial design applications or industrial designs registered under the Harare Protocol.

Recommendation

Agreed to

Section 93 (2) Delete and substitute therefor the following new subsection—

(2) The provisions of sections 62, 63, 64, 65, 66, 67, 68, 69, 70 and 71 shall apply, with necessary modifications, to this Part.

Recommendation

Agreed to

Section 113 Delete the word “minister” wherever it occurs and substitute therefor the word “Cabinet Secretary”.

Recommendation

Agreed to

Section 113 (6)

Delete and substitute therefor the following new subsection—

(6) The Cabinet Secretary shall appoint a person who has experience of not less than seven years in matters relating to industrial property being qualified and entitled to practise as an advocate in Kenya to be the Secretary to the Tribunal.

Recommendation

THAT, the amendment proposed to section 113 (6) should be deleted and substituted therefor the following—

(6) The Cabinet Secretary shall through a competitive process appoint a person who has experience of not less than seven years in matters relating to industrial property being qualified and entitled to practice as an advocate in Kenya to be the Secretary to the Tribunal.

Justification

The Committee’s proposal to have the provision amended to provide that the appointment of the Secretary to the Tribunal be through a competitive process shall create a platform for fair competition among applicants for the position of secretary to the Tribunal. This will ensure that merit and qualification is the criteria applied in appointing the Secretary to the Tribunal.

Section 117 Delete the word “minister” and substitute therefor the word “Cabinet Secretary”.

Recommendation

Agreed to

Section 120 Delete the word “minister” wherever it occurs and substitute therefor the word “Cabinet Secretary”.

Recommendation

Agreed to

Second Schedule Delete the word “minister” wherever it occurs and substitute therefor the word “Cabinet Secretary”.

Recommendation

Agreed to

4.3 Anti-Counterfeit Act, 2002 (No. 19 of 2002)

Long title

Delete the word “agency” and substitute therefor the word “Authority”.

Recommendation

Agreed to

Section 2

Delete the definition of the term “Agency” and substitute therefor the following definition—
“Authority” means the Anti-Counterfeit Authority established under section 3;

Insert the words “any item that bears an intellectual property right” immediately after the
“counterfeiting” in the definition of “counterfeit goods.”

"consumer" includes any member of the public or person who purchases or likely to purchase
goods as an end user other than the owner of intellectual property right; and

"counterfeit mark" means a spurious mark-

(a) that is used in connection with any goods, labels, patches, stickers, wrappers, badges,
emblems, medallions, charms, boxes, containers, cans, hand tags, documentation or packaging
of any type or nature;

(b) that is identical with, or substantially indistinguishable from, a mark registered in the
trade mark register and in use, whether or not a person knows such a mark was registered;

(c) that is applied to or used in connection with the goods for which the mark is registered, or
is applied to or consists of a label, patch, sticker, wrapper, badges, emblems, medallion, charms,
boxes, containers, cans, hand tags, documentation or packaging of any type or nature, that
is designed, marked or otherwise intended to be used on or in connection with the goods for
which the mark is registered; and

(d) The use of which is likely to cause confusion, to cause mistake, or to deceive.

Recommendation

Agreed to

Part II

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 3 Marginal note

Delete the word "Agency" appearing in the marginal note and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 3 (1)

Delete the word "Agency" wherever it appears and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 3 (2)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 4

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 5

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Opening Statement

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 5(d)

Insert the following paragraphs immediately paragraph (d)-

(da) advise the government through the Cabinet Secretary on policies and measures concerning the necessary support, promotion and protection of intellectual property rights as well as the extent of counterfeiting;

(db) to carry out inquiries, studies and research into matters relating to counterfeiting and the protection of intellectual property rights.

Recommendation

Agreed to

Section 6 Marginal note

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 6(1)

Delete the word "Agency" and substitute therefor the word "Authority."

Recommendation

Agreed to

Section 7(a)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 7(b)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 7(c)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 7(d)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 7(e)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 7(f)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 7(g)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 10 (1)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 10 (2) (c)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 11 (Marginal Note)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 11

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to.

Section 12 (1)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 12 (2)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 12 (3)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 14 (1)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 14 (2)

Delete the word "Agency" wherever it appears and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 15

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 16 (2)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 16 (3)

Insert the following subsections immediately after subsection (3)—

(3A) Notwithstanding the provisions of any other written law for the time being in force, no claim under this Act shall be brought against the Authority for any alleged damage to or loss of any goods after the expiry of a period of twelve months from the date of the seizure, removal or detention of the goods, as the case may be.

(3B) The provisions of Part IV of the Government Proceedings Act shall apply mutatis mutandis to the Agency in relation to any execution of any judgment, decree or order against the Authority issued by any Court or tribunal or any other competent authority.

Recommendation

Agreed to

Section 17 Marginal Note

Delete the word "Agency" appearing in the marginal note and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 17 Opening Statement

Delete the word "Agency" appearing in the opening statement and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 17 (a)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 17 (b)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 17 (c)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 17 (d)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 17 (e)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 18

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 19 (1)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 19 (2) (a)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to.

Section 19 (2) (b)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to.

Section 19 (2) (c)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 19 (2) (d)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 19 (4)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 20 (1)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 20 Opening Statement

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 20 (2) (a)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 20 (2) (b)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 20 (3)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 21 (1)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to.

Section 21 (2)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 23 (3)

Insert the following new subsections immediately after subsection 3—

(4) An inspector shall have the power to investigate any offence related or connected to counterfeiting notwithstanding that such an offence is not expressed as such under the provisions of this Act. Delete.

(5) An inspector shall have the same powers as are exercised by a customs officer with regard to importation of counterfeit goods under the East African Community Customs Management Act, 2005.

(6) If a magistrate, on sworn information in writing—

(a) is satisfied that there is reasonable ground to believe either—

(i) that any goods, books or documents which an inspector has power under this section to inspect are on any premises and that their inspection is likely to disclose evidence of commission of an offence under this Act; or

(ii) that any offence under this Act has been, is being, or is about to be committed on any premises; and

(b) is also satisfied either—

(i) that admission to the premises has been or is likely to be refused and that notice of intention to apply for a warrant under this section has been given to the occupier; or

(ii) that an application for admission, or the giving of such a notice, would defeat the object of the entry, or that the premises are unoccupied, or that the occupier is temporarily absent and it might defeat the object of the entry to await his return,

The magistrate may by warrant under his hand, which shall continue in force for a period of one month, authorize an inspector to enter the premises, if need be by force.

(7) An inspector entering any premises by virtue of this section may take with him such other persons and such equipment as may appear to him to be necessary; and on leaving any premises which he has so entered by virtue of a warrant he shall, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured against trespassers as he found them.

Recommendation

Agreed to

Section 26

Insert the following subsection immediately after subsection (8)—

(9) In any criminal or civil proceedings concerning an act of dealing in counterfeit goods, the evidence of any person in the employment of the intellectual property rights holder or its agent with demonstrable training offered by such intellectual property rights holder or experience in the identification of the intellectual property rights holder's products shall be admissible as expert evidence.

Recommendation

Agreed to

Section 32

Insert the following paragraphs immediately after subsection (g)—

- (h) have in his possession or control in the course of trade any labels, patches, stickers, wrappers, badges, emblems, medallion charms, boxes, containers, cans, cases, handtags, documentations, or packaging of any type or nature, with a counterfeit mark applied thereto, the use of which is likely to cause confusion, to cause mistake, or to deceive;
- (i) aids or abets or conspires in the commission of any offence under this Act;
- (j) import into Kenya, any goods or items bearing a trade mark, trade name or copyright that has not been recorded with the Agency;
- (k) import into Kenya, in the course of trade, any goods or items except raw materials that is unbranded;
- (l) Fail to declare the quantity or the intellectual property right subsisting in any goods being imported into the Kenya;
- (m) falsely declare the quantity or the intellectual property rights subsisting in any goods being imported into Kenya; or
- (n) import into or transit through Kenya any labels, patches stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hand tags, documentations, or packaging of any type or nature, with a counterfeit, mark, applied thereto, the use of which is likely to cause confusion, to cause mistake, or to deceive.

Recommendation

Agreed to

Section 33 (4)

Insert the following words "including receiving and acting on consumer complaints" immediately after the word "initiative".

Recommendation

Agreed to

Section 33 (5)

Insert the following subsection immediately after subsection 5—

(6) Notwithstanding the provision of subsections (1) and (2) of this section, a consumer or purchaser of goods may, where he has reasonable cause to suspect that an offence under this Act has been committed, is being committed or is likely to be committed by any person, lay a complaint with the Executive Director who shall cause appropriate steps to be taken in accordance with the provisions of this Act.

Recommendation

Agreed to

Section 34 Marginal note

Insert the words "or Executive Director" immediately after the word "Commissioner" appearing in the marginal note.

Recommendation

Agreed to

Section 34 (1)

Insert the words "or Executive Director" immediately after the word "Commissioner".

Recommendation

Agreed to

Section 34 (2)

Insert the words "or Executive Director" immediately after the word "Commissioner".

Recommendation

Agreed to

Section 34 (3)

Insert the words "or Executive Director" immediately after the word "Commissioner".

Recommendation

Agreed to

Section 34 (4)

Insert the words "or Executive Director" immediately after the word "Commissioner".

Recommendation

Agreed to

Section 34 (5)

Insert the words "or Executive Director" immediately after the word "Commissioner".

Recommendation

Agreed to

Section 34 (6) (a)

Insert the word "or inspector" immediately after the words "customs officer".

Recommendation

Agreed to.

Section 34 (6) (b)

Insert the words "or Inspector" immediately after the word "customs officer" wherever it appears and the words "or Executive Director" immediately after the word "Commissioner" respectively.

Recommendation

Agreed to

Section 34 (7)

Insert the words "or Executive Director" immediately after the word "Commissioner".

Recommendation

Agreed to

Section 34 (9)

Insert the words "or the Authority" immediately after the word "Act".

Recommendation

Agreed to

Section 34A

Insert the following new section immediately after section 34A—

34B (1) Trademarks relating to goods to be imported into Kenya, irrespective of the place of registration, shall be recorded with the Agency in the prescribed manner if the registration is current.

(2) Applicants for recordation of trademarks shall be notified of the approval or denial of an application filed under this section in a prescribed manner by notice in the Anti- Counterfeit newsletter published by the Agency.

(3) An application to record one or more trademarks shall be in writing in the prescribed manner and addressed to the Agency and shall include the following information—

- (a) the name, complete business, address, and citizenship of the trademark owner or owners (if a partnership, the citizenship of each partner; if an association or corporation, the State, country, or other political jurisdiction within which it was organized, incorporated, or created);
- (b) the places of manufacture of goods bearing the recorded trademark;
- (c) sample of the trademarked goods or a sufficient digital photographic representation of the trademarked goods with appropriate detail for identification and differentiation from any counterfeits;
- (d) the name and principal business address of each foreign person or business entity authorized or licensed to use the trademark and a statement as to the use authorized; and
- (e) The identity of any parent or subsidiary company or other foreign company under common ownership or control which uses the trademark abroad.

(4) The application shall be accompanied by—

- (a) a status copy of the certificate of registration certified by the registering authority showing title to be presently in the name of the applicant;

(b) The fee set out in the Second Schedule to the Act.

Provided that if the trademark is registered for more than one class of goods, the fee for recordation shall be for each class.

(5) The recordation of the trademark and protection thereunder shall be effective on the date an application for recordation is approved.

(6) The recordation of a trademark shall remain in force for a period of one year from the date of approval of the application for recordation or the current registration period of the trademark, whichever is shorter.

(7) Recordation of a trademark shall be cancelled if the trademark registration is finally cancelled or revoked.

(8) If there is change in ownership of a recorded trademark and the new owner wishes to continue the recordation with the Agency, the new owner shall apply immediately by—

- (a) complying with subsection (4) hereinabove
- (b) describing any time limit on the rights of ownership transferred;
- (c) submitting a status copy of the certificate of registration certified by the registering author showing title to be presently in the name of the new owner; and
- (d) Paying a fee as prescribed in the Second Schedule to the Act.

(9) If there is a change in the name of the owner of a recorded trademark, but no change in ownership, written notice thereof shall be given to the Agency accompanied by—

- (a) a status copy of the certificate of registration certified by the registering authority showing title to be presently in the name as changed; and
- (b) a fee as prescribed in the Second Schedule to the Act.

(10) The owner of a recorded trademark shall submit a written application in the prescribed manner to the Agency not later than 30 days to the expiration of the current recordation.

(11) An application for renewal of recordation shall be accompanied by—

- (a) a status copy of the certificate of registration certified by the registering authority showing the title to be in the name of the applicant; and
- (b) a statement describing any change of ownership or in the name of the owner and any change of addresses of the owners and places of manufacture;
- (c) a fee as prescribed in the second schedule to the Act.

(12) The provisions of this Section shall apply to the recordation of copyrights, trade names or any other form of intellectual property rights mutatis mutandis.

(13) The Agency shall after satisfying itself that imported goods have complied with the provisions of this section issue to the importer of goods a certification mark in the form of an anti-counterfeit security device at a fee to be set out in the Second Schedule to the Act.

(14) The Agency shall have the power to seize and destroy any goods originally imported into Kenya but found within Kenya that do not bear the anti-counterfeit security device.

Recommendation

Agreed to

Section 35

Insert the following new subsection immediately after sub-section (4)—

(5) Where a Court has concluded the hearing of a matter in any criminal proceedings whether the suspect is convicted or acquitted and the goods in the opinion of Court are counterfeit and it appears that the suspect has benefited or obtained some monetary advantage from dealing in counterfeit goods the subject matter of the criminal proceedings, the Court shall on application of the prosecutor order the suspect to forfeit that benefit or monetary advantage to the Agency within a period of three months and in default the Agency may trace and recover that benefit or advantage from the suspect.

Recommendation

Agreed to

Section 36

Delete the word "Agency" wherever it appears and substitute therefor the word "Authority".

Recommendation

Agreed to.

4.4 The Competition Act, 2017 (No. 11 of 2017)

Section 10 (1) (a)

Delete and substitute therefor the following new paragraph—

“(a) a chairperson appointed by the President.”

Recommendation

Agreed to.

5.0 COMMITTEE OBSERVATIONS

The Committee made the following observations on the proposed Bill;

1. The Export Processing Act,

The first amendment relates to Section 2 of the Act by introducing eligible activities in the Export Processing Zones. They comprise of agricultural activities preceding processing as well as value addition, aquaculture, dairy & ranching as well as silviculture. The second amendment is about opening up the criteria of declaring an Export Processing Zone to include a land and building or parts of them. The third amendment proposes to relax the qualifications of an EPZ developer or operator to reduce the minimum period of holding land for the EPZ activity from 30 to 10 years and building for 6 years.

2. The Industrial Property Act

The Industrial Property Act provides for promotion of inventive and innovative activities to facilitate the acquisition of technology through the grant and regulation of patents, utility models, technovations and industrial designs among others.

The main thrust of the proposed amendment to this Act is the alignment to the provisions of the Constitution of Kenya 2010 and other clarifications such as replacing “minister” with “Cabinet Secretary”; correcting some referencing errors as well as introducing a slightly more elaborate procedure for the application, examination, opposition and registration of patents.

3. The Anti-Counterfeit Act,

The proposed amendment in this Act relates to transforming the Anti-Counterfeit Agency into an Authority and introducing new definitions that is; consumer and counterfeit mark which are key in the functioning of the institution. Secondly, the Agency is proposed to be given additional functions which are policy advisory and research on intellectual property and counterfeit matters. Third, the Executive Director and inspectors from the Agency have been proposed to be given powers same as the Commissioner General for KRA and customs officer respectively, when dealing with importation of counterfeit goods. Fourth, it also prescribes elaborate provisions to address offenses under counterfeiting including a tip-off from consumers being able to trigger an inspection. Finally, the amendment proposes an elaborate procedure for recording and issuance of anti-counterfeit security device, at a prescribed fee, by the Agency, the trademarks for goods to be imported into the country. This will also extend to copyrights, trade names and other forms of intellectual property, and the Agency is proposed to be granted powers to seize and destroy counterfeit goods imported into the country but found without security device.

Ideally, the proposed amendments seek to strengthen the Anti-Counterfeit Agency in order to be in a position to address the proliferation of counterfeits into the country, thereby evading payment of necessary taxes and disregarding the intellectual property. The penalties have also been enhanced for deterrent.

4. The Competition Act,

This law provides for the promoting and safeguarding competition in the economy as well as protecting consumers from unfavourable market conduct.

There is only one amendment is proposed for this Act, which is the change of the appointing authority of the chairperson of the Competition Authority from the Cabinet Secretary to the President. This is likely to give the Board of the authority a profile for effective performance of its functions.

6.0 RECOMMENDATION

Having analyzed the Bill vis-à-vis the memoranda submitted by the public, the Committee recommends that The Export Processing Zones Act, 1990, The Industrial Property Act, No. 3 of 2001, The Anti-Counterfeit Act, No. 13 of 2008 and The Competition Act, No. 12 of 2010 be approved and passed by the House with the following amendments—

The Export Processing Zones Act, 1990 (Cap. 517)

Section 2

THAT, the proposed definition of the term “eligible activities” be deleted and substituted therefor with the following—

S. 2 "eligible activities" include activities to enable agricultural activities preceding processing and value addition directly related to value addition conducted in Kenya within a gazetted export processing zone in aquaculture, horticulture, tea, coffee, floriculture dairy and ranching and silviculture.

Justification

The Committee was of the view that the proposed definition was likely to be abused by unscrupulous business individuals as there was no express requirement for the processing and value addition to be conducted in Kenya.

Section 21

THAT, the amendment proposed to be deleted and substituted therefor with the following—

S. 21 Delete the words “for a minimum period of thirty years within the export processing zone” and substitute therefor the words “or building or part thereof for a minimum period of ten years for land and buildings or part thereof”.

Justification

The Committee was of the view that the six years minimum lease period proposed for buildings or part thereof was short. The Committee therefore proposed to extend the lease period to ten years. The import of the Committee's amendment is to assign an equal minimum lease period for land, buildings or part thereof.

The Industrial Properties Act, (No. 2 of 2001)

Section 12 (2)

THAT, the amendment proposed to section 12(2) of the Act be deleted.

Justification

The Committee was of the view that delegation of duties is an administrative matter. Administrative matters do not as a matter of practice and principle warrant legislative intervention. The Board may issue directives on delegation of duties by the Managing Director to the Deputy Managing Director

Section 113 (6)

THAT, the amendment proposed to section 113 (6) should be deleted and substituted therefor the following—

The Cabinet Secretary shall through a competitive process appoint a person who has experience of not less than seven years in matters relating to industrial property being qualified and entitled to practice as an advocate in Kenya to be the Secretary to the Tribunal.

Justification

The Committee's proposal to have the provision amended to provide that the appointment of the Secretary to the Tribunal be through a competitive process shall create a platform for fair competition among applicants for the position of secretary to the Tribunal. This will ensure that merit and qualification is the criteria applied in appointing the Secretary to the Tribunal.

The Anti-Counterfeit Agency Act, (No. 13 of 2008)

Section 2

THAT, the Bill be amended in section 2 by inserting the words "or outside Kenya" immediately after the words "subsisting in Kenya" appearing in the definition of the word "counterfeiting".

Justification

The proposed new amendment is intended to enable the agency initiate measures targeted at protecting intellectual property rights registered outside Kenya.

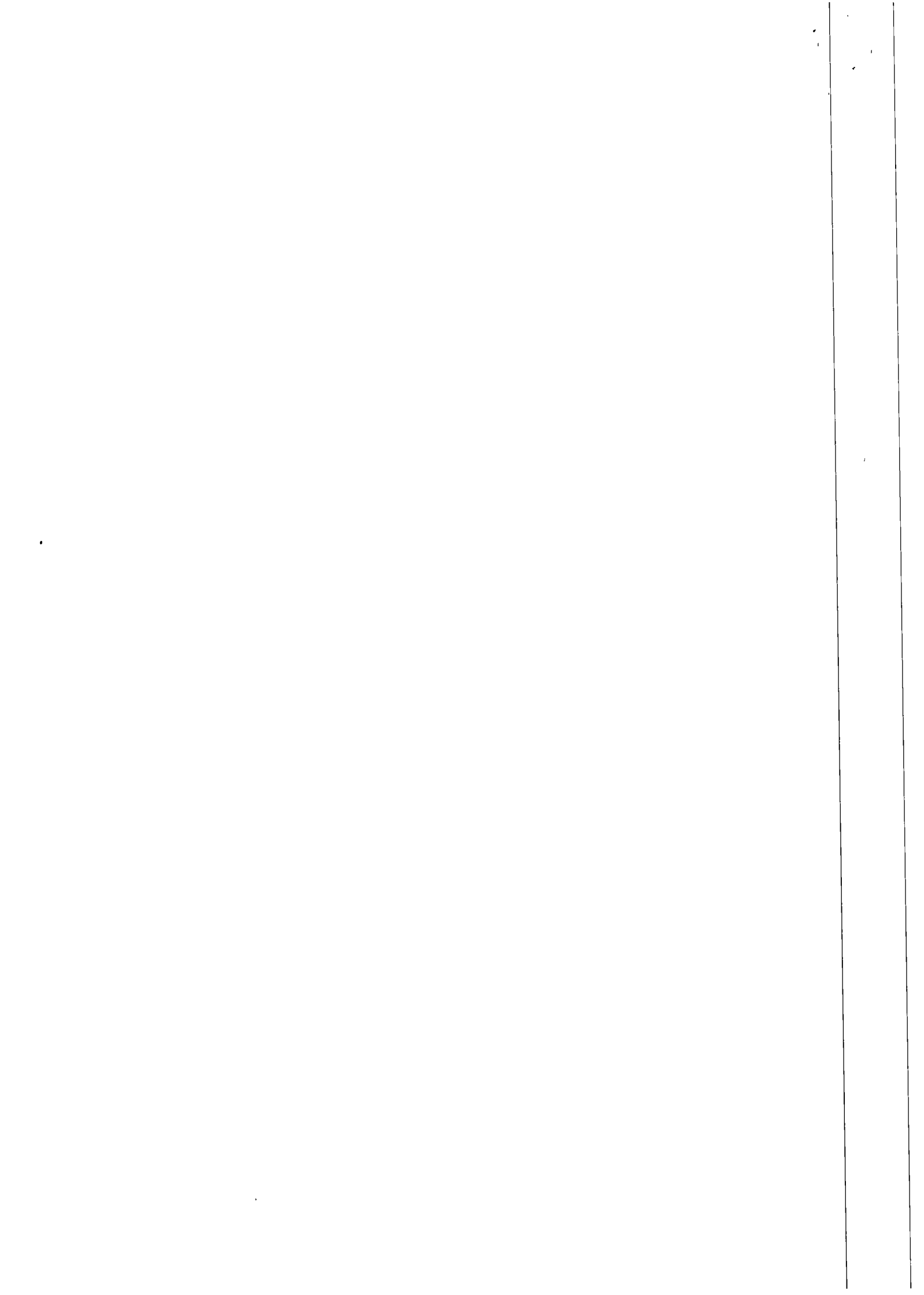
The Competition Act, No. 12 of 2010

THAT, the amendment proposed to the Competition Act, be adopted as proposed.

SIGNED..........DATE.....*28/06/2018*.....

HON. KANINI KEGA, M.P (CHAIRPERSON)

DEPARTMENTAL COMMITTEE ON TRADE, INDUSTRY AND COOPERATIVE



DEPARTMENTAL COMMITTEE ON TRADE, INDUSTRY & COOPERATIVES



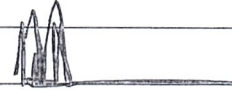
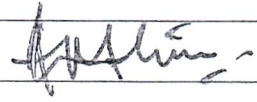
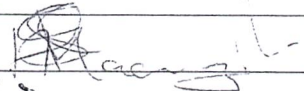
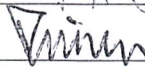
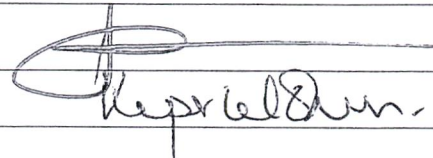
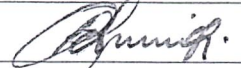
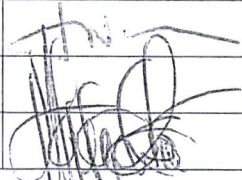
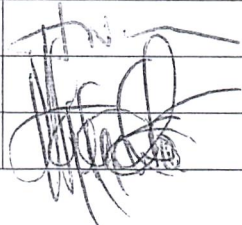
ADOPTION LIST

**Clerk's Chambers
National Assembly
NAIROBI**

National Assembly

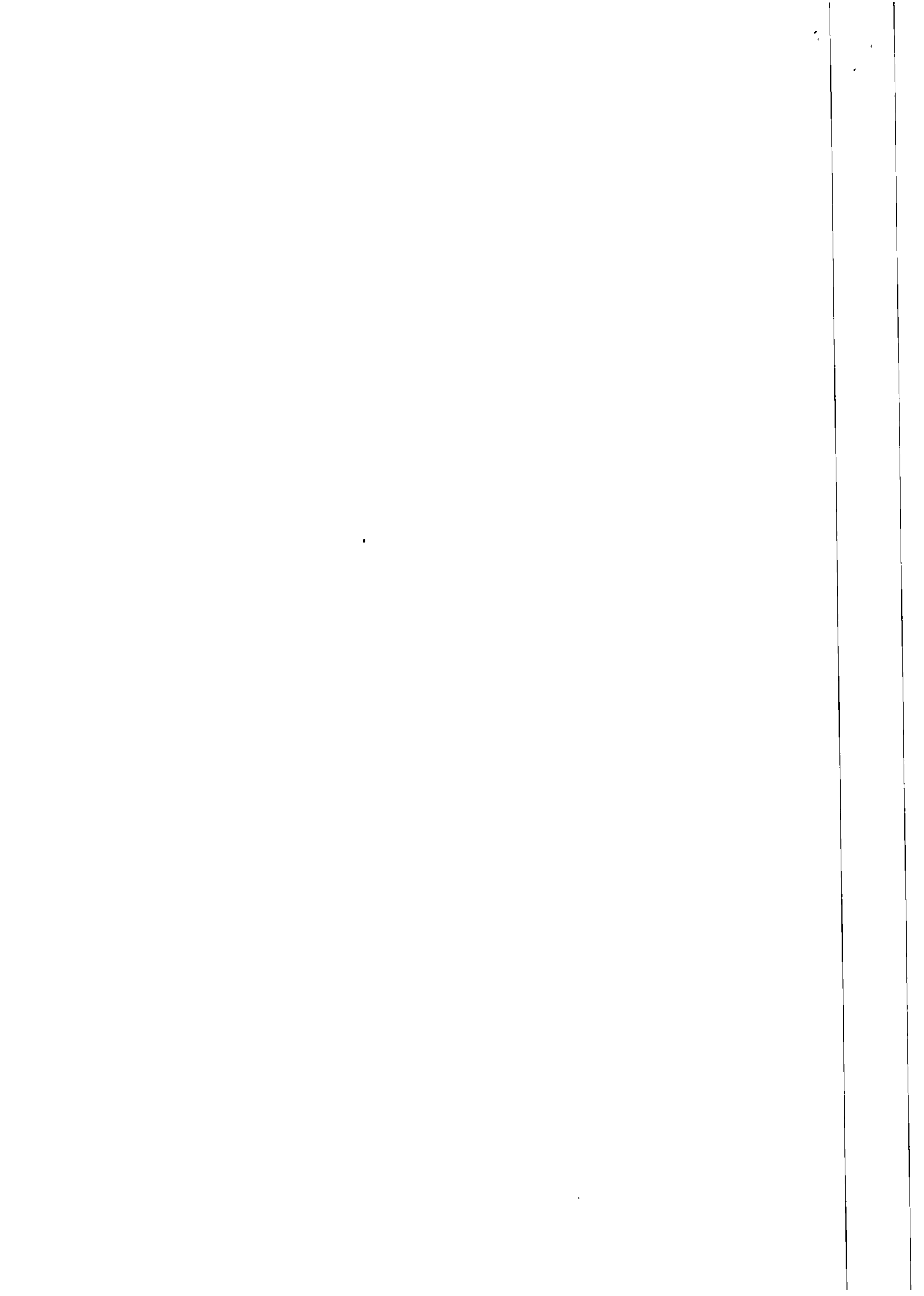
Agenda: The report on The Statute Law (Miscellaneous Amendment) Bill, 2018

Date: 20th June, 2018

NO.	NAME	SIGNATURE
1.	Hon. Kanini Kega, M.P. – Chairperson	
2.	Hon. Cornelly Serem, M.P. – Vice Chairman	
3.	Hon. Alexander Kimutai Kigen Kosgey, MP	
4.	Hon. Alois Musa Lentoimaga, MP	
5.	Hon. Anab Mohamed Gure, MP	
6.	Hon. Andrew Mwadime, MP	
7.	Hon. Bunyasi John Sakwa, MP	
8.	Hon. Daniel Maanzo, MP	
9.	Hon. Wanyonyi Ferdinand, MP	
10.	Hon. James Mukwe, MP	
11.	Hon. Jones Mlolwa, MP	
12.	Hon. Kipruto Moi, MP	
13.	Hon. Murungi Kathuri, MP	
14.	Hon. Gichimu Robert, MP	
15.	Hon. Kimani Patrick Wainaina Jungle, MP	
16.	Hon. Korir Generali Nixon Kiprotich, MP	
17.	Hon. Nduati Joseph Ngugi, MP	
18.	Hon. Wachira Rahab Mukami, MP	
19.	Hon. Dr. Wilberforce Oundo, Phd, MP	

ERIC NYAMBATI

FOR: CLERK OF THE NATIONAL ASSEMBLY



**MINUTES OF THE 14TH SITTING OF THE DEPARTMENTAL COMMITTEE ON
TRADE, INDUSTRY AND COOPERATIVES HELD ON THURSDAY 7TH JUNE, 2018
IN ROOM 26 IN KICC, AT 10.30 AM.**

PRESENT

1. Hon. Kanini Kega, MP – **Chairperson**
2. Hon. Cornelly Serem, MP – **Vice Chairperson**
3. Hon. Daniel Maanzo, MP
4. Hon. James Mukwe, MP
5. Hon. Jones Mlolwa, MP
6. Hon. Kipruto Moi, MP
7. Hon. Gichimu Robert, MP
8. Hon. Wachira Rahab Mukami, MP
9. Hon. (Dr.) Wilberforce Oundo, Phd, MP

APOLOGIES

1. Hon. Alexander Kimutai Kigen Kosgey, MP
2. Hon. Alois Musa Lentoimaga, MP
3. Hon. Andrew Mwadime, MP
4. Hon. Bunyasi John Sakwa, MP
5. Hon. Murungi Kathuri, MP
6. Hon. Wanyonyi Ferdinand, MP
7. Hon. Anab Mohamed Gure, MP
8. Hon. Kimani Patrick Wainaina Jungle, MP
9. Hon. Korir Generali Nixon Kiprotich, MP
10. Hon. Nduati Joseph Ngugi, MP

IN ATTENDANCE

NATIONAL ASSEMBLY

- | | | |
|----|--------------------|----------------------|
| 1. | Mr. Erick Nyambati | Clerk Assistant III |
| 2. | Ms. Nuri K. Nataan | Clerk Assistant III |
| 3. | Mr. Josphat Motonu | Fiscal Analyst I |
| 4. | Mr. Peter Mwaura | Legal Counsel II |
| 5. | Mr. Chelanga Maiyo | Research Officer III |
| 6. | Mr. Richard Sang | Sergeant at Arms |

MIN. NO.059/DC-N/2018

PRELIMINARIES

The Chairperson called the meeting to order at 10.30 am and proceeded to say the prayer. He thereafter invited the Legal Counsel to brief the Committee on the Statute Law.

MIN. NO.060/DC-N/2018

BRIEF ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) (NO. 1 AND 2) BILL, 2018

The Committee was briefed by the legal counsel as follows, that:-

The Bills proposes to amend;

1. The Co-operatives Societies Act, (Cap. 490) to create a new form of members of co-operative societies by creating a new class of members targeted towards social impact investments. The Bill seeks to safeguard member rights in the democratic choice in co-operative societies by giving the Cabinet Secretary supervisory powers to prevent oppression of members by creation of such new classes. It also seeks to limit the voting powers of social impact members to specific resolutions; maintenance and operation of the proposed Special Fund, investment committee, remuneration of the special fund trustee and similar affairs.
2. The Sacco Societies Act, (No. 14 of 2008) to create an exception to the restricted investments that a Sacco society is permitted to make. The Bill seeks to provide for the establishment of a Committee to monitor and supervise the Special Fund and the appointment of a Special Fund Trustee who shall be responsible for receiving and investing g the Special Fund.

3. The Micro and Small Enterprises Act to create a conducive environment for investors.
4. The Export Processing Zones Act to create a conducive environment for investors in the manufacturing sector and promoting value addition.
5. The industrial property act to align the definitions in the act with the constitution.
6. The Anti-Counterfeit Act, 2008 to make provisions relating to the Board and
7. The Competition Act to provide for the mode of appointment of chairpersons of the Competition Authority

The Committee was further informed that, it is worth noting that even though The Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12 and 13) should ideally contain minor and consequential amendments, some of the proposed amendments in the Bill seem to contain many and substantive amendments which may negate the philosophical principle behind the introduction of the “omnibus” Bill.

MIN. NO.061/DC-N/2018

CONSIDERATION OF MEMORANDA

The Committee received and considered memoranda from the following stakeholders as follows,

1. Ministry of Industry Trade and Cooperatives

Cooperative Societies Act

The Ministry opposed the proposed creation of a class of ‘social impact members’ on account of the fact that, the proposed amendment negates the philosophy, principles and values of the cooperative movement.

Further, exemption of the said members from payment of subscription fees violates principle number three of the cooperative movement on equality of members.

Further, that the approval of the resolution creating a category ‘special class members’ flies in the face of section 3 of the Cooperative Societies Act. The Ministry was of the view that the role of the Cabinet Secretary is limited to providing services which may be required for the efficient operation of cooperatives and the administration of the provisions of the Act.

In sum, the Ministry submitted that cooperatives are by nature an association of persons, not capital and that any attempts to provide otherwise ought not be entertained.

Sacco Societies Act

The Ministry submitted that it was opposed the proposed creation of a Special Fund since the same exists in the Cooperatives Act section 90A “Cooperative Fund”

The Ministry was further opposed to the creation of an Investment Fund since this would be tantamount to creating a parallel governance structure outside section 28 which provides that the Board shall be the governing body of the society.

That the proposed Investment Committee is an amorphous body since it neither a Committee of the Board nor management.

Creation of the proposed Special Fund Trustee will run parallel to the existing structure under the Sacco Societies Regulatory Authority (SASRA).

The Ministry is in the process of under taking wholesome review of the National Cooperative Policy. The exercise will result in a more comprehensive, guided and informed review of the cooperatives laws proposed for amendment.

2. Council of Governors

The Council submitted that an inter-governmental technical committee should be formed to review the entire principal Act since it was formed prior to the formation of county governments.

The Council further submitted that the Cooperatives Act does not take cognizance of counties yet the Sacco Societies Act makes reference to the Sacco Act on several occasions.

3. KUSCCO

Cooperative Societies Act

KUSCCO held the view that the proposed definition was unnecessary and that it does not fit within the context of cooperative societies as defined by the International Cooperative Alliance (ICA).

The union was opposed to the creation of a new class of members on the ground that the said members will operate outside the primary rules and principles of cooperative societies.

KUSCCO further submitted that the proposed amendments violate the International cooperative principles on open voluntary membership and democratic control.

Further, that the proposed amendment was a violation of international principle number three on economic member participation.

KUSCCO was opposed to the proposed amendment on the ground that approval of resolutions passed at the annual general meeting is a function of the Commissioner of cooperatives whilst the function of the Cabinet Secretary is limited to handling appeals emanating from the decisions of the Commissioner of Cooperatives.

Further, that the proposed amendment was an attempt to create a Board within a Board.

The union also opposed the amendment on the ground if carried as currently drafted the special class members will only champion their interests.

The union opposed the amendment on the ground that the provision greatly limits the rights of ordinary members and accords preferential treatment to the special class members.

In sum, KUSCCO was of the view that the proposed amendments were discriminatory.

Sacco Societies Act

The union submitted that—

Section 2

- (a) The proposed definition was unnecessary; and
- b) The proposed definition violates the cooperative principle which is the ground norm of the cooperative sector.

Section 17

submitted that—

- (a) It was opposed to the proposed creation of a new class of members on the ground that as currently structure, the said members stand to operate outside the core principles of the cooperative movement.

Section 19

submitted that—

- (a) It was opposed to the proposed amendment on the ground if carried, the special class members will only champion their interests thus defeating the principle of bipartisanship in the cooperative sector.

Section 21

submitted that—

- (a) It was opposed to this amendment on the ground that the provision limits the rights of ordinary members and accords preferential treatment to the special class members.

4. Cooperative Alliance of Kenya

Cooperative Societies Act

The Cooperative Alliance of Kenya submitted that cooperative principles require that members of a cooperative rank equally. No member of a cooperative movement should be accorded preferential treatment above other members.

Further, that the proposed amendment was both exclusionary and discriminatory as it seeks to make the rights of ordinary members subject to the rights of the proposed Special Class Members.

Sacco Societies Act

Submitted that the proposed amendments were out rightly discriminatory.

Further that the proposed amendment violate the basic cooperative principles including the principle on the economic participation of members

5. Anjarwalla & Khanna Co. Advocates

Anjarwalla & Kahanna Co. advocates submitted that—

Section 32 The proposed provision is arbitrarily broad. It will compel importers to pay for searches with the Anti-Counterfeit Authority. Too much would be lost waiting for searches. The provision does not limit its application to good imported in the course of trade. If carried it would be an offence to import any kind of goods for personal use into Kenya.

Recommendation

Deletion of the provision

Section 34

S 34B (1) Registration of Trademarks is a matter for the Kenya Industrial Properties Institute (KIPI).

This will be tantamount to unnecessary duplication of tasks amongst government agencies. Thus burdening investors and impacting negatively on the ease of doing business in Kenya. The provision flies in the face of the principle of territoriality in trademarks and IP rights The provision as read together with the offence created under section 32(j) presumes that the trademark or intellectual property mark will as of right have been registered in Kenya. This is not practicable as it is possible to use IP rights without registering them.

S. 34B (2) The section accords the Authority power to approve or decline applications for recordation trademarks.

It however fails to provide a criterion for such approval and denial.

Recommendation

The criterion for such approval or denial should be set-out expressly.

The same should be limited to confirmation that the documentary proof of currency and validity of the registration mark at KIPI.

S, 34B (3) The proposed section requires that the citizenship and political jurisdictional details be availed at the point of seeking registration.

Recommendation

The requirement to provide citizenship details should be expunged.

S. 34B(6) The proposed section proposes to that the recordation of a trademark shall be in force for one year only.

This time frame is unreasonably short in the importation business.

This will reduce the ease of doing business in Kenya.

Recommendation

Validity of the recordation of the trademark should be annexed to the validity of the corresponding registration at KIPi which is 10 years.

S. 34B(10) This section is on renewal of recordation. It appears the word “renewal” was left out.

Recommendation

Insert the phrase “for renewal of the recordation trademark” immediately after the words “written application”.

It is also proposed that the expulsion of the mandatory renewal of the recordation trademark.

S. 34B(13) This section requires the issues of an anti-counterfeit device upon payment of a specified fee. This will impact negatively on the ease of doing business in Kenya.

Recommendation

The security device should be issued free of charge or upon payment of a nominal fee.

S. 34B(14) The section proposes destruction of goods imported to Kenya and which do not bear the anti-counterfeit security device. As a general rule destruction of goods can only be undertaken on the strength of a court order. The section does not specify the meaning of originally imported into Kenya. Thus, it could be applied in retrospect.

Recommendation

Destruction of goods ought to be contingent upon—

- (a) Application by a holder of a certificate issued under the Act.
- (b) Issuance of a court order.

The Committee made the following observations on the proposed Bill;

1. The Cooperative Societies Act,

The Principal Act provides for the constitution, registration and regulation of the cooperatives in the country and related policies. The proposed amendment seeks to introduce a new type of membership of the cooperative societies called social impact membership, with the approval of the Cabinet Secretary. The purpose of this is to make use of the established legal framework of the cooperatives to create a system of social impact investment. However, the social impact member will not pay membership fees and voting rights will be limited to resolutions regarding the special fund, investment committee and the special fund trustee.

2. The Sacco Societies Act

This Act provides for licensing, regulation, supervision and promotion of the Sacco Societies in the country and also establishment of the Sacco Societies Regulatory Authority.

The main amendment here is the provision for a possible establishment of a special fund into which social impact members will contribute money for social impact investment that is meant to be borrowed by eligible persons for the purpose of funding their start-ups and viable innovations.

In particular, the amendment provides for the establishment of a Special Fund, Investment Committee, Advisory Board of the Investment Committee, Special Fund Trustee which is a corporate administrator of the special fund and the eligible persons within the specific Sacco Society where the special fund is established.

It is worth noting that the proposed new form of membership of the Cooperative Societies and the elaborate framework of operating the new arrangement intends to make use of the already established legal framework and success of the cooperatives movement in Kenya. Nevertheless, it is evident that there is no provision as to the benefits likely to accrue to the Sacco Society that may establish such special fund since the beneficiaries seem to be solely, the social impact members. In addition, there is no provision as to the contingent liabilities that may arise on account of establishing and operating this new system within the Saccos.

3. The Micro & Small Enterprises Act.

The Micro & Small Enterprises Act provides for the promotion, development and regulation of the Micro and Small Enterprises in the country and also establishment of the Micro & Small Enterprises Authority.

The main thrusts of the proposed amendment are two-fold: first, there is the introduction of an additional function to the Micro and Small Enterprises Authority which is to undertake accreditation of business development service providers. The second one relates to the

introduction of new source of funding to the Micro and Small Enterprises Fund as Parliamentary Appropriation. Since part of the payouts from the fund is meant to fund SMEs, then this latter proposal may be considered alongside the fact that funding for SMEs may be achieved through the already existing Kenya Industrial Estates (KIE) mechanism or the now proposed social fund under the SACCO Societies legislation.

4. The Export Processing Act,

The first amendment relates to Section 2 of the Act by introducing eligible activities in the Export Processing Zones. They comprise of agricultural activities preceding processing as well as value addition, aquaculture, dairy & ranching as well as silviculture. The second amendment is about opening up the criteria of declaring an Export Processing Zone to include a land and building or parts of them. The third amendment proposes to relax the qualifications of an EPZ developer or operator to reduce the minimum period of holding land for the EPZ activity from 30 to 10 years and building for 6 years.

5. The Industrial Property Act

The Industrial Property Act provides for promotion of inventive and innovative activities to facilitate the acquisition of technology through the grant and regulation of patents, utility models, technovations and industrial designs among others.

The main thrust of the proposed amendment to this Act is the alignment to the provisions of the Constitution of Kenya 2010 and other clarifications such as replacing “minister” with “Cabinet Secretary”; correcting some referencing errors as well as introducing a slightly more elaborate procedure for the application, examination, opposition and registration of patents.

6. The Anti-Counterfeit Act,

The proposed amendment in this Act relates to transforming the Anti-Counterfeit Agency into an Authority and introducing new definitions that is; consumer and counterfeit mark which are key in the functioning of the institution. Secondly, the Agency is proposed to be given additional functions which are policy advisory and research on intellectual property and counterfeit matters. Third, the Executive Director and inspectors from the Agency have been proposed to be given powers same as the Commissioner General for KRA and customs officer respectively, when dealing with importation of counterfeit goods. Fourth, it also prescribes elaborate provisions to address offenses under counterfeiting including a tip-off from consumers being able to trigger an inspection. Finally, the amendment proposes an elaborate procedure for recording and issuance of anti-counterfeit security device, at a prescribed fee, by the Agency, the trademarks for goods to be imported into the country. This will also extend to copyrights, trade names and other forms of intellectual property, and the Agency is proposed to be granted powers to seize and destroy counterfeit goods imported into the country but found without security device.

Ideally, the proposed amendments seek to strengthen the Anti-Counterfeit Agency in order to be in a position to address the proliferation of counterfeits into the country, thereby evading payment of necessary taxes and disregarding the intellectual property. The penalties have also been enhanced for deterrent.

7. The Competition Act,

This law provides for the promoting and safeguarding competition in the economy as well as protecting consumers from unfavorable market conduct.

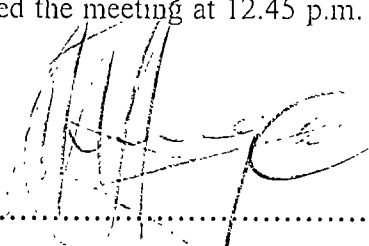
There is only one amendment is proposed for this Act, which is the change of the appointing authority of the chairperson of the Competition Authority from the Cabinet Secretary to the President. This is likely to give the Board of the authority a profile for effective performance of its functions.

MIN. NO.063/DC-N/2018

ADJOURNMENT

The Chairperson adjourned the meeting at 12.45 p.m. The date for the next meeting will be held on notice.

SIGNED.....



(Chairperson)

DATE.....

20/06/2018

**MINUTES OF THE 15TH SITTING OF THE DEPARTMENTAL COMMITTEE ON
TRADE, INDUSTRY AND COOPERATIVES HELD ON THURSDAY 14TH JUNE, 2018
IN CPA ROOM, MAIN PARLIAMENT BUILDING, AT 10.30 AM.**

PRESENT

1. Hon. Kanini Kega, MP – **Chairperson**
2. Hon. Cornelly Serem, MP –**Vice Chairperson**
3. Hon. Alois Musa Lentoimaga, MP
4. Hon. Andrew Mwadime, MP
5. Hon. Daniel Maanzo, MP
6. Hon. James Mukwe, MP
7. Hon. Kipruto Moi, MP
8. Hon. Gichimu Robert, MP
9. Hon. Kimani Patrick Wainaina Jungle, MP
10. Hon. Nduati Joseph Ngugi, MP
11. Hon. Wachira Rahab Mukami, MP
12. Hon. (Dr.) Wilberforce Oundo, Phd, MP

APOLOGIES

1. Hon. Alexander Kimutai Kigen Kosgey, MP
2. Hon. Bunyasi John Sakwa, MP
3. Hon. Murungi Kathuri, MP
4. Hon. Jones Mlolwa, MP
5. Hon. Wanyonyi Ferdinand, MP
6. Hon. Anab Mohamed Gure, MP
7. Hon. Korir Generali Nixon Kiprotich, MP

IN ATTENDANCE

STAKEHOLDERS

- | | | |
|----|---------------------|--|
| 1. | Fanwel Kidenda | CEO EPZA |
| 2. | Charles W. Mahinda | AG. CEO Special Economic Zones Authority |
| 3. | Ms. Doris Githua | Ministry of Industry, Trade and Cooperatives |
| 4. | Ms. Maria Ouya | Corp. Secretary EPZA |
| 5. | Mr. Ephantus Mogere | Account Manager Legal Service EPZA |
| 6. | Mr. J. O. Adero | DD ACA |
| 7. | Dr. John Akoth | DD ACA |

NATIONAL ASSEMBLY

- | | | |
|----|---------------------|----------------------|
| 1. | Mr. Erick Nyambati | Clerk Assistant III |
| 2. | Ms. Nuri K. Nataan | Clerk Assistant III |
| 3. | Mr. Peter Mwaura | Legal Counsel II |
| 4. | Mr. Jonathan Lemurt | Fiscal Analyst |
| 5. | Mr. Chelanga Maiyo | Research Officer III |
| 6. | Ms. Winifred Atieno | Audio Officer |
| 7. | Mr. Richard Sang | Sergeant at Arms |

MIN. NO.064/DC-N/2018

PRELIMINARIES

The Chairperson called the meeting to order at 10.30 am and proceeded to say the prayer. Introductions were made thereafter and the stakeholders were invited to submit their views on the Statute Law (Miscellaneous Amendment) Bill, 2018.

MIN. NO.065/DC-N/2018

MEETING WITH STAKEHOLDERS ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2018

SPECIAL ECONOMIC ZONES AUTHORITY

The Chief Executive Officer (EPZA) Mr. Mahinda submitted as follows, that;-

EPZA welcomes the proposed amendments as it will create a conducive environment for investors in the manufacturing sector and promoting value addition.

The proposed amendments seeks to broaden the list of eligible activities under the EPZ Act (Cap 517) of the Laws of Kenya

The proposal seeks to reduce the cost of value addition on local agricultural products by integrating the agricultural activities with direct value addition under the Export Processing Zones (EPZ) program as opposed to the current situation where the separation approach leads to increased costs as the agricultural activities are taxed and administered under a separate regulatory regime then the value addition is regulated under the EPZs. This will expand EPZ benefits to the agricultural activity and therefore make Kenya's value added agricultural products more competitive globally.

Commercial activities have been allowed under the EPZ Act since inception of the EPZ program. EPZA works with KRA Customs Services which is present at all EPZs and is mandated to collect revenue to ensure compliance and collect taxes on EPZ local sales.

The proposed amendment targets attraction of investments in Global Sourcing/Buying Houses (IPR own-ers/brand owners); Regional Distribution/Logistics Hubs (e.g. intermediate goods and consumables) with full taxes paid for domestic sales.

The current restriction makes Kenya unattractive as a regional trade logistics hub and denies local manufacturers ready access to critical inputs to support manufacturing investments.

ANTI-COUNTERFEIT AGENCY

The CEO ACA, Mr. Kidenda submitted as follows, that;-

The Agency welcome the proposed amendments as it will keep away counterfeits from the market and ensure fair competition and ease of doing business for legitimate businesses.

ACA's experience has shown that unbranded goods are a major source of IP infringements.

Kenya is under obligation to provide protection for trademarks registered in other countries under TRIPS and in respect of goods that are traded in the country. Therefore, IP protection must not be made voluntary in order to protect the IP owners, government, consumers and the general public from harmful counterfeit goods.

MIN. NO.066/DC-N/2018

COMMITTEE OBSERVATIONS

The Committee observed that,

The Bill seem to contain many and substantive amendments which may negate the philosophical principle behind the introduction of the “omnibus” Bill which should ideally contain minor and consequential amendments.

There was need to hold another consultative meeting with the Special Economic Zones Authority, Anti-Counterfeit Authority in conjunction with the Ministry of Industry, Trade and Cooperatives so that Members can be well informed regarding the proposed amendments. It was therefore recommended that the secretariat to organize a retreat on the same.

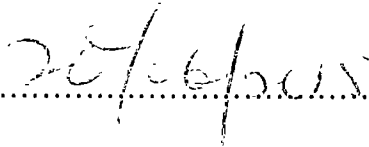
MIN. NO.067/DC-N/2018

ADJOURNMENT

The Chairperson adjourned the meeting at 12.45 p.m. The date for the next meeting will be held on notice.

SIGNED.....

(Chairperson)

DATE.....

**MINUTES OF THE 17TH SITTING OF THE DEPARTMENTAL COMMITTEE ON
TRADE, INDUSTRY AND COOPERATIVES HELD ON WEDNESDAY 20TH JUNE,
2018 AT THE BOMA HOTEL, AT 10.00 AM.**

PRESENT

1. Hon. Kanini Kega, MP – **Chairperson**
2. Hon. Cornelly Serem, MP – **Vice Chairperson**
3. Hon. Alois Musa Lentoimaga, MP
4. Hon. Andrew Mwadime, MP
5. Hon. Daniel Maanzo, MP
6. Hon. Wanyonyi Ferdinand, MP
7. Hon. James Mukwe, MP
8. Hon. Jones Mlolwa, MP
9. Hon. Kipruto Moi, MP
10. Hon. Murungi Kathuri, MP
11. Hon. Gichimu Robert, MP
12. Hon. Korir Generali Nixon Kiprotich, MP
13. Hon. Wachira Rahab Mukami, MP
14. Hon. (Dr.) Wilberforce Oundo, Phd, MP

APOLOGIES

1. Hon. Alexander Kimutai Kigen Kosgey, MP
2. Hon. Bunyasi John Sakwa, MP
3. Hon. Anab Mohamed Gure, MP
4. Hon. Kimani Patrick Wainaina Jungle, MP
5. Hon. Nduati Joseph Ngugi, MP

IN ATTENDANCE

STAKEHOLDERS

1. Dr. Adan Mohammed, EGH CS, Ministry of Industry, Trade and Cooperatives
2. Mr. Ismail Noor PS State Department for Cooperatives
3. Mr. Fanwel Kidenda CEO EPZA
4. Mr. Charles W. Mahinda AG. CEO Special Economic Zones Authority
5. Ms. Doris Githua Ministry of Industry, Trade and Cooperatives
6. Ms. Maria Ouya Corp. Secretary EPZA
7. Mr. Ephantus Mogere Account Manager Legal Service EPZA
8. Mr. J. O. Adero DD ACA
9. Dr. John Akoth DD ACA

NATIONAL ASSEMBLY

1. Mr. Robert Nyaga Deputy Director PBO
2. Mr. Erick Nyambati Clerk Assistant III
3. Ms. Nuri K. Nataan Clerk Assistant III
4. Mr. Peter Mwaura Legal Counsel II
5. Mr. Chelanga Maiyo Research Officer III
6. Mr. Richard Sang Sergeant at Arms

MIN. NO.072/DC-N/2018

PRELIMINARIES

The Chairperson called the meeting to order at 10.00 am and proceeded to say the prayer. Introductions were made thereafter and the stakeholders were invited to submit their views on the Statute Law (Miscellaneous Amendment) Bill, 2018.

MIN. NO.073/DC-N/2018

**MEETING WITH THE MINISTRY OF INDUSTRY,
TRADE AND COOPERATIVES ON THE STATUTE
LAW (MISCELLANEOUS AMENDMENTS) BILL,
2018**

The Committee had a consultative meeting with the Ministry regarding the Statute Law (Miscellaneous Amendments) Bill, 2018 and made the following observations, that:-

1. There is need to change the name of Anti-Counterfeit Agency to Anti-Counterfeit Authority to enhance the enforcement power of the Agency in its operation.
2. The Authority will have to change the management structure to conform with the structure of an Authority including the Board of Directors
3. There is need to define a consumer in order for a consumer to report counterfeiting other than the trademark owner alone, to protect the intellectual property rights
4. To expand the fight against counterfeiting there is need to review the structure of the agency as well as provide adequate financing through budgetary allocation
5. Section 23 seeks to expand the scope of inspectors to enhance their powers to ensure that inspectors are granted permission to inspect premises suspected to have counterfeit goods.
6. There is need to put the penalty for possession of counterfeit goods at Kes. 200,000 or three times the value of goods whichever is higher.
7. There is need to change terms such as the Minister to correct anomalies under the Industrial Property Act
8. Delegation of duties should not be an Act of Parliament but be handled administratively

MIN. NO.074/DC-N/2018

**CONSIDERATION OF THE STATUTE LAW
(MISCELLANEOUS AMENDMENTS) BILL, 2018**

The Committee deliberated on the Bill as follows—

Clause by Clause Analysis

The Committee analyzed the proposed amendments clause by clause and made its recommendations as follows—

1. Export Processing Zones Act 1990, CAP 517

Section 2 Insert the following definition in proper alphabetical sequence-

"eligible activities" include activities to enable agricultural activities preceding processing and value addition, aquaculture, dairy and ranching and silviculture.

Recommendation

THAT, the proposed definition of the term "eligible activities" be deleted and substituted therefor with the following—

S. 2 "eligible activities" include activities to enable agricultural activities preceding processing and value addition directly related to value addition conducted in Kenya within a gazetted export processing zone in aquaculture, horticulture, tea, coffee, floriculture, dairy, ranching and silviculture.

Justification

The Committee was of the view that the proposed definition was likely to be abused by unscrupulous business individuals as there was no express requirement for the processing and value addition to be conducted in Kenya. Further, there was no requirement that the processing and value addition be conducted within the confines of a gazette export processing zone.

Section 15 (1)

Insert the following words "land or building or part thereof immediately after the word "area".

Recommendation

Agreed to

Section 21 (2) Delete the words "for a minimum period of thirty years within the export processing zone" and substitute therefor the words "or buildings or part thereof for a minimum period of ten years for land and six years for buildings or part thereof".

Recommendation

THAT, the amendment proposed to section 21 be deleted and substituted therefor with the following—

S. 21 Delete the words “for a minimum period of thirty years within the export processing zone” and substitute therefor the words “or building or part thereof for a minimum period of ten years for land and buildings or part thereof”.

Justification

The Committee was of the view that the six years minimum lease period proposed for buildings or part thereof was short. The Committee therefore proposed to extend the lease period to ten years. The import of the Committee’s amendment is to assign an equal minimum lease period for land, buildings or part thereof.

Section 26 (3B)

Delete

Recommendation

Agreed to

2. The Industrial Properties Act, (No. 3 of 2001)

Section 2

Delete the definition of the expressions "ARIPO protocol", "National Commission for Science, Technology and Innovation" and "Minister".

Insert the following new definitions in proper alphabetical sequence-

"Cabinet Secretary" means the Cabinet Secretary for the time being responsible for matters relating to the Institute;

"Harare Protocol" means the protocol on patents and industrial designs adopted at Harare on 10th December 1982;

"international-type search" means a search similar to an international search provided under Article 15 of the Patent Cooperation Treaty;

"National Commission for Science, Technology and Innovation" has the meaning assigned to it under the Science, Technology and Innovation Act, 2013.

Recommendation

Agreed to

Section 6

Delete the word "Minister" wherever it occurs and substitute therefor the word "Cabinet Secretary".

Recommendation

Agreed to

Section 9 Delete the word "Minister" and substitute therefor the word "Cabinet Secretary".

Recommendation

Agreed to

Section 12 (2)

Delete and substitute therefor the following new subsection—

(2) The Managing Director may delegate to a Deputy Managing Director or to a manager the functions conferred on him or her under this Act.

Recommendation

THAT, the amendment proposed to section 12(2) of the Act be deleted.

Justification

The Committee was of the view that delegation of duties is an administrative matter. Administrative matters do not as a matter of practice and principle warrant legislative intervention. The Board may issue directives on delegation of duties by the Managing Director to the Deputy Managing Director.

Section 16

Delete the word "Minister" and substitute therefor the words "Cabinet Secretary".

Recommendation

Agreed to

Section 18

Delete the word "Minister" wherever it occurs and substitute therefor the words "Cabinet Secretary".

Recommendation

Agreed to

Section 21 Delete the word “Minister” and substitute therefor the words “Cabinet Secretary”.

Recommendation

Agreed to

Section 27 Delete the word “Minister” wherever it occurs and substitute therefor the words “Cabinet Secretary”.

Recommendation

Agreed to

Section 29 (1) (a) Delete and substitute therefor the following new paragraph–

(a) a culture of the micro-organism has been deposited with a depository institution as prescribed by the regulations.

Recommendation

Agreed to

Section 29 (1) (b) Delete

Recommendation

Agreed to

Section 29 (1) (c) Delete

Recommendation

Agreed to

Section 34 (4) Delete and substitute therefor the following new subsection–

(4) The appointment of an agent shall be indicated by furnishing a power of attorney signed by the applicant

Recommendation

Agreed to

Section 34 (5) Delete and substitute therefor the following new subsection–

(5) The description shall disclose the invention and the best mode for carrying out the invention, in full, clear, concise and exact terms as to enable a person skilled in the art to make, use or evaluate the invention and that description shall include any drawing and relevant deposits as in the case of microorganisms and self-replicable material which are essential for the understanding of the invention.

Recommendation

Agreed to

Section 53 (2) (a) Delete and substitute therefor the following new paragraph–

“(a) to disclose the invention in accordance with this Act.”

Recommendation

Agreed to

Section 59 Delete and substitute therefor the following new section–

(1) For the purposes of this section–

“regional application” means an application for a patent, utility model or industrial design filed in accordance with the Harare Protocol and the regulations made thereunder;

“receiving office” has the meaning assigned to it by the Harare Protocol;

“designated office” has the meaning assigned to it by the Harare Protocol;

“designate” has the meaning assigned to it by the Harare Protocol;

(2) The Institute shall act as a receiving office where Kenya is designated in a regional application.

(3) The Institute shall act as a designated office where Kenya is designated in a regional application.

(4) The functions of the Institute under this section shall be performed in accordance with the provisions of this Act and the Harare Protocol;

Provided that in case of conflict, the provisions of this Act shall apply.

(5) A patent, utility model or industrial design granted or registered under the Harare Protocol and in which Kenya is designated shall be treated as if it were granted or registered under this Act.

(6) For purposes of subsection (5)–

(a) the owner of the patent, utility model or industrial design shall have the same rights and remedies and be subject to the same conditions as the owner of a patent, utility model or industrial design granted or registered under this Act; and

(b) the provisions of this Act relating to surrender, revocation, infringement and rectification of registers shall apply, with necessary modifications, to the patent, utility model or industrial design.

(7) The requirements and procedures under this section shall be prescribed in regulations.

Recommendation

Agreed to

Section 62

Delete the word “court” and substitute therefor the word “Tribunal”.

Recommendation

Agreed to

Section 63 Delete and substitute therefor the following new section—

63. In the absence of any agreement to the contrary between the parties, joint owners of an application or a patent may, separately, transfer their rights in the application or patent, exploit the protected patent and preclude any person from exploiting the patent but may only jointly grant permission to any third person to do any of the acts referred to in section 54.

Recommendation

Agreed to

Section 77 Delete the word “Minister” and substitute therefor the words “Cabinet Secretary”.

Recommendation

Agreed to

Section 80 Delete the word “minister” wherever it occurs and substitute therefor the word “Cabinet Secretary”.

Recommendation

Agreed to

Section 84 (1) Delete and substitute therefor the following new subsection—

“(1) For the purposes of this Part –

“industrial design” means the overall appearance of a product resulting from one or more visual features of the shape, configuration, pattern or ornamentation of a product; and

“product” means anything that is made by hand, tool or machine.

Recommendation

Agreed to

Section 84 (2) Delete and substitute therefor the following new subsection—

(2) The protection under this Act shall not extend to anything in an industrial design which serves solely to obtain a technical result or to methods or principles of manufacture or construction.

Recommendation

Agreed to

Section 86 (2) Delete and substitute therefor the following new subsection—

(2) An industrial design is new unless it is identical or substantially similar in overall impression to an industrial design that has been disclosed to the public anywhere in the world by publication or use prior to the filing date or, where applicable, the priority date of the application for registration

(3) Delete and substitute therefor the following new subsection—

“(3) Section 23(4) shall apply, with necessary modifications, with respect to industrial designs.”

(4) Delete and substitute therefor the following new subsection—

“(4) The following shall not be registered as industrial designs –

(a) industrial designs that are contrary to public order and morality;

(b) works of sculpture, architecture, painting, photography and any other creations that are purely of artistic nature.”

Insert the following new subsection immediately after subsection (4) –

“(5) The details of the requirements and the procedure under this section shall be prescribed in regulations.”

Recommendation

Agreed to

Section 87 Delete the marginal note and substitute therefor with the following new marginal note—

“Application, examination, opposition and registration.”

(2) Delete.

(4) Delete and substitute therefor the following new subsection—

(4) Section 36 shall apply, with necessary modifications, in respect of amendment and division of applications for registration of industrial designs.

(6) Delete the expression “or a specimen thereof” in the proviso.

(8) Delete and substitute therefor the following new subsection—

(8) The managing director shall, if satisfied that an application meets the requirements of this section and of sections 84 and 86, accept the application and publish it in the prescribed manner.

(9) Delete and substitute therefor the following new subsection—

(9) Any interested person may, within the prescribed time and in the prescribed manner, give notice of opposition to the Managing Director.

Insert the following new subsections after subsection (9)—

(10) Where the managing Director establishes that a design application does not meet the requirements for registration, the Managing Director shall send the applicant a report setting out the objections to registration and if the applicant does not reply to the objections within the prescribed period, the application shall be deemed abandoned.

(11) Where an application for registration of an industrial design is accepted and published in error, the Managing Director may publish in the journal an indication to that effect and direct that the application be re-examined.

(12) The details of the requirements and procedure under this section shall be prescribed in regulations.

(13) The Managing Director shall, if satisfied that an application meets the requirements of this Act, register the industrial design and issue a certificate of registration to the applicant.

Recommendation

Agreed to

Section 90 Delete the expression “specimens, etc” in the marginal note.

Recommendation

Agreed to

Section 90 (1) Delete and substitute therefor the following new subsection—

(1) An application for registration of an industrial design together with any drawing, photograph, graphic representation or specimen shall be kept confidential until the application is published in accordance with section 87.

Recommendation

Agreed to

Section 90 (2) Delete the expression “and specimens” in paragraph (d).

Recommendation

Agreed to

Section 90 (3) Delete and substitute therefor the following new subsection—

(3) After publication, any person may obtain the official copy of the application.

Recommendation

Agreed to

Section 90 (4) Delete.

Recommendation

Agreed to

Section 91 Delete and substitute therefor the following new section—

91. The Managing Director shall, in relation to each industrial design registered under section 87, publish the details prescribed in the regulations.

New Insert the following new section after section 91—

91A. Section 46 shall apply, with necessary modifications, with respect to the maintaining of the register of industrial designs.

Recommendation

Agreed to

Section 92 (4) Delete and substitute therefor the following new subsection—

(4) Section 59 shall apply, with necessary modifications, with respect to industrial design applications or industrial designs registered under the Harare Protocol.

Recommendation

Agreed to

Section 93 (2) Delete and substitute therefor the following new subsection—

(2) The provisions of sections 62, 63, 64, 65, 66, 67, 68, 69, 70 and 71 shall apply, with necessary modifications, to this Part.

Recommendation

Agreed to

Section 113 Delete the word “minister” wherever it occurs and substitute therefor the word “Cabinet Secretary”.

Recommendation

Agreed to

Section 113 (6)

Delete and substitute therefor the following new subsection—

(6) The Cabinet Secretary shall appoint a person who has experience of not less than seven years in matters relating to industrial property being qualified and entitled to practise as an advocate in Kenya to be the Secretary to the Tribunal.

Recommendation

THAT, the amendment proposed to section 113 (6) should be deleted and substituted therefor the following—

(6) The Cabinet Secretary shall through a competitive process appoint a person who has experience of not less than seven years in matters relating to industrial property being qualified and entitled to practice as an advocate in Kenya to be the Secretary to the Tribunal.

Justification

The Committee’s proposal to have the provision amended to provide that the appointment of the Secretary to the Tribunal be through a competitive process shall create a platform for fair competition among applicants for the position of secretary to the Tribunal. This will ensure that merit and qualification is the criteria applied in appointing the Secretary to the Tribunal.

Section 117 Delete the word “minister” and substitute therefor the word “Cabinet Secretary”.

Recommendation

Agreed to

Section 120 Delete the word “minister” wherever it occurs and substitute therefor the word “Cabinet Secretary”.

Recommendation

Agreed to

Second Schedule Delete the word “minister” wherever it occurs and substitute therefor the word “Cabinet Secretary”.

Recommendation

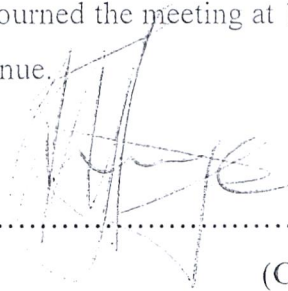
Agreed to

MIN. NO.075/DC-N/2018

ADJOURNMENT

The Chairperson adjourned the meeting at 1.30 p.m. The next meeting will be held at 2.30pm the same day in same venue.

SIGNED.....



(Chairperson)

DATE.....



**MINUTES OF THE 18TH SITTING OF THE DEPARTMENTAL COMMITTEE ON
TRADE, INDUSTRY AND COOPERATIVES HELD ON WEDNESDAY 20TH JUNE,
2018 AT THE BOMA HOTEL, AT 3.00 PM.**

PRESENT

1. Hon. Kanini Kega, MP – **Chairperson**
2. Hon. Cornelly Serem, MP – **Vice Chairperson**
3. Hon. Alois Musa Lentoimaga, MP
4. Hon. Andrew Mwadime, MP
5. Hon. Daniel Maanzo, MP
6. Hon. Wanyonyi Ferdinand, MP
7. Hon. James Mukwe, MP
8. Hon. Jones Mlolwa, MP
9. Hon. Kipruto Moi, MP
10. Hon. Murungi Kathuri, MP
11. Hon. Gichimu Robert, MP
12. Hon. Korir Generali Nixon Kiprotich, MP
13. Hon. Wachira Rahab Mukami, MP
14. Hon. (Dr.) Wilberforce Oundo, Phd, MP

APOLOGIES

1. Hon. Alexander Kimutai Kigen Kosgey, MP
2. Hon. Bunyasi John Sakwa, MP
3. Hon. Anab Mohamed Gure, MP
4. Hon. Kimani Patrick Wainaina Jungle, MP
5. Hon. Nduati Joseph Ngugi, MP

IN ATTENDANCE

STAKEHOLDERS

- | | | |
|----|------------------------|--|
| 1. | Dr. Adan Mohammed, EGH | CS, Ministry of Industry, Trade and Cooperatives |
| 2. | Mr. Ismail Noor | PS State Department for Cooperatives |
| 3. | Mr. Fanwel Kidenda | CEO EPZA |
| 4. | Mr. Charles W. Mahinda | AG. CEO Special Economic Zones Authority |
| 5. | Ms. Doris Githua | Ministry of Industry, Trade and Cooperatives |
| 6. | Ms. Maria Ouya | Corp. Secretary EPZA |
| 7. | Mr. Ephantus Mogere | Account Manager Legal Service EPZA |
| 8. | Mr. J. O. Adero | DD ACA |
| 9. | Dr. John Akoth | DD ACA |

NATIONAL ASSEMBLY

- | | | |
|----|--------------------|----------------------|
| 1. | Mr. Robert Nyaga | Deputy Director PBO |
| 2. | Mr. Erick Nyambati | Clerk Assistant III |
| 3. | Ms. Nuri K. Nataan | Clerk Assistant III |
| 4. | Mr. Peter Mwaura | Legal Counsel II |
| 5. | Mr. Chelanga Maiyo | Research Officer III |
| 6. | Mr. Richard Sang | Sergeant at Arms |

MIN. NO.076/DC-N/2018

PRELIMINARIES

The Chairperson called the meeting to order at 3.00 pm and proceeded to say the prayer.

MIN. NO.077/DC-N/2018

CONSIDERATION OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL, 2018

The Committee deliberated on the Bill as follows—

Clause by Clause Analysis

The Committee analyzed the proposed amendments clause by clause and made its recommendations as follows—

3. Anti-Counterfeit Act, 2008 (No.13 of 2018)

Long title

Delete the word “agency” and substitute therefor the word “Authority”.

Recommendation

Agreed to

Section 2

Delete the definition of the term “Agency” and substitute therefor the following definition—

“Authority” means the Anti-Counterfeit Authority established under section 3;

Insert the words “any item that bears an intellectual property right” ,immediately after the “counterfeiting” in the definition of “counterfeit goods.”

"consumer" includes any member of the public or person who purchases or likely to purchase goods as an end user other than the owner of intellectual property right; and

"counterfeit mark" means a spurious mark-

(a) that is used in connection with any goods, labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, hand tags, documentation or packaging of any type or nature;

(b) that is identical with, or substantially indistinguishable from, a mark registered in the trade mark register and in use, whether or not a person knows such a mark was registered;

(c) that is applied to or used in connection with the goods for which the mark is registered, or is applied to or consists of a label, patch, sticker, wrapper, badges, emblems, medallion, charms, boxes, containers, cans, hand tags, documentation or packaging of any type or nature, that is designed, marked or otherwise intended to be used on or in connection with the goods for which the mark is registered; and

(d) The use of which is likely to cause confusion, to cause mistake, or to deceive.

Recommendation

Agreed to

Part II

Delete the word “Agency” and substitute therefor the word “Authority”.

Recommendation

Agreed to

Section 3 Marginal note

Delete the word "Agency" appearing in the marginal note and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 3 (1)

Delete the word "Agency" wherever it appears and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 3 (2)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 4

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 5

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Opening Statement

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 5(d)

Insert the following paragraphs immediately paragraph (d)-

(da) advise the government through the Cabinet Secretary on policies and measures concerning the necessary support, promotion and protection of intellectual property rights as well as the extent of counterfeiting;

(db) to carry out inquiries, studies and research into matters relating to counterfeiting and the protection of intellectual property rights.

Recommendation

Agreed to

Section 6 Marginal note

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 6(1)

Delete the word "Agency" and substitute therefor the word "Authority."

Recommendation

Agreed to

Section 7(a)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 7(b)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 7(c)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 7(d)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 7(e)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 7(f)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 7(g)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 10 (1)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 10 (2) (c)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 11 (Marginal Note)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 11

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to.

Section 12 (1)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 12 (2)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 12 (3)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 14 (1)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 14 (2)

Delete the word "Agency" wherever it appears and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 15

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 16 (2)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 16 (3)

Insert the following subsections immediately after subsection (3)—

(3A) Notwithstanding the provisions of any other written law for the time being in force, no claim under this Act shall be brought against the Authority for any alleged damage to or loss of any goods after the expiry of a period of twelve months from the date of the seizure, removal or detention of the goods, as the case may be.

(3B) The provisions of Part IV of the Government Proceedings Act shall apply mutatis mutandis to the Agency in relation to any execution of any judgment, decree or order against the Authority issued by any Court or tribunal or any other competent authority.

Recommendation

Agreed to

Section 17 Marginal Note

Delete the word "Agency" appearing in the marginal note and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 17 Opening Statement

Delete the word "Agency" appearing in the opening statement and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 17 (a)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 17 (b)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 17 (c)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 17 (d)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 17 (e)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 18

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 19 (1)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 19 (2) (a)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to.

Section 19 (2) (b)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to.

Section 19 (2) (c)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 19 (2) (d)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 19 (4)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 20 (1)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 20 Opening Statement

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 20 (2) (a)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 20 (2) (b)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 20 (3)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 21 (1)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to.

Section 21 (2)

Delete the word "Agency" and substitute therefor the word "Authority".

Recommendation

Agreed to

Section 23 (3)

Insert the following new subsections immediately after subsection 3—

- (4) An inspector shall have the power to investigate any offence related or connected to counterfeiting notwithstanding that such an offence is not expressed as such under the provisions of this Act. Delete.
- (5) An inspector shall have the same powers as are exercised by a customs officer with regard to importation of counterfeit goods under the East African Community Customs Management Act, 2005.
- (6) If a magistrate, on sworn information in writing—

(a) is satisfied that there is reasonable ground to believe either—

- (i) that any goods, books or documents which an inspector has power under this section to inspect are on any premises and that their inspection is likely to disclose evidence of commission of an offence under this Act; or
- (ii) that any offence under this Act has been, is being, or is about to be committed on any premises; and

(b) is also satisfied either—

- (i) that admission to the premises has been or is likely to be refused and that notice of intention to apply for a warrant under this section has been given to the occupier; or
- (ii) that an application for admission, or the giving of such a notice, would defeat the object of the entry, or that the premises are unoccupied, or that the occupier is temporarily absent and it might defeat the object of the entry to await his return,

The magistrate may by warrant under his hand, which shall continue in force for a period of one month, authorize an inspector to enter the premises, if need be by force.

(7) An inspector entering any premises by virtue of this section may take with him such other persons and such equipment as may appear to him to be necessary; and on leaving any premises which he has so entered by virtue of a warrant he shall, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured against trespassers as he found them.

Recommendation

Agreed to

Section 26

Insert the following subsection immediately after subsection (8)—

(9) In any criminal or civil proceedings concerning an act of dealing in counterfeit goods, the evidence of any person in the employment of the intellectual property rights holder or its agent with demonstrable training offered by such intellectual property rights holder or experience in the identification of the intellectual property rights holder's products shall be admissible as expert evidence.

Recommendation

Agreed to

Section 32

Insert the following paragraphs immediately after subsection (g)—

- (h) have in his possession or control in the course of trade any labels, patches, stickers, wrappers, badges, emblems, medallion charms, boxes, containers, cans, cases, handtags, documentations, or packaging of any type or nature, with a counterfeit mark applied thereto, the use of which is likely to cause confusion, to cause mistake, or to deceive;
- (i) aids or abets or conspires in the commission of any offence under this Act;
- (j) import into Kenya, any goods or items bearing a trade mark, trade name or copyright that has not been recorded with the Agency;
- (k) import into Kenya, in the course of trade, any goods or items except raw materials that is unbranded;
- (l) Fail to declare the quantity or the intellectual property right subsisting in any goods being imported into the Kenya;
- (m) falsely declare the quantity or the intellectual property rights subsisting in any goods being imported into Kenya; or
- (n) import into or transit through Kenya any labels, patches stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hand tags, documentations, or packaging of any type or nature, with a counterfeit, mark, applied thereto, the use of which is likely to cause confusion, to cause mistake, or to deceive.

Recommendation

Agreed to

Section 33 (4)

Insert the following words "including receiving and acting on consumer complaints" immediately after the word "initiative".

Recommendation

Agreed to

Section 33 (5)

Insert the following subsection immediately after subsection 5—

(6) Notwithstanding the provision of subsections (1) and (2) of this section, a consumer or purchaser of goods may, where he has reasonable cause to suspect that an offence under this Act has been committed, is being committed or is likely to be committed by any person, lay a complaint with the Executive Director who shall cause appropriate steps to be taken in accordance with the provisions of this Act.

Recommendation

Agreed to

Section 34 Marginal note

Insert the words "or Executive Director" immediately after the word "Commissioner" appearing in the marginal note.

Recommendation

Agreed to

Section 34 (1)

Insert the words "or Executive Director" immediately after the word "Commissioner".

Recommendation

Agreed to

Section 34 (2)

Insert the words "or Executive Director" immediately after the word "Commissioner".

Recommendation

Agreed to

Section 34 (3)

Insert the words "or Executive Director" immediately after the word "Commissioner".

Recommendation

Agreed to

Section 34 (4)

Insert the words "or Executive Director" immediately after the word "Commissioner".

Recommendation

Agreed to

Section 34 (5)

Insert the words "or Executive Director" immediately after the word "Commissioner".

Recommendation

Agreed to

Section 34 (6) (a)

Insert the word "or inspector" immediately after the words "customs officer".

Recommendation

Agreed to.

Section 34 (6) (b)

Insert the words "or Inspector" immediately after the word "customs officer" wherever it appears and the words "or Executive Director" immediately after the word "Commissioner" respectively.

Recommendation

Agreed to

Section 34 (7)

Insert the words "or Executive Director" immediately after the word "Commissioner".

Recommendation

Agreed to

Section 34 (9)

Insert the words "or the Authority" immediately after the word "Act".

Recommendation

Agreed to

Section 34A

Insert the following new section immediately after section 34A—

34B (1) Trademarks relating to goods to be imported into Kenya, irrespective of the place of registration, shall be recorded with the Agency in the prescribed manner if the registration is current.

(2) Applicants for recordation of trademarks shall be notified of the approval or denial of an application filed under this section in a prescribed manner by notice in the Anti- Counterfeit newsletter published by the Agency.

(3) An application to record one or more trademarks shall be in writing in the prescribed manner and addressed to the Agency and shall include the following information—

- (a) the name, complete business, address, and citizenship of the trademark owner or owners (if a partnership, the citizenship of each partner; if an association or corporation, the State, country, or other political jurisdiction within which it was organized, incorporated, or created);
 - (b) the places of manufacture of goods bearing the recorded trademark;
 - (c) sample of the trademarked goods or a sufficient digital photographic representation of the trademarked goods with appropriate detail for identification and differentiation from any counterfeits;
 - (d) the name and principal business address of each foreign person or business entity authorized or licensed to use the trademark and a statement as to the use authorized; and
 - (e) The identity of any parent or subsidiary company or other foreign company under common ownership or control which uses the trademark abroad.
- (4) The application shall be accompanied by—
- (a) a status copy of the certificate of registration certified by the registering authority showing title to be presently in the name of the applicant;

(b) The fee set out in the Second Schedule to the Act.

Provided that if the trademark is registered for more than one class of goods, the fee for recordation shall be for each class.

(5) The recordation of the trademark and protection thereunder shall be effective on the date an application for recordation is approved.

(6) The recordation of a trademark shall remain in force for a period of one year from the date of approval of the application for recordation or the current registration period of the trademark, whichever is shorter.

(7) Recordation of a trademark shall be cancelled if the trademark registration is finally cancelled or revoked.

(8) If there is change in ownership of a recorded trademark and the new owner wishes to continue the recordation with the Agency, the new owner shall apply immediately by—

- (a) complying with subsection (4) hereinabove
- (b) describing any time limit on the rights of ownership transferred;
- (c) submitting a status copy of the certificate of registration certified by the registering author showing title to be presently in the name of the new owner; and
- (d) Paying a fee as prescribed in the Second Schedule to the Act.

(9) If there is a change in the name of the owner of a recorded trademark, but no change in ownership, written notice thereof shall be given to the Agency accompanied by—

- (a) a status copy of the certificate of registration certified by the registering authority showing title to be presently in the name as changed; and
- (b) a fee as prescribed in the Second Schedule to the Act.

(10) The owner of a recorded trademark shall submit a written application in the prescribed manner to the Agency not later than 30 days to the expiration of the current recordation.

(11) An application for renewal of recordation shall be accompanied by—

- (a) a status copy of the certificate of registration certified by the registering authority showing the title to be in the name of the applicant; and
- (b) a statement describing any change of ownership or in the name of the owner and any change of addresses of the owners and places of manufacture;
- (c) a fee as prescribed in the second schedule to the Act.

(12) The provisions of this Section shall apply to the recordation of copyrights, trade names or any other form of intellectual property rights mutatis mutandis.

(13) The Agency shall after satisfying itself that imported goods have complied with the provisions of this section issue to the importer of goods a certification mark in the form of an anti-counterfeit security device at a fee to be set out in the Second Schedule to the Act.

(14) The Agency shall have the power to seize and destroy any goods originally imported into Kenya but found within Kenya that do not bear the anti-counterfeit security device.

Recommendation

Agreed to

Section 35

Insert the following new subsection immediately after sub-section (4).—

(5) Where a Court has concluded the hearing of a matter in any criminal proceedings whether the suspect is convicted or acquitted and the goods in the opinion of Court are counterfeit and it appears that the suspect has benefited or obtained some monetary advantage from dealing in counterfeit goods the subject matter of the criminal proceedings, the Court shall on application of the prosecutor order the suspect to forfeit that benefit or monetary advantage to the Agency within a period of three months and in default the Agency may trace and recover that benefit or advantage from the suspect.

Recommendation

Agreed to

Section 36

Delete the word "Agency" wherever it appears and substitute therefor the word "Authority".

Recommendation

Agreed to.

4. The Competition Act, 2010 (No. 12 of 2010)

Section 10 (1) (a)

Delete and substitute therefor the following new paragraph—

“(a) a chairperson appointed by the President.”

Recommendation

Agreed to.

MIN. NO.078/DC-N/2018

ADOPTION OF THE STATUTE LAW
(MISCELLANEOUS AMENDMENTS) BILL, 2018

The Committee adopted the report with the proposed amendments.

MIN. NO.079/DC-N/2018

ADJOURNMENT

The Chairperson adjourned the meeting at 6.45 p.m. The date for the next meeting will be held on notice.

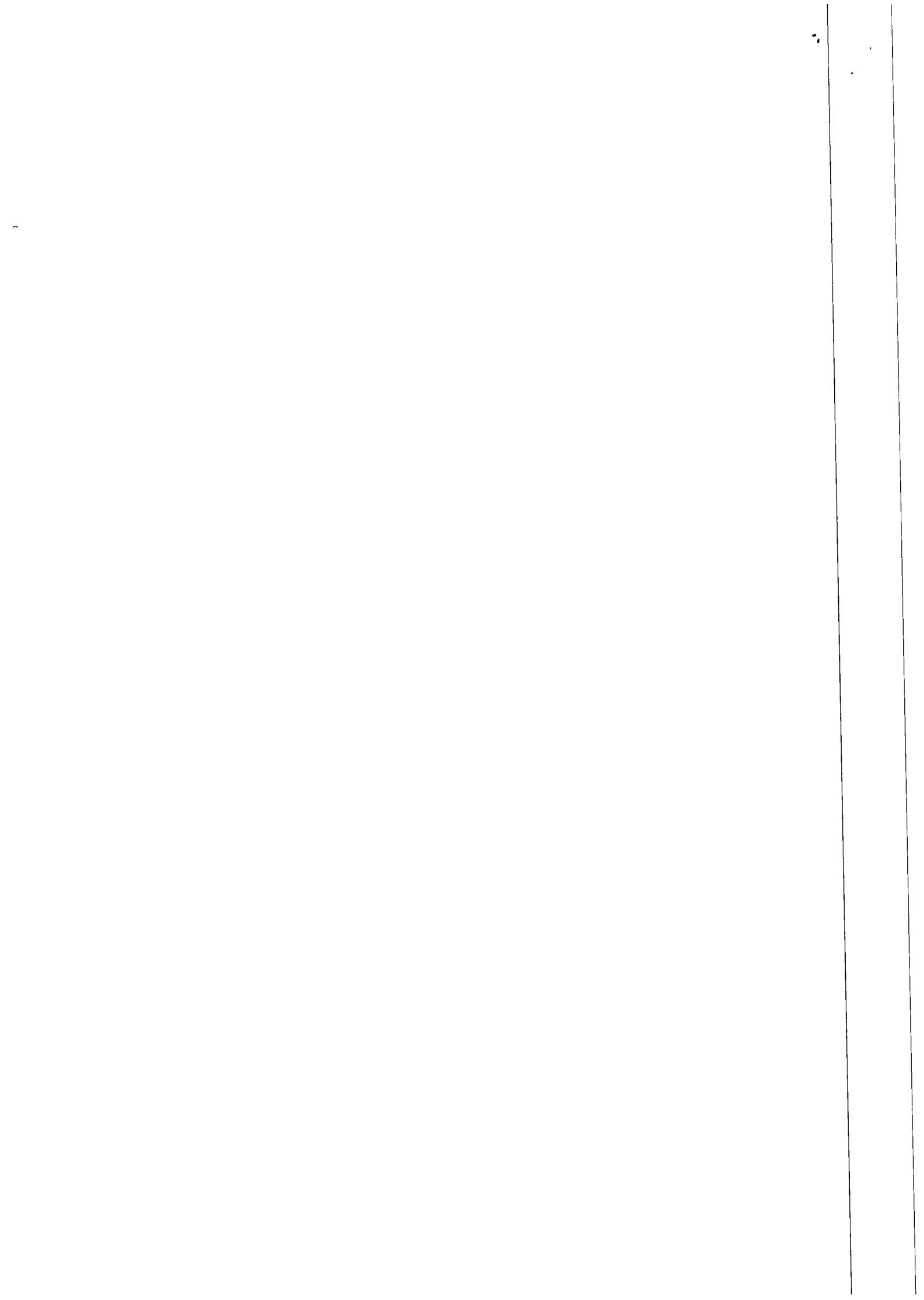
SIGNED.....



(Chairperson)

DATE.....

20/06/2018



REPUBLIC OF KENYA



NATIONAL ASSEMBLY
TWELFTH PARLIAMENT – SECOND SESSION

In the matter of consideration of the National Assembly of the Statute Law
(Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12 of 2018)

STANDING ORDER 127(3)

Article 118(1)(b) of the Constitution provides that: "Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees". Standing Order 127(3) provides that, "the Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account views and recommendations of the public when the Committee makes its report to the House".

The Statute Law (Miscellaneous Amendments) Bill, 2018 National Assembly Bill No. 12 of 2018 was published on 10th April, 2018 and read a First Time 18th April, 2018. The Bill is in keeping with the practice of making various amendments which do not merit the publication of separate Bills and consolidating them into one Bill. The Bill therefore proposes amendments to various Acts of Parliament. Pursuant to the provisions of Standing Order 127(1) of the National Assembly Standing Orders which provides that a Bill having been read a First Time shall stand committed to the relevant Departmental Committee, the proposed amendments to various Acts of Parliament stand committed to the following Departmental Committees of the National Assembly -

NO.	ACT TO BE AMENDED	COMMITTEE
1.	The Judicature Act (Cap 8)	Justice and Legal Affairs
2.	Oaths and Statutory Declarations Act (Cap 15)	
3.	The Advocates Act (Cap 16)	
4.	The Civil Procedure Act (Cap 21)	
5.	The Law of Contract Act (Cap 30)	
6.	The Foreign (Reciprocal Enforcement) Act (Cap 43)	
7.	The Probation of Offenders Act (Cap 64)	
8.	The Criminal Procedure Code (Cap 75)	
9.	The Extradition (Contiguous & Foreign Countries) Act (Cap 76)	
10.	The National Council for Law Reporting Act 1994	Administration and National Security
11.	The Witness Protection Act No. 16 of 2005	
12.	The Anti-Counterfeit Act No. 13 of 2005	
13.	The Proceeds of Crime & Anti-Money Laundering Act No. 9 of 2009	
14.	The Judicial Service Act No. 1 of 2011	
15.	The Office of the Director of Public Prosecutions Act No. 2 of 2012	
16.	The Kenya Law Reform Commission Act No. 19 of 2013	
17.	The Nairobi Centre for International Arbitration Act No. 26 of 2013	
18.	The Companies Act No. 17 of 2015	
19.	The Bribery Act No. 47 of 2016	
20.	The Law of Succession Act (Cap 160)	
21.	The Registration of Persons Act (Cap 107)	
22.	The Public Holidays Act (Cap 110)	
23.	The Community Service Order Act No. 10 of 1998	
24.	The Alcoholic Drinks Control Act No. 4 of 2010	
25.	The Independent Police Oversight Authority Act No. 25 of 2011	
26.	The National Authority for the Campaign Against Alcohol and Drug Abuse Act No. 14 of 2012	Transport, Public Works and Housing
27.	The Housing Act (Cap 117)	
28.	The Kenya Ports Authority Act (Cap 291)	
29.	The Kenya Airports Authority Act Cap. 295	
30.	The Traffic Act (Cap 403)	
31.	The Kenya Roads Board Act No. 7 of 1999	
32.	The National Construction Authority Act No. 41 of 2011	
33.	The Engineers Act No. 43 of 2011	Education and Research
34.	The National Transport and Safety Authority No. 35 of 2012	
35.	The Higher Education Loans Board Act, 1995	
36.	The Kenya School of Law Act No. 26 of 2012	
37.	The Legal Education Act No. 27 of 2012	
38.	The Kenya Institute of Curriculum Development Act No. 4 of 2013	
39.	The Universities Act No. 42 of 2012	
40.	The Science, Technology and Innovation Act No. 28 of 2013	
41.	The Industrial Property Act No. 3 of 2001	Trade, Industry and Cooperatives
42.	The Export Processing Zones Act, 1990	
43.	The Privatisation Act No. 2 of 2005	
44.	The Competition Act No. 12 of 2010	
45.	The Children Act No. 6 of 2001	Labour and Social Welfare
46.	The Employment Act No. 11 of 2007	
47.	The Labour Institutions Act No. 12 of 2007	
48.	The Labour Relations Act No. 14 of 2007	
49.	The National Youth Council Act No. 10 of 2009	
50.	The National Social Security Fund Act No. 48 of 2015	
51.	The Wildlife Conservation and Management Act No. 47 of 2013	Environment and Natural Resources
52.	The Forest Conservation and Management Act No. 34 of 2016	
53.	The National Drought Management Authority Act No. 4 of 2015	
54.	The Environmental Management and Coordination Act No. 6 of 1992	
55.	The Retirement Benefits (Deputy President and Designated State Officers) Act No. 8 of 2015	Finance and National Planning
56.	The Kenya Post Office Savings Bank Act Cap 243	
57.	The Land Act No. 6 of 2012	Lands
58.	The Land Registration Act No. 3 of 2012	
59.	The Tourism Act No. 28 of 2011	Sports, Culture and Tourism
60.	The National Youth Service Act Cap 200	
61.	The Protection of Traditional Knowledge and Cultural Expressions Act No. 32 of 2016	Defence and Foreign Relations
62.	The Public Archives and Documentation Service Act (Cap 19)	
63.	The Kenya Defence Forces Act No. 25 of 2012	Agriculture and Livestock
64.	The Treaty Making and Ratification Act No. 45 of 2012	
65.	The Kenya Agricultural and Livestock Research Act No. 17 of 2013	Communication, Information and Innovation
66.	The Biosafety Act No. 2 of 2009	
67.	The Kenya Information and Communication Act No. 2 of 1998	
68.	The Copyright Act No. 12 of 2001	

Pursuant to Article 118(1)(b) and Standing Order 127(3), the Clerk of the National Assembly invites members of the Public to submit any representations they may have on the Statute Law (Miscellaneous Amendments) Bill, 2018. The representations may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk, Main Parliament Buildings, Nairobi; or emailed to clerk@parliament.go.ke; to be received on or before Monday, 14th May, 2018 at 5:00 pm. The Bill may be found on the Parliament website at <http://www.parliament.go.ke>, or <http://www.kenyalaw.org>.

MICHAEL SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY

Memorandum

To The Clerk of the National Assembly
From Anjarwalla and Khanna
Date 15th May, 2018
Subject Comments on some of the amendments proposed to be made through the Statute Law (Miscellaneous Amendments) Bill, 2018 (National Assembly Bill No. 12 of 2018) (the Bill) to various Acts of Parliament

1. Comments on the proposed amendments to the Anti-Counterfeit Act, Number 13 of 2008, ("the Act")

A. References to "the Agency" in the Bill

Observation

We note that the Bill proposes the deletion of the term "Agency" (which refers to the Anti-Counterfeit Agency) throughout the Act and proposes to rename the Agency as the Anti-Counterfeit Authority and to refer to it as "the Authority" throughout the Act.

We note however that the Bill contains a number of the proposed provisions that still refer to regulator as "the Agency" rather than "the Authority". For instance, the proposed sections 16 (3B), 32 (j), 34B (1), (3), (8), (9), (10), (13) and (14) refer to "the Agency" instead of "the Authority".

Analysis

This is a minor error that can easily be amended to ensure consistency in the Bill.

Recommendation

We recommend that any references to "the Agency" throughout the Bill be replaced with "the Authority".

B. Proposed introduction of a new Section 23^{1/2} (4) to the Act – Power to investigate unexpressed offences

Observation

The Bill proposes the introduction of a new section 23 (4) to the Act which would empower inspectors to investigate any offences related or connected to counterfeiting notwithstanding that such an offence is not expressed as such under the provisions of the Act.

Analysis

This clause appears to go against the general spirit of the well-established criminal law principle expressed in Latin as "nullum crimen sine lege" (that is "no crime without law"). This principle of criminal law prescribes that a crime ought not to be presumed to have been committed where there is no express law defining the offence. The intention of this principle is to create clarity on the sort of conduct that constitutes criminal actions and to erect a statutory safeguard against the arbitrary criminalisation of acts after they have already been carried out.

Further, if the investigations contemplated under this amendment lead to an arrest, charging and conviction in court, this provision could also fall foul of Article 50 (2) (n) of the Constitution of Kenya which states that:

“Every accused person has the right to a fair trial, which includes the right—

- n) not to be convicted for an act or omission that at the time it was committed or omitted was not—
 - i. an offence in Kenya; or
 - ii. a crime under international law”

Recommendation

In view of the above, we would recommend the deletion of the phrase “notwithstanding that such an offence is not expressed as such under the provisions of this Act” where it appears in the new section 23 (4) that is proposed under the Bill.

C. Proposed introduction of a new Section 32 (j) to the Act – Criminalisation of the importation into Kenya of goods bearing a trademark, trade name or copyright not recorded under the Act

Observation

The Bill proposes to introduce a new section 32 (j) which would make it an offence for any person to import into Kenya any goods bearing a trademark, trade name or copyright that has not been recorded with the Anti-Counterfeit Agency.

Analysis

We are of the view that the enactment of this provision will be likely to hinder import trade in Kenya. Such a provision would compel importers to conduct searches with the Anti-Counterfeit Agency and to incur the attendant expenses so as to satisfy themselves that the intellectual property (IP) rights subsisting on the goods to be imported have been recorded with the Anti-Counterfeit Agency and that the importation of the same would therefore not contravene the law. The time spent waiting for the search results would further reduce the efficiency of the importation process and the ease of doing business for importers in Kenya.

Additionally, this clause is too wide in its application. It does not limit the offence to goods that are imported into Kenya in the course of trade. As such, if this provision were to be enacted as is, it would be an offence to import into Kenya any goods meant for personal use and bearing /consisting of a trademark, trade name or copyright that has not been recorded with the Anti-Counterfeit Agency.

Recommendation

We recommend the deletion of the proposed section 32 (j) from the Bill.

D. Proposed introduction of a new Section 34B (1) to the Act - Mandatory recordation of trademarks with the Anti-Counterfeit Agency

Observation

Clause 34B (1) of the Bill proposes to require all owners of registered trademarks that are used on goods imported into Kenya to record such trademarks with the Anti-Counterfeit Agency.

Analysis

The registration of trademarks in Kenya is handled by the Kenya Industrial Property Institute (KIPI). The proposed requirement of recordation of trademarks with the Anti-Counterfeit Agency would amount to a duplication of tasks between government agencies. Any enactment of this proposed provision is likely to reduce the ease of doing business as an additional financial burden of registering the trademarks with the Anti-Counterfeit Agency would have to be borne by one of the parties to the import transaction (presumably the importer) if not by both.

By requiring owners of trademarks registered abroad to record the same with the Anti-Counterfeit Agency, the Bill purports to confer intellectual property rights in Kenya upon the owners of trademarks that are not registered in Kenya contrary to the well-established principle of territoriality of trademarks and IP rights.

Further, the amendment under the proposed section 34B (1), as read with the offence created under the proposed section 32 (j), implies a presumption that all IP rights applied to goods being imported into Kenya would generally have already been registered either in Kenya or abroad. This is not a feasible presumption as there is generally no legal obligation to register a trademark or copyright interest in Kenya or internationally and as such it is possible for such IP rights to be used in trade without being registered.

Recommendation

The recordation of trademarks under the proposed section 34B (1) should be subject to the discretion of the owners of the trademarks (as opposed to being a mandatory requirement). In this scenario, trademark owners who desire to take advantage of the proposed recordation system would then have the option of recording their trademarks with the Anti-Counterfeit Agency.

Further, in order to deal with the current disregard of the principle of territoriality of IP rights, the words "irrespective of the place of registration" should be deleted from the proposed section 34B (1).

Please note that we only make the above recommendation as a middle ground option. The ideal situation would be to delete the provisions on recordation of trademarks with the Anti-Counterfeit Agency and to require KIPI to digitise its database and to provide the Anti-Counterfeit Agency with direct access to the same.

E. Proposed introduction of a new section 34B (2) in the Act – Approval and denial of applications by the Anti-Counterfeit Agency

Observation

The proposed section 34B (2) suggests that the Anti-Counterfeit Agency will have the power to approve or deny applications for the recordation of trademarks. The criterion for such approval and denial is not stated.

Analysis

The conferring of the power of approval and denial of recordation applications on the Anti-Counterfeit Agency without clearly setting out the criteria for such approval or denial raises questions regarding the duplication of trademark examination roles. It is unclear whether the Anti-Counterfeit Agency would then have to examine the registrability of trademarks while assessing recordation applications made to it under the Act.

Recommendation

The criteria for the approval and denial of recordation applications should be clearly set out in the Bill to stipulate instances where an application can be denied by the Anti-Counterfeit Agency. We would propose that the criteria for approval be simple and limited to a mere confirmation that the documentary proof of current and valid trademark registration at KIPI has been provided.

F. Proposed introduction of a new section 34B (3) to the Act – Requirement to provide details of the citizenship of the owners of the trademark

Observation

The proposed section 34B (3) (a) requires applications for recordation of trademarks to include details of the citizenship of the trademark owner or owners, or the citizenship of each partner (if a partnership) or details of the State, country, or other political jurisdiction within which the trademark owner was organized, incorporated, or created (if an association or corporation).

Analysis

The regulation of ownership of trademarks and the details of owners falls within KIPI's mandate. As such, this proposal is likely to result in the duplication of KIPI's work. Further, the introduction of additional requirements such as supplying the details of the citizenship of the trademark owner is unnecessary as such details are not relevant to the issue of subsistence of a trademark. This proposed section 34B (3) would therefore only serve to increase bureaucracy and to reduce the ease of doing business.

Recommendation

We would recommend deletion of the requirement to state the citizenship of the trademark owner.

G. Proposed introduction of a new section 34B (6) to the Act- Validity period for the recordation of the trademarks with the Anti-Counterfeit Agency

Observation

The proposed section 34B (6) provides that the recordation of a trademark shall remain in force for a period of one year from the date of approval of the application for recordation or for the duration of the current registration period of the trademark, whichever is shorter.

Analysis

The period of one year is too short a time frame for validity of the recordation with the Anti-Counterfeit Agency. It would be cumbersome for importers of goods to have to ensure that the trademark recordations for each of the goods that they import are renewed every year. This is another proposal that is bound to reduce the ease of doing business in Kenya.

Recommendation

We recommend that the validity of the period of recordation of trademarks with the Anti-Counterfeit Agency be tied to the period of validity of the corresponding registration of the trademarks at KIPI (which is currently ten (10) years).

H. Proposed introduction of a new section 34B (10) to the Act - Minor amendments

Observation

The proposed section 34B (10) of the Bill provides that the owner of a recorded trademark shall submit a written application in the prescribed manner to the Anti-Counterfeit Agency not later than 30 days to the expiration of the current recordation.

Analysis

From the context in which this proposed provision sits, it appears that it was intended to regulate the renewal of the validity of the recordation with the Anti-Counterfeit Agency. The word "renewal" however appears to have been omitted from the wording of the section.

Recommendation

We propose that the phrase "for renewal of the recordation of the trademark" be included immediately after the words "written application" where they appear in the proposed section 34B (10).

Further, in line with our recommendation on the proposed section 34B (1) above, we recommend that the mandatory requirement for renewal of the recordation under the proposed section 34B (10) be removed and replaced by a discretionary option to renew on the part of the owner of the recorded trademark. This may be achieved by the replacement of the word "shall" with "may" where it appears in the wording of the proposed section 34B (10).

I. Proposed introduction of a new section 34B (13) to the Act – Requirement for the anti-counterfeit security device

Observation

The proposed section 34B (13) requires the Anti-Counterfeit Agency to issue a certification mark to importers of goods in the form of an anti-counterfeit security device at a fee to be prescribed under the Act provided that the Anti-Counterfeit Agency is satisfied that the imported goods have complied with the provisions of the proposed section 34B.

Analysis

The requirement for payment of an additional fee for issuance of the certification mark would, if passed into law, further increase the cost of doing business in Kenya for import traders who would already have incurred the cost of applying for the recordation of trademarks with the Anti-Counterfeit Agency.

Recommendation

We would recommend that the anti-counterfeit security device be issued at a nominal fee or for free.

J. Proposed introduction of a new section 34B (14) to the Act – Seizure and destruction of goods by the Anti-Counterfeit Agency

Observation

The proposed section 34B (14) of the Bill gives the Anti-Counterfeit Agency the power to seize and destroy any goods originally imported into Kenya that do not bear the anti-counterfeit security device.

Analysis

As a general rule, destruction of goods can only be done upon the issuance of a court order as set out under section 27 and 28 of the Act. This provision does not specify what the term "originally imported into Kenya" means and could as such be interpreted as having retrospective effect.

Recommendation

We recommend that this subsection be amended to qualify this power and make the destruction of the goods contingent upon:

- a) application by a person to whom a certification mark has been issued under the Act; and
- b) the issuance of a court order for the destruction of the goods in question.

2. Comments on the amendments proposed to be made to the Industrial Property Act, Chapter 509, Laws of Kenya

We do not have any comments to make on any of the amendments proposed to be made to the Industrial Property Act through the Bill.

3. Comments on the amendments proposed to be made to the Copyright Act, Chapter 130, Laws of Kenya

We do not have any comments to make on any of the amendments proposed to be made to the Copyright Act through the Bill.

4. Comments on the amendments proposed to be made to the Bribery Act, 2016

A. Retrospective application of the Bribery Act, 2016 – section 27 of the Bribery Act, 2016

Observation

The proposed amendment of section 27 (2) of the Bribery Act, 2016 deletes the word "this Act" appearing immediately after the words "offence under" and substitutes them with the words "the Act referred to in subsection (1)".

Analysis

The proposed amendment seems to be a rectification of a presumed reference error to the Bribery Act, 2016 instead of the Anti-corruption and Economic Crimes Act 2003. The amendment, however, does not address concerns on the retrospective application of section 27 of the Bribery Act, 2016.

Recommendation

We recommend that section 27 (2) of the Bribery Act, 2016 is amended to read as follows:

"The Bribery Act shall not apply with respect to bribery offences or suspected bribery offences under the Anti-corruption and Economic Crimes Act, 2003 committed before the coming into force of the Bribery Act, 2016."

5. Proposed amendments to the Proceeds of Crime and Anti-Money Laundering Act, No 9 Of 2009 (the PROCAMLA Act)
- A. Proposed inclusion of legal professionals as designated as non-financial businesses or professionals by amendments to section 2 and 48

Observation

We note the proposed amendment of sections 2 and 48 of the PROCAMLA Act is designed to include legal professionals as designated nonfinancial businesses or professionals so as to place on them an obligation to adhere to the reporting requirements under the PROCAMLA Act.

Analysis

The proposed amendment will allow the Financial Reporting Centre to carry out an inspection of the records held by an advocate in respect of clients as permitted under section 24 (c) of the PROCAMLA Act which provides that:

“The Centre –

may, at any time, cause an inspection to be made by an inspector authorised by the Director-General in writing and the inspector may enter the premises of any reporting institution during ordinary business hours to inspect any documents kept pursuant to the requirements of this Act, and ask any question relating to such documents, make notes and take copies of the whole or any part of such documents;” (Emphasis ours)

The proposed amendments are an affront to the constitutional rights to privacy and access to justice guaranteed under article 31 (c) and 48 (respectively) of the Constitution of Kenya, 2010 to every person. The limits proposed are neither fair nor reasonable in an open and democratic society.

The constitutional right to privacy between a client and an advocate is so sacrosanct that it has been afforded protection under common law and further protection under the Evidence Act, due to the central role it plays in ensuring access to justice which is another constitutional right.

Further, the provision encroaches on the legal privilege of advocate – client confidentiality provided under the Evidence Act (Cap 80 Laws of Kenya) (the **Evidence Act**) and the Advocates Act, Chapter 16 of the Laws of Kenya. Section 134 of the Evidence Act provides as follows:

- (1) No advocate shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

- a) any communication made in furtherance of any illegal purpose;

- b) any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

This privilege subsists even after the advocate has ceased to act for their client.

The proposed amendment would gravely hinder the constitutional rights of access to justice and privacy without any proper justification for the limitation.

Recommendation

Section 2 and 48 should not be amended as proposed and should be maintained.

6. **Proposed amendments to the Public Procurement and Asset Disposal Act, No. 3 of 2015 (the PPOA Act)**

A. **Proposed changes to section 9(1)(k) of the PPOA Act**

Observation

The proposed amendment to section 9(1)(k) of the PPOA Act will exonerate the Public Procurement Regulatory Authority from any obligation to develop and manage the State portal on procurement and asset disposal and ensure that it is available and easily accessible.

Analysis

If the Public Procurement Regulatory Authority is exempted from developing and managing the state portal on procurement and asset disposal, it is likely that there would be reduced transparency regarding the processes surrounding procurement and asset disposal, thereby contravening the principle of transparency as set out under Article 10 (2) (c) of the Constitution of Kenya, 2010.

The failure to have a statutory body as the primary person responsible for ensuring the State portal is easily accessible will lead to a lack of transparency and accountability as nobody will be charged for ensuring transparency surrounding the procurement process.

Recommendation

Section 9(1) (k) of the PPOA Act should be maintained as is and the proposed amendment should be disregarded.

B. **Proposed changes to section 43 of the PPOA Act**

Observation

The proposed amendment of section 43 of the PPOA Act allows persons authorised by the Public Procurement Authority to enter any premises of a procuring entity, at a reasonable time and inspect the premises so as to make inquiries that maybe necessary for the collection of information.

Analysis

Persons who are authorised by the Authority to carry out investigations, inspections, assessments and reviews ought to present proof of such authorisation prior to their entry to make enquiries and carry out investigations.

Further, the inspection should be limited to the business premises of the procuring entity and ought to be carried out during work hours. This is to avoid the Authority accessing the procuring entity's premises at odd hours (likely to be by way of breaking in) and causing damage to property of the procuring entity.

Recommendation

The proposed amendment should be phrased as follows:

"When conducting Investigations, Inspections, Assessments and Reviews relating to contracts, procurement and asset disposal proceedings, any a person authorised by the Authority may enter any the business premises of a procuring entity during ordinary business hours, subject to issuance of prior notice to the said procuring entity and inspect the premises to make inquiries that maybe necessary for the collection of information."

7. Proposed amendments to the Labour Relations Act, 2007

Observation and recommendation

The proposed amendments to section 48 and 50(2) of the Labour Relations Act make reference to 'check off agreement'. We are of the view that there is need to define check off agreement so as to distinguish the term from other forms off agreements mentioned in the Labour Relations Act.

There also seems to be a typographical error in the proposed section 48(11) (a) that provides that "the trade union shall give written notice of such alternation to the employer", the correct word would be alteration. "The typographical error ought to be amended.



anti
counterfeit
agency

OFFICE OF THE EXECUTIVE DIRECTOR

Our Ref: ACA/ENF/C/1VOL.3/(198)

Date: 21st May, 2018

Eric Nyambati
Clerk
National Assembly – Parliamentary Trade Committee
Protection House, 1st Floor
NAIROBI

Dear Eric,

RE: STATUTE LAW (MISCELLANEOUS AMENDMENTS) BILL 2018, NATIONAL ASSEMBLY BILL
NO. 12 OF 2018 – CHANGES TO THE ANTI-COUNTERFEIT ACT, NO. 13 OF 2008

RESPONSE TO COMMENTS FROM STAKEHOLDERS

The above subject refers;

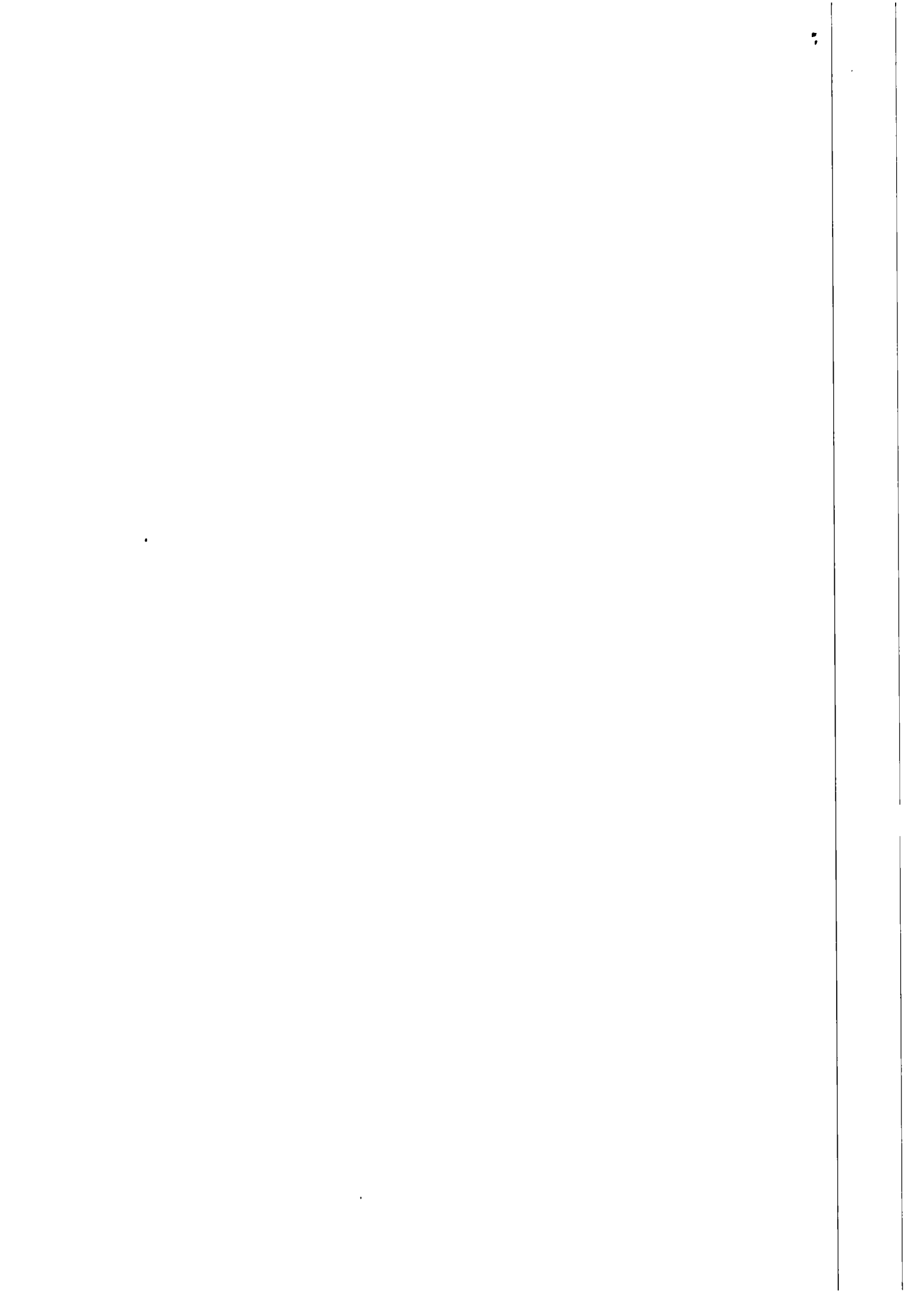
Forwarded herewith, please find response from stakeholders on the proposed amendments to the Anti-Counterfeit Act, 2008 for enactment by parliament.

We thank you for your continued support.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'E. Halake', is written over a large, stylized, hand-drawn arrow pointing to the left.

E. Halake, SS
EXECUTIVE DIRECTOR



RESPONSE TO COMMENTS FROM STAKEHOLDERS

<u>No.</u>	<u>Proposed Provision</u>	<u>Comments from Dr. Henry Kibet Mutai</u>	<u>ACA's Response</u>
1	Add a new 32(j) into import Kenya, any goods or items bearing a trade mark, trade name or copyright that has not been recorded with the Agency (sic)	There is no obligation to register a trademark or copyright whether locally or internationally.	<p>1. For a person to have an exclusive right to a trademark, it has either to be registered or fall within the category of "well-known mark". The Agency expect imported goods to fall within either category.</p> <p>2. The mandate of the Agency is to protect intellectual property rights owners from abuse provided they can demonstrate their right.</p> <p>3. Countries make laws to address specific challenges and problems. In this case, Kenya has to address the issue of importation of counterfeit goods and the proposed law is the best to address the challenge of importation of counterfeit goods.</p> <p>4. The proposed amendments have inbuilt flexibilities under 32B (12) to deal with issues of copyright and related works.</p> <p>5. The US provide the best example of the recordation system for trademarks, trade names, and copyright. See US Electronic Code of Federal Regulations, Title 19, Chapter I, Part 133. A available at: https://www.ecfr.gov/cgi-bin/text-idx?SID=16c0d726cd451729ca3982d17baaab0a&mc=true&node=pt19.1.133&rgn=div5#se19.1.133</p> <p>6. Benefits of e-recordation:</p> <p>(a) Making intellectual property rights information available at the ports to help border personnel with infringement determinations.</p>

<u>No.</u>	<u>Proposed Provision</u>	<u>Comments from Dr. Henry Kibet Mutai</u>	<u>ACA's Response</u>
		<p>(b) Eliminating paper applications and the need for supporting documents.</p> <p>(c) Allowing rights owners to upload images of their protected rights and products.</p>	
		<p>Moreover, it does not take into account the fact that IP right may have expired (e.g. copyrighted work).</p>	<p>1. IP right that has expired cannot be protected. Hence, no requirement is required of a business person dealing with expired trademark or copyrighted work since they cannot be protected under the law.</p>
		<p>By omitting the words "in the course of trade", this provision criminalizes importation of goods by consumers for private and</p>	<p>1. There is no need to use the phrase with respect to every offence under the Act.</p> <p>2. Section 32(f) allows importation of goods for private and domestic use of the exporter or importer.</p> <p>3. Section 26(8) already provides for the test (in the course of trade).</p>

<u>No.</u>	<u>Proposed Provision</u>	<u>Comments from Dr. Henry Kibet Mutai</u>	<u>ACA's Response</u>
		<p>personal use that do not have the proposed security device.</p> <p>Copyright protection is automatic and does not require any registration to subsist.</p> <p>No infringement of any IP right exists in relation to unbranded goods.</p>	<p>1. True. However, for purposes of enforcement, recordation enables law enforcement agencies to target imports and contact the IPR owner when they suspect IP infringement in the imported goods.</p> <p>2. The proposed amendments at 34B (12) already provides for flexibilities for that.</p>
2	Add a new s.32 (k) import into Kenya, in the course of trade, any goods or items except raw materials that is unbranded		<p>1. ACA's experience has shown that unbranded goods are a major source of IP infringements.</p> <p>2. Some unscrupulous businesspersons import unbranded goods and then later, while in the country, they fix infringing labels (imported separately or manufactured locally) on those products so that they bear known brands.</p> <p>3. To stop this, it will be mandatory for business persons to brand their goods in order to make it easier for consumers to distinguish these goods from known brands.</p> <p>4. There is already in existence a law against unbranded goods in the form of the Trade Descriptions Act and consequently this proposed amendment is not unique or new.</p>
		<p>This provision criminalizes the importation of unbranded goods, which by definition are not counterfeit because they do not bear any brand or trade</p>	<p>1. ACA's experience has shown that unbranded goods are the source of IP infringements.</p> <p>2. Some unscrupulous businesspersons import unbranded goods and then later, while in the country, they fix infringing labels (imported separately or manufactured locally) on those products so that they bear known brands.</p> <p>3. To stop this, it will be mandatory for business persons to brand their goods in order to make it easier for consumers to distinguish these goods from known brands.</p> <p>4. Under the Trade Descriptions Act, all goods are required to be branded. This is an extension of that</p>

<u>No.</u>	<u>Proposed Provision</u>	<u>Comments from Dr. Henry Kibet Mutai</u>	<u>ACA's Response</u>
3	Section 34B (1). Trademarks relating to goods to be imported into Kenya, irrespective of the place of registration, shall be recorded with the Agency in the prescribed manner if the registration is current	This proposal would introduce a second trademarks registry in Kenya.	<p>law.</p> <ol style="list-style-type: none"> 1. No. KIPI has a registry of trademarks that have been registered after a formal application for registration, while ACA intends to have a database and record of registered trademarks, irrespective of the place of registration for purposes of enforcement and targeting. 2. Under the Anti-Counterfeit Act, brand owners are required to submit their trademark registration certificate as proof of ownership of IP right, among other requirements. 3. Recordation of these documents for purposes of enforcement is what is intended in this section, which the Agency is already doing. However, the section is being introduced for clarity purposes. 4. IPR cannot be enforced without information from the brand owners. 5. For enforcement to be more effective, there is need for brand owners to provide the necessary information to facilitate court action in case of infringement. This provision will make it easier for the Agency to file a matter in court and prosecute it. 6. It should be noted and appreciated that the intended amendments deal with control and monitoring of imports and consequently the intellectual property rights in issue will in most cases foreign and not registered with KIPI.
4	34B (2). Applicants for recordation of	The provision also extends trademark protection to trademarks registered outside Kenya. This proposal again duplicates the work already	<ol style="list-style-type: none"> 1. Kenya is under an obligation to provide protection for trademarks registered in other countries under TRIPS and in respect of goods that are traded in the country. 2. Trademarks which are in the KIPI registry and those registered with the WIPO are enforceable in Kenya. 3. Business persons are required to provide proof of registration from KIPI and/or WIPO (if registration covers Kenya). 1. No. For purposes of enforcement under the Anti-Counterfeit Act, a brand owner is required to submit an IP certificate issued by KIPI as proof of IP ownership.

<u>No.</u>	<u>Proposed Provision</u>	<u>Comments from Dr. Henry Kibet Mutai</u>	<u>ACA's Response</u>
5	trade marks shall be notified of the approval or denial of an application filed under this section in a prescribed manner by notice in the Anti-Counterfeit newsletter published by the Agency	done by KIPi under the Trade Marks Act.	<p>2. The Agency may confirm from KIPi that such a certificate is valid in order to approve or deny recordation. Recordation is denied if the purported IP certificate is not genuine or it is expired.</p> <p>3. ACA has a clear mandate. KIPi registers IPR while ACA enforces.</p> <p>4. At the same time, the intellectual property rights that will be in issue will go beyond what is available in the KIPi register as the goods being targeted are foreign manufactured goods with foreign registrations whose records need not necessarily be with KIPi.</p>
6	34B(3). An application to record one or more trademarks shall be in the writing in the prescribed manner and addressed to the Agency (sic) and shall include the following information –	This proposal again duplicates the work already done by KIPi and introduces additional requirements such as supplying the citizenship of the trademark owner which are wholly irrelevant to the issue of subsistence of a trademark.	<p>1. No. KIPi has a registry of trademarks for which it has received formal applications and eventually cleared for registration. In essence the mandate of KIPi is to register.</p> <p>2. On the other hand, ACA protects registered trademarks from abuse and intends to have a database or record of registered trademarks for purposes of enforcement and targeting. In order to effectively deal with IP infringements at the source, information about citizenship is also critical to facilitate international investigation and enforcement.</p> <p>3. The goods being targeted are imports in respect of whose trademarks may not necessarily be with KIPi.</p>
6	34B (4). The application shall	This provision also duplicates the	<p>1. No. Under the Anti-Counterfeit Act, the Agency charges a complaint fee for processing an IP case. This increases the cost to firms that report many cases of IP infringement.</p>

<u>No.</u>	<u>Proposed Provision</u>	<u>Comments from Dr. Henry Kibet Mutai</u>	<u>ACA's Response</u>
	be accompanied by -	work of KIPI and adds to the cost of doing business by charging fees for applications to the ACA.	<ol style="list-style-type: none"> 2. To reduce the cost of doing business, the Agency intends to abolish the complaint fees and to replace it with yearly fees with no limitation on the number of IP complaints to be filed with the Agency. 3. It will be convenient for brand owners to pay a one-off fee rather than paying for each complaint they make with ACA.
7	34B (5). The recordation of the trademark and protection thereunder shall be effective on the date an application for recordation is approved.	This provision purports to deny protection to trade marks that are not recorded under the Anti-Counterfeit Act. This is contrary to IP law that a trademark proprietor has exclusive and legal right to enforce it.	<ol style="list-style-type: none"> 1. Under the TRIPS Agreement and other international and regional laws, governments have a duty and responsibility to combat IP infringements in order to improve the ease of doing business. Indeed, the Constitution of Kenya mandates the government to support, promote, and protect the IPR of its people. 2. Therefore, IP protection must not be made voluntary in order to protect the IPR owners, government, consumers and the general public from harmful counterfeit goods. 3. This provision is meant for border measures and control and does not preclude brand owners from laying complaints for infringement of goods already in the market. 4. Besides, trademarks are private right and the criminal protection provided by the State through the Anti-Counterfeit Agency is additional to any self-protection of the registered owners through civil action.
8	34B (6). The recordation of a trademark shall remain in force for a period of one year from the date of the approval of the application for recordation or the current	There is no rationale and logic requiring annual renewal.	<ol style="list-style-type: none"> 1. Brand owners are required to supply the Agency with samples of the genuine products for identification purposes. 2. The products undergo changes frequently in terms of labelling etc. This provision ensures that the information that is filed with the Agency remains current. 3. It is impossible to protect genuine products from counterfeiting unless the Agency has current and reliable information on the genuine products hence the annual renewal.

ACA's Response

<u>No.</u>	<u>Proposed Provision</u>	<u>Comments from Dr. Henry Kibet Mutai</u>	<u>ACA's Response</u>
9	<p>registration of the period of the trademark, whichever is shorter.</p> <p>34B (8). If there is a change in ownership of a recorded trademark and the new owner wishes to continue the recordation with the Agency (sic), the new owner shall apply immediately by -</p>	<p>This proposal supports the creation of a parallel register. It also increases the cost of doing business.</p>	<ol style="list-style-type: none"> 1. No. KIPI has a registry of trademarks for which it received formal applications and eventually approved for registration. 2. ACA on the other hand intends to have a database and record of registered trademarks for purposes of enforcement. 3. For effective targeting and enforcement, the database must be up-to-date. 4. Further, the target here is foreign originated goods for whose trademark registrations may not be with KIPI since they are registered abroad. 5. There is no creation of a parallel registry. The proposed amendment is meant to have a record of registered trademarks, mostly foreign, for the purposes of enforcement and keeping away counterfeit goods from our borders.
10	<p>34B (9). If there is a change in the name of the owner of a recorded trademark, but no change in ownership, written notice thereof shall be given to the Agency (sic)</p>	<p>The provision will increase the cost of doing business and reduce the ease of doing business.</p>	<ol style="list-style-type: none"> 1. No. To the contrary, it will improve the ease of doing business and reduce costs. Recordation gives law enforcement agencies the latitude to stop counterfeiting at the border and hence become effective in combating counterfeiting. 2. It is at the border that huge consignments of counterfeit goods may be seized and this is effective rather than chasing counterfeit goods that have already entered the country. Moreover, for effective targeting and enforcement, the database must be up-to-date. 3. The proposed amendments will keep away counterfeits from the market and ensure fair competition and ease doing business for legitimate businesses.

<u>No.</u>	<u>Proposed Provision</u>	<u>Comments from Dr. Henry Kibet Mutai</u>	<u>ACA's Response</u>
11	accompanied by 34B (10). The owner of a recorded trademark shall submit a written application in the prescribed manner to the Agency not later than 30 days to the expiration of the current recordation.	The provision does not specify the purpose of the application. Trademark law requires renewal of trademark every 10 years.	<ol style="list-style-type: none"> 1. The purpose of application is to record and enforce future IP infringements relating to the IP in question. It is meant for border protection and control. 2. The timeline will enable the Agency to know whether the IP in question will be renewed for protection with KIPI or left out to expire for public use. 3. In case of the latter, the Agency will capture information to the effect that the brand is expiring and hence will not require protection. 4. There are already enough flexibilities with regards to IPRs.
12	34B (11). An application for renewal of recordation shall be accompanied by:...	The provision increases the amount of bureaucracy faced by trademark owners.	<ol style="list-style-type: none"> 1. Under the Anti-Counterfeit Act, a brand owner is required to submit various documents including an IP certificate issued by KIPI as proof of IP ownership when filing a complaint on IP infringement for purposes of investigation and enforcement. This is what brand owners are already doing under the Act. 2. There is no bureaucracy for ensuring that there is adequate border protection and control.
13	34B (12). The provisions of this Section shall apply to the recordation of copyrights, trade names or any other form of intellectual property rights	This provision purports to extend the mandatory recordation requirement to copyright yet under international law copyright subsists	<ol style="list-style-type: none"> 1. Under the international law, copyright is automatic and hence registration is not required. However, for purposes of enforcement and to protect copyright owners from infringement of their copyrighted works, it is international practice that copyrights are recorded with law enforcement agencies (such as customs) for purposes of protection at the border. 2. There are already enough flexibilities with regards to IPRs.

No.	Proposed Provision	Comments from Dr. Henry Kibet Mutai	ACA's Response
14	<p>mutatis mutandis.</p> <p>34B (13). The Agency (sic) shall after satisfying itself that imported goods have complied with the provisions of this section issue to the importer of goods a certification mark in the form of an anti-counterfeit security device at a fee to be set out in the Second Schedule to the Act</p>	<p>without any requirement to register copyright.</p> <p>This is a blatant revenue raising measure which will increase the cost of doing business.</p>	<p>1. IPR owners use substantial amount of resources to fight counterfeiting. Research has shown that IPR owners lose a substantial amount of their market share to counterfeiters.</p> <p>2. If counterfeiting is reduced, then IPR owners will enjoy a higher market share and reduced costs of IP surveillance. Therefore, users must pay for the services that the government provides in order to protect them from IP infringements.</p> <p>3. This proposal is not unique to ACA. For instance, KeCoBo has an anti-piracy device for CDs and DVDs. The device is for monitoring and evaluation and enforcement purposes.</p> <p>4. What ACA seeks with regard to the device is therefore not unique or new.</p>
15	<p>34B (14). The Agency shall have the power to seize and destroy any goods originally imported into Kenya but found</p>	<p>This provision does not specify what the term "originally imported into Kenya" means and could be interpreted as</p>	<p>1. This is not unique to Kenya. For instance, KEBS applies such provision where they declare goods as substandard.</p> <p>2. This provision is also consistent with the Presidential directive that counterfeit goods be destroyed upon seizure.</p> <p>3. ACA is just implementing the Presidential directive in the form of this proposed legislative amendment.</p>

<u>No.</u>	<u>Proposed Provision</u>	<u>Comments from Dr. Henry Kibet Mutai</u>	<u>ACA's Response</u>
	within Kenya that do not bear the anti-counterfeit security device.	having retrospective effect. Moreover, destruction of goods should not occur without issuance of a court order.	

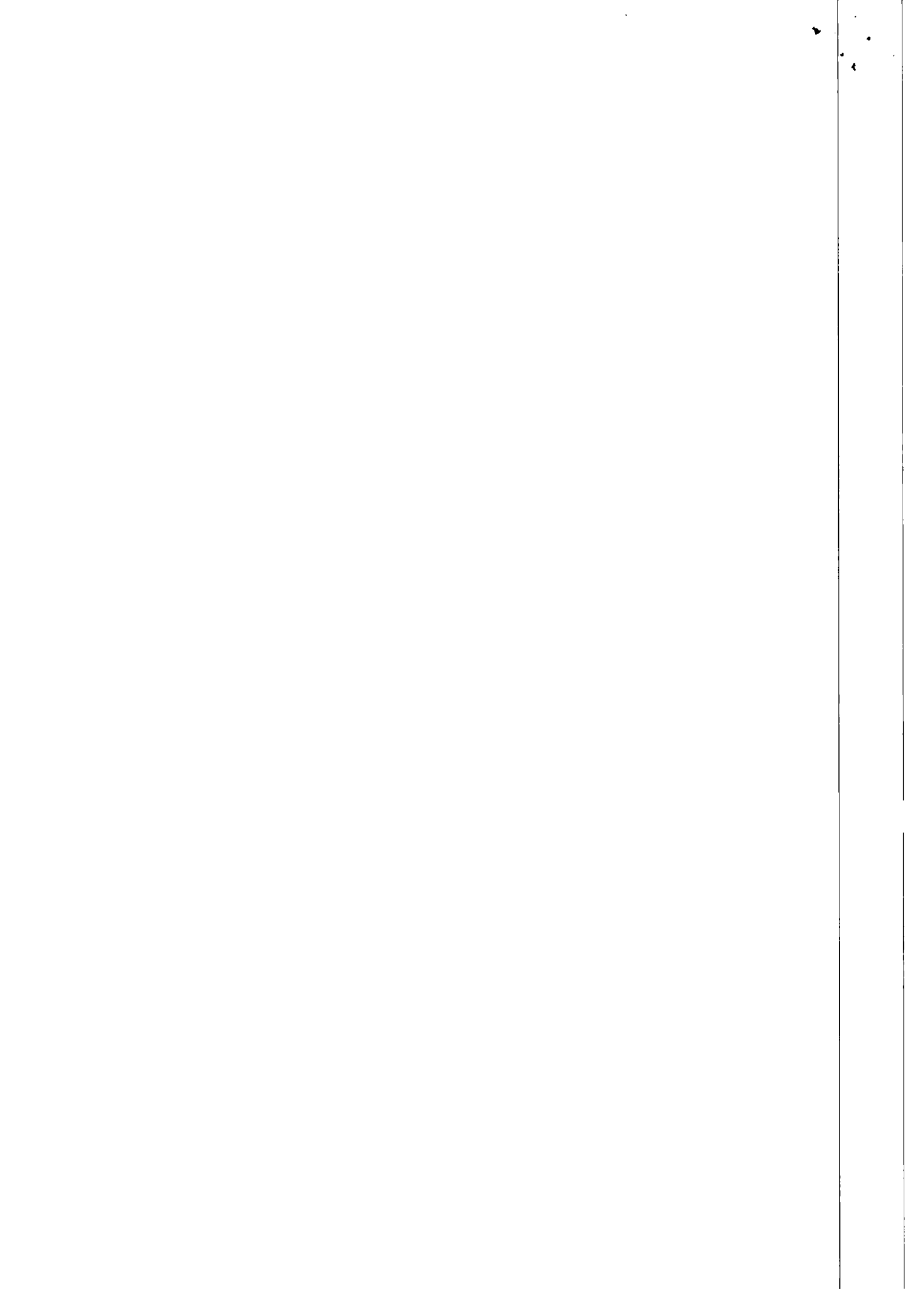
Comments on Issues Raised by Kenya Industrial Property Institute

<u>No.</u>	<u>Proposed Provision</u>	<u>Comments By KIPi</u>	<u>ACA's Response</u>
1.	Section 32(j)	Offends the provisions of the Trade Marks Act that does not provide for mandatory registration.	<ol style="list-style-type: none"> 1. The target of the proposed section is foreign originated goods whose registration need not necessarily be with KIPi. They will most certainly be registered with foreign, national registration bodies. 2. For a trademark to enjoy protection and exclusive right of use by the purported owner, it must either be registered or fall within the category of well-known mark. The importer of goods must be able to provide this information. 3. Already the Trade Descriptions Act requires that goods being imported into the country must have mandatory information which includes identity and name of the manufacturer. The proposed amendment is therefore not unique or new. 4. The goods being targeted being foreign originated goods, the records of their trademarks will in most cases not be available with KIPi.
		Contradicts the provisions of the Anti-Counterfeit Act which protects intellectual property rights already protected under the Industrial Property Act.	<ol style="list-style-type: none"> 1. Once again, the goods being targeted are foreign originated goods whose registrations are in most cases foreign. 2. The proposed amendment seeks to control the import of counterfeit goods and is therefore outward looking.

	<p>3. The criminal provisions of the legislations mentioned by KIPI are for internal measures and are more suited for goods already within the country.</p> <p>4. There is therefore no contradiction at all.</p>		
<p>2. Section 34B</p>	<p>Duplication of the mandate of KIPI</p>	<p>No jurisdiction requires mandatory registration or recording of trade marks.</p>	
	<p>1. There is no duplication.</p> <p>2. KIPI registers trade marks etc. ACA is not seeking to register any trade mark etc but to just have a record of the registered trade marks etc for ease of enforcement.</p>		
	<p>1. For a trade mark to enjoy a semblance of protection either in the criminal or civil courts, it must be registered or fall within the category of well-known mark.</p> <p>2. The Agency expects any goods being imported to be referenced to a particular person or entity or manufacturer as required by the Trade Descriptions Act.</p> <p>3. This reference will ensure that it is possible to determine whether the said goods are legitimate {genuine} or counterfeit.</p> <p>4. Besides, laws are made to deal with particular situations or challenges and presently importation of counterfeit goods is the biggest challenge or threat to the manufacturing sector in Kenya.</p> <p>5. There is basically no standard measure or international best practice on legislation and consequently Kenya is at liberty to make laws to deal with its particular situation and in its best national interest.</p> <p>6. Once laws are made, people have to comply and we expect goods being imported to demonstrate registration of trade marks etc or at the very least meet the concept or doctrine of well-known marks.</p>	<p>1. The Agency has at its disposal sufficient provisions to enable it enforce trade mark rights in Kenya</p>	<p>1. The Agency is mandated to protect intellectual property rights from abuse through the criminal justice system.</p> <p>2. The Agency has been doing this for the last eight {8} years since its inception in</p>

		<p>the year 2010.</p> <ol style="list-style-type: none"> 3. The Agency has realized that it is impossible to enforce the provisions of the Act without sufficient information and which information revolves around the intellectual property rights in issue and the goods they relate to. 4. This information has been lacking especially with regard to foreign originated goods and which information is also not available with KIPI wholly. 5. The proposed amendments seek to cure this incapacity on behalf of the Agency and therefore it is not true that the Agency has at its disposal sufficient provisions to enable it enforce intellectual property rights. 6. It is in the national interest that counterfeit goods are kept outside our borders and not to be allowed into the country. 7. To do this information is key and this is what the proposed amendments seek to provide and cure. <ol style="list-style-type: none"> 1. Presently, intellectual property rights owners are free to voluntarily supply particulars of those rights for customs or border purposes. 2. This has not worked and the Agency has only received such voluntary submissions from two foreign companies. 3. Consequently, that same provision has not worked in the national interest and counterfeit goods have continued to flood our country from foreign countries. 4. A shift is needed to control counterfeit goods coming into the country thus the necessity of the proposed amendments. 5. As stated elsewhere, there is no standard measure of legislation save for national interest and it is in the national economic interest of Kenya that counterfeit imports are permanently kept out and this is only possible with the proposed amendments.
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6. These amendments in no way encroach on the registration mandate of KIPI as ACA only seeks to strengthen its enforcement mandate.



Handwritten notes:
0 10-11-18
8/9/18

From: "Kairu Wangombe" <kairu.wangombe@gmail.com>
To: clerk@parliament.go.ke
Sent: Monday, May 7, 2018 7:30:20 PM
Subject: ANTI: COUNTERFEIT ACT NUMBER 130 OF 2008

Counterfeiting has become a multi billion Shilling Industry in Kenya. that has crippled existing and potential industries .The emergence of China as in global stage as the per-eminent industrial power house, has opened the flood gates of budding entrepreneurs from far and wide. The Geo-politics of the world notwithstanding, the sweatshops of China have encouraged and promoted to the worst possible levels intellectual property theft.

China being what it is today,the biggest industrial powerhouse in the world, is in the forefront of not only illegal poaching but also the "Wall Street" of counterfeit products, contra-bands and substandard goods.which have a deleterious effect on middle level economies like the Kenyan economy.

Kenya should stand its ground /feet in its quest to self industrialize, by combating the bogus trade of counterfeits to promote and spur its nascent industrial potential. All products that are patented outside China destined for Kenya should be subjected to thorough forensic search, to ascertain their authenticity. Downtown Nairobi alongside other metropolitan towns towns in Kenya are major destinations of these products originating from China.

A typical case is the British brand "Pegler" who are trendsetters in sanitary fittings.Surprisingly, here in Kenya the said product is available as Number 2 and Number 3. The former is the "actual counterfeit" and the latter is the substandard one.

These problem is not exclusive to that brand alone, but to virtually all hardware products.The market psychology, is such that having the counterfeits, owing to their inexpensiveness, underpins the Governments policy on employment creation, and thus is perfectly "legal".

The Anti-Counterfeit authority (the "Authority") that should be in the forefront of nipping such nefarious practices in the bud,has failed in its mandate,and or, is complicit in the eradication of the vice.

All goods originating from China should be double checked for the purposes of arresting this vice. Its my considered opinion that the board of the Authority should be disbanded plus fresh vetting of the staff.

Yours Faithfully,
Kairu Wangombe

Handwritten:
Mr. Nyumbati / Ms. Kwana
Pls. TNA
09/05/2018

**NATIONAL ASSEMBLY
RECEIVED**
08 MAY 2018
SENIOR DEPUTY CLERK
LEGAL & COMMITTEES
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